

SEARCH ORDERS AND SELF-INCRIMINATION
An Employee Competition Update Paper

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INTRODUCTION

1. Privilege (and the right of a party to invoke privilege to prevent another party having access to information or documents) can be both a lawyers' friend and a lawyers' foe. Paul Goulding QC will examine the position in relation to legal professional privilege, while this talk looks particularly at the privilege against self-incrimination.
2. It is obviously vitally important that appropriate safeguards are included in any Search Order to ensure that the Defendant's entitlement to the privilege is not destroyed by an Order granted without notice to him. The nature and scope of those safeguards are, however, currently a matter of some uncertainty.

THE NATURE OF THE PRIVILEGE

3. The privilege against self-incrimination (or PSI) is a common law right, the essence of which is summarised in section 14(1) of the Civil Evidence Act 1968. This refers to 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*".
4. In *Blunt v Park Lane Hotel Limited* [1942] 2 KB 253 (CA), Goddard LJ summarised the general rule in the following way:

"The 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.”

5. The question for the court is whether the risk of exposure to criminal proceedings is sufficient to give rise to the privilege. The classic statement of the relevant level of risk is in R v Boyes [1861] 1B&S 311 at page 330:

“To entitle a witness to the privilege of not answering a question as tending to incriminate him, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable grounds to apprehend danger to the witness from his being compelled to answer. If the facts of the witness being endangered be once made to appear, great latitude should be allowed to him in judging the effect of any particular question. The danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things, and not a danger of imaginary character having reference to some barely possible contingency.”

6. The degree or level of risk was considered by Lord Denning MR in Rio Tinto Zinc v Westinghouse Electric Co. [1978] AC 547 (HL) at page 574:

“There is the further point: once it appears that a witness is at risk, then ‘great latitude should be allowed to him in judging for himself the effect of any particular question’: see R v Boyes ... It may only be one link in the chain, or only corroborative of existing material, but still he is not bound to answer if he believes on reasonable grounds that it could be used against him. It is not necessary for him to show that proceedings are likely to be taken against him, or would probably be taken against him. It may be improbable that they will be taken, but nevertheless, if there is some risk of their being taken — a real and appreciable risk — as distinct from a remote or insubstantial risk, then he should not be made to answer or to disclose the documents ... But where there is a real and appreciable risk, or an increase of an existing risk, then his objection should be upheld.

Roskill LJ added:

“It cannot, I think, be right in these cases for the court to attempt a quantitative assessment of the probability one way or the other of the risk of proceedings ultimately being taken, and then to seek to draw the line, one way where the probabilities in the view of the court are thought to be more or less evenly balanced and the other where the balance is more disparate. It is not for the court to resolve problems of this kind by calculating odds. I think that the right question is to ask that posed by Shaw LJ on Friday afternoon. Can exposure to the risk of penalties (or in other cases to the risk of prosecution for a criminal offence) be regarded as so far beyond the bounds of reason as to be no more than a fanciful possibility?”



7. Thus (in the words of Mann J in *Phillips v Newsgroup Newspapers & Ors* [2010] EWHC 2952 (Ch) at [26], having cited the previous authorities) considerable latitude is given to the person claiming the privilege and, putting the matter slightly colloquially, he is entitled to the benefit of any doubt.
8. The scope of the risk, in terms of the sort of use to which the information might be put, was elaborated on in *Saunders v United Kingdom* [1997] 23 EHRR 313:

“71. The court does not accept the Government’s premise on this point since some of the Applicant’s answers were in fact of an incriminating nature in the sense that they contained admissions to knowledge of information which tended to incriminate him (see paragraph 31 above). In any event, bearing in mind the concept of fairness in Article 6, the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature — such as exculpatory remarks or mere information on questions of fact — may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. Where the credibility of an accused must be assessed by a jury, the use of such testimony may be especially harmful. It follows that what is of the essence in this context is the use to which evidence obtained under compulsion is put in the course of the criminal trial.”

9. In *Den Norske Bank v Antonatos* [1999] QB 271 (CA) at page 289, Waller LJ said:

“A witness is entitled to claim the privilege in relation to any piece of information or evidence on which the prosecution might wish to rely in establishing guilt. And, as it seems to me, it also applies to any piece of information or evidence on which the prosecutor would wish to rely in making his decision whether to prosecute or not.”

This obviously represents a very generous cloak of protection.

10. Thus, in summary, PSI has commonly been understood to extend to material which might set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character (see *Rank Film Ltd v Video Information Centre* [1982] AC 380 (HL) at 443 (per Lord Wilberforce)) i.e. it would protect the material that would assist a prosecutor merely by passing across his/her desk.



11. The protection extends to offences under the law of any part of the United Kingdom but does not extend to a fear of prosecution overseas. Nevertheless, the risk of incrimination under foreign law is a factor that the Court may take into account as a matter of discretion in deciding whether and, if so, on what terms a disclosure order may be made (*Arab Monetary Fund v Hashim* [1989] 1 WLR 565 (Morritt J)).
12. If the potential proceedings are for recovery of a penalty, then this will count; indeed, potential proceedings for breach of EC regulations (e.g. breaches of the competition provisions in the EC Treaty) would fall within the ambit of protection. Proceedings under the Directors Disqualification Act 1986 are not covered (*Official Receiver v Stern* [2000] 1 WLR 2230 (CA)) but proceedings for civil contempt are (*Memory Corporation v Sidhu* [2000] Ch 645 (Arden J)).
13. The privilege may be invoked by someone to protect themselves or their spouse (section 14 of the Civil Evidence Act 1968) but not for the protection of a third party (*British Steel Co v Granada Television* [1981] AC 1096 (at first instance, at 1106, per Megarry V.-C.)). It is undecided whether a director, servant or agent could invoke the privilege on the grounds that it would incriminate the company.
14. The English common law right to PSI has also traditionally been understood to extend beyond a right to refuse to answer questions tending to incriminate and also to include a protection for incriminating material of whatever nature (including documents and electronic records) which were created other than under compulsion. This led to the rather bizarre position that documents that could be seized by a prosecutor under a criminal search order might not be liable to be seized under a civil Search Order. As we will see, this distinction between answers given under compulsion and documents created prior to proceedings has recently become very important (and a matter of some uncertainty).
15. Where PSI is not excluded, it confers an absolute protection on the party claiming it, which the Judge has no discretion to overrule. As a result, the

Courts have traditionally hated PSI while recognising that it is too long established in English law as a basic liberty of the subject to be abolished other than by Parliament.

EXCEPTIONS TO THE PRIVILEGE

16. PSI is not absolute and it is open to the legislature by statute to abrogate PSI. Statute may do so expressly or by implication.
17. In relation to express statutory exceptions, such exceptions typically provide that PSI may not be claimed in the course of civil proceedings, but that statements or admissions consequently made in those proceedings may not be relied on in subsequent criminal proceedings. The well-known examples are:
 - Section 31 of the Theft Act 1968 abrogates the right in relation to any “*offence under this Act*”.
 - Section 72 of the Senior Courts Act 1981 abrogates the right in relation to intellectual property rights.
 - Section 13 of the Fraud Act abrogates the right in relation to questions arising in any proceedings relating to the recovery of property which may incriminate for any offences involving “*fraudulent conduct or purpose*”.

We consider recent(ish) cases in relation to the two latter provisions in more detail below.

18. In relation to implied statutory exceptions, Judges are willing to hold that PSI has been impliedly abrogated where this is deemed necessary for legislation to be effective. For example, in R v K [2010] QB 343 (CA), the Court of Appeal held that a husband in divorce proceedings could not invoke PSI when asked about his assets, notwithstanding that his answers might also be of interest to the tax authorities. The Family Proceedings Rules 1991 imposed a duty on

parties to ancillary relief proceedings to provide information about their financial resources and, in order for the civil court to be able to discharge the duty imposed by section 25 of the Matrimonial Causes Act 1973, it was necessary for those Rules to be interpreted as having abrogated PSI. As a result, information provided by a party in those proceedings was provided under compulsion.

19. The Court of Appeal mitigated the effect of this finding by ruling that the information provided under compulsion in such a case was inadmissible in later criminal proceedings (for cheating the public revenue), in that the use of admissions contained in the ancillary relief proceedings would deprive the defendant of the fair trial to which he was entitled under Article 6 ECHR and would therefore be excluded under section 78 of the Police and Criminal Evidence Act 1984.

Section 72 of the SCA 1981

20. Section 72 is well known for applying to cases involving alleged interference with intellectual property rights in the form of copyrights. Its ambit appears however to be substantially wider than has traditionally been thought and it has recently been successfully deployed by Claimants who are seeking to “bust” the privilege in cases involving confidential commercial information: Phillips v News Group Newspapers & Ors [2010] EWHC 2952 (Ch) (Mann J) and Gray v News Group Newspapers [2011] EWHC 349 (Ch) (Vos J).
21. Both cases arose out of the *News of the World* “phone hacking” affair and concerned the meaning of the words “*technical or commercial information*” in the definition of “*intellectual property*” in section 72(5). In essence, the dispute turned on the question of whether or not a claim for breach of confidence could fall within that definition. Appeals in both cases are due to be heard in the Court of Appeal later in the year (Phillips is in a window from 9 May 2011 to 31 October 2011 and Gray is in a window between 1 July 2011 and 19 December 2011).



22. In *Phillips'* case, Mann J decided (after only brief argument and without having had the only relevant authority relating to the terms of section 72(5) cited to him) that "*commercial information*" was a broad expression that had to be information that related to commerce (or business) and that had a confidential quality.
23. In *Gray*, Vos J heard argument over 3 days in relation to the precise ambit of section 72 and held (at [77]) that by using the terms "*technical or commercial information*" Parliament had intended deliberately to expand the meaning of "*intellectual property*" beyond the string of express meanings that included patents, trademarks, copyrights and registered designs. He held (at [80] and [83]) that section 72(5) refers to "*protectable*" technical or commercial information; i.e. technical or commercial information that can be protected by action.
24. These cases (depending on the on outcome of the pending appeals) are clearly very important in the context of team move and breach of confidence cases.

The Fraud Act 2006

25. The Fraud Act 2006 came into force on 15 January 2007. It created a new general offence of fraud with three possible elements (1) fraud by false representation; (2) fraud by failing to disclose information; and (3) fraud by abuse of position. It is of great interest to criminal practitioners for the offences that it creates – but it is also of great interest to civil practitioners for the exemptions that it creates in section 13.
26. Section 13 abrogates the privilege against self-incrimination in certain circumstances. The trade-off for this exemption is the same as in section 31(1) of the Theft Act 1968 – the prosecutor is not able to rely on the answers that are given (although compelled documents may be used). Section 13 is similar to section 31(1) of the Theft Act 1968 but crucially different in one important respect.



27. Under the terms of section 13, a person is not to be excused from answering any question put to him in “*proceedings relating to property*” or complying with any order made in proceedings relating to property on the ground that doing so may incriminate him or his spouse of an offence “*under this Act or a related offence*”.
28. **What has not changed?** Proceedings relating to property means any proceedings for the recovery or administration of any property, the execution of a trust or an account of any property or dealings with property. This is a widely drawn clause, with property meaning money or other property whether real or personal (including things in action and other intangible property). It is the same as section 4(1) and 31(1)(a) of the 1968 Act.
29. **What has changed?** The crucial innovation in section 13 of the 2006 Act is the reference to “*a related offence*”. A related offence is defined (in section 13(4)) as conspiracy to defraud and any other offence involving any form of fraudulent conduct or purpose. As you will know, the exception contained in the 1968 Act was severely dented by the fact the privilege still subsisted in relation to a charge of conspiracy (under the common law or the Criminal Law Act 1977) (see *Sociedade Nacional de Combustiveis de Angola v Lundqvist* [1991] 2 QB 310).
30. Section 13 therefore removes the dent that existed in the old structure and now Defendants cannot rely on the fear of prosecution for offences of tax evasion, false accounting, forgery or bribery to avoid answering questions: as held by the Court of Appeal in *Kensington International Limited v Republic of Congo* [2008] 1 WLR 1144. What would remain however is the fear of a criminal prosecution for, say, a sexual offence.

WHAT IS PROTECTED?

31. An Independent Computer Expert, appointed by a Search Order, finds highly objectionable pornographic images of children on a computer that is being searched pursuant to that Order. What should the expert do? Is the owner of the computer able to invoke PSI? These were the question posed in *C Plc v P*



(Secretary of State for the Home Department and Attorney-General Intervening)
[2008] Ch 1 (CA).

32. Before the search was commenced, the Defendant (“P”) indicated that he would rely on his PSI in respect of any material which the search disclosed. In the course of the search, a number of computers were imaged by an independent computer expert, who found the offensive material and applied to the Court for directions as to what he should do with it. Evans-Lombe J held that the expert could and should provide that material to the police; the Court of Appeal agreed, albeit that the reasoning of the Court of Appeal is somewhat difficult to follow.
33. Longmore LJ (with whom Sir Martin Nourse agreed) held that independent matters coming to light in the course of executing a proper order of the Court could not be protected by PSI – the privilege was directed towards protecting individuals from being required to answer interrogatories or to “*disclose matters which are ordinarily discoverable*” (whatever that may mean). Although the reasoning is not entirely clear, the majority of the Court of Appeal held that there was no PSI in the offending material because it was material which existed independently of the Search Order. Longmore LJ did however seek to limit the ambit of his judgment by observing (at [38]) that the court was simply being asked to give the expert leave to disclose the offending material to the police; the court was not being asked to discharge or vary the original order on grounds of PSI.
34. The apparent intent of Longmore LJ’s judgment is to distinguish between information and evidence created by reason of the Order (for example, answers to questions and specific documents required to be handed over pursuant to an express obligation contained within the Order) and material which existed prior to the Order and, perhaps, had not been the subject of selection prior to being handed over. This latter point is one that will often arise in computer imaging searches, where the taking of the image and the placing of it in the hands of the Supervising Solicitor and the IT expert is necessarily prior to the searching of that image.



35. Lawrence Collins LJ decided to dismiss the appeal on the narrow basis that no issue of privilege arose, since the transfer of the obscene material had only been an incidental effect of the Order. There was no privilege because P was not ordered to produce incriminating material; the order for the production of the computer and the imaging of what is contained on the computer was, by reason of section 72 of the Senior Courts Act 1981, an order in respect of which no complaint was made. Lawrence Collins LJ held that it was as if an Order had been made for the recovery of counterfeit handbags, which when handed over were found to be stuffed with drugs.
36. Unlike the majority of the Court of Appeal, Lawrence Collins LJ declined to decide as to whether or not it is open to the Court of Appeal to find as a general rule that there is no privilege in respect of pre-existing or independent material. He went on, nevertheless, to set out the “*powerful case in policy terms*” for not extending PSI to such material.
- First, the rationale for the existence of the privilege did not justify extending PSI to such material (the privilege could be justified on two grounds, first that it discourages the ill-treatment of a suspect and secondly that it discourages the production of dubious confessions (see *A T & T Istel Ltd v Tully* [1993] AC 45 (HL)).
 - Secondly, there was considerable authority outside England for the view that the privilege applies only where the party is ordered to verify the material.
37. However, Lawrence Collins LJ was not willing (at his then appellate level) to distinguish the decisions of the House of Lords in *Re Westinghouse*, *Rank Video* and *A T & T Istel* on the basis that they all involved a testimonial obligation to disclose and verify documents and to hold that the principles enunciated in those cases do not apply to the compulsory production of pre-existing documents. The position of Lawrence Collins LJ is seen by many as appropriately cautious – those authorities cannot on normal principles be distinguished so as to make PSI inapplicable to pre-existing documents.

38. However, it seems to us that the decision in *C Plc v P* places Claimants and Defendants in something of a bind. Can or should they adopt the position that all pre-existing documents are not protected by PSI?

LOSS OF THE RIGHT TO CLAIM PRIVILEGE

39. The right to rely on PSI may be waived. Once the evidence is supplied, it will be too late. This will be the case even if the defendant is not told of his right to claim the privilege (*O v Z* [2005] EWHC 238 (Ch) (Lindsay J)).

EFFECT OF TAKING THE PRIVILEGE

40. The Court can draw adverse inferences from the taking of the privilege against self-incrimination (e.g. *Den Norske Bank v Antonatos* [1999] QB 271 (CA), at 295-296).
41. The Court can also enter judgment against a Defendant who has declined to provide a witness statement in response to an application for summary judgment (*V v C* [2001] EWCA Civ 1509).

SEARCH ORDERS AND MATTERS OF PRACTICALITY

42. The example Search Orders attached to the Practice Direction 25A supplementing CPR 25 and in the Commercial Court Guide (White Book, Vol 2, page 377) both provide (in paragraph 11) for the respondent to have an opportunity (not to exceed two hours, unless the Supervising Solicitor agrees) to gather together any documents that he believes may be incriminating or privileged and hand them over to the Supervising Solicitor for him to assess whether they are incriminating or privileged as claimed. The example order also provides that where the Supervising Solicitor decides that any of the documents may be incriminating or privileged or is in any doubt as to their status, he will exclude them from the search and retain them in his possession pending further order of the Court.



43. It is part of the role of the Supervising Solicitor to advise a respondent that he may be entitled to avail himself of the privilege against self-incrimination (CPR PD 25A, para 7.4(4)(b)).

44. In *C Plc v P*, the Court of Appeal held that it was not satisfactory for a general reservation of PSI to be made by a respondent at the commencement of the execution of a Search Order – the correct way was to identify the particular computer which contained the potentially incriminating material and argue the privilege question while the computer was in the custody of the Supervising Solicitor before it was passed to the computer expert for imaging. The example Search Order is therefore not entirely satisfactory and a respondent (and his lawyers) to a Search Order need to consider carefully how and when to invoke the privilege.

45. Indeed, where possible, concerned respondents will want to seek to have arguably privileged material held for safekeeping by their own solicitors, rather than the Supervising Solicitor. This will minimise the risk of sensitive information being compelled from the Supervising Solicitor.

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