Editor's Note

Rolling Back the Privilege against Self-incrimination from Documentary Disclosure

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The decision of Evans-Lombe J. in *C Plc v P* [2006] EWHC 1226, Ch., challenges the received wisdom that the privilege against self-incrimination entitles a party to civil proceedings to refuse inspection of documents in his possession if they might implicate him in a criminal offence.

The high water mark of the application of the privilege against self-incrimination in civil proceedings was the House of Lords decision in *Rank Film Distributors Ltd v Video Information Centre* [1982] A.C. 380, [1981] 2 All E.R. 76. The claimants suspected the defendants of intellectual property piracy. They obtained a search order (known at the time as an Anton Piller order) authorising the removal of illicit copies of films from the defendants' premises. The order also directed the defendants to supply the claimants with information concerning the infringements of the claimants' rights, and to disclose and produce documents relating to their illicit trade. The House of Lords held that while the privilege provided no impediment to the recovery of illicit films, the defendants were entitled to immunity from both providing incriminating information and from handing over documents concerning their illicit trade.

Of course, the House of Lords was aware that its decision was likely to impede the protection of intellectual property rights against unlawful copying and selling of film, music and other material. It therefore called for legislative intervention. As a result, Parliament enacted the Supreme Court Act 1981, s.72, which withdrew the privilege in proceedings for the infringement of intellectual property (amended by the Copyright, Designs and Patents Act 1988, Sch.7, para.28). Section 72 provided that in such proceedings a person shall not be excused by reason of self-incrimination from answering any question or from complying with any order made in those proceedings. Thus, the privilege was excluded not only in respect of disclosing freestanding documentary evidence

but also from testimonial requests. However, the section went on to provide that no statement or admission made in answering a question or in complying with any order shall, in proceedings for any related offence, be admissible in evidence against that person.

Since this enactment was limited to proceedings concerning intellectual property, it left untouched the wider problem. Consequently, defendants pursued for other types of fraudulent dealings could continue to refuse disclosure of incriminating documents in their possession. The courts have periodically urged Parliament to limit the effect of the privilege against self-incrimination in civil litigation (*Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist* [1991] 2 Q.B. 310, [1990] 3 All E.R. 283, CA at 338 and 302–303 respectively, *per* Sir Nicolas Browne-Wilkinson V.C.; *AT & T Istel Ltd v Tully* [1993] A.C. 45, [1992] 3 All E.R. 523 at 53 and 530 *per* Lord Templeman, and 534 *per* Lord Griffiths; *Den Norske Bank ASA v Antonatos* [1999] Q.B. 271 at 284, [1998] 3 All E.R. 74 at 84, *per* Waller L.J.). However, such calls for reform have remained unheeded. It is therefore necessary to revisit the basic question of whether there is any justification for the application of the privilege against self-incrimination to documentary disclosure and whether this common law principle may be modified by judicial decision.

The principal reason why it has been thought that the privilege against self-incrimination applied to the disclosure of documents that existed independently of a disclosure order is that the duty to produce documents was traditionally considered to be a testimonial obligation. A non-party called upon to produce documents at the trial would be summoned by a subpoena *duces tecum* and would be sworn in before producing the documents. Hence, since a party called to produce documents was treated as a witness, and since the privilege provided an excuse from complying with testimonial obligations, it was thought that the privilege provided a conclusive immunity from documentary disclosure. Even today, a non-party who is summoned to produce documents in legal proceedings is treated as a witness (CPR r.34.2(1)(b)). Similarly, CPR r.31.2 states that a ''party discloses a document by stating that the document exists or has existed''; and CPR r.31.23 provides that a person who knowingly makes a false disclosure statement may be liable in contempt.

There are several reasons for saying that the application of the privilege to documentary disclosure is unjustified. First, disclosure and production for inspection are testimonial obligations only in a technical sense. The real evidential significance of pre-existing documents does not turn on what the person disclosing them now says but on what they say for themselves. Indeed, compromising documents, such as fraudulent accounts, would be admissible even if the defendant denied their authenticity.

Secondly, the privilege's rationale has no application to documentary disclosure. In *AT&T Istel Ltd v Tully* [1993] A.C. 45, at 53 Lord Templeman placed the contemporary rationale of the privilege against self-incrimination on the basis that 'it discourages ill-treatment of a suspect and second that it discourages the production of dubious confessions'. He stressed that these considerations had no relevance to civil proceedings. In the same case Lord Griffiths said ([1993] A.C. 45, at 57):

> "I can for myself see no argument in favour of the privilege against producing a document the contents of which may go to show that the holder has committed a criminal offence. The contents of the document will speak for itself and there is no risk of the false confession which underlies the privilege against having to answer, questions that may incriminate the speaker."

Thirdly, the application of the privilege to civil search orders is bizarre when contrasted with the comparable criminal process, in which the privilege cannot be asserted. The police may obtain a search order and seize (by force, if necessary) incriminating documents in the possession of a suspect (Police and Criminal Evidence Act 1984, s.8) and in certain circumstances the police may do so even without an order (s.19 of the 1984 Act). Thus, while a defendant would be immune from a civil search order, lest incriminating documents were found which could later be used in criminal proceedings, the same defendant would have no immunity in criminal proceedings from the forcible seizure of the same documents for the purpose of being used in criminal proceedings against him.

Despite these shortcomings, which have been periodically reflected in judicial unease about the application of the privilege to the disclosure process, the problem has not been directly tackled until now. In *C Plc v P* [2006] EWHC 1226, Ch., a search order was made against the defendant to obtain materials concerned with breaches of copyright. During the execution of the order, the defendant claimed the privilege against self-incrimination in respect of a computer, but nevertheless allowed the computer to be seized. An independent expert appointed to assist with the execution of the search order then examined the computer and found it to contain child pornography material. The expert applied to court for directions whether he was free to notify the police of the discovery of the pornographic material, possession of which could amount to serious criminal offence. The defendant objected on grounds of self-incrimination. The matter came before Evans-Lombe J.

The judge held that the defendant had not lost his right to assert the privilege by reason only of allowing the computer to be taken into the custody of the solicitor who acted as Supervising Solicitor in the execution of the search order. He therefore had to consider whether the defendant was entitled to insist on his privilege and on the suppression of the incriminating material. As this raised a fundamental and novel issue concerning the privilege, the Attorney-General was alerted and he agreed to the appointment of an Advocate to the Court. The Home Office was also represented at the hearing.

For the reasons outlined above, Evans-Lombe J. accepted that the application of the privilege to pre-existing documentary material lacked justification. He reviewed judicial comments made on this point in recent times, both in this country and elsewhere, and summarised their effect by saying (at [34]):

> "Whereas a compelled statement is evidence that would not have existed independently of the exercise of the powers of compulsion, evidence which exists independently of the compelled statements could have been found by other means and its quality does not depend on its past connection with the compelled statement. Accordingly evidence of the latter type

> is in no sense 'testimonial' and PSI [privilege against self-incrimination] ought not to attach to it.''

Nonetheless, Evans-Lombe J. felt that the change in judicial views about the privilege since the House of Lords decision in *Rank Film Distributors Ltd v Video Information Centre* did not of itself free the court from the binding force of that case. He therefore sought a better justification for departing from that decision.

The key to departing from the House of Lords decision turned out to be the Human Rights Act 1988. Under s.6(1) of this Act, it is unlawful for a public authority to act in a way that is incompatible with a Convention right. Consequently, when reaching a decision impinging on human rights the court must have regard to all the rights protected under the ECHR, and not just to the right against self-incrimination. Evans-Lombe J. drew attention to ECHR Art.2, protecting the right to life, to Art.3, enshrining the protection from torture, inhuman or degrading treatment, and to Art.8, protecting respect for private and family life. He noted that these rights were engaged in this case because child pornography posed a serious threat to the public. It therefore became necessary to balance the need to protect members of the public, and children in particular, from infringement of their Arts 2, 3 and 8 rights against the need to protect the defendant's right against self-incrimination. He also observed that while the rights protected under Arts 2 and 3 are absolute, the privilege against self-incrimination is not. Evans-Lombe J. explained the result of the balancing exercise as follows (at [56]):

> ''It seems to me that the public's right under Articles 2, 3 and 8 to be protected from the effect of criminal activity when balanced against P's right to Domestic PSI [privilege against self-incrimination], which would otherwise operate to prevent me from directing that the offending material be passed to the police, requires me to modify P's right so as to enable the material to be so transferred. I am reinforced in arriving at that conclusion to know that it will be open to P to apply to the trial judge, at any prosecution of him for the offence of possession of such material, to exclude it as evidence under section 78 of the Police and Criminal Evidence Act 1984.''

His Lordship found support in *Price v Leeds City Council* [2006] UKHL 10; [2006] 2 W.L.R. 570, for concluding that the fact that the Human Rights Act 1998 and the ECHR justified overriding the privilege in the circumstances of this case permitted him to depart from the decision in *Rank Film Distributors Ltd*. In *Price v Leeds City Council* the House of Lords considered whether a court which would ordinarily be bound by precedent is no longer bound to follow it if it is inconsistent with a later ruling of the ECtHR. The House of Lords was of the view that such departure from precedent would be justified only in extreme circumstances. Evans-Lombe J. thought the circumstances of the case before him justified such departure. He said:

> ''80. . . . It does seem to me that it is at least strongly arguable that this is the exceptional case which fits into the 'partial exception' spoken of by

Lord Bingham [in *Price v Leeds City Council*]. I do so for the following reasons:-

i) The decisions of the House of Lords, the *Rank Film* case and the *AT & T* case, and of the Court of Appeal, the *Den Norske* case and earlier cases which would otherwise bind me, were handed down before the coming into force of the Human Rights Act on the 2nd October 2000. The decisions of the House of Lords were handed down before that Act was passed. In none of those cases was a Convention point taken. Although *Attorney Generals Reference No 7* and *R. v Kearns* are referred to in the judgment of Mr Justice Lindsay in the *O Ltd* case it is clear that the IEA (''independent evidence argument'') was not raised before him.

ii) The enactment of the Human Rights Act fundamentally altered the legislative circumstances after those decisions of the House of Lords and the Court of Appeal. I refer back to paragraph 71 to illustrate this point. It seems to me to be highly likely that had the case for modification of Domestic PSI [privilege against self-incrimination], for which the Attorney General contends, been available to the House of Lords in the *Rank Films* and *AT &T* cases they would have accepted it with open arms.

iii) There appears to be almost universal disapproval of the way in which Domestic PSI operates on the procedure for disclosure in civil cases. I repeat the earlier passage in this judgment where I set out the perceived advantages, urged on me on behalf of the Attorney General, of a decision to modify the privilege.

iv) It is arguable that the decision of the Court of Appeal in *Attorney Generals Reference No 7*, in which the *Rank Film* case is cited, is authority, binding upon me in favour of the IEA.''

Evans-Lombe J. therefore held ''that this is a case where the court can modify the application of Domestic PSI so as to exclude from its ambit material constituting free standing evidence which was not created by the respondent to the search order under compulsion'' ([82]). Since the material was subject to the normal undertaking not to use it for any purpose outside the proceedings, the judge also gave permission for passing on the information to the police.

The decision to roll back the privilege from documents that exist independently of any testimonial compulsion is wholly laudable. But it is important to note that this judgment (now under appeal) is limited in scope. Its *ratio decidendi* is confined to holding that the privilege against self-incrimination may be overridden in respect of independently existing documents where this is necessary in order to protect other rights safeguarded by the ECHR. Evans-Lombe J. did not hold that henceforth the privilege has ceased to apply to documentary disclosure generally.

However, for the reasons outlined above there is now an overwhelming case for the removal of the privilege from the process of documentary disclosure. Indeed, such removal would bring English law into line with ECtHR jurisprudence. The right to fair trial under ECHR Art.6 cannot be

invoked to justify a refusal to hand over documentary evidence. The ECtHR has held that the privilege against self-incrimination is concerned to protect persons from being convicted of crime on the basis of their own compelled testimony, but does not apply "to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents required pursuant to a warrant, breath, blood and urine samples . . ." (*Saunders v UK* (1997) 23 EHRR 313 at para.69, 337 at 67. See also *R. (on the application of Green Environmental Industries Ltd) v Hertfordshire County Council* [2000] 2 A.C.412 at 422, [2001] 1 All E.R. 773 at 781; *Re A-G Reference (No 7 of 2000)* [2001] EWCA Crim 888; [2001] 2 Cr. App. Rep. 19).

This dictum brings us back to the point made earlier about the position in criminal procedure. Under s.8 of the Police and Criminal Evidence Act 1984 a magistrate may issue a search warrant authorising entry (by force if necessary) to search and seize material likely to assist a criminal investigation. Under s.19(3) of the 1984 Act a constable may seize such material in certain circumstances even without a search order. Material so seized would be admissible in any subsequent criminal proceedings. The question therefore arises: if neither at common law nor under the ECHR does the privilege against self-incrimination protect a person suspected of crime from compulsory and forcible seizure of inculpating documents, why should it protect a party to civil proceedings from disclosure? There is only one rational answer to this question: the privilege should not protect parties from disclosure of documents that exist independently of the disclosure order.

Further, if the law were to be changed so that the privilege did not apply to documentary disclosure, there would be no reason to exclude from criminal proceedings incriminating documents obtained in disclosure. Put differently, there would be no justification for invoking s.78 of the Police and Criminal Evidence Act 1984 to exclude such documents from a subsequent criminal trial on the grounds that their admission would adversely affect the fairness of the criminal proceedings. The use in evidence of documents obtained in civil disclosure should no more undermine the fairness of the criminal process than the use in evidence of documents obtained by the use of compulsory criminal powers of seizure and vice versa.