

PRACTICAL LAW

DISPUTE RESOLUTION BLOG



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Implications of the judgment in Civil Aviation Authority v R (on the application of Jet2.com Ltd)

In the recent decision of *Civil Aviation Authority v R Jet2*, the Court of Appeal confirmed that the dominant purpose test, previously understood by some to be the sole domain of *litigation privilege*, also applies to *legal advice privilege (LAP)*. The decision means that only those communications created for the dominant purpose of obtaining or giving legal advice will be protected by LAP. We consider some of the practical implications of this decision below.

Establishing the dominant purpose

Although the involvement of a lawyer in the relevant document may be a good starting point for considering whether LAP subsists, 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. The dominant purpose test should be applied to each document in order to determine whether it is protected by LAP. Ultimately, this will require analysis of the purpose of the document and the context in which it was created, sent or received.

Multi-addressee emails and meeting notes

The *Jet2* decision considers the question of multi-addressee communications and meetings where the addressees/attendees are a mixture of lawyers and non-lawyers. This is a recurrent issue in modern *disclosure* exercises, and will be of particular interest to



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In order to determine whether a multi-addressee communication is subject to LAP, the first step is to assess whether the dominant purpose of the communication is the giving or obtaining of legal advice. In this context, the Court of Appeal prescribed a broad approach to the concept of “legal advice”. So, 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. This includes advice “given in a commercial context through a lawyer’s eyes”, provided the dominant purpose of the communication is to obtain or give that advice. However, where the dominant purpose is to give or obtain the commercial views of non-lawyer addressees, for example, the communication will not be protected by LAP, even if a subsidiary purpose is simultaneously to obtain legal advice from the lawyer.

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 to the contents of the meeting. However, if the dominant purpose is commercial, the meeting will generally not be privileged, although legal advice sought or given in the meeting should be subject to LAP.

Parties wishing to ensure that LAP applies to a particular communication, document, or meeting may wish to consider taking the following practical steps:

- Consider at an early stage the contents and intended purpose of the communication/meeting, the addressees/attendees of the communications/meeting, and whether the communication/meeting is intended to be protected by LAP.
- So far as possible, distinguish commercial issues from legal issues, either in separate communications or meeting notes, or as separate sections within the same communication or meeting note such that any legal advice is capable of being easily redacted.
- Label the relevant communication as being a communication the dominant purpose of which is the giving or obtaining of legal advice which is subject to LAP. Ensure that meetings (and notes of meetings) record the same point. Whilst a document’s label is not determinative of whether or not LAP applies (this is a question of fact), appropriate labelling will put recipients on notice that the communication or meeting note is intended to be protected by LAP.

Parties giving disclosure in litigation

The *Jet2* decision, in effect, limits the circumstances in which parties may withhold documents and communications on the basis of LAP. As a consequence, disclosure exercises may be more time consuming and expensive because lawyers will be required to consider whether the dominant purpose test applies to relevant communications in the context of LAP as well as litigation privilege. In many cases, the answer will be obvious; in others, it may well involve a detailed and time consuming analysis of the document and the factual matrix in which it sits. We expect that this will generally increase the universe of relevant documents available to the parties and the court, which may provide the courts with a clearer picture of relevant events than would otherwise have been the case.

The *Three Rivers (No 5)* definition of “client”

A decision which has received significant commentary over the last few years, and which had a bearing on the *Jet2* decision, is [Three Rivers Council v The Governor and Company of the Bank of England \(No 5\)](#), in which the Court of Appeal held that only those employees

specifically tasked with seeking and receiving legal advice constitute a “client” for the purpose of LAP, and that communications with other employees (not so tasked) were not protected by LAP.

Courts at various levels, and in various jurisdictions, have struggled with the reasoning in *Three Rivers No. 5*, notably in [SFO v ENRC](#), where the Court of Appeal criticised the decision for being out of step with the realities of modern business. In particular, this was because employees who feed into the process of obtaining legal advice may be scattered across the globe and may not work under a centralised function, and the decision appeared to favour small businesses over large ones. The Court of Appeal in *Jet2* agreed with that criticism and, adding some criticisms of its own, stated that it would be inclined to depart from *Three Rivers No. 5* were it able to do so (which it was not). As a result, *Three Rivers No. 5* remains the law and in-house lawyers should continue to ensure that only those employees specifically tasked with giving or obtaining legal advice on behalf of the client communicate with lawyers. If permission is given for an appeal of the *Jet2* decision, that may provide the Supreme Court with an opportunity to consider *Three Rivers No. 5*.
