

COURT OF APPEAL CONFIRMS “DOMINANT PURPOSE” TEST FOR LEGAL ADVICE PRIVILEGE

R (Jet2.com Ltd) v Civil Aviation Authority [2020] EWCA Civ 35

Introduction

By a decision handed down on 28 January 2020 in *R (Jet2.com Ltd) v Civil Aviation Authority (Law Society of England & Wales intervening)* [2020] EWCA Civ 35, the English Court of Appeal confirmed that the correct test to apply to the issue of whether Legal Advice Privilege (“LAP”) covered a particular document or communication was whether its “*dominant purpose*” had been for the giving or seeking of legal advice. The Court of Appeal also set out the approach for the application of the “*dominant purpose*” test in circumstances where a communication is sent to a group that includes both lawyers and non-lawyers.

Background

In December 2017, the Civil Aviation Authority (“CAA”) had issued a press release that appeared to single out Jet2 (a company operating flights to and from the UK) for particular criticism in light of its refusal to sign up to a new alternative dispute resolution scheme in the aviation sector. In January 2018 and February 2018, Jet2 and the CAA exchanged written correspondence on the matter. That correspondence was provided by the CAA to a newspaper, which then ran an online article in which the CAA’s criticisms of Jet2 were repeated, and in which references were made to the contents of the correspondence.

On 12 April 2018, Jet2 commenced judicial review proceedings against the CAA challenging the decisions to publish the initial press release and to publish the further correspondence. Jet2 made an application in those proceedings for specific disclosure of all drafts of the CAA’s February 2018 letter together with all records of any discussions of those drafts.

First instance decision

An issue arose as to whether all of those documents were privileged, and therefore non-disclosable. In the course of two judgments, Mr Justice Morris held that the documents were not privilege and should be disclosed, and that, even if he had considered that the documents had been privileged, such privileged had been waived by the CAA through its disclosure of an email dated 24 January 2018 from the CAA’s Head of Consumer Enforcement Department to further employees of the CAA, including its Principal Legal Adviser.

In so finding, Mr Justice Morris held that the correct test to establish whether a document attracted LAP was whether it had been sent for the “*dominant purpose*” of seeking or giving legal advice from a lawyer. Where a communication had been sent to multiple addressees (not all of whom were lawyers) it could still be privileged if it satisfied the “*dominant purpose*” test (even if it sought the commercial views of other people). However, by contrast, a multi-addressee communication that was predominantly seeking such commercial views would not attract LAP, even if it was contemporaneously sent to a lawyer for the purpose of legal advice. Thus, the versions of the email that were created by the CAA before the consultation with its in-house lawyer(s) were not privileged.

Appeal Decision

The Court of Appeal (Lord Justice Hickinbottom giving the main judgment) dismissed the CAA’s appeal against the judgments of Mr Justice Morris.

Lord Justice Hickinbottom, on a review of the authorities concerning LAP, gave a helpful summary of some key propositions (at paragraph 69), including:

“i) Consideration of LAP has to be undertaken on the basis of particular documents, and not simply the brief or role of the relevant lawyer.

ii) However, where that brief or role is qua lawyer, because “legal advice” includes advice on the application of the law and the consideration of particular circumstances from a legal point of view, and a broad approach is also taken to “continuum of communications”, most communications to and from the client are likely to be sent in a legal context and are likely to be privileged. Nevertheless, a particular communication may not be so – it may step outside the usual brief or role.

iii) Similarly, where the usual brief or role is not qua lawyer but (e.g.) as a commercial person, a particular document may still fall within the scope of LAP if it is specifically in a legal context and therefore, again, falls outside the usual brief or role.

iv) In considering whether a document is covered by LAP, the breadth of the concepts of legal advice and continuum of communications must be taken into account.

v) Although of course the context will be important, the court is unlikely to be persuaded by fine arguments as to whether a particular document or communication does fall outside legal advice, particularly as the legal and non-legal might be so intermingled that distinguishing the two and severance are for practical purposes impossible and it can be properly said that the dominant purpose of the document as a whole is giving or seeking legal advice.

vi) Where there is no such intermingling, and the legal and non-legal can be identified, then the document or communication can be severed: the parts covered by LAP will be non-disclosable (and redactable), and the rest will be disclosable...

vii) A communication to a lawyer may be covered by the privilege even if express legal advice is not sought: it is open to a client to keep his lawyer acquainted with the circumstances of a

matter on the basis that the lawyer will provide legal advice as and when he considers it appropriate”.

Lord Justice Hickinbottom next considered the “*dominant purpose*” test – noting (at paragraph 96) that “*the jurisprudence is far from straightforward and the authorities do not speak with a single, clear voice*”. However, Lord Justice Hickinbottom found that Mr Justice Morris had been correct to proceed on the basis that the correct test for LAP was whether the “*dominant purpose*” (as opposed to one purpose) of the communication was to obtain or to give legal advice. In that course of that finding, Lord Justice Hickinbottom considered the recent decision in *Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd* [2018] EWCA Civ 2006, and was unpersuaded that the court in that case had been correct to consider LAP and Litigation Privilege as fundamentally different with regard to purpose, but was satisfied that that case did not “*significantly undermine*” the authorities which accepted that the dominant purpose test applied to LAP.

Lord Justice Hickinbottom next turned to the issue of multi-addressee communications, and (upholding the judgment of Mr Justice Morris below) set out the correct approach (at paragraph 100), including that:

- The dominant purpose test applies to LAP. Although the general role of the relevant lawyer may be a useful starting point, the test requires focus on the documents/communications in question and must be applied to each one.
- In assessing the purpose(s) of a single multi-addressee communication, full account must be taken of the wide scope of “*legal advice*” and of the concept of “*continuum of communications*”. A communication or continuum of communications for the “*dominant purpose*” of instructing a lawyer will most likely be privileged; but those for the dominant purpose of obtaining the non-lawyer addressees’ commercial views will most likely not be privileged.
- A response from the lawyer containing legal advice, even if copied to multiple addressees, is almost certain to be privileged – but the dominant purpose test must still be applied.
- Generally, multi-addressee communications should be considered as separate bilateral communications between the sender and each recipient. Whilst the form (single communication to multiple addresses vs multiple bilateral communications) may in some circumstances be significant in determining purpose, it is purpose, not form, that is the focus.
- There is some benefit to asking whether, if the communication had been sent just to the lawyer, would it have been privileged. If not, then the question of whether the emails to the non-lawyers were privileged hardly arises. But, if the correct approach to LAP is maintained then it is doubtful whether there will be any difference in consequences: “*Where there is a multi-addressee email seeking both legal and non-legal advice or input, if regarded as separate communications, 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. If it is not for that*

purpose, in most cases, the email as a whole will clearly not have the dominant purpose of obtaining legal advice”.

Finally, Lord Justice Hickinbottom considered (*obiter*) that Mr Justice Morris had been incorrect to find that the CAA would have waived privilege. However, the judge below had been correct to find that the documents were not privileged in the first place, so the issue of waiver became academic.

Concluding Remarks

Whilst the judgment is clear in terms of outlining the correct test for the application of LAP (was the “*dominant purpose*” of the communication to give or to seek legal advice), it is anticipated that practical issues may continue to arise as commercial operators consider the protections that their internal communications may or may not have (as a matter of law) in future litigation.