

## Chapter 21: Privilege

### The privilege against self-incrimination

#### Statutory provisions

##### *Statutory withdrawal of privilege*

#### Page 664

In *R (Bright) v Central Criminal Court* [2001] 1 WLR 662, the majority view was that s 9(1) of the Police and Criminal Evidence Act 1984, whereby a judge may order production of certain types of material for the purposes of a criminal investigation, has excluded the privilege against self-incrimination. However, if the subject of the order is prosecuted, the judge may consider Art 6 of the European Convention on Human Rights and whether to exclude the material under s 78 of the Police and Criminal Evidence Act 1984.

Contrast *R (Malik) v Manchester Crown Court* [2008] 4 All ER 403. However, in *R (River East Supplies Ltd) v Crown Court at Nottingham* [2017] 2 Cr App R 384 (27), the court described as ‘powerful’ the argument that prevailed with the majority in *R (Bright) v Central Criminal Court*.

#### *Compulsory production of pre-existing documents and materials*

#### Page 666

In *R (River East Supplies Ltd) v Crown Court at Nottingham* [2017] 2 Cr App R 384 (27), the Divisional Court rejected a submission that it should follow three decisions of the House of Lords insofar as they had operated on the assumption that the privilege *does* extend to ‘independent’ material. The decisions of the House of Lords were: *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547, *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 and *AT & T Istel v Tully* [1993] AC 45.

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In *R (Malik) v Crown Court at Manchester* [2008] 4 All ER 403, DC at [78], it was said that in deciding whether to exercise the *discretion* to order production of ‘independent’ documents, the privilege against self-incrimination is an important relevant factor to be taken into account, but as the court observed in *R (River East Supplies Ltd) v Crown Court at Nottingham* [2017] 2 Cr App R 384 (27) at [102], on the best view of existing authority the privilege against self-incrimination does not apply to ‘independent’ documents and therefore no question of the exercise of judicial discretion can arise.

## **Legal professional privilege**

### ***Establishing the privilege***

#### **Pages 673-674**

The court has a general discretion to inspect the document for which privilege is claimed to see whether the test has been correctly applied. Although it should be cautious about doing so, inspection is not limited to cases in which, without sight of the document, it is 'reasonably certain' that the test has been misapplied. The discretion should be exercised in accordance with the overriding objective. See *W H Holding Ltd v E20 Stadium LLP* [2018] EWCA Civ 2652.

## **Communications between lawyer and client—legal advice privilege**

### ***General***

#### **Page 674**

There is no requirement to show that the purpose of giving or receiving legal advice was the dominant purpose: see *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2019] 1 All ER 1026, CA at [131] – [132].

In *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006 at [123] – [130], the Court of Appeal said that it would have departed from *Three Rivers District Council v Governor of the Bank of England (No 5)*, if it had been open to it to do so. It noted that the case operates to the disadvantage of large corporations, where the information upon which the legal advice is sought is unlikely to be in the hands of the main board or 'designated officers or employees'; in the case of individuals and many small businesses, the information can normally be obtained by the individual or board members. It was also noted that the case is out of step with international common law in an area where commonality is desirable, particularly since so many multinational companies operate across borders and have subsidiaries in numerous common law countries.

### ***Communications that do not specifically seek or convey legal advice***

#### **Page 677**

in *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB) at [95]–[97], it was held that 'working papers' are protected only if they would betray the tenor of the legal advice given to the client; and a verbatim note of what the solicitor was told by a prospective witness is not, without more, covered by legal advice privilege just because the solicitor interviewed him with a view to using the information provided as a basis for advising his client. This

was questioned on appeal, but the Court of Appeal declined to resolve the issue, having held that the interview notes in the case before it were covered by litigation privilege (*Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2019] 1 All ER 1026, CA at [141] – [142]).

## Communications with third parties—litigation privilege

### General

#### Page 678

In *W H Holdings Ltd v E20 Stadium LLP* [2018] EWCA Civ 2652 at [27], Sir Terence Etherton MR described the main principles governing the scope of litigation privilege in the following terms.

- i) Litigation privilege is engaged when litigation is in reasonable contemplation.
- ii) Once litigation privilege is engaged it covers communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with the conduct of the litigation, provided it is for the sole or dominant purpose of the conduct of the litigation.
- iii) Conducting the litigation involves deciding whether to litigate and also includes whether to settle the dispute giving rise to the litigation.
- iv) Documents in which such information or advice cannot be disentangled or which would otherwise reveal such information or advice are covered by the privilege.
- v) There is no separate head which covers internal communications falling outside the ambit of litigation privilege as described above.

As to (iii) thus in both civil and criminal cases the privilege can cover legal advice given to head off, avoid or settle reasonably contemplated proceedings, including advice in a document created with the intention or understanding that it would be shown to the prospective adversary, eg a position statement prepared for a mediation (*Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006 at [102]).

On the question whether *criminal* proceedings were in reasonable contemplation, there is no general principle that privilege cannot attach until either a suspect knows the full details of what an investigation is likely to unearth or a decision to prosecute has been taken; and the fact that a formal investigation has not commenced will be relevant, but not necessarily determinative. See: *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006 at [99] – [100], disapproving comments to the contrary approved, obiter, in *R v Jukes* [2018] 2 Cr App R 114 (9) at [23]. Such obiter approval is also to be found in *R (AL) v Serious Fraud Office* [2018] EWHC 856 (Admin) at [108].

## **The subject matter of privilege**

### ***Pre-existing documents***

#### **Page 683**

In addition to the examples given in the first paragraphs, see the further example of *Financial Reporting Council Ltd v Sports Direct International plc* [2019] 2 All ER 974, Ch D. (Legal professional privilege cannot be claimed for a document not privileged in itself but attached to an email seeking or giving legal advice).

### ***Exceptions to the privilege***

#### **Page 684**

Despite the sweeping pronouncements in *Derby Magistrates' Court, ex p B* [1996] AC 487, HL, concerning the absolute and permanent nature of legal professional privilege, there are four exceptions: statutory provisions, fraud, reports for the purposes of care proceedings under the Children Act 1989 and cases in which instructions given or advice received are in issue in litigation.

A fifth exception was established in *R v Brown* [2015] EWCA Crim 1328 in circumstances which are likely to recur only very rarely. Communications between the accused and his lawyers took place in the presence of nurses to whom he was handcuffed in order to avoid the risk of him harming himself. There were no secure facilities at the court to remove the risk and there was no suggestion of misuse by the nurses of the privileged communications.

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#### **Footnote 174**

In the light of the above, *R v Brown* [2015] EWCA Crim 1328 represents a fifth exception.

### ***Fraud***

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#### **Footnote 172**

See also *Financial Reporting Council Ltd v Sports Direct International plc* [2018] EWHC 2284 (Ch) (production to a regulator, by either the client of a regulated person or the regulated person himself, of documents privileged in the hands of the client, the production being solely for the purposes of a confidential investigation by the regulator into the conduct of the regulated person).

**Page 686**

Privilege does not attach to advice on how to cloak as a dismissal for redundancy dismissal of an employee for making complaints of disability discrimination: *X v Y Ltd* UKEAT/0261/17/JOJ.

***Duration of the privilege***

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**Footnote 207**

The principle in the text relates to assertion of the privilege, not waiver (*Re Lemos* [2018] 1 All ER 313, Ch D).

***Waiver***

**Page 693**

**Footnote 240**

See also *Financial Reporting Council Ltd v Sports Direct International plc* [2018] EWHC 2284 (Ch): waiver for statutory audit purposes not extending beyond the statutory auditor to the regulator of statutory auditors.