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Litigation & Arbitration Group

Client Alert

New guidance on Legal Advice Privilege has landed in *Jet2.com v Civil Aviation Authority*

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The Court of Appeal's recent decision in *The Civil Aviation Authority* v *Jet2.Com Ltd* [2020] EWCA Civ 35 provides important new guidance on the application of legal advice privilege ("**LAP**"), including clarifying whether a person claiming LAP must show that the ***dominant purpose*** of the relevant communication was to obtain or give legal advice. The leading judgment of Hickinbottom LJ provides a clear summary of the law in relation to LAP and serves as an important reminder of the limits to LAP and the proper care required by clients and lawyers when seeking or giving legal advice, particularly in the context of internal, multi-addressee correspondence.

This client alert provides a summary of the proceedings to date, including the existing law in this area and the first instance decisions of Morris J, before turning to the issues before the Court of Appeal and key practical considerations to take away from its judgment.

Overview

Factual background

In the context of judicial review ("**JR**") proceedings brought in April 2018 by Jet2.com Limited ("**Jet2**"), a UK airline operator, against the Civil Aviation Authority ("**CAA**"), the UK aviation industry regulator, Jet2 challenged the lawfulness of the CAA's decisions to issue a press release in December 2017 and thereafter to publish (and provide to the *Daily Mail*) a letter from the CAA to Jet2 of 1 February 2018 (the "**February Letter**"), which was critical of Jet2's decision not to participate in a new alternative dispute resolution scheme for consumers proposed by the CAA.

As part of the JR proceedings, Jet2 made an application for disclosure of materials, including (i) all drafts of the February Letter; and (ii) all records of any communications discussing those drafts, which were said to be relevant to the "improper purposes" ground of challenge (i.e., that the CAA acted for improper purposes in its publications, namely to damage Jet2's reputation in order to pressure the airline to join the new scheme). In resisting disclosure, the CAA asserted LAP over these communications on the basis that (i) in-house lawyers were "*involved in those discussions and gave advice in relation to the various drafts*"; and (ii) subsequent discussions of those drafts with others remained subject to LAP because they were caught by the "*continuum of communications*" with in-house lawyers.

Separately, and by way of response to Jet2's claim, the CAA submitted a witness statement that (amongst other purposes) sought to show that a particular email (which indicated certain malintent towards Jet2's 'billionaire chairman') was "*not reflective of any part of the approach taken by the CAA*". In support, the CAA exhibited a separate email of 24 January 2018 (the "**January Email**"), which attached the first draft of the February Letter. This point is important in relation to the Court's approach to 'collateral waiver', which this alert considers further below.

Morris J's First Instance Decision(s)

The key issue before Morris J was whether LAP could be asserted over the drafts of, and communications relating to, the February Letter and, if so, whether there had been a waiver of that privilege by the CAA.

By way of reminder, for LAP to apply, there must be: (a) a confidential communication; (b) between lawyer and client; and (c) for the purpose of giving or obtaining legal advice in the relevant legal context. This is to be distinguished from the (broader) application of litigation privilege ("**Litigation Privilege**") which covers communications between lawyer and client, or either of them and a third party, for the sole or dominant purpose of giving or receiving legal advice, or collecting evidence, in connection with existing or contemplated litigation.

In a judgment handed down in December 2018,[1] Morris J reached the following conclusions:

Application of the dominant purpose test

Whilst there is academic commentary suggesting that the point was not free from doubt, Morris J considered that the current authorities and *obiter* observations in <u>*Three Rivers (No 5)*</u>[2] support the view that claims for LAP are "*in principle*" subject to a dominant purpose test (i.e., whether the communication was brought into existence with the dominant purpose of it being used to obtain legal advice). He considered that, typically, where a communication is with an external lawyer, the question of the dominant purpose of the communication is unlikely to arise. However, the issue may be more acute where the communication involves in-house lawyers, who can often play a dual role within a company. In circumstances where an in-house lawyer is consulted as an executive about largely commercial matters, then the dominant purpose test will fall to be applied.

Communications to multiple addressees

Morris J went onto consider the application of the dominant purpose test in respect of certain communications sent to multiple addressees (some lawyers, some not), over which LAP had been claimed by the CAA. He concluded that any drafts of the February Letter which were created before consultation with the CAA's in-house lawyers were <u>not privileged</u> (even if it was contemplated that legal advice would be taken on the draft in due course, unless the dominant purpose of the draft was to seek legal advice on it). Moreover, subsequent drafts of the February Letter were not covered by LAP unless specifically drafted by lawyers or for the dominant purpose of obtaining legal advice.

Collateral waiver

On 4 February 2019 a further hearing took place to determine the CAA's application for permission to appeal. Jet2 opposed the application and, in doing so, advanced a new alternative argument that, if and insofar as the communications were privileged, an appeal would have no prospect of success. This is because having voluntarily disclosed the January Email (as an exhibit to the CAA's supporting witness statement), the CAA was said to have waived privilege in respect of all communications concerning the draft February Letter. In a further judgment handed down on 5 February 2019,[3] Morris J accepted Jet2's submission.

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[1] [2018] EWHC 3364 (Admin).
[2] [2003] EWHC 2565.
[3] On 5 February 2019; [2019] EWHC 336 (Admin).

Court of Appeal Analysis

On appeal, the Court of Appeal was tasked with determining the following key issues (amongst others): (i) does a claim for LAP require the proponent to show that the relevant communication was created or sent for the "*dominant purpose"* of seeking or giving legal advice; (ii) what is the proper approach to determining the privilege status of email communications between multiple addressees, some of whom are lawyers, and some are not; and (iii) the extent to which the voluntary disclosure of a privileged communication results in the collateral waiver of other privileged communications relating to the same issues on which the disclosed document touches.

In seeking to determine the above questions, the Court of Appeal first outlined five key propositions arising from the jurisprudence on legal professional privilege:

- Proposition 1: LAP applies to communications, not only with a lawyer in private practice, but also with an in-house lawyer.
- Proposition 2: LAP not only covers a communication from the lawyer containing advice and the client's own written record of advice, but also any communication disseminating, considering or applying that advice internally. LAP also attaches to communications from a lawyer to a third party containing information provided by the client to the lawyer (subject to LAP) which the client has given authority to disclose, as confirmed in *Raiffeisen Bank International v Asia Coal Energy Ventures Limited and Ashurst LLP* [2019] EWHC 3 and recently upheld by the Court Appeal in January 2020.[4]
- Proposition 3: LAP applies to communications only for the purpose of obtaining or giving legal advice, and not, for example, other professional or commercial advice.

(The Court noted that, whilst these three propositions were uncontroversial, the following two required more consideration).

- Proposition 4: Material collected by a client (or by a lawyer on its behalf) from third parties for the purposes of instructing lawyers to give advice is not covered by LAP; and, further, where the relevant client is a corporation, documents or other materials between an employee of that corporation and a co-employee or corporation's lawyers do not attract LAP *unless* the employee was tasked with seeking and receiving such advice on behalf of the company (as confirmed in *Three Rivers (No.5)*)[5] and followed in *SFO v ENRC [2018] EWCA Civ 2006*).[6]
- Proposition 5: LAP applies only where the communication has been made "*in a legal context*" (with 'legal advice' being widely defined). In this regard, the Court confirmed the following general principles:
  - Consideration of LAP has to be undertaken on the basis of particular documents, not simply by the brief or role of the relevant lawyer.

[4] [2020] EWCA Civ 11. See our previous client alert here relation to the implications of the first instance decision in a transactional context.
[5] [2003] EWHC 2565.
[6] Similar to the views expressed by the Court of Appeal in *ENRC*, Hickinbottom LJ doubted the analysis and conclusion that had been reached in *Three Rivers (No 5)* on this issue, noting that, had it been open to him, he would have been disinclined to follow it in this case. The Court of Appeal did go on to distinguish the facts in *Jet2* on the basis that (i) the relevant (in-house) lawyers were acting *qua* lawyers, rather than as executives providing commercial advice; and (ii) the non-lawyers were all relatively senior executives, such that there was no evidence to suggest they were not "*an emanation of the client*". For further analysis on the importance of defining the "*client*" or "*emanation of the client*" for purposes of LAP, see our previous client alert here.

- Since (i) 'legal advice' includes both advice on the application of the law and the consideration of particular issues from a legal viewpoint; and (ii) a broad approach is taken to the "*continuum of communications*", most communications between client and lawyer (where the brief/role is *qua* lawyer) are likely to be privileged.[7]

- Where the brief/role is not *qua* lawyer, a document might fall within the scope of LAP if it is specifically in a legal context.

- Legal and non-legal contexts might be so intermingled such that a distinction between the two is impossible, in which case a Court should look at the document as a whole to determine whether the dominant purpose is giving or seeking legal advice.

- Where separate legal and non-legal parts can be identified, a document can be severed, meaning that the privileged parts are redacted upon disclosure.

- A communication to a lawyer might also be covered by LAP even if express legal advice is not sought, as clients are entitled to keep their lawyer acquainted with a matter on the basis that a lawyer would give advice as and when appropriate.

The "dominant purpose" test

After a detailed consideration of the leading authorities on LAP and having readily accepted that they "*do not speak with a single, clear voice*", Hickinbottom LJ concluded that the balance of authority was in favour of a dominant purpose test. The contrary views expressed in *ENRC* were *obiter* and therefore insufficient to undermine the earlier authorities. Furthermore, Hickinbottom LJ considered there were good grounds for including such a test in relation to LAP, namely that (i) there was *"no compelling rationale*" for differentiating between LAP and Litigation Privilege in this context; and (ii) the fact that a "*dominant purpose*" was applied in other common law jurisdictions was persuasive.

The Court therefore concluded that Morris J was correct in holding that, for LAP to apply, the proponent of privilege must show that the dominant purpose of the communication or document was to obtain or give legal advice and, accordingly, CAA's appeal was dismissed.

LAP as it applies to multi-addressee communications

In relation to the application of LAP to multi-addressee emails sent simultaneously to various individuals for advice/comments, including a lawyer, the Court of Appeal held that it was important to first identify the purpose(s) of the communication. If the dominant purpose of the communication is, in substance, to settle the instructions to the lawyer, then, subject to the principle set out in *Three Rivers (No.5)* (Proposition 4; collection of material), that communication will be covered by LAP. But if the dominant purpose is to obtain the commercial views of the non-lawyer addressees, then it will not be privileged (even if a subsidiary purpose is to obtain legal advice from the lawyer). However, the response from the lawyer, if it contains legal advice, will almost certainly be privileged (even if copied to more than one addressee).

Approach to collateral waiver

Given the Court's conclusions on these issues, the question of collateral waiver was largely academic. However, Hickinbottom LJ did, nonetheless, go on to helpfully restate the following key principles:

[7] Although not referenced in Hickinbottom LJ's analysis here, the recent *Raiffeisen Bank* judgments are also instructive. In the context of a sale and purchase agreement, Ashurst LLP confirmed to Raiffeisen Bank that it had received instructions from its client to hold the purchase price monies in its client account pending transfer to an escrow agent. In subsequent litigation, Raiffeisen Bank sought disclosure of the underlying instructions on the basis that such communications were not advice in the "*relevant legal context*". Moulder J's decision, upheld on appeal, rejected the bank's arguments and considered Ashurst's role to be inherently legal, but in any event, if the materials did not themselves contain advice on matters of law, they would be part of the "*continuum of communication*" between lawyer and client in the relevant legal context and, therefore, subject to LAP.

- Although the voluntary disclosure of a privileged communication can result in a broader waiver of privilege, it does not automatically follow that all privileged documents relating to the issues upon which the disclosed document touches have been waived.
- The starting point is to ascertain the issue in relation to which the voluntarily disclosed material has been deployed, known as the "*transaction test*",[8] with waiver being limited to documents relating to that 'transaction' subject to the overriding requirement for fairness. Referring to *Fulham Leisure Holdings Ltd v Nicholson Graham & Jones*,[9] once the 'transaction' is identified, then the whole of the material which is objectively relevant to that transaction must be disclosed.
- The purpose and nature of the voluntary disclosure are crucial to the assessment of whether there has been a collateral waiver.

Applying those principles, the Court of Appeal held that (i) the relevant 'transaction' was limited to the January Email and fairness did not require any further disclosure; and (ii) the purpose of the disclosure was 'modest' and it could not be right that it resulted in the collateral waiver of all internal communications relating to the drafting of the February Letter (including those revealing legal advice from CAA's lawyers). Accordingly, had the Court found that the communications were privileged, it would have held that privilege had not been waived.

Conclusion and practical considerations

Privilege is not absolute and the introduction of a dominant purpose test in the application of LAP is a further reminder of the limits of privilege. Simply copying a lawyer into an email chain or having a lawyer attend a meeting may be not be sufficient to give rise to a claim of privilege.

Instead, consideration needs to be given to whether the dominant purpose of the communication – whether to a single or multiple addressee – is giving or obtaining legal advice. In this regard, the wide scope of legal advice and the concept of "*continuum of communications*" must be taken into account. Clients and lawyers (both in-house and external) should therefore be mindful when a document is created, or a meeting arranged, of the purpose of that document/meeting. When seeking legal advice, it is advisable to keep communications to a standalone email between the lawyer and the individual(s) seeking the advice, to reduce the risk of any ambiguity as to the dominant purpose of the communication. As Hickinbottom LJ put it: "*LAP is a privilege, and those who wish to take advantage of it should be expected to take proper care*."

[8] *General Accident Fire and Life Assurance Corporation Ltd v Tanter* [1984] 1 WLR 100.
[9] [2006] EWHC 158.

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