Legal advice privilege: a dominant purpose test, but to what end?

The Court of Appeal has developed the test for legal professional privilege and has held that legal advice privilege applies only to confidential communications between lawyer and client that are made for the dominant purpose of seeking or obtaining legal advice (*The Civil Aviation Authority v R on the application of Jet2.com Ltd [2020] EWCA Civ 35*). In practice, however, the addition of the word "dominant" seems likely to add little to the existing test.

Jet2.com also considers how legal advice privilege applies in the context of multi-addressee emails that include both lawyers and non-lawyers. This is a common scenario, particularly in the in-house context, so it is disappointing that the court's decision did not offer more in the way of clear practical guidance.

Continuum of communications

English law applies a highly restrictive interpretation of the "client" for the purposes of legal advice privilege, as established by the notorious Court of Appeal decision in *Three Rivers District Council and others v The Governor and Company of the Bank of England (Three Rivers No 5) ([2003] EWCA Civ 474)*. So for a corporate entity, it covers only communications between the lawyers advising the company and the individuals tasked with obtaining that advice on the company's behalf. Individuals who are authorised merely to provide information to the lawyers are not included.

However, once there is a lawyer and a client in this sense, the protection afforded by legal advice privilege is very broad. Firstly, legal advice is not confined to telling the client the law but also includes advice as to what should be done in the relevant legal context. Secondly, the privilege covers not only specific requests for, and the provision of, advice, but also includes the entire exchange aimed at keeping them both informed so that advice may be sought and given as required, known as the "continuum of communications". So while it has long been recognised that, for legal advice privilege to apply, a communication has to be broadly for the purpose of legal advice, the notion of a dominant purpose test has not been viewed as an easy fit.

It is clear, however, that *Jet2.com* does not seek to narrow this broad concept of legal advice, which was in any event established at House of Lords level (*Three Rivers No 6 [2004] UKHL 48; see News brief "Legal advice privilege: here to stay", www.practicallaw.com/4-103-2418*). The privilege will not apply if the dominant purpose of consulting the lawyer is to obtain commercial input rather than legal advice; for example, if an in-house lawyer has dual roles. And even where the dominant purpose of consulting the lawyer is to obtain legal advice, a communication will not be privileged if it falls outside of that context. However, in general terms, the protection of the privilege should remain broad.

Rationale for a dominant purpose

In coming down in favour of a dominant purpose test, the court was heavily swayed by the test for litigation privilege, where the document in question must have been prepared for the dominant purpose of litigation that was reasonably in contemplation at the relevant time (*see feature article "Privilege in investigations: the road ahead", www.practicallaw.com/w-017-0846*). As legal advice privilege and litigation privilege are both limbs of legal professional privilege, the court could not see a compelling rationale for differentiating between them. It also looked at the common law in Australia, Singapore and Hong Kong, where a dominant purpose test applies to both limbs of the privilege, and said that there was an advantage in adopting similar principles in this area.

It is important to note, however, that litigation privilege, as well as legal advice privilege as it has developed in those common law jurisdictions (which chose not to follow *Three Rivers No 5*), is not restricted to communications between lawyer and client and, in some cases, even applies to third-party communications. In those circumstances, it is necessary to have some limiting factor, which is supplied by the dominant purpose test.

In contrast, legal advice privilege under English law is already tightly restricted, as it applies only to communications between lawyer and client as narrowly defined by *Three Rivers No 5*. The adoption of a dominant purpose test for legal advice privilege would be understandable if English law were to follow other common law jurisdictions in removing the requirement for a lawyer to client communication. As things stand, however, arguments based on harmonising the law seem less compelling.

Multi-addressee communications

The court in *Jet2.com* also discussed the application of legal advice privilege in the context of emails sent to both lawyers and non-lawyers. Unfortunately, this aspect of the decision is not easy to follow.

At some points, the court appears to suggest that the dominant purpose test should be applied to the multi-addressee communication as a whole, so that if the dominant purpose is to seek legal advice from the lawyer then it is privileged, but if it is to seek commercial views then it is not privileged, even if a subsidiary purpose is to obtain advice from the lawyer.

However, the judgment also clearly states that the court's preferred view is that each communication between the sender and each recipient should be considered separately, as legal advice privilege essentially attaches to communications. Therefore, the question of whether a communication to a non-lawyer is privileged should not be dictated by its form, that is, whether it has been sent in the same email as a communication to a lawyer or whether the emails have been sent separately.

The proper analysis of multi-addressee communications appears to be as follows:

- An email sent by a client to a lawyer is privileged if it is for the dominant purpose of seeking legal advice in the broad sense. Conversely, it is not privileged if the lawyer is being asked for commercial input. The fact that non-lawyers are copied in for information does not affect its privileged status.

- An email between two non-lawyers is not covered by legal advice privilege, given the need for a lawyer-client communication. The fact that a lawyer is copied in for information does not change that. If, however, the email reveals a privileged

communication, such as reporting legal advice, the relevant section is privileged and can be redacted.

- Combining a privileged communication to a lawyer with a non-privileged communication to a non-lawyer does not protect the otherwise non-privileged communication. So where an email is addressed equally to a lawyer and a non-lawyer, seeking both legal and non-legal input on a given set of facts, it will likely have to be disclosed. However, where the email contains a specific request for legal advice from the lawyer, or reports legal advice previously received, then again it can be redacted to that extent.

- In each of the above scenarios, the lawyer's response is privileged provided that it is for the dominant purpose of providing legal advice, in the broad sense, rather than providing commercial input.

- The same principles apply to meetings attended by lawyers and non-lawyers. Legal advice that is requested and given at a meeting is privileged, but the mere presence of a lawyer does not mean that the whole meeting is protected by legal advice privilege.

Commentary on *Three Rivers No 5*

As in *SFO v ENRC*, the court in *Jet2.com* was highly critical of the narrow approach established in *Three Rivers No 5* to the question of who is the client for the purposes of legal advice privilege, and would not have been inclined to follow that decision if it were free to depart from it (*[2018] EWCA Civ 2006; see News brief "ENRC privilege decision: welcome news but difficulties remain", www.practicallaw.com/w-016-7167*). This helpfully adds to the weight of criticism of *Three Rivers No 5*. However, any change to the law will have to wait for a suitable case to go to the Supreme Court.

Jet2.com is somewhat confusing in appearing to suggest, in places, that a communication between two non-lawyers may be covered by legal advice privilege if it is for the dominant purpose of settling instructions to the lawyer. However, the court notes repeatedly that this is subject to *Three Rivers No 5*, which in fact rules out that idea due to its emphasis on the need for a lawyer or client communication. Perhaps, therefore, the court's comments in *Jet2.com* regarding communications between non-lawyers should be understood as applying only if *Three Rivers No 5* is overturned in future.

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