

Legal Advice Privilege: the Court of Appeal clarifies the application of the 'dominant purpose' in context of multi-addressee communications

A recent Court of Appeal decision has confirmed that legal advice privilege ("**LAP**") is subject to the 'dominant purpose' test.

In *The Civil Aviation Authority v Jet2.Com Ltd* [2020] EWCA Civ 35, the Court of Appeal determined that The Civil Aviation Authority ("**CAA**") could not claim LAP over email correspondence that was predominantly conducted for the purposes of seeking commercial views, rather than legal advice. This is a significant decision, providing much needed clarity to a complicated area of law.

Background and judgment

The issue arose out of an application by Jet2 to seek specific disclosure of various categories of documents from the CAA in relation to drafts of a letter and records of internal discussions regarding those drafts. The CAA claimed LAP over these documents. At first instance, Mr Justice Morris held that LAP did not apply. The CAA appealed this decision.

The dominant purpose test applies to legal privilege

One important issue raised in the appeal was whether, for a communication to fall within the scope of LAP, it must have had the dominant purpose of obtaining or giving legal advice, or whether it was sufficient merely for that to be a purpose of the communication (i.e. not dominant). Prior to this case, there had been conflicting statements in the authorities. While several authorities suggested that the dominant purpose did apply, in the Court of Appeal discussion in *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited* [2018] EWCA Civ 2006, the Court had (obiter) expressed the view that there was no such requirement.

In this case, the Court rejected the obiter comments in *Eurasian*, and concluded that the dominant purpose test does indeed apply. For LAP to apply, the relevant document or communication must have come into existence for the dominant purpose of seeking or giving legal advice. The Court in particular, noted that the dominant purpose test applies in jurisdictions such as Australia, Hong Kong and Singapore, and there was an advantage in adopting similar principles.

Interestingly, the Court expressed disapproval of the principle established in *Three Rivers Council v The Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474: that where the relevant client is a company, documents between an employee of that company and a fellow employee or the company's lawyers, even if required or designed to enable those lawyers to give legal advice to the company, do not attract LAP unless the employee was tasked with seeking and receiving such advice on behalf of the company. These comments may provide further support for the restrictive definition of 'client' in the *Three Rivers (No.5)* case to be re-evaluated.

The Court of Appeal decision in *Three Rivers (No.5)*, and in particular its restrictive view of who constitutes the client for the purposes of LAP, has been somewhat controversial. It has been criticised as not reflecting commercial reality as, in many situations, the individuals providing the information the lawyers require may not be the same individuals who receive or act on the advice provided. It is worth noting that in *Astex Therapeutics Ltd -v- AstraZeneca* [2016] EWHC 2759 (Ch) and *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch), the Court in each case acknowledged these criticisms of the *Three Rivers (No.5)* decision, but felt bound to apply it in its most restrictive sense. Based on these two cases, the common-sense approach is to proceed on the basis that the *Three Rivers (No.5)* client test, as restrictive as it may be, still applies until such time as the matter is revisited by the Supreme Court.

Multi-addressee communications

A key concern which frequently arises during a disclosure review is how to deal with emails that contain legal advice and which have been sent to multiple addresses. This is an issue on which, prior to this case, there had been no clear or authoritative guidance.

In this case, the disputed documents included emails sent to a number of addresses within the CAA, including both lawyers and non-lawyers.

The Court's approach was that multi-addressee emails should be considered as separate communications between the sender and each recipient on the email.

Once separated, the Court's approach was that, if the email containing/requesting legal advice was sent to the lawyer alone, it would be subject to LAP. If LAP applies to the lawyer's email, then the question is whether the emails to the non-lawyers attract LAP. In this situation, if the dominant purpose of the communication is to obtain instructions or provide legal advice, LAP will apply regardless of who it is sent to. However if the dominant purpose is to gain commercial views of the non-lawyers, LAP may not apply.

The Court confirmed that an email sent to a non-lawyer for a commercial comment, but also sent to a lawyer for legal advice, is not protected by LAP, **unless** the email or the non-lawyer's response discloses or might disclose the nature of the legal advice sought and given.

The Court also noted that where there are multiple purposes to a communication, the court is unlikely to distinguish between the legal and non-legal purposes if the two are so entangled that it becomes impractical to separate them. If they can be separated, redaction may be required prior to disclosure. The same principle also applies to meetings.

The Court also considered the issue of emails and attachments. A document which is not privileged does not become privileged simply because it was sent to a lawyer, even as part of a request for legal advice. Therefore, separate and discrete consideration will need to be given to both the email and the attachment when circulating documents containing legal advice.

Practical considerations

- Lawyers can be consulted as much for their commercial views as well as legal advice - this is particularly relevant for an in-house lawyer, where both legal and commercial queries may be requested. However, privilege will only attach to a communication when a lawyer is advising in a legal context.
- It is important to keep communications with legal advisers separate from commercial communications where possible (particularly in the case of in-house lawyers in large companies).
- All communications where the dominant purpose is to obtain legal advice should be clearly marked as privileged and confidential, and due care must be taken when circulating such legal advice, particularly to multiple addresses.
- As we know, merely copying in lawyers or having lawyers present at meetings is not sufficient to attract LAP. Nor will a document created before lawyers are involved become privileged simply because it is sent subsequently to a lawyer for their legal advice.