

The right of privilege against self-incrimination: *Volaw v Comptroller of Taxes*

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A recent Privy Council decision relating to long-running Jersey proceedings (*Volaw v- Comptroller of Taxes* [2019] UKPC 29) provides clarification on the extent to which a party to an action may resist disclosure notices from authorities by utilising the right of privilege against self-incrimination.

What was the background to this judgment and what was the issue for the court to determine?

Volaw Trust and Corporate Services Limited (*Volaw*) offered corporate services to numerous companies linked to Mr Larsen, a Norwegian national who was the subject of criminal investigations in both Jersey and Norway for fraud and tax evasion. *Volaw* itself had also been under criminal investigation relating to the services it provided to Mr Larsen.

In this context, *Volaw* had been served with various notices for compulsory disclosure (the Notices). One Notice was issued by Her Majesty's Attorney General of Jersey (following a Letter of Request from Norway and pursuant to the Investigation of Fraud (Jersey) Law 1991 (the 1991 Law)) and other Notices were issued by the Jersey Comptroller of Taxes (following a request made under the terms of a Tax Information Exchange Agreement between Jersey and Norway and issued pursuant to the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 as amended (the 2008 Regulations)).

Volaw resisted disclosure of the requested materials on grounds that they were themselves under criminal investigation and could rely on privilege against self-incrimination.

The Jersey Royal Court and the Jersey Court of Appeal had both found that the relevant privilege did not apply to pre-existing documents and therefore could not be relied upon. This is founded on the principle that the privilege against self-incrimination is a right to silence from

incriminating oneself but does not protect someone from pre-existing incriminating evidence.

The key questions the Privy Council had to make findings on were:

Whether the Notices were compatible with Article 6 of the European Convention on Human Rights (the Convention) (right to a fair trial); and

Whether privilege against self-incrimination under Jersey customary law had been abrogated by the 2008 Regulations, and/or were Notices issued pursuant to the 2008 Regulations compatible with Jersey customary law.

What did the court decide?

a) Compatibility with Article 6 of the Convention

The Privy Council disagreed with the lower courts, insofar as they found that European Court of Human Rights (**ECHR**) case law interpreting Article 6 of the Convention stated that privilege against self-incrimination does apply to pre-existing documents. Nevertheless, it found that the privilege can be relied on in certain circumstances only. The key relevant factors are:

1) The nature and degree of compulsion used to obtain the evidence

The key ECHR case of *Ibrahim v United Kingdom* (Applications Nos 50541/08, 50571/08, 50573/08 and 50531/09) identified three situations this may be engaged:

- a suspect is obliged to testify under threat of (or actual) sanction; and/or
- a suspect is under physical or psychological pressure (often amounting to torture in contravention of Article 3 of the Convention); and/or
- where authorities use subterfuge to elicit information they were unable to obtain during questioning of a suspect.

2) The weight of public interest in the investigation and punishment of the offence

3) The use to which any material is put

The Privy Council stated that the right not to self-incriminate was found to be primarily concerned with proof of guilt at trial, and therefore presupposes evidence is used to prove a case. The Privy Council stated that it does not act as a general prohibition on the use of compulsory powers during an investigation, rather it is more concerned with how that evidence is used during a criminal trial.

In the specific circumstances, the Privy Council found that Volaw could not rely on privilege against self-incrimination to resist disclosure.

Volaw was subject to compulsion in the Notices with a threat of non-compliance, but the nature of the threat was found not to be of a character which would engage privilege. The Privy Council further found that there was substantial public interest in investigating serious and complex fraud, as well as holding regulated service providers like Volaw to account. Finally, no charges had been brought against Volaw, and should such charges arise the Privy Council said Volaw would remain capable of objecting to the admission of the relevant evidence at trial.

a) Compatibility with Jersey customary law

The Privy Council noted that Jersey customary law permitted suspects to resist disclosure of pre-existing documents which expose them to criminal liability. It was agreed by the parties that customary law had been impliedly abrogated in respect of Notices issued under the 1991 Law by the passing of that statute, and therefore could not be relied upon.

In respect of the Notices issued pursuant to the 2008 Regulations, the Privy Council's principle finding was that Jersey customary law did not apply where the relevant criminal sanctions arose under a foreign law (i.e. Norway). In those circumstances, it did not need to make, and did not make, a finding as to whether the 2008 Regulations abrogated Jersey customary law.

What are the practical implications of this decision?

The judgment sets a helpful framework on when the privilege against self-incrimination may be relied on, with such principles applicable to a great number of circumstances and the majority of criminal offences.

The case comes as regulatory, tax and relevant criminal investigations are increasing in scope and regularity. Therefore directors, corporate service providers and compliance teams should take stock of what responses are appropriate or available when they are served with compulsory disclosure notices. The Privy Council's decision has left the door ajar to resist disclosure of materials on grounds of privilege against self-incrimination. Nevertheless, any person seeking to place reliance on such privilege should be mindful that the circumstances in which it will apply will be limited and legal advice should be sought.

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Meet the Author



[Damian Evans](#)

Partner

[Jersey](#)

E: damian.evans@ogier.com

T: [+44 1534 514378](tel:+441534514378)

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