Rochfort v. The Trade Practices Commission:[1] Can an Employee Resist an Order for the Production of His Master's Documents?

Barbara Jane Hamilton*

The general principle of the law relating to subpoenas is that:-

> "A person properly served with a subpoena duces tecum in due form requiring him to produce specified documents must (subject to the payment of any necessary conduct money) attend at the place directed by the subpoena and produce such of the specified documents as are in his possession."[2]

However, is it a sufficient excuse for an employee served with a subpoena duces tecum requiring him to produce his master's documents to resist production on the ground that he has not received his master's permission to do so? This was held to be a sufficient reason by the English Court of Appeal in 1911 in *Eccles & Co. v. Louisville and Nashville Railroad Company,*[3] a decision which is acknowledged as still representing the English position. In the recent case of *Rochfort v. The Trade Practices Commission* (T.P.C.),[4] the High Court declined to follow this decision and some members of the Court also cast doubt on another longstanding decision of the English Court of Appeal, concerning a Company's right to rely on the privilege against self-incrimination.[5]

As Gibbs C.J. pointed out in *Rochfort*:-

> [A] subpoena duces tecum ... is an essential means of securing the administration of justice, but, since the ends of justice are not to be obtained by illegal means, the person to whom a subpoena is addressed is not required to obtain improperly the documents of another, even though he may happen to have access to them. It is perhaps, for this reason that it has been held that a person who has possession of documents only as a servant cannot be compelled to produce them if his master refuses to allow him to do so."[6]

In *Eccles,*[7] the Court of Appeal was asked to uphold an order for attachment of a witness for refusing to produce certain documents, pursuant to an order made under the Foreign Evidence Tribunals Act 1856. It appeared that the witness had possession, custody or control over the documents only in the character of a servant. It was established that the witness had not been expressly

* B.A. (U.Q.), LL.B.(Hons.)(U.Q.), A.S.D.A., Solicitor of the Supreme Court of Qld. Lecturer, School of Law, Queensland Institute of Technology.

1. (1982) 43 A.L.R. 659.
2. *Ibid.,* at 661, per Gibbs C.J.
3. [1912] 1 K.B. 135.
4. (1982) 43 A.L.R. 659.
5. *Triplex Safety Glass Co. Ltd. v. Lancegaye Safety Glass (1934) Ltd.* [1939] 2 All E.R. 613.
6. (1982) 43 A.L.R. 659, at 661.
7. [1912] 1 K.B. 135.

forbidden by his master to produce the documents and indeed had not requested his master's permission to do so.

The Court held that no order for attachment ought to be made as the Court was *not* satisfied that the witness would *not* be in violation of his duty to his master in producing the documents.[8] Kennedy L.J. dissented on the ground that it could be inferred from the circumstances that the witness would not be in violation of any duty to his master by producing the documents.[9]

In *Rochfort v. T.P.C.,*[10] Rochfort tried to rely on the *Eccles* principle to justify his refusal to produce certain documents pursuant to a subpoena duces tecum served on him. Proceedings had been commenced by the T.P.C. against a number of companies, several of which were members of the National Freight Forwarders Association (N.F.F.A.). Rochfort was the Executive Director of the Australian Road Transport Federation (A.R.T.F.), an unincorporated association consisting of eleven member associations, one of which was the N.F.F.A. Rochfort also held the title of Executive Director of the N.F.F.A. and attended to some secretarial work for the N.F.F.A. He was paid by the A.R.T.F.

Rochfort was served with a subpoena duces tecum requiring him to produce certain documents belonging to the N.F.F.A. and the A.R.T.F. He argued that the documents were not in his possession, but were in the possession of the A.R.T.F. or the N.F.F.A., their members or executives. It was held at first instance[11] that he was an employee of the A.R.T.F., but not of the N.F.F.A. It was also noted that Rochfort had not sought permission from either body to produce the documents. Bowen C.J., at first instance, held that Rochfort need not produce the documents of the A.R.T.F. relying on the principle in *Eccles.*[12] This is said to be that an employee need not produce his master's documents, for to do so would violate the servant's duty to his master. Rochfort was ordered to produce the documents of the N.F.F.A., as he was not in its employ. This decision was upheld by the Full Federal Court for somewhat different reasons.[13] Rochfort appealed to the High Court who unanimously upheld the order.[14]

It is possible to view this judgment as consistent with the *Eccles* principle, as the High Court were not asked to consider whether Rochfort had to produce the documents of the A.R.T.F., the body to which he had a master/servant relationship. It having been established that he was not an employee of N.F.F.A., as Mason J. pointed out, "Even if the *Eccles* principle were correct, the appellant would stand outside this because it would not be a case in which he was required to produce his employer's documents."[15]

Notwithstanding this, it seems clear that all four judges who

8. *Ibid.*, at 145 to 146, per Vaughan Williams L.J.; and at 147, per Buckley L.J.
9. *Ibid.*, at 153.
10. (1982) 43 A.L.R. 659.
11. *Trade Practices Commission v. T.N.T. Management Pty. Ltd* [1982] A.T.P.R. 40-280.
12. [1912] 1 K.B. 135.
13. (1981) 37 A.L.R. 439.
14. (1982) 43 A.L.R. 659.
15. *Ibid.*, at 668.

comprised the Court would have refused to follow the *Eccles* principle. Murphy J. stated definitely that the judges of the Federal Court were right in holding they were not bound to follow the decision[16] and that production of the documents of the A.R.T.F. should also have been ordered.[17]

Wilson J. also noted that no assistance was derived from *Eccles*[18] here, "but in any event in my opinion it is not necessarily sufficient for an employee who has physical custody of documents belonging to his employer to decline to produce them in answer to a subpoena addressed to him on the grounds that he lacks the authority of his employer to do so."[19] His Honour expressed a preference for the dissenting judgment of Kennedy L.J.,[20] as had Smithers and Shepherd J.J. in the Federal court[21], on appeal from Bowen C.J.

Mason J. also doubted the correctness of the *Eccles* principle. His Honour said, "to my mind the absence of authority from the employer to bring the documents to Court and to produce them is not a material circumstance when the Court's order requires them to be brought and produced,"[22] and "[w]here the employee has express or implied authority to deal with the employer's documents viz. the circumstances contemplated by Kennedy L.J., ... it is proper for the Court to overrule an objection to produce made on the grounds that the employee merely holds the documents for his employer."[23]

Gibbs C.J. did not think *Eccles* established the proposition rejected by Kennedy L.J., "That the mere statement by a person required to produce documents that he has them as a servant is sufficient to justify a refusal to produce them," and "that it is always the implied duty of a person who says he has possession of documents merely as a servant to disobey an order for production."[24] He thought the decision was reached because the majority of the Court did *not* think the applicant for a Writ of Attachment had discharged the onus of proving that the servant would *not* be violating his duty to his master in producing the document.[25]

Though it was not necessary to decide the point, it is clear that the High Court were not prepared to follow the long-standing *Eccles* decision.[26] Their Honours, like Kennedy L.J., envisaged circumstances of employment where the employee is in such a position of control and has such discretion to act, that he may produce his master's documents without permission and without violating any duty to his master.

It is not clear whether the High Court has gone further and will

16. *Ibid.*, at 670.
17. *Ibid.*, at 671.
18. [1912] 1 K.B. 135.
19. (1982) 43 A.L.R. 659, at 671.
20. *Ibid.*
21. (1981) 37 A.L.R. 439, at 446 and 449, respectively.
22. (1982) 43 A.L.R. 659, at 666.
23. *Ibid.*, at 667.
24. *Ibid.*, at 662.
25. *Ibid.*
26. [1912] 1 K.B. 135.

compel the production of documents by an employee, when his employer explicitly refuses permission for him to do so. Kennedy L.J. in *Eccles* agreed with the majority in that case that, "the law clearly is that a servant whatever his position, who is told by his master not to produce documents belonging to him has an excuse for non-production which the court will accept."[27]

It seems that Gibbs C.J. would not go so far as to compel the production in the face of an explicit order of a master not to do so, as he cited with seeming approval[28] *Crowther v. Appleby*[29] and *Re Higgs; Ex Parte Leicester*[30] which he said established that principle, as well as Kennedy L.J.'s statement above and similar dicta by Lord Denning M.R. in *Penn-Texas Corporation v. Murat Anstalt* (No. 2).[31] On Murphy J's formulation of the principles in this area, it appears open for a Court to disregard the employer's objection to production. One might summarise His Honour's view, as follows:-[32]

1. The Court will not order a person summoned to produce the documents if he lacks possession of or power over them and the person who does have possession or power can be identified and summoned.
2. Even if some other person has "general property" in the documents, if the person summoned has a "special property" in the documents, "according to the terms or conduct of his employment ... which gives him possession or power over the documents", the objection will be overruled.

On this analysis it seems that Murphy J. would order production of his master's documents by a servant with "special property" in those documents, even if the master expressly refused his permission to do so.

The question was not decided by Mason J., with whom Wilson J. agreed, though he quoted the principle, set out above in the words of Kennedy L.J., without disapproval[33] and attributed it to the decision in *Crowther v. Appleby*.[34] Later Mason J., in the course of his judgment, says that the subpoena duces tecum is an intrusion into the citizen's right to keep documents to himself and His Honour notes generally that there must be some recognition of an employer's rights with respect to his documents, before the Court will compel production; as His Honour said, "To acknowledge that the employee's possession is sufficient in itself to sustain an obligation to produce, without reference to his employer, would be to disregard the employer's rights with respect to his documents".[35] His Honour further seems to say that the court has jurisdiction to award production regardless of the employer's

27. *Ibid.*, at 152.
28. (1982) 43 A.L.R. 659, at 661.
29. (1873) L.R. 9 C.P. 23.
30. (1892) 66 L.T. (N.S.) 296.
31. [1964] 2 Q.B. 647, at 663.
32. (1982) 43 A.L.R. 659, at 669 et seq.
33. *Ibid.*, at 665.
34. (1873) L.R. 9 C.P. 23.
35. (1982) 43 A.L.R. 659, at 666.

objection, although it may take into account such an objection as a discretionary basis for refusing an order.[36]

With respect, one doubts the wisdom of overruling *Eccles,*[37] a case on a narrow procedural point, with the result of further extending the law of contempt, at least to the extent of placing the onus on the servant served with a subpoena duces tecum to gain his master's express refusal. The Court appears to have adopted an approach very similar to that of Kennedy L.J. in *Eccles,*[38] in acknowledging that certain employees have such liberty of action that documents belonging to their master can truly be said to be in their control, custody or possession and could be produced without violation of their duty to their employer. One finds little objection in this, although it obviously places employees in a more difficult position, provided Kennedy L.J.'s caveat is also accepted, that the Court may not compel production where the employer has explicitly denied permission for production by the employee.[39]

There would be grave objection to a decision that compelled production in the face of an employer's direction to an employee not to produce, as that would abrogate the employer's right to rely on the privilege against self-incrimination. It has been held in a string of English decisions[40] that a person cannot object to the production of documents on the ground that the documents may tend to incriminate another person. That one cannot rely on privilege where the documents incriminate another has been endorsed by Murphy and Mason J.J. in *Rochfort,*[41] whereas Gibbs C.J. and Wilson J. did not discuss the question.

The privilege against self-incrimination is one of the fundamental protections of individuals charged under the criminal law. It seems totally opposed to principle to deny this protection to a person, purely because he employs persons and reposes a trust in their ability to act within their delegated authority, with his interest in mind. Such a principle would have the perverse effect that employers would be advised to recruit their employees as partners in crime.

If in a subsequent decision the Court were to take *Rochfort*[42] further and compel production against the employer's express wishes, it is submitted that it ought also to depart from the English decisions denying the availability of a privilege based on the tendency to incriminate on another's behalf. This illustrates that these matters seem better left to a legislative approach to law reform.

To deny the privilege to a corporation, as suggested by Murphy J.,[43] is also better suited to a legislative approach, as it would be

36. *Ibid.*
37. [1912] 1 K.B. 135.
38. *Ibid.*, at 148 et seq.
39. *Ibid.*, at 152.
40. *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation* [1978] A.C. 547, cf. *R. v. Kinglake* (1870) 11 Cox C.C. 499 and *R. v. Adey* (1831) 1 M. & Rob. 94.
41. (1982) 43 A.L.R. 659, at 666 and 670, respectively.
42. *Ibid.*
43. *Ibid.*, at 670 to 671.

productive of much complication and confusion, quite apart from the issue of principle involved. Indeed such a rule has no clear cut application to the present case, because since an unincorporated association has no legal personality, who are the relevant owners of the documents—the corporate members of the association or the natural persons on the committee? If both groups, then surely the documents cannot be produced to the detriment of the natural persons, merely because corporate part owners of them are not privileged. The solution of granting the natural persons immunity from criminal prosecution is not available at common law, as held by the House of Lords in *Rank Film Distributors Ltd. v. Video Information Centre.*[44]

The current attitude of the High Court to claims of privilege or, indeed, to any claim which seeks to limit the powers of the courts or the executive to obtain information is well reflected in the following quotation from the judgment of Mason J. in *O'Reilly v. Commission of State Bank of Victoria*[45]:-**

> "A more persuasive reason for confining [legal professional privilege] is that it is impossible to assess how significantly the privilege advances the policy which it is supposed to serve. The strength of this public interest is open to question. It may be doubted whether it does very much to promote candour on the part of the client to his legal adviser. Candour on the part of public servants has ceased to be an important buttress to Crown privilege. And, *even if the existence of the privilege does encourage the client to make full disclosure to his legal adviser, is that public interest so much stronger than the public interest in having litigation determined in the light of the entirety of the relevant materials?*
>
> "The existence of the privilege is too well entrenched to be abolished by a flourish of the judicial pen. But the nature of the public interest which it serves and the comments which I have made indicate that it should be closely confined. Indeed, its application beyond judicial and quasi-judicial proceedings would create other problems. It is difficult to evaluate the benefits that would flow from a wider application of the privilege, except to say that it would preserve the advantages of allowing the privilege in subsequent judicial or quasi-judicial proceedings. But *it would secure these advantages by denying access to information which might be highly relevant and important for other purposes* and at the cost of imposing on unqualified persons—in this case an authorized officer of the Commissioner—the burden of deciding difficult questions of legal professional privilege. To me these factors indicate that the privilege should be limited to judicial and quasi-judicial proceedings. The fact that *Grant* has narrowed the ambit of legal professional privilege in judicial proceedings is not a persuasive reason for giving the privilege an application outside the field of judicial and quasi-judicial proceedings."
>
> (emphasis added)

44. [1981] 2 All E.R. 76.
45. (1982) 44 A.L.R. 27, at 42.

***Editors' Note*: Since receipt of this article the High Court has overruled *O'Reilly v. Commission of State Bank of Victoria* (1982) 44 ALR 27, in *Baker v. Campbell* (1983) 57 A.L.J.R. 749. The change, however, affects only the application of the principle.

As against this, in a delicate counter-poise, may be placed the eloquent judgment of Knight Bruce V.-C. in *Pearse v. Pearse,*[46] where his Lordship said:-

> "The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination, nor probably would the purpose of the mere disclosure of truth have been otherwise than advanced by a refusal on the part of the Lord Chancellor in 1815 to act against the solicitor, who, in the cause between Lord Cholmondeley and Lord Clinton, had acted or proposed to act in the manner which Lord Eldon thought it right to prohibit. *[Cholmondeley v. Clinton (1815) 19 Ves.Jr. 261.] Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much.* And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications, which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself."
>
> (emphasis added)

46. (1846) 1 De G & Sm. 12, at 28 to 29.