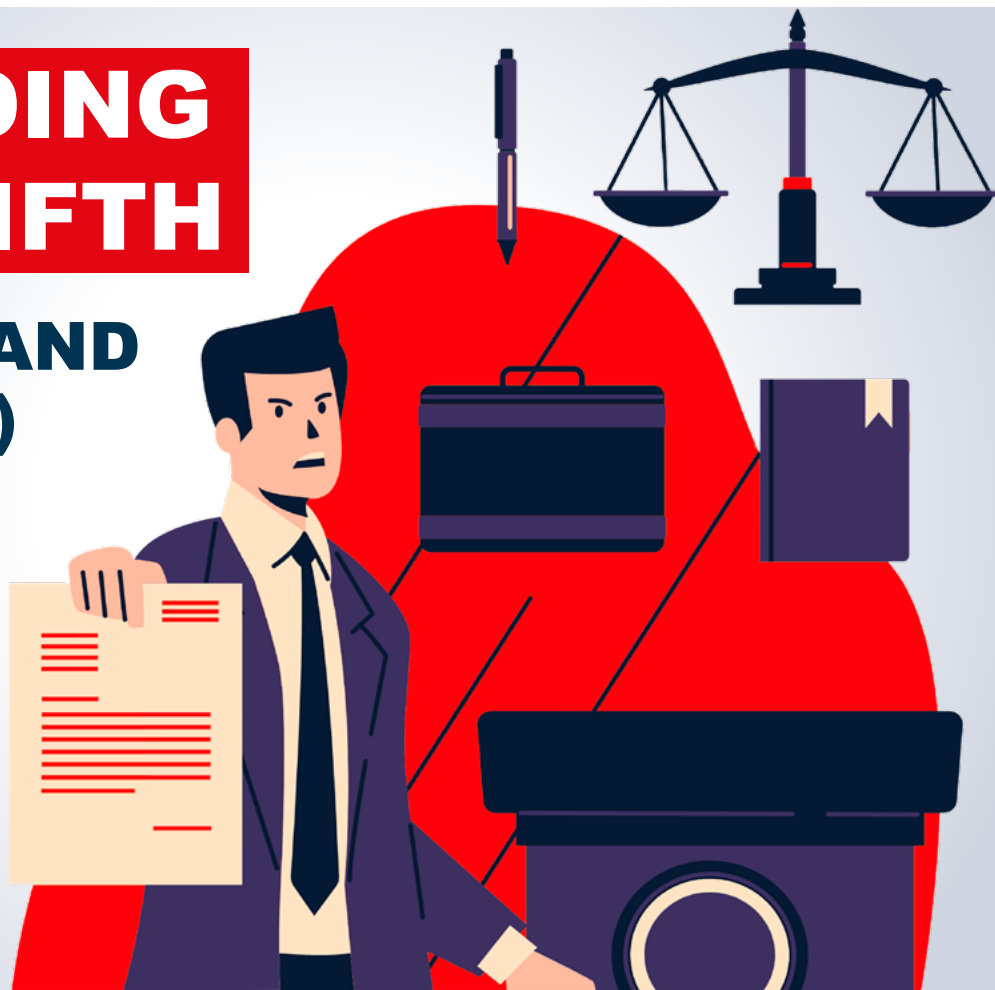


# PLEADING THE FIFTH

(IN ENGLAND & WALES)



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## Introduction

The Fifth Amendment to the United States Constitution is famous. As fans of at least baseball <sup>1</sup> and Jay-Z<sup>2</sup> know, that amendment is concerned with the privilege against self-incrimination. Whilst the equivalent provisions in England & Wales are less well-known, they remain of significant importance to (civil) fraud lawyers. This article looks at: (A) the definition and scope of the privilege against self-incrimination; (B) statutory abrogation of the privilege; (C) practical matters arising from overlapping civil and criminal proceedings; and (D) the future of 'pleading the Fifth' in this jurisdiction.

## The privilege against self-incrimination

In England & Wales, the privilege against self-incrimination has been described as a "very long and firmly established feature of the common law": *Phillips v News Group Newspapers Ltd*

[2012] EWCA Civ 48; [2012] 2 All ER 74, at [14] (Master of the Rolls). That privilege was defined by Goddard LJ in *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253 as follows (at 257):

"[T]he rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty, or forfeiture which the judge regards as reasonably likely to be preferred or sued for".

(the "Privilege")

## Statutory conferral (and abrogation) of the Privilege

### Civil Evidence Act 1968

The Privilege in civil proceedings was expressly preserved by section 14(1) of the Civil Evidence Act 1968 (the "Civil Evidence Act"), which provides that:

"The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty -

- (a) shall apply only as regards criminal offence under the law of any part of the United Kingdom and penalties provided for by such law; and
- (b) shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the spouse or civil partner of that person to proceedings for any such criminal offence or for the recovery of any such penalty".

The Privilege has, however, been 'cut down' by a number of statutory provisions including: <sup>3</sup> (i) the Fraud Act 2006; and (ii) the Theft Act 1968.

1 <https://www.nytimes.com/2005/03/18/sports/baseball/mcgwire-offers-no-denials-at-steroid-hearings.html>.

2 Jay-Z, Never Change (Feat. Kanye West): "Plead the Fifth when it comes to the fam".

3 For a fuller list, see *Phillips v News Group Newspapers Ltd* [2012] EWCA Civ 48; [2012] 2 All ER 74, at [16].

## Fraud Act 2006

Section 13(1) of the Fraud Act 2006 (the “**2006 Act**”) abrogates the Privilege in the following terms:

“A person is not to be excused from -

- (a) answering any question put to him in proceedings relating to property, or
- (b) complying with any order made in proceedings relating to property,

on the ground that doing so may incriminate him or his spouse or civil partner of an offence under this Act or a related offence”.

The term “proceedings relating to property” in section 13(1) is defined by section 13(3) of the 2006 Act to mean “any proceedings for (a) the recovery or administration of any property, (b) the execution of a trust, or (c) an account of any property or dealings with property, and ‘property’ means money or other property whether real or personal (including things in action and other intangible property)”.

In *Kensington International v Republic of Congo* [2007] EWCA Civ 1128; [2008] 1 All ER (Comm) 934 the Court of Appeal held that statutory provisions abrogating the Privilege should not be strictly construed: at [36] (Moore-Bick LJ). Specifically, Moore Bick LJ held that:

1. The definitions in section 13(3) did not require the subject matter of the civil proceedings to be the specific property of which the Claimant is said to have been deprived by criminal conduct: at [39]-[40].
2. Consequently, the 2006 Act abrogated the Privilege in a civil claim brought in debt. Suing on a debt was held to be a “proceeding ... for ... the recovery ... of ... property” within the meaning of section 13(3): at [49].
3. Section 13(3) seems likely to encompass a claim in restitution or damages to ‘recover’ money or other property: at [48] (Moore-Bick LJ).<sup>4</sup>

The ‘rider’ “or a related offence” in section 13(1) casts the scope of abrogation widely, as applying to: “conspiracy to defraud” and “any other offence involving any form of fraudulent conduct or purpose”: section 13(4) of the 2006 Act. The following have been held to amount to “related offence[s]” under that section:

- A. Civil claim(s) in bribery: *Kensington*, at [63] (Moore-Bick LJ) & [90] (Carnwath LJ); and
- B. The offence of acquisition, retention, use and/or control of criminal property in section 328(1) of the Proceeds of Crime Act 2002 (“**POCA**”): *JSC BTA Bank v Ablyazov* [2009] EWCA Civ 1124; [2010] 1 WLR 976, at [25] (Moses LJ). That section of POCA provides that:

“A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person”.

## Theft Act 1968

In similar terms to the 2006 Act, the Theft Act 1968 (the “**Theft Act**”) had provided (and still provides) that:

“A person shall not be excused, by reason that to do so may incriminate that person or the spouse or civil partner of that person of an offence under this Act -

- (a) from answering any question put to that person in proceedings for the recovery or administration of any property, for the execution of any trust or for an account of any property or dealings with property ...”.

It should be noted, however, that the Privilege is disappplied in a narrower range of circumstances under the Theft Act than under the 2006 Act, since the Theft Act contains no provision for abrogation in the case of related offences. The Theft Act accordingly abrogates the Privilege only in relation to offences set out in that statute.

## Practicalities & the future

Three practical points arise from the summary of the law above:

- I. First, English civil judges will often rule on the applicability of the statutory provisions abrogating the Privilege at the beginning of the trial (or, at the latest, at the start of the cross-examination of the relevant witness). Cross-examining Counsel remains in principle entitled to put questions, the answers to which could lead to a witness incriminate him- or herself. The Judge and Counsel for the witness must therefore be astute to warn the witness or intervene sufficiently quickly before any answers are given!

II. Second, difficulties arise where the witness is not a party to the proceedings or is a party but unrepresented. The writer has been involved in a case in which a co-Defendant who expressed a wish to rely on the Privilege was unrepresented. In that case, the Judge sought submissions on the applicability of the Privilege from all represented parties before agreeing to ‘police’ the cross-examination by warning the unrepresented party during his questioning.

III. Third, increasing doubts have been heaped on the Privilege by Judges in England & Wales: see the collection of “judicial observations from authoritative sources” in Phillips, at [17]. In that case, the Master of the Rolls took the “opportunity to express [his Lordship’s] support for the view that [the Privilege] has had its day”: at [18]. Until the Civil Evidence Act is amended by Parliament, however, the Privilege (and its attendant difficulties) will remain with us. By virtue of the 2006 Act’s relatively expansive exceptions to the Privilege, however, fewer civil fraud Defendants than before will be entitled in this jurisdiction to ‘plead the Fifth’.

