

UK CLIENT MEMORANDUM | ENGLISH LAW UPDATES

Hong Kong – the Court of Appeal rejects the narrow definition of “client” as set out in *Three Rivers (No 5)* for the purpose of legal advice privilege

7 July 2015

AUTHORS

Peter Burrell | **Joanna Ogden**

The Hong Kong Court of Appeal last week delivered its decision in *Citic Pacific Limited v Secretary for Justice and Commissioner of Police (29/06/2015, CACV 7/2012)*. The judgement set a new precedent in Hong Kong for legal advice privilege, and although not binding in English law, adds to the debate about the decision in *Three Rivers District Council v Governor and Company of the Bank of England (No 5) [2003] QB 1556*. The Court in *Three Rivers (No 5)* took a restrictive interpretation of the meaning of a “client” when determining if communications were privileged where they were between a client and a lawyer for the purpose of obtaining legal advice. Not all employees were to be considered to be “the client”.

The Hong Kong Court of Appeal rejected the decision of the Hong Kong Court of First Instance, and stated that the *Three Rivers (No 5)* test to define a “client” in the context of legal advice privilege was too restrictive and that “*in the context of a corporation, where the necessary information may have to be acquired by the management from employees in different departments or at various levels of the corporate structure, there is a need to protect the process of gathering such information for the purpose of getting legal advice*”.

The Hong Kong Court of First Instance had applied the decision of the English Court of Appeal in *Three Rivers (No 5)* and held that only the Group Legal Department, reporting to the Board of Directors, was to be considered the “client” of Citic, and that all other employees were considered to be third parties, such that only communications between the Board and/or Group Legal and the external lawyers were protected by privilege and that any communications between

Hong Kong – the Court of Appeal rejects the narrow definition of “client” as set out in *Three Rivers (No 5)* for the purpose of legal advice privilege

Continued

any other employee and Group Legal were not. This was the case even where the documents created by the employees were done so at the request of Group Legal.

In overturning the decision of the Court of First Instance, the Hong Kong Court of Appeal adopted a wider test for the application of legal advice privilege, with legal advice privilege no longer being limited to communications between an external lawyer and the corporation’s in-house counsel. Under Hong Kong law, legal advice privilege can now extend to cover communications between the external lawyer and the corporation as a whole, with all employees within the corporation being considered the “client”. Confidential internal documents created by any employee for the dominant purpose of obtaining legal advice, including any preparatory material even if it contains factual information, will now be protected by legal advice privilege. The Court of Appeal held that in this regard, no distinction should be drawn between an individual litigant and a corporation.

In “*respectfully disagree[ing]*” with the decision in *Three Rivers (No 5)*, the Hong Kong Court of Appeal held that “*the rationale for [legal professional privilege] is equally applicable to litigation privilege and legal advice privilege, there has to be effective and meaningful protection for confidentiality in the process of obtaining legal advice in the litigious and non-litigious context. A restrictive definition of client would tend to frustrate the policy of [legal professional privilege] and it cannot be the right test for identifying the proper limit for legal advice privilege*”.

In our opinion, the approach adopted by the Hong Kong Court of Appeal is the correct one and this decision gives further grist to the mill for *Three Rivers (No 5)* to be re-visited. Even the House of Lords, when considering an earlier different decision of the Court of Appeal questioned *Three Rivers (No 6)* whether *Three Rivers (No 5)* was correctly determined but declined the invitation to review it.

If you have any questions regarding this memorandum, please contact Peter Burrell in London (+44 20 3580 4702, pburrell@willkie.com), Joanna Ogden in London (+44 20 3580 4732, jogden@willkie.com) or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.

7 July 2015

Copyright © 2015 Willkie Farr & Gallagher LLP.

This memorandum is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum may be considered advertising under applicable state laws.

WILLKIE FARR & GALLAGHER (UK) LLP

* Willkie Farr & Gallagher (UK) LLP is a limited liability partnership formed under the laws of the State of Delaware, USA and is authorized and regulated by the Solicitors Regulation Authority with registration number 56565.
