

Ch 22: Privilege

The privilege against self-incrimination

'A tendency to expose'

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It would seem that there is no 'tendency to expose to a criminal charge' where the witness, in effect, denies any suggestion of wrongdoing on his part: *R v Ferati* [2020] EWCA Crim 1313.

Compulsory production of pre-existing documents and materials

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Where a challenge is brought under Art 6, it should be determined by reference to four factors: (i) the nature and degree of compulsion used to obtain the material; (ii) the weight of public interest in the investigation and punishment of the related offences or potential offences; (iii) the existence of safeguards in the procedure; and (iv) the use to which material obtained by compulsion may be put: *Volaw Trust and Corporate Services Ltd v Office of the Comptroller of Taxes* [2019] UKPC 29 at [61].

Production of information for extra-judicial purposes

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As to how a breach of Art 6 might potentially occur, see *Volaw Trust and Corporate Services Ltd v Office of the Comptroller of Taxes* [2019] UKPC 29 at [72]: (i) where a person might be punished for refusing to incriminate himself during extra judicial enquiries; and (ii) where the fairness of a trial itself might be prejudiced by extra judicial enquiries, as when, under national law, the accused's attitude during the enquiries might be used against him in a criminal trial.

Legal professional privilege

The nature of the privilege

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The court will not investigate matters of registration or the regulation of a foreign lawyer; the only requirement for privilege is that he acts in the capacity or function of a lawyer: *PJSC Tatneft v Bogolyubov* [2021] 1 WLR 403, QB.

Communications between lawyer and client—legal advice privilege

General

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In *R (Jet2.com Ltd) v Civil Aviation Authority* [2020] QB 1027, CA, it was held, after an extensive review of the authorities, that in order to establish legal advice privilege it must be shown that the purpose of obtaining or giving legal advice was the dominant purpose.

Care is required when applying the dominant purpose test to: (i) emails sent simultaneously to both lawyers and non-lawyers for their advice or comments; and (ii) meetings, including records of meetings, attended by both lawyers and non-lawyers. Detailed guidance, beyond the scope of this work, is set out in *R (Jet2.com Ltd) v Civil Aviation Authority*, *ibid* at [100]-[101].

Exceptions to the privilege

Fraud

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The exception does not operate retrospectively to remove privilege, rather it prevents privilege from arising in the first place: *Curless v Shell International Ltd* [2019] EWCA Civ 1710 at [55].

In *Addlesee v Dentons Europe LLP* [2020] EWHC 238 (Ch) at [48], it was held that the standard of proof to be met is the standard of *strong* prima facie evidence. It is lower than the balance of probabilities and the test for summary judgment.

Duration of the privilege

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Where privilege attaches to a communication it remains privileged unless the privilege is waived or overridden by statute in express terms or by necessary implication. Privilege does not cease because the party who would originally have been able to claim it no longer exists. Thus privilege will continue to attach to communications between a company and its solicitors even though the company might have been dissolved. See: *Addlesse v Dentons Europe LLP* [2019] 3 WLR 1255, CA.

Waiver

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Where a claimant makes a recording of a medical examination by his own expert, any privilege in the recording is waived upon disclosure of the medical report since the waiver operates across the whole medical examination and the claimant's recording is an aspect of that: *MacDonald v Burton* [2020] EWHC 906 (QB).

Without prejudice negotiations

Exceptions

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The rule cannot be used to exclude material which is so central to an issue raised by the party resisting its disclosure that absent the material, there would be a serious risk that a trial would be unfair, for example, where the issue raised by the party resisting disclosure is fraud and the material sought serves to rebut fraud: *Berkeley Square Holdings v Lancer Property Asset Management Ltd* [2020] EWHC 1015 (Ch) at [83].

Adrian Keane and Paul McKeown, The Modern Law of Evidence, 13th Edition

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