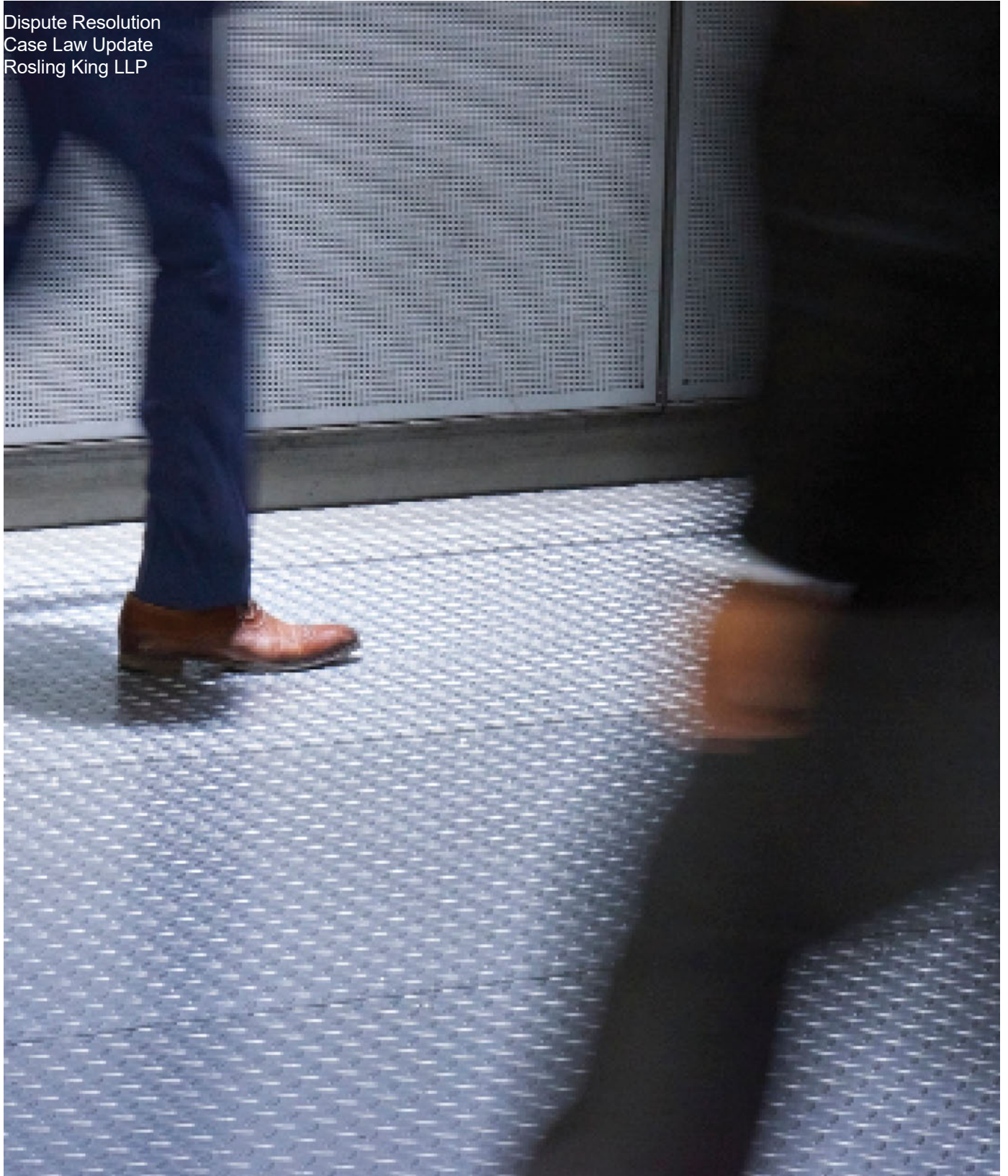




Dispute Resolution  
Case Law Update  
Rosling King LLP



### Background

The judicial review proceedings were brought by R (on the application of Jet2.com) against the Civil Aviation Authority (“**CAA**”). The CAA, as the UK regulator of the aviation industry, had promoted and encouraged commercial airlines to partake in an alternative dispute resolution (“**ADR**”) programme for the resolution of consumer complaints. Due to a number of reasons, Jet2 chose not to participate in the ADR programme. This resulted in the CAA taking the following actions:

- 1 Issuing a press release in December 2017 criticising Jet2 and confirming their refusal to sign up to the programme; and
- 2 Publishing correspondence between the CAA and Jet2 in February 2018, including supplying such correspondence to the Daily Mail.

On 12 April 2018, Jet2 brought judicial review proceedings against the CAA to challenge the decision to issue the press release and publish the correspondence. Jet2 submitted that the publishing of the above documents had been for an “improper purpose”. Given the grounds of the challenge, Jet2 made a subsequent application for disclosure of several categories of documents, including drafts of a letter sent by the CAA to Jet2 on or around February 2018 and all discussions surrounding such drafts. The intention behind obtaining and reviewing such communications was to establish the true purpose of releasing the communications to the public. The CAA contested this application on the basis that the documents were subject to legal advice privilege (“**LAP**”).

The Judge at first instance (Morris J) held that, as obtaining legal advice would need to have been the dominant purpose of these documents, they were not covered by LAP and confirmed that all documents should be disclosed. It was held that even if such documents were covered by privilege, this had been waived by the CAA when they previously disclosed an internal email dated 24 January 2018.

The CAA appealed the decision on the basis that the Judge erred in the following respects:

- 1 In holding claims for LAP are subject to a dominant purpose test;
- 2 The approach for dealing with multi-addressee communications and their protection by way of LAP;
- 3 In holding that the CAA must consider each email and each attachment separately to assess whether it is covered by privilege; and
- 4 That the voluntary disclosure of an email dated 24 January 2018 resulted in the “collateral waiver” of privilege in respect of all documents in the period 16 January 2018 up until the 7 February 2018 (the date of publication of the Daily Mail article).

### Decision

The Court of Appeal unanimously held that any party claiming LAP is required to demonstrate that the relevant document or communication was created or sent for the dominant purpose of obtaining legal advice.

#### Ground 1

The Court considered a number of authorities when assessing whether LAP is subject to the dominant purpose test. The CAA cited the case of *The Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2018 EWCA Civ 2006; 2019 1 WLR 791] (“**Eurasian**”) and argued that the Court had concluded that the dominant purpose test did not apply to LAP. The CAA submitted that the issue had been fully argued before the court and should be followed. Jet2 argued that the dominant purpose test had been recognised and accepted as applicable to LAP in a number of cases including *The Sagheera* [1997 1 Lloyd’s Rep 160], *Three Rivers (No 5)* [2002 EWHC 2730 Comm], *Three Rivers (No 6)* [UKHL 48] and *Philip Morris* [2003 EWHC 3028]. Hickinbottom LJ agreed with the submissions made by Jet2 and held that the decision in *Eurasian* did not determine the issue of the dominant purpose test as the circumstances in that case predominantly concerned litigation privilege. *Eurasian* did not relate to documents such as emails that had been created partly for the purpose of obtaining legal advice and partly for another reason (such as obtaining non-legal advice) as was the situation in this case. For these reasons, alongside the authorities cited by Jet2, the Court stated that:

- 1           Whilst the *Eurasian* case distinguishes between litigation privilege and LAP, it was held that they are limbs of the same privilege and there is no compelling rationale to differentiate between the two; and
  
- 2           The application of the dominant purpose test to LAP has been accepted in other jurisdictions. Whilst the position is not uniform, this still suggests that the test can work in practice and there are advantages to adopting a similar approach to the common law.

#### Ground 2

The Court, in agreement with Morris J, held that the dominant purpose test applied to multi-addressee communications. Each communication would need to be considered by the CAA to establish whether the dominant purpose was to obtain legal advice or seek the commercial views of others. The former would allow the use of LAP whilst the latter would not (despite lawyers being copied into emails and even if the subsidiary purpose is to simultaneously obtain legal advice). The judgment confirms that it is not necessary for the advice to be specifically requested and, when considering whether any document might disclose legal advice, the context of such communications should be considered by the parties.

#### Ground 3

Hickinbottom LJ held that Morris J was correct in confirming that separate consideration will need to be given to individual communications and each attachment to assess whether these are privileged. This was based on the established principle that a document which is sent to a lawyer is not privileged simply because it has been sent, even as part of a request for legal

advice.

#### Ground 4

The Court found in favour of the appellants on the final ground. Contrary to Morris J's decision, Hickinbottom LJ held that waiver of one email does not constitute a waiver of LAP on all documents and communications. The Court considered the purpose and nature of the voluntary disclosure, as this is a fundamental element of assessing any "collateral waiver", and held that there was no risk of unfairness in these circumstances as the disclosure was not in respect of legal advice.

#### Commentary

The decision explores the ambit of LAP and provides useful guidance in relation to multi-addressee communications as highlighted by the following points made by Hickinbottom LJ:

- 1 Any response from a lawyer containing legal advice will be covered by LAP;
- 2 LAP attaches to documents and communications rather than the role of the lawyer. Subsequently, multi-addressee communications should be considered as separate bilateral communications between sender and each recipient' The form of the communication may not always be relevant for these purposes.
- 3 Meetings between a party, their lawyers and any non-lawyers would be treated with the same approach as with written communications. Should the lawyer attend the meeting with the dominant purpose of providing legal advice, this will be covered by LAP. However, the mere presence of a lawyer is insufficient to render the whole meeting subject to LAP.
- 4 The judgment suggests using the advocated approach of considering whether, if the email had been sent to the lawyer alone, it would have been privileged. If any communications had been sent to any non-lawyers, then the parties will need to consider whether the dominant purpose was to obtain instructions or disseminate legal advice.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.