THE LAW OF PRIVILEGE

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Senior Law Lord

OXFORD

UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford OX2 6DP

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in

Oxford New York

Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto

With offices in

Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
South Korea Switzerland Thailand Turkey Ukraine Vietnam

Oxford is a registered trade mark of Oxford University Press
in the UK and in certain other countries

Published in the United States
by Oxford University Press Inc., New York

First published 2006

British Library Cataloguing in Publication Data
Data available

Library of Congress Cataloging-in-Publication Data

The law of privilege / editor, Bankim Thanki;
contributors, Chloe Carpenter . . . [et al.];
foreword by Lord Bingham of Cornhill.
p. cm.
Includes index.
ISBN–13: 978–0–19–928776–5 (alk. paper)
1. Confidential communications – Lawyers – England.
2. Attorney and client – England.
3. Confidential communications – Lawyers.
4. Attorney and client. I. Thanki, Bankim, 1964–
II. Carpenter, Chloe, 1978–
KD7519.A77L39 2006
347.42'0504—dc22 2006003273

Typeset by RefineCatch Limited, Bungay, Suffolk
Printed in Great Britain
on acid-free paper by
Biddles Ltd., King's Lynn, Norfolk

ISBN 0–19–928776–7 978–0–19–928776–5

1 3 5 7 9 10 8 6 4 2

FOREWORD

In almost every contested civil action there is a dispute about what happened. The court has to decide. It may accept the claimant's version of events, or the defendant's. Or it may find the truth to lie somewhere between their competing accounts. Or it may, very exceptionally, find it impossible to decide one way or the other. But it is important to the parties that the court reaches the right conclusion, and it is also important to the good ordering of society. To help the court in its task the parties are required to make available all materials pertinent to its decision.

To this general rule there is one absolute, or all but absolute, exception: materials bearing on legal advice sought or given, and materials which come into existence for the purpose of litigation, are privileged from disclosure. This exception to the general rule was well understood and settled years ago.

Or was it? The exceptional nature of this privilege, and the suspicion of litigating parties that the material for which their opponents claim privilege contains an armoury of smoking guns, have one demonstrable result: that the nature, contents, and bounds of the privilege are constantly tested, challenged, and explored. In recent past, judges at first instance, in the Court of Appeal, in the House of Lords, and in the Privy Council have all been required to rule on various features of the privilege. It is not a straightforward subject.

This book, covering legal professional privilege and other heads of privilege also, is part textbook, part (extended) learned article. As a good textbook should, it provides a clear, analytical, comprehensive, fully referenced, up-to-date, and accurate summary of the law as it stands. It also, in the manner of a learned article, provides an informed critique of the existing law. The editor and his team of contributors have opinions of their own, which they express with no hint of obsequiousness. Others will no doubt challenge their opinions, and may do so successfully in the next round of cases to reach the courts. The law will not stand still. But their exposition of the existing law will prove hard to breach, and their opinions will be hard to ignore.

All who are called upon to consider these topics in future will be indebted to Bankim Thanki QC and his team for a treatise which illuminates and orders the

whole field of privilege, and makes a valuable contribution to the literature of the law.

Tom Bingham
House of Lords
21 November 2005

PREFACE

This book is about the right or 'privilege' of a person to refuse to produce a document or to answer questions on the ground of some special interest recognized by law[1]—however probative the relevant material may be and however damaging the consequences of non-disclosure. Privilege is therefore a potential obstacle to the discovery of truth and the common law accordingly recognizes very few categories of privilege.[2] These are legal professional privilege, including its two principal sub-categories of legal advice privilege and litigation privilege, the cognate categories of joint and common interest privilege, without prejudice privilege,[3] and the privilege against self-incrimination.

In terms of our approach, we should say at the outset that we have not sought to provide a simple list of rules. This is unashamedly an argumentative work. Lord Steyn has commented that authors should more freely and trenchantly express criticism of precedents which they regard as wrongly decided. He suggests that there is a tendency in England for textbook writers to be too reverential towards 'aberrant judicial decisions which are often artificially fitted into the mosaic of the law by piling qualification upon qualification'. In Lord Steyn's view, this tendency 'does not help students, the practising profession or judges'.[4]

Emboldened by these words, we have not felt inhibited from pointing out where we think the courts have gone wrong. To give a few examples, we have looked critically at cases such as *Three Rivers 5*, *Re L*, *Barclays Bank v Eustice*, and *Formica v ECGD*. Of course, since this is a work primarily aimed at practitioners, we have also attempted to set out the law as we understand it to be in the light of decisions binding on inferior courts.

An important aspect of the book is classification. Proper classification is vital if the scope and extent of privilege is properly to be understood and the correct principles extracted from the cases. We draw specific attention to the classification of the boundaries between legal advice privilege and litigation privilege, recently confirmed by the House of Lords in *Three Rivers 6*, which is addressed

[1] This tracks the definition provided in the Glossary to the CPR.
[2] R Pattenden, *The Law of Professional–Client Confidentiality* (2003), para 16.05.
[3] Including conciliation privilege.
[4] P Matthews and H Malek, *Disclosure* (2nd edn, 2001), foreword to 1st edn, vii.

in Chapter 1 (Section B). Legal advice privilege in particular, which is the subject matter of Chapter 2, cannot be properly understood without observing these boundaries. Litigation privilege is dealt with in Chapter 3, and here the importance of proper classification is paramount.

While the conceptual basis and justification for legal advice privilege has now received substantial recent attention in the higher courts, this still remains to be done in relation to litigation privilege. Chapter 3 also discusses the future of that head of privilege. Amongst the topics addressed in Chapter 4 is whether the crime/fraud exception is now properly classified as a crime/fraud exception at all. Chapter 5 addresses the circumstances in which legal professional privilege can be lost, including the shortcomings of the language of waiver to describe the principle in play. Common interest privilege and its interrelationship with joint privilege are rarely understood: Chapter 6 attempts to put this right. Chapter 7 addresses without prejudice privilege, including the problem areas of the extent to which the principle applies only to admissions and the scope of the 'unambiguous impropriety' exception. Chapter 8 concerns the privilege against self-incrimination, an area where there has been and remains a marked tension between the European Court of Human Rights and domestic courts.

A word of warning is that special care should be taken in trying to extract accurate or meaningful principles from pre-twentieth century authorities on legal professional privilege, especially cases pre-dating the decision of the Court of Appeal in *Minet v Morgan* in 1873, in which Lord Selborne LC stated that the law had only gradually reached a broad and reasonable footing. We have generally found Edward Bray's magisterial work on discovery, first published in 1885, to be the most reliable starting point to any investigation of the older cases.[5] Many of the principles relating to privilege enunciated by Bray remain accurate statements of the law today.

In writing this book we have accumulated a number of debts. In particular, we would like to thank Lord Bingham for finding the time in his busy schedule to look at the manuscript, to write the Foreword and for his generous encouragement of the project as a whole.

We are very grateful to Neil Andrews,[6] Fellow of Clare College, Cambridge and Louise Merrett, Fellow of Trinity College, Cambridge for commenting incisively on draft sections of the book. The responsibility for any errors in the book of course remains with the authors.

[5] *Principles and Practice of Discovery* (1885).

[6] Readers looking to place privilege issues within the broader framework of civil litigation could do no better than to refer to Neil Andrews' *English Civil Procedure* (2003) or to Adrian Zuckerman's *Civil Procedure* (2003).

We are indebted to Christine Child, the Librarian at Fountain Court Chambers, who has provided marvellous support in successfully tracking down even the most obscure authorities. Her professionalism and patience considerably assisted the production of this book.

We were extremely fortunate in our commissioning editors at Oxford University Press. Jane Kavanagh first approached me with the idea for this book in 2004 and her enthusiasm, drive and encouragement got the project off the ground where many others might have failed or given up. Catherine Redmond, assisted by Jonathan Kingham, saw the project through to the production stage with great skill and patience. Thereafter we are indebted to Rowena Lennon, the production editor, and to Caroline Quinnell, the copy editor, for steering us through the final stages as smoothly and painlessly as could be imagined, as well as to Tony Williams for his patience and vigilance in proof-reading the text.

We have also been lucky enough to have had access to a rich source of ideas and observations from friends and colleagues who are too numerous to mention individually. However, amongst them are Jonathan Sumption QC, Nick Stadlen QC, Ben Valentin, John Goddard, Philip Croall, and David Murray (who undertook valuable research for Chapter 6). Special thanks go to our joint Head of Chambers, Michael Lerego QC, who reviewed and commented on sections of the book addressing criminal procedure from his perspective as a Recorder.

Finally, a few words about the author team: my interest in the subject matter of this book flows in large measure from my involvement in the *Three Rivers* litigation, but this only brushed a corner, albeit an important one, of the subject. I have been fortunate in being able to assemble an extremely talented team of co-authors, all of whom have interests and expertise in different areas of the broader subject. They are all highly successful barristers at Fountain Court Chambers and I have had the privilege of leading all of them at one time or another (and four of the team were formerly my pupils). I should also mention that Henry King was of enormous assistance to me during the editorial process, at the same time as shouldering his share of the burden of authorship.

While our specialist area is commercial litigation in most of its guises, which explains some of the emphases of the book—we hope it will be of use to all practitioners and students of procedure.

We have endeavoured to state the law and practice in the light of materials available to us as at 14 March 2006.

Bankim Thanki QC
Fountain Court
Temple EC4
14 March 2006

LIST OF ABBREVIATIONS

The Convention	Convention for the Protection of Human Rights and Fundamental Freedoms (the European Human Rights Convention) (Rome, 4 November 1950; TS 71(1953); Cmd 8969)
CPR	Civil Procedure Rules, effective from 26 April 1999, enacted by SI 1998/3132, with numerous later amendments
ECHR	The European Court of Human Rights
RSC	Rules of the Supreme Court, some of which remain in Schedule 1 to the CPR
Three Rivers 5	*Three Rivers District Council and Others v Governor and Company of the Bank of England (No 5).* Unless otherwise stated, references to *Three Rivers 5* are to the judgment of the Court of Appeal, reported at [2003] QB 1556. The neutral citation for the judgment of Tomlinson J at first instance is [2002] EWHC 2730 (Comm) (also available at [2003] CP Rep 34)[1]
Three Rivers 6	*Three Rivers District Council and Others v Governor and Company of the Bank of England (No 6).* Unless otherwise stated, references to *Three Rivers 6* are to the decision of the House of Lords, reported at [2005] 1 AC 610. The decision of the Court of Appeal, reversed on appeal, is reported at [2004] QB 916 and will be referred to as '*Three Rivers 6, CA*'. The neutral citation for the unreported judgment of Tomlinson J at first instance is [2003] EWHC 2565 (Comm)
Wigmore	JH Wigmore, *Evidence in Trials at Common Law*, vol 8, rev JT McNaughton (1961)

[1] A brief report is at (2002) 152 NLJ 1924.

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