Before the High Court

A Witness's Civil Immunity from Criminal Prosecution

LEE AITKEN*

1. *The Central Problem*

In *Reid v Howard*[1] the High Court of Australia granted special leave to appeal with alacrity.[2] Central to the appeal is a simple question: in the absence of statute, to what extent is it possible for a civil tribunal,[3] in order to induce a witness to testify, to fashion a "use immunity", that is, protection from future criminal prosecution or penalty based on his or her testimony?

The New South Wales Court of Appeal had held that it is possible, in an appropriate case, to fashion a "civil immunity" for a prospective witness. Under the immunity, the witness would be compelled to testify about a matter within his or her knowledge, whether that testimony incriminates him or her or not, with the protection of a court order which prevents either the content of that testimony from being revealed to any third party, or the prosecuting authorities from using it in a prosecution for any offence thus revealed.

A similar issue arises in civil claims for fraud,[4] applications for Anton Piller relief,[5] and Corporations Law actions which contemplate both a civil and a criminal action.[6] The suppression or control of information which comes adventitiously into the hands of an opposing party who may make inappropriate use of it arises frequently and the courts, unfortunately, have no unified way of dealing with it.

For example, if a search warrant is improperly executed and subsequently set aside as unjustified, how are the investigators to be prevented from using information improperly gleaned from the documents disclosed?[7] What if

* Barrister, Supreme Court of New South Wales.

1 (1993) 31 NSWLR 298.

2 The Court granted special leave without needing to hear from counsel for the applicant to the appeal.

3 See, for example, section 18 of the *New South Wales Crime Commission Act* 1985 which requires a witness to answer questions in the absence of a "reasonable excuse" notwithstanding that they tend to criminate him or her: *Ganin v New South Wales Crime Commission* Court of Appeal 14 December 1993 unreported; for English provisions, see *Re Arrows Ltd No 4* [1993] Ch 452; *Bishopsgate Investment Management Ltd (in Provisional Liquidator) v Maxwell* [1993] Ch 1.

4 *Johnstone v United Norwest Co-operative Limited* English Court of Appeal 11 February 1994 (all references to Lexis transcript); *Boden v Inca Gemstones plc* 20 January 1994 English Court of Appeal unreported – no privilege to refuse to answer questions in aid of discovery under Order 48 Rules of the Supreme Court UK.

5 *Johnstone v United Norwest* above n4 at 5.

6 See generally, Wood, P M, "Collateral Advantages of the Privilege against Self-Incrimination in Civil Cases" (1990) March *Commercial LQ* 21.

7 See, for example, *Frank Truman Export Ltd v Metropolitan Police Commissioner* [1977]

documents are discovered pursuant to compulsory process and the discoverer then seeks to use them for a collateral purpose?[8] If discovery is accidentally made of documents otherwise privileged — how does the injunctive order of the court operate in any effective way to preserve the privilege otherwise lost?[9]

A large problem, considered in more detail below, is the extent to which the Executive, operating through its prosecutorial organs, may be properly bound by any ruling of the civil court, whether before that court or not. In the United Kingdom, the absence of the prosecuting authority as a notional party has been seen as a major impediment to the making of an effective "immunity order". The court's power in Australia is acknowledged as being less trammelled.

It is significant that in *Butler v Board of Trade*,[10] the only authority which has discussed the ability to issue injunctive relief to restrain the Crown from using at trial confidential information which it had obtained, Goff J (as he then was) held that

> it would not be a right or permissible exercise of the equitable jurisdiction in confidence to make a declaration at the suit of the accused in a public prosecution in effect restraining the Crown from adducing admissible evidence relevant to the crime with which he is charged.

2. *The Call for Reform*

With the large growth in commercial fraud has come a more frequent call to remove the privilege against self-incrimination by requiring an answer from the party interrogated in return for the undertaking that the information so revealed will not be made available to any prosecutor. For example, in *Westpac Banking Corporation v Halabi*,[11] Powell J permitted an employee, allegedly acting in breach of his fiduciary duty, to rely upon the privilege against self-incrimination to avoid the effects of a mandatory disclosure order. He reached

---

QB 952 at 961. In discussing the "improper" use of material seized by the police, Swanwick J observed: "The court would not permit the prosecution to act in trespass and beyond their lawful powers and unreasonably". He does not say how any such evidence would be immunised from use.

8 See, for example, *Derby & Co Ltd v Weldon (No 8)* [1991] 1 WLR 73 where there had been inadvertent discovery of privileged documents. The question arose how that information should be treated in the hands of the other party. Earlier, in *Goddard v Nationwide Building Society* [1987] QB 670 the English Court of Appeal (May and Nourse LJJ) had held that an injunction might be granted to restrain the use of such information; see, in particular per Nourse LJ at 684–685. In *Derby* (at 99) Dillon LJ in the Court of Appeal expressly disavowed any "balancing exercise" under which the court would "weigh the privilege and consider whether the privilege should outweigh the importance that the document should be before the court at trial, or the importance that possession of the document and the ability to use it might have for the advocate ...".

9 A similar problem arises with respect to the preservation of confidential information in a large law firm which seeks to act on both sides of a transaction and endeavours to preserve the confidence by the erection of an internal "Chinese Wall" or "cone of silence": *Lee (David) & Co (Lincoln) Ltd v Coward Chance (a firm)* [1990] 3 WLR 1278; *Fruehauf Finance Corp Pty Ltd v Feez Ruthning* [1991] 1 Qd R 558; *Carindale Country Club Estate Pty Ltd v Astill* (1993) 115 ALR 112.

10 [1971] Ch 680 at 690.

11 Unreported 18 September 1991.

this decision reluctantly and called for the introduction of a "limited use" immunity by virtue of which it might be possible for the defendant to be required to make compulsory disclosure under a protection from potential criminal liability for answers which he gave. Similarly, in *Spedley Securities Ltd (in liq) v Bond Brewing Investments Pty Ltd*[12] Cole J found it contrary to the public interest that those entrusted with public funds in the running of large commercial concerns should be permitted to "decline to provide such information either upon the ground that they are not obliged to do so because of right of silence, or alternatively, upon the ground that to do so may incriminate that person".

3. *The Course of English Authority*

Standing four-square against any such civil immunity (and ready at hand for adoption by the High Court in *Howard*) is the decision of the House of Lords in *Rank Film Distributors Ltd v Video Information Centre.*[13] *On the other hand, more recently the English Court of Appeal in Re O*[14] and the House of Lords have upheld procedures in which, with the consent of prosecuting authorities as a party to the proceedings, an order has been made which prevents disclosure *AT & T Istel Ltd v Tully.*[15]

4. *Policy Considerations*

A major difficulty in determining the question is the potpourri of policy considerations involved. These include:

(a) the basic principle that the administration of justice be carried on in public;[16]

(b) the recognition as a matter of common law that no one be compelled to criminate himself or herself;[17] and

(c) the public interest in ensuring that those bringing a civil action have available to them all relevant evidence which bears upon the claim. (Related to this is the apparent reluctance of the Parliaments in either England or some jurisdictions of Australia to legislate for the problem;[18] compare the Canadian position discussed below).

---

12 (1991) 9 ACLC 522, 535–536. *Banque Brussels Lambert v Australian National Industries Ltd* (unreported 5 October 1990 per Rogers CJ Comm D) and Wood, above n6.

13 [1982] AC 380. The effect of the decision was subsequently removed by the passing of section 72 of the *Supreme Court Act* 1981.

14 [1991] 2 QB 520.

15 [1993] AC 45 at 66–67.

16 *Re New World Alliance Pty Ltd* (1993) 12 ACSR 299 at 317 per Sheppard J.

17 See *Sorby v The Commonwealth* (1983) 152 CLR 281 at 294 per Gibbs CJ.

18 The issue was raised in *Rank Video* (above n13) and legislation was quickly passed to remove the problem; see section 72 of the *Supreme Court Act*. In Australia there have been many unheeded calls for similar legislation to be enacted, although such legislation does exist in some jurisdictions: see section 11 *Evidence Act* 1906 (WA), section 87 *Evidence Act* 1910 (Tas).

The recent English cases demonstrate a marked reluctance to maintain the sanctity of the privilege against self-incrimination in civil actions. In *Istel*, for example, Lord Templeman referred to the privilege dyslogistically as "an archaic and unjustifiable survival from the past".[19] However, as Kirby P observed in *Ganin*,[20] not everyone shares Lord Templeman's views, at least in the criminal context. The International Covenant on Civil and Political Rights provides that a defendant is not obliged to incriminate himself or confess his guilt in the determination of any criminal charge brought against him or her.[21]

5. *Binding the Prosecuting Authorities*

The view of Goff J in *Butler v Board of Trade* has already been noted above. It is not clear to what extent that judgment turned on the now out-moded notion that the Executive could not be in contempt of court: *M v Home Office*.[22]

It is clear that it is possible for, say, the Federal Court, to issue an injunction within its jurisdiction to restrain a State Commission of Inquiry from considering matters currently before the Federal Court and which might embarrass, inconvenience or prejudge those proceedings.[23] There seems no reason in principle why an injunction should not be available from either a State or Federal court to restrain an apprehended breach of an immunity order on the part of those responsible for prosecutions.

The New South Wales Court of Appeal in *Howard* held that the consent of the prosecuting authorities was not a necessary precondition to the making of an immunity order. Handley JA (with whom Meagher and Sheller JJA agreed) noted that he could "discern no reason in principle why the prosecution authorities should be immune from proceedings for contempt of court if they knowingly act to thwart or frustrate orders of a civil court ...".[24] If that be true, then, the court held, it could make no difference whether or not consent was given.

On the other hand, the making of such orders would not completely immunise the testimony since it would always be open to the Crown to obtain the relevant evidence by independent action. An order "would only prevent [the prosecuting authorities] from obtaining the benefit of compulsory disclosures which they could not otherwise lawfully obtain themselves".[25]

In order to guard against this collateral danger it is suggested that a trial court confronted with evidence apparently obtained in disobedience to an earlier immunity order would need to rely upon its inherent power to avoid injustice by preventing such evidence from being led by the prosecution.

---

19 Above n15 at 53; also quoted by Lord Griffiths at 58.
20 *Ganin*, above n3, transcript at 13.
21 Ibid. Article 14.3 (g) cited by Kirby P.
22 [1992] 4 All ER 97.
23 *Sharpe v Goodhew* (1989) 90 ALR 221.
24 (1993) 31 NSWLR 298 at 309.
25 Ibid.

6. *Authority after* Howard

In *Re New World Alliance Pty Ltd*,[26] Sheppard J declined to follow the approach taken in *Howard*. He noted that there was no question but that the court possessed the relevant jurisdiction and power to make the order which was sought. Rather, he regarded the question as one of discretion. As a discretionary matter, he did not think it appropriate for a single judge to overrule the basic protection of the common law embodied in the privilege against self-incrimination.

As to the prosecutor, Sheppard J preferred the approach of Lord Ackner in *Istel* to that of the court in *Howard*. In *Istel* Lord Ackner concluded that for the Crown to be bound by any order of the civil court it was necessary for the prosecuting authority to have notice of the proposed order and "unequivocally agree not to make use, directly or indirectly, of material divulged as a result of compliance with the order".[27] Sheppard J asked rhetorically,

> should the court in the proper exercise of its discretion inflict on a prosecuting authority against its will, or without knowing what its attitude is, a situation in which it will be effectively denied access to documents (for example, by the execution of a search warrant) which could be of critical importance for the prosecution?[28]

In *Grofam Pty Ltd v Macauley* Ryan J adopted similar reasoning in refusing to make the order sought. He noted two things. Firstly, any order would impose a heavy burden on investigators and, secondly, it would gravely restrict the prosecution's choice of legal counsel since it would be necessary to have a "new" team not infected with the information made available under the privilege application to have conduct of the final hearing.[29]

Most recently, in *Johnstone v United Norwest Co-operatives Ltd*[30] the English Court of Appeal considered the civil court's power to "mould" an order to protect a witness in the context of the issue of an *Anton Piller* order and *Mareva* relief. In the course of making compulsory disclosure orders the Deputy Judge had granted:

(a) an order that the statement of disclosure be not disclosed as an affidavit forming part of the court file; and

(b) an injunction restraining the applicant from disclosing any information document or record obtained pursuant to the order to any police force or prosecuting authority.

---

26 (1993) 12 ACSR 299.

27 Above n15 at 63–64.

28 Above n26 at 316.

29 (1994) 121 ALR 22 at 36 citing observations of Wilcox J in *Jackson v Wells* (1985) 5 FCR 296 at 307 on the embarrassment which may be caused to legal counsel who are privy to information which they are unable either to make known to their clients or to use in the conduct of the proceedings.

30 Court of Appeal (Civil Division) 11 February 1994 unreported; Dillon, Stuart-Smith, Hobhouse LJJ.

However, the Court of Appeal declined to permit the orders to continue because of the possibility that the prosecuting authorities would seek to obtain information collaterally against which the orders made in their absence would be ineffective.[31]

It may be noted that the English courts seem to proceed on the basis that the prosecution authorities may, like any other non-party to a civil proceeding, ignore the order of the court which is not binding upon them. In New South Wales at least the more robust and sensible view is taken. Although only relevant by analogy, the Court of Appeal's decision in *Silkstone Pty Ltd v Devreal Capital Pty Ltd*[32] makes clear that the effect of an interlocutory injunction on an "innocent third party" is material only as a matter of discretion, not jurisdiction to make the order sought.[33] It would appear to follow that the basic rationale for the English view, viz, that the Crown is not bound since it is not heard, would not apply here. The difference, perhaps, lies in the greater sympathy shown by the English courts with respect to potential executive liability, but that distinction is a good possible reason for not applying a similar view here.

7. *The Risk of Crimination*

Might not a better solution lie in tightening the scope for claiming that testimony may be incriminatory by raising the level of proof required of the witness before a claim will be entertained? What is the risk of crimination which must be demonstrated in order to attract the privilege?

The conventional test[34] is laid down clearly in the judgment of Bowen CJ in Eq in *Re Intercontinental Development Corporation Pty Ltd*;[35] the danger must be "real and appreciable, and not of an imaginary or insubstantial character".[36] In *Saffron v Federal Commissioner of Taxation*[37] Beaumont J noted that such a danger may be evanescent because of undertakings given by the Crown which, while falling short of a full pardon, would nonetheless attract the court's jurisdiction to order a permanent stay if it appeared they were about to be disregarded.[38]

---

31 Lexis Transcript at 9 per Dillon LJ citing Lord Ackner in *Istel* to the effect that without an adequate assurance of non-prosecution the witness's notional protection may prove illusory.

32 (1990) 21 NSWLR 317.

33 Per Kirby P at 324.

34 Note that in *Ganin* (Transcript at 26) Kirby P observed that there may be some dispute whether or not the English test is the same: *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547 at 581 (English Court of Appeal). In *Sociedade Nacional de Combustiveis de Angola VEE v Lundqvist* [1990] 3 All ER 283 at 291–92 (surprisingly not cited in *Ganin*) Staughton LJ discussed the relevant authorities in great detail and preferred a test of "reasonable ground to apprehend danger" of prosecution.

35 (1975) 1 ACLR 253 at 259.

36 See also *Ex parte P; Re Hamilton* (1957) 74 WN (NSW) 397 at 399–400 per Maguire J cited by Sheppard J in *Re New World Alliance Pty Ltd* (1993) 118 ALR 699 at 705–6.

37 (1992) 109 ALR 695 (FC).

38 Id at 699 citing *Williams v Spautz* (1992) 107 ALR 635.

It is suggested that one way in which the present practical problem could be surmounted in a large number of cases is by scrutinising the evidence advanced in support of the claim to privilege and disallowing it except in those cases in which the potential danger to prosecution is clearly demonstrated.

In *Lundqvist*,[39] the most recent English Court of Appeal discussion of the "test", Staughton LJ noted that the requirement is one of more than a "fanciful" danger but that the witness is not obliged to condescend to particulars if in doing so he would thereby deprive himself of the privilege.

A similar pragmatic approach was recently adopted by the English Court of Appeal in *Boden v Inca Gemstones*.[40] There, a defendant invoked the privilege against self-incrimination when called upon to testify with respect to a judgment creditor's examination under Order 48 of the English Rules. The Crown Prosecution Service gave an undertaking that it would not prosecute for offences connected with the main claim but did not extend it to crimes which had no connection "with the crimes for which the ... defendant had already been convicted".[41]

8. *The Position Elsewhere*

Unusually, little help is obtained on the present matter from examining North American analogies. This is because statute has intervened in both Canada and the United States.

In Canada, specific provision is made for the problem of immunity by the terms of section 5 of the *Canada Evidence Act*, RSC 1970, c E–10.[42]

In *Haywood Securities v Inter-Tech Resource*,[43] Lambert JA (dissenting in the result) noted three types of immunity which can be asserted:

(a) "use immunity";[44]

(b) "use and derivative use immunity" which extends to "clue" facts; and

(c) transactional immunity.[45]

---

39 Above n34.

40 Unreported 20 January 1994 Bingham MR and Steyn LJ.

41 *Johnstone v United Norwest Co-operatives Ltd* (Lexis Transcript at 8) per Dillon LJ summarising the effect of *Inca*.

42 Section 5 provides as follows:
(1) No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.
(2) Where with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence.

43 (1987) 24 DLR (4th) 724.

44 As Kirby P explains in *Ganin* above n3 (transcript at 14) "use immunity" protects the person, the subject of compulsion, from the use of the enforced testimony itself.

45 "Transactional immunity" protects the witness in respect of any prosecution arising out of

The "use and derivative use" immunity operates

> to ensure that the prosecution gets the benefit of the witnesses' testimony, is forbidden from using that testimony or material derived from that testimony, but without being obliged to pay a price (often considered too high) of affording complete exculpation to the witness from past criminal activities, which may not have been known at the time the questions were first asked.[46]

The Canadian Charter of Rights and Freedoms has had no discernible impact on the position mandated by the express terms of the statute.[47]

In *Haywood Securities* the majority held that the terms of the statute deliberately distinguished between the non-compellability of an accused, and the compellability of a witness. The latter is, nevertheless, protected against the collateral use of that incriminating evidence.

The United States has adopted a similar approach with the Fifth Amendment.[48] In *Haywood Securities*, Lambert JA (citing *Kastigar v United States*) stated that "In the usual case, if the privilege is properly claimed, that ends the matter".[49]

New Zealand authority has taken a more expansive view of the Court's power to mould an appropriate order.[50] For example, in *Busby v Thorn EMI*,[51] a case dealing with *Mareva* relief, the New Zealand Court of Appeal held that it was possible, by appropriate protective order, to require a witness to testify and prevent the subsequent use of that testimony in criminal proceedings.

In *BPA v Black*[52] Waddell CJ noted that the particularly wide powers available in New Zealand to control the processes of the criminal courts meant that New Zealand authority was not relevant to the Australian experience. It is an open question whether in the light of recent Australian developments on staying criminal proceedings these strictures would still apply.[53]

9. *Conclusion*

The decision in *Reid* confronts the High Court with a stark policy choice. Many judges at first instance have complained about the inability properly to

---

a transaction with respect to which the testimony is related: per Kirby P in *Ganin* above n3, Transcript at 14.

46 *Ganin*, Transcript at 14.

47 In particular, section 7 of the Canadian Charter of Rights and Freedoms did not of itself exclude the use of such testimony.

48 *Kastigar v United States* 406 US 441 (1972) 453 cited by Kirby P in *Ganin* above n3, Transcript at 15.

49 *Haywood Securities* above n43 at 733 per Lambert JA citing *Kastigar v United States* 406 US 441 (1972).

50 On this topic generally, see Magner, E, "Dealing with Claims to the Privilege Against Self-incrimination in Civil Cases" (1988) 7 *Aust Bar R* to whom I am indebted for pointing out this line of decisions.

51 (1984) 2 IPR 304, 312 per Cooke P.

52 (1985) 11 NSWLR 612.

53 See for example Sheppard J's views on the power of the court in *Re New World Alliance* discussed in the text to nn 16 and 36.

decide matters before them because a defendant, usually the person with the most intimate knowledge of the matter under dispute, claims that to testify will expose him or her to a criminal liability.

There is no reason why, by using its contempt and inherent powers, the Court is unable as a matter of principle to mould an order which is effective to prevent the prosecuting authorities from relying on the evidence thus revealed. We are now far removed from the time of the Tudors and the peremptory methods of the Star Chamber.

Sheppard J in *Re New World Alliance*[54] was reluctant as a judge at first instance to mould the operation of the privilege against self-incrimination. The High Court has the power to do so by mandating a new common law rule and the relevant policy considerations dictate, in the presence of legislative enervation and inaction, that it should do so. The conclusions which may be drawn from the High Court's readiness to grant special leave are equivocal: it may suggest that the frustration of plaintiffs with a good claim against failed company promoters and directors will continue to go unassuaged or simply that the High Court recognised that the appeal concerns a real issue calling for its determination.

54 Above n16.