

**IN THE CROWN COURT FOR NORTHERN IRELAND
(SITTING AT BELFAST)**

THE QUEEN

v

**WILLIAM CORRY, LESLIE WRIGHT, SAFEWAYS (IRELAND) LIMITED,
GILBERT ASH (NI) LIMITED AND BRICKKILN CIVIL ENGINEERING
CONTRACTORS LIMITED**

HART J

[1] This is an application for third party disclosure by one of the defendants directed to another defendant under the provisions of Section 51A and 51B of the Judicature (Northern Ireland) Act 1978. It appears to raise a hitherto novel point, namely whether the court has power to order a co-defendant to make disclosure to another defendant under the third party disclosure provisions of the Judicature Act.

[2] For the purposes of this application it is sufficient to say that the application is brought by Safeways (Ireland) Limited (Safeways) and is directed to Gilbert Ash (NI) Limited (Gilbert Ash). Safeways and Gilbert Ash are two of the five defendants who appear on the same indictment charged with various offences under the provisions of the Waste and Contaminated Land (Northern Ireland) Order 1997. Briefly stated the allegation is that Gilbert Ash as the designated contractor under its contract with Safeways was responsible for removing the waste from a building site for Safeways in Bangor, County Down in 2003. The other defendants are alleged to have played various roles in the same set of offences. None of the defendants are jointly charged in the sense that they appear together in one or more counts, but all are on the same indictment.

[3] The material part of the notice lodged on behalf of Safeways is:

“..for an Order that the Managing Director Gilbert Ash (NI) Limited, Building Contractors, of 47 Boucher Road, Belfast, BT12 6HR or a designated director of the firm make disclosure of and deliver up to the Court all files, notes, reports, communications, correspondence, site meetings, certifications and records and all other documentation howsoever described in the possession, custody, control or power of the said persons, and in particular all those records relating to the removal of any waste from the premises at Main Street, Bangor by Gilbert Ash (NI) Limited, its servants, agents or sub-contractors, and in particular the Accused Wright between 10th September and 17th October 2003, relating to Safeways Stores (Ireland) Limited and in particular the construction of a superstore complex at Main Street, Bangor, County Down”.

[4] Mr Beattie, who appears on behalf of Safeways, argued that as Gilbert Ash were in a contractual relationship with Safeways and contractually obliged to produce documents relating to the Waste Management Plan Safeways were entitled to obtain disclosure of those documents. He said that if these documents were not produced Safeways would be prejudiced in preparing its defence under Article 4 of the 1997 Order. He conceded that there was no authority for such an application, but argued that at the very least the documents should be examined by Gilbert Ash in order to see whether the contents were in any way prejudicial to Gilbert Ash.

[5] For Gilbert Ash Mr Dunlop argued:

(1) That as a co-defendant on this indictment Gilbert Ash was not a compellable witness and therefore the court could not make an order for production of documents by Gilbert Ash to Safeways.

(2) The application therefore falls at the first hurdle because it is in the form of an application for a witness summons directed to Gilbert Ash under Section 51A and 51B of the 1978 Act and as Gilbert Ash is not a compellable witness no witness summons should issue against it.

(3) Alternatively, Gilbert Ash has a right not to incriminate itself and it was not sufficient for Safeways to argue that Gilbert Ash had to say that they felt that they were or may be incriminated, because Gilbert Ash were not required to produce these documents.

(4) The essence of third party disclosure proceedings is that the third party to whom the summons is directed is not a party to the proceedings, whereas Gilbert Ash is a party as a co-defendant and therefore the proposed procedure was inappropriate.

(5) If Parliament had intended to depart from the long established rule that a defendant was not a compellable witness then Section 51 would have said so.

(6) To require Gilbert Ash to produce these documents would undermine its right not to incriminate itself, both at common law and by virtue of the provisions of Article 6 of the European Convention.

[6] As the notice seeking the third party disclosure order makes clear, any order under the provisions of Section 51 takes the form of an order of the court directing the individual named therein to either attend to give evidence under Section 51A, or to make advance production of the documents under Section 51B. Thus Section 51 A(2) provides;

“In such a case the Crown Court shall, subject to the following provisions of this section, issue a summons (a witness summons) directed to the person concerned and requiring him to -

(a) attend before the Crown Court at the time and place stated in the summons, and

(b) give the evidence or produce the document or thing.”

[7] Section 51B provides that a witness summons issued under Section 51A (2) may

“also require him to produce the document or thing -

(a) at a place stated in the summons, and

(b) at a time which is so stated and precedes that stated under Section 51A(2),

for inspection by the person applying for the summons.”

[8] If any person fails to comply with a witness summons then he is guilty of contempt of court by virtue of Section 51G, and under Section 51H a warrant may be issued for his arrest and production before the court.

[9] The starting point for consideration of this issue is that an accused is never a compellable witness in a criminal trial, whether at the request of the prosecution or a co-defendant. Thus Section 1 of the Criminal Evidence Act (Northern Ireland) 1923 provides:

“1. Every person charged with an offence... shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with other person:

Provided as follows –

(a) A person so charged shall not be called as a witness in pursuit of this Act except on his own application;”

[10] Although the 1923 Act has been amended by Schedule 1 of the Criminal Evidence (Northern Ireland) Order 1999 the position is unchanged because Section 1(1) of the 1923 Act as amended provides:

“(1) A person charged in criminal proceedings shall not be called as a witness in the proceedings except upon his own application”.

[11] Although the amendments of the 1923 Act by the provisions of Schedule 1 of the 1999 Order have not yet been brought into effect it can be seen that the law remains unchanged in this respect.

[12] Were it the case that a defendant could take advantage of the provisions of Section 51 to require a co-defendant to attend and give evidence on pain of being found in contempt of court if the witness summons was not obeyed, the effect would be to circumvent the long-established common law rule which is embodied in the statutory provisions to which I have referred, namely that an accused cannot be compelled to give evidence unless he wishes to do so.

[13] Although it is the case that what is sought in the present application is the advance production of documents, I do not consider that there is any difference in principle between an application seeking the production of documents and seeking that a witness gives oral testimony. Indeed it is clear from the provisions of Section 51A to which I have already referred that no distinction is drawn between attending to give evidence and to produce a document or thing. One may test the proposition advanced by Mr Dunlop by considering what the position would be if the witness summons required the

defendant to produce the document at the trial. Effectively the defendant would be compelled either to go into the witness box to produce the document, and thus forfeit its right not to give evidence unless it wishes to do so, or find itself, and in practice the person in jeopardy would be the designated witness, at risk of being held in contempt if the witness refused to produce the document. It must also be borne in mind that this situation could be brought about by the prosecution serving an application for a witness summons under Section 51. The end result in either event would be the same and this cannot be correct. I am therefore satisfied that Mr Dunlop's first submission is correct and that the court has no power to issue a witness summons upon the application of one defendant directed to another defendant who is jointly charged in the same indictment. On that ground alone the application must fail.

[14] In any event, Mr Dunlop falls back upon the right of Gilbert Ash not to incriminate itself, and argues that an order requiring it to produce documents would breach its right to a fair trial under the provisions of Article 6 of the European Convention. The privilege against self-incrimination is long-established at common law, see the discussion of this privilege in *Clinton v Bradley* [2000] NI 196. In *Saunders v UK* 23 EHRR 313 the European Court described the right not to incriminate itself as a generally recognised international standard which lay at the heart of the notion of a fair procedure under the provisions of Article 6 of the European Convention. Whilst this was in the context of an application by the prosecution I consider that the principle must equally apply to an application by a defendant because the effect must be the same, namely that the defendant must also be required to prove his case without resort to evidence which has been obtained in defiance of the will of the co-accused by a procedure which exposes the person to whom the procedure is directed to the risk of providing incriminating evidence under compulsion. Although there is a clear distinction drawn in the domestic jurisprudence between the use of evidence at the trial which has been obtained by powers of compulsory questioning during the investigative phase of an inquiry, as I have already indicated the procedure under Section 51A and 51B presupposes that the person to whom the order is directed can be required to appear at the trial and give evidence or produce the document. Therefore, were it necessary to do so, I would hold that the issue of a third party notice under the provisions of Section 51A in the circumstances of the present case would be to infringe the right of Gilbert Ash not to incriminate itself, and that the application should be refused on this ground also.

[15] I appreciate that this has the effect of denying Safeways access to information which may be of assistance to its case but it cannot advance its case by means which may have the effect of infringing the rights of a co-defendant.

[16] For these reasons the application is refused.