CLIENT ALERT

English Court of Appeal Finds Legal Advice Must Be Dominant Purpose to Obtain the Privilege

Feb.05.2020

On January 28, 2020, the English Court of Appeal handed down an important decision on legal advice privilege (LAP) within judicial review proceedings brought by Jet2 against the Civil Aviation Authority. The CAA had sought to refuse disclosure of specific documents on privilege grounds.

The judgment of Hickinbottom LJ, in which Patten and Peter Jackson LJJ joined, is: *Civil Aviation Authority v R Jet2.Com Ltd* [2020] EWCA Civ 35.

The primary result of the judgment was to settle affirmatively that for LAP to apply the dominant purpose of a communication must be the giving or receiving of legal advice. The Law Society once again was intervenor, as it has been in previous cases in recent years shaping the contours of English legal professional privilege.

As canvassed below, the judgment also discussed: the ambit of "communications" and the role of in-house lawyers; the (much debated view of) the "client" in LAP; waiver of privilege; and the consideration of attachments to privileged documents.

Dominant Purpose in Legal Advice

Litigation privilege has long been established to require that the litigation be the dominant purpose of communications in order for it to apply. Perhaps surprisingly, however, whether the criterion also applied to LAP was not a settled matter until a few days ago.

A different but unanimous bench of the Court of Appeal had provided the *obiter* view that dominant purpose did not apply to LAP in *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited* [2018] EWCA Civ 2006.[1][1] That bench viewed the requirement as tautological – either a communication gives or receives legal advice or it does not.

Nevertheless, in this most recent judgment Hickinbottom LJ stated that "*the jurisprudence is far from straightforward and the authorities do not speak with a single, clear voice*."[2][2] He sought therefore to provide that clear voice now:

> "*…for legal advice privilege to apply to a particular communication or document, the proponent of the privilege must show that the dominant purpose of that communication or document was to obtain or give legal advice*."[3][3]

In setting this requirement, English common law joins Australia, Singapore and Hong Kong.[4][4]

Placing the Purpose in the "Continuum of Communications"

The requirement for a dominant purpose now set, the judgment also clarifies how to consider that purpose.

First, the Court confirmed that communications involving in-house lawyers as well as external lawyers are captured by LAP, as long as their role is that *qua* lawyer.[5] Once that is established in an initial communication, also protected by the privilege are:[6]

- Communications passing on, considering or applying that advice internally.
- Possibly the dissemination of advice to third parties, particularly the lawyer's expression of their client's instructions to others.

Such further consideration of legal advice is known as the "continuum of communications."

The Court of Appeal Desires a Practical View of the Corporate "Client"

Since the Court of Appeal decision nearly two decades ago in *Three Rivers Council v The Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474, the concept of a corporate "client" for purposes of LAP has been restricted to a specifically designated group of employees responsible for the giving of instructions and receiving of legal advice. Communications to and from employees not in the designated group have not been covered. This has most particularly been an issue for information-gathering. As Hickinbottom LJ noted:

> *"…material collected by a client (or by his lawyer on his behalf) from third parties or independent agents 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 the corporation's lawyers, even if required or designed to equip those lawyers to give legal advice to the corporation, do not attract LAP unless the employee was tasked with seeking and receiving such advice on behalf of the company…"*[7]

This definition of "client" and the consequent result for the application of LAP has since seen criticism from other members of the Court of Appeal as unrealistic and impractical, particularly in *SFO v ENRC*.[8] On this matter, Hickinbottom LJ agreed.[9] Once again, it is a matter where English law is out of step with other common law jurisdictions. Nevertheless, it must be taken up by the Supreme Court in order for any reconsideration of the position to occur.

Collateral Waiver

A witness for the CAA, Mr Moriarty, had attached a particular email to his witness statement to show that a prior, non-privileged communication, was "*not reflective of any part of the approach taken by the CAA*."[10] A debate ensued whether that disclosure constituted collateral waiver by the CAA. As Hickinbottom LJ summarized:

> *"'the issue [is] in relation to which the [voluntarily disclosed material] has been deployed', known as the "transaction test", waiver being 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 does not apply to all documents which could be described as "relevant" to the issue…"*[11]11

The Court's view was that the disclosure's purpose was very narrow – the view of the "transaction" being taken in that context. Although the email was in a chain of correspondence some of which involved legal advice, the particular email did not reveal legal advice and was not disclosed for such a purpose, but to show the differing mindsets of CAA executives. Consequently, there was no collateral waiver.

Attachments as Separate Documents

Attachments to electronic communications, and particularly emails, are commonplace. The CAA had argued that an email and its attachments be analysed as a single communication. The Court of Appeal disagreed. Documents do not become privileged because they are sent to lawyers. Attachments to emails are no different in that regard, and separate consideration as to privilege must occur.[12]12

Final Thoughts

With this decision, the Court of Appeal has clarified that, for legal professional privilege of either type to operate, a communication's primary purpose must be legal advice or the pursuit of litigation. Whatever the context, therefore, adding a lawyer to a discussion is not enough to change its character and add the protection of privilege, and the strictures as to when LAP will apply remain heavy.

The judgment is also helpful in confirming that LAP be treated no differently as between in-house and external lawyers and that the question, if not always simply addressed, is whether the lawyer is interacting with the client *qua* lawyer. Nevertheless, given the limited definition of the "client" which still exists, until the Supreme Court takes up the matter expressly designated lines of communication will remain a prudent, if burdensome, approach. In particular, while documents disseminating legal advice, once given, may be widely covered by LAP, extracting information from employees remains a process which can easily stray outside its scope.

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[1] At [131]-[132].

[2] *Civil Aviation Authority v R Jet2.Com Ltd* [2020] EWCA Civ 35, [96].

[3] *Id.*

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[4] *Id.*, [95](ii).

[5] *Id.*, [44].

[6] *Id.*, [45].

[7] *Id.*, [47].

[8] *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited* [2018] EWCA Civ 2006, [127].

[9] *Civil Aviation Authority v R Jet2.Com Ltd* [2020] EWCA Civ 35, [55]-[57].

[10] *Id.*, [115].

[11] *Id.*, [113], *quoting General Accident Fire and Life Assurance Corporation Limited v Tanter* [1984] 1 WLR 100 at 113D per Hobhouse J.

[12] *Id.*, [107].

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