

## CHECK YOUR (LEGAL ADVICE) PRIVILEGE

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In *The Civil Aviation Authority v R (on the application of Jet2.Com Limited) & Anr*<sup>[1]</sup> the English Court of Appeal recently revisited the thorny issue of Legal Advice Privilege (“LAP”), providing some much-needed clarification on when it will apply, particularly in the context of communications sent to multiple addressees.

"With such an important doctrine, it is vital to ensure that the rules are clearly understood, and the boundaries are clearly defined."

LAP is a cornerstone of the operation of the rule of law and allows individuals and bodies corporate to consider their legal position in the knowledge that communications with their lawyers will remain confidential and will not be disclosed to other parties or the courts. However, with such an important doctrine, it is vital to ensure that the rules are clearly understood, and the boundaries are clearly defined.

### BACKGROUND

The case involved the judicial review of the Civil Aviation Authority’s (CAA) decision to make public statements about Jet2.com’s refusal to become part of an alternative dispute resolution (ADR) scheme for passenger flight delay claims. The CAA adopted a robust view as to why Jet2.com was reluctant to engage with the ADR scheme and in a series of internal emails, shared with their in-house lawyers, considered how they might best manage a media campaign on the issue. Jet2.com sought specific disclosure of those documents, but the CAA asserted that they were covered by LAP. At first instance the High Court held the documents should be disclosed and the CAA appealed, asserting that the first instance judge had erred:

1. In holding that claims for LAP are subject to a “dominant purpose” test;
2. When considering if multi-addressee communications are protected by LAP;
3. In holding that the assessment of an email or attachment needs must be carried out discretely, without reference to the context of a chain of correspondence or the email the attachment is attached to; and
4. In his approach to the issue of collateral waiver.

### DISCUSSION

This case concerned communications sent to an in-house lawyer rather than retained outside counsel. Whilst such lawyers provide legal advice to the organisation, it is fair to say that their function ranges far wider. They are integral parts of their organisations and are involved in commercial issues as well as legal issues.

Following examination of the authorities, the Court of Appeal found:

1. Consideration of LAP has to be undertaken on the basis of particular documents, and not simply the role of the relevant lawyer;
2. However, where the lawyer is giving legal advice, most communications to and from them are likely to be sent in a legal context and are likely to be privileged;
3. A document may still fall within LAP even if sent by an in-house lawyer operating as a commercial person, if it is specifically in a legal context;
4. Context will be important but fine arguments as to whether a particular document falls outside legal advice are unlikely to persuade the court;
5. Where the legal and non-legal parts of a communication can be identified, the parts covered by LAP will be non-disclosable and the rest will be disclosable in a redacted form; and
6. A communication may be covered by LAP even if advice is not expressly requested, as clients are entitled to update their lawyers on the basis that the lawyer will provide legal advice as and when appropriate.

## DOMINANT PURPOSE

LAP is one limb of legal professional privilege, the other being litigation privilege. Litigation privilege covers communications between lawyers and the client or third parties where the dominant purpose of the communication is to defend actual or contemplated litigation. Thus, where an investigatory report was prepared in relation to a rail accident to help the British Railways Board to decide whether to revise operational safety procedures, as well as to obtain legal advice in anticipation of litigation, the House of Lords held that the report was disclosable since its dominant purpose was not to obtain legal advice.[2]

**"As LAP and litigation privilege are two limbs of the same privilege, there was no compelling reason to treat them differently."**

Jet2.com contended that a dominant purpose test similarly applies in the case of LAP. The Court of Appeal agreed, holding that although the authorities did not speak with a single, clear voice, there was a preponderance of authority which supported the inclusion of a dominant purpose criterion into LAP. As LAP and litigation privilege are two limbs of the same privilege, there was no compelling reason to treat them differently. It was therefore necessary to show that the documents for which the CAA claimed privilege were for the dominant purpose of obtaining or giving legal advice.

## MULTIPLE RECIPIENTS

Most of the emails sought by Jet2.com had been addressed to multiple addressees, including the CAA's in-house lawyers. In determining whether such communications were covered by LAP, the Court of Appeal emphasised the need to focus on each specific document in question to identify its dominant purpose.

The Court of Appeal considered that, if the dominant purpose of a multi-addressee communication was to settle instructions to the lawyer then the communication would be covered by LAP, even if it was sent to the lawyer by way of information. However, if the dominant purpose was to obtain the commercial views of the non-lawyer addressees, then it would not be privileged, even if a subsidiary purpose was also to obtain legal advice from the lawyer addressee. Equally, any response from the lawyer would almost certainly be privileged, even if copied to more than one addressee, if it contained legal advice.

Similarly, the Court held that the mere presence of a lawyer at a meeting will not render the whole meeting the subject of LAP – the contents of the meeting would only be privileged if the dominant purpose was to obtain legal advice.

In this case the CAA accepted that it could not be said that the dominant purpose of the majority of the emails sought by Jet2.com were for the dominant purpose of seeking legal advice, or that they could realistically disclose the nature of the legal advice being sought, and so it was held that they were not covered by LAP.

"It is well-established that a document which is not privileged does not become so simply because it is sent to lawyers."

## EMAILS AND ATTACHMENTS

Noting that it is well-established that a document which is not privileged does not become so simply because it is sent to lawyers, the Court of Appeal agreed with the first instance judge that emails and attachments should be considered separately.

## COLLATERAL WAIVER

The voluntary disclosure of a privileged document can result in the collateral waiver of privilege in other material. As a separate issue, Jet2.com contended that the CAA had done just that in this case.

In assessing this argument (notwithstanding its finding that the documents were, in any event, not privileged), the Court of Appeal adopted the transaction test, examining the purpose for which the particular material had been disclosed and the point in the action it was said to address. Once the transaction has been identified all documents that relate to it will fall within the waiver and should be disclosed, subject to issues of fairness. Applying the test in this case, the Court of Appeal considered the relevant "transaction" was limited to the communication that had been voluntarily disclosed, and fairness did not require more.

## ANALYSIS

This judgment serves as a valuable reminder of the limits on the principle of privilege under English law.

For those who have been or may be involved in a marine casualty or incident, there are some important practical lessons to observe:

- It is now clear that the dominant purpose of the document or documents over which you would wish to claim privilege must be the provision of legal advice. Simply using an in-house lawyer as a conduit or copying them into messages in an attempt to assert privilege will not be sufficient for that document to become privileged. In the intense period immediately following an incident, that might not be at the forefront of people's minds.

- It remains necessary to consider who is receiving the advice given by the lawyer during an incident. Following the decision in *Three Rivers (No. 5)*<sup>[1]</sup>, if advice is distributed widely within an organisation, it runs the risk of losing its status as privileged correspondence. Whilst the Court of Appeal repeated criticism of that principle<sup>[2]</sup>, it was obliged to uphold the restrictive view of who within an organisation is authorised to receive privileged correspondence. That position will not change until the situation is considered by the Supreme Court.
- Finally, owners, operators and managers should consider what investigations are being carried out at the time of an incident and what purpose documents are prepared for. For example, ISM incident investigation forms are not prepared in anticipation of litigation, they are prepared to comply with an owner's obligations under the ISM Code and the owner's safety management system. They would therefore be disclosable in any future claim. These documents should, of course, be filled out at the time of the incident as they form an important part of the investigative process and simply not creating them or avoiding any written correspondence will create its own suspicions. However, care should be taken not to jump to conclusions that are, at the time they are drawn, largely unsubstantiated because they are based on a very small part of the evidence that is likely to be collected.

**"It is best to have a policy in place before an incident so that the parties might best benefit fully from the protections available to them."**

In short, it is best to have a policy in place before an incident so that the parties might best benefit fully from the protections available to them.

[1] [2020] EWCA Civ 35

[2] *Waugh v British Railways Board* [1980] AC 521

[3] [2003] EWCA Civ 474

[4] See our briefing note on the decision in *Serious Fraud Office v Eurasian Natural Resources Corporation Limited* [2018] EWCA Civ 2006, available [here](#)

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