NOTES OF CASES

CAN A PARTY FACED WITH AN "ANTON PILLER" ORDER RELY ON THE PRIVILEGE AGAINST SELF INCRIMINATION?

Television Broadcasts Ltd. v. *Mandarin Video Holdings Sdn. Bhd.*[1]

P.M.K. Rajah v. *Worldwide Commodities Sdn. Bhd. and Ors.*[2]

THIS article is concerned with an issue faced by the Malaysian High Court in *Television Broadcasts Ltd.* v. *Mandarin Video Holdings Sdn. Bhd.* and *P.M.K. Rajah* v. *Worldwide Commodities Sdn. Bhd. and Ors.* Chan J. and Zakaria Yatim J., who decided the cases respectively, came to contrasting conclusions as to whether or not a person served with an "Anton Piller"[3] order could rely on the privilege against self-incrimination.[4] Although the English Court of Appeal and the House of Lords decided in *Rank Film Distributors Ltd. and Others* v. *Video Information Centre and Others*[5] that the claim to this privilege ought to be upheld in such circumstances, both Chan J. and Zakarta Yatim J. were obliged to consider the effect of section 132 of the Malaysian Evidence Act 1950[6] (which, apart from insignificant differences in terminology, is identical to section 134(1), (2) and (3) of the Singapore Evidence Act[7]) to determine whether the provision abolished the privilege, thereby rendering the *Rank* case inapplicable to the Malaysian scene. In view of the equi-

1 [1983] 2 M.L.J. 346. The appeal against judgement in this case was struck off by the Federal Court.

2 [1985] 1 M.L.J. 86.

3 The "Anton Piller" order is so named by virtue of the case of *Anton Piller K.G.* v. *Manufacturing Processes Ltd.* [1976] 1 All E.R. 779 in which the Court of Appeal gave formal approval to this remedy. It is an interlocutory injunction (invariably applied for on an *ex parte* basis) of a specialised type granted by the court for the detention and preservation of documents and other materials, the continued existence of which is essential to the interests of justice. This remedy has been in considerable demand in the field of industrial and intellectual property. The plaintiff, on the basis of his claim against the defendant for infringement of copyright, trademark, patent or trade secret, seeks an order of Court for the incriminating document and articles in the possession of the defendant forthwith to be placed in the custody of a person approved by the court. The defendant may also be required to answer questions set out in the order.

4 The rule is that "… in any legal proceedings a person, whether a party to the proceedings or not, cannot be compelled to answer any question or produce any document or thing if to do so would tend to expose him to proceedings for an offence.": Templeman LJ. in *Rank Film Distributors (Ltd.) and Others* v. *Video Information Centre and Others* [1980] 2 A.E.R. 273 at 288. For full explanation of rule see Cross on Evidence, fifth edition, page 275 *et seq.*

5 [1980] 2 All. E.R. 273; [1981] 2 All. E.R. 76 (Court of Appeal and House of Lords judgements respectively).

6 Act 56 as amended as at May 1982.

7 Cap. 5, Singapore Statutes, Revised Edition, 1970 as reprinted on 1. October 1982.

valence of the Malaysian and the Singapore provisions, these decisions of the Malaysian High Court have a significant bearing on how the Singapore Court would decide the issue.

The Facts

In the *Television Broadcasts* case, the first two plaintiffs were the owners of the copyright in certain television films. The third plaintiff had exclusive rights to the reproduction of these films on video cassettes for distribution to the public. The plaintiffs alleged that the defendants were copying these films and making video cassettes for sale without authorisation. The plaintiffs applied, *ex parte,* for and obtained an "Anton Piller" order to detain and preserve articles and documents in the possession of the defendants. The plaintiffs' *inter partes* application for the order to be continued[8] was heard before Chan J. The defendants objected to the application on the ground, *inter alia,* of the privilege against self-incrimination (such evidence would provide a basis for their prosecution for offences under the Copyright Act, 1969).

In *P.M.K. Rajah,* the plaintiff claimed that the first defendants had been involved in certain activities with the intention of defrauding the plaintiff.[9] The plaintiff applied, *ex parte,* for and obtained an "Anton Piller" order to detain and preserve certain accounts and trading statements in the possession of the first defendant. The defendants applied to the Court for a discharge of the order on the ground, *inter alia,* of the privilege against self-incrimination (such evidence would provide a basis for their prosecution for, *inter alia,* conspiracy to defraud). The application was heard before Zakaria Yatim J.

The Decisions

Both Chan J. and Zakaria Yatim J. considered the effect of *Rank*.[10] In that case, the plaintiffs, film companies who owned the copyright in certain films, obtained *ex parte* "Anton Piller" orders against the defendants who, the plaintiffs claimed, were making copies of these films and recording and selling unauthorised video cassettes of such copies. The House of Lords upheld the claim of privilege against self-incrimination and declared that the Court should not grant an *ex parte* order compelling disclosure of documents or the answering of questions in such circumstances.

Lord Wilberforce said:

> However, it is only too clear... that the supply of the information and the production of the documents sought would tend to expose the respondents to a charge of conspiracy to defraud.[11]

[8] It is the norm in the case of an *ex parte* application for the order to be effective for a short period of time, usually one week. Unless the case is settled by that time the plaintiff will apply *inter paries* to the Court for the order to continue. It is at this stage that the defendant has the opportunity to state his objection, if any, to the order.

[9] The details are not given in the judgement.

[10] [1981] 2 All. E.R. 76.

[11] *Ibid.,* at 80.

The crucial question which faced both the Malaysian judges was whether section 132 of the Evidence Act 1950 removed the privilege totally or partially. Although Chan J. considered the provision as having abrogated the privilege, Zakaria Yatim J. was of the view that the section affected the common law position only with regard to persons testifying in Court and that a recipient of an "Anton Filler" order, not being in this category, could rely on the *Rank* case as the basis for his claim to the privilege. Accordingly, whereas Chan J. held in favour of the plaintiffs by allowing the order to continue, Zakaria Yatim J. discharged the order against the defendants.

Commentary

Section 132 provides as follows:

> 132. (1) A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit, or in any civil or criminal proceeding, upon the ground that the answer to that question will criminate or may tend directly or indirectly to criminate, him, or that it will expose, or tend directly or indirectly to expose, the witness to a penalty or forfeiture of any kind, or that it will establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of the Government of Malaysia or of any State or of any other person.
>
> (2) No answer which a witness shall be compelled by the court to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by that answer.
>
> (3) Before compelling a witness to answer a question the answer to which will criminate or may tend directly or indirectly to criminate him the court shall explain to the witness the purport of subsection (2).

The source of the contrariety of the approaches of Chan J. and Zakaria Yatim J. to section 132 lay in the interpretation of the word "witness". The question was whether the section only applies to persons giving evidence in the court room or encompasses any situation where a person is ordered to tender evidence *(e.g.* the Anton Piller Piller order). Chan J. preferred the broader construction. He stated his view in the following way:—

> In my judgement, a witness is a person who gives or "furnishes" evidence. If a person gives or is compelled by a court order (as in this case) to give evidence then he is a witness.[12]

He cited two Indian Supreme Court decisions to support his proposition: *M.P. Sharma* v. *Satish Chandra*[13] and *The State of Bombay* v. *Kathi Kalu Oghad.*[14] Both cases concerned Article 20(3) of the Indian Constitution which provides that "no person accused of any offence shall be compelled to be a witness against himself." The Supreme Court *(per* Jagannadhadas J. in the former case[15] and Das

12 [1983] 2 M.L.J. 346, at 357.
13 (1954) S.C.R. 1077.
14 (1962) 3 S.C.R. 10.
15 *Supra,* note 13.

Gupta J. the latter case[16]) came to the conclusion that the word "witness" covered a person who furnished evidence whether in or out of Court. However, as will be seen, Article 20(3) cannot be likened to section 132 and Chan J.'s reliance on the Indian authorities must, it is submitted, be open to question. Both Indian judges made it quite clear that their interpretation of "witness" was based on the particular characteristics of Article 20(3). Thus, in the face of Counsel's suggestion that Article 20(3) was confined to the oral evidence of the accused at his trial, Jagannadahas J. referred specifically to the words "to be a witness" and interpreted them to mean that a person can be a witness against himself outside the oral testimony that he gives in court.[17] In *The State of Bombay* case Das Gupta J. agreed with this approach. He said: "… the protection afforded to an accused in so far as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him."[18] The important point to bear in mind is that both judges shared the view that the interpretation would have been different if the provision had read: "appear as a witness". Their approach to the interpretation of the word "witness" was based on the terminology of Article 20(3) as opposed to a general interpretation of the word. Indeed, Jagannadhadas J. referred to section 132 of the Indian Evidence Act (on which the Malaysian and Singapore provisions are based and to which they are identical in effect) and stated that the section modified the English Common Law "as regards the oral testimony of witnesses by introducing compulsion."[19] Therefore, according to Jagannadhadas J., section 132 abolishes the privilege in the case of a witness giving evidence in Court, but not in the case of a person compelled to furnish evidence outside of court proceedings. Here then is an interpretation of section 132 which is totally dissimilar to the same judge's interpretation of Article 20(3) and reveals that the interpretation of the word "witness" is a matter of the context in which it appears. Finally, there is the question of what weight, if any, can be placed on the interpretation of a provision of the criminal law for the purpose of civil proceedings. It was on this particular point that Zakaria Yatim J. in *P.M.K. Rajah* decided that the two Indian cases could not "… form the basis of a definition of the word "witness" in section 132 of the Act."[20]

Chan J. then referred to *In re Westinghouse Uranium Contract*.[21] The matter before the Court of Appeal and the House of Lords was whether certain individuals should be ordered, *inter alia,* to appear for an oral examination in connection with a suit pending in the United States. Chan J. stated that these persons were referred to by the Courts as "witnesses" despite the fact that they had not yet been examined at proceedings. However, the word seems to have been used to refer to the capacity of those persons in the event that they were ordered to appear at the proceedings. Thus, Lord Roskill

16 *Supra,* note 14.
17 (1954) S.C.R. 1077, at 1088.
18 (1962) 3 S.C.R. 10, at 40.
19 (1954) S.C.R. 1077, at 1085.
20 [1985] 1 M.L.J. 86, at 89.
21 [1978] A.C. 547.

calls them "potential witnesses,"[22] persons who are not yet, but may become, witnesses.[23] The most important point is that the case was not concerned with the definition of the word either in a general or specific context and certainly has no bearing on section 132 of the Malaysian Evidence Act.

The determination of the meaning of a statutory provision should commence with an analytical approach of the statute as a whole. This, it is submitted, must be the first step. Although there is no formal definition of the word "witness" in the interpretation section[24] of the Act, it is significant that Part III of the Act (in which section 132 is found) is entitled "production and effect of evidence." Evidence is defined as including: "all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry" (oral evidence) and "all documents produced for the inspection of the Court" (documentary evidence). Part III of the Act is clearly concerned with the evidence that is to be presented (note the use of the word "production" in the heading) at the trial as it includes subjects such as burden of proof and estoppel, and the competence, compellability and examination of witnesses. Section 132 is part of a group of provisions[25] which come under the sub-heading "witnesses". The first provision under this subheading, section 118,[26] states that anyone can testify unless they come within the stipulated qualifications. It is submitted that this first provision defines the sub-heading it comes under, "witnesses". Accordingly the effect of section 118 is to enable the following provisions (which include section 132) to refer to the word on the basis of its ascribed meaning, that is, a person who testifies before the court. There is ample support in the form of law dictionaries[27] and textbooks[28] for the proposition that a person who testifies is a witness and that testimony is the giving of evidence on oath during legal proceedings. This is further borne out by section 139 which provides that a person who merely produces a document to the court is not a witness.[29]

Part III, by the very nature of its constituent provisions, is concerned with what transpires at the trial and not with what happens before hand. It follows that section 132 would not apply to an order of court (such as an "Anton Piller" order) to furnish evidence out of Court. Although Chan J. did not subscribe to such an approach, Zakaria Yatim J., on the basis of an extremely brief reference to two provisions[30] relating to the examination of witnesses in court, had this to say:

22 *Ibid*., at 566.

23 It is difficult to understand how Roskill L.J.'s phrase could have been interpreted by Chan J. as supporting his stand that a witness is merely a person who "furnishes evidence." See *supra,* note 1, at 358.

24 Section 3.

25 Sections 118 to 134 of the Malaysian Evidence Act and sections 120 to 136 of the Singapore Evidence Act.

26 Section 120 of the Singapore Evidence Act.

27 See, for instance, the definitions of 'witness' and 'testimony' in Jowitt's Dictionary of English Law, Second edition, Volume 2; Radin's Law Dictionary second edition and The Oxford Companion to Law by David H. Walker.

28 For instance, Cross on Evidence, fifth edition, pp. 5 and 6.

29 Section 141 of the Singapore Evidence Act.

30 Sections 138 and 139. He also referred to 0.38 of the Rules of the Supreme Court.

> In my opinion, a witness, in the context of section 132 of the Act, is a person who testifies on oath or affirmation in a Court of Law or in a judicial tribunal. Therefore, a person giving discovery of documents pursuant to an "Anton Piller" order does not fall within the meaning of the word "witness" in section 132 of the Evidence Act. In other words, section 132 does not apply at all to discovery in respect of an "Anton Piller" order.[31]

Perhaps the most revealing provision is subsection (3) of section 132 which states:

> Before compelling a witness to answer a question the answer to which will criminate or may tend directly or indirectly to criminate him the court shall explain to the witness the purport of subsection (2).

Subsection (2) provides:

> No answer which a witness shall be compelled by the court to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by that answer.

Chan J. considered[32] that subsection (3) could be satisfied by the inclusion of a statement in the "Anton Piller" order informing the defendant of the protection offered. However, such reasoning is, in the writer's view, inconsistent with the words of the subsection: "... the Court shall explain to the witness the purport of subsection (2)." These words, it is submitted, assume the presence in court of the person to be questioned in order that the Court can ensure that he understands. If this is the case, then clearly a person served with an "Anton Piller" order is not within the scope of subsection (3) and accordingly not within the ambit of section 132 at all. The importance of the principle that there be an explanation was propounded by the Court of Appeal in the *Rank* case.[33]

Bridge L.J. said:

> But very different considerations apply to those parts of an Anton Piller order which require the person to whom the order is addressed to give forthwith to the person serving the order answers to specified questions and disclosure of relevant documents. It has long been the practice of judges hearing oral evidence to warn witnesses who are in apparent danger of incriminating themselves that they are entitled to claim privilege from self-incrimination. It would not be practicable, in my judgment, to embody an effective warning of that kind in a typical peremptory Anton Piller order in such terms as to ensure that the recipient of the order fairly understood his position, what he was required to do and what were the options open to him. It must follow, I think, that the only satisfactory practice will be, when the court invited to make an Anton Piller order can see from the strength of the applicant's evidence that the

[31] *Supra,* note 2, at 89.
[32] *Supra,* note 1, at 358.
[33] [1980] 2 All. E.R. 273.

> proposed defendant is in danger of self-incrimination, to abstain from making any order *ex parte* requiring immediate answers to questions or disclosure of documents.[34]

Templeman L.J. said:

> In the present case the defendants were given no chance, no warning and no opportunity for reflection for reasons which as I have indicated, were well justified. But those reasons do not justify a penal and peremptory order which could only be obeyed at the risk of self-incrimination. The defendants were confronted with service of a complicated order which included peremptory orders for discovery and interrogation requiring instant obedience and they were informed by the penal notice on the order that disobedience would expose them to penal consequences.[35]

Guidance on the scope of section 132 might also be found in relation to English statutory provisions, such as section 72 of the Supreme Court Act 1981 and section 31 of the Theft Act 1968. The purpose of these English provisions, like section 132, is to abolish the privilege against self-incrimination in certain situations[36] while at the same time conferring protection against arrest and prosecution. However, the English provisions are clearly wider: the abolition of the privilege does not just apply to a witness but to "a person" facing an "order" of Court.[37] Had terminology such as this been used in section 132, there would have been no doubt as to its applicability to the recipient of an "Anton Piller" order. Indeed section 72 was specifically enacted to restore the Anton Piller order which had been considerably weakened as a remedy by the *Rank* case.[38] On the other hand section 132 has its roots in a nineteenth-century Indian statute[39] which could hardly be said to encompass a remedy which was only established in 1976.[40] It follows that, in view of the differences in terminology and background between section 132 and the English statutory provisions, it is difficult to accept Chan J.'s view[41] that section 72 is a basis for the contention that section 132 abrogates the right of a recipient of an "Anton Piller" order to rely on the privilege against self-incrimination.

Conclusion

Notwithstanding the frequency of applications for "Anton Piller" orders,[42] there is yet to be a reported case in Singapore in which the order has been challenged on the basis of the privilege against

34 *Ibid*., at 286.
35 *Ibid*., at 288-289.
36 Section 72 of the Supreme Court Act relates to "proceedings for infringement of rights pertaining to any intellectual property or passing off" whereas section 31 of the Theft Act concerns proceedings relating to theft.
37 See section 72(1) and 72(1)b, Supreme Court Act 1981 and section 31(1) and 31(1)b, Theft Act 1968.
38 *Supra,* note 5.
39 The Indian Evidence Act of 1872.
40 *Supra,* note 3.
41 *Supra,* note 1, at 356.
42 *Supra,* note 3. Lord Denning M.R. in *Ex Parte Island Records Ltd.* (1978) Ch. 122, at 133, said: "so useful are these orders that they are in daily use …".

self-incrimination. Although the present state of the law may be uncertain in view of the conflicting Malaysian cases and the absence of a decision in Singapore, it is submitted that, for the reasons already stated in this note, the proper approach to the interpretation of section 132 is that of Zakaria Yatim J. in *P.M.K. Rajah.* In other words, section 132 does not extend to a defendant who faces an "Anton Piller" order: he can rely on the privilege against self-incrimination.[43]

However, if this is indeed the present state of the law one can appreciate the sentiments of Chan J. who expressed his concern about the lack of protection for copyright owners in such circumstances, protection which is much needed against "men without scruples".[44] Lord Denning, in the *Rank* case, put it like this:

> There is plain evidence here that the defendants have done great wrong to the plaintiffs. They have stolen the plaintiffs' copyright in hundreds of films and have not paid a penny for it. Yet these wrongdoers glory in their wrongdoing. They get legal aid, and supported by it they say that, by reason of their wrongdoing, they have a privilege against self-incrimination. They rub their hands with glee and say to the injured plaintiffs. "You cannot ask us any questions. You cannot see any of our documents. We have a privilege by which we can hold you at bay and tell you nothing. You cannot prove any damages against us, not more than minimal. You cannot get an account of our profits."
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> To allow wrongdoers to take advantage of their wrongdoing in this way is an affront to justice itself. It is a great disservice to the public interest. It should not be allowed. If this illicit traffic is to be stopped, strong measures are needed.[45]

Although both the Court of Appeal and the House of Lords decided in favour of the defendant they intimated that the involvement of the legislature would be necessary to alter the legal situation.[46] In the House of Lords, Lord Russell said:

> Inasmuch as the application of the privilege in question can go a long way in this and other analogous fields to deprive the owner of his just rights to the protection of his property I would welcome legislation somewhat on the lines of s.31 of the Theft Act 1968; the aim of such legislation should be to remove the privilege while at the same time preventing the use in criminal proceedings of statements which otherwise have been privileged.[47]

[43] However, if the circumstances are such that disclosure would *not* "tend to expose" the defendant *(e.g.* he has already criminated himself) or that incrimination is in respect of a trivial offence, then he would not be entitled to rely on the privilege: *Rank Film Distributors Ltd. and Ors.* v. *Video Information Centre and Others* [1981] 2 All. E.R. 76.

[44] *Supra,* note 1, at 352.

[45] *Supra,* note 33, at 282-283 (dissenting judgement).

[46] *Ibid*., *(per* Bridge L.J.) at 286, *(per* Templeman L.J.) at 292.

[47] [1981] 2 All. E.R. E.R. 76, at 86. See also Lord Wilberforce's comment (at 82) and Lord Fraser's statement (at 85).

As has been said, legislation in the form of section 72 of the Supreme Court Act 1981 has been passed in England specifically to restore the "Anton Piller" order to the position of potency which it enjoyed prior to the *Rank* case. As far as Malaysia and Singapore are concerned, if the *P.M.K. Rajah* decision is based on a correct interpretation of section 132 then there is, in this writer's view, a need for legislative action in the same vein as section 72 of the Supreme Court Act 1981.

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