

(2012) DFSARAC 9

Cristal Capital Management (Dubai) Limited (in formation) acting by Mr Luis Freire

DIFC Regulatory Law 2004 RAC Rule 25

Decision on Application for Disclosure

1. These proceedings concern an appeal by Cristal Capital Management (Dubai) Limited (in formation) acting by Mr Luis Freire ("Applicant") against a decision of the Dubai Financial Services Authority ("Executive") to refuse its application for a licence.
2. On 5 December 2012, the Panel heard argument from the parties in regard to the 31 October 2012 Application of the Applicant, which sought disclosure of a legal opinion prepared by counsel for the Executive, along with any related attachments ("Legal Opinion"). Mr Javid Rafiq appeared for the Applicant. Mr Lawrence Paramasivam and Mr Collin Wu appeared for the Executive. Both parties had previously filed skeleton arguments regarding the issues in question within the time provided by the Panel's directions.
3. The Executive opposed the Application on the basis that the Legal Opinion was subject to legal professional privilege. At the hearing, the Panel determined that the Executive had the burden of establishing on a balance of probabilities the existence of such privilege, and the Applicant would have the burden of establishing on a balance of probabilities that any of the Executive's actions waived a claim of privilege as a matter of law.
4. The Executive asserted that the law to be applied should be the law of England and Wales, pursuant to an analysis based on the cascade of applicable laws found in Article 8 of the Law on Application of Civil and Commercial Laws in the DIFC, DIFC Law No. 3 of 2004. The law of England and Wales appears at Article 8(e) as the default position.
5. The Applicant submitted that the relevant law was either DIFC law under Article 8(a) or the law most closely related to the facts of and the persons concerned in this matter as stated in Article 8(d).
6. Neither party identified any DIFC Law or any other law in force in the DIFC that would apply to the matters in issue. Indeed, the Applicant submitted that DIFC law was silent on the question of legal professional privilege apart from Article 82 of the Regulatory Law, which was not directly applicable. Neither party suggested that any law of any Jurisdiction other than that of the DIFC had expressly been chosen by any DIFC Law, nor by the parties.

7. The Applicant did not identify any specific law as applicable under Article 8(d), beyond suggesting the applicability of common law in general and relying primarily, but not exclusively, upon authorities from Australia.
8. Having considered the representations on this point, the Panel accepted the submissions of the Executive. The Panel concluded that neither 8(a) nor 8(d) was relevant, and that 8(e) was applicable to the question to be determined.
9. The Executive asserted that legal professional privilege was applicable as to the Legal Opinion because Mr Matthew Shanahan was part of the in-house legal capacity of the Executive and had delivered the opinion in pursuance of his functions in that capacity. Witness statements of Mr Nicholas Alves and Mr Matthew Shanahan were cited in that connection. The Executive submitted that the author of the Legal Opinion was legally qualified and subject to professional discipline. In addition, he had his "legal spectacles" on at the time of preparing it and therefore had satisfied the requirement set out in *Three Rivers DC v Bank of England (No 6)* [2004] UKHL 48 at page 60 (Lord Rodger). The Executive also submitted that in English law, opinions issued by in-house lawyers had the same status as those from external legal counsel, pursuant to *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1972] 2 QB 102 at page 129 (Lord Denning).
10. In response, the Applicant submitted that there were two bases for concluding that the Executive's submission was incorrect. First, the "client" had not been the Executive as a whole, but only the Supervision and Authorisation Committee ("SAAC"). Accordingly, any privilege was limited to communications passing between the lawyer and SAAC. It followed that, in accordance with the Court of Appeals decision in *Three Rivers DC v Bank of England (No 5)* [2003] QB 1556, the privilege had been lost since the opinion was circulated to third parties. The loss occurred because, in this case, the Legal Opinion had been circulated outside the SAAC in draft and in final form.
11. Secondly, the Applicant emphasised four particular points which suggested that Mr Shanahan had not been wearing "legal spectacles" at the time. Those included the fact that he had attended some earlier meetings with the Applicant during the authorisation process; the fact that he was an observer at the SAAC meetings themselves; the fact that he had made non-legal observations at the 15 August 2012 SAAC meeting; and the fact that there appeared not to have been formal instructions on the scope of the Legal Opinion requested, emphasising the need for privilege and confidentiality.
12. Pursuant to the legal authorities submitted by the parties, the Panel determined that the Applicant could not overcome the Executive's claim that the Legal Opinion was covered by legal professional privilege. The Panel concluded that the "client" of the Legal Services team had in fact been the rest of the Executive as a whole. Even if the four points at paragraph 11 were taken into account, there was no basis to conclude that the Legal Opinion had been written on a basis that denied it the protection of legal professional privilege in the laws of England and Wales. Mr Shanahan was a member of the Legal team, under the supervision of other qualified lawyers, and subject to professional discipline. He was not a member of SAAC and was not one of the decision-makers when SAAC made a recommendation for the final decision by the relevant Managing Director.

13. As to waiver, the Applicant's Skeleton Argument had suggested that privilege had been waived because the minutes of the SAAC meeting on 15 August 2012 reflected that a legal opinion was requested "to support the recommendation by DFSA to reject the Application", and secondly, because the minutes of the SAAC meeting on 9 September 2012 indicated that two members of it had specifically relied on the Legal Opinion in reaching their conclusions. A third suggestion in the Skeleton Argument, derived from tracked changes in a draft letter, was abandoned by the Applicant during the hearing. The Applicant relied on authorities in Australia relating to loss of privilege, including *Mann vs. Carnell* [1999] 201 CLR 1 at paragraph 29 (conduct inconsistent with maintaining confidentiality) and *Seven Network Ltd vs. News Ltd (no 12)* [2006] FCA 348 at paragraph 12 (voluntary disclosure of the gist or conclusion of legal advice).
14. The Executive submitted that the first point had no weight, as privilege cannot be waived for an opinion yet to be prepared. As to the second, the reliance on the Legal Opinion in the second SAAC meeting did not amount to inconsistent conduct nor to disclosure of the gist or conclusion, but merely its effect. On the authorities, whether in Australia or in England and Wales, this meant that the privilege had not been lost.
15. The Panel was not persuaded by the Applicant's argument and authorities regarding the issue of waiver of privilege. The Panel determined that there had in fact been no inconsistent conduct, and no disclosure of the gist or conclusion of the Legal Opinion in the SAAC minutes.
16. In this particular case the Panel concludes that the motivation underlying the Applicant's request for disclosure of the Legal Opinion is its view that it does not yet have a full understanding of the legal reasoning followed by the Executive in rejecting the application, beyond the summary stated in the letter of 17 September 2012.
17. In this context, the Panel assumes that the Executive's Statement of Response, due on 3 January 2013, will contain all relevant legal arguments, and in order to facilitate the hearing the Panel will afford to the Applicant an opportunity to reply to that Statement of Response by filing a Statement of Reply.

Decision

18. The applicable law regarding the issues of privilege and waiver, pursuant to Article 8 of the Law on Application of Civil and Commercial Laws in the DIFC, DIFC Law No. 3 of 2004, is the law of England and Wales.
19. The Executive's claim of legal professional privilege in relation to the Legal Opinion is upheld.
20. The Applicant may file a Statement of Reply to the Executive's Statement of Response. If the Applicant chooses to file such a Statement of Reply, it shall be due by 5:00 PM on 17 January 2013, and should be filed electronically with the Secretary and a copy provided simultaneously to counsel for the Executive. The times specified in paragraphs 12 and 13 of the previous Amended Procedural Direction of 10 November 2012 remain in effect.

6 December 2012

A handwritten signature in black ink, appearing to read "Georg Wittich". The signature is written in a cursive style with some capital letters.

Georg Wittich
Panel Chair, (2012) DFSARAC 9