**V v C [2001] EWCA Civ 1509.**

LORD JUSTICE WALLER:

Introduction

1. This is an appeal from the decision of McCombe J dated 8 March 2001. By that decision he allowed an appeal from Master Miller dated 27 September 2000 by which the Master had dismissed the claimant's application for summary judgment against the first defendant. McCombe J in allowing the appeal gave judgment against the defendant for £11.3m and on a further aspect judgment on liability with damages to be assessed (the amount claimed being some £70.5m).
2. The appeal raises points of principle and practice relating to the privilege against self-incrimination. The particulars of claim were served on 13 March 2000. By those particulars of claim VTFL sought various forms of relief against Mr Clough, including (1) a claim in paragraph 7.2 that Mr Clough was liable to account to VTFL for sums totalling £11,317,521.15 ("£11.3m.") and (2) a claim in paragraphs 7.1 and 7.7 for damages for breach of fiduciary and other duties. The particulars of claim went into considerable detail as to the ways and means by which it was alleged by VTFL that Mr Clough had misappropriated, or was liable for the misappropriation of, monies of VTFL, by the use of accounts and/or companies over which it was asserted that Mr Clough had ownership or control.
3. A defence was due on 10 April 2000 and extensions of time were requested. Ultimately on 9 May 2000 Mr Clough served his defence. For the most part the defence confined itself to the observation that Mr Clough could not plead to an allegation because that might incriminate him and asserted that the claimant was put to proof of the matters so asserted. Thus, for example, where the points of claim contained an assertion that a company or account was within the ownership or control of Mr Clough, the response in the defence was in the above terms.
4. It is not in issue that the prosecuting authorities were concerned to investigate Mr Clough and concerned to consider the possibility of criminal proceedings against him. Indeed we now know since the hearing before McCombe J that Mr Clough was, on 31 July 2001, charged with fraudulent trading contrary to section 458 of the Companies Act 1985.
5. No application was made on behalf of Mr Clough to stay the proceedings. In the result an application was made by the claimant for summary judgment, that application being supported by a witness statement dated 24 May 2000. No application was made on behalf of Mr Clough to adjourn the summary judgment application. A witness statement was put in by Mr Colledge on behalf of Mr Clough which the judge accurately summarises in this way:

"Mr Colledge states that in order to provide a detailed defence to the claim it is inevitable that Mr Clough would be required to provide information that will or may assist a prosecution. The nature of such information is not identified. Among certain submissions in his statement, it is contended by Mr Colledge that to proceed with a summary judgment now is to require Mr Clough either (a) to "buy" his right not to incriminate himself at the price of having judgment entered against him or (b) to forego that right with the attendant risks to the criminal process under way against him. Mr Colledge states his belief that open discussion in the civil context, and especially any judgment, is bound to be widely reported not only in the financial papers but generally, and that he is very concerned that if judgment were to be entered, as a result of the claim to privilege, the resulting publicity would seriously compromise Mr Clough's right to a fair trial of both the civil and the criminal proceedings."

1. Nothing is said in the witness statement of Mr Colledge even in the most general terms about the nature of Mr Clough's defence. All that is said is that "in order to provide a detailed defence to the claim it is inevitable that Mr Clough would be required to provide information that will or may assist a prosecution." On the basis of that evidence it was simply submitted on his behalf that the privilege against self-incrimination had been invoked and had been invoked bona fide. In the result it was submitted it was not open to the court to grant summary judgment. The submission, as I understand it, was that this invocation was temporary in the sense that the privilege could only be invoked pending conclusion of the criminal proceedings. But, until that conclusion (so it was submitted) the court had no latitude as to whether to proceed or not with the summary judgment application.
2. The summary judgment application came on before Master Miller on 27 September 2000. He held that VTFL had proved its case for summary judgment for breach of fiduciary duty (the damages to be assessed) but not in respect of the money had and received claims of £11.3m. He also held that Mr Clough was entitled to claim the privilege against self-incrimination in answer to VTFL's application. The Master found that contrary to VTFL's submission Mr Clough was not seeking simply a stay of the action. In those circumstances he refused the application to strike out the defence, and the application for summary judgment was dismissed on the basis that Mr Clough had "a compelling reason why the case should be disposed of at trial" within the meaning of CPR 24.2(b).
3. On 8 March 2001 McCombe J allowed the appeal of VTFL. In essence he held:-

(1) that VTFL had proved its case for summary judgment on breach of fiduciary duty (entitling it to both (i) an enquiry for damages to be assessed and (ii) judgment for £11.3m.) but he held that VTFL had not proved its case for summary judgment in respect of the money had and received claim of £11.3m;

(2) that whilst Mr Clough might be entitled to claim the privilege against self-incrimination in principle, that of itself was not an answer to VTFL's application;

(3) that Mr Clough was effectively seeking a stay or was inviting the court to decline to proceed with a summary determination because of fear of prejudice to a fair trial in the criminal proceedings; and

(4) that the circumstances did not warrant that course.

1. Thus it was that the judge gave judgment for £11.3m and a further judgment on liability for damages to be assessed.

Self-incrimination: the true nature of the privilege

1. Halsbury's Laws of England (4th Ed) (1975) Vol 13 at paragraph 92 puts the matter this way:

"92. Privilege against incrimination of self or spouse. There is a general rule of evidence that a person should not be compelled to say anything which might tend to bring him into the peril and possibility of being convicted as a criminal. Hence in any civil proceedings, any person, whether a party or not, cannot be compelled to produce any document or thing or to answer any question, if to do so would tend to expose that person, or his or her spouse, to proceedings for an offence of for the recovery of a penalty, but this rule applies only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law, and does not extend to criminal offences under a foreign law."

1. Various points would seem to me to flow from the above if it correctly describes the nature of the privilege. First, the privilege is against being "compelled" and this must mean being compelled by lawful authority or "compelled on pain of punishment" (a phrase as we shall see used by Lord Mustill in *Reg. v Director of Serious Fraud Office, Ex parte Smith* [1993] AC 1 at 30-31). Second, the privilege "in any civil proceedings" is against being "compelled" to answer questions or produce documents. If the privilege had been against being required to put in a defence, one would expect that to have been established heretofore. Certainly there is no suggestion that "a defence" is a document to which it is contemplated the privilege against producing documents would apply. Third, (and this really arises from what I have just said) the privilege seems to be against being compelled to provide evidence or information. So far as pleading a defence is concerned there is no "compulsion" to put in a defence at all. Judgment can be allowed to go in default. Furthermore even if a defence is pleaded there is no compulsion to plead anything which provides information to the claimant. A claimant can be put to proof (see CPR 16.5). Of course if the defendant intends to put forward a different version of events from that given by the claimant, he is required by CPR 16.5(2)(b) to put forward that version. But, I stress there is no compulsion on him so to do because there is no compulsion on him to put forward a different version of events as opposed simply to putting the claimant to proof of the allegations that the claimant makes. So far as pre-trial proceedings are concerned, it is only if the claimant seeks to "compel" discovery and the production of a document, or "compel" an answer to an interrogatory in order to assist his case that the privilege would appear to arise.
2. If the above is a correct understanding of the nature of the privilege, the stance of Mr Geering QC on behalf of Mr Clough simply has no basis. The plea made in the defence and supported by the affidavit can only be relevant in the context of the court being required to rule (a) whether the civil proceedings generally or the summary judgment application should be adjourned either because they cannot be tried fairly or because trying them might affect the fairness of a criminal trial; or possibly (b) whether, even if the summary proceedings should not be adjourned, it is right to give judgment without a full trial having regard to any handicap a defendant may be under in being required to put in some evidence if he is to obtain what under the old rules used to be called leave to defend.
3. Is the above statement quoted from Halsbury's Laws and my understanding of what it means supported by authority? In my view it is supported by many authorities both ancient and modern. Indeed it is hardly possible to open an authority dealing with privilege against self-incrimination without confirmation that both the general statement is accurate and my understanding of it is correct. I will accordingly select only a few quotations from a few authorities over the centuries. Lord Eldon LC in *Paxton v Douglas* (1812) 19 Ves. Jun. 225 at 227-228, as cited recently in *Den Norske Bank A.S.A. v Antonatos and Another* [[1999] QB 271](https://www.bailii.org/cgi-bin/redirect.cgi?path=/ew/cases/EWCA/Civ/1998/649.html" \o "Link to BAILII version) at 285H, said:

"In no stage of the proceedings in this court can a party be compelled to answer any question, accusing himself, or any one in a series of questions, that has a tendency to (incriminate . . .) . . . "