

For discussion
on 28 November 2005

LegCo Panel on Administration of Justice and Legal Services

Legal Professional Privilege and Search Warrants

Communications between a client and his legal advisor, whether oral or in writing, are privileged from disclosure, where those communications are for the purpose of obtaining legal advice, whether or not legal proceedings are in train. The privilege does not attach to communications between a client and his legal advisor in furtherance of any crime or fraud.

2. In Pang Yiu-hing, Robert v. Commissioner of Police and Another¹, Hartmann J. [paraphrasing Lord Taylor in R. v. Derby Magistrates' Court ex parte B²] referred to legal professional privilege as ‘one of the pillars upon which the administration of justice in Hong Kong rests.’ In explaining the reason for and extent of the privilege, His Lordship went on to quote Lord Bingham CJ in R. v. Manchester Crown Court, ex parte Rogers [1999] 1 WLR 832 at 839:

“It is in my judgment important to remind oneself of the well established purpose of legal professional privilege, which is to enable a client to make full disclosure to his legal adviser for the purposes of seeking legal advice without apprehension that anything said by him in seeking advice or to him in giving it may thereafter be subject to disclosure against his will...legal professional privilege applies, and applies only, to communications made for the purpose of seeking and receiving legal advice.”

¹ [2002] 4 HKC 579 at 587H.

² [1996] 1 AC 487 at 507D.

3. Legal professional privilege does not apply in respect of communications in obtaining advice for a criminal purpose. The rule was summarised by Grove J in *R. v. Cox and Railton* [1884-85] 14 QBD 153, commencing at 168:

“...the rule does not apply to all which passes between a client and his solicitor, but only to what passes between them in professional confidence, and no Court can permit it to be said that the contriving of a fraud can form part of the professional occupation of an attorney or solicitor.

...In order that the rule may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed the client does not consult his advisor professionally, because it cannot be the solicitor’s business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist. The solicitor’s advice is obtained by fraud.”

4. The Department of Justice and its prosecutors are conscious of the importance of the privilege and the reasons for it. The interests of justice require that a person should be able to consult his lawyer in confidence, with the knowledge that whatever communications pass between them will not be revealed without his consent. This fundamental principle is respected by all of those concerned with law enforcement.

5. The courts of Hong Kong, like their counterparts in England³, have, however, made it abundantly clear that communications in furtherance of a criminal purpose are not protected by the privilege⁴. From time to time, Law Enforcement Agencies receive information to the effect that a person has sought the assistance of a lawyer to further a criminal enterprise or to perpetrate a fraud. The lawyer will usually not appreciate that he has been used for this purpose. The communication may be important evidence in respect of the prosecution for a serious criminal offence of the person who has utilised the services of the lawyer. In order to obtain access to that evidence, it may be necessary for the relevant law enforcement officer to apply to a magistrate to obtain a search warrant to seize the communications.

6. That legal professional privilege may attach to a document or documents sought under a search warrant is a matter that the applicant for the search warrant, usually a police officer, is required by internal orders to bring to the attention of the magistrate at the time that the application is made. It is also a matter that the magistrate will take into account when deciding whether to issue the search warrant or to impose any conditions on the seizure of the material, such as a condition that the material when seized be sealed and remain sealed until any issue relating to legal professional privilege has been resolved.

7. On 4 August 2005, the opportunity was taken by circular to remind prosecutors in the Department of Justice, as well as Law Enforcement Agencies, that when a search warrant is sought for a law office, it is necessary to ensure that magistrates are alerted to the fact that

³ See *R. v. Cox and Railton* [supra.]

⁴ *Pang Yiu Hung Robert v Commissioner of Police & Anor.* [supra] at 590A et. seq.

issues of legal professional privilege might arise in respect of documents which may be seized under the warrant, and that an endorsement should appear in the search warrant [for the information of the person upon whom the warrant is executed] in the following terms:

‘To enable any issue of legal professional privilege to be resolved in respect of documentary exhibits seized at the said premises, any documents seized will be sealed for a period of 7 days, to enable any claims of legal professional privilege to be addressed.’

Department of Justice
November 2005

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