PRIVILEGE AGAINST SELF-INCrimINATION IN CIVIL CASES

Some clients have the misfortune to become embroiled in both criminal and civil proceedings at the same time. The difficulties caused can be much more significant than simply the increased time and cost of having to deal with two sets of proceedings. In particular, defendants will be concerned about putting forward a positive case in the civil proceedings when they may not have been charged with an offence and do not know the scope of the criminal case against them. That defendant may wish to rely on the privilege against self-incrimination so as to avoid giving evidence in the civil proceedings which may later be used against them in the criminal investigation.

The privilege against self-incrimination may be invoked at a number of stages during the course of civil proceedings. It is most likely to be engaged when a defendant is required to disclose information pursuant to a freezing order or search order, and at the disclosure/inspection of documents stage.

This article will focus on what happens at trial. What steps can a party to civil proceedings take at that stage to avoid providing evidence which might incriminate them?

Where the defendant can show that there is a real risk of serious prejudice which may lead to injustice, the civil court has the jurisdiction to stay the civil proceedings until the related criminal trial has been concluded – see Jefferson Limited v. Bhetcha [1979] 1 WLR. However, the civil courts have been reluctant to stay civil cases save in the most extreme circumstances. A stay is most likely if a criminal trial arising out of the same facts is imminent and there will only be a short delay caused to the civil trial. A defendant should also bear in mind that a conviction is admissible in civil proceedings, so a stay followed by a conviction may end up damaging their position in the civil proceedings.

If the civil court will not stay the proceedings, then a defendant must give careful thought to, first, whether the privilege against self-incrimination is available to them and, secondly, whether they wish to invoke that privilege.

The right to refuse questions which have a tendency to expose the witness to proceedings for a criminal offence or criminal penalty is set out in s.14(1) Civil Evidence Act 1968. There have, however, been a number of statutory exceptions to that provision. Most importantly for civil fraud trials, is the Fraud Act 2006. S.13 of that Act removes the privilege against self-incrimination in relation to offences under the Act in any proceedings “relating to property”, a very wide provision likely to catch most civil fraud cases. The one saving grace for defendants is that any admission is not admissible in the criminal proceedings.

It is therefore important, in advance of the trial, to analyse the types of offences which might come into play so as to be able to demonstrate that the privilege can still be relied on.

If the privilege does remain, a defendant will have to consider carefully whether to invoke their right not to answer relevant questions. Failing to do so may result in the Court determining that allegations advanced by the claimant were unanswered and finding in the claimant’s favour.

A defendant will very often have to make a choice as to whether defending the criminal or civil proceedings is more important to them, and adopt a strategy which can best protect their interests in that case.

THE ENGLISH COURTS COME TO THE AID OF SUCCESSFUL CLAIMANTS IN ARBITRATIONS

The freezing injunction (also known as the Mareva injunction) has been a central feature in English litigation for several decades now, along with its frequent companion: the order that a respondent disclose his assets, within and without the jurisdiction. These orders can be granted both in advance of a claim being commenced, during proceedings and after final judgment to discover and preserve a judgment debtor’s assets until execution can be levied on them. The purpose of these orders is to prevent frustration of a judgment by the removal of assets from the jurisdiction or their concealment.

These principles have been extended by the English courts into the arbitration arena. Thus, where an arbitration award has been converted into a judgment, the English courts have the power to order a freezing injunction and that the judgment debtor should disclose his assets within and outside the jurisdiction. The same has been held to apply even if an award has not been turned into a judgment: the English courts have the power to make the same orders in relation to an arbitration as they could have made if the arbitral reference in question had been a High Court action. The absence of a judgment, as distinct from an award, is seen to make no difference for it is the policy of the law that arbitration awards should be satisfied and executed. Moreover, the Courts have been willing to make freestanding disclosure orders which do not need to be tagged to an application for a freezing injunction. This can be particularly useful in cases where proof of fraudulent intent

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