

The recent High Court decision in *Property Alliance Group Ltd v Royal Bank of Scotland* clarifies the meaning of the “dominant purpose” test in the context of the litigation privilege definition, and how it is applied where a party has obtained recordings of conversations through deception.

Background

The Court granted RBS’ application to inspect audio recordings and their transcripts, made secretly by the claimant’s Managing Director (MD), in separate meetings with two of RBS’ former employees, in the hope that the recordings would yield evidence to support the claimant’s claim.

The claim arose out of the alleged mis-selling of swap contracts by RBS to the claimant Property Developer. In the months preceding and subsequent to filing the claim, the MD had arranged meetings with two former employees of RBS, who had worked for RBS at the time the swap contracts were entered into but had since moved on to new employment. The MD led them to believe that he was interested in furthering their respective business relations. However, his real intention was to gather evidence to support the claimant’s claim by covertly recording the meetings. In the course of disclosure to RBS, the claimant accidentally included an email to its solicitors that referred to the recordings of the meetings, inadvertently bringing their existence to RBS’ attention.

The Court had to consider whether RBS should be permitted to inspect the recordings and transcripts of the meetings, in the light of the claimant’s assertion that they should be subject to litigation privilege.

The claimant contended that this situation was indistinguishable from one where a solicitor arranged a meeting with a potential witness to take a proof of evidence. Accordingly, provided litigation was in contemplation, the communications at the meeting were privileged despite the variety of motives for agreeing to meet.

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Judgment

The Court held that litigation privilege could not apply to a verbatim recording or transcript of a conversation made for use in litigation, unless the conversation itself was privileged. The test for establishing litigation privilege, following the House of Lords’ decision in *Three Rivers DC v Bank of England (Disclosure) (No4)*, was whether the recordings and transcripts had been produced for the dominant purpose of conducting litigation.

The question of whether the conversations were privileged turned on the “dominant purpose” of the meetings. It was held that the test is one of objectivity; a decision for the Court not the parties, taking into account all the evidence including that of the parties’ intentions.

The MD’s and ex-employees’ respective purposes for attending the meetings were found to be clear but entirely divergent. Accordingly, the critical point was that the MD had actively deceived the two former employees. That deception distinguished the circumstances from the example of a solicitor taking a proof of evidence from a potential witness. It also meant that the fair and correct approach was to look at things from the perspective of RBS’ former employees. Therefore, the dominant purpose of the meetings had not been, with regard to the conduct, litigation and consequently, RBS was entitled to inspect the recordings and transcripts of the meetings.

Implications

This case sounds as a warning for parties attempting to gain an advantage over their opponents by using deceptive methods to obtain evidence. It is now also clear that when determining whether litigation privilege applies to conversations, the Court will look at the events objectively, taking into account all the evidence, including the parties’ intentions. However, where there has been deception, the innocent party’s motives and intentions will be used to establish the dominant purpose of those conversations.