

# LEGAL ADVICE PRIVILEGE: SOME WELCOME CLARIFICATION

*The Court of Appeal confirms the dominant purpose test applies*

The Court of Appeal’s recent judgment in *The Civil Aviation Authority v R. (on the application of Jet2.com Limited)* [2020] EWCA Civ 35 confirmed that the dominant purpose test applies to legal advice privilege (LAP). The judgment provides welcome clarification to an aspect of LAP that had previously been uncertain and provides essential guidance on how the court will apply the test where correspondence is sent simultaneously to legal and non-legal personnel.

The specific facts of the case are largely inconsequential, but the Court of Appeal made a number of key findings that are of much broader application:

## Dominant purpose

The dominant purpose test applies to LAP. It has been clear for many years that the dominant purpose test applies where litigation privilege is claimed but there was conflicting case law as to whether the test extended to LAP. The Court of Appeal’s ruling confirms that a document will be covered by LAP only where it has come into existence for the dominant purpose of giving or receiving legal advice.

This has particular significance for in-house counsel who hold board-level roles in their organisations and so will be asked their commercial as well as legal views on particular issues. In such cases, it will not be sufficient that in-house counsel ordinarily fulfils a legal function. The court will look at every communication on its own merits and determine the dominant purpose in each case.

## Multi-recipient emails

The application of the dominant purpose test to LAP also causes particular issues where emails are sent to wide circulation groups of legal and non-legal personnel simultaneously seeking commercial and legal input.

The Court of Appeal made clear that the correct approach was to look at multi-addressee emails as separate bi-lateral communications between the sender and each recipient. The dominant purpose test must then be applied to each of those bi-lateral communications.

Although the Court of Appeal considered that the adoption of this approach over considering each email as a single communication should make little difference to the application of LAP, it does seem to lean toward LAP not being found to apply where, for example, a draft letter is sent simultaneously for legal and commercial comment.

That said, the Court of Appeal did acknowledge that, in determining the purpose of a communication, the wide scope of “legal advice” (including the giving of advice in a commercial context through a lawyer’s eyes) and the concept of a “continuum of communication” must be fully considered. Accordingly, if the dominant purpose of a chain of emails was to settle instructions to the lawyer, LAP would apply to the entire chain.

Conversely, if the dominant purpose of a communication is to seek commercial input, it will not be granted the protection of LAP simply because a lawyer was also asked for his/her views. By the same token, the mere presence of a lawyer at a meeting will not cause the entire meeting to be considered privileged, although any legal advice sought or given at the meeting may be.

## Practical guidance

In-house legal teams would be well advised to update internal communications guidelines to take account of the Court of Appeal’s decision. In particular:

### *Be clear on the purpose of a communication*

Where a communication is intended to seek legal advice, this should be made clear on its face and the communication should be framed accordingly. Where both legal and commercial input is sought, it may be advisable to send separate emails, particularly if the element seeking legal advice is potentially sensitive.

### *Consider your recipients*

In an age where circulation lists grow ever longer, consider carefully who should receive a particular communication. The Court of Appeal confirmed that the narrow definition of ‘client’ adopted in *Three Rivers No. 5* persists until it receives consideration from the UK Supreme Court. Particularly where legal advice is sought, it may, therefore, be prudent to restrict the number of commercial recipients.



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