Case Summary

Lai Chee Ying (黎智英) v Commissioner of Police

HCMP 1218/2020; [2022] HKCFI 3003; [2022] 5 HKLRD 617
(Court of First Instance)
(Full text of the Court's decision in English at https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=148577&currpage=T)

Before: Hon Wilson Chan J
Date of last written submissions: 20 September 2022
Date of Decision: 30 September 2022

Legal professional privilege ("LPP") – litigation privilege – evidence in support of claim to privilege subject to anxious scrutiny – whether litigation reasonably contemplated or anticipated for communications pre-dating arrest and search operation – mere possibility of litigation not sufficient – assisting third party in another case not the same – whether communications made for sole or dominant purpose of conducting litigation – whether materials compiled or selected for obtaining legal advice

Journalistic materials ("JM") – purpose of creation/acquisition and intention of conveyor – whether informing public debate or matters of public interest – procedural safeguards for search and seizure of JM under IGCO irrelevant for determining whether JM – JM claims not made out because complete absence of particulars – fraud exception to LPP not applied

Background

1. The Plaintiff's two iPhones had been seized by the Police in

execution of a search warrant at his residence on 10 August 2020. Pursuant to the Protocol adopted by the Court to determine any claims made by the Plaintiff in respect of legal professional privilege ("LPP") and journalistic material ("JM"), the Plaintiff made an LPP claim over 49 items and 8,098 JM claims. Under the Protocol, the Plaintiff bore the burden of specifying the special basis and the full factual context upon which any of the seized materials was said to constitute LPP or JM.

Major provision(s) and issue(s) under consideration

- NSL 39
- Interpretation and General Clauses Ordinance (Cap. 1) ("IGCO")

2. Since the Commissioner agreed not to dispute the LPP claims in relation to (a) communications between the Plaintiff and his Senior Counsel after his arrest for the purpose of seeking legal advice and (b) communications between the Plaintiff and his legal representatives in relation to a legal action, the Court examined whether the Plaintiff had made good the remaining LPP claims and all of his JM claims.

Summary of the Court's rulings

(a) Remaining LPP Claims

3. LPP consisted of two categories: (a) legal advice privilege; and (b) litigation privilege which was not confined to communications involving legal advice. The Plaintiff only asserted litigation privilege for his LPP claims. In assessing the evidence in support of a claim for privilege, it was necessary to subject the evidence to "anxious scrutiny". The Court applied *Starbev GP Ltd v Interbrew Central European Holding BV* [2013] EWHC 4038 (Comm) which set out the requirements for a claim for litigation privilege. (paras. 8 to 13)

4. All the remaining LPP claims consisted of communications between the Plaintiff and other parties during the period from 24 June 2020 to 9

August 2020 which predated 10 August 2020, being the date of his arrest and the search operation. For the Plaintiff to succeed in the remaining LPP claims, he needed to make out the litigation privilege, specifically that: (a) litigation in which the Plaintiff was a party was in contemplation; and (b) the communication was made for the sole or dominant purpose of conducting that litigation. (paras. 18 and 19)

(i) Whether litigation was in contemplation

5. The Plaintiff clearly failed to discharge the burden of establishing that litigation was reasonably contemplated or anticipated when the communications pre-dating his arrest and the search operation came into existence. (para.27)

(a) He could not have been aware that there was any criminal investigation, let alone possible prosecution, against him prior to the arrest and search operation, given that such investigation was highly confidential and was not disclosed to him. There was no objective evidence to substantiate his bare assertions as to his alleged contemplation of litigation *prior to* his arrest. (paras. 20 and 21)

(b) The Plaintiff had failed to condescend upon the necessary particulars as to the basis for his contemplation of litigation under the NSL. By virtue of NSL 39, acts committed prior to the coming into force of the NSL (or the mere fact of the promulgation of the NSL itself) would not and could not, without more, have given rise to any "contemplation" of litigation under the NSL. Hence, on the basis of the dearth of objective evidence from the Plaintiff in these proceedings, it defied belief that he began to labour under any contemplation of litigation under the NSL on 24 June 2020, prior to the NSL's promulgation on 30 June 2020. (para. 23)

(c) The Plaintiff's bare assertions of his fear that the NSL would be used against him (and hence engaging in discussions with various parties on how to challenge it) were clearly insufficient and fell to be rejected. Putting his case to its highest, where there was no litigation commenced or even threatened, and merely by the passing of the NSL, the Plaintiff had developed no more than a general apprehension of future litigation because of general circumstances surrounding him and those he sympathized with, but this was insufficient. A mere possibility of litigation or a distinct possibility that someone might at some stage bring proceedings would not suffice. (para. 24)

(d) In relation to the actual litigation referred to by the Plaintiff, it concerned third parties (i.e. the students who had been arrested) instead of the Plaintiff himself. While the Plaintiff alleged that such arrest gave rise to concern over NSL's potential interference with his constitutional right, he did not go so far as to make clear that this fact had given rise to any contemplation of litigation against himself. Assisting a third party in another case was not the same as being in contemplation of litigation against himself. (para. 25)

(e) The fact that legal professionals had been involved did not assist the Plaintiff (para. 26).

(ii) Whether the communications were made for the sole or dominant purpose of conducting the litigation

6. On the basis of the evidence before the court, the dominant purpose test was clearly not satisfied. (para. 32)

(a) The Plaintiff's evidence as to the purpose of the relevant materials was inadequate. His communications with non-lawyers in his "NSL team" could not, without proper

explanation/basis, have been made for the purpose of seeking advice for contemplated litigation. (paras. 28 and 30)

(b) To express concerns over the potential interference of the NSL with the Plaintiff's constitutional rights did not equate to the conduct of litigation. (para. 31(1))

(c) The purpose of the "NSL team" (consisting of both lawyers and non-lawyers) was to brainstorm how best to protect themselves from an anticipated interference with their constitutional rights by the NSL. This amounted to no more than general discussions on the potential impact of the NSL. The brainstorming was not conducted for the purpose of enabling legal advice to be sought or given, and/or seeking or obtaining evidence or information to be used in or in connection with any anticipated or contemplated proceedings. (para. 31(4))

(iii) Whether the materials were compiled or selected for obtaining legal advice (the Lyell exception[1])

7. The Plaintiff's submission that the materials subject to the remaining LPP claims were nevertheless privileged because they were compiled or selected for obtaining legal advice was rejected by the Court. (para. 33)

(a) There was no evidence that any compilation or selection exercise had in fact been carried out.

(b) As a general rule, non-privileged documents did not, without more, acquire privilege simply because they were copied by a solicitor for purposes of an action. A non-privileged original document handed to a solicitor for purposes of an action and not copied would seem to be even more remote from any sustainable claim to privilege.

(c) There was no suggestion by the Plaintiff that the materials were

[1] *Lyell v Kennedy (No. 3)* [1884] 27 Ch D 1, as discussed in *Hansfield Developments v Irish Asphalt Ltd* [2009] IEHC 420, paras. 65 – 66.

documents collected, selected, or compiled by his lawyers. Hence, the *Lyell* exception did not apply.

8. The Plaintiff's reliance on the common interest privilege also failed. (para. 34)

(b) JM claims

9. The mere fact that the material was in possession of a journalist was not determinative of its nature, nor was the form in which the material was published. One had to look at the purpose of the creation and acquisition of the material in question and the intention of the conveyor (if applicable). Among others, in order to constitute JM, the speech or article prepared for the purpose of publication should be directed to informing public debate and on other matters of public interest. (*A and B v Commissioner of Police* [2021] HKCFI 1801 followed) (paras. 36 and 40(4))

10. The issue was whether the disputed JM materials constituted JM as alleged, not whether there were sufficient procedural safeguards in the balancing process. However, the Plaintiff had given up on making good his JM claims, and no explanation or argument had been proffered by the Plaintiff in this regard. Matters as to "alternative procedure" or "procedural safeguards" for the search and seizure of JM (if any) within the two iPhones were separate issues in the judicial review proceedings in another action. Even under the "alternative procedure" with "procedural safeguards" under the IGCO, only actual JM would be sealed for further disposal, not materials merely "known or suspected" to be JM. (paras. 37 and 38)

11. Further, there was a complete lack of particulars on the JM claims. The Plaintiff's categorisation and descriptions of the disputed JM materials were wholly deficient and provided no meaningful guidance on what those materials might include. In the absence of proper evidence

on the factual context for the particular materials subject to claim, it was impossible that the JM claims could be made out. The Plaintiff had thus failed to discharge his duty of making good his JM claims. (paras. 40 and 42)

12. It would be dangerous, and perhaps even unfair, for the court to rely on the charges laid by the prosecution, which were yet to be tried, to hold that the disputed JM materials were caught by the fraud exception to LPP (i.e. the materials had come into existence as part of the criminal conduct). (paras. 43 and 44)

13. For the reasons set out above, the remaining LPP claims and the JM claims were dismissed.

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