

## PRIVILEGE: A DOMINANT PURPOSE PREDOMINATES

The Court of Appeal has introduced a *dominant* purpose test for legal advice privilege – privilege is restricted to confidential lawyer-client communications whose dominant purpose is to obtain or to give legal advice.

If a document is covered by legal professional privilege, a party is entitled (with very limited exceptions) to refuse to disclose it to anyone else, whether an opponent in litigation, a regulator, or the police. Privilege offers a formidable shield.

There are two species of legal professional privilege in English law: litigation privilege, and legal advice privilege. Since a decision of the House of Lords in 1979, it has been a requirement for litigation privilege that the dominant purpose of the communication is the conduct of litigation. If the conduct of litigation is a subsidiary purpose - even if it is equal with another purpose - litigation privilege does not apply. But there has been continuing uncertainty whether a comparable dominant purpose test applies to legal advice privilege.

Until now. In *R (Jet2.com Ltd) v The Civil Aviation Authority* [2020] EWCA Civ 35, the Court of Appeal decided that legal advice privilege only applies to confidential communications between clients and their lawyers if the dominant purpose of the communication is to seek or give legal advice. It is not enough if seeking legal advice is only a purpose or one of several purposes. Despite the doubts of textbook writers and the absence of any direct authority, and with double negatives abounding (see the quote on the right), the Court chose to follow the flow in other common law jurisdictions.

The decision in *Jet2.com* restricts the scope of legal advice privilege, but the practical impact of the decision will be limited in most cases. In particular, the Court of Appeal stressed the breadth of what constitutes a communication for the purpose of obtaining or giving legal advice. It covers not just a formal request for legal advice but any communication sent to a lawyer in a legal context or even just to keep the lawyer up to date in case legal advice is required. Similarly, a communication is privileged if it passes on legal advice to those in the business who need to act on the advice even if the communication is not itself for the purpose of obtaining or giving that advice.

If a communication is to or from a lawyer alone, it is likely to be privileged – at least unless the lawyer is acting in a commercial, rather than a legal, capacity. The Court of Appeal's decision will be most relevant to communications (in practice, emails) sent to multiple addressees, including lawyers. *Jet2.com* confirms that merely adding a lawyer as an addressee will not be sufficient to make a communication privileged (it never has been).

### Key issues

- Legal advice privilege follows litigation privilege in having a dominant purpose test
- Each link in an email chain must be considered individually for privilege purposes

“I do not consider that there is any good ground for not following the preponderance of authority which supports the inclusion of a dominant purpose test for LAP”

[Hickinbottom LJ](#)  
*R (Jet2.com Ltd) v CAA*

The initial question for any multi-addressee email is: what is the dominant purpose of the email as a whole? If it is to seek legal advice, or even just to settle within the lawyer's client what legal advice is required, the communication will be protected by legal advice privilege. If the dominant purpose is otherwise, the email will not be privileged (unless it reveals legal advice previously given or the nature of legal advice being sought - though that could raise questions of redaction).

Even if the initial email is not privileged, subsequent elements in the email chain could be. If, for example, one of the recipients then directs a specific question to the lawyer, that email will be privileged. Similarly, if the lawyer responds to the initial email, that response will also be privileged. Email chains can develop a life of their own, and it is necessary to consider whether each link in the chain is privileged and, if not, whether part of the chain should be redacted. Privilege in practice is, however, often more difficult than privilege in theory – it can be easier to state what the test is than actually to apply it to specific emails.

### **Who is the lawyer's client?**

On a related note, one continuing sore in the law of legal advice privilege is the "client" issue, caused by the baleful decision in *Three Rivers (No 5)* [2003] EWCA Civ 474. Legal advice privilege applies to communications between a client and its lawyer. This requires identification of the client, which most would think both easy and obvious. But in *Three Rivers (No 5)*, the Court of Appeal decided that a lawyer's client for privilege purposes is not (or not necessarily) the whole of the corporation that pays the lawyer's bills but, rather, it is only those within the corporation charged with obtaining legal advice. This means that communications between lawyers and others within the client organisation, even if necessary for legal advice to be given, are not privileged.

The decision in *Three Rivers (No 5)* has been heavily criticised. In *Jet2.com*, the Court of Appeal added to that criticism. The Court said that it found the judgment in *Three Rivers (No 5)* "difficult", and "doubt[ed] both the analysis and conclusion" in the case. However, the Court accepted that *Three Rivers (No 5)* is binding on all English courts below the Supreme Court. It will therefore require a case to reach the highest court in order to put the law on a firm, and in this regard the right, footing.

## **CONTACTS**

### **Simon James**

Partner

T +44 20 7006 8405

E [simon.james](mailto:simon.james@cliffordchance.com)

@cliffordchance.com

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London, E14 5JJ

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