

CAA v R (on the application of Jet2.com Limited): the Court of Appeal confirms the dominant purpose test for legal advice privilege

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Authors: [John Rogerson](#), [Bryony Withers](#), [Emma Shields](#)

In perhaps the clearest statement on this issue to date, the Court of Appeal in *The Civil Aviation Authority v R (on the application of Jet2.com Limited)*,¹ has confirmed the “dominant purpose” test for legal advice privilege.

Summary

In recent years, the courts have frequently been called upon to define the scope of legal advice privilege.² Understandably, it remains a contentious topic between litigants: a party subject to a requirement to allow disclosure and inspection of documents will assert a broad interpretation of legal advice privilege, while the party seeking inspection will seek to rely upon a narrow one.

It is settled law that a claim to litigation privilege is subject to a “dominant purpose” test. In other words, a party asserting litigation privilege must, if challenged, be able to show that the document in question was prepared for the dominant purpose of litigation proceedings (including those in contemplation). By contrast, the courts have thus far been less clear in their application of a dominant purpose test in the context of legal advice privilege (LAP).

The application of a dominant purpose test to legal advice privilege has practical implications, particularly for claims to privilege in respect of multi-party communications. For example, does a communication with lawyers and non-lawyers sent for dual purposes (seeking both legal advice and commercial views) attract legal advice privilege? The Court of Appeal in *Jet2* has made a number of important observations on the application of legal advice privilege in this context.

The Facts

In April 2018, Jet2.com (“Jet2”) brought judicial review proceedings against the Civil Aviation Authority (“CAA”). Jet2 challenged the CAA’s decision to publish a press release and correspondence with Jet2, relating

¹ [2020] EWCA Civ 35.

² Legal advice privilege is one of the two components of legal professional privilege and applies to communications between a client and a lawyer for the purpose of giving or receiving legal advice. The second component is litigation privilege which applies to communications between a client and a lawyer (or with third parties) created for the dominant purpose of litigation proceedings, either ongoing or reasonably contemplated.

to Jet2's refusal to participate in an alternative dispute resolution scheme for consumers. The correspondence included a letter sent by the CAA to Jet2 on 1 February 2018 (the "February Letter").

In the context of those proceedings, Jet2 sought inspection of drafts of the February Letter and all records of internal discussions of those drafts. The CAA resisted this on the basis that an in-house lawyer at the CAA had been involved in discussing and preparing the drafts of the letter and therefore the documents sought were covered by legal advice privilege.

At first instance,³ Morris J concluded that a claim for legal advice privilege is subject to an assessment of whether the communication was sent for the dominant purpose of obtaining legal advice. Applying this dominant purpose test, the Court decided that: (i) drafts of the February Letter would only be privileged from inspection if they were specifically drafted by lawyers or prepared for the dominant purpose of seeking legal advice - even if subsequently shown to a non-lawyer; and (ii) where a draft of the February Letter was sent in the same email to both lawyers and non-lawyers, neither the email nor the February Letter as sent to the non-lawyer would be privileged. Morris J noted that communications by lawyers advising on the drafts would still be covered by privilege, as would communications between non-lawyers disclosing the nature of the legal advice given.⁴

The CAA appealed Morris J's decision.

The Court of Appeal's Judgment

In dismissing the appeal, the Court of Appeal held that a communication must have been prepared for the dominant purpose of seeking or obtaining legal advice for it to be covered by legal advice privilege. Hickinbottom LJ, giving judgment, acknowledged that the previous authorities to date had not presented a straightforward position on this issue.⁵ However, in considering those authorities (including those which were not binding on the Court), he confirmed that he did not consider his judgment to be a departure from previous jurisprudence.⁶

Nevertheless, Hickinbottom LJ remarked that the concept of legal advice privilege remains a broad one. The courts apply an expansive interpretation of what constitutes "legal advice" in communications between a client and its lawyer. In addition, the authorities are clear that information passed between a client and its lawyer intended to keep the lawyer abreast of recent developments can form part of a "continuum of communications" and are covered by legal advice privilege,⁷ subject to the application of the "dominant purpose" test.

Following Hickinbottom LJ's conclusion that the "dominant purpose" test applies, the Court set out certain circumstances in which multi-party communications will attract privilege:⁸

1. In the case of a communication shared with both non-lawyers and lawyers, the purpose of the communication should be identified, taking into account the broad scope of "legal advice" and the "continuum of communications".
2. If the dominant purpose of the communication is to settle instructions to the lawyer, then it will attract legal advice privilege. However, a communication which is created for the dominant purpose of seeking commercial views will not generally be privileged, even where the secondary purpose is to seek legal advice.

³ *R (on the application of Jet2.com Limited) v Civil Aviation Authority* [2018] EWHC 3364 (Admin).

⁴ [2018] EWHC 3364 (Admin), paragraphs 99 to 102.

⁵ Paragraph 96.

⁶ Paragraphs 92 and 96.

⁷ *Balabel v Air India* [1988] Ch 317; *Three Rivers Council v The Governor and Company of the Bank of England (No. 6)* [2004] UKHL 48.

⁸ A summary of Hickinbottom J's conclusions can be found at paragraph 100 of his judgment.

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3. A communication prepared for the dominant purpose of seeking commercial views may still be privileged where it may disclose the nature of legal advice requested or obtained from a lawyer.

Hickinbottom LJ reasoned that the same conclusions should apply to records of meetings attended by both non-lawyers and lawyers. He suggested that the parts of the meeting involving communications with the lawyers present would attract privilege, whereas the parts pertaining to commercial discussions would not.

Comment

While some practitioners may regard the decision in *Jet2* as a step away from the protections of legal advice privilege, it is equally important to note that the Court of Appeal emphasised that the privilege remains broad in scope. In many scenarios, certainly involving external counsel, communications between a client and lawyer will be sent in the context of seeking legal advice, and are likely therefore to attract legal advice privilege.⁹ Indeed, the Court of Appeal suggested that the courts will be “*extremely reluctant*” to delve into an examination of whether a communication sent by a lawyer (including an in-house lawyer) to a client will have been sent for the dominant purpose of seeking legal advice.¹⁰

The Court of Appeal’s findings in respect of multi-party communications have practical implications for clients who frequently communicate with or seek the advice of in-house lawyers. As before, it is not sufficient simply to copy a lawyer to a multi-party communication in order to seek to ensure that that correspondence attracts privilege; the communication must either: (i) be sent with the dominant purpose of seeking legal advice; or (ii) contain details of the legal advice provided.

Ultimately, the courts seek to ensure an equitable balance between the need for disclosure and inspection of relevant material to dispose of a case and a party’s right to communicate confidentially with its lawyers. It pays, therefore, to consider the contents and purpose of emails at a stage when in-house lawyers become involved in a matter. In the words of Hickinbottom J, “[*legal advice privilege*] is a privilege, and those who wish to take advantage of it should be expected to take proper care when they do so”.¹¹

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom

T +44 20 7532 1000

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⁹ Paragraph 69.

¹⁰ Paragraph 100(iii).

¹¹ Paragraph 93(iii).