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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN

T CLINTON

(Complainant) Respondent

and

JOHN JAMES BRADLEY

(Defendant) Appellant

CARSWELL LCJ

This appeal comes before us by way of case stated from a decision of a resident magistrate Mr CH McKibbin given on 1 March 1999, whereby he convicted the appellant of an offence against paragraph 5(1) of Schedule 2 to the Proceeds of Crimes (Northern Ireland) Order 1996 (the 1996 Order) of failing without reasonable excuse to comply with a requirement imposed upon him to answer questions put to him by a financial investigator. The issue upon which the appeal turned was whether the appellant had reasonable excuse to refuse to answer if he believed that to do so might tend to incriminate him in respect of another offence with which he was subsequently charged.

The object of the 1996 Order was to provide means of tracing and confiscating money and property derived from criminal conduct. To that end the Order gave to the courts powers of various kinds designed to assist in the process of tracing the proceeds of crime. Article 49 empowers a

county court judge, when satisfied of the matters set out in paragraph (1), to appoint a financial investigator to exercise for the purposes of the investigation the powers conferred by Schedule 2. Paragraphs 2 and 3 of Schedule 2 confer upon the financial investigator a number of specified powers, the material one for present purposes being that contained in paragraph 2(1):

> "A financial investigator may by notice in writing require any person who he has reason to believe has information which appears to the investigator to relate to any matter relevant to the investigation to attend before the investigator at a specified place either forthwith or at a specified time and answer questions or otherwise furnish information which appears to the investigator to relate to the investigation."

Paragraph 4 specifies certain restrictions on the exercise of the powers contained in paragraphs 2 and 3. Paragraph 5 makes it an offence to fail to comply with a financial investigator's requirements:

> "5.-(1) A person shall be guilty of an offence if without reasonable excuse he fails to comply with a requirement imposed on him under paragraph 2 or 3.
>
> (2) A person who -
>
> (a) knows or has reasonable cause to suspect that an investigation is being carried out or is likely to be carried out under this Schedule; and
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> (b) falsifies, conceals, destroys or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of, documents which he knows or has reasonable cause to suspect are or would be relevant to such an investigation,
>
> shall be guilty of an offence unless he proves that he had no intention of concealing the facts disclosed by the document from any person carrying out such an investigation.
>
> (3) A person guilty of an offence under sub-paragraph (1) shall be liable, on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale or to both.

> (4) A person guilty of an offence under sub-paragraph (2) shall be liable -
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> (a) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine or to both;
>
> (b) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or to both."

Paragraph 6 contains restrictions on the use which may be made of answers given or information furnished by the person interviewed and paragraph 7 contains restrictions on disclosure of the information so gained. Paragraph 6 reads:

> "6. Any answers given or information furnished by a person in response to a requirement imposed under paragraph 2 or 3 may not be used in evidence against him except -
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> (a) on a prosecution for an offence under the Perjury (Northern Ireland) Order 1979; or
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> (b) on a prosecution for some other offence where evidence inconsistent with any such answers or information is relied on by the defence; or
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> (c) on a prosecution for an offence under paragraph 5."

Two financial investigators were duly appointed by a county court judge to investigate whether any person had benefited from certain conduct to which Article 49 of the 1996 Order applied, namely, theft and false accounting, contributing to the resources of a proscribed organisation, assisting in the retention or control of terrorist funds and contraventions of the Betting, Gaming and Amusements (Northern Ireland) Order 1985. They caused a notice to be served on the appellant pursuant to paragraph 2(1) of Schedule 2, stating that they had reason to believe that he had information relevant to the investigation and requiring him to attend at Woodbourne police station at 2 pm on 25 February 1998 and to answer questions or otherwise furnish information which appeared to them to relate to the investigation.

The appellant attended at the time and place specified, accompanied by his solicitor. In paragraphs 3.5 to 3.8 of the case stated the magistrate sets out what followed:

> "**3.5** The Investigators explained to him and Mr Winters the Applicant's rights and duties under the 1996 Order. No caution was administered and the Applicant was warned that he could not avail of his right to silence and that the law required him to answer the questions they would put to him. They agreed that they were assisting the RUC in the RUC investigation, that there would be interaction between them and the RUC, that there might be a slight overlap in the type of questions asked by them and by the RUC, and that information and answers given by the Applicant to them could well be passed to the RUC, although the purpose of their questioning was not the same as the RUC.
>
> **3.6** Thereafter, after consultation, the Applicant refused to answer any further questions put by the Investigators. The reason he gave for this refusal was that he did not want to jeopardise anything he said as part of his defence in the RUC case against him for false and fraudulent accounting.
>
> **3.7** At the time of the questioning of the Applicant on the 25th day of February 1998, the Applicant had not been charged with any offence by the RUC, although there was an ongoing RUC investigation regarding certain funds of the Irish Republican Felons Club and the Applicant had been released by the RUC on recognizance for later interview. The Applicant was subsequently charged on the 14th day of May 1998 by the RUC that he `in furnishing information for the accounts of the Irish Republican Felons Association .... dishonestly with a view to gain by yourself or another or with intent to cause loss to another made or required for an accounting purpose which to [his] knowledge was or might be misleading, false or deceptive in a material particular, namely money received from functions not shown in total'.
>
> **3.8** It was clear to me that the charge subsequently brought by the RUC against the Applicant could not have arisen from replies given in the interview by the Investigators on the 25th day of February 1998, but that the Defendant genuinely felt that there was a genuine risk that any information he may have given to the inspectors might tend to incriminate

> him in that other offence with which he was subsequently charged."

It was argued before the magistrate that the appellant had a reasonable excuse not to comply with the investigators' requirement to answer questions or otherwise furnish information. The magistrate rejected the defence, holding in paragraph 3.10 of the case:

> "After examination of the relevant Statutes and case law I came to the conclusion, with regret, that the Defendant's natural desire not to incriminate himself in the parallel RUC case could not, in the context of this particular Statute (the 1996 Order) constitute a `reasonable excuse'. My reason for this was that to allow such a defence here would have the effect of totally negativing the clear purpose of the legislation, which was to compel answers to questions of an investigative nature to be put to an interviewee in precisely this type of case and not to allow him to use the defence of any right not to incriminate himself in such investigations."

He therefore found the offence proved and convicted the appellant, imposing a fine of £500.00. By a requisition dated 9 March 1999 the appellant applied to the magistrate to state a case for the opinion of this court on the question of law therein set out. The magistrate on 8 June 1999 stated and signed a case, in which the question of law posed was as follows:

> "Was I correct in law in holding that a refusal by a Defendant to answer questions put by a Financial Investigator in compliance with a Notice pursuant to Paragraph 2(1) of Schedule 2 of the Proceeds of Crime (Northern Ireland) Order 1996, on the grounds that it could incriminate that Defendant in pending criminal matters, could

> not constitute `reasonable excuse' within the meaning of Paragraph 5
> of Schedule 2 of the said Order?"

The privilege against self-incrimination is one of what Lord Mustill in *R v Director of Serious Frauds Office, ex parte Smith* [1993] AC 1 at 30 described as a "disparate group of immunities" commonly grouped together under the general heading of the "right to silence" (a phrase frequently misunderstood or misused). It is expressed in the maxim *nemo tenetur prodere seipsum* cited by Blackstone (*Comm.* iv, 296). The privilege falls within the class of principles described by Lord Hoffmann in *R v Hertfordshire County Council, ex parte Green Environmental Industries Ltd* (2000, unreported) as –

> "prophylactic rules designed to inhibit abuse of power by investigatory authorities and to preserve the fairness of the trial by preventing the eliciting of confessions which may have doubtful probative value."

In the context of *Mareva* orders it has been held that the privilege against self-incrimination extends not merely to the giving of information which might create a risk that the giver could be prosecuted. In *Den Norske Bank ASA v Antonatos* [1998] 3 All ER 74 at 89 Waller LJ described the breadth of the privilege as follows:

> "Thus, it is not simply the risk of prosecution. A witness is entitled to claim the privilege in relation to any piece of information or evidence on which the prosecution might wish to rely in establishing guilt. And, as it seems to me, it also applies to any piece of information or evidence on which the prosecution would wish to rely in making its decision whether to prosecute or not."

It has been suggested that the privilege extends to information which may set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character. In *Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist* [1991] 2 QB 310 at 332 Beldam LJ supported that view of the ambit of the privilege. Staughton LJ, however, at page 325 expressed reservations whether it extends as far as that, and the point is not finally settled.

The grounds on which counsel for the appellant contended that he had a reasonable excuse for refusing to answer the investigators' questions were –

(a) the legislature could not have intended to make such an inroad into the privilege against self-incrimination without a very clear expression of intention, and it was not sufficiently clear that it did so intend;

(b) the ambiguity permits the court to have regard to Article 6(1) of the European Convention on Human Rights, of which the requirement was in breach;

(c) in other areas of our law the existence of a risk of self-incrimination has been held to constitute a reasonable excuse for refusing to give information.

The question whether the provisions of Schedule 2, in conferring a power to ask questions or obtain documents or information, excludes the privilege against self-incrimination is one of construction. We do not consider that paragraph 5(1) is ambiguous. The wording of the provision is itself perfectly clear, that the failure to comply with the investigators' requirement to answer questions or furnish information is an offence unless the person so required has a reasonable excuse. It is the content of what is meant by a reasonable excuse which the appellant claims is ambiguous. In our opinion the fact that paragraph 6 provides a safeguard against his answers or information being used in evidence, together with the other safeguards contained in Schedule 2, demonstrates with sufficient clarity that Parliament did not intend that the person concerned could put forward the risk of self-incrimination as a reasonable excuse. If he could, then there would be no need for paragraph 6, which would be wholly superfluous. Parliament can and from time to time does enact provisions which interfere with the right to silence. As Lord Mustill said in *Ex parte Smith* at page 40, it has not shrunk, where it seemed appropriate to do so, from interfering in a greater or lesser degree with that group of immunities. Nor, as Lord Mustill also pointed out (*ibid.*), has the provision making such provision always been explicit, and more commonly it has been left to be inferred from

general language. We respectfully agree with Windeyer J in the High Court of Australia in *Rees v Kratzmann* (1965) 114 CLR 63 when he said at page 80:

> "If the legislature thinks that in this field the public interest overcomes some of the common law's traditional consideration for the individual, then effect must be given to the statute which embodies this policy."

There is a considerable public interest in combating money laundering and tracing the proceeds of crime, and Parliament must in our view have intended that the privilege should for that purpose be overridden, substituting the safeguards provided for in Schedule 2. Were it otherwise, the statutory purpose would very easily be stultified and the Order rendered largely ineffective: cf *Bishopsgate Investment Management Ltd v Maxwell* [1993] Ch 1 at 20, where Dillon LJ expressed a similar view of the investigatory powers conferred on the Bank of England by the Banking Act 1987. That would, as Lord Bingham CJ pointed out in *R v Staines and Morrissey* [1997] 2 Cr App R 426 at 442, amount to a repeal, or a substantial repeal, of a statutory provision.

We do not find the decision in *R v Donnelly* [1986] NI 54, relied upon by the appellant, of assistance in considering this issue. In that case the accused was charged with failing without reasonable excuse to give information to a constable, contrary to section 5(1) of the Criminal Law Act (Northern Ireland) 1967. His defence, which was accepted by Hutton J, was that the information would tend to incriminate him and therefore he had a reasonable excuse for withholding it. In the 1967 Act there was no provision comparable with paragraph 6 of Schedule 2 to the 1996 Order, and accordingly the judge held that the privilege against self-incrimination prevailed. He pointed out at page 59 that this would apply only where there was a genuine risk to the person claiming the privilege:

> "However I make it clear that in my opinion the defence of reasonable excuse based upon the principle that a man is not bound to incriminate himself will only be valid where there is a genuine risk that the information would tend to incriminate the person and make him liable to prosecution. A person should not be able to raise the defence of reasonable excuse successfully where the possibility of his

> being prosecuted by reason of the information he might give is fanciful and artificial."

The decision in *R v Donnelly* must in our view be distinguished from the present case, where the safeguards minimise the risk to the person from information is required and show that the legislature intended to override the privilege.

For the reasons which we have given we consider that there is no ambiguity in paragraph 5(1) of Schedule 2 to the 1996 Order and therefore it is not necessary to resort to the European Convention on Human Rights for assistance in its interpretation. We have, however, considered its effect and are of the opinion that it does not assist the appellant. It was argued on his behalf, in reliance upon *Saunders v UK* (1996) 23 EHRR 313, that to require a person to incriminate himself would mean that his trial was unfair, in breach of Article 6(1) of the Convention. That cannot, however, be judged at the time when the investigators require the person concerned to answer questions or furnish information, or even at the time when the magistrates' court decides on the commission of an offence under paragraph 5(1). It can only be determined at the time of the trial of the offence in respect of which it is claimed that the person may be incriminated by the answers or information: see *R v Director of Public Prosecutions, ex parte Kebeline* [1999] 4 All ER 801 at 834, per Lord Steyn. As the European Court of Human Rights remarked at paragraph 69 of its judgment in *Saunders v UK*, the question must be examined by the court in the light of all the circumstances of the case. These cannot possibly be known at the time when the investigators require answers or information.

It is apparent from the observations of the European Court of Human Rights in *Saunders v UK* that it was concerned with the use at the defendant's eventual trial of the information gained from him at the examination stage, and that it was not casting doubt upon the propriety of the use of compulsory powers at that earlier stage. In paragraph 67 of its judgment the Court said:

> "The Court first observes that the applicant's complaint is confined to the use of statements obtained by the DTI Inspectors during the criminal proceedings against him. While an administrative investigation is capable of involving the determination of a `criminal charge' in the light of the Court's case law concerning the autonomous meaning of this concept, it has not been suggested in the pleadings before the Court that Article 6(1) was applicable to the proceedings conducted by the Inspectors or that these proceedings themselves involved the determination of a criminal charge within the meaning of that provision. In this respect the Court recalls its judgment in *Fayed v. United Kingdom* where it held that the functions performed by the Inspectors under section 432(2) of the Companies Act 1985 were essentially investigative in nature and that they did not adjudicate either in form or in substance. Their purpose was to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities - prosecuting, regulatory, disciplinary or even legislative. As stated in that case, a requirement that such a preparatory investigation should be subject to the guarantees of a judicial procedure as set forth in Article 6(1) would in practice unduly hamper the effective regulation in the public interest of complex financial and commercial activities."

As Lord Hoffman observed in *Ex parte Green Environmental Industries Ltd* (supra), the European jurisprudence is firmly anchored in the fairness of the trial and is not concerned with extra-judicial inquiries. We therefore conclude that the proper application of the principle of the

fairness of the trial enshrined in Article 6 of the Convention does not lead to the conclusion that the appellant had a reasonable excuse for failing to comply with the investigators' requirements.

We accordingly consider that the decision of the resident magistrate was correct. We answer the question posed in the affirmative and dismiss the appeal.

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JUDGMENT

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