TENSIONS AND PROBLEMS GATHERING THE BEST EVIDENCE

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DISCLOSURE NOTICES

1. At first sight, the expression ‘‘disclosure notice’’ suggests a relatively tame instrument: in fact, such a notice is a powerful tool for uncovering material relevant to an investigation.

2. Disclosure Notices of the type considered here, are creatures of statute that empower an investigator (specified in the statute) to require a person to whom notice is given, to provide information relevant to an investigation, and/or to produce relevant documents, and/or to answer questions with respect to any matter relevant to the investigation.

3. The Serious Fraud Office has had such a power since 1987 (s.2, CJA1987). Similar powers are provided for by other enactments, e.g. s.165, Financial Services and Markets Act 2000; s.193, Enterprise Act 2002; and more recently, s.60 – 70 SOCPA 2005.

I. Disclosure Notices under ss.60-70 SOCPA 2005

4. Sections 60 to 70 came into force (in England and Wales) on 1st April 2006: S.I.2005/1521.

5. Under SOCPA, the power to issue disclosure notices vests in three ‘Investigating Authorities’: the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions, and the Lord Advocate (see s.60(5)).

What is a “disclosure notice”?

6. This is defined by s.62(3), SOCPA2005 [emphasis supplied]:

> “s.62(3) In this Chapter “disclosure notice” means a notice in writing requiring the person to whom it is given to do all or any of the following things in accordance with the specified requirements, namely-
>
> (a) ***answer questions*** with respect to any matter relevant to the investigation;
>
> (b) ***provide information*** with respect to any such matter as is specified in the notice;
>
> (c) ***produce such documents***, or documents of such descriptions, relevant to the investigation as are specified in the notice.
>
> (4) In subsection (3) “the specified requirements” means such requirements specified in the disclosure notice as relate to-
>
> (a) the time at or by which,
>
> (b) the place at which, or
>
> (c) the manner in which,
>
> the person to whom the notice is given is to do any of the things mentioned in paragraphs (a) to (c) of that subsection; and those requirements may include a requirement to do any of those things at once.”

7. By s.62(3) a ‘‘disclosure notice’’ is written notice served on any person in respect of whom there are reasonable grounds for believing that he may be able to provide information likely to be of substantial value to the investigation of an offence (s.62(1)).

8. It will be seen that the notice need not be served on the person suspected of committing the offence under investigation (s.62(1)).

9. A Notice may be delivered to the person in question, or it may be left at ‘his proper address’, or it may be sent by post to him at that address (s.69(2)). It is not clear whether notice is given once it is posted - even if the notice fails to arrive at its intended destination.

10. Presumably, the power to provide "information", is a power to require a person to provide (for example) a report of events, or a schedule of data.

No power under SOCPA to appeal the issue of a notice

11. The RCPO make the point in their *Guidance Notes* that: "There is no right of appeal within SOCPA for the giving of a disclosure notice, therefore the only challenge will be by way of Judicial Review. Lawyers must ensure that when they make a decision to give a disclosure notice that there is a full record and audit trail of their decision making process" [para.5].

Offences that might attract the issuing of a disclosure notice

12. A notice may pertain to an investigation in relation of any of the offences mentioned in s.61, SOCPA2005:

(1)…..

(a) any offence listed in Schedule 2 to the Proceeds of Crime Act 2002 (c. 29) (lifestyle offences: England and Wales);

(b) any offence listed in Schedule 4 to that Act (lifestyle offences: Scotland);

(c) any offence under sections 15 to 18 of the Terrorism Act 2000 (c. 11) (offences relating to fund-raising, money laundering etc.);

(d) any offence under section 170 of the Customs and Excise Management Act 1979 (c. 2) (fraudulent evasion of duty) or section 72 of the Value Added Tax Act 1994 (c. 23) (offences relating to VAT) which is a qualifying offence;

(e) any offence under section 17 of the Theft Act 1968 (c. 60) (false accounting), or any offence at common law of cheating in relation to the public revenue, which is a qualifying offence;

(f) any offence under section 1 of the Criminal Attempts Act 1981 (c. 47), or in Scotland at common law, of attempting to commit any offence in paragraph (c) or any offence in paragraph (d) or (e) which is a qualifying offence;

(g) any offence under section 1 of the Criminal Law Act 1977 (c. 45), or in Scotland at common law, of conspiracy to commit any offence in paragraph (c) or any offence in paragraph (d) or (e) which is a qualifying offence.

(h)[1] in England and Wales—

(i) any common law offence of bribery;

(ii) any offence under section 1 of the Public Bodies Corrupt Practices Act 1889 (c.69) (corruption in office);

(iii) the first two offences under section 1 of the Prevention of Corruption Act 1906 (c.34) (bribes obtained by or given to agents).

(2) For the purposes of subsection (1) an offence in paragraph (d) or (e) of that subsection is a qualifying offence if the Investigating Authority certifies that in his opinion—

(a) in the case of an offence in paragraph (d) or an offence of cheating the public revenue, the offence involved or would have involved a loss, or potential loss, to the public revenue of an amount not less than £5,000;

(b) in the case of an offence under section 17 of the Theft Act 1968 (c. 60), the offence involved or would have involved a loss or gain, or potential loss or gain, of an amount not less than £5,000."

Conditions for giving a disclosure notice under SOCPA

13. Sections 62-64 provide [emphasis added]:

[1] Inserted by the Serious Organised Crime and Police Act 2005 (Amendment of Section 61(1)) Order 2006; 2006 No. 1629; in force from the 20th June 2006.

s.62(1) If it appears to the Investigating Authority-

(a) that there are ***reasonable grounds for suspecting*** that an offence to which this Chapter applies has been committed, [2]

(b) that ***any person has information*** (whether or not contained in a document) ***which relates to a matter relevant to the investigation*** of that offence, and

(c) that there are ***reasonable grounds for believing that information*** which may be provided by that person in compliance with a disclosure notice ***is likely to be of substantial value*** (whether or not by itself) ***to that investigation***,

he may give, or authorise an appropriate person to give, a disclosure notice to that person.

(2) In this Chapter "appropriate person" means-

(a) a constable,

(b) a member of the staff of SOCA who is for the time being designated under section 43, or

(c) an officer of Revenue and Customs.

…..

(5) A disclosure notice must be signed or counter-signed by the Investigating Authority.

(6) This section has effect subject to section 64 (restrictions on requiring information etc.).

14. The phrase ''substantial value'' is intended to serve as a limiting element (and the phrase appears in numerous enactments)[3], but in practice, it is unlikely to do more than prevent notices being given for the production of trivia. All relevant information that has value to an inquiry can be justified as meeting the requirements of the section. In any event, judgment about whether a piece of information is likely to be of substantial value rests with the investigating authority.

15. The notice may require that person to (i) answer questions relevant to the investigation, and/or to (ii) provide information with respect to matters specified in the notice, and/ or (iii) produce documents relevant to the investigation.

<u>Handling of documents etc.</u>

16. Section 63, SOPCA gives 'authorised persons' various powers over documents and information that is produced to them.

17. A particularly important power is given by s.63(2)(b): namely to "require the person producing them to provide an explanation of any of them".

63 Production of documents

(1) This section applies where a disclosure notice has been given under section 62.

(2) An authorised person may-

(a) **take copies** of or extracts from any documents produced in compliance with the notice, and

(b) ***require the person producing them to provide an explanation of any of them***.

(3) Documents so produced may be retained for so long as the Investigating Authority considers that it is necessary to retain them (rather than copies of them) in connection with the investigation for the purposes of which the disclosure notice was given.

(4) If the Investigating Authority has reasonable grounds for believing-

(a) that any such documents may have to be produced for the purposes of any legal proceedings, and

(b) that they might otherwise be unavailable for those purposes,

they may be retained until the proceedings are concluded.

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2 The offences set out in section 61, SOCPA 2005.

3 For example, s.8, PACE 1984; the International Criminal Court Act 2001, Prt.1, schd.5; Terrorism Act 2000, schd.5, Part 2.

(5) If a person who is required by a disclosure notice to produce any documents does not produce the documents in compliance with the notice, an authorised person may require that person to state, to the best of his knowledge and belief, where they are.
(6) In this section "authorised person" means any appropriate person who either-
(a) is the person by whom the notice was given, or
(b) is authorised by the Investigating Authority for the purposes of this section.
(7) This section has effect subject to section 64 (restrictions on requiring information etc.).

18. The RCPO has published a very helpful guidance notes regarding the operation of this provision: http://www.rcpo.gov.uk/rcpo/guidance/guidance.shtml.

Restrictions on requiring information

19. Restrictions on requiring information, and protections, appear in s.64, SOCPA.

"64 Restrictions on requiring information etc.
(1) A person may not be required under section 62 or 63-
(a) to answer any ***privileged question***,
(b) to provide any ***privileged information***, or
(c) to produce any *privileged document*,
except that a lawyer may be required to provide the name and address of a client of his.
(2) A "privileged question" is a question which the person would be entitled to refuse to answer on grounds of ***legal professional privilege*** in proceedings in the High Court.
(3) "Privileged information" is information which the person would be entitled to refuse to provide on grounds of legal professional privilege in such proceedings.
(4) A "privileged document" is a document which the person would be entitled to refuse to produce on grounds of legal professional privilege in such proceedings.
(5) A person may ***not be required*** under section 62 ***to produce*** any ***excluded material*** (as defined by section 11 of the Police and Criminal Evidence Act 1984 (c. 60)).
(6) In the application of this section to Scotland-
(a) subsections (1) to (5) do not have effect, but
(b) a person may not be required under section 62 or 63 to answer any question, provide any information or produce any document which he would be entitled, on grounds of legal privilege, to refuse to answer or (as the case may be) provide or produce.
(7) In subsection (6)(b), "legal privilege" has the meaning given by section 412 of the Proceeds of Crime Act 2002 (c. 29).
(8) A person may not be required under section 62 or 63 to disclose any information or produce any document in respect of which he owes an obligation of confidence by virtue of carrying on any banking business, unless-
(a) the person to whom the obligation of confidence is owed consents to the disclosure or production, or
(b) the requirement is made by, or in accordance with a specific authorisation given by, the Investigating Authority.
(9) Subject to the preceding provisions, any requirement under section 62 or 63 has effect despite any restriction on disclosure (however imposed)."

20. Information is not required to be given in respect of matters that are subject to the rules of legal professional privilege (actually, the rules set out in s.64 of the 2005 Act), or in respect of 'excluded material' (s.64(5) and s.11 of the Police and Criminal Evidence Act 1984), or matters subject to the rules of confidence when carrying out banking business (s.64(8)).

21. A statement made by a person in response to a requirement imposed under either s.62 or s.63 of SOCPA may not be used in evidence against the person supplying it, in any

criminal proceedings, unless s.65(2) or (3) applies (notably perjury, or the making of an inconsistent statement when giving evidence).

22. This echoes s.197 Enterprise Act 2002, and ss.30A and s.65B of the Competition Act 1998: see para.165 of the Government's Explanatory Notes; and note *Saunders v. The United Kingdom* (E.Crt.H.R.; 43/1994/490/572) 17 December 1996, Art.6, ECHR; and see *Office of Fair Trading v X* [2003] EWCH 1042 (Comm).

23. A person who fails, without reasonable excuse, to comply with a requirement stipulated in the Notice, commits an offence contrary to s.67(1) of the 2005 Act. (for the meaning of ''reasonable excuse'' in the context of s.2 of the Criminal Justice Act 1987 (c.38), see *Marlwood Commercial Inc v Kozeny* [2004] 3 All E.R. 648). Concern was expressed in Parliament about disclosure notices made under SOCPA 2005 (Vera Baird QC,MP, *Hansard*, col.1085 (December 7, 2004).

II. Disclosure Notices under other enactments

24. The Serious Fraud Office may, by notice served under s.2(2) of the CJA1987, ''require the person whose affairs are to be investigated ('the person under investigation') or any other person whom he has reason to believe has relevant information to ***answer questions*** or otherwise ***furnish information*** with respect to any matter relevant to the investigation at a specified place and either at a specified time or forthwith''.

25. By s.2(3) of the Criminal Justice Act 1987, the Director may:

> ''require the person under investigation or any other person to produce at such place as may be specified in the notice and either forthwith or at such time as may be so specified, any specified **documents** which appear to the Director to relate to any matter relevant to the investigation or any documents of a specified description which appear to him so to relate... [and to take copies, etc].''

26. These powers have been used sparingly, in complex and serious cases of fraud, which are difficult or impossible to investigate any other way (and see ''*Legislating the criminal code: corruption*'', Law Commission CP145, March 1997).

27. The section 2 powers were amended by the Criminal Justice International Cooperation Act 1990 to take into account requests for assistance made by prosecuting agencies in foreign jurisdictions: *Energy Financing Team v SFP* [2005] EWHC 1626 (Admin). It may not always be practicable to serve a notice on the person being investigated. The warrant should be sufficiently clear about the documents sought to be obtained by the SFO.[4]

[4] "Mr Downes accepts that where documents are sought from someone suspected of involvement in a fraud (and both EFT and GML were in that position) it will rarely be practicable to obtain them by notice pursuant to section 2(3), but he submits that because the execution of a warrant is an intrusive power the Director, before applying for a warrant, must first consider whether section 2(3) can be used, and if he does have to resort to section 2(4) he can only seek a warrant in relation to documents which could have been adequately described for the purposes of· section 2(3). Historically the English courts have never allowed warrants to be used by investigating authorities to conduct fishing expeditions, or even to obtain documents only normally obtainable on discovery, and that approach, Mr Downes submits, is now re-enforced by the provisions of the European Convention. Furthermore, the person against whose property the warrant is directed, and the officer who executes it, both need to know at the time of execution to what property it relates, and if it is possible to obtain the documents which are sought from some other untainted source (such as a bank) then there should not be an application for a warrant at all".

28. By s.2(9) and (10) of the 1987 Act, LPP is preserved (and obligations of confidence in the context of banking business):

> (9) A person shall not under this section be required to disclose any information or produce any document which he would be entitled to refuse to disclose or produce on grounds ***of legal professional privilege*** in proceedings in the High Court, except that a lawyer may be required to furnish the name and address of his client.
>
> (10) A person shall not under this section be required to disclose information or produce a document in respect of which he owes an obligation of ***confidence*** by virtue of carrying on any ***banking business*** unless -
>
> (a) the person to whom the obligation of confidence is owed consents to the disclosure or production; or
>
> (b) the Director has authorised the making of the requirement or, if it is impracticable for him to act personally, a member of the Serious Fraud Office designated by him for the purposes of that subsection has done so.

29. Note also s.165 of the Financial Services and Markets Act 2000, which provides a similar power for the disclosure of information and documents, but this is subject to s.413 of the Act which provides that a person is not required to produce, disclose or permit the inspection of "protected items". "Protected items" is defined by s.413 to mean:

> (2)….
>
> (a) communications between a professional legal adviser and his client or any person representing his client which fall within subsection (3);
>
> (b) communications between a professional legal adviser, his client or any person representing his client and any other person which fall within subsection (3) (as a result of paragraph (b) of that subsection);
>
> (c) items which -
>
> (i) are enclosed with, or referred to in, such communications;
>
> (ii) fall within subsection (3); and
>
> (iii) are in the possession of a person entitled to possession of them.
>
> (3) A communication or item falls within this subsection if it is made -
>
> (a) in connection with the giving of legal advice to the client; or
>
> (b) in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings.
>
> (4) A communication or item is not a protected item if it is held with the intention of furthering a criminal purpose.

30. Note also s.193 of the Enterprise Act 2002 in relation to investigations by the Office of Fair Trading in connection with suspect cartel offences. Section 193 of that Act (subs.(1) and (2)) provide:

> ''(1) The OFT may by notice in writing require the person under investigation, or any other person who it has reason to believe has relevant information, to answer questions, or otherwise provide information, with respect to any matter relevant to the investigation at a specified place and either at a specified time or forthwith.
>
> (2) The OFT may by notice in writing require the person under investigation, or any other person, to produce, at a specified place and either at a specified time or forthwith, specified documents, or documents of a specified."

31. Section 193 of the EA2002 takes subject to s.196 of the Act, which preserves LPP.

32. See also the Money Laundering Regulations 2007, regulation 37, and which will come into force on the 15th December 2007. By reg.37(7), A person may not be required under this regulation to provide or produce information or to answer questions which he would be entitled to refuse to provide, produce or answer on grounds of legal professional

privilege in proceedings in the High Court, except that a lawyer may be required to provide the name and address of his client".

33. Problems may arise where information obtained under these compulsory powers is then shared with other agencies – or it is proposed that information should be shared: consider *Wallace Smith Trust Co Ltd (In Liquidation) v Deloitte Haskins & Sells and Coopers & Lybrand Deloitte* (10th July 1996); see also ***R v Kearns*** [2002] EWCA Crim.748, and *Brady* [2004] EWCA Crim 1763[5].

34. In his incisive commentary to the case of ***R v Brady***, Professor David Ormerod identified a number of difficulties:

> "Once it is established that the purposes include criminal investigation, there is little limitation on the sharing of such information between agencies. This raises some difficult issues. Arguably, the fact that Parliament has been selective in empowering only certain agencies to conduct compulsory questioning in relation to specific types of alleged conduct suggests a presumption that other agencies are not entitled to the product of such questioning? Otherwise, Parliament would have empowered all agencies to obtain information compulsorily. An alternative interpretation is that Parliament's restriction on which body is entitled to conduct a compulsion interview is a deliberate mechanism for ensuring some quality control over the persons exercising such power rather than restrict the distribution of information so obtained. It could also be argued that condoning such widespread sharing means that an agency whose primary purpose is to obtain information under compulsion for an administrative inquiry could share material with a prosecuting agency that could not otherwise have obtained such information, and whose sole purpose is to obtain information for prosecution. By permitting this, the court might be providing an opportunity for abuse of process arguments in which the defence allege that the agency using the compulsory powers was doing so for or on behalf of the prosecuting agency which lacked the powers."

35. A further area of difficulty, yet to be satisfactorily resolved, is cross-border sharing of information between law-enforcement agencies. At an EU level, it seems likely that EUROJUST will have an important role to play in this area.

36. Note that documents containing information disclosed to public bodies under compulsion of law do not form a separate category protected by P.I.I.: *Wallace Smith Trust Co*. (10th July 1996, Chancery Division).

Section 13 of the Fraud Act 2006 [Evidence]

37. This section provides, with emphasis supplied, (in force from the 15th January 2007):

> *(1) A person is not to be excused from-*
> *(a) answering any question put to him in **proceedings relating to property**, or*
> *(b) complying with any order made in proceedings relating to property,*
> *on the ground that doing so may incriminate him or his spouse or civil partner of **an offence under this Act** or a **related offence**.*
> *(2) But, in proceedings for an offence under this Act or a related offence, a statement or admission made by the person in-*
> *(a) answering such a question, or*
> *(b) complying with such an order,*
> *is not admissible in evidence against him or (unless they married or became civil partners after the making of the statement or admission) his spouse or civil partner.*

[5] ***R v Brady*** is noted in [2005] Crim LR 226.

*(3) "**Proceedings relating to property**" means any proceedings for-*
(a) the recovery or administration of any property,
(b) the execution of a trust, or
(a) an account of any property or dealings with property,
and "property" means money or other property whether real or personal (including things in action and other intangible property).
(4) "Related offence" means-
(a) conspiracy to defraud;
*(b) **any other offence involving any form of fraudulent conduct or purpose**.*

38. This section removes the so-called "privilege against self-incrimination" in proceedings relating to property, but s.13(2) FA2006 affords a level of protection to the person concerned.[6]

39. However, what is meant by "any other offence involving any form of fraudulent conduct or purpose"? Does that expression mean an offence where an essential ingredient is fraudulent conduct, or fraudulent purpose e.g. knowingly concerned in the fraudulent evasion of the payment of duty (CEMA1979 offences), or is a wider construction permissible – namely, any offence that has a fraudulent object or purpose (e.g. bribing an official)?

40. Note that the protection in s.13(2) relates to (a) proceedings under the FA2006 and (b) "a related offence". If the first construction were held to be correct, then the protection under s.13(2) would not extend to offences that would otherwise be embraced were the second interpretation to be applied. For example, if the first construction is correct, the protection would be afforded to a person charged with a conspiracy to defraud, but not to a person charged with corruption. Is that an indication that the 'second interpretation' is the correct one?

41. In *Kensington International v Vitol and others* [2007] EWHC 1632 (Comm), the third parties resisted Kensington's application, for the disclosure of documents, by asserting PSI, having expressed apprehension as to the risk of exposure to criminal charges of bribery and/or corruption according to UK law. Dishonesty is not an ingredient of those offences. Nonetheless, Gross J held that corruption offences involve a "form of fraudulent purpose or conduct" and therefore come within the definition of "related offence" in s.13 of the Fraud Act.

42. The Court of Appeal (Civil Division) [2007] EWCA Civ 1128 dismissed the appeal, remarking [per Moore-Bick LJ]:

> "40. Notwithstanding the importance of the privilege against self-incrimination, I am reluctant…to construe section 13 in a way that would limit its scope more than must inevitably be the case in giving a fair interpretation to the language Parliament has chosen to use. The beneficial effects of a provision of this kind make it undesirable to do so. The limitations imposed by the section itself are that the proceedings in which disclosure is sought must be proceedings in relation to property and that the risk must be of incrimination of an offence involving fraudulent conduct or a fraudulent purpose. Although Parliament no

[6] And consider the interesting case of *Compagnie Noga D'Importation et D'Exportation S.A. v Australia and New Zealand Banking Group Ltd* [2007] EWHC 85 (Comm); and see the old, but leading, cases of *Sociedada Nacional de Combustiveis de Angola U E E v. Lundquist* [1981] 2QB.310, and *R v. Boyes* [1861] 1.B & S 311. Note *Arab Monetary Fund v. Hashim* [1989] 1 WLR.565 in the context of incrimination regarding offences triable overseas; and see Supreme Court Act 1981, s. 72; and *Renworth v Stephansen* [1996] 3 All ER 244.

> doubt contemplated that most proceedings in relation to property would have as their object making good a loss resulting from an offence of fraud under the Act, section 13 does not limit the range of proceedings to which it applies in that way. Indeed, it would be surprising if it did, because the court would then have to determine whether an offence under the Act had been committed in relation to the property in question in order to decide whether the person to whom the order was directed was entitled to claim privilege. In my view section 13(1) applies, as its terms suggest, to any proceedings relating to property falling within the terms of subsection (3).

43. As for the expression in s.13(1)(b) which reads, "A person is not to be excused from complying with *any order made in proceedings relating to property*…." (emphasis added), the Court of Appeal said:

> "Taken as a whole it is quite capable of referring to proceedings in the wider sense and thus as including the substantive claim. The fact that the procedure for making the application may take the form of an independent action does not in my view affect the matter."

44. In *Kensington v Vitol*, it had been submitted, by V, that s.13(1) extends only to proceedings by which the claimant seeks to recover property of which he has been wrongfully deprived and does not include a claim to obtain payment of a debt. The Court of Appeal rejected that submission on the grounds that because "property" in s.13(1) includes "money", the expression "any proceedings for the recovery of [money]" must be understood as including proceedings to recover a debt by suing on the chose in action.

45. But what is meant by a "related offence" – and does s.13 encompass the offences of bribery and corruption? As to those matters the Court of Appeal said:

> "58. The Fraud Act does not contain a simple definition of fraud or fraudulent conduct; rather, it defines the statutory offence of fraud by reference to a breach of sections 2, 3 and 4, each of which contains a description of conduct which amounts to a breach of that section. In addition, section 9 makes it an offence knowingly to be a party to the carrying on of a business with intent to defraud creditors or for any other fraudulent purpose. Against that background I think that the expression "any fraudulent conduct or purpose" in section 13 must be intended to refer to conduct, or to a purpose, that is fraudulent in the sense that it partakes of the essential characteristics of fraud as described in sections 2, 3 and 4.
>
> 59. For my own part I think that the essence of fraud is deception of one kind or another coupled with injury or an intention to expose another to a risk of injury by means of that deception.
>
> 60…. [V's] argument fails to take account of two matters. The first is the fact that the only purpose of offering or giving a bribe is to undermine the agent's loyalty to his principal and persuade him to abandon his duty. That is the essence of the corruption and therefore any offer of a bribe can only be intended to have that corrupting effect. It also involves deception in the sense described earlier. The second is the fact that a bribe necessarily exposes the principal (or, in the case of bribery of a public official, the public) to the risk of harm, even if it does not lead to actual harm. In my view, therefore, offering or giving a bribe necessarily involves a form of fraudulent conduct or purpose within the meaning of section 13(4)(b)."

46. Mr Justice Gross also held that s.13 FA2006 has retrospective effect, because that section is an evidential provision: "Procedural changes in the law are expected to improve

matters for all concerned; it is therefore presumed that they apply to pending as well as future proceedings." The Court of Appeal went further [para.70]:

> "In my view it is wrong to characterise section 13 as 'retrospective'. It is not. It changes the law in relation to future proceedings, albeit that change may relate to the proof of events that occurred before it came into effect. Moreover, insofar as broader considerations of fairness are relevant, I agree with the judge that it is fanciful to suppose that anyone, including these appellants, is likely to have conducted himself in the conscious belief he would not be required to disclose incriminating information or documents in any proceedings in which he might, for whatever reason, later be caught up."

Search Orders

47. These were formerly known as "*Anton Piller* orders" but they now have developed into a powerful tool for the discovery of information: see ***In The Matter of OTL*** [2006] EWHC 1226 (Ch).

FINANCIAL REPORTING ORDERS

Statutory provisions

48. Note that s.76 and s.78 SOCPA2005 came into force on the 1st April 2006: SI 2006/378. Sections 79 to 81 came into force on the 1st April 2006 (save Scotland): SI 2006/378.

49. Sections 76 and 79 SOCPA 2005, provide as follows:[7]

Section 76: Financial reporting orders: making

(1) A court sentencing or otherwise dealing with a person convicted of an offence mentioned in subsection (3) may also make a financial reporting order in respect of him.

(2) But it may do so only if it is satisfied that the risk of the person's committing another offence mentioned in subsection (3) is sufficiently high to justify the making of a financial reporting order.

(3) The offences are-

~~(a) an offence under any of the following provisions of the Theft Act 1968 (c. 60)-~~
~~section 15 (obtaining property by deception),~~
~~section 15A (obtaining a money transfer by deception),~~
~~section 16 (obtaining a pecuniary advantage by deception),~~
~~section 20(2) (procuring execution of valuable security, etc.),~~

(aa)[8] an offence under either of the following provisions of the Fraud Act 2006—
(i) section 1 (fraud),
(ii) section 11 (obtaining services dishonestly),

(ab)[9] a common law offence of conspiracy to defraud,

(ac)[10] an offence under section 17 of the Theft Act 1968 (c. 60) (false accounting),

~~(b) an offence under either of the following provisions of the Theft Act 1978 (c. 31)-~~
~~section 1 (obtaining services by deception),~~
~~section 2 (evasion of liability by deception),~~

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7 In force, from April 1, 2006: *Statutory Instrument 2006 No. 378 (C.9), The Serious Organised Crime and Police Act 2005 (Commencement No. 5 and Transitional and Transitory Provisions and Savings) Order 2006.*

8 Section 76(3)(aa) replaced s.76(3)(a) and (b) by virtue of para.36 of Schd.1 to the Fraud Act 2006 which fully came into force on the 15th January 2007: see S.I.2006/3200.

9 Inserted by the Serious Organised Crime and Police Act 2005 (Amendment of Section 76(3)) Order 2007; SI.2007/1392, in force on the 4th May 2007.

10 Inserted by the Serious Organised Crime and Police Act 2005 (Amendment of Section 76(3)) Order 2007; SI.2007/1392, in force on the 4th May 2007.

(c) any offence specified in Schedule 2 to the Proceeds of Crime Act 2002 (c. 29) (lifestyle offences).[11]

[12]{*(d) a common law offence of bribery,*

(e) an offence under section 1 of the Public Bodies Corrupt Practices Act 1889 (c. 69) (corruption in office),

(f) the first two offences under section 1 of the Prevention of Corruption Act 1906 (c. 34) (bribes obtained by or given to agents),

(g) an offence under any of the following provisions of the Criminal Justice Act 1988 (c. 33)–
section 93A (assisting another to retain the benefit of criminal conduct)[3],
section 93B (acquisition, possession or use of proceeds of criminal conduct),
section 93C (concealing or transferring proceeds of criminal conduct),

(h) an offence under any of the following provisions of the Drug Trafficking Act 1994 (c. 37)[4]–
section 49 (concealing or transferring proceeds of drug trafficking),
section 50 (assisting another person to retain the benefit of drug trafficking),
section 51 (acquisition, possession or use of proceeds of drug trafficking),

(i) an offence under any of the following provisions of the Terrorism Act 2000 (c. 11)–
section 15 (fund-raising for purposes of terrorism),
section 16 (use and possession of money etc. for purposes of terrorism),
section 17 (funding arrangements for purposes of terrorism),
section 18 (money laundering in connection with terrorism),

(j) an offence under section 329 of the Proceeds of Crime Act 2002 (c. 29)[5] (acquisition, use and possession of criminal property),

(k) a common law offence of cheating in relation to the public revenue,

(l) an offence under section 170 of the Customs and Excise Management Act 1979 (c. 2)[6] (fraudulent evasion of duty),

(m) an offence under section 72 of the Value Added Tax Act 1994 (c. 23)[7] (offences relating to VAT),

(n) an offence under section 144 of the Finance Act 2000 (c. 17) (fraudulent evasion of income tax),

(o) an offence under section 35 of the Tax Credits Act 2002 (c. 21) (tax credit fraud),

(p) an offence of attempting, conspiring in or inciting the commission of an offence mentioned in paragraphs (aa), (ac) or (d) to (o),

(q) an offence of aiding, abetting, counselling or procuring the commission of an offence mentioned in paragraphs (aa), (ac) or (d) to (o).}

(4) The Secretary of State may by order amend subsection (3) so as to remove an offence from it or add an offence to it.

(5) A financial reporting order-
(a) comes into force when it is made, and
(b) has effect for the period specified in the order, beginning with the date on which it is made.

(6) If the order is made by a magistrates' court, the period referred to in subsection (5)(b) must not exceed 5 years.

(7) Otherwise, that period must not exceed-
(a) if the person is sentenced to imprisonment for life, 20 years,
(b) otherwise,15 years.

Section 79 – Effect

79. Financial reporting orders: effect

(1) A person in relation to whom a financial reporting order has effect must do the following.

(2) He must make a report, in respect of-

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[11] Includes s.327, 328 of the Proceeds of Crime Act 2002 (money laundering) but not s.329; hence the amendment – perhaps having regard to the case of Terry Adams: see *The Times*, 10th March 2007: http://www.timesonline.co.uk/tol/news/uk/crime/article1495112.ece

[12] Inserted by the Serious Organised Crime and Police Act 2005 (Amendment of Section 76(3)) Order 2007; SI.2007/1392, in force on the 4th May 2007.

(a) the period of a specified length beginning with the date on which the order comes into force, and
(b) subsequent periods of specified lengths, each period beginning immediately after the end of the previous one.

(3) He must set out in each report, in the specified manner, such particulars of his financial affairs relating to the period in question as may be specified.
(4) He must include any specified documents with each report.
(5) He must make each report within the specified number of days after the end of the period in question.
(6) He must make each report to the specified person.
(7) ….
(8) In this section, "specified" means specified by the court in the order.
(9) ….
(10) A person who without reasonable excuse includes false or misleading information in a report, or otherwise fails to comply with any requirement of this section, is guilty of an offence and is liable on summary conviction to-
(a) imprisonment for a term not exceeding-
(i) in England and Wales, 51 weeks,
(ii) in Scotland,12 months,
(iii) in Northern Ireland, 6 months, or
(b) a fine not exceeding level 5 on the standard scale,
or to both.

Discussion

50. Financial Reporting Orders may be made in respect of persons convicted of an offence particularised in the 2005 Act (typically a "criminal lifestyle" offence, set out in Schedule 2 of the Proceeds of Crime Act 2002) where the risk of re-offending is sufficiently high to justify making the order. Note the amendments that have been made to s.78 by the Fraud Act 2006, as well as those that are proposed in the published draft S.I.

51. The list of offences in subs.(3) is fairly short, but the list of so-called 'life style offences' in sch.2 to the Proceeds of Crime Act 2002 is long. It follows that many offences fall within s.76 SOCPA. There is nothing in s.76 that limits its application to serious offences only.

52. A Financial Reporting Order is an order that the offender provide particulars of his financial affairs to a specified person (probably a police officer), for such periods and in such detail as the court directs. The order may endure for a maximum of five years if made in a Magistrates' Court, 15 years if made in a higher court, or 20 years if the defendant was sentenced to life imprisonment. It is not clear precisely how many FRO's have been made to date.

53. The Lord Chief Justice was "helpful in his suggestion" that the reports should not be at fixed intervals throughout the course of the order, and the Bill was accordingly amended to allow the sentencer to direct when reports are to be served [*Hansard*, April 7th, 2005, col.1585].

54. The government has said that financial reporting orders will act as a deterrent to re-offending [*Hansard*, March 14, 2005, col.1080], but there is no evidence that this will be so. The real purpose is to increase the fund of knowledge held by the law enforcement agencies.

55. Note that the section offers no express protection against self-incrimination by the disclosure of information under the terms of a Financial Reporting Order. Article 6 of the ECHR is engaged and, with that Article in mind, *Justice* made the following comments about s.78 SOCPA in its briefing paper to the House of Lords on Second Reading:[13]

> "The European Court of Human Rights has said that its
>
> > "rationale lies, inter alia, in protecting the person 'charged' against improper compulsion by the authorities and thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the 'person charged'".[14]
>
> 38. In the case of *Saunders v. United Kingdom* (1996) 23 EHRR 313 the conviction and sentence of the defendant on fraud charges based on information supplied to the Department of Trade and Industry under compulsory powers was found to be in breach of Article 6.…
>
> 39. The fact that this is an order that can only be imposed after a relevant conviction and for preventative purposes does not, we believe, render it a proportionate interference with the right to silence. We are also concerned at the extent of interference with the right to privacy allowed under the financial reporting regime, since the information obtained may be disclosed under clause 77(5) (financial reporting orders: verification and disclosure) in a very broad range of circumstances."

56. In *R v Baybasin*, His Honour Judge Stone (June 2006) made a Financial Reporting Order and ruled that:[15]

    a. The powers do not arise merely on conviction, but they also arise where a person has in the past been convicted of a subsection 3 offence, and the Court is again dealing with that person. Nowhere is there expressed to be any limitation of time in respect of the prior conviction.
    b. the statute envisages a disqualification and its over-riding purpose is not to punish, but to protect the public,
    c. The order does not have the character of increased punishment, and this impression is reinforced by section 81(5) of the 2005 Act;
    d. The order, if made in connection with offences committed before the operation of s.76, SOCPA, does not amount to an increased penalty for the purposes of art.7 of the ECHR;

57. In Scotland, the relevant form (form 49.2) is reproduced below:

Form of financial reporting order

FINANCIAL REPORTING ORDER

COURT:

DATE:

OFFENDER:

Address:

Date of birth:

THE COURT, sentencing or otherwise dealing with the offender in respect of an offence mentioned in section 77(3) of the Serious Organised Crime and Police Act 2005, namely the offence(s) of (*specify*);

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13 *Briefing for House of Lords Second Reading*; March 2005, http://www.justice.org.uk/images/pdfs/socpb12.pdf

14 *Serves v. France* (1997) 28 EHRR 265 at para.47.

15 A full transcript is available on the Law Society website: http://www.lawsociety.org.uk/documents/downloads/dynamic/ReginavAbdullahBaybasinCase.pdf

AND being satisfied that the risk of the offender committing another offence mentioned in section 77(3) of that Act is sufficiently high to justify the making of a financial reporting order;

ORDERS that during a period of (*specify length of period*) from the date of this order the offender shall make reports to (*specify person*) in respect of the period of *(specify length of period)* beginning with the date of this order and subsequent period(s) of (*specify length(s) of period(s)*), each period beginning immediately after the end of the previous one; and that each report shall be made within (*specify number*) days after the end of the period in question; and that each report shall set out (*specify particulars of financial affairs to be provided and the manner in which they are to be provided*); [and that (*specify documents*) shall be included with each report].

Signed

Clerk of Court

LEGAL PROFESSIONAL PRIVILEGE [LPP] and P.S.I.

History/Sketch of LPP

55. The ability of law enforcement agencies to gather material in order to further an investigation into fraud or other serious crime, increasingly depends on their ability to prise information out of the hands of persons who hold it, and who will usually be in a position to say something about it.

56. However, three privileges (and one immunity) serve as barriers to disclosure. These are the privileges of (i) litigation privilege, (ii) legal advice privilege, and (iii) the privilege against self-incrimination (often described – erroneously – as the 'right to silence); and 'public interest immunity' [P.I.I.].[16]

57. The boundaries of all four protections are constantly probed and, occasionally re-drawn by case-law and by statute (not always in favour of the state).

58. An authoritative 'overview' of UK law relating to third-party and defence disclosure would have much to commend it. Unhappily, most practitioners are left bewildered by rules that are in a state of flux, and which seem to lack a discernible thread that binds them. This state of affairs is compounded by the fact that terms are used loosely, sometimes interchangeably. The decision of the Court of Appeal in ***R v Khan*** [2007] EWCA Crim 2331 is one of considerable importance with respect to a witness who, whilst giving evidence in criminal or civil proceedings, declines to answer questions that are designed to probe the truth of his plea of guilty (or his admission to having committed an offence) by asserting the privilege against self-incrimination. Unhappily, in what is otherwise a neatly structure judgment, the Court described P.S.I. as "legal professional privilege".[17]

59. In cases to which PACE 1984 applies, s.10 of that Act defines "items subject to legal privilege" as:

> "(1) …

[16] Note that for the purposes of s.330, POCA2002 [failure to disclose: regulated sector], there is a further privilege for "relevant professional advisers" in receipt of information or other matter that came to them in the circumstances set out in section 330(10).

[17] There are eight references to "LPP" in the judgment, but each instance is surely a reference to PSI. One suspects that this is merely an uncharacteristic oversight.

(a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;
(b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and
(c) items enclosed with or referred to in such communications and made[18] -
  (i) in connection with the giving of legal advice; or
  (ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings,

when they are in the possession of a person who is entitled to possession of them."

60. It has been said that s.10 reflects the position at common law (as at 1984): see the speech of Lord Goff, ***R v Central Criminal Court, ex p. Francis & Francis*** [1989] AC 346.[19] The problems in that case stemmed from the wording of s.10(2) PACE, namely, "Items held with the intention of furthering a criminal purpose are not items subject to legal privilege". If the 'intention' must be that of the person holding the items (and typically that would be an innocent legal adviser), the exception would rarely apply. In ***Cox and Railton*** (1884) 14 QBD 153, it was held that no legal privilege attaches to legal advice that was obtained for the purpose of committing crime.[20] But the question that arose in ***R v Central Criminal Court, ex p. Francis & Francis*** (and which had not been answered by any authority directly on the point) was whether a criminal intention "on the part of a stranger to the relationship of solicitor and client, destroys the privilege of the client"[21]. By a majority, their Lordships held that it is immaterial to the exception in ***Cox and Railton*** whether "it is the client himself, or a third party who is using the client as his innocent tool, who has the criminal intention"[22]. Because this view was to be taken as representing the position at common law, it was open to their Lordships to conclude (as the majority did) that s.10(2) PACE merely reflects the common law. But, in reality, part of the boundary of LPP had been redrawn.[23]

61. Section 10(1)(a) PACE applies to communications made with the "client" - including, it would seem, all communications made through an agent of the client. In the light of ***Three Rivers DC v Bank of England (No.5)***[24], there might now be uncertainty concerning

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18 In ***R v R*** [1994] 1 WLR 758; [1995] 1 Cr.App.R.183, it was held that the word "made" in s. 10(1)(c) is used in a general sense and is wide enough to include the meaning an item that was 'brought into existence'. In that case, the prosecution was prevented from adducing evidence of a scientist (who had originally been instructed by the defence) to give evidence of opinion based on a sample of blood that had been provided by the accused.

19 Lord Bridge did not share that view: "I do not see any sound basis for making the assumption that in section 10 Parliament set out to reproduce in the form of a statutory code every aspect of the common law relating to legal professional privilege. On the contrary, if a true codification had been intended, something substantially more elaborate would clearly have been required. If, on the other hand, Parliament had intended, without codification, that the common law rules should determine whether or not material was to be immune from discovery under the powers of Part II on the ground that it was subject to legal professional privilege, it would have been simple to say so."

20 This does not mean that LPP is regained once a crime has been committed.

21 See the speech of Lord Oliver of Aylmerton. On one view, the privilege is not 'destroyed': it is simply does exist if the exception applies.

22 Per Lord Goff.

23 "….this development of the law goes well beyond any previous authority and, if it is a legitimate extension of a previously accepted principle, it should be capable of being expressed in language sufficiently precise to make clear the boundary within which the new principle is to apply that the criminal intention of one party may operate to deprive another innocent party seeking legal advice of the protection of legal professional privilege." [per Lord Bridge, ***R v Central Criminal Court, ex p. Francis & Francis***]

24 [2003] EWCA Civ. 474; [2003] QB 1556.

precisely who the 'client' is with respect to an organisation or a corporate entity. This point is considered in detail at paragraph 92 of this handout.

62. Section 10(1)(b) PACE, extends the level of protection to communications with third parties -- provided 'legal proceedings' have at least been 'contemplated'.

63. Section 10(1)(c)(i) PACE, embraces items enclosed with correspondence "in connection with the giving of legal advice". However, at common law, if a definite prospect of litigation is not contemplated, *legal advice privilege* [LAP] protects only communications between lawyer and client. Even if litigation is contemplated, the communication to/from a third party must have been made, and/or the document created, for the purpose of advising or acting with regard to the litigation.

64. Thus, in relation to third parties, LAP does not "apply to documents communicated to a client or his solicitor for advice to be taken upon them but only to communications passing between that client and his solicitor…and documents evidencing such communications": *Three Rivers DC No.5* [2003] EWCA Civ 474, CA, per Longmore LJ. In relation to organisations and corporate entities, this state of affairs may cause difficulties for several reasons. First, it is not always easy to identify who the 'client' is (see now *Three Rivers DC No.5* [2003] EWCA Civ 474, CA.[25] Secondly, it may be difficult to determine whether a person is the 'agent' of a client, or a 'third party'. Thirdly, the communication or document might have more than one purpose – in which case, one looks to the "dominant purpose".

65. The distinction between "litigation privilege" and "legal advice privilege" appears to be of recent origin. Neither phrase appears in UK statutes.[26] In a search in 1998, LEXIS indicated 31 cases in which the phrase 'litigation privilege' had been used.[27] Both terms are subheads of LPP: they are not terms of art, but labels of convenience that loosely describe two sets of circumstances.

66. In *Ventouris v Mountain* [1991] 1 WLR 607, Bingham LJ (as he then was) said[28] that the expression "litigation privilege" is open to an objection, namely:

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25 See Ho Hock Lai, "*Legal Advice Privilege and the Corporate Client*"; Singapore Journal of Legal Studies [2006] 231–263

26 It should be noted that a further sub-head of LPP arguably exists, namely, "common interest privilege" – which can be used as a sword, but which is more often used as a shield: see *Winterthur Swiss Insurance Company v AG (Manchester) Limited* [2006] EWHC 839 (Comm), in which Aikens J said:
"The concept of 'common interest' privilege derives from *Jenkyns v Bushby*, a decision of Kindersley V-C. He held that a case for the opinion of counsel, prepared in relation to separate litigation for the benefit of the predecessor in title to the defendant in the action, but after the present dispute had arisen, was privileged from production in the later action. The concept was developed in the Court of Appeal's decision in *Buttes Gas and Oil Co v Hammer (No 3*) [1981] 1 QB 223. Brightman LJ expressed the proposition of law to which he gave assent in this way: "…if two parties with a common interest and a common solicitor exchange information for the dominant purpose of informing each other of the facts, or the issues, or advice received, or of obtaining legal advice in respect of contemplated or pending litigation, the documents or copies containing that information are privileged from production in the hands of each".
Thus Aiken J added: "where a communication is produced by or at the instance of one party for the purposes of obtaining legal advice or to assist in the conduct of litigation, then a second party that has a common interest in the subject matter of the communication or the litigation can assert a right of privilege over that communication as against a third party. The basis for the right to assert this "common interest privilege" must be the common interest in the confidentiality of the communication".

27 *Cross &Tapper on Evidence*, 9th ed., p.438.

28 At p.611.

> "that it suggests a privilege pertaining to litigation, whereas it is clear that the privilege covers communications between the client, his agent, and his professional legal adviser, *even when no litigation is pending or contemplated*."

67. The last part of that statement (which accurately described the law as it then existed) needs to be modified in the light of subsequent case law. The distinction between 'litigation privilege' and 'legal advice privilege' has become sharper.

68. The position now seems to be that 'litigation privilege' must pertain to litigation whereas 'legal advice privilege' is broader and covers communications between lawyers and their clients in all areas where advice might be given by a professional legal adviser as to what "should prudently and sensibly be done in the relevant context" [per Taylor LJ in ***Babebel v Air India*** [1988] Ch.317, and see ***Three Rivers DC (2004)***[29] [2004] UKHL 48 [para.62].

69. In ***Winterthur Swiss Insurance Company v AG (Manchester) Limited*** [2006] EWHC 839 (Comm), Mr Justice Aikens summarised the differences between LP and LAP as follows:

> "67. The cases have developed a distinction between two sub-types, or "sub-heads"[30] of "legal professional privilege". In the earliest cases, the privilege from compulsory production was confined to information (principally documentary) that was created where legal proceedings were in contemplation. That type of legal professional privilege has become known today as "litigation privilege". But, in two landmark cases in 1833, Lord Brougham LC held that legal professional privilege extended to communications where legal advice was sought and given when no litigation was contemplated.[31] That sub-type of legal professional privilege has become known today as "legal advice privilege".
>
> 68. The rationale for the first sub-type (i.e. "litigation privilege") rests, in modern terms, on the principles of access to justice, the proper administration of justice, a fair trial and equality of arms. Those who engage in litigation or are contemplating doing so may well require professional legal advice to advance their case in litigation effectively.[32] To obtain the legal advice and to pursue adversarial litigation[33] efficiently, the communications between a lawyer and his client and a lawyer and a third party and any communication brought into existence for the dominant purpose of being used in litigation must be kept confidential, without fear that what is said or written might be disclosed. Therefore those classes of communication are covered by "litigation privilege".[34]
>
> 69. The rationale for the second sub - type of privilege, (i.e. "legal advice privilege"), is that it advances the rule of law.[35] Citizens, corporations and other legal entities need to know what the law is so that they can decide what they can and cannot do and so manage their affairs according to law. If a citizen or corporation is to obtain advice on his legal rights and obligations, the lawyer consulted must be given all the relevant facts so as to give effective advice. Many cases have concluded that all the relevant facts will not necessarily be given unless they are imparted in confidence to the lawyer and the lawyer is under a duty to keep that information and his advice confidential. To protect that confidentiality and so advance the rule of law, the cases have developed the rule that communications between

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29 Also known as *Three Rivers DC (No.6).*

30 The phrase of Lord Carswell in *Three Rivers DC v Bank of England (No 6)* [2005] 1 AC 610 at para 105.

31 *Greenough v Gaskell* (1833) 1 M&K 98 at 103*; Bolton v Liverpool Corporation* (1833) 1 M&K 88 at 94.

32 Several cases have quoted Dr Johnson's description of the function of lawyers as a "class of the community who, by study and experience, have acquired the art and power of arranging evidence, and of applying to the points at issue what the law has settled. A lawyer is to do for his client all that his client might fairly do for himself if he could". Boswell, *Life of Johnson,* ed. *Birkbeck Hill* (1950) vol 5,p 26.

33 "Litigation privilege" cannot be relied on in legal proceedings that are not "adversarial", per the majority of the House of Lords in: In *re L (A Minor) (Police Investigation: Privilege)* [1997] AC 16.

34 *Three Rivers DC v Bank of England (No 6)* at para 27, per Lord Scott of Foscote.

35 *Ibid. at para 34 per Lord Scott of Foscote,* referring to paras 15.8 to 15.10 of Professor Adrian Zuckerman's book: *Zuckerman's Civil Procedure (2003).*

> lawyers and clients[36] that are generated even when no litigation is contemplated, will not be subject to compulsory production, unless a statutory power expressly or by implication requires it.[37] But "legal advice privilege" does not extend to communications obtained from third parties that are to be shown to the lawyer for the purpose of obtaining legal advice.[38]

70. It is submitted that the distinction between LP and LAP makes sense, partly because the role of law in society has changed (i.e. the trend towards 'positive law'; the creation of numerous statutory offences that have been added to the 'statute book'; and the enactment of civil/regulatory processes). The role of the legal profession has adapted accordingly: lawyers give advice not only in relation to *private* rights and obligations, but also in relation to *public* ones. The criminal justice process is largely adversarial in nature but there are inquisitorial/regulatory components.

Rationale of LPP

71. Legal professional privilege is "not based upon the maintenance of confidentiality": per Lord Carswell, ***Three Rivers DC (2004)***, para.86. That, at least, is the position at common law.

72. The privilege exists to further the interests of justice so that the parties are free to:

> "unburden themselves without reserve to their legal advisers and their legal advisers are free to give honest and candid advice on a sound factual basis, without fear that these communications may be relied on by an opposing party."[39]

73. The same 'freedom' featured in the reasoning of the Court of Appeal in ***Bowman v Fels*** [2005] EWCA Civ 226. The same reasoning justifies the existence of the privilege in criminal proceedings: see also ***Three Rivers DC (2004)*** [2004] UKHL 48, para.28; ***Daniels Corp v ACCA*** [2002] 192 ALR 561, and see ***R v Derby JJ ex.p.B*** [1996] AC 487; ***Kelly v Warley JJ*** [2007] EWHC 1836 (Admin).

Is LPP absolute?

74. In ***Three Rivers DC (2004)***, Lord Scott described LPP as absolute in that it cannot be overridden by some supposedly greater public interest, and thus no balancing exercise has to be carried out by the court once the criteria for establishing the existence of LPP are met [para.25]. To that extent, the privilege is as absolute as any other entitlement. LPP either exists or it does not: there is no discretionary component that empowers a court to grant or to withhold LPP.

75. But the boundaries of LPP are not absolute. Case law has played a significant role in setting and re-determining the boundaries of the privilege, and in this connection, the

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[36] In ***Three Rivers DC v Bank of England (No 5) [2003] QB 1556, the*** Court of Appeal held that, in the case of a corporate client, in relation to "legal advice privilege" the privilege could not attach to communications to the legal adviser by either employees who were not part of the directing mind and will of "the client" or by others who were not "the client".

[37] ***R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*** [2003] 1AC 563.

[38] ***Waugh v British Railways Board*** [1980] AC 521 at 541 – 2, per Lord Edmund – Davies. See also: Three ***Rivers DC v Bank of England (No 5)*** [2003] QB 1556 at paras 19 and 21 per Longmore LJ, giving the judgment of the court. The House of Lords dismissed a petition to appeal this decision and refused to consider its correctness in ***Bank of England (No 6).***

[39] Per Bingham LJ (as he then was) in ***Ventouris v Mountain*** (1991)

courts find the point of balance between two opposing imperatives, namely, making the maximum relevant material available to the court of trial, and avoiding unfairness to individuals by revealing confidential communications between their lawyers and themselves: per Lord Carswell in *Three Rivers DC (2004)* [para.86]. There is an obvious public interest in ensuring that a party deserving of a just result, or remedy, get it.

76. LPP can be overridden by primary legislation (*Morgan Grenfell Ltd., v Special Commissioner of Income Tax* [2003] 1 AC 563; [2001] EWCA Civ 329, CA; but not, it seems, by secondary legislation see *Kelly v Warley JJ* [2007] EWHC 1826 (Admin).

77. Even primary legislation will not be taken to override LPP in the absence of express language or by necessary implication to that effect (see *Bowman v Fels*): "the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual" (per Lord Hoffman, *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115.

Litigation Privilege

78. 'Litigation privilege' – as the expression suggests – pertains to litigation. The scope of that privilege was concisely stated by Aikens J in *Winterthur Swiss Insurance Company v AG (Manchester) Limited* [2006] EWHC 839 (Comm), as follows:

> "Litigation privilege" extends, in time, to information (which must include information stored in electronic form as well as in documentary form) which is produced either during the course of adversarial (as opposed to inquisitorial or investigative) litigation, or when such litigation is in contemplation. The privilege obviously covers legal advice given by a lawyer to his client for the purposes of such existing or contemplated litigation. It also extends to communications between the lawyer and his client and the lawyer and third parties, provided that those communications are made for the sole or dominant purpose of obtaining legal advice or conducting that litigation.[40] In deciding whether a communication is subject to "litigation privilege", the court has to consider objectively the purpose of the person or authority that directed the creation of the communication.[41]

79. Litigation privilege is a category[42] of legal professional privilege (LPP) that enables a client to keep confidential all communications made between himself and his professional legal adviser, as well as communications between that adviser and a third party (but only if certain specific conditions are met,[43] and see para.83 of this handout). Thus both the information given by a third party, and the identity of the person supplying it, are confidential and privileged: *China National Petroleum Corp* [2002] EWHC Ch60, and see *Kelly v Warley JJ* [2007] EWHC 1836 (Admin).

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40 *Grant v Downs* [1976] 135 CLR 674, per Barwick CJ (dissenting in the result) at page 677; *Waugh v British Railways Board* [1980] AC 521; *Three Rivers DC v Bank of England (No 6)* at paras 100 to 102 per Lord Carswell.

41 *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027 at 1037 per Slade LJ, with whom Woolf LJ and Sir George Waller agreed.

42 In *Three Rivers DC* (2004), HL, Lords Carswell described LPP as a single integral privilege "whose sub-heads are legal advice privilege and litigation privilege" [para.105].

43 There has been much discussion about whether legal advice privilege [LAP] protects communications between the litigant and third parties: see Lord Scott in *Three Rivers DC (2004)*, para.29. In cases to which s.10 PACE 1984 does not apply, the answer seems to be that LAP does not protect third party communications. Communications between litigants and third parties are protected by L.P. if three conditions are met: (a) litigation must be in progress or in contemplation; (b) the communications must have been made for the sole or dominant purpose of conducting that litigation; (c) the litigation must be adversarial, not investigative or inquisitorial.

80. In *Kelly v Warley JJ* [2007] EWHC 1836, Laws LJ made the point that litigation privilege can arise "without the involvement of any legal adviser. A litigant in person enjoys it" [para.18].

81. For the purposes of PACE 1984 [s.10(1)(b)], the communications must be made "in connection with or in contemplation of legal proceedings and for the purpose of such proceedings".

82. Again for the purposes of PACE 1984, the privilege extends to items "enclosed with or referred to in such communications" and which were made for the purposes stated above [s.10(1)(c)(ii), PACE 1984].

83. For cases other than those to which PACE applies, the authorities suggest:[44]

    a. That litigation privilege attaches to communications made for the sole or dominant purpose of conducting litigation, and

    b. The litigation must relate to proceedings that are adversarial in nature – not investigative or inquisitorial: see ***Re L*** . Note that 'legal advice privilege' is not similarly restricted: see *Three Rivers DC (2004)*. There is ample authority for the proposition that litigation privilege is a "creation of adversarial proceedings and it cannot exist in the context of non-adversarial proceedings": see ***Re L*** [1997] AC16, HL, and *Three Rivers DC (2004)*, and see "*The Modern Law of Evidence*", Professor Adrian Keane, 6th ed., p.643.

    c. Litigation privilege is restricted to proceedings in a court of law: see *Three Rivers DC (2004)* [2004] UKHL 48

84. Note that legal *advice* privilege affords wider protection:[45] see *Three Rivers DC (2004)*, para.105.[46]

Legal Advice Privilege [LAP]

What is legal advice privilege?

85. 'Legal advice privilege' covers communications between lawyers and their clients in all areas where advice might be given by a professional legal adviser as to what "should prudently and sensibly be done in the relevant context" [per Taylor LJ in *Babebel v Air India* [1988] Ch.317, and see *Three Rivers DC (2004)* [para.62].

86. LAP does not exist where advice lacks a "relevant legal context". One test for determining whether such a context exists is to determine whether the advice "relates to the rights, liabilities, obligations or remedies of the client, either under private law or

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[44] See *Anderson v Bank of British Columbia (*1876) 2 Ch.D 644; *Southwark and Vauxhall Water Co. v Quick* (1878) 3 QBD 315; and *Wheeler v Le Marchant* (1881) 17 Ch.D. 675; see also *Three Rivers DC (2004)* [2004] UKHL 48, paras.96-101.

[45] The ambit of legal advice privilege appears to embrace "matters that come within the ordinary scope of professional employment" [*Greenough v Gaskell* (1833) 1 My&K98], or matters that fall within the ordinary course of the solicitor's business: see *Minter v Priest* [1929] 1 K.B.655.

[46] Lord Brown described the ambit of legal advice privilege in very broad terms: *Three Rivers DC (2004)* [2004] UKHL 48, at para.120. See also the short article by Joanne Butler, Harbottle & Lewis, "Three Rivers and Privilege": http://www.harbottle.com/hnl/pages/article_view_hnl/1723.php.

under public law".[47] If the answer is in the negative, then LPP probably does not attach itself to such advice: see Lord Scott in *Three Rivers DC (2004)* [para.38]. For example, a law graduate who sought the advice of a practising barrister about joining an Inn of Court would not have done so in a 'relevant legal context'. But, if the same graduate sought the advice of the same solicitor about his failure to be admitted to the Inn, and whether he could judicially review the Inn's decision to reject his application, then the advice would have a 'relevant legal context'.

87. LAP attaches to legal advice that is given to a client whether or not it is in connection with pending court proceedings: *R v Derby JJ ex.p. B* [1996] AC 487, p.510; and see *Henry v Henry* [2007] NIQV 67.

88. A feature of 'litigation privilege' it that it cannot be claimed in order to keep confidential a report prepared for use in non-adversarial proceedings: litigation privilege pertains to proceedings in a court of law. But, 'legal advice privilege' is not similarly restricted.

What does "legal advice" mean?

89. In *Three Rivers DC (2004)*, the Court of Appeal said that the natural meaning of "legal advice" is "advice in relation to law" and not "advice given by a lawyer" [2004] EWCA Civ 218.[48] The primary object of the client/lawyer relationship was to obtain assistance that required knowledge of the law. Thus, LAP attached to communications between solicitor and client when the ***dominant purpose*** is the ***obtaining of advice and assistance in relation to legal rights and obligations***. Note that the Court of Appeal appears to have focussed on *private* rights and obligations.

90. On appeal to the House of Lords,[49] their Lordships held that legal advice privilege must also cover advice and assistance in relation to *public* law rights, liabilities and obligations.

91. On the facts of *Three Rivers DC (2004)*, the Court of Appeal concluded that advice as to how the Bank should present its case to the Inquiry (i.e. "presentational purposes"), did not qualify for privilege. However, the House of Lords found in favour of the Bank: given that much of the Bank's focus had been on its public legal rights and obligations, the advice given to it its legal advisers attracted LPP.[50]

Who is "the client" for the purposes of Legal Advice Privilege?

92. This question is particularly relevant in relation to organisations and corporate entities.

93. In *Three Rivers DC (No.5)* [2003] QB 1556, the Court of Appeal held that information provided to solicitors by an employee of the client, stood in the same position as information provided by an independent third party.

94. Put shortly, documents communicated or produced to a legal adviser by a third party, for the purpose of giving legal advice, and where adversarial litigation is not even contemplated, are not protected: consider *Wheeler v Le Marchant* (1881) 17 Ch D 675. In other words, source material, or pre-existing material (e.g. reports, invoices, contracts)

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47 This might include advice given for presentational purposes: and see the opinion of Lord Carswell at para.112 in *Three Rivers DC (2004).*

48 Paragraph 10.

49 *Three Rivers DC (2004)* [2004] UKHL 48.

50 *Three Rivers DC (2004)* [2004] UKHL 48, at para.84

provided to a legal adviser, or obtained by him, would not be privileged. This is in marked contrast with 'litigation privilege' by which both the information given, and the identity of the person supplying it, are confidential and privileged: *China National Petroleum Corp* [2002] EWHC Ch60, and see *Kelly v Warley JJ* [2007] EWHC 1836 (Admin).

95. It follows that if the Court of Appeal in *Three Rivers DC (No.5)* is correct, then employees, officers, and ex-officers of a company who provide information to a legal adviser acting on behalf of the 'client', fall outside the lawyer/client relationship, with the result that communications between them are not protected by LAP.

96. In the subsequent action, *Three Rivers DC (2004)* [2004] UKHL 48, the House of Lords declined to express views about whether the Court of Appeal was correct or whether it had gone too far [paras.46-48].

97. Unsurprisingly, this state of affairs has caused much concern. In a thorough and detailed article regarding this point (*Legal Advice Privilege and the Corporate Client*), Ho Hock Lai suggests that:[51]

> "On a wide reading, it appears that legal advice privilege cannot be claimed by an organisation over reports created internally by its employees for the purpose of allowing the organisation to receive legal advice from its lawyers. This view has rightly attracted strong criticisms in England for an alleged failure to reflect the practical realities of corporate life."

98. What is the position of a Money Laundering Reporting Officer who seeks independent legal advice regarding a particular transaction in the context of the money laundering legislation, and in circumstances where the MLRO relies on information supplied to him/her by a colleague? Is the information supplied by the latter protected by LPP?

99. In her helpful article, Joanne Butler (*Harbottle & Lewis LLP*)[52] makes the following comments (emphasis added):

> "…Communications between a lawyer and an organisation on a project tend to involve many people. Even if an in-house lawyer is the main point of contact, what happens if the managing director, commercial director or finance director are also in communication with external lawyers from time to time? It all depends on whether these directors fall within the definition of "client". Particular problems also arise for in-house lawyers, as whilst communications between in-house lawyers and external lawyers will usually be privileged, communications between in-house lawyers and other members of staff may not be.
>
> The larger the company, the larger the potential problem. Companies act through their staff e.g. through the human resources department in respect of employment issues. A number of staff may be involved in interviewing other members of staff, collecting documents, and collating information for legal advisers. ***As increasing numbers of staff become involved in matters on which legal advice is sought, so a greater proportion will be found not to be the instructing client. The documents produced by them, which could end up being 'hostages to fortune", will therefore be disclosable***.

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51 "*Legal Advice Privilege and the Corporate Client*"; Singapore Journal of Legal Studies [2006] 231–263

52 http://www.harbottle.com/hnl/pages/article_view_hnl/1723.php. The author is immensely grateful to Ms Butler for permitting him to reproduce these paragraphs in this handout.

Questions arise, for example, as to how an internal investigation into an alleged disciplinary matter be viewed in respect of privilege. Litigation privilege may be unavailable because, at this stage, the employer may not know whether there are any grounds to bring proceedings against the employee under investigation. If so, documents produced internally collating evidence would not be privileged. Letters from the client to its legal adviser asking for advice on how best to deal with the situation would, however, be privileged under the legal advice head.

100. Ms Butler offers the following "practical tips" to organisations [emphasis added]

* Establish at the outset, before giving instructions to and receiving advice from external lawyers, the nominated person/s who/m external lawyers are to deal with and who will, therefore, be "the client". Avoid naming an artificially wide range or large number of individuals.

* Ensure that there is a clear chain of communication between you and colleagues within your company who are seeking legal advice. Document who is giving you instructions.

* Restrict the dissemination of information as much as possible on a need-to-know basis. Ensure that all documents containing information relevant to seeking legal advice are created by (or at least with the express clearance of) you/"the client" and are not created by third party employees.

* ***Discourage employees of a company, who are reporting to you/ "the client" on the subject of which legal advice is being sought, from copying in anyone else within (or outside) the company, as the copy is unlikely to be protected from disclosure.*** (Even if the original advice is privileged, a copy taken of it may not be if it is created for a non-privileged purpose.) Care needs to be taken when using the "reply to all" button on e-mails.

* If it becomes necessary to disclose privileged material to a third party, ensure that it is provided on confidential terms. (If advice is being given to members of a multi-disciplinary team, for example on a corporate transaction, it will frequently be necessary for the legal advice to be copied to other members of the team.)

* ***If privilege does not apply, consider whether the information can be given orally rather than in writing. For example, if instructing a non-legal expert (and litigation privilege does not apply), a possible solution is for the expert to report orally to you and you then build that into your advice.***

* Encourage members of the company, when they are reporting to "the client", to mark all communications regarding obtaining legal advice as "privileged and confidential". Whilst labelling of communications in this way is not conclusive as to whether or not they attract privilege, it is helpful and may guard against inadvertent disclosure.

* Explore IT solutions such as the automatic diversion of e-mail from lawyers into separate folders.

* ***Warn of the dangers of making manuscript notes on privileged documentation, as such notes are unlikely to be privileged.***

* Discourage the analysis or discussion of legal advice in written documents, including memoranda, e-mails and minutes.

* Educate staff on the risks inherent in document creation. Communications should be drafted keeping in mind the possibility that they may be used in court, so consider whether it is really necessary to create a potentially damaging document in the first place.

* As e-mail is used as an informal communication method that carries the inherent risk of indiscreet remarks being made, companies should consider a formal policy on the permitted use of e-mail or other instant messaging services."

Matters common to LP and LAP

Documents not brought into existence for the purpose of (or in contemplation) of litigation

101. *Ventouris v Mountain* decided that LPP did not attach to an 'original' document which did not come into existence for (i.e. was created for) the purpose of pending or contemplated litigation, ***unless the document betrays advice given by the professional legal adviser to his/her client***. In the latter situation, it is of course 'legal advice privilege' that acts as a bar to disclosure.

102. The position is the same regardless of whether the document is a copy, or a translation of the original/copy: *Sumitomo Corporation v Credit Lyonnaise Rouse Ltd* [2001] EWCA Civ 1152.

103. Note that even if LP or LAP is not available, there might be circumstances in which disclosure can be successfully resisted by asserting the privilege against self-incrimination (PSI): consider *OTL* [2006] EWHC 1226 Ch., *C Plc v P* [2007] EWCA Civ 493; and *Kensington International v Vitol and others* [2007] EWHC 1632 (comm.).

Disclosure, LPP, and case-management issues

104. The question arises whether LPP can be claimed in criminal proceedings if the defence is directed by the Court (and/or by statute) to provide a statement of its case (e.g. a Defence Case Statement) or to disclose the names and particulars of witnesses it proposes to call.

105. In *Kelly v Warley JJ* [2007] EWHC 1836 (Admin), a Deputy District Judge made a direction at a case management hearing in the following terms: "The defence provide details within 14 days to the prosecution…of their witnesses to enable the prosecution to consider any issues in relation to making applications to admit bad character information under the provisions of the Criminal Justice Act 2003".

106. Section 6C of the CPIA1996 was not in force. The question in the case was whether the Magistrates Court had the legal power to make the direction it did. The answer to this question turned on two others: (i) whether the direction made by the deputy district judge required the claimant to disclose material which was subject to LPP or LP enjoyed by him, and (ii) whether, if it did, the deputy district judge possessed the power to make such an order and, in particular, whether the Criminal Procedure Rules authorised him to do so.

107. The Court held that litigation privilege attaches to the identity and other details of witnesses intended to be called in adversarial litigation, civil or criminal, "whether or

not their identity is the fruit of legal advice".[53] The Court added that litigation privilege would attach to the identity of the witnesses "just as surely whether the claimant were represented or not".

108. The Court identified a distinction which exists between (i) an *unconditional order* for the disclosure of the identity and particulars of witnesses that a party to the proceedings proposes to call (infringes LPP in the absence of a power provided by primary legislation), and (ii) an order that procedural sanctions may be imposed if advanced disclosure is not made (no infringement of LPP – even in the absence of a power provided by primary legislation).

109. Three paragraphs in the judgment of the Court in *Kelly v Warley JJ* are particularly noteworthy:

> 32….. a power to require disclosure of privileged material may only be characterised as doing no more than regulating practice and procedure if it forms part of a code (I mean only a series or group of provisions – "code" is not a term of art) having that purpose. If such a power is open-ended, not coloured and confined by moderate procedural sanctions for breach, it is likely to be regarded by the courts as an attempt to infringe privilege as such; and that will be unlawful unless strictly authorised by express provision or necessary implication in primary legislation.….
>
> 33…I have referred to "moderate" procedural sanctions. "Proportionate" might be a better term. In my judgment this is an important condition to be met if a rule is to be treated as no more than a procedural regulation. In principle such a rule must provide for no more than might reasonably be required for the proper working of such a regulation. If it goes further, it will not be categorised as procedural only. It will be liable to be treated as purporting to change the general law of evidence. Unconditional orders for disclosure of privileged material plainly exceed this boundary. So, I think, would a rule which absolutely prohibited a party – with no discretion in the trial court – from calling a witness whose identity he had not disclosed in advance. Such a rule would exceed the requirements of a reasonable regulatory regime. Though their validity is not of course dependent on it (since they are found in main legislation) the forthcoming measures contained in ss.6C and 11 of the 1996 Act, together with the code to be promulgated under s.21A, are true regulatory measures.
>
> 34. I return to the direction in the present case. It was unconditional. It is true, as I have said, that CrPR Part 3.5(2) permits the court to specify the consequences of failing to comply with a direction. But that is an open-ended provision, which is itself, I think, a problematic circumstance in this context. Where an order apparently infringes LP or LPP, absent a justification in main legislation I think it can be saved only by a case management code having the characteristics I have described, and not a regime of judicial discretion."

110. Save, perhaps, for (d) below, it would seem that LPP cannot be claimed as reasons for not complying with the following requirements:

    a. The disclosure of particulars of an alibi: s.6A(2), CPIA 1996;
    b. The provision of a Defence Case Statement: s.6A, CPIA 1996;
    c. The provision of an updated Defence Case Statement: s.6B, CPIA 1996
    d. [Notification of names of experts instructed by accused: – when/if this provision is brought into force: s.6D, CPIA 1996]

[53] Paragraph 20 of the judgment. A point supported by earlier authority: *China National Petroleum Corp* [2002] EWHC Ch 60.

e. [Witnesses that the defence propose to call at trial – when/if this provision is brought into force: s.6C, CPIA 1996]

f. The provision of a 'defence response' to a *Statement of Information*: s.17 POCA 2002

g. An order for the defendant to provide information relevant to confiscation proceedings: s.18 POCA 2002.

111. The case of *Kelly* is of considerable importance. Typically, the party asserting LPP does so in the hope that the material will not form part of the evidence in the proceedings which are pending or contemplated. But, in the context of the kind of directions that have been mentioned in the preceding paragraph, the party holding the material does wish to introduce it into evidence: it is merely a question of when (for whatever reason) that material is deployed evidentially.

112. Section 6D(1) of the CPIA1996 might prove problematic should it come into force. That provision reads (emphasis added):

> "If the accused ***instructs a person*** with a view to his providing any expert opinion ***for possible use as evidence*** at the trial of the accused, he must give to the court and the prosecutor a notice specifying the person's name and address."

113. Section 6D is not a provision that requires the defendant merely to disclose the identity of an expert whose opinion the defendant is minded to use evidentially at trial. The defence must comply with the section even if it decides not to use the expert's opinion, or if it decides not to ask the expert for a report at all.

114. It is submitted that the subject matter of s.6D is material that would otherwise be protected from disclosure by LPP. It is further submitted that the decision of *Comfort Hotels Ltd* [1988] 3 AER 53 (on which the Court in *Kelly v Warley JJ* based a significant part of its reasoning) is of limited assistance on this point. In *Comfort Hotels*, a summons had been issued under RSC Order 38 r.2A for an order that the parties be required to exchange written statements of the evidence which they intended to lead at the trial: s.6D of the CPIA1996 is not of that ilk.

115. Note also the problems that can be encountered by defendants who seek to explain away their failure to mention relevant facts when interviewed, by testifying to the advice that had been given to them by their legal adviser [s.34 of the Criminal Justice and Public Order Act 1994]: see ***R v Loizou*** [2006] EWCA Crim 1719; and see ***R v. Bowden*** (1999) 2 Cr. App.R.176; *Wishart* [2005] EWCA 1337. In *Loizou*, the Court of Appeal said [emphasis added], "….a defendant who merely gives evidence that he made no comment on the advice of his solicitor does not thereby waive his privilege. (A justification for this rule can be found in *Beckles* [2004] EWCA Crim 2766, paragraph 43). Secondly, a defendant (or his solicitor if called) who gives evidence of what was said to the solicitor in response to a prosecution allegation of recent fabrication does not thereby waive privilege".

116. But in *Bowden*, the Court of Appeal made it clear that

> "if (as here) the defence elicit evidence at trial of a statement made by a defendant or his solicitor pre-trial of the grounds on which legal advice had been given to answer no questions, the defendant voluntarily withdraws the veil of privilege which would otherwise protect confidential communications between his legal adviser and himself, and having done so he

cannot resist questioning directed to the nature of that advice and the factual premises on which it had been based." (Underlining added)

117. The reason for the distinction was explained by the Court of Appeal in *Loizou* as follows:

> "83. There is a distinction between having to reveal what was said to a solicitor to rebut an allegation of recent fabrication and volunteering information about the legal advice over and above stating that the refusal to answer questions was as a result of receiving such advice. In the former scenario the reason privilege has not been waived is there is no way of dealing with the allegation other than by revealing what was said. In the latter scenario, while the effect may be to enable an allegation of recent fabrication to be made, this is the consequence of the voluntary provision by or on behalf of the defendant of information which because of its partial nature is misleading."

118. It must be remembered that although the object of ss.34 to 37 CJPOA was "to weaken the protection which criminal defendants had previously enjoyed against the drawing of inferences adverse to them from such failures and refusals in the circumstances specified, they do not affect the law on legal professional privilege", per Hooper LJ in *Loizou*.[54]

The Privilege against Self-Incrimination [PSI]

Historical perspective

119. An attractive historical account of the history of the privilege against self-incrimination is given by Professor Richard Helmholz.[55] According to Helmholz, the privilege emerged in the 17th century when English judges used the maxim "*nemo tenetur prodere se ipsum*" (no man is required to betray himself) to limit the jurisdiction of the ecclesiastical courts to interrogate persons who were suspected religious dissenters. It did so by requiring the Court of High Commission to comply with the maxims that it professed to follow. Maxims other than "*nemo tenetur prodere se ipsum*", included "*nemo punitur sine accusatore*" (no one is punished in the absence of an accuser), and "*nemo tenetur detegere turpitudinem suam*" (no one is bound to reveal his own shame).

120. Helmholz states that a plausible hypothesis is that the privilege began "as a limitation on the religious duty to confess".[56]

121. If the origins of PSI are traceable to a power-struggle for jurisdiction, and to protect the accused from confessing to what may or may not be a 'true bill', or to protect the accused from the grip of good or bad law, then PSI exists on shaky ground.

122. A stronger justification for PSI is that it exists to protect an accused who might otherwise volunteer – or be compelled to provide – information in circumstances where that information is in fact false/unreliable or it has been obtained by unfair means. PSI is often equated with the "right to silence".

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54 Para.73 of the judgment.

55 *The Privilege Against Self Incrimination*, University of Chicago Press, 1997.

56 See also, "*The Privilege Against Self-Incrimination: a historical tour of the privilege as we know it*": 2005"; Sally Ramage: http://www.indymedia.org.uk/en/2005/09/323584.html

123. In the opinion of the Queensland Law Reform Commission (December 2004), PSI and the "right to silence" are not co-extensive:

> "[The privilege] is merely one element of the broader right to silence, which refers to a variety of immunities that differ in their nature, origins, incidents, and importance" [chp.2.1]

124. In *R. v Director of Serious Fraud Office, Ex parte Smith* [1993] AC 1, pp.30-31, Lord Mustill described "six rights of silence":

> "(1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.
>
> (2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.
>
> (3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.
>
> (4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.
>
> (5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.
>
> (6) A special immunity . . . possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial."

125. Both the QLRC and Sally Ramage make the point that, in practice, PSI lacked clout until defendants acquired the right to be represented, and for their representative (counsel) to question witnesses and to address the court.

126. The QLRC identified the following principal arguments in support of PSI, as well as those for abrogating it:[57]

In support of PSI

a. To prevent abuse of power;
b. To prevent conviction founded on a false confession;
c. To protect the accusatorial system of justice;
d. To protect the quality of evidence;
e. To avoid the "cruel trilemma":
    i. D refuses to disclose information and incurs a penalty/sanction for not doing so;
    ii. D provides the information and risks incriminating himself;
    iii. D lies rather than discloses the truth.
f. To protect human dignity and privacy;

In support of abrogating PSI

a. To enhance the powers of the prosecution to collect evidence;
b. To enhance the rights of victims.

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[57] And see the excellent article by Michael Redmayne "*Rethinking the Privilege Against Self-Incrimination*" Oxford Journal of Legal Studies/2007, Volume 27/Issue 2 - OJLS 2007 27 (209).

PSI in the new millennium

127. A summary of issues and propositions relating to PSI is set out below:

When may PSI be asserted?

(i) Tests seem to vary:

a. When there are reasonable grounds to apprehend danger to the witness from his being compelled to answer: ***R v Boyes*** (1861): ***R v Garbett*** (1847); this was the test applied by the Court of Appeal in ***R v Khan*** (and see ***R (CPS) v Bolton Magistrates Court*** [2004] 1 WLR 835 at para. 24 p845).

b. The witness must satisfy the court that there is a reasonable probability that his answer/disclosure will or may incriminate him: ***Re Genese*** (19886) 3 Marr 233

c. There must be greater than a "remote or insubstantial risk" of prosecution: ***Rio Tinto Zinc Corp v Westinghouse Electric Corp*** [1978] 1 All ER 434, [1978] AC 547, [1978] 2 WLR 81

d. "More than a fanciful possibility": ***Rio Tinto Zinc.***

e. No PSI if prosecution is "so improbable as to be virtually without substance": ***Rio Tinto Zinc.***

f. There must be more than a bare possibility of legal peril: ***Re Reynolds*** (1882);

g. Section 14(1) Civil Evidence Act 1968:

> "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—
>
> (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 husband or wife of that person to proceedings for any such criminal offence or for the recovery of any such penalty."

Other points relating to PSI

(ii) PSI is not available if a witness is already at risk of prosecution; or if the questioning is related to the truth of a plea of guilty to a criminal charge: see ***R v Khan*** [2007] EWCA Crim 2331.

(iii) PSI exists if an item of information is a "link in the chain of proof": ***Paxton v Douglas*** (1812): ***Rio Tinto Zinc***; and see ***In The Matter of OTL*** [2006] EWHC 1226 (Ch).

(iv) The exercise of the privilege does not, of itself, amount to an admission of wrongdoing;

(v) A defendant may decline to specify the items in respect of which he asserts PSI if to do so, might itself tend to incriminate him; ***Sociedade Nacional Angola v Lundqvist*** [1991] 2 QB 310;

(vi) A claim of PSI is not evidence of guilt: *Lundqvist*; cf. *Rank Film Distributors v. Video Information Centre* [1982] AC 380

(vii) PSI does not extend to criminal offences or penalties under foreign law: *Arab Monetary Fund v Hashim* [1989] 3 All ER 466; and per Waller LJ in *V v C* [2001] EWCA Civ 1509; but see *R v Khan* [2007] EWCA Crim 2331 which considered the possible implications of Article 6 ECHR.[58]

(viii) However, re foreign law, note that a UK court has <u>discretion</u> not to order production of documents.

(ix) PSI does not extend, in the case of a company, to incrimination of its office holders: *Lundqvist*; *Rio Tinto Zinc*; [privilege is that of the person claiming it] and see *Kensington International v Vitol and others* [2007] EWHC 1632 (Comm).

(x) Less clear, is whether an assertion by the witness that he has a defence is inconsistent with asserting PSI: consider *Lundqvist*;

(xi) PSI might be lost if, before it was asserted, the material was put into the hands of a 3rd party, or it is put into the public domain:

a. *Quaere* whether PSI is lost by delivering material to the Supervising Solicitor in connection with the execution of a 'search order': *Den Norske Bank A.S.A. v Antonatos and Another* [1999] QB 271; see also *C Plc v P* [2007]

b. *Quaere* whether PSI is only lost if the privilege is not asserted before the items are produced to the court: *Warman International Ltd and Others -v- Envirotech Australia Pty Ltd and Others* (1986) 57 ALR 253; *OTL case.*

c. PSI should be asserted at the earliest opportunity.

(xii) In civil proceedings, the privilege applies notwithstanding the protection in criminal proceedings of s.78 PACE 1984;

<u>Who decides whether PSI is available?</u>

(xiii) It is for the judge to say whether there is reasonable grounds to apprehend danger to the witness, of prosecution: *Re Westinghouse Electric Group* [1977] 3 All ER 717.

(xiv) Reasonable grounds may appear from the circumstances of the case; or from matters put forward by the witness: *re Westinghouse Electric Corporation.*

(xv) Latitude should be given to a defendant to judge for himself the effect of any particular question.

(xvi) But a witness must not trifle with the courts: *Adams v Lloyd*. How can one tell if the claim is genuine?

(xvii) PSI must be claimed by sworn evidence: *OTL Case*; consider *Kensington International v Vitol and others* [2007] EWHC 1632 (Comm).

[58] This case, in the context of foreign proceedings, is discussed below.

(xviii) An affidavit claiming privilege is not conclusive that there is a reasonable probability that his answers/disclosure will or may incriminate him: ***R v Boyes.***

Is PSI an absolute privilege?

(xix) PSI is a common law right, which is not absolute, in the sense that statute may derogate from it:

Brown v Stott (2002) 31 AC 681: [2001] 2 WLR 817, PC
OTL Case;
R v Allen (No.2) [2001] 4 All ER 768 HL
Note Art.6, ECHR;

(xx) If PSI is engaged, the protection is absolute and the judge cannot override it: *Rank Film Distributors v. Video Information Centre* [1982] AC 380

Theft Act 1968, s.31: abrogation of PSI

(xxi) A conspiracy to commit a Theft Act offence is not "an offence under this Act":

Lundqvist; applying *Cuthbertson* (re the MDA 1971).

(xxii) *Khan v Khan* [1982] 2 All ER 60: the possibility of a prosecution for forgery (not an offence under TA1968) could not be excluded, but any prosecution would be in substance a prosecution in relation to the theft of the money, and therefore "proceedings for an offence under the Act" - the privilege did not apply.

(xxiii) Consider the impact of rules giving the courts greater jurisdiction (than hitherto) to try offences in England and Wales (last act rule, etc);

Fraud Act 2006, s.13: abrogation of PSI

(xxiv) *Kensington International v Vitol and others* [2007]

European PSI v. Domestic PSI

(xxv) European PSI does not apply to self-standing/independent evidence;

(xxvi) In UK law and pre-HRA1998, PSI arguably did extend to self-standing/independent evidence:

AT&T Istel v Tully (lamented in *Rank Film Distributors*);
See now: *C Plc v P* [2007] EWCA Civ 493

(xxvii) Note *Saunders v UK*:

a. "The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused."

b. "[PSI] 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."[59]

(xxviii)In *Thompson Newspapers* (1990), La Forrest J., said:

a. "The fact that derivative evidence exists independently of the compelled testimony means, as I have explained, that it could also have been discovered independently of any reliance on the compelled testimony. It also means that its quality as evidence does not depend on its past connection with the compelled testimony."

b. "What prejudice can an accused be said to suffer from being forced to confront evidence 'derived' from his or her compelled testimony, if that accused would have had to confront it even if the power to compel testimony had not been used against him or her?"

(xxix) *R v Kearns* [2002] EWCA Crim.748 leans in favour of the Strasbourg analysis of PSI; PSI not available if the material is for an administrative purpose, or for use in an extra-judicial inquiry.

(xxx) The remarks of La Forrest J., found favour with the Court in *AG Ref (No.7 of 2000)* [2001] 2 Cr.App.R.286.

a. However, neither *Rank Films*, nor *AT&T Istel*, were referred to in the judgment of the court in *AG Ref (No.7 of 2000);*

b. In *OTL case*, the Chancery Division held that the interests of justice, and the impact of the HRA 1998, required domestic PSI to follow Strasbourg (European) PSI.

c. *C Plc v P* [2007] EWCA Civ 493

<u>Distinction between administrative and judicial determinations</u>

(xxxi) There is a distinction between:

(i) questioning during the course of "extra-judicial inquiries"- see *R. v. Hertfordshire County Council, Ex.p. Green Environmental Industries Ltd and Another*,[60] and

(ii) the use of the material thereby obtained in a subsequent criminal prosecution: see *Saunders v UK.*

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[59] By contrast, oral statements of a suspect made under compulsion, as well as written material brought into existence by him under compulsion, and which tends to incriminate him, is covered by PSI. A number of statutes were amended by s.59, schd.3 of the Youth Justice and Criminal Evidence Act 1999 to give effect to the decision of the EcrtHR in *Saunders*, but the decision did not have retrospective effect in the UK (i.e. prior to the HRA1998 coming into force, and which incorporated much of the ECHR) and see *Lyons, Saunders and others* [2003] Cr.App.R. 24, HL: Per Lord Bingham: "In response to this decision the Attorney General issued guidance to prosecutors, referring to section 434(5) of the [Companies Act 1985] and other statutory provisions to similar effect and indicating that, save in certain situations not relevant for present purposes, prosecutors should not normally use in evidence as part of the prosecution case or in cross-examination answers obtained under compulsory powers. Statutory effect was given to this guidance by section 59 of and Schedule 3 to the Youth Justice and Criminal Evidence Act 1999."

[60] [2000] UKHL11; [2000] 2 AC 412; [2000] 1 All ER 773; [2000] 2 WLR 373

Passing disclosed material to third parties

(xxxii) As a rule, there is no prohibition against disclosing material to a third party, but a criminal court has discretion to exclude evidence otherwise admissible, under s.78 PACE 1984.

R. v. Brady [2005] 1 Cr.App.R. 5, CA; and *Kent Pharmaceuticals Ltd v. Director of Serious Fraud Office* [2005] 1 W.L.R. 1302, CA (Civ. Div).

PSI and material that predates legal proceedings: pre-existing/independent material

128. PSI applies (i) to the oral statements of a suspect made under compulsion, and (ii) to written material brought into existence by him under compulsion, and which tends to incriminate him.

129. Until recently, it seemed to be the law that, in relation to pre-existing documents, PSI operated differently in civil law, and in criminal law.

130. The traditional view was that *in civil proceedings*, PSI applies to pre-existing documents, and therefore a person could assert the privilege when served with a civil 'search order' (formerly an *Anton Piller order*[61]) and thereby keep the material confidential.[62] This is not the case if the same person is faced with a search warrant issued pursuant to statute (e.g. PACE 1984). In his textbook on *Civil Procedure* (2003), Adrian Zuckerman described the difference (if it exists) as "absurd".[63]

131. In Strasbourg jurisprudence, PSI does not extend to self-standing/independent evidence. Thus, in *Saunders v UK*,[64] the Court said:

> 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.

132. Even before the HRA1998 came into force, recent judgments of UK domestic courts have chimed with Strasbourg jurisprudence. Thus, in *R v Kearns* [2002] EWCA Crim.748, the Court said:

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61 See *Anton Piller K.G. v Manufacturing Processes Limited*, [1975] EWCA Civ 12. Lord Denning MR, in classic 'Denning style', said: You might think that with all these safeguards against abuse, it would be of little use to make such an Order. But it can be effective in this way: It serves to tell the defendant that, on the evidence put before it, the Court is of opinion that he ought to permit inspection - nay, it orders him to permit - and that he refuses at his peril. It puts him in peril not only of proceedings for contempt, but also of adverse inferences being drawn against him; so much so that his own Solicitor may often advise him to comply. We are told that in two at least of the cases such an Order has been effective. We are prepared, therefore, to sanction its continuance, but only in an extreme case where there is grave danger of property being smuggled away or of vital evidence being destroyed."

62 The *Anton Piller* jurisdiction was put on a statutory footing by s.7, Civil Procedure Act 1997, but the Act offers the following protection: "This section does not affect any right of a person to refuse to do anything on the ground that to do so might tend to expose him or his spouse to proceedings for an offence or the recovery of a penalty".

63 And see the submissions to like effect made on behalf of the Attorney General *In The Matter of OTL* [2006] EWHC 1226 (Ch); and see now *C Plc v P* [2007].

64 43/1994/490/572; [1996] 23 EHRR 313.

> "[*Attorney-General's Reference (No 7 of 2000)*] [65] came to the conclusion that the *Saunders case* (at paragraphs 68 and 69) recognised a distinction between a statement of a defendant that had been made under compulsion and the production of pre-existing documents or other evidence under compulsory powers.
> 52. The Court concluded (in paragraph 59) that this distinction was valid; jurisprudentially sound and should be followed. In the Court's view legitimate objection might be made to evidence that a defendant had been forced to create by the use of compulsory powers. However if the evidence was already in existence and the only effect of the use of the compulsory powers was to bring such evidence to the attention of the court, then its production could not be so objectionable. That is because the existence and quality of such evidence are independent of any order to produce it that is made against the will of the accused person. Therefore the production of such pre-existing and "independent" evidence could not render a trial unfair and so breach Article 6.
> 53. What conclusions can be drawn from the Strasbourg cases and the UK cases on the scope of the right to silence and the right not to incriminate oneself? In our view the following is clear:
> ….
> (4) There is a distinction between the compulsory production of documents or other material which had an existence independent of the will of the suspect or accused person and statements that he has had to make under compulsion. In the former case there was no infringement of the right to silence and the right not to incriminate oneself. In the latter case there could be, depending on the circumstances."

133. Note also *R v Hundal and Dhaliwal* [2004] EWCA Crim.389, CA., which concerned a prosecution under s.11 of the Terrorism Act 2000. The Court, in dismissing the appeal, approved the passage at paragraph 53(4) in the judgment of Mr Justice Aikens in *Kearns* (above).

134. It therefore seems to be the law of England and Wales that the privilege against self-incrimination (PSI) is limited to testimonial evidence, oral and written: excluded from its application is self-standing evidence not produced under compulsion.[66]

135. In *C Plc v P* [2007] EWCA Civ 493.

> C alleged intellectual property infringements by P. C obtained a civil search order (formerly known as an 'Anton Piller Order') which authorised a computer expert to take charge of the material seized from P's premises. Before the search was carried out, P obtained the advice of a solicitor who attended the premises. The solicitor informed the parties and the Supervising Solicitor, that P would assert PSI in respect of incriminating material which the search might disclose. The search went ahead, and computers were seized and delivered to the computer expert who discovered the allegedly "offending material" stored on one of the computers.

136. The question arose whether P lacked PSI in material that existed *before* the search order was executed, and whether – in any event – he lacked that privilege once the offending material was discovered.

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65 [2001] EWCA Crim 888; [2001] 2 Cr App R 286

66 See *In The Matter of OTL* [2006] EWHC 1226 (Ch); and see now *C Plc v P* [2007] EWCA Civ 493, following *Attorney General's reference (No 7 of 2000*) [2001] 1 WLR 1879 -- having regard to the judgment of Justice La Forrest in *Thompson Newspapers Ltd v Director of Investigation and Research* (1990) 54 CCC 417 – and see *R v Kearns* [2002] 1 WLR 2815.

137. At first instance,[67] Evans-Lombe J held that P had effectively claimed PSI in respect of the material to be produced pursuant to the search order, before the search started, and an objective consideration of the events occurring after the execution of that order did not result in the conclusion that he lost the benefit of it.

138. By so holding, the case of *C Plc* was distinguishable from *O v Z*[68]. Although the facts of the two cases were very similar, in *O v Z* no claim to PSI was made by the Respondent to the search order before the search started, in the course of which the offending material was passed to the independent computer expert for imaging. On that basis, Mr Justice Lindsay held that the suspect had lost his PSI and directed that the offending material be handed over to the police [para.53]. A claim to PSI was made by Z after the offending material had been discovered by the computer expert and after the adjourned return date of the application for the search order. In *C Plc*, P's solicitor had at least raised the prospect that PSI might be an issue.

139. Evans-Lombe J also held that PSI does not extend to material which constitutes freestanding evidence not brought into existence by him under compulsion and which could have come to public notice otherwise than as the result of the exercise of some statutory power to require disclosure enforceable by a court [para.24].[69]

140. Mr. Justice Evans-Lombe[70] summarised the effect of the judgment of Justice La Forest in *Thompson Newspapers Ltd v Director of Investigation and Research* (1990) 54 CCC 417 in these terms:

> "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 ought not to attach to it." [71]

141. The Court of Appeal dismissed the appeal but on different grounds.[72] Longmore LJ said that the court was bound by *Attorney-General's Reference (No 7 of 2000)* [2001] 1 WLR 1879, and since in that case the privilege was held not to extend to documents which were independent evidence then the same must apply to "things" which are independent evidence.

142. Longmore LJ added that even if that were not so, the words "or thing" does not apply to a "thing" discovered in execution of a court order as distinct from a "thing" that is compelled to be produced:

> "[the] 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".

143. Longmore LJ said:

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67 The case was then styled *OTL*
68 [2005] EWHC 238 (Ch).
69 [2006] EWHC 1226 (Ch)
70 [2006] EWHC 1226 (Ch)
71 Note *Attorney General's reference (No 7 of 2000)* [2001] 1 WLR 1879
72 [2007] EWCA Civ 493.

> "36. I would, therefore, conclude in the present case that, 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, there is no privilege in the offending material itself which is material which existed independently of the order. This is essentially the position maintained by Professor Adrian Zuckerman in the first (2003) edition of his work on Civil Procedure, paras 17-9 to 17-13. These paragraphs are repeated in his second edition (2006) where he welcomes the decision of Evans-Lombe J in this case at para. 17-12A.
>
> 37. It follows that even before the enactment of the Human Rights Act 1998, there was no privilege in the material and there could be no bar to the disclosure of the material to the police if it is otherwise right to do so.
>
> 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" from P."

144. Collins LJ did not think that it was necessary to rule on the wider question whether it is open to the Court of Appeal to find as a general rule that there is no privilege in respect of what has been described as pre-existing or independent material, but 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: see Professor Adrian Zuckerman, *Civil Procedure*, 2nd ed. 2006, Chap 17. Sir Martin Nourse agreed with the judgment of Longmore LJ.

145. The impact of *C Plc v P* is likely to be profound, but both the Strasbourg jurisprudence and domestic case law, has moved ever closer to the position set out in *C Plc. v P*: see also *R v Kearns* [2002] EWCA Crim 748.

146. Arguably, some of the issues mentioned above feature in *Kensington International v Vitol and others* [2007] EWHC 1632 (comm.).

147. *Kensington International Ltd v Vitol* is particularly interesting in relation to the interpretation of s.13 of the Fraud Act 2006, namely, that s.13 abrogates PSI retrospectively. Section 13 is an "evidential provision" [consider the same point in relation to chapter 1 to Part 11 of the CJA 2003 – the bad character provisions – which were applied on the day that the provisions came into force, and not to trials where the alleged offence was committed on or after the commencement date].

PSI in criminal proceedings and the failure of a witness to answer questions

148. It is not unusual for witnesses in criminal proceedings to decline to answer questions on the grounds that they fear reprisals were they to do so, or because the answer might tend to incriminate them. When this occurs, the courts are usually content to proceed on the basis that it is sufficient to leave it to fact-finders to determine whether the witness's reason for failing to answer questions is reasonable, or whether the witness is being obdurate and less than frank. The witness is rarely the subject of contempt proceedings.

149. However, in *R v Khan* [2007] EWCA Crim 2331[73], the appellant (K) gave evidence on behalf of his co-defendant, S, and testified that the latter was an innocent dupe. K had

[73] Decided on the 16th October 2007.

earlier pleaded guilty to the offence in respect of which S was then being tried. When K was cross-examined, he said that he did not wish to admit the truth of matters that were embraced in his plea of guilty. The trial judge (Fulford J) drew a distinction between those matters which K had already admitted by virtue of his plea of guilty (as well as the 'basis of plea' contained in the Crown's position statement) and those matters which fell outside the scope of his plea of guilty, and the position statement.

150. The Court of Appeal held that PSI does not apply in circumstances where the witness has already incriminated himself and there is no material risk of further incrimination:

> "[the protection] cannot be invoked where the compulsion to answer questions creates no material increase to an existing risk of incrimination. This is the vital principle relevant to the instant appeal. If the compulsion to answer questions does not increase the risk of incrimination or strengthen the case against a defendant then there is no basis for affording that defendant protection against the questioning."

151. Unhappily, in what is otherwise a neatly structure judgment, the Court misdescribed the protection as "legal professional privilege" rather than PSI.

152. The Court also made the point that the motives of the witness for asserting the privilege are not of paramount importance:[74]

> "It is dangerous to assess the strength of the claim to privilege on the basis of the motive of the person seeking to invoke it. There will be many cases where it will be "convenient" for a defendant to rely upon the privilege. Often his motives will be mixed. But even if the motives are mixed that is no basis for refusing the protection against self-incrimination. The court should not refuse protection merely because it suspects the good faith of the person seeking to deploy the privilege."

Foreign criminal proceedings and PSI

153. In ***R v Khan*** [2007] EWCA Crim 2331, K faced parallel proceedings in the United States where he had been indicted with one other on similar but not identical charges. The Court had some interesting things to say about the principle that the privilege does not apply in relation to offences under foreign law and the possible impact of Article 6 of the ECHR:

> "25. ...There is ample authority for the proposition that the privilege does not apply in relation to offences under foreign law (see in particular Lord Diplock in ***Re Westinghouse Electric Corporation Contract*** [1978] AC 547 at 636 and ***Brannigan v Davison*** [1997] AC 238, a decision of the Privy Council). Although the decision in ***Re Westinghouse*** concerned s.14 of the Civil Evidence Act 1968, as Longmore LJ pointed out in ***C PLC v P*** [2007] EWCA Civ 493 at para 33, it can make no difference whether the privilege is invoked in civil as opposed to criminal proceedings. Whether the need for protection arises in civil or criminal proceedings must be irrelevant; the important feature of the privilege is that it provides protection against criminal proceedings.
>
> 26. But, it will be observed from our description of the judge's ruling that he did not rely upon the principle that the privilege is not available in respect of foreign proceedings, which, in the instant case, is a prosecution in the United States. It is small wonder that he did not do so. He had no need to rely upon the principle in the light of his conclusion that the reasons advanced for refusing to answer were not genuine. We wish to make clear that we shall follow the deft footwork of the judge. Despite what has hitherto been believed to be clear authority for the principle that privilege is not available in respect of

[74] Judgment, para.35

foreign criminal proceedings, the issue may need to be revisited in the light of Article 6 of the European Convention on Human Rights and in the context of extradition proceedings. That is not to indicate that there is any substance in reliance upon Article 6 but merely to avoid giving a decision on the question where it is unnecessary to do so. This judgment is not to be regarded as any authority one way or the other in relation to the availability of the privilege in respect of foreign proceedings where there is a risk of extradition."

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