Barristers' Chambers

www.ashleymurraychambers.co.uk

Issue 15 The Queen v K [2009] EWCA Crim 1640

Introduction:

1. This decision of the Court of Appeal involved cross-appeals arising from directions given by the Judge in tax evasion criminal proceedings resulting from disclosure made on a Form E and other documents in ancillary relief proceedings.

2. The Husband had disclosed the existence of overseas bank accounts in his Form E. In subsequent meetings, some 'on the record' and some 'without prejudice', the Husband made statements as to the nature and purpose of those accounts. Subsequently, the records and Form E were supplied to HMRC by a third party informer and these documents then formed the major evidence in the Revenue's criminal prosecution case against him.

The Decision:

3. The Court, on the appeal hearing, addressed and answered five issues:

(i) could the Husband claim privilege against self-incrimination in the ancillary relief proceedings;

In Reply:

*(a) Parties to ancillary relief proceedings are under a duty to give full and frank disclosure (see **Jenkins v Livesey [1985] AC 424**) and a failure to do so may result in any order made being set aside and the party responsible being prosecuted for perjury for the misleading information provided on the Form E (see the **Family Proceedings Rules 1991, rules 2.61A-F**). Accordingly, upon the proper construction of the **Matrimonial Causes Act 1973** and, particularly, the secondary legislation by which the **Rules** thereto were given effect by Parliament, it must have been intended to abrogate the normal rule preventing a party exposing himself to self-incrimination.*

*(b) It was, therefore, not open to the parties (here the Husband) within the ancillary relief process to claim privilege against self-incrimination, primarily, because, if it was, "it would be impossible for the court to discharge its duty under **section 25** of the Act if it were deprived of the information on which it is required to act." [see paras 30 to 32 of Judgment].*

(ii) if not, was the information he provided in those documents admissible against him at the trial;

In Reply:

(a) The privilege against self incrimination is not an absolute (see Lord Bingham, Privy Council, ***Brown v Stott [2003] 1 A.C. 681****). The essential principle is that a restriction of an accused person's*

right not to incriminate himself will not infringe his right to a fair trial (under Article 6) provided that the compulsion under which the information is obtained is of a moderate nature and the use of the evidence obtained by it represents a proportionate response to a pressing social need. It is, therefore, necessary to consider the nature of the compulsion applied, the nature of the evidence obtained by means of it and the social need which the admission of such evidence at a subsequent trial is intended to meet.

(b) Applying such an approach here, the Court concluded that as the Husband's admissions had been compelled from him under the ancillary relief procedure and as the consequence of not providing such disclosure could be imprisonment for contempt which was a severe sanction, the admission of evidence obtained under such a process was not 'a reasonable and proportionate response' to the social need in question, namely the suppression of tax evasion. Accordingly, a social need of suppressing tax evasion, in this instance, did not justify an infringement of the fundamental right of an accused person not to incriminate himself and, therefore, the use of admissions/statements obtained in this way in ancillary relief proceedings would not be permitted in the criminal trial of the Husband [see paras 40 to 43 of Judgment].

(iii) were oral statements/admissions made during a specific meeting, part of the "without prejudice" discussions;

In Reply:

(a) The Court accepted that as a general proposition:-

'...if parties to a dispute have entered into "without prejudice" communications with a view to compromising their differences, the protection which normally attaches to such communications covers whatever is said in the course of them, including admissions, and that it is not permissible to (subsequently) isolate some parts and treat them as falling outside that protection.'

(b) However, it found, as a fact, that specifically the parties could agree and had agreed in this case that the first part of the meeting in question was to be 'on the record' and, therefore, that part was unprotected and did not form part of the 'without prejudice' discussions [see para 49 of Judgment]..

(iv) if not, were these statements/admissions admissible against him at the trial;

In Reply:

Normally, such evidence, so obtained, would be admissible in a criminal trial, if relevant to the issue. However, here it was clear, because of the process of ancillary relief within which the statements/admissions had been made, that the Husband had been 'compelled' to be full and frank in his disclosure (see above) and, again, this prevented the same being admitted against him because of his right to a fair trial under Article 6 [see paras 50 to 51 of Judgment]..

(v) whether the statements/admissions he made in the course of subsequent "without prejudice" negotiations are admissible against him at the trial.

In Reply:

(a) Legal professional privilege is concerned with disclosure and not with admissibility and if evidence of a privileged communication has fallen into the prosecution's hands, use may be made of it (see ***Butler v Board of Trade [1971] Ch. 680****). As stated by Ormrod LJ in* ***R v Tompkins 67 Cr.App.R. 181****:-*

"Privilege, in this context, relates only to production of a document; it does not determine its admissibility in evidence. (A note between client and his lawyer, though clearly privileged from production, was admissible in evidence once it was in the possession of the prosecution: ***Butler v Board of Trade [1971] Ch. 680).*** *Admissibility depends, essentially, on the relevance of the document; the method by which it has been obtained is irrelevant:* ***Kuruma, Son of Kanui v R [1955] A.C. 197****, per Lord Goddard C.J. at p. 203."*

(b) Hence, where, as here, the evidence sought to be adduced was not the result of a process of disclosure under compulsion within the ancillary relief procedure, but was volunteered within 'without prejudice' discussions between the parties – then the basic issue was as to the competing importance of two public policies – the first being to enable parties to negotiate freely without compromising their positions in relation to their current dispute (the 'without prejudice' rule) and the second being the need to investigate and prosecute crime. As the application to adduce the evidence was by a third party, namely the prosecuting authority and not by the other party to the 'without prejudice' discussions and as there was no question of the evidence of the statement/admissions having been obtained by illegal means, then in those circumstances, the public policy of prosecuting a crime was stronger than that of preserving confidentiality between different parties and subject matter. The statements/admissions the Husband had made would, therefore, not be inadmissible in the criminal trial [see paras 71 to 73 of Judgment].

Commentary:

4. The decision puts beyond any doubt that there is no place within the ancillary relief procedure for a claim to privilege on the basis of self incrimination, be it within the Form E or in questionnaire replies or in the witness box when giving evidence. The very nature of Parliament's intention, implicitly expressed in the Ancillary Relief Rules supporting the process, abrogates such protection and compels the information to be disclosed so that the Court can carry out its statutory duty under **section 25** of the **1973 Act**.

5. Of course, in subsequent criminal proceedings against a spouse, in which there is then an attempt to place reliance upon the information so disclosed within earlier ancillary relief proceedings, the then defendant may be heard to say that his or her right to a fair trial is being infringed since he or she were 'compelled' to provide the information in question. Whether that plea will succeed will depend upon the balance between the level of compulsion used in the first place to gain the information and the degree of mischief against which the prosecution in the criminal proceedings is aimed. In the instant

case, that balance was tipped in favour of the defendant – had the alleged crime been more heinous, undoubtedly the balance would have been the other way.

6. The Husband had made some admissions in the ancillary relief negotiations openly, as being specifically 'on the record' and, therefore, could not then claim that the same fell under the protective umbrella of other 'without prejudice' discussions occurring at the same time. This had the consequence, however, that such open admissions were inadmissible within the criminal proceedings since they had been made under the duty to make full and frank disclosure and hence by compulsion. By contrast, ironically, the admissions/statements made under the 'without prejudice' part of the discussions had not been similarly 'compelled' and could be admitted in evidence, if relevant, against the Husband in the criminal trial.

16th December 2009.

Ashley Murray
Ashley Murray Chambers
Liverpool