



Summary of Judgment

Lai Chee-ying (“Plaintiff”) v Commissioner of Police HCMP 1218/2020; [2022] HKCFI 3003

Decision : Plaintiff’s claims of legal professional privilege (“LPP”) and journalistic material (“JM”) over materials seized by Police dismissed with costs *nisi* to the Commissioner of Police (“Commissioner”)

Date of last written submissions : 20 September 2022

Date of Decision : 30 September 2022

Background

1. On 10 August 2020, upon a search operation, the Police seized from the Plaintiff’s residence, among other things, his two iPhones (“Seized Materials”). Of the Seized Materials, the Plaintiff made LPP claim over 49 items (“LPP Claims”) and made 8,098 JM claims (“JM Claims”).
2. In line with well-established authorities, it falls upon the Plaintiff to make good any LPP or JM claim. Hence, the Protocol provided that the Plaintiff bears the burden of specifying, by way of affidavit and written submissions, the “special basis or bases and the full factual context upon which” any of the Seized Materials was/were “said to constitute” LPP or JM.

Issue in dispute

3. Save and except the items amounting 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 another set of legal proceedings¹, which the Commissioner agreed not to dispute the Plaintiff’s claim for LPP, **whether the Plaintiff has made out his LPP Claims (on the basis of litigation privilege) (“Remaining LPP Claims”) and JM Claims in respect of the remaining items .**

¹ The information of which was redacted pursuant to the directions made by the Honourable Mr. Justice Wilson Chan on 9.11.2022.



Department of Justice's Summary of the Decision

(Full text of the Decision at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=148577&QS=%2B%7C%28HCMP%2C1218%2F2020%29&TP=JU)

LPP Claims

4. LPP consists of two categories, namely, legal advice privilege and litigation privilege. Here, the Plaintiff only asserts litigation privilege for his LPP Claims (paragraph 8).
5. The relevant legal principles on litigation privilege as summarized in *Hollander, Documentary Evidence in Hong Kong* (2nd ed) §16-004 are as follows (paragraph 13):-

“(1) The burden of proof is on the party claiming privilege to establish it.

(2) An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in a witness statement are not determinative and are evidence of a fact which may require to be independently proved. The court will scrutinise carefully how the claim to privilege is made out and the witness statements should be as specific as possible.

(3) The party claiming privilege must establish that litigation was reasonably contemplated or anticipated. It is not sufficient to show that there is a mere possibility of litigation, or that there was a distinct possibility that someone might at some stage bring proceedings, or a general apprehension of future litigation. As Eder J stated in *Tchenguz v Director of the SFO* [2013] EWHC 2297 (QB) at §48(iii): ‘Where litigation has not been commenced at the time of the communication, it has to be ‘reasonably in prospect’; this does not require the prospect of litigation to be greater than 50% but it must be more than a mere possibility’.

(4) It is not enough for a party to show that proceedings were reasonably anticipated or in contemplation; the party must also show that the relevant communications were for the dominant purpose of either (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings. Where communications may have taken place for a number of purposes, it is incumbent on the party claiming privilege to establish that the dominant purpose was litigation. If there is another purpose, this test will not be satisfied.”



6. Based on the information provided by the Plaintiff, all the Remaining LPP Claims consist of communications between 24 June and 9 August 2020, which predate 10 August 2020, i.e. they came into existence prior to the Plaintiff's arrest and the search operation (paragraph 18). It falls upon the Plaintiff to make out the litigation privilege, that:-
- (i) litigation was in contemplation; and
 - (ii) the communication was made for the sole or dominant purpose of conducting that litigation.
7. The Plaintiff has clearly failed to discharge the burden of establishing **(i)**, that litigation was reasonably contemplated or anticipated when the communications pre-dating his arrest and the search operation came into existence:-
- (a) As a matter of indisputable fact, prior to the arrest and search operation on 10 August 2020, the criminal investigation against the Plaintiff and related persons was highly confidential and was not disclosed to the Plaintiff. Therefore, the Plaintiff could not have been aware that there was any investigation, let alone possible prosecution against him before the operation (paragraph 20).
 - (b) There was no objective evidence (documentary or otherwise) to substantiate the Plaintiff's bare assertions as to his alleged contemplation of litigation prior to his arrest (paragraph 21).
 - (c) The Plaintiff's bare assertions of his fear of being caught by the NSL (and hence discussions with various parties on how to challenge it) were clearly insufficient and fell to be rejected. The Plaintiff developed no more than a "general apprehension of future litigation". That the Plaintiff has adduced no contemporaneous evidence to show his awareness of the circumstances rendering litigation a real likelihood rather than a mere possibility is telling (paragraph 24).
 - (d) The mere fact that legal professionals have been involved would not necessarily be sufficient to satisfy the requirements for litigation privilege (paragraph 26).



8. The Plaintiff has also failed to establish **(ii)**, that the communication was made for the sole or dominant purpose of conducting that litigation. The Plaintiff's evidence as to the *purpose* of the relevant materials was inadequate (paragraphs 28-30); even the claimed purposes fall short of being a sole or dominant purpose of conducting litigation against himself (paragraphs 31-32); the *Lyell* exception that the materials were compiled or selected for obtaining legal advice was inapplicable (paragraph 33); and the Plaintiff's reliance on the common interest privilege also failed (paragraph 34).

JM Claims

9. As held in the case of *A v Commissioner of Police* [2021] 3 HKLRD 300, §26, the mere fact that the material is in possession of a journalist is not determinative of its nature, nor is the form in which the material is published. In order to constitute JM, among others, the speech/article prepared for the purpose of publication should be directed to informing public debate and on other matters of public interest (paragraph 36).
10. The issue here is simply whether the relevant materials are JM or not. Yet, the Plaintiff has proffered no explanation or argument in this regard.
11. Even under the "alternative procedure" with "procedural safeguards" under the Interpretation and General Clauses Ordinance, Cap. 1, only actual JM would be sealed for further disposal, not materials merely "known or suspected" to be JM (paragraph 38).
12. Given the complete lack of special basis or bases and/or full factual context upon which the disputed JM materials were said to constitute JM, the Court ruled that the Plaintiff has singularly failed to discharge his duty of making good his JM Claims, and the JM Claims fell to be dismissed *in limine* (paragraphs 40-42).

Conclusion

13. Save for the items which the Commissioner agreed not to dispute the Plaintiff's claim for LPP, the Remaining LPP Claims and the JM Claims were dismissed (paragraph 45). The Commissioner shall be at liberty to inspect, extract and/or otherwise access or use for investigation any part of the disputed materials under the LPP Claims and the JM Claims (except the agreed items) (paragraph 46).



14. There be an order *nisi* that costs of the Plaintiff's claims for LPP and JM over the Seized Materials be paid by the Plaintiff to the Commissioner, to be taxed if not agreed, with a Certificate for 3 Counsel (paragraphs 47-48).

Department of Justice

December 2022

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