Editor's Note

The Privilege Against Self-incrimination may not Confer a Right to Refuse Disclosure of Incriminating Documents that came into Existence Independently of the Disclosure Order

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The privilege against self-incrimination entitles a person to refuse to answer a question if the answer may incriminate him or her. Accordingly, a suspect may refuse to answer questions during police interrogation and an accused standing trial for a criminal offence may refuse to testify. Put simply, a person may refuse to answer any question if to do so would tend to expose him or her to proceedings for a criminal offence or for the recovery of a penalty under the law of the United Kingdom. So much is settled law, founded on the belief that it is inhumane to compel a person to make an admission of guilt that could then be used to convict him or her. What has been less clear is whether the privilege against self-incrimination confers immunity from disclosure obligations in civil proceedings. In other words, can a party to civil proceedings refuse to allow inspection of a document that predates the disclosure order on the grounds that the document would incriminate him or her?

This question was considered, albeit indirectly, in the recent Court of Appeal decision in *C Plc v P* [2007] EWCA Civ 493. A search order was made against the defendant to obtain materials concerned with breaches of copyright. During the execution of the order a computer was seized and handed over to an expert for examination. The expert found child pornography material on the computer. He applied to court for directions whether he was free to notify the police of the discovery since possession of such material could amount to serious criminal offence. The defendant objected on grounds of self-incrimination.

The matter came before Evans-Lombe J., who made two important rulings in *C Plc v P* [2006] EWHC 1226, Ch (discussed in (2006) 25 C.J.Q. 427). He 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 supervising solicitor in the execution of a search order. The defendant was therefore still able to object to handing over the material to the police. Secondly, the judge held that although there was House of Lords authority that the privilege applied to documentary disclosure, the privilege was overridden in this particular case since it was outweighed by the need to protect the human rights of potential child victims. In particular, Evans-Lombe J. noted that since the enactment of the Human Rights Act 1998 it had become clear that the privilege did not apply in criminal proceedings in relation to evidence that came into existence independently of any compulsory questioning of the defendant or any application of the court's compulsory discovery process. He concluded that the court should modify the common law doctrine to the extent necessary to protect the human rights of others.

The defendant appealed against this decision. However, by the time of the appeal, and as if to demonstrate the pointlessness of the privilege in the context of civil disclosure, the police helped themselves to the offending computer by executing a search warrant at the premises of the expert who was keeping it. As a result, the appeal became academic, but the court nevertheless agreed to hear it since all concerned were interested in obtaining a ruling as a matter of principle.

In his judgment on appeal, Longmore L.J. drew attention to the narrowness of the issue before the court. He noted that the order for the production of the computer was made under s.72 of the Supreme Court Act 1981, explained below, so that there could be no legitimate objection to the seizure or to the use of any evidence found on the computer for the purpose of proving breach of intellectual property rights. Consequently, the only issue was whether the privilege against self-incrimination could be asserted to prevent disclosure of the pornographic material to the police, on the grounds that the material was being discovered as the result of the exercise of legal process against a defendant. Presented in this way, the issue gave rise to little difficulty for the simple reason that at common law all relevant evidence is admissible, no matter how it was obtained; subject of course to the court's discretion to exclude such evidence if it thought that its admission would render the process unfair. Longmore L.J. explained (at [38]):

> ''It is necessary to emphasise that the only issue before the judge and on this appeal is whether W should have the leave of the court to disclose the offending material to the police. It is in this context that I would hold that no privilege exists in the material itself which is itself 'real' and 'independent' evidence and is not itself 'compelled testimony' . . . ''

He further elaborated that the privilege could:

> ''. . . not apply to a 'thing' discovered in execution of a court order as distinct from a 'thing' that is compelled to be produced. [Even if t]he

> privilege can be invoked to refuse to answer interrogatories or to refuse to disclose matters which are ordinarily discoverable; those matters may be documents or other 'things', but independent matters coming to light in the course of executing a proper order of the court are in an altogether different category'' ([34]).

To have disposed of the case on this narrow basis would have left the law in an unsatisfactory position, because as we shall presently see there is some authority for the view that the privilege confers a right to refuse to disclose incriminating documents. Yet, any such rule would be wholly unsupported by the rationale of the privilege and, moreover, would make no sense in practice.

Take the rationale first. At the foundation of the privilege lies the revulsion against compelling a person to make incriminating statements. The privilege is accorded, Lord Templeman observed in *AT&T Istel Ltd v Tully* ([1993] A.C. 45; [1992] 3 All E.R. 523 at 53 and 530 respectively; see also *R. v Director of Serious Fraud Office, Ex p. Smith* [1992] 3 All E.R. 456 and 463–464), because ''it discourages the ill-treatment of a suspect and secondly that it discourages the production of dubious confessions''. None of this applies where a party to civil proceedings is merely required to disclose documents that exist prior to, and independently of, the order for disclosure.

In practice too, any such privilege would be of limited use. Indeed, allowing a party to refuse to hand over documents on grounds of self-incrimination is nothing short of absurd. This is because the privilege does not operate to protect such documents in criminal proceedings. Where the police have reason to believe that a person is in possession of evidence, including documents, proving the commission of a criminal offence, they may execute a search order and seize such evidence, even by force if necessary. As already mentioned, this is exactly what the police did in the case under consideration. It therefore verges on the bizarre to allow a party to withhold disclosure of documents on grounds that they may be used in a criminal prosecution, when the prosecuting authorities are free at any time to go and seize these documents for the very purpose of prosecuting the offender. The absurdity becomes even more startling when one considers that a party subject to a disclosure order is not free to suppress the existence of any documents, not even privileged documents (CPR Pt 31.2). All that a party may do is to refuse inspection, to the extent that he or she has any valid right to do so (CPR Pt 31.3). Put differently, the obligation to provide a list of all the documents in a party's possession or control is unqualified. The qualification on grounds of privilege applies only to inspection. Consequently, once a party has claimed privilege, it is likely that the police would hear of it and, in appropriate circumstances, obtain a search and seizure order.

An example will help to illustrate this point. Suppose that a dishonest employee has kept documents recording fraudulent transactions that enabled him to skim regularly sums of money from his employers. The employers bring civil proceedings to recover the missing funds. A disclosure order is made in the normal way. The employee must disclose the existence of the documents, although he may describe them in such a way as not to reveal

their content. However, if he wishes to withhold inspection, he must claim privilege in respect of the incriminating documents, assuming that privilege does apply to such documents. At this point, if the police get wind of the fact that the employee is in possession of evidence of fraud, the police may seize the documents under a search order and use them for prosecuting the crime. It follows therefore that while according privilege from inspection can make it more difficult for a civil party to prove his or her rights, it in no way hinders the seizure and use of the documents in order to mount a criminal prosecution.

Conscious of the absurdity of applying the privilege against self-incrimination to documentary disclosure, Longmore L.J., with whom Sir Martin Nourse concurred, reviewed the law on this issue and sought to dispel the belief that the privilege provides immunity from disclosing documents that exist independently of any compulsion.

The modern authority applying the privilege to disclosure is the House of Lords decision in *Rank Film Distributors Ltd v Video Information Centre* [1981] 2 All E.R. 76; [1982] A.C. 380. The claimants obtained an Anton Piller (i.e. search) order against the defendants who were thought to be involved in copyright piracy. The order required the defendants to: (i) supply information about their illicit dealings; (ii) allow access to premises for the purpose of looking for illicit copy films and to allow their being removed to safe custody; and (iii) disclose and produce documents. The House of Lords held that part (ii) could stand, but that the defendants were entitled to assert the privilege against self-incrimination and refuse to both supply information and to disclose documents that may assist in a criminal prosecution against them.

It did not take long to realise that this decision provided boost to copyright piracy. The legislature reacted with uncommon alacrity to the situation and within a matter of months Parliament passed what is now s.72 of the Supreme Court Act 1981, which removed the privilege altogether in proceedings for infringement of intellectual property rights. Accordingly, a party to such proceedings may not be excused by reason of self-incrimination from answering questions, or from complying with any order made in those proceedings (including disclosure orders). However, the section goes on to say that no statement or admission made by a person in answering a question or complying with the order shall be admissible against that person in a criminal prosecution. Unfortunately, however, the legislature left untouched the House of Lords decision insofar as all other proceedings were concerned.

Some aspects of the *Rank Film* decision and of s.72 of the 1981 Act are puzzling. The reason why the House of Lords thought that the privilege could provide an excuse from complying with a discovery order was that it considered compliance with such an order to be a testimonial obligation. Whether this was a correct assumption will be discussed below. The point that needs to be made here is that even if that were so, a search order does not impose on a defendant any testimonial obligation whatever. Indeed, the opposite is the case because a search order may be granted only where the defendant cannot be trusted to comply with a discovery order. It is precisely

because a testimonial order would be ineffectual that a search order takes the matter out of the defendant's hands and entrusts the gathering of the evidence to a supervision solicitor who is acting in this regard as an officer of the court. It is therefore difficult to see how a defendant can claim the privilege in relation to a civil search order any more that he or she can claim the privilege in the face of a criminal search order.

A related problem arises in connection to s.72 of the 1981 Act, which states:

> ''72(1) In any proceedings to which this subsection applies a person shall not be excused, by reason that to do so would tend to expose that person, or his or her spouse . . . to proceedings for a related offence or for the recovery of a related penalty—
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> (a) from answering any questions put to that person in the first-mentioned proceedings;
> (b) from complying with any order made in those proceedings.
>
> . . .
> (3) . . . no statement or admission made by a person—
>
> (a) in answering a question put to him in any proceedings to which subsection (1) applies; or
> (b) in complying with any order made in any such proceedings, shall, in proceedings for any related offence or for the recovery of any related penalty, be admissible in evidence against that person or (unless they married . . . after the making of the statement or admission) against the spouse of that person.''

It is perplexing that s.72(1)(b) should by implication assume that the privilege would otherwise provide an excuse from complying with ''any order . . . in . . . proceedings'', but that the exemption from use in evidence in s.72(3) should be much narrower and should apply only to a ''statement or admission made by a person . . . in complying with any order''. It would therefore appear that a person may not refuse to disclose incriminating documents, but such documents will not fall under the exemption unless they include a statement or an admission made in complying with the order. Thus, for instance, a fraudulent account made years earlier cannot be considered a ''statement or admission made by a person . . . in complying'' with a disclosure order and would not fall under the exemption.

That s.72 should give rise to such puzzles is explicable by the origin of this piece of legislation was rushed through in order to remove the effect of the *Rank Film* decision in proceedings for infringement of intellectual rights. As a result, the muddle that lay at the foundation of that decision was carried into the ensuing legislation. Yet, despite the fact that this legislation dealt *Rank Film* a moral blow, it seemed to survive in proceedings to which s.72 of the 1981 Act did not apply. However, its continued validity in these areas did not go unchallenged. For instance, in *AT&T Istel Ltd v Tully* [1993] A.C. 45; [1992] 3 All E.R. 523, Lord Griffiths, dissenting, said (at 57 and 533–534):

> "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."

The jurisprudence of the European Court of Human Rights points in the same direction. In *Saunders v United Kingdom* [1996] ECHR 19187/91; (1996) 23 E.H.R.R. 313, the ECtHR stated that:

> "69. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the contracting parties to the Convention and elsewhere, it does not extend 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 acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing."

The Court of Appeal (Criminal division) relied on this decision when it held in *Attorney General's Reference (No.7 of 2000), Re* [2001] EWCA Crim 888; [2001] 2 Cr. App. R. 19 that obtaining documents under compulsory process did not violate the accused's right against self-incrimination, which forms part of the right to a fair trial, and was thus admissible.

In *C Plc v P*, Longmore L.J. drew attention to these and other authorities and expressed the view that even at common law the privilege against self-incrimination did not apply to documents which were independent evidence; namely, documents which came into existence independently of any compulsion to testify or make disclosure. He therefore concluded (at [36]):

> ". . . although the offending material had to be disclosed to the supervising solicitor and the computer experts by virtue of the order originally granted by Peter Smith J. [the search order], there is no privilege in the offending material itself which is material which existed independently of the order."

Incidentally, this interpretation of the privilege corresponds to the interpretation placed above on s.72(3) of the 1981 Act.

Sir Martin Nourse agreed with Longmore L.J. that, contrary to *Rank Film*, the privilege against self-incrimination does not apply to independently existing documents and that, therefore, a party to civil proceedings cannot refuse disclosure of such documents on grounds of privilege. However, as already noted, this view cannot be strictly regarded as the ratio of the case since the decision would have gone the same way even if the privilege did provide an excuse from complying with a disclosure order.

Indeed, Lawrence Collins L.J. went out of his way to state that it was not:

> ". . . now necessary to rule on the wider question whether it is open to this court to find as a general rule that there is no privilege in respect of what has been described as pre-existing or independent material" ([45]).

He accepted:

> ". . . that there is a powerful case in policy terms for there being no privilege with respect to disclosure of free-standing documents or other material not brought into existence under compulsion . . ." ([46]).

However, he did not think that the Court of Appeal could depart from the *Rank Film* decision. He stated:

> "63. This court is, of course, bound by these decisions, and I would hesitate at this appellate level to distinguish all three of the decisions of the House of Lords in *Re Westinghouse*, *Rank Video* and *A.T.&T. Istel* on the basis that they involved a testimonial obligation to disclose and verify documents, and to hold that the principles enunciated in those decisions do not apply to the compulsory production of pre-existing documentary evidence."

He said that:

> ". . . to draw a distinction between the testimonial obligation to produce and verify, on the one hand, and to the obligation to produce pre-existing evidence would not give any weight to the reference in section 14 of the Civil Evidence Act 1968 to the right of a person in civil proceedings to refuse to 'produce any document or thing', which has been said to be declaratory: *Re Westinghouse Uranium Contract* [1978] A.C. 547, 636, *per* Lord Diplock" ([64]).

As for the criminal cases which held that the privilege did not apply to pre-existing documents, he had this to say:

> "72. *Attorney-General's Reference (No.7 of 2000)* and *R v Kearns* therefore are cases which are solely concerned with the question whether in a particular statutory context the privilege has been abrogated or limited by legislation, and whether that legislation is compatible with the Human Rights Convention . . .
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> Consequently, although *Attorney-General's Reference (No.7 of 2000)* and *R v Kearns* are plainly illustrative of a reluctance to afford privilege in cases of independent evidence, they are not binding authority for a limitation on the privilege at common law.
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> 73. I would add that I have no doubt that *Saunders v United Kingdom*, paras 68–69 and *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465 cannot be used to justify departure from any principle laid down by the House of Lords in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380. It is one thing to say that a rule which requires production of independent evidence is Convention-compliant and quite another to use the Convention to abrogate a rule which might otherwise

> grant a privilege against production of such evidence. It is beyond doubt that the domestic law of a Convention State may give greater rights than the Convention requires. In my judgment *Kay v Lambeth London Borough Council* cannot be used to abrogate rights of the individual which would otherwise exist under English law.''

Lawrence Collins L.J. agreed, however, with the majority's conclusion that there was no privilege in this case, but only on a very narrow ground that the defendant was not ordered to produce incriminating material. The material in question happened to be found in the course of a normal and perfectly legitimate search order aimed at discovering infringement of intellectual property rights. He overlooked the fact, noted above, that the same can be said of any material that is found in the course of executing a search order, including documents showing fraudulent dealing.

The Court of Appeal's decision leaves the law in a rather uncertain state. On the one hand, we have the majority's view that the privilege against self-incrimination cannot be asserted to refuse disclosure of documents that exist independently of any disclosure order or any other compulsory process. This view is plainly sensible, especially considering that such documents are amenable to seizure in criminal proceedings. Any other view would be plainly perverse. On the other hand, however, the majority view does not represent the ratio decidendi of the decision. It is therefore necessary to say a little more about authority supporting a different view.

The first thing to note is that the right against self-incrimination is a common law creature. True, it receives some statutory treatment in s.14 of the Civil Evidence Act 1968. However, the purpose of that Act was not to define the privilege, but only to make two special provisions regarding the privilege, to the extent that it existed at common law. It states:

> ''s 14 Privilege against incrimination of self or spouse or civil partner.
> (1) 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—
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> (a) shall apply only as regards criminal offences 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.''

Thus, the purpose of the enactment was to limit the operation of the privilege to domestic offences, and to extend it to spouses and now partners. Although this section has been said to be declaratory (e.g. *Westinghouse Uranium Contract, Re* [1978] A.C. 547 at 636, *per* Lord Diplock), it plainly does not change the common law nor can it prevent its development. The focus of the discussion must therefore be on whether the House of Lords decision in *Rank Film* and a

couple of other cases making similar assumptions are sustainable and should be followed.

As already noted, the reason why the privilege against self-incrimination was thought to apply to the disclosure process was because the duty to produce documents had traditionally been regarded as a testimonial obligation. For example, documents in the hands of non-parties would be produced in legal proceedings by means of a subpoena *duces tecum*. A person subject to such a subpoena was summoned to produce the documents in court and would be sworn when doing so. Even today, a non-party who is summoned to produce documents in legal proceedings is treated as a witness (see CPR Pt 34.2(1)(b)). Formally, the disclosure process too still takes a testamentary form. CPR Pt 31.2 states that a "party discloses a document by stating that the document exists or has existed". CPR Pt 31.23 states that a person who knowingly makes a false disclosure statement may be liable in contempt.

However, the formality of the disclosure process cannot alter its true nature. The fact of the matter is that a person who produces a document in court or who gives disclosure makes no statement about either the authenticity of the document or the truth of any matter stated in it. At common law, the evidential significance of pre-existing documents does not turn on what the person producing or disclosing them now says, but on what they say for themselves. True, a party giving disclosure admits possession. To the extent that there is anything to the privilege in this area, it may provide immunity from using the admission in evidence. But this is hardly ever the use to which documents are put. Even the formality is now wearing thin because where the documents are in the hands of a non-party the court may require the non-party to produce the documents ahead of the trial (CPR Pt 34.2(4)), so that no oath at all is administered and the person fulfils his or her obligation by merely posting the documents in question to the court.

A party ordered to disclose documents is merely required to confirm that he or she has complied with the order in the sense that he or she has disclosed the existence of all the relevant documents in his or her possession or control. Such party is required to say nothing about the authenticity of the documents or their truth. It is beyond dispute that a party must disclose the existence of all the relevant documents, even those documents which he or she asserts to be forgeries or which he or she claims to be false. Add to this the fact that no privilege attaches to such documents in criminal proceedings and any justification for saying that the privilege applies in disclosure evaporates. The majority was therefore right to refuse to be bound by earlier authority when it is devoid of any rhyme and reason and to refuse to declare as valid a law which no one denies is an ass.