COMPLY FIRST AND FIGHT LATER: THE LAW RELATNG TO SECTION 20 REQUESTS

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The courts have always acknowledged that the policy of the law in the context of compulsory powers of production of material is *'a simple reflection of the common view that one person should so far as possible be entitled to tell another person to mind his own business'*. Indeed such was said by Lord Mustill in the case of *R v SFO ex p Smith*[1] before he then immediately went on to note that notwithstanding this *'our lives are permeated by enforceable duties to provide information on demand, created by Parliament and tolerated by the majority, albeit in some cases with reluctance*.'

In the context of health and safety the enforceable duties that come to mind in this context are in relation to the wide ranging powers in section 20 of the Health and Safety at Work etc. Act 1974. It is, of course, the most potent part of an inspector's armoury. There appears to have been few examples of this part of the Act being tested in the courts but to the extent that it has, and by analogy with similar regulatory compulsory powers in other contexts, it appears the reach is potentially very wide.

The starting point is that the powers have to be exercised only for specific purposes namely *'carrying into effect any of the relevant statutory provisions within the field of responsibility of the enforcing authority'*[2] concerned. This obviously includes an investigation of an offence and in the case of *R (Wandsworth LBC) v South Western Magistrates' Court* [2003] ICR 1287 it was observed that such powers can be used *'in carrying out both formal and informal enforcement'* actions.

There is no actual limit set out in the statute as to *when* these powers can be used and in particular there is no limitation in the Act which suggests that they cannot be used in connection with a Defendant once criminal proceedings have begun. It may however be suggested that the position changes after caution and the powers are in some way restricted. Further analogies may be sought to be drawn with the limitation that there is on a police officer to question a suspect after charge.[3]

Notwithstanding the initial attractiveness of these arguments, appealing as they do to an almost instinctive engagement of the privilege against self-incrimination, it appears that such approaches are not supported by authority. Perhaps the most important case in this respect is the *Ex p Smith* case referred to above. That case considered the power that the Director of the Serious Fraud Office was given to require answers to questions and furnish information under the Criminal Justice Act 1987. The argument that it could be implied that such powers came to an end at the moment of charge was specifically rejected. The court focused on the purpose of the powers which emphasised that they were to be exercised in order to obtain

[1] [1993] AC 1
[2] HSWA 1974 s20(1)
[3] See para 16.5 PACE Code C Code of Practice

information in connection with an investigation. A clear parallel can therefore be drawn with s20. Lord Mustill's view was that to contend that upon charge the Defendant was no longer a person under investigation was 'unreal' and to suggest that the moment of charging was a watershed for these purposes was not accurate. It should also be noted that *Ex p Smith*, dating as it does from 1991, preceded the Criminal Procedure and Investigations Act 1996 which now specifically states that:

> *(1) For the purposes of this Part a criminal investigation is an investigation conducted by police officers with a view to it being ascertained—*
> *(a) whether a person should be charged with an offence, or*
> *(b) whether a person charged with an offence is guilty of it*

Lord Mustill also considered the reliance placed in argument on the prohibition on questioning after charge or, alternatively, after a detainee has been informed that he may be prosecuted for an offence. He identified that the purpose of the principle at the heart of this restriction was to protect against what were described as past abuses by way of judicial interrogation. After some consideration of the history which led to the establishment of this principle he concluded that although '*misuse of judicial interrogation is now only a distant history, it seems to have left its mark on public perceptions of the entire subject.'* He concluded that the relevant provision in Code C recognises that '*a person in custody is in a specially vulnerable position, and hence at a particular disadvantage in responding to questions in a balanced and measured way, that it has been thought safer both to prohibit questioning after a certain point, and to exclude from evidence answers given to such questioning.'* Thus it is clear that any analogies drawn with the provisions of Code C would be of little assistance in the context of s20 and does not provide any support for any argument that such powers should be limited in the same way.

Thus it appears clear that the ambit of the s20 powers is wide and extends beyond the initial investigation stage to the period leading up to trial. Notably in the case of *Davies*[4], whilst the case was focused on the application of the reverse burden of proof, as part of the submissions made the argument was advanced that by using the s20 powers the investigator was in a position to acquire all the information it needed for the purpose of a prosecution before charge. Thus, it was contended, the prosecution would not be reliant on what, for example, a Defendant produced in a Defence Case Statement. The Court of Appeal rejected this approach as too simplistic. It acknowledged that there might be straightforward cases where this was so but went on to say that there would also be even simple cases where this was not the position. The court noted that the enforcing authority will have been reliant to a large extent on the information that the Defendant chooses to provide and that the reality will be that the Defendant will be and will remain the only person who really knows when and what he has done to avoid the risk in question. Whilst consideration of the scope of s20 powers was not a specific issue in that case the implication that their use can extend up and until trial is clear.

[4] [2002] EWCA Crim 2949

However a distinction must be made between obtaining the material pursuant to s20 and its use at trial. The overriding safeguard is the court's discretion to exclude evidence pursuant to s78 of the Police and Criminal Evidence Act 1984. It follows from this that whilst a Defendant may be aggrieved that it is being placed in a position where it is having to produce potentially incriminating material for a prosecutor to use at trial it cannot justify refusal for this reason. The position appears to be that set out by the House of Lords in *R v Hertfordshire County Council ex p Green Environmental Industries Ltd*[5] which considered the compulsory powers provided for by s71(2) of the Environmental Protection Act 1990. In that case Lord Hoffman said:

'In a prosecution under the Act of 1990 the trial judge would have a discretion to exclude the answers. He could also exclude evidence found in consequence of the answers. That discretion is conferred by section 78 of the Police and Criminal Evidence Act 1984. The discretion may be exercised on the ground that having regard to the circumstances in which the evidence was obtained, its admission would have an unduly adverse effect on the fairness of the trial. But statute deprives the appellant of any privilege not to answer. He must provide the information and take his chance on persuading the judge at trial to exclude it.'

However the fact that such a request is made in the context of preparation for trial should not be, of itself, a reason for exclusion under s78; that is, after all, part of the purpose of the s20 powers in the context of a criminal investigation.

If the Defendant chooses not to provide the information he can be prosecuted for it, such a failure being an offence under s33(1)(e). There is no defence in the Act based on reasonable excuse or anything similar; it appears to be an offence of the most strict kind of strict liability. It may be that seeking to stay a prosecution for failure to comply with such a requirement by reason of abuse of process may be the most attractive, perhaps the only, way of countering such an allegation, so there will be close consideration of the relevant sections of the HSE Enforcement Policy in this regard. However the availability of the obvious alternative option of disclosing the material and then arguing s78 is likely to blunt any application for a stay on the grounds of misuse of any power. An application under s78 is the appropriate way of dealing with any alleged misuse of executive power in obtaining such evidence.

In practice the s20 powers are likely to be used to obtain documents such as risk assessments, method statements and similar which have not so far been supplied by a Defendant. However if the powers are sought to be used to obtain specific answers to specific questions from individual entities pursuant to s20(2)(j), then s20(7) provides that no answer given in response to such a question shall be admissible in evidence against that person. However it is important to remember that this prohibition does not apply to documents and evidence of answers given to questions is only inadmissible against the person from whom it was obtained. If the question is asked of and answer given by an individual then it will be, in the ordinary course of events, admissible as against a corporate Defendant. This was considered during the hearing of *Green* in the Court of Appeal and Lord Justice Waller was of the view that questions that may be directed to a named Director could be admissible as against his company. It can

[5] [2000] 2 AC 412

be appreciated how such an approach may give rise to arguments about who exactly the request was made to and in what capacity any response was given. That said tactical considerations may mean that it is unlikely that the prosecution would want to rely on any such statement in any event by calling the Director to give evidence against his company. It may be such issues rarely, if ever, would arise in practice.

The domestic case law appears to be consistent with the approach taken in European jurisprudence. The case of *Orkem v Commission of the European Communities*[6] involved investigation of potential offences arising from breaches of competition law. The approach taken by the European Court of Justice was that requests for factual information, even if incriminating, were not objectionable but what was illegitimate were attempts to invite admissions of wrongdoing. It can be appreciated that any material received upon similar attempts would be likely to be excluded under s78. Compulsory powers were also considered by the European Court of Human Rights in *Saunders v United Kingdom.*[7] This case considered powers under the Companies Act 1985 which had no equivalent of s20(7) and which were held to infringe the right against self-incrimination. Ultimately this ruling resulted in statutory amendments introducing provisions equivalent to s20(7) in the relevant statues preventing use of answers so obtained in the context of the Companies Act at any subsequent trial.

Thus it seems that the approach of the law is that a wide interpretation will be given to the scope of such powers which can be exercised after charging and even after receipt of a Defence Case Statement or in the run up to trial. It appears that the recipient will have little option but to comply and any Defendant will have to attempt to argue exclusion under s78. It may be that if the information sought and obtained is documentary material which is clearly pertinent to the issues in any trial an application to exclude such material is going to meet with difficultly. Whilst the law may start from the position that an individual can tell others to mind their own business, when health and safety is in issue, it may be that the obtaining of such material is everyone's business.

[6] Case 374/87 [1989] ECR 3283
[7] (1996) 23 EHRR 313