

## English Court of Appeal Clarifies the Scope of Legal Advice Privilege

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### Introduction

It is well established that the “dominant purpose” test applies in the context of litigation privilege. However, until now, it has been unclear whether the test also applies to legal advice privilege (LAP). Further, there are real difficulties in applying the law relating to privilege in multiparty email exchanges. In this update, we consider the Court of Appeal’s recent decision in *Civil Aviation Authority v. R Jet2* ([2020] EWCA Civ 35), which confirmed that the dominant purpose test also applies to LAP. The decision has particular implications for in-house lawyers providing a mix of legal and commercial advice, as well as wider consequences for parties giving disclosure in High Court litigation.

### Legal Professional Privilege - Key Concepts

Generally, all admissible and relevant communications fall to be disclosed in court proceedings, even if they are confidential. However, evidence that is privileged is not required to be disclosed, even if it is admissible and relevant.

#### Types of privilege

There are two principal types of privilege which apply:

- Litigation privilege, which protects confidential communications between a lawyer and a client, or between either a lawyer or a client and a third party, that are created at a time when litigation is reasonably in contemplation and for the dominant purpose of the litigation.
- LAP, which protects confidential communications between a lawyer and a client that relate to the giving or obtaining of legal advice (and not other professional or commercial advice), and any documents which contain or reproduce that advice.

#### LAP - Meaning of “Client”

In *Three Rivers Council v. The Governor and Company of the Bank of England (No 5)* ([2003] EWCA Civ 474), the Court of Appeal held that not all communications passing between lawyers and a corporate client attract LAP. In particular, LAP only protects

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those communications passing between the lawyer and those employees of the client who are specifically tasked with seeking and receiving legal advice (the “Three Rivers Exception”).

#### LAP - Scope of “Legal Advice”

In *Balabel v. Air India* ([1988] Ch 317), the Court of Appeal construed the scope of legal advice broadly, finding that in most lawyer-client relationships there will be a continuum of communications aimed at keeping both informed for the purpose of facilitating the provision of legal advice as required. The Court held that all such communications would attract LAP, and confirmed that legal advice is not confined to telling the client what the law is, but also includes advice as to what should sensibly be done in the relevant legal context.

#### Court of Appeal’s Decision

Briefly, the case arose as a result of judicial review proceedings commenced by Jet2 against the Civil Aviation Authority (CAA). The CAA resisted Jet2’s application for specific disclosure of certain communications between CAA executives and one member of CAA’s in-house legal team on the basis that they were subject to LAP. Jet2 argued that the relevant communications were not created for the dominant purpose of giving or obtaining legal advice and, therefore, were not protected by LAP. The CAA disputed that the dominant purpose test applied in the context of LAP.

In upholding the High Court’s decision, the Court of Appeal held that:

1. **Dominant Purpose:** A person claiming LAP must show that the dominant purpose of the particular communication is the giving or obtaining of legal advice. Establishing the dominant purpose of a particular document is a fact sensitive exercise. The Court will undertake a detailed consideration of the contents of the document, the purpose for which it was created, and the context in which it was created, sent or received.
2. **Multi-addressee Emails:** In the context of multi-addressee emails which are sent to both lawyers and non-lawyers:
  - A. If the dominant purpose of the multi-addressee email is to obtain legal advice or settle instructions to the lawyer, then LAP will apply, subject to the Three Rivers Exception discussed above. However, if the dominant purpose is to obtain the commercial views of non-lawyer addressees, the communication will not be protected by LAP, even if a subsidiary purpose is simultaneously to obtain legal advice from the lawyer addressee.
  - B. The fact that a document is sent to or from (or copied to) a lawyer does not mean that it will necessarily be protected by LAP. Generally, however, the Court will adopt a broad approach when considering whether a communication contains legal advice, such that where the lawyer’s role is to act as a lawyer (as opposed to a commercial advisor), LAP will apply to the continuum of communications passing between lawyer and client, including advice “given in a commercial context through a lawyer’s eyes.”
  - C. If a response from a lawyer to a multi-addressee email contains legal advice, it will generally be treated as part of the continuum of communications between lawyer and client and will attract LAP. In these cases, the Court will be reluctant

to engage in a detailed enquiry as to whether the dominant purpose test is satisfied.

D. Communications which, on their own or as part of a chain of communications, disclose, or might realistically disclose, the nature and content of legal advice will be subject to LAP.

3. **Multi-party Meetings:** The same approach applies to multi-party meetings between lawyers and non-lawyers (and records of the same). If the dominant purpose of the meeting is the obtaining of legal advice, LAP will apply. However, if the dominant purpose is commercial, the meeting will generally not be privileged, although legal advice sought or given in the meeting will be subject to LAP. Unless inextricably intermingled, it should be possible to redact legal advice contained in meeting notes for the purpose of disclosure.

4. **Emails and Attachments:** An attachment is not protected by LAP simply because the email to which it is attached attracts LAP. Emails and attachments will therefore be treated as separate documents for the purpose of considering whether they are protected by LAP. In this regard, it is worth noting that in *Three Rivers (No 5)*, the Court confirmed that LAP does not extend to documents obtained by the client from third parties for the purpose of instructing their lawyer.

## Conclusion

The decision limits the circumstances in which parties may withhold documents and communications on the basis of LAP, and potentially increases the burden on parties undertaking disclosure and considering whether relevant communications between their client's commercial, personnel and in-house lawyers are protected by LAP. As a consequence of wider disclosure of in-house communications, the Court may well have a clearer picture of relevant events, whereas previously key communications may have been withheld on the basis of a broad application of LAP.

Parties wishing to protect the advice provided by their internal or external lawyers: (a) should give careful consideration to whether the communication or meeting is intended to be protected by LAP; (b) so far as possible or practical, should not mix commercial and legal issues in multi-addressee emails or, where that is not possible, the sender should seek to ensure it is made clear that the dominant purpose of multi-addressee emails is the giving or obtaining of legal advice; (c) bear in mind that emails and attachments should be considered separately for the purpose of LAP; and (d) ensure that only those employees specifically tasked with giving or obtaining legal advice on behalf of the client communicate with lawyers.

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