IAN WINTER QC

YOU NEVER SAW A FISH ON THE WALL WITH ITS MOUTH SHUT

THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THE DECISION OF THE COURT OF APPEAL IN R V K [2009] EWCA CRIM 1640

ISSUE NINE WINTER 2009
PUBLISHED BY

CLOTH FAIR CHAMBERS

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[1] Unreliably attributed to Sally Berger but the true origin is unclear.

King John, pressured by the barons and threatened with insurrection, reluctantly signs the great charter on the Thames island of Runnymede

The fish on the wall has its mouth open because it couldn't resist the temptation to open it when the occasion appeared to justify doing so. There are few convicted defendants who likewise could resist the temptation to open their mouths and thereby assist their prosecutors with their own words. The frequency with which this happens and the value attached by prosecutors and indeed jurors to the accused's own words has not diminished the jurisprudential disquiet at requiring a suspect to answer questions, notwithstanding the probative value that such answers may give.

This of course is because it has long been understood that an element of compulsion is capable of rendering even the most apparently cogent admission unreliable. At Runneymede in 1215 King John (under a degree of compulsion agreed to include) at paragraph 38 of Magna Carta the fundamental principle that,

"In future no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it."

Interestingly, although appreciating that compulsion, usually in the form of torture, was capable of rendering a confession unreliable and something that required corroboration, Magna Carta did not render torture induced confession evidence inadmissible because of the use of torture: it rendered it inadmissible only where it was unsupported and as such was unreliable. Magna Carta therefore outlawed reliance upon the product of the torture unless that product was supported by credible evidence as to its truth. English jurisprudence advanced in 1215, not by recognising that torture was inhumane and contrary to the rights of man but, by recognising that a defendant should not be convicted upon the basis of unreliable testimony produced as a result of it.

Had paragraph 38 of Magna Carta remained the law, which could have been the case even once the use of torture had been outlawed[2], the question over the admissibility of the accused's statement would not have been whether the statement had been compelled but whether there was supporting evidence as to its truth.

Paragraph 39 of Magna Carta enshrined into English law what became known as the principle of due process,

"No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."

This was made clear by Edward III's Statute, the Liberty of Subject 1354, the only clause of which stated,

"That no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law."

Neither of these Statutes rendered the statement of an accused person inadmissible as a result of it having been compelled since due process of law at that time allowed courts to compel confessions from suspects. A special warrant was obtained from James I, in 1605, to authorise the torture of Guy Fawkes, for example. The use of torture was not abolished in England until the 1640's and even then the practice of 'peine forte et dure', whereby stones were placed on a suspect's chest to encourage him to enter his plea, continued and was only abolished in 1772. It was the excesses of the Star Chamber and High Commission during

[2] Article 5 of the Universal Declaration of Human Rights 10.12.1948.

the seventeenth century that focused attention upon the manner in which the confession was obtained as opposed to the use to which the confession was put.

In the seventeenth century opponents of the Star Chamber identified the Latin maxim 'nemo tenetur se ipsum accusare' ('no man is bound to accuse himself') as the principle upon which to fight the injustice of the Star Chamber. The Latin maxim does not of course translate as 'the right to remain silent' since it is specifically restricted to the right not to accuse oneself. If to 'excuse' means to provide the reasons why someone is not responsible for something then to 'accuse' means to provide the reasons why someone is responsible for something. By operation of the maxim, a man is not to be compelled so that he himself provides the reasons, or evidence, as to his guilt.

At that time the judge of the Star Chamber required an accused to answer a series of interrogatories designed to extract a confession. It presented the accused with the cruel trilemma of being condemned if he refused to answer, being condemned for perjury if he lied or being condemned if he admitted the crime. In 1637 John "Freeborn" Lilburne was arrested for disseminating Puritan literature and brought before the Star Chamber. He was asked how he pleaded. Lilburne refused to answer, demanded to be presented with the charges and challenged the right of the Chamber to compel his plea. The Star Chamber refused to entertain his submissions and imprisoned him. He was brought back to the Star Chamber and asked again how he pleaded; he still refused to answer. He was then flogged with a three-thonged whip, dragged behind an ox cart and pilloried at Westminster. He still refused to answer claiming that his right not to answer was his birth right.

In 1642 the trial of the twelve bishops established the precedent in English law that a man could not be compelled to incriminate himself. The twelve bishops were accused of endorsing an allegedly treasonous petition and were asked how they pleaded. They refused to answer. The court did not require them to do so thereby setting a precedent for the principle that a man could not be required to plead to an allegation and thereby incriminate himself.

These principles were taken by the Puritans to America where they became incorporated into the American Constitution. Hence the Fifth Amendment to the United States Constitution, ratified in 1791, which states that,

"No person…shall be compelled in any criminal case to be a witness against himself".

So it was that the long road from Magna Carta, some six hundred years in length, diverted the test for admissibility from an assessment of the unreliability of the compelled testimony and the existence of material supportive of it, to an assessment of the existence of the compulsion itself. Compelled testimony became inadmissible because of the mere fact of the compulsion, however reliable the testimony might in fact be. This was undoubtedly the more noble a justification and one that led in due course to the outlawing of torture and other forms of compelling confessions but it was also one that led to situations where courts were deprived of a person's account of events in circumstances that produced injustice. It was time to embark on the long road back from the principle that no man is bound to accuse himself.

Parliament came to appreciate that situations arise where, unless information can be procured from an individual, it is impossible to achieve a just disposal of an action. The clearest example of this relates to the identity of the driver of a car responsible for an accident, even a death, but who was not apprehended at the scene. The ability of a court to

do justice in relation to that event may often be wholly frustrated by an inability to demand from the suspected driver (and owner of the vehicle) the identity of the person driving it at the relevant time.

There are many such situations. In s.177 of the Bankruptcy Act 1849 Parliament enacted that the Bankruptcy Court had power to *"summon the bankrupt before it, and, if necessary compel his attendance by warrant, and that it should be lawful for the Court to examine the bankrupt…touching all matters relating to his trade…"*. In **R v Scott (1856) 25 LJ (MC) 128**, questions were put to a bankrupt pursuant to this section under threat of committal for contempt of court. The Court held that the objection to the admissibility of evidence obtained under such compulsion did not apply to the lawful examination of a person in the course of a judicial proceeding because the privilege had been removed by s.177 of the Act. In short that Parliament may abrogate the privilege against self-incrimination. The Act however said nothing expressly about the removal of the privilege. It simply provided the court with the power to compel attendance and for the bankrupt to be examined. It is plain therefore that the power of Parliament to abrogate the privilege may be exercised inferentially.

This was made abundantly clear in the decisions of the Court of Appeal in **In re London Investments Plc [1992] 2 WLR 850, Bank of England v Riley [1992] 2 WLR 840, and Bishopsgate Investments Ltd v Maxwell [1992] 2 WLR 991**, at p.1002 per Dillon LJ *"It is not in doubt that Parliament may abrogate the privilege against self-incrimination by Statute…Apart, however from the cases where the privilege against self-incrimination has been expressly removed by Statute, there are cases where it has been held to have been impliedly removed."*

Parliament has done so on a very large number of occasions including but not limited to the following; s.114(4) Medicines Act 1968, s.30(6) Fair Trading Act 1973, .21(2) Slaughterhouses Act 1974, s.165(3) Consumer Credit Act 1974, .81(3) Weights and Measures Act 1985, s.47(2) Consumer Protection Act 1987, the Property Misdescriptions Act 1991, s.109B(5) Social Security Administration Act 1992, Sch. 2 Timeshare Act 1992, Paragraph 11 of Sch. 7 of the Data Protection Act 1998, s.71 Environmental Protection Act 1990 for which see **R v Hertfordshire CC, ex parte Green [2000] 2 AC 412U**, s.10 Statistics of Trade Act 1947, s.14(1) Attachment of Earnings Act 1971, s.9 Police and Criminal Evidence Act 1984, for which see **R (Bright) v CCC [2001] 1 WLR 662**, s.6 Explosive Substances Act 1883, s.31 Theft Act 1968, s.9 Criminal Damage Act 1971, s.9 Employment Agencies Act 1973, s.20 Health and Safety at Work Act 1974, s.72 Supreme Court Act 1981, s.434 and 447 Companies Act 1985, s.433 Insolvency Act 1986, s.20 Company Directors Disqualification Act 1986, s.57 Building Societies Act 1986, s.67 Friendly Societies Act 1992, s.2 Criminal Justice Act 1987 for which see **Hamilton v Naviede [1995] 2 AC 75 Lord Browne-Wilkinson**, s.83 Companies Act 1989, ss. 48, 50 and 98 Children Act 1989, s.26 Competition Act 1998, s.174 Financial Services and Markets Act 2000, s.310 Pensions Act 2004, Terrorism Act 2000, Land Registration Act 2002, Sch. 6 Proceeds of Crime Act 2002, s.134-5 Nationality Immigration and Asylum Act 2002, Sch. 7 Companies (Audit, Investigations and Community Enterprise) Act 2004 and s.13 Fraud Act 2006.

It is clear therefore that Parliament has traversed a considerable distance back from the high ground of the privilege against self-incrimination achieved at such cost over so many years. That this is both lawful and in compliance with Article 6 of the European Convention on Human Rights is undoubtedly the case. In **Brown v Stott [2003] 1 AC 681, at 704**, Lord Bingham said,

"The jurisprudence of the European Court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for. The general language of the Convention could have led to the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances. But this approach has been consistently eschewed by the court throughout its history…The court has recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention".

Lord Steyn added at page 709,

"It is also clear that the privilege against self-incrimination is not an absolute right…it is noteworthy that closely related rights have been held not to be absolute [the right of access to the courts and the presumption of innocence]…In my view [the privilege against self-incrimination]… is plainly not absolute. From this premise it follows that an interference with the right may be justified if the particular legislative provision was enacted in pursuance of a legitimate aim and if the scope of the legislative provision is necessary and proportionate to the achievement of the aim".

The circumstances in which Parliament may abrogate the privilege are not therefore limited. The question whether in any particular case a Statute has abrogated the privilege will be determined in accordance with the formula set out by Aikens J in **R v Kearns [2002] 1 WLR p.2815 at p.2824**, who summarised the position thus,

"…whether a particular statutory restriction on the rights to remain silent and not to incriminate oneself was compatible with the principal and express rights of article 6 would depend on three factors:

i) the particular social or economic problem being dealt with by the statute;
ii) the circumstances in which the qualification or restriction is imposed;
iii) the precise scope of the qualification on those rights that is imposed by the statutory provisions."

What Parliament on occasions also did, however was to render the product of the compelled testimony admissible in criminal proceedings against its maker. Many of the above quoted Statutes made no reference to the use of compelled testimony in criminal prosecutions, whilst others banned such use and others still expressly provided for such use. Some of those Statutes, like the Bankruptcy Acts, were designed to produce evidence upon which the Bankruptcy Courts could act and as Statutes were unconcerned about the ancillary use to which such testimony might be put in a criminal trial. Others, like the Criminal Justice Act 1987, were specifically focused upon obtaining testimony for use against a suspect in a criminal trial. In such cases the journey along the road away from the high point of the privilege against self-incrimination had reached its original starting point, pre-Magna Carta, in which a person could be convicted on the sole basis of his unsupported testimony, which he had been compelled to give.

Then came the decision in **Saunders v United Kingdom 23 EHRR 313 at 337**,

"The Court recalls that, although not specifically mentioned in Article 6 of the Convention the right to silence and the right not to incriminate oneself are generally recognised

international standards which lie at the heart of the notion of a fair trial procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6(2) of the Convention….In particular, it must be determined whether the applicant has been subject to compulsion to give evidence and whether the use made of the resulting testimony at his trial offended the basic principles of a fair procedure inherent in Article 6(1) of which the right not to incriminate oneself is a constituent element."

Thus it was that it fell to the European Court to remind Parliament of its own long history and role in enshrining in English law one of the fundamental human rights, the privilege against self-incrimination. The European Court set out in terms that,

"In particular, it must be determined whether the applicant has been subject to compulsion to give evidence and whether the use made of the resulting testimony at his trial offended the basic principles of a fair trial procedure inherent in Article 6…".

As a result, the various Statutes referred to above that specifically provided that compelled testimony could be used in a criminal trial against its maker were rendered incompatible with the European Convention on Human Rights and had to be amended so as to remove the clause that allowed the product of the compulsion to be admissible in criminal cases. This was done in Schedule 3 to the Youth Justice and Criminal Evidence Act 1999 which amended twelve Statutes so as to add the following words into those Statutes,

"…in criminal proceedings in which that person is charged with an offence to which this subsection applies – (a) no evidence relating to the statement may be adduced, and (b) no question relating to it, may be asked, by or on behalf of the prosecution, unless evidence relating to it is adduced…by or on behalf of that person".

This achieved the balance between the fundamental principle that a person cannot be compelled to incriminate himself and the imperative that justice must be done in cases where without information from the individual himself the court is impotent to secure it. The person can be compelled to provide the information but that compelled testimony cannot be relied on against him in criminal proceedings. This is also consistent with the original Latin maxim that gave rise to the principle in English law. The prohibition is on a person incriminating himself. If the information is used for a purpose other than to incriminate (as in render criminal by virtue of a conviction in a criminal court) there is no objection to such use. Thus, the testimony may be used to administrate a bankrupt's property, or to ensure compliance with the Companies Act, or to establish with whom a child should live or for any of the myriad purposes referred to in the various Acts. In addition and importantly the testimony may also be used for investigatory purposes in a criminal case. The SFO, for example, may compel an answer using their s.2 powers to inform the scope or ambit of an investigation but they may not rely on it in evidence in any criminal proceedings subsequently brought.

An important question is therefore raised for practitioners advising persons subject to compulsory powers, has the Statute in question abrogated the privilege against self-incrimination such that the interrogatories must be

answered? If yes then the testimony must be given and that testimony may be sent to the police, Revenue and Customs or the SFO for investigatory purposes but it may not be called in evidence at a subsequent criminal trial. If no, then the testimony need not be given but if it is given then the privilege against self-incrimination will have been waived, the testimony will not have been compelled and it may be relied on in evidence in a subsequent criminal trial.

An important question is therefore raised for practitioners advising persons subject to compulsory powers, has the Statute in question abrogated the privilege against self-incrimination such that the interrogatories must be answered? If yes then the testimony must be given and that testimony may be sent to the police, Revenue and Customs or the SFO for investigatory purposes but it may not be called in evidence at a subsequent criminal trial. If no, then the testimony need not be given but if it is given then the privilege against self-incrimination will have been waived, the testimony will not have been compelled and it may be relied on in evidence in a subsequent criminal trial.

Practitioners will also now need to consider the provisions of the Fraud Act 2006 and in particular s.13. The section removes the privilege against self-incrimination in all 'proceedings relating to property' such that a person is required to answer questions irrespective of whether the answers may incriminate him. The section makes it clear, consistent with the Saunders exclusionary rule, that the product of the compulsion is inadmissible in any criminal proceedings for an offence of fraud under the 2006 Act or for any 'related offence'. 'Related offence' includes conspiracy to defraud and *"any other offence involving any form of fraudulent conduct or purpose"* (s.13(4)).

The first question therefore is whether the proceedings in which the compulsion is to be applied are proceedings relating to property, the second is whether the product of the compulsion is likely to be relevant to proceedings for fraud or a related offence. In this regard the Court of Appeal has applied a very broad definition to the meaning of 'related offences'. In **Kensington International Ltd v Republic of Congo [2007] EWCA Civ 1128**, Moore-Bick LJ held that the question as to whether an offence was a 'related offence' was determined by a consideration of the essential character and ingredients of the offence as opposed to the particular manner in which it might have been committed. He held that the offence of bribery was a related offence because the offering or giving of a bribe necessarily involved a form of fraudulent conduct or purpose.

This approach was endorsed by Pill LJ in **JSC BTA Bank v Ablyazov and others [2009] EWCA Civ 1124**, who held that s.13(4) is *"wide enough to include an offence which charges conduct which has a fraudulent quality, notwithstanding that it has no fraudulent purpose"*. He held that that the offence of entering into a s.328 Proceeds of Crime Act 2002 money laundering arrangement was necessarily to conceal from public officials the criminal source of property. Even if the crime that produced the property was not a crime of fraud, for example because it was the proceeds of drug dealing, *"the effect or the potential effect of the arrangement into which the offender enters…is to conceal the fact that the property is… [so derived]. That element of concealment is, in my view, deceptive and fraudulent…"* (see para.s 22-24).

Care therefore will need to be taken when advising clients involved in a civil action relating to property that the information they may be compelled to give might thereafter be used by prosecuting authorities, not evidentially so as to incriminate them, but for investigative purposes in relation to a broad range of offences where some form of deception is present even though not explicit as an ingredient of the offence.

An example of this was starkly illustrated in the recent case of **R v K [2009] EWCA Crim 1640**. K was a solicitor. He married. His marriage did not last and his wife sought divorce proceedings against him. The suit went to Ancillary Relief Proceedings during which Mr K was required to provide details of his assets and income in what is known as the Form E. The Form E states upon it that,

"*You have a duty to the court to give full, frank and clear disclosure of all your financial and other relevant financial circumstances. A failure to give full and accurate disclosure may result in any order the court makes being set aside...*"

Mr K gave full information but the wife through her solicitor required further information. A meeting was held at which Mr K was asked for further information and provided it. This meeting was said to be subject to privilege but certain matters at the commencement of the meeting were said to be 'on the record'. Certain interrogatories were later produced by the wife and answered by Mr K in which he disclosed further information. A second without prejudice meeting was held a few months later in the course of seeking to settle the Ancillary Relief Proceedings during which certain admissions to tax evasion were made by Mr K.

In essence the information provided by Mr K in the Form E and in the answers to the interrogatories and in the first meeting, certain admissions made during the first meeting and the admissions made in the second meeting amounted to a prima facie case against Mr K of cheating the public revenue. A Revenue informant working at the behest of the wife supplied the Revenue with that material. After the Ancillary Relief Proceedings were concluded the Revenue investigated the case, arrested Mr K and prosecuted him. One hundred percent of the case against Mr K came from copies of the Form E, the answers to the interrogatories and from notes made by the respective solicitors as to what Mr K had said in the course of the two meetings.

The Fraud Act 2006 was not in force at the time of the Ancillary Relief proceedings in 2001 and could not be relied on to establish that Mr K did not enjoy a privilege against self-incrimination in such proceedings. Unfortunately no consideration was given prior to the compilation of the Form E or the answers to the interrogatories, or prior to the conduct of the two meetings as to whether the privilege against self-incrimination existed in Ancillary Relief Proceedings or whether it had been abrogated. This was largely because Ancillary Relief Proceedings are conducted under circumstances of maximum secrecy where it is very rare indeed for the judge to order that anything said or written in the course of such proceedings should be sent to the Revenue. The case highlights however the importance for practitioners of the questions raised above as to the existence or otherwise of the privilege and the circumstances that flow from it.

It was argued on behalf of Mr K at dismissal proceedings in the Crown Court and on Appeal to the Court of Appeal by way of interlocutory appeal that the privilege against self-incrimination in Ancillary Relief Proceedings had been abrogated by s.25 of the Matrimonial Causes Act 1973 which states that,

"It shall be the duty of the court in deciding whether to exercise its powers under s.23, 24, 24A or 24B above [Ancillary relief orders in respect of property] and if so, in what manner, to have regard to all the circumstances of the case...(2) As regards the exercise of the powers of the court... in relation to a party to the marriage the court shall in particular have regard to the following matters – (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future...".

Reliance was placed upon the decision of the House of Lords in Jenkins v Livesey [1985] 1 AC 424 at 435, where it was held that,

"The scheme which the legislature enacted by sections 23, 24 and 25 of the Act of 1973 was a scheme under which the court would be bound, before deciding whether to exercise its powers under sections 23 and 24, and, if so, in what manner to have regard to all the circumstances of the case including, inter alia, the particular matters specified in paragraphs (a) and (b) of section 25(1). It follows that, in proceedings in which parties invoke the exercise of the court's powers under sections 23 and 24, they must provide the court with information about all the circumstances of the case, including, inter alia, the particular matters so specified. Unless they do so, directly or indirectly, and ensure that the information provided is correct, complete and up to date, the court is not equipped to exercise, and cannot therefore lawfully and properly exercise, its discretion in the manner ordained by section 25(1)".

Further reliance was placed upon the Family Proceedings Rules 1991 S.I. 1991/1247 as amended by S.I. 1999/3491 which stated at Rule 2.61B that,

"Both parties must, at the same time, exchange with each other, and each file with the court, a statement in Form E, which – (a) is signed by the party who made the statement…and (c) contains the information and has attached to it the documents required by that Form. (3) Form E must have attached to it – (a) any documents required by Form E; (b) any other documents necessary to explain or clarify any of the information contained in Form E".

It was submitted that a party to the proceedings has no alternative and must complete and file Form E. He/she must also file all the supporting documents required by the Form. This was underlined by the President in the **Procedural Direction [2000] 1 FLR 997**, where Butler-Sloss P stated at paragraph 2.1, *"The Pre-application Protocol…outlines the steps parties should take to seek and provide information from and to each other prior to the commencement of any ancillary relief application. The court will expect the parties to comply with the terms of the protocol".*

Paragraph 2.7 of the Protocol states as follows,

"The protocol underlines the obligation of parties to make full and frank disclosure of all material facts, documents and other information relevant to the issues. Solicitors owe their clients a duty to tell them in clear terms of this duty and of the possible consequences of breach of that duty. This duty of disclosure is an ongoing obligation and includes the duty to disclose any material changes after initial disclosure has been given".

The trial judge ruled that the Matrimonial Causes Act 1973 in combination with the decision of the House of Lords in **Jenkins v Livesey** and the Rules had not abrogated the privilege. He was overturned on appeal. Moore-Bick LJ, with Holman J and Rafferty J held, having reviewed the extensive jurisprudence on the topic, that since the Ancillary Relief Court could not discharge its statutory duty imposed on it by s.25 unless the parties were required to disclose all relevant information, even if it tended to incriminate them, then the privilege against self-incrimination had been abrogated. It was held that the purpose of the legislation would be frustrated if a party to the proceedings could invoke the privilege. As a result, *"it follows that in our view the information contained in K's Form E and his answers to Mrs K's questionnaires was obtained under compulsion"* (see paragraph 32 of the judgment).

The prosecution argued at first instance and on appeal that

even if that were the case there was no bar to the use of the compelled product in criminal proceedings because the exclusionary rule set out in **Saunders** did not apply to this situation. It was argued that this case fell within the exception to the exclusionary rule identified in **Brown v Stott [2003] 1 AC 681U**. Both the trial judge and the Court of Appeal rejected this argument. The question is not a question of judicial discretion for the trial judge as to whether to admit compelled testimony. The question is an important question of principle. In certain limited circumstances where there is a pressing social need (such as the identification of the driver in road traffic cases as in **Brown v Stott**) it may be possible for there to be a limited restriction of a person's right not to incriminate himself so long as the restriction is established by Statute and is a proportionate response to that pressing social need.

Although there is a need to investigate and prosecute tax evaders no statutory provision has been enacted to permit the use of compelled testimony to address that need and in any event it would be difficult to see that an unrestrained abolition of the privilege would be proportionate to that need (see paragraphs 40 – 43 of the judgment). It followed therefore that the material obtained under compulsion was inadmissible against Mr K.

The case raised an important further issue however. Both the meetings at which information was provided and admissions to tax evasion were made by Mr K were subject to privilege. The first meeting was a without prejudice meeting with certain matters said to be 'on the record' at the start of that meeting. There was a dispute of fact as to whether the admissions made at that meeting were made within the open part of the meeting but the trial judge and the Court of Appeal held that they were. The Court of Appeal considered however that since the meeting took place on the same day that the Form E was served and was largely to enable the wife to obtain further information that she argued should have been in the Form E, the meeting was held under the compulsion that applied to the Form E such that it fell within the Saunders exclusionary rule, discussed above.

The second meeting was more complicated. It did not fall within the compulsion arising from the Form E since it did not relate to the obtaining of information. It was however wholly conducted on a without prejudice basis and was clearly aimed at seeking to settle the Ancillary Relief Proceedings. It raised the important question as to whether admissions to a criminal offence made during without prejudice meetings can nevertheless be relied on in criminal proceedings if they happen to fall into the hands of a prosecuting authority.

The Court of Appeal held that although there was a strong public policy in protecting such privileged communications from use in court proceedings, viz. the need to encourage the settlement of civil actions, it did not extend so as to operate as a cloak for crime or other unambiguous impropriety. The starting question for the admissibility of such evidence therefore was whether it was relevant. If relevant was there any rule of law preventing its admissibility? Since the rule preventing reliance upon things said in without prejudice meetings was a rule based upon public policy it could be limited by a competing public policy, namely the need to prosecute crime. The Court of Appeal held that the public interest in prosecuting crime outweighed the public interest in the settlement of civil disputes such as to prevent the without prejudice nature of the meeting operating so as to render anything said therein inadmissible in subsequent criminal proceedings. The trial judge would of course have had a residual discretion nevertheless to exclude it pursuant to s.78 Police and Criminal Evidence Act 1984.

Fortunately for Mr K the admission made in the second meeting was not sufficient for the case to proceed. With the bulk of the material inadmissible, because it had been obtained by compulsion, he was acquitted.

The case acts therefore as a warning to litigants in civil cases. If it becomes necessary or expedient to make admissions to a criminal offence in order to settle the civil case in without prejudice negotiations no protection will be afforded to the maker of the admission should such admissions fall into the hands of a prosecuting authority. When a litigant in civil cases is asked to provide information he would be wise to consider whether he can be compelled to do so such that any information provided could not be used against him in criminal proceedings.

As the fish on the wall no doubt considered at the time, opening his mouth seemed like a pretty good idea. How much must he have regretted it subsequently? Before ones less fishy (or indeed more fishy) clients open their mouths in the future they may need some pretty careful advice as to the consequences of doing so.

CLOTH FAIR KALISHER SCHOLARSHIP 2009

BY LAURA FIELD

One of the ideas behind the Kalisher Scholarship is that by financially supporting a trainee criminal barrister the possibility of losing them to another, better paid, profession is reduced. It is therefore ironic that I was unable to collect the results of the BVC and the Kalisher Scholarship as this fear had already come to pass and, after failing to find any para-legal work, I was busy answering the phone in the head office of a London children's day nursery. I frantically called the college on my lunch break and had an agonising wait as the administrator said that she would 'get back to me'. It was therefore, with my Greggs pasty in hand (you can take the girl out of the North...), that I answered my phone with a heavy heart and then burst into tears in the middle of Clapham Common as I was informed that I had in fact been awarded the Cloth Fair Kalisher Scholarship.

Although I can never repay the generosity of Cloth Fair Chambers and the Kalisher trustees this award means so much more to me than the money; it is the knowledge that I was deemed worthy of such a prestigious honour. It is satisfying indeed to realise that the most daunting panel I have ever faced shared the belief that I had in myself. I can barely describe the relief that being reimbursed the BVC fees instils. Although I still have education induced debt it is a wonderful feeling to know that my bank manager can now only hound me for five years instead of ten.

I hardly needed July 2009 to get any better but then, on the last day of the month, I was made two offers of pupillage.

Interestingly the offers were from the only two chambers who, due to the timing of interviews and the Kalisher Scholarship results, knew of my success. The Kalisher trustees had not only plugged my financial black hole and boosted my confidence but had seemingly ensured that I can now look forward to commencing pupillage at 2 Pump Court, Chambers of Richard Christie QC, in October 2010.

Whilst I may not yet be in any position to give advice, an aspiring barrister may be interested to know that the majority of the time that I spent in front of interview panels in the last year was consumed discussing my climbing, being an appropriate adult, gymnastics, Camp America, Leeds University Officers Training Corps, dress-making and volunteer work in a Bolivian monkey sanctuary. The fact that personality and diversity was so highly valued was a refreshing contrast to the assumption that is voiced in universities, bar schools and law student accommodation throughout the land; that a perfect degree from a perfect university is the be all and end all.

The Criminal Bar is home to talented, passionate, humorous and energetic advocates such as the late Michael Kalisher QC and it is with great pride that I anticipate joining these ranks knowing that at least my finances and pupillage are under control. I just hope that I can think of something witty to say to the Lord Chief Justice at the scholarship presentation lecture...

Laura Field was awarded The Cloth Fair Kalisher Scholarship at the Kalisher Lecture on 6th October 2009 by the Lord Chief Justice, The Right Hon The Lord Judge

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