

Legal Advice Privilege and In-house Practice: Court of Appeal Provides Welcome Guidance

by Joseph Lewin

Existing Test

Legal Advice Privilege (“LAP”) allows a party to withhold from disclosure communications between a lawyer and client, which are confidential and for the dominant purposes of obtaining legal advice.

This article summarises recent important clarification on the application of privilege arising from Lord Justice Hickinbottom’s recent judgement *in R (on the application of Jet2.com Ltd) v Civil Aviation Authority* [2020] EWCA Civ 35.

Since the principles of privilege were first established, the ways in which lawyers and their clients communicate and carry on business has changed drastically; we find ourselves in an era of fast and fleeting email correspondence, fueled by powerful, worldwide internet connectivity. However, at times, it has appeared that case law has struggled to keep up with these changes. In particular, the leading judgement on LAP - *Three Rivers Council v The Governor and Company of the Bank of England (No 5)* [2002] EWHC 2730 (Comm) - has often proved difficult to apply in practice.

In the *Three Rivers Council (No 5)* case, the Court held that LAP applies to communications between “client and lawyer” which are in principle “subject to a dominant purpose test, namely whether the communication or document was brought into existence with the dominant purpose of it or its contents being used to obtain legal advice.” There is, however, often a degree of uncertainty around when emails fall within this test. In particular, in applying the test it is difficult to establish whether:

- i. it is necessary for legal advice to be specifically requested for LAP to apply; and
- ii. a specific document, in consideration of LAP, should be looked at in isolation or in the context of communications that precede and follow it.

For example, it is common for non-lawyer within the client’s business to send out drafts

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to various advisors in a single email chain, including accountants and in-house lawyers. In these circumstances, the Three Rivers test is difficult to apply.

New Guidance

However, in a recent privilege case, Hickinbottom LJ clarifies elements of the dominant purpose test, providing some much-needed guidance.

Judicial review proceedings were initiated by Jet2.com (“Jet2”), a company operating flights to and from the United Kingdom, against the Civil Aviation Authority (“CAA”), the UK aviation industry regulator, in which Jet2 challenged the lawfulness of the CAA’s decision to issue a Press Release and post-Press Release correspondence concerning Jet2 to the press. Following Jet2’s successful application for specific disclosure, the CAA challenged a ruling made by Morris J, in a December 2018 first instance judgment, that the disclosure of documents in this dispute with Jet2 were not covered by LAP. The appeal was made on the grounds that the judgment erred in:

- a. holding the dominant purpose test necessary to establish LAP;
- b. the approach taken to multi-addressee communications;
- c. the assessment of LAP in consideration of an attachment to an email; and
- d. the approach to collateral waiver of privilege in other documents.

The appeal was dismissed by the Court, with Hickinbottom LJ affirming the approach of the trial judge. However, the judgment clarified certain elements of the dominant purpose test. The guidance given on multi-addressee communications is particularly helpful for in-house lawyers, who often take on a dual role of both legal and commercial adviser. Hickinbottom LJ held that:

- i. the dominant purpose test applies to documents and communications and must be applied to each respectively;
- ii. multi-addressee communications sent simultaneously to various individuals for their advice or comments are to be considered as separate communications between the sender and each recipient;
- iii. it is not necessary for legal advice to be specifically requested for LAP to apply; the exercise should be carried out with regard to the wide scope of LAP, which includes the giving of commercial advice through a lawyer’s eyes;
- iv. in a multi-addressee email seeking both legal advice and non-legal advice or input, “those to and from the lawyer will be privileged: otherwise, they will not be privileged, unless the real (dominant) purpose of a specific email to/from non-lawyers is that of instructing the lawyer”;
- v. the purpose of the communication needs to be identified and “if the dominant purpose

of the communication is, in substance, to settle the instructions to the lawyer” or if the dominant purpose is to convey legal advice, then LAP will apply;

vi. if the dominant purpose of a multi-addressee email is to obtain commercial views of the non-lawyer addressees, “then it will not be privileged, even if a subsidiary purpose is simultaneously to obtain legal advice from the lawyer addressee(s)”;

vii. emails and attachments must be considered separately for the purpose of identifying documents covered by LAP; and

viii. in determining whether any document may disclose legal advice, it must be considered in the context of communications which precede and follow it.

This decision is a helpful clarification of the law, but a degree of uncertainty remains and wherever possible, emails seeking legal advice should be kept separate from those seeking commercial input. Needless to say, the mere inclusion of lawyers on an email chain will not guarantee that it is privileged.