

## JUSTICE CONFERENCE – CRIMINAL LAW UPDATE

### Peter Carter QC - synopsis

#### 1. LPP & privilege vs state interest

- a. Investigatory Powers Act 2016 & draft Codes of Practice
- b. LPP in internal company investigations – *SFO v ENRC* [2017] EWHC 1017 (QB)
- c. Letters of request & privilege against self-incrimination -

The High Court has held that letters of requests were not disclosable in proceedings concerning the legitimacy of a production order and that the privilege against self-incrimination does not extend to "independent material".

The letters of request and production order related to an ongoing investigation by the US Food and Drug Administration Office (FDA) into the applicant's alleged involvement in the trading of counterfeit drugs. The court held that:

- It was established authority that letters of request are confidential and are not disclosed as a matter of principle to the court or any affected party (*Abacha v Secretary of State for the Home Department* [2001] EWHC 787 (Admin) applied).
- The ratio of the majority of the Court of Appeal in *C plc v P* [2007] EWCA Civ 493, applied by the Court of Appeal (Criminal Division) in *R v S(F)* [2008] EWCA Crim 2177 was binding. Accordingly, the common law privilege against self-incrimination does not extend to material that is "independent" within the meaning of the Strasbourg jurisprudence on Article 6 of the European Convention of Human Rights.
- Material is "independent" in this sense where it is obtained through the use of compulsory powers, and which has an existence independent of the will of the suspect, such as documents acquired pursuant to a warrant or production order.

The documents set out in the challenged order were indisputably "independent" and therefore the claim of privilege against self-incrimination could not apply to

them. (*R (River East Supplies Ltd) v Crown Court at Nottingham* [2017] EWHC 1942 (Admin).)

## 2. Slavery Human Trafficking – Modern Slavery Act 2015

- a. Increasing recognition of scale of problem – statement by National Crime Agency 10/8/17 <http://www.nationalcrimeagency.gov.uk/news/1171-law-enforcement-steps-up-response-to-modern-slavery>  
cf slow response of courts - *R v. N and Le* [2012] EWCA Crim 189; *L and others v. R* [2013] EWCA Crim 991; *R v. M(L) and others* [2010] EWCA Crim 2327.
- b. S.45 MSA statutory defence & its inadequacies – *R v Joseph* [2017] EWCA Crim 36 – [see Riel Karmy-Jones' forthcoming Crim.L.R article]

“Although the Court of Appeal at para 20-21 of the judgement helpfully collated and set out the principles to be drawn from the common law authorities between 2010 and 2013, they took the view that there was no need to re-define the approach of the common law to bring it in line with the statutory defence provided by s. 45 of the Modern Slavery Act, or to develop the law of duress.

The Court of Appeal did not really address the issue of whether in a case that pre-dates the MSA, the questions of nexus and compulsion, by their very nature questions of fact, may be left to a jury, or whether once prosecutorial discretion has been exercised in favour of a prosecution, the defendant is denied that. Instead the Court simply did not accept the submission, and it may be that the door is now closed on a defendant who pre-dates the MSA raising the issue at trial. This leaves them reliant on the uncertainty of prosecutorial discretion only overseable by judicial review principles, or abuse of process application if identified pre-conviction, and on appeal if identified after. And presumably leaves the judges to decide the issues of fact on the basis of submissions and evidence called.

In giving this judgement, the Court recognised the difficulty of timing, saying “*we accept that the cases the court has to consider are cases where the issue as to trafficking often has arisen after conviction. Changing the law of duress would not alter that type of case. A court cannot grapple with the issue until it is raised; ...*” This is understandable, but gives no practical assistance. Furthermore it places a great burden on those defendants who truly are victims, who, like the young girl in *O*, are unable to understand their situation, and unable to properly explain it. And if they are able to do so, how should defence counsel advise such a defendant? What advice as to plea should be given? Or as to the conduct of the trial thereafter.”

- c. Supply chains – response of multinationals.

### 3. Disclosure – failures by CPS

A joint inspection by Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI) and Her Majesty's Inspector of Constabulary (HMIC) found widespread failures across the Criminal Justice System when it comes to disclosure of evidence.

For summary: <http://www.justiceinspectorates.gov.uk/hmicfrs/news/news-feed/inspectors-find-widespread-concerns-with-disclosure-practices-across-the-cjs/>

For full report: [http://www.justiceinspectorates.gov.uk/ciji/wp-content/uploads/sites/2/2017/07/CJJI\\_DSC\\_thm\\_July17\\_rpt.pdf](http://www.justiceinspectorates.gov.uk/ciji/wp-content/uploads/sites/2/2017/07/CJJI_DSC_thm_July17_rpt.pdf)