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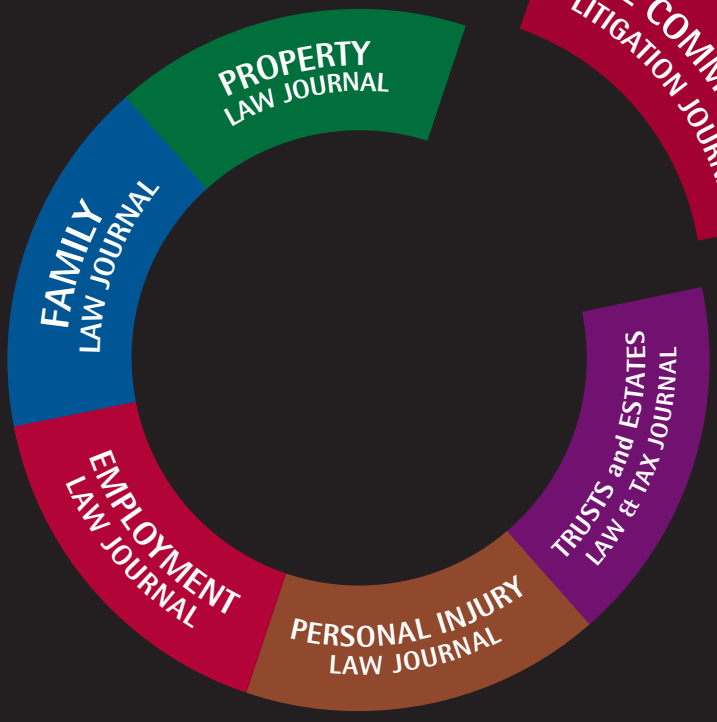

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Cabin pressure

Clare Arthurs and Nicole Finlayson chart the course of legal advice privilege

Clare Arthurs (pictured top) is an associate director and Nicole Finlayson a knowledge lawyer with Penningtons Manches LLP

'If the dominant purpose of the email is to seek commercial views, then regardless of whether the lawyer was copied in for information or for the purpose of legal advice, the email, in so far as it is sent to a non-lawyer, is not privileged.'

The airline Jet2 has been flying high while the Civil Aviation Authority (CAA) had a bumpy landing in the Court of Appeal in a key judgment on legal advice privilege (LAP).

In *The Civil Aviation Authority v The Queen on the Application of Jet2.com Ltd* [2020], the Court of Appeal gave important guidance on the application of LAP, confirming that for LAP to apply, the dominant purpose of a communication must be to give or seek legal advice.

Fasten your seatbelts

The underlying dispute arose out of Jet2's decision not to participate in the CAA's new alternative dispute resolution scheme for consumer complaints (the scheme). In December 2017 the CAA published a press release criticising airlines who chose not to participate, including Jet2 (the press release).

Jet2 wrote to the CAA complaining about the tone and content of the press release and explaining its reasons for not joining the scheme (the 16 January letter). The CAA replied to Jet2 (the 1 February letter) and then provided a copy of the exchange to the *Daily Mail*, which subsequently published articles which were critical of Jet2 and largely adopted the CAA's stance.

Chocks away

Taxiing to the Administrative Court, Jet2 issued judicial review proceedings challenging the CAA's decisions to issue the press release, publish the resulting correspondence and provide that correspondence to the *Daily Mail*. Jet2 argued that the CAA had no power to make the publications or that alternatively, if it did have such power, it had exercised the power for unauthorised and improper purposes ie to damage Jet2's trading interests, punish Jet2 for not joining the scheme and pressure Jet2 into joining it.

Jet2 applied for disclosure of various categories of document, including all drafts of the 1 February letter and all records of discussions of those drafts. These, it said, were necessary to understand the CAA's reasons and purpose behind the publication of the letter, and were therefore relevant to the 'improper purposes' grounds of challenge. One draft and its covering email had already been disclosed voluntarily (the 24 January email), but the CAA claimed LAP over other emails and drafts in the discussion.

Deciding the application at first instance, Morris J held that these documents should be disclosed. After a careful review of the authorities and the leading text *Documentary Evidence* by Charles Hollander QC, and despite acknowledging commentary to the contrary, he concluded that claims to LAP are subject to a dominant purpose test.

He also observed that the issue of dominant purpose is unlikely to arise in emails to external lawyers, but may well be more acute where material is sent to in-house lawyers, who may have a dual role in the company (ie both legal and commercial).

Turning specifically to emails sent to multiple addressees, including both lawyers and non-lawyers, the judge held that although the position is not established by authority, if the dominant purpose is to seek advice from the lawyer and others are copied in for information only, then the email will be privileged. However, if the dominant purpose of the email is to seek commercial views, then regardless of whether the lawyer was

copied in for information or for the purpose of legal advice, the email, in so far as it is sent to a non-lawyer, is not privileged. Further, if the email is sent to the non-lawyer for commercial comment, but sent to the lawyer for legal advice, then it will not be privileged unless it or the non-lawyer's response discloses or might disclose the nature of the legal advice.

Take-off

Sparks flew in particular regarding an internal email sent on 24 January by a non-lawyer to an in-house lawyer and other non-lawyers at the CAA. Applying the above test, Morris J found that the 24 January email and its attachment were not privileged because they were not prepared for the dominant purpose of obtaining legal advice and did not disclose the nature of legal advice sought.

He accepted Jet2's contention that by disclosing the 24 January email, the CAA had waived privilege in all communications concerning the draft 1 February letter (ie a collateral waiver), and he described the communications as 'a single process of internal discussion, which does not have discrete parts' (para 22). He thus concluded that the transaction in question comprised all drafts of the 1 February letter, and emails and internal discussions about those drafts. Fairness required disclosure of the entire chain regardless of whether or not individual documents contained legal advice.

The CAA appealed to the Court of Appeal.

Cruising at altitude

Hickinbottom LJ gave a soaring leading judgment. While the focus of the appeal was largely on whether a dominant purpose test applied, he identified five relevant propositions from the authorities regarding LAP. The first three, he said, are uncontroversial, while the other two require greater consideration (readers may wish to swap their hot towel for a cold one at this point):

Proposition 1
LAP applies not only to communications with external lawyers, but also with in-house lawyers.

Proposition 2
LAP attaches not only to a document from the lawyer containing advice and the client's own written record of a lawyer's advice, but also to any communication passing on, considering or applying that advice internally. LAP will, in certain circumstances, attach to the dissemination of advice to third parties, and (when authorised) communications from a lawyer to a third party (*Raiffeisen Bank International AG v Asia Coal Energy Ventures Ltd* [2020]).

Proposition 3
LAP applies to communications only for the purpose of obtaining or giving legal advice, and not other professional or commercial advice.

Proposition 4
Material collected by a client (or a lawyer on their behalf) from third parties or independent agents for the purposes of instructing lawyers to advise is not covered by LAP. Where the client is a corporation, documents between an employee and a co-employee or the corporation's lawyers do not attract LAP, even if required or designed to equip those lawyers to give legal advice to the corporation, unless the employee was tasked with seeking and receiving such advice on behalf of the company.

This proposition derives from *Three Rivers District Council v The Governor and Company of the Bank of England (No 5)* [2003] as followed (with express reluctance) by the Court of Appeal in *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2018]. Hickinbottom LJ would also have been 'disinclined to follow' *Three Rivers (No 5)* had he been able to do so (para 57). He agreed with Sir Geoffrey Vos C in *Eurasian* that *Three Rivers (No 5)* is out of step with overseas common law. It is also 'unsafe' because it was founded on analysis of authorities decided when the distinction between litigation privilege and LAP was 'very much in its infancy'. It is also, in the modern world, likely to place larger corporations at a disadvantage compared to smaller entities.

Material collected by a client (or a lawyer on their behalf) from third parties or independent agents for the purposes of instructing lawyers to advise is not covered by LAP.

He also added that (para 56):

i) ... where lawyers are instructed, the individual within a corporation instructing them must be able to ensure that the instructions are in accordance with the wishes of the senior executives in the company, which may involve input from more junior employees who are knowledgeable about the relevant issues. Internal communications settling instructions must be covered by LAP. It is unclear to me how the proposition in *Three Rivers (No 5)* quite allows for that.

ii) For no obvious reason, the law in relation to LAP as set out in *Three Rivers (No 5)* in respect of collection of information for the instruction of lawyers appears to be out of line with the law in respect of the dissemination of advice from lawyers, once received.

Hickinbottom LJ held that, on the evidence, all the relevant lawyers were in-house lawyers acting in a legal rather than commercial capacity. All the non-lawyers involved were senior executives and fell within the scope of the 'client'. Accordingly, LAP would attach to any confidential communication between lawyer and non-lawyer that was made for the purpose of giving or obtaining legal advice (*Three Rivers (No 5)* distinguished).

Proposition 5
For LAP to apply, the relevant communication must be made 'in

a legal context' (the first limb), but otherwise 'legal advice' is widely defined (the second limb).

In respect of the legal context, Morris J had found that the CAA's lawyers were engaged in the internal correspondence as lawyers, such that communications to them were generally made in an appropriate 'legal context'. As to 'legal advice', Hickinbottom LJ emphasised that (para 68):

> ... it is now well-established and uncontroversial that LAP covers more than just communications between lawyers and clients with regard to what the law is.

Leaving aside the issue of whether the relevant purpose must be dominant, the authorities indicate that (para 69):

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.

ii) 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 lawyerwill provide legal advice as and when he considers it appropriate.

The CAA had accepted that the dominant purpose of the relevant documents could not be said to seek legal advice.

Grounded

The Court of Appeal unanimously dismissed the appeal.

Ground 1: the dominant purpose test

It was common ground that there was no direct authority on this point. The Court of Appeal, however, agreed with Jet2, confirming that the balance of authority was in favour of the dominant purpose test applying to LAP. *Eurasian* was the only authority to suggest that the dominant purpose test does not apply; but that was *obiter* and the court had not reviewed the authorities.

Hickinbottom LJ further criticised *Three Rivers (No 5)* for a lack of clarity on this point, but observed that their Lordships appeared to have assumed that the dominant purpose test applied without adverse comment.

Moreover, there is no compelling rationale for differentiating between the two limbs of legal professional privilege as regards a dominant purpose test. The fact that common law jurisdictions such as Australia, Singapore and Hong Kong have all adopted a dominant purpose test for both litigation privilege and LAP not only suggests that such a test can work in practice, but also that it is advantageous for the common law to adopt similar principles.

Accordingly, while accepting that the jurisprudence and authorities 'do not speak with a single, clear voice', the Court of Appeal therefore accepted that a claim for LAP requires the party claiming the privilege to show that the relevant document or communication was created or sent for the dominant purpose of obtaining legal advice (para 94).

Ground 2: multi-addressee communications

The CAA had accepted that the dominant purpose of the relevant documents could not be said to seek legal advice. Neither could it be said that they might realistically disclose the nature of the legal advice sought from or given by the in-house lawyer. Hickinbottom LJ generally agreed with the approach that Morris J had applied to these documents.

The appropriate approach to multi-addressee emails is the following:

- Although the general role of the lawyer may be a useful starting point, the dominant purpose test must be applied to each document and communication.

- In respect of single emails sent simultaneously to multiple addressees for advice/comment, including a lawyer, the purpose(s) of the communication must be identified, with the wide scope of 'legal advice' and the concept of 'continuum of communications' being taken fully into account. Is the dominant purpose to settle instructions to the lawyer, or to obtain the commercial views of the non-lawyer addressees?

- If the response from the lawyer contains legal advice then it will almost certainly be privileged, even if copied to more than one addressee.

- Multi-addressee communications should be considered as separate bilateral communications between the sender and each recipient.

- There is 'some benefit' in considering whether the email would have been privileged if it was sent to the lawyer alone (as if not, the issue of whether any of the other emails are privileged 'hardly arises').

- Whether considered as a single communication or separate ones, in many cases there would not be any difference in consequence.

- Where a communication might realistically disclose legal advice, that communication will in any event be privileged.

- In terms of meetings attended by lawyers and non-lawyers, the same principles apply as to documents and communications.

Hickenbottom LJ also clarified that when considering whether a document discloses or might disclose the nature of legal advice sought or given, then:

- it is not necessary for legal advice to have been specifically requested; and

- the document must be considered in the context of the communications preceding and following it.

In the present case, the 24 January email was not privileged; although sent to three recipients, of whom one was a lawyer, its dominant purpose was not to obtain legal advice.

Ground 3: separate consideration of emails and attachments

The Court of Appeal confirmed that Morris J had not erred in requiring emails and attachments to be separately considered for the purposes of judging to which LAP attached (para 107):

> It is well-established that a document which is not privileged does not become so simply because it is sent to lawyers, even as part of a request for legal advice... In giving disclosure, some separate consideration of substantive documents and attachments therefore has to be undertaken.

Ground 4: waiver

Morris J had held that if he was wrong in concluding that the relevant documents were not privileged, privilege had been waived in any case (collaterally) by the CAA disclosing the 24 January email. Although this ground was now academic, Hickinbottom LJ nonetheless addressed it shortly, finding (albeit *obiter*) that Morris J was wrong to conclude that there would have been a collateral waiver.

The starting point is to ascertain 'the issue in relation to which the [voluntarily disclosed material] has been deployed' ie the 'transaction test' as defined in *General Accident Fire and Life Assurance Corporation Ltd v Tanter* [1984]. The waiver will be limited to documents relating to that 'transaction', subject to the overriding requirement for fairness. The transaction is not the same as the subject matter of the disclosed document or communication, and waiver will not automatically apply to all documents which could be described as relevant to the issue, as is the case in disclosure. The purpose and nature of the voluntary disclosure are crucial in assessing what constitutes the relevant transaction.

Morris J had wrongly identified the transaction. The CAA's purpose in disclosing the 24 January email and attached draft was to show that the language used in the previous 18 January email (which was not privileged) was not reflective of the CAA's approach. Consequently, the relevant transaction so far as that voluntary disclosure was concerned was restricted to the 24 January email. Fairness did not require more.

The long haul?

In-house lawyers should adopt the brace position and consider the Court of Appeal's pragmatic points regarding how organisations with an in-house legal function communicate internally. Can communications between lawyers and non-lawyers be kept separate, and meetings for more than one purpose be held separately, as far as possible?

The Court of Appeal recognised the importance of privilege to the rule of law, but noted that it was not an absolute principle. Hickinbottom LJ was 'unimpressed' by the submission that the application of the dominant purpose test to LAP would make it difficult for those who wish to obtain legal and non-legal advice simultaneously. Other commonwealth countries have adopted the test without apparent difficulty; and perhaps more tellingly (para 93):

> ... LAP is a privilege, and those who wish to take advantage of it should be expected to take proper care when they do so.

The Court of Appeal's renewed criticism of *Three Rivers (No 5)* and the plethora of cases relating to privilege in the last 12 months suggest that privilege (whether litigation or LAP) will continue clocking up judicial air miles for the foreseeable future. ■

Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd [2018] EWCA Civ 2006

General Accident Fire and Life Assurance Corporation Ltd v Tanter [1984] 1 WLR 100

Raiffeisen Bank International AG v Asia Coal Energy Ventures Ltd & anor [2020] EWCA Civ 11

The Civil Aviation Authority v The Queen on the Application of Jet2.com Ltd [2020] EWCA Civ 35

Three Rivers District Council & ors v The Governor and Company of the Bank of England (No 5) [2003] EWCA Civ 474

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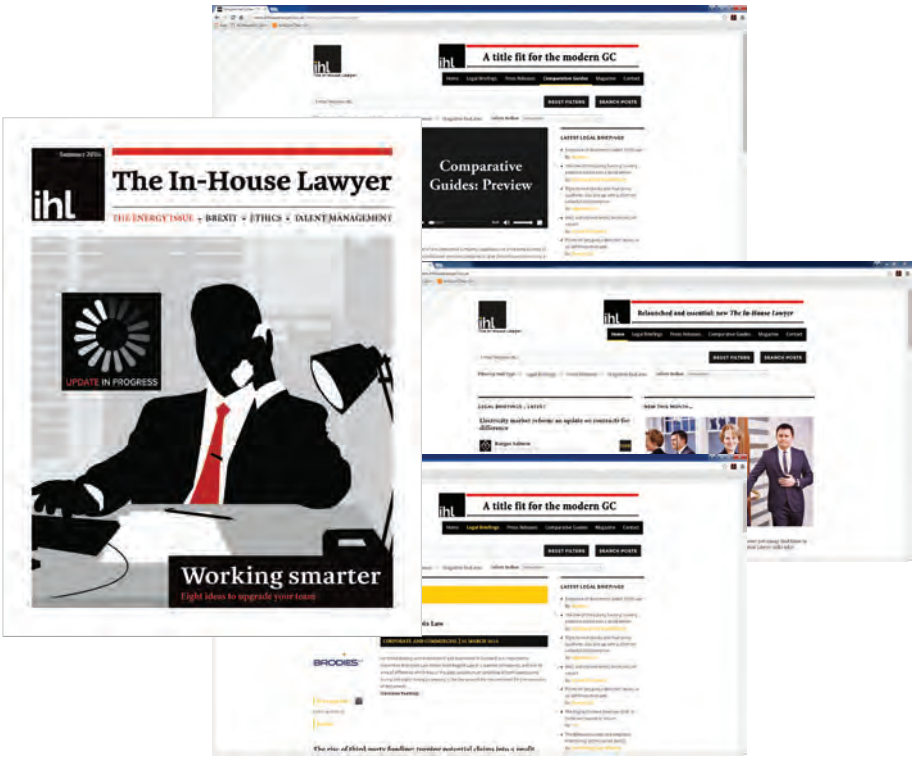

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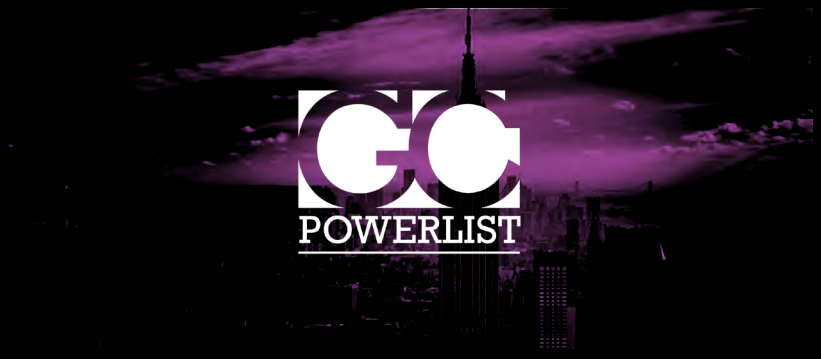

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