



Competition Law Association

British Group of the
Ligue Internationale du Droit de la Concurrence
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The Right to Silence in Competition Law Investigations

Speaker: Tim Owen QC

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Venue: Matrix Chambers, London

The right to silence and the privilege against self-incrimination are generally regarded as fundamental rights, much like the core principle of the presumption of innocence, the right to trial by jury and the right to due process. The right to silence has its roots in the common law, but how relevant is it today? Can a personal privilege translate to the benefit of a corporation to secure evidence in proceedings? Is there any scope for discrete development of the principle?

History

There are conflicting interpretations of the historical origin of the right to silence. There is the orthodox common law theory, the foreign influenced ecclesiastical law theory, derived from canon law, and the adversarial theory. The generally accepted view is that the privilege against self-incrimination evolved in the context of the inevitable tension between the common law adversarial system and the inquisitorial approach of the ecclesiastical courts.

During the reign of Charles I, the leveller John Lilburne refused to take the ex officio oath at his trial for distributing heretical books, arguing it was contrary to Magna Carta. This was a key turning point and eventually led to the establishment of the right not to incriminate oneself in common law. The Long Parliament which commenced in 1640 abolished the Star Chamber and swept away the inquisitorial oath. In 1649, the English High Court recognised the rule against self-incrimination. The principle developed more quickly in the English common law system than on the continent, where inquisitorial proceedings were favoured.

Modern state of the law

Re Volaw Trust [2019] UKPC 29

- Appellants argued that they were not required to comply with notices to hand over documents as the compulsory production of incriminating documents in the course of pre-trial investigations violated the privilege against self-incrimination under Article 6 of the ECHR.
- The Attorney General of Jersey argued that Article 6 was not violated in the absence of a trial taking place.
- The Privy Council found that service of the notices did not deprive the appellants of the right to a fair trial under Article 6 ECHR, but it noted that there were conflicting authorities on the matter.

There are a number of Court of Appeal authorities which rejected the proposition that the compulsory production of pre-existing documents violated the privilege against self-incrimination either at common law or under the ECHR. These cases focused on ***Saunders [1996] 23 EHRR 313*** where the ECHR stated that the

right not to incriminate oneself is primarily concerned with allowing an accused person to remain silent. However, it did not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect, such as documents acquired pursuant to a warrant.

There are a number of judgments of the European court which could not be reconciled with that approach, including ***Funke [1993] 16 EHRR 297 and JB v Switzerland (Application No 31827/96) given 3 May 2001*** as well as other Divisional Court and Court of Appeal cases which took a less categorical approach.

Ibrahim v. United Kingdom (Applications Nos 5054108, 50571/08, 50573/08 and 40531/09) given 13 September 2016

- Grand Chamber noted that although the right to a fair trial is unqualified, determining if a trial has been fair requires an assessment of the proceedings as a whole, taking in to account the minimum rights listed in article 6(3).
- Complaints under article 6 which tended to be about pre-trial investigations crystallise at the trial itself, it is the down to the court to consider whether the trial was prejudiced by the initial compulsory document request.
- The right not to incriminate oneself is concerned with respecting the will of a person to remain silent and the protection of the accused against improper compulsion by the authorities.
- The court also identified three types of compulsion. First, where a suspect is obliged to testify under threat of a sanction. Second, where there is physical or psychological pressure and third, where the authorities use subterfuge.

According to Lord Reed, there is a material difference between real evidence and statements. Real evidence exists independently of any compulsion so its reliability is not affected by the use of compulsion. It is therefore unsurprising that the focus has been on the protection of the suspect from improper compulsion. Lord Reed also stated that the privilege against self-incrimination does not act as a general prohibition against compulsory powers to obtain documents at the stage of an investigation. What is critical is what use will be made of the documents.

Shannon v UK (Application no. 6563/03)

- Mr Shannon, who was chair of the Irish Republican Felons Club, was convicted in Northern Ireland of failing to comply with a financial investigator's requirement to answer questions.
- The court in Strasbourg found that in attending an interview there was a real likelihood that Mr Shannon would have had to give information which could arise in criminal proceedings.
- The court also stated that there was no need for proceedings to be brought for the right not to incriminate oneself to be engaged and finally concluded there had been a breach of Article 6.

Final Word

The procedural questions in this area are often overlooked. For example, corporate criminal liability raises practical and theoretical questions. Who represents the corporation? To what extent does the corporation benefit from procedural safeguards developed for individuals? In the USA, the Supreme Court has clarified that the Fifth Amendment is a purely personal privilege and it cannot be exercised by corporate employees on the corporation's behalf. In the UK, corporations do enjoy the privilege on the face of it. While the ECHR has not given the matter detailed consideration, the CJEU concluded in ***Case 374/87 Orkem v Commission*** that an undertaking cannot refuse to hand over incriminating documents, but the Commission cannot compel an undertaking to provide answers involving a direct admission of a violation of competition law. There remain uncertainties in the realm of the corporation.