It is a common occurrence in disclosure reviews; an email sent from a client to a lawyer but including other internal addressees. The content may vary – from an explicit message to the lawyer, to a generic request for input. In *CAA v The Queen on the application of Jet2.com* [2020] EWCA Civ 35, the Court of Appeal examined how legal advice privilege (LAP) is to be applied in such circumstances. The key tool? grafting a “dominant purpose” test onto LAP. We consider the implications

**Background to the disputed documents**¹

The case concerned an application for judicial review brought by Jet2.com against the Civil Aviation Authority (CAA). That arose from a decision of the CAA to issue public statements criticising Jet2.com’s lack of participation in a redress scheme for consumers.

In those proceedings, Jet2.com sought disclosure of emails and attachments concerning drafts of a letter that the CAA had composed in early 2018 (that in turn being a response to a letter Jet2.com had sent to the CAA to complain about its treatment). Jet2.com thought that these documents would help reveal the CAA’s reasons behind its actions under review.

There were multiple addressees to these emails who were asked to comment on the draft; in each case one or more of whom were in-house lawyers, whilst one or more of whom consisted of senior executives at the CAA. The lawyers were acting *qua* lawyers and the non-lawyers were accepted to be the “client” for the purposes of *Three Rivers* 5² [59,97].

**The principal legal issues**

The dispute concerned how LAP should be applied in such cases (litigation privilege not being relevant on the facts). In essence the CAA’s position was that, as a lawyer had been involved in the communications, that they were all part of the necessary *continuum of communication* between client and lawyer for the purpose of legal advice, and that they were therefore all covered by LAP. At first instance, the judge had declined to follow such an approach,

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¹ Numbers in square brackets are to paragraphs in the Court of Appeal’s judgment.
² [2003] EWCA Civ 474.
instead looking at whether the dominant purpose of those communications was to obtain legal advice. The CAA challenged this approach and its application to the documents in question.

**Dominant purpose?**

After a lengthy review of the authorities [70-96] the Court of Appeal concluded that a dominant purpose test applies to LAP i.e. the relevant communication must be made for the *dominant* purpose of giving/receiving legal advice.

**Treatment of multi-addressee emails**

The question therefore arose as to how that dominant purpose test would fall to be applied in relation to a multi-addressee email sent between client(s) (within the meaning of *Three Rivers 5*) and lawyer(s) (always assuming that the other constituent elements to a claim for LAP are were made out). The Court of Appeal set this out at [100-102]. The key points are:

> An email sent by a client to lawyers for the dominant purpose of seeking legal advice will attract LAP whether it’s sent to the lawyer direct, by way of information, or as part of a rolling series of communications [100(ii)]. This is so notwithstanding that it is copied to non-lawyers for information.

> The Court of Appeal's “preference” was to treat a multi-addressee email as separate communications to each recipient. The Court nonetheless expressed the expectation that it will rarely matter, for these purposes, whether such an email is treated as a single communication, or separate communications to each. If the requisite dominant purpose is met then in either case the material will attract LAP [100 (iv)-(vi)].

> A similar rationale applied to a note of a meeting attended by lawyers and client non-lawyers. If the dominant purpose of that meeting were to obtain legal advice then everything said would attract LAP [100 (viii)].

> In identifying that purpose due account should be taken of the width of the concept of “legal advice” in the LAP context and the respect given for the concept of a “continuum” of communication between client and lawyer [100(ii)] (i.e. evidence of dominant purpose is not limited to specific requests for legal advice).

> When the requisite dominant purpose is absent, LAP can still attach to the extent that the communication (or meeting note) evidences/discloses the content of privileged communications [100(vii)/(viii)] (e.g. a sentence recounting advice from a lawyer, in an otherwise commercial email, can be redacted). In assessing that, the wider context of communications preceding/following the relevant communication can be taken into account [101].

> A reply by the lawyer to a multi-addresssee email from a client, even if copied to more than one addressee, will almost certainly be privileged; bearing in mind the wide scope of “legal advice” and “continuum” of communications [100 (iii)].
Other, ancillary, observations of the Court of Appeal

Before turning to the implications of this decision, it is worth noting a few other points of importance from the Court of Appeal’s judgment:

> The Court of Appeal conducts a useful survey of certain key propositions concerning LAP at [35-69]. Key points of interest include an endorsement of the parameters of existing case law on dissemination of privileged material both internally and to third parties [45], a repeat of the recent criticism levied at Three Rivers (No 5) in ENRC v SFO, albeit with an acknowledgment that it remains binding [57], and acknowledgement of the width of protection available to a lawyer client/communication once a relevant legal context is identified and a lawyer is acting as such [69].

> Since a non-privileged document does not generally become privileged simply by sending it to a lawyer, it followed that that attachments to emails need to be assessed for privilege as separate documents [104-108].

Comment and observations

Where does the Court of Appeal’s approach leave LAP claims in this context?

> Summing up the above, the dominant purpose test in English law may have most practical application as a control mechanism in multi-addressee communications. In that context, whilst it has always been understood that the mere copying in of a lawyer does not confer LAP, the need to identify the “dominant purpose” of a given communication does add a layer of complexity.

> The Court of Appeal’s preferred view that multi-addressee emails should be treated as a separate communication with each separate recipient may compound the matter for a disclosing party with control over the copies which went to non-lawyers (e.g. where, as will often be the case, the non-lawyer sender’s emails are controlled by it). It undermines any basis for saying that there was simply one communication with the lawyer subject to LAP which need not be disclosed.

> In the case of a message from client to lawyer, with other (client) non-lawyers simply copied in for information, LAP will attach to the message and the cc’s will simply constitute an internal dissemination of that privileged material (which, generally speaking, does not lose privilege).

> Where a message from a client is addressed to both a lawyer and a (client) non-lawyer, and that (client) non-lawyer is asked for input for the purposes of instructing the lawyer, then the Court of Appeal appears to regard that (distinct) communication to the (client) non-lawyer as independently attracting privilege, on the basis of its dominant purpose.³

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³ In its discussion of multi-addressee emails, especially when considering whether they were to be categorised as separate communications [100(iv)-(vi)], the Court of Appeal is not entirely clear as to the correct basis upon which the communication between (client) non-lawyers might attract LAP. Given that LAP is generally understood as being restricted to communications between client and lawyer, an implication that such a communication attracts LAP simply because a dominant purpose test is met seems odd. It may be that the Court of Appeal had in mind that, where such a test is met, there is, first and foremost, a communication with a lawyer involved. But this is unclear.
If, however, that (client) non-lawyer’s input was, instead, being requested by the originating client for a wider commercial purpose (as opposed to being part of the process of instructing the lawyer), the communication to the (client) non-lawyer may only attract LAP to the extent that it evidences/discloses privileged material (itself a question of fact)).

The decision does not mean that Three Rivers 5 has been jettisoned. In some common law jurisdictions, Hong Kong for example, the dominant purpose test has been used as the control mechanism for permitting internal communications from employees to be more generally brought within the scope of LAP4. This is not what has happened here. The Court of Appeal expressly acknowledged it was bound by Three Rivers 5 and the case did not concern any “third parties” (whether other employees of CAA or otherwise).

How would matters have played out if a third party had been involved? Imagine a situation where a client sends an email to a lawyer, and two non-lawyer employees in the same organisation (one, NL, being part of the “client”, and the other, TP, being a “third party” employee under Three Rivers 5). Both are asked for input for the purpose of instructing the lawyer. Following Jet2.com, the (distinct) communications to the lawyer, and to NL, would likely attract LAP. The communication to TP would not as it squarely falls within Three Rivers 5 (although, again, any parts of the communication to TP evidencing or disclosing privileged material would attract privilege).5

Finally, claims to LAP in, for example, English court or regulatory proceedings will now need to be phrased as referring to “dominant” purpose (e.g. confidential communication between client and solicitor for the dominant purpose of the giving or receiving of legal advice).

Click here for a copy of the judgment.

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5 Likewise, if the factual situation was instead that the third party has merely been cc’d into an otherwise privileged communication then the correct analysis would, it is suggested, be one of a privileged communication being disseminated to a third party – in which case privilege is not lost provided confidentiality was maintained.