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法律專業保密權

Legal Professional Privilege(LPP) in Citic Court Case

(中英版)

Introduction

On 28 March 2012, the Court of Appeal delivered a judgment on the issue of legal and professional privilege in Hong Kong: CITIC Pacific Limited v Secretary for Justice and Commissioner of Police CACV 60 of 2011.

During the global financial crisis in 2008, CITIC was exposed to fluctuations in the foreign exchange markets thereby leading to predicted financial losses. Profit warning was issued by CITIC accordingly but CITIC was accused of failing to comply with the time line specified by the Listing Rules governing profit warning, i.e. “as soon as is reasonably practicable”. It was alleged that CITIC intentionally delayed the announcement.

The Securities and Futures Commission (the “SFC”) stepped in and commenced investigation against CITIC. During the course of investigation, CITIC handed over 6 documents to the SFC. The 6 documents were then passed to the Department of Justice for the purpose of seeking legal advice. At the same time, the Police also probed into CITIC’s activities and intended to investigate the documents. Against this background, CITIC applied to the High Court to ask for return of the documents in order to stop disclosure to any third party including the Police. CITIC lost in the first instance. On appeal, the Court of Appeal allowed CITIC’s appeal and clarified the law relating to legal and professional privilege.

Origin of the privilege

The privilege was intended to protect confidentiality of the communications (including documents and conversations) between lawyer and his clients. Under this principle, confidentiality and legal privilege are both sides of the same coin. The advantages are to ensure a man’s fair access to legal advice and encourage frank and full disclosure by client to

his lawyer and in return, to enable the lawyer to render faithful professional advice to the client. With this privilege, a client is entitled to refuse disclosure of privileged documents or information to any third party in any investigation or court action. Unless it is ordered by the court, no person can compel a party to disclose any privileged document or information between a man and his lawyer.

Exceptions

Despite the legal privilege, such protection is not absolute and can be lost in certain circumstances. Firstly, the privilege is confined to the communications based upon the relationship of lawyers and clients. In other words, casual talks between a lawyer and a man on social occasions are not protected.

Secondly, the protection only attaches to the communications for the purpose of seeking legal advice or any matters generated during the communications. For example, a defendant is not allowed to claim privilege merely because he passed to his lawyers some evidential materials such as the stolen goods in question for legal advice. The reason being that such evidential material itself is not “generated” from the communications between the legal adviser and his client.

Thirdly, the privilege belongs to the client but not to lawyers. Only client is entitled to waive such privilege by agreeing to disclose the documents. A lawyer cannot decide for his client.

Lastly, the legal privilege cannot be abused. The court does not allow any person to claim privilege to serve illegal or fraudulent purposes.

Key issue of the case

It has to be noted that the letter from CITIC’s lawyers to the SFC stated plainly that the documents were disclosed for the purpose of the SFC’s investigation only. It cannot go so far as to say that CITIC was prepared to waive privilege in the documents to the whole world. However, Counsel for the Government argued that when agreeing to disclose the documents, CITIC fully waived the legal and professional privilege. The Court of Appeal endorsed CITIC’s approach and took the view that CITIC’s disclosure only amounted to partial waiver and CITIC did not waive the legal and professional privilege to a third party such as the Police.

Observation

The judgment should be welcomed by the legal profession as the principle of legal professional privilege is reassured. It is believed that the ruling can also reinforce human rights such as the right to confidential legal advice under Article 35 of the Basic Law which provides, amongst other things, Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for the protection of their lawful rights.

引言

今年三月廿八日，上訴庭就中信泰富(CITIC Pacific) 上訴一案，對法律專業保密權 (Legal Professional Privilege) 提出重要的觀點。現與大家分享。

在 2008 年全球金融危機當中，中信泰富的投資亦受影響。但似乎中信泰富未有按上市規則在合理可行時間內作出盈警通知，結果中信泰富要面對證監會的調查。在調查過程中，中信泰富向證監會提供文件以作證監會調查之用。中信泰富其後得悉證監會已將該文件送往律政署尋求法律意見。與此同時，警方亦對中信泰富展開調查，並希望取得該文件。中信泰富便入稟高等法院原訟庭，要求法庭頒令該六份文件只限證監會調查之用，並不得再向第三者(如警方)披露。原訟庭不同意中信泰富的觀點，判中信泰富敗訴。故中信泰富便向上訴庭提出上訴。上訴庭三位法官一致裁定中信泰富勝訴。而上訴庭的判詞對法律專業保密權作出詳盡的解釋。

特權由來

法律專業保密權的原意是肯定律師及其客戶之間溝通(包括文件及通話) 的保密性。當溝通受到法律保障時，客戶便可向律師說出事實真相，好讓律師可以履行責任，向客戶提供專業意見。所以在法律專業保密權的保障下，當事人有權拒絕向第三者披露這些受保障的文件和資料。在訴訟過程中，任何一方亦不可逼令對方披露法律保障的文件和資料(除非法庭裁定這些文件不受法律專業保密權所保障)。

例外

儘管這些溝通和文件受到保障，亦不代表絕對的。首先，保障只限於律師和客戶的關係上所進行的溝通。換言之，與律師在社交場合所作的溝通不受保障。

第二，保障的範圍只限於尋求法律意見的溝通及法律意見引伸的事項。所以一名被告不可將殺人賊贓交予律師保管，以享受法律專業保密權。

第三，保密權是給予客戶，只有客戶才可放棄保障。例如當客戶授權律師向法庭或對方披露受法律保障的文件時，便等同放棄法律專業保密權。這裡要強調一點，法律專業保密權在於客戶而不在律師。

第四，法律專業保密權不得被濫用。法庭不會容許客戶使用這項特權，以執行犯罪或欺詐的企圖。

案中關鍵

其實中信泰富的律師向證監會提供文件時，已在信中清楚說明文件只限證監會調查之用。代表政府的大律師辯稱當中信泰富同意披露文件時，中信泰富已全面放棄法律專業保密權。但上訴庭不同意，並認為中信泰富只是向證監會放棄部份保密權，中信泰富並沒有向其它方(例如警方) 放棄保密權。

總結

上訴庭的判決無疑是再一次肯定法律專業保密權，而法律專業保密權亦加強香港的人權保障。此外，相信律師界亦歡迎上訴庭對法律專業保密權的合理及中肯的釐定。

Nothing shall constitute legal advice to any person by Messrs. Maurice WM Lee Solicitors (Tel: (852) 2537 5833) (Website: www.wmleehk.com)

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