THE JAMAICAN BAR ASSOCIATION
in association with

THE GENERAL LEGAL COUNCIL
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CONTINUING LEGAL EDUCATION
WEEKEND SEMINAR

DATE: NOVEMBER 19-20, 2011

VENUE: RITZ CARLTON – MONTEGO BAY

BE AWARE – BEWARE

AN INTRODUCTION TO THE CONSTITUTIONAL ISSUES ARISING FROM LEGISLATION REQUIRING COOPERATION IN INVESTIGATIONS

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BE AWARE – BEWARE

AN INTRODUCTION TO THE CONSTITUTIONAL ISSUES ARISING FROM LEGISLATION REQUIRING COOPERATION IN INVESTIGATIONS

PART 1 – INTRODUCTION

1.0 Why does legislation that requires answers to questions and / or production of documents or material in criminal or administrative investigations raise constitutional issues?

1.1 Such legislation, as we will see, raises the issue as to whether the use of answers to questions, documents or material provided in response to such investigations or the failure to cooperate with the investigations breaches the fair trial provision of our Constitution.

1.2 A fair trial provision was contained in the Jamaican constitution prior to the amendment to provide for a Charter of Fundamental Rights and Freedoms. It has now been reproduced in the charter which was passed in April 2011.

1.3 Section 16 (1) of the Charter states:

> *"Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law".*

1.4 Section 16(2) states:

> *"In the determination of a person's civil rights or obligations or of any legal proceedings which may result in a decision adverse to his interests he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law".*

1.5 Section 16(6)(f) states:

> *"Every person charged with a criminal offence shall…*
>
> *not to be compelled to testify against himself or to make any statement amounting to a confession or admission of guilt"*

1.6 This part of the paper traces how this issue arises in a general way. As we will see the E.C.H.R. and U.K. cases are particularly significant

because of the absence of Jamaican and West Indian cases in relation to this issue.

1.7 Questions 1-5 deal with the common law right to silence and the common law privilege against self-incrimination and the fact that legislation compelling cooperation in investigations, expressly or by implication, could abrogate these rights.

1.8 Questions 6-8 deal with the circumstances under which human rights issues have arisen in European Convention "E.C.H.R." cases in respect of legislation compelling cooperation in investigations, expressly or by implication. Also dealt with are the significance of these cases to Jamaica and the fair trial provision in our constitution

1.9 Questions 9-10 deal with the circumstances under which these human rights issues have arisen in United Kingdom "U.K." legislation and U.K. cases as a result of the application of the E.C.H.R. to the U.K. Also dealt with is the significance of the U.K. cases to Jamaica and the fair trial provision in the constitution.

1.10 The structure and order of topics in this paper is a modification of the treatment of this issue in the text The Law of Evidence, fourth edition by Ian Dennis.

2.0 What is the common law right to silence mentioned at 1 above?

2.1 The common law right to silence in the face of questioning was recognized by Lord Mustill in R v Director of Serious Fraud Office Ex. P. Smith [1993] A.C. 1 at 30-32. In this case, Lord Mustill suggested that the right to silence is a term used somewhat loosely to refer to any one or more of a "disparate group" of six immunities which "differ in nature, origin, incidence and importance." He said:

> *"Amongst these may be identified: (1) a general immunity possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons and bodies, (2) a general immunity possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them, (3) a specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain and punishment to answer questions of any kind; (4) a specific immunity, possessed by accused persons undergoing trial, from being*

compelled to give evidence, and from being compelled to answer questions put to them in the dock; (5) a specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to offence addressed to them by police officers or persons in a similar position of authority; (6) a specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment made on failure (a) to answer questions before the trial, or (b) to give evidence at the trial."

2.2 The immunities numbered (1), (2) and (3) above are relevant to this paper. It follows from the above that at common law a person, whether a suspect or not, is entitled to decline to answer questions by the police. In the case of Green v D.P.P. [1991] Crim.L.R. 782, an issue arose as to whether or not the conduct of a brother of a suspect amounted to an obstruction of the police in the execution of their duty. The conduct in question was his telling the suspect not to answer the questions of the officers.

2.3 It was held that in the circumstances of the case that brother's conduct did not amount to an obstruction. More importantly counsel for the prosecution conceded that it was lawful for a suspect not to answer questions directed to him by the police and that it was lawful for a third party to advise a suspect of his right not to answer questions. This common law principle would apply to equally to questioning by other investigators.

3.0 Does the common law offence of misprision of felony qualify the common law right to remain silent during investigations?

3.1 Arguably yes, in relation to the questioning of a non-suspect in relation to a felony. According to Archbold Criminal Pleading, Evidence and Practice, 36th edition, misprision of felony consists in concealing or procuring the concealment of a felony known to have been committed 1 Hawk. Cc. 20, 59; 1 Russ.Cr., 12th ed., 167. The offence is a misdemeanour at common law and applies to non-suspects. This duty on the part of a non-suspect to provide information in relation to a felony is arguably inconsistent with the right to remain silent.

3.2 In Sykes v D.P.P. [1962] A.C. 528 the House of Lords had to consider whether the offence still existed in England at that time. It held that the offence of misprision of felony still existed. It further held that the

concealment necessary to constitute the offence did not involve a positive act, and a mere omission to inform the authorities of a felony, of which the appellant knew, was sufficient to justify the appellant's conviction. The offence of misprision of felony has since been abolished by statute in England, but not so in Jamaica.

3.3 However, the offence does not apply in relation to the questioning of a suspect. The learned authors of Archbold Criminal Pleading, Evidence and Practice, 36th edition, in reference to the offence at a time when it applied in England, at paragraph 4166 state that:

> *"Non - disclosure is excused also where disclosure would tend to incriminate the prisoner. Mere silence, at any rate after a person has been cautioned, cannot amount to misprision and a person questioned about a felony is not bound to answer if his answer would tend to incriminate him with regards to that or some other offence."*

4.0 What is the common law privilege against self-incrimination and explain its relationship, if any, to the common law right of silence?

4.1 There is no statutory definition of the common law privilege against self-incrimination in Jamaica. However in Rio Tinto Zinc Corp v Westinghouse Electric Corp [1978] A.C. 547 at 636 HL, Lord Diplock referred to a statutory definition in England as restating the common law.

4.2 The definition restating the common law privilege against self-incrimination was approved by Lord Diplock and is as follows:

> *"The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty."*

4.3 The distinction between this common law privilege against self-incrimination and the common law right to silence is that the former extends beyond answers to questions and extends more broadly to the right of person or body to refuse to produce evidence against themselves.

5.0 Could legislation requiring answers allow for such answers to be used against the witness in subsequent proceedings, contrary to the common law privilege against self-incrimination?

5.1 There are no Jamaican or West Indian cases on this point but the U.K. cases indicate clearly that the answer is yes. The U.K. cases show that where legislation required answers but did not expressly prohibit the use of the answers in other proceedings, the common law privilege against self-incrimination was rendered unavailable. Therefore the answers could be used in evidence against their makers.

5.2 The case of R v Scott (1856) Dears & B 47, is often cited as authority on this issue. In this case, a witness had been made to answer questions in relation to his trade dealings and estate under the Bankruptcy Law Consolidation Act 1849. His answers were subsequently admitted against him in criminal proceedings. Lord Campbell said:

> *"When the legislature compels parties to give evidence accusing themselves and means to protect them from the consequences of giving such evidence, the course of legislation has been to do so by express enactment."*

6.0 Has a human rights issue arisen under the E.C.H.R. and in E.C.H.R. cases in relation to legislation requiring cooperation by answers, production of documents and/or material in investigations?

6.1 Yes, the human rights issue has arisen under the E.C.H.R and in the E.C.H.R. cases in the context of Article 6 (1) of the E.C.H.R protecting the right to a fair trial. The two landmark cases are Funke v France [1993] 16 E.H.R.R 297 and Saunders v United Kingdom (1997) 23 E.H.R.R. Article 6 (1) of the E.C.H.R states:

> *"In the determination of his civil rights and obligations or any criminal charge against him everyone is entitled to a fair and public hearing in a reasonable time by an independent and impartial tribunal established by law".*

6.2 In Funke v France the European Court of Human Rights held that Article 6(1) of the European Convention on Human Rights includes the right of anyone charged with a criminal offence to remain silent and not to contribute to incriminating himself. The case concerned the production of documents.

6.3 The applicant was prosecuted under legislation compelling production of bank statements to French custom authorities for failing to produce these on request. The Court held that the conviction of the applicant for this offence was a violation of Article 6 (1). The applicant had argued that customs had brought the criminal proceedings to compel him to cooperate in a prosecution in an offence against French customs regulations. The Court agreed and hence its decision.

The subsequent case of Saunders v United Kingdom concerned answers, as distinct from documents. Answers were given by Saunders as requested by DTI inspectors under the Companies Act. Under that Act the inspectors could compel a person to answer their questions and the answers obtained could be used in any subsequent proceedings. At Saunders' trial for conspiracy, false accounting, and theft, evidence was adduced of answers given by him to the DTI inspectors. He was convicted. The court held that the use of the incriminating statements had deprived Saunders' of his right to a fair hearing within the meaning of Article 6 (1).

6.4 In Saunders v U.K. the Court said:

> *"The Court recalls that, although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6."*

6.5 It should be noted that as a direct result of the Saunders case the U.K. Youth Justice and Criminal Evidence 1999 inserted "use immunity" provisions into a large number of statutory powers concerned with fraud related investigations. These provisions provide immunity for answers and statements made in response to compulsory questioning under the relevant powers. They did not however protect pre-existing documents disclosed under compulsion

7.0 Are the E.C.H.R recognised rights of the privilege against self incrimination and the right to remain silent absolute? In other words can these rights be abrogated, expressly or by implication, by legislation, requiring cooperation by answers, production of documents or material in investigations?

7.1 In **Saunders v United Kingdom** the European Court recognised that the privilege is not absolute.

7.2 A decision of the European Court recognising this is John Murray v U.K. (1996) 22 E.H.R.R. 29. In this case the court had to consider whether U.K. legislation allowing the court to draw inferences from silence during questioning violated Article 6 of the E.C.H.R. The court made clear that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of Article 6. It also held, however, these standards were not absolute.

7.3 Therefore whilst it would be incompatible with Article 6 to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself, where a situation clearly calls for an explanation the accused's silence can be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. All the circumstances of the case have to be taken into consideration.

8.0 What significance, if any, do the E.C.H.R. and E.C.H.R. cases have in relation to Jamaica?

8.1 The first point to note is that the human rights provisions in our Jamaican constitution are modelled on the provisions of the E.C.H.R. In Bowe v R [2006] 68 WIR 10 Lord Bingham, writing for the Privy Council, in reference to the Bahamian Constitution, compared the human rights provisions in that Constitution to the on the provisions of the European Convention on Human Rights and appeared to suggest that the Constitution should be interpreted in like manner as the provisions of that convention. This rationale would apply to the interpretation of the human rights provisions in the Jamaican constitution and in particular to the fair trial provision because the Jamaican Constitution is also modelled on the convention.

8.2 It follows that since the Jamaican fair trial provision in the constitution is modelled on the E.C.H.R fair trial provision it is arguable that our fair trial provision ought to be interpreted in like manner based on the reasoning in Bowe v R. It also follows that the fair trial provision in our Constitution at section 16(1) and referred to at paragraph 1.3 above also impliedly protects the right to remain silent and the privilege against self incrimination.

8.3 The authors have found no West Indian cases considering the E.C.H.R cases on this issue except for a dissenting judgment of Osadebay J.A. in the Bahamian Court of Appeal decision of Attorney General v Financial Clearing Corporation Civil Appeal No 70 of 2011. In this case the Court of Appeal considered a constitutional challenge to a section of the Financial Intelligence Unit Act. The section gave the Financial Intelligence Unit (FIU) power to order a bank to produce information to the FIU on a client's bank account without the consent of the owner and without a court order.

8.4 The court was unanimous in its decision that the section of the Act in question did not breach the fundamental right to privacy guaranteed by the constitution. They held that the confidentiality of banking

information was not a fundamental right protected by the Constitution. The article protecting the right to privacy in the Bahamian Constitution is 15 similar to section13 of the Jamaican Constitution prior to the amendment by the Charter of Rights.

8.5 However, Osadebay J.A. concluded that another article in the Bahamian constitution had been breached. In a dissenting judgment he referred to and relied on the fair trial provision in article 21 of the Bahamian constitution. He concluded that E.C.H.R case of Saunders v U.K. applied to the interpretation of that article and hence, he interpreted it as preserving the privilege against self incrimination. On that basis he also concluded that the section of the Act in question breached article 21 of the constitution to the extent that it provided for a person to be compelled by the FIU to provide possible incriminating information on pain of punishment.

9.0 What is the relationship between the E.C.H.R and U.K. domestic law? What is the significance of this relationship to the possible interpretation by Jamaican courts of legislation requiring cooperation in investigations?

9.1 The E.C.H.R was incorporated into English law by the Human Rights Act 1998 and so the E.C.H.R fair trial provision has also been incorporated into U.K. domestic law.

9.2 In so far as legislation is concerned section 3 (1) of the Humans Right Act provides that as so far as it is possible to do so, legislation must be read and given effect in a way that is compatible with Convention rights. If this is not possible, the legislation must be applied, but the court can make a declaration of its incompatibility with the Convention. In that event this should lead to an amendment to the legislation to remove the incompatibility.

9.3 In so far as case law is concerned section 6 (1) of the Humans Rights Act provide that it is unlawful for a public authority to act in a way which is incompatible with a convention right. By section 6 (3), 'public authority' includes a court and therefore U.K. domestic courts must have regard to the convention in all their decisions. However, under section 2 (1) of the Human Rights Act the court is simply required to take such decisions 'into account'.

9.4 The House of Lords made it clear that it did not consider itself bound to follow ECHR cases in the case of Re McKerr [2004] 1WLR 807. Lord Hoffman said:

> "*It should no longer be necessary to cite authority for the proposition that the Convention, as an international treaty, is not part of English domestic law...Although people sometimes speak of the Convention having been incorporated into domestic law that is misleading metaphor. What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention.*
> *They are available against specific public authorities, not the United Kingdom as a state. And their meaning and application is a matter of domestic courts, not the court in Strasbourg.*"

9.5 The significance of this is that the E.C.H.R. and U.K. cases may sometimes conflict in so far as the right to silent and the privilege against self incrimination is concerned in particular on the issue of their application to legislation requiring cooperation in investigations. This means that in the event of a conflict between the E.C.H.R case law and the U.K. domestic case law on this issue the Jamaican court may have to decide between both. Therefore, an attempt will be made in this paper to identify any significant conflict between the E.C.H.R case law and the U.K. case law.

10.0 Does Jamaica have legislation requiring cooperation in investigations?

10.1 Yes, a chart summarising to such legislation is an appendix of this paper. Much of this legislation has been passed in the past decade.

PART II-CRIMINAL INVESTIGATIONS

11.0 What is the rationale for the right to remain silent and the privilege against self incrimination in relation to legislation requiring answers in criminal investigations?

11.1 In Attorney General v Financial Clearing Corporation Case, Osadebay J.A. in his dissenting judgement referred to and relied on paragraph 68 of the judgment in Saunders v U.K. which states that:

> *"Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of article 6 (see Murray v U.K. 22 EHRR 29 and Funke v France 16 EHRR 297). The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in article 6 (2) of the convention."(emphasis ours)*

12.0 Is there a test to the degree of compulsion necessary to breach the privilege?

12.1 Based on the case of Heaney and McGuinness v Ireland considered at paragraphs 15.1 and 15.2 below, the test appears to be whether the compulsion destroys the "very essence" of the privilege. (In Heaney McGuinness v Ireland the court referred to this phrase in Funke v France.)

13.0 At what stage does the privilege arise i.e. does it arise at the stage of questioning or thereafter? Can the privilege be breached even if there is no prospect of the information compulsorily obtained being used in criminal proceedings?

13.1 Generally the issue of the privilege arises in two circumstances. Firstly if there is a prosecution and conviction for failure to comply with the legislation requiring answers. Secondly where a person does comply and discloses information and it is used in a subsequent prosecution. Ian Dennis in his text The Law of Evidence states:

> *"From the point of view of human rights there are two problems to considered. One problem arises where a person refuses to comply with a demand under on e of these powers for information or documents. Does the prosecution and conviction of him for failure to comply violate article 6? The other problem arises where the person does comply and discloses information or documents. If that information or those documents are used in a subsequent prosecution is there a violation of art. 6?"*

13.2 However in the E.C.H.R. case of Shannon v UK (2006) 42 E.H.R.R. 31 the issue as to whether the privilege could apply arose in another context other than the two circumstances mentioned above at paragraph 13.1. In this case, the information obtained compulsorily was not used in the

criminal proceedings because those proceedings were struck out on grounds of delay. An applicant answered questions by financial investigators under proceeds of crime legislation. He was subsequently charged with fraud offences, namely false accounting and conspiring to defraud. The investigators sought to require him to answer more questions while the charges were still in existence. The applicant did not comply and was convicted and fined under the legislation for failure to comply. The fraud criminal prosecution was, however, struck out.

13.3 The applicant challenged in the European Court his conviction for failure to comply with in circumstances where he had already been charged for offences arising out of facts being investigated.

13.4 The court appeared to reject the submissions of the government based on the U.K. cases of R v Hertfordshire City Council ex parte Green Environmental Industries Ltd and R v Kearns that questions arise under article 6 once and only once the criminal proceedings have begun. (Those cases are considered in more detail at paragraphs 25.3 and 25.4. The court held that there was a breach of the privilege in the circumstances and said at paragraphs 33 and 34 that :

> *"The underlying proceedings in the present case – the prosecution for false accounting and conspiracy to defraud – were never pursued. The Government concludes from this that the right not to incriminate oneself cannot be at issue in the present case because in the event there were no substantive proceedings in which the evidence could have been used in an incriminating way.*
>
> *The Court recalls that in previous cases it has expressly found that there is no requirement that allegedly incriminating evidence obtained by coercion actually be used in criminal proceedings before the right not to incriminate oneself applies. In particular, in Heaney and McGuinness, it found that the applicants could rely on Art 6(1) and (2) in respect of their conviction and imprisonment for failing to reply to questions, even though they were subsequently acquitted of the underlying offence. Indeed, in Funke, the Court found a violation of the right not to incriminate oneself even though no underlying proceedings were brought, and by the time of the Strasbourg proceedings none could be."*

14.0 Is the privilege confined to admissions of wrongdoing or directly incriminating answers?

14.1 In Saunders v U.K. in paragraph 71 the Court said:

"In any event bearing in mind the concept of fairness in Article 6 (art. 6), the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature - such as exculpatory remarks or mere information on questions of fact - may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility".

15.0 Have the E.C.H.R. cases and the U.K. domestic cases been consistent in their application of the privilege in relation to compelled answers under legislation requiring these?

15.1 Initially no, because in the E.C.H.R case of Heaney and McGuinness v Ireland (2001) 33 E.H.R.R 12, [2001] Crim.L.R.381 and the U.K. Privy Council case of Brown v Stott (Procurator Fiscal, Dunfermline and another [2001] 2 All ER 97 appear to conflict. In Heaney and McGuiness v Ireland the applicants were arrested in connection with an alleged terrorism offence. They were asked by investigators to account for their movements during the period in question under legislation which compelled them to do so. They refused to do so and were prosecuted and convicted for failing to comply with the legislation. They subsequently complained that their right to silence and their right not to incriminate themselves under Article 6 were violated and the court agreed.

15.2 In the Court's view, the "essence of the privilege" was destroyed where they were compelled to choose between the threat of imprisonment for failing to provide information and the risk presented by providing information relevant to very serious charges that might be brought against them.

15.3 However in the U.K. Privy Council case of Brown v Stott the Privy Council on appeal from Scotland found no violation of article 6 where the compelled statement made by the appellant under section of the Road Traffic Act was used against her. The following summary in paragraphs 15.4 and 15.5 of the decision is a modification of a summary from the text The Modern law of Evidence, eighth edition by Adrian Keane.

15.4 Under section 172 the Act the person keeping the vehicle was required to give such information as may be required as to the identity of the driver to the police. Under the Act a failure to comply was an offence punishable by a fine, mandatory endorsement, and discretionary disqualification from driving. It was held that evidence of an admission obtained from the accused that she had driven the car and was used in a prosecution under the Act for driving with alcohol above the prescribed

limit. It was held that the use of the admission did not infringe Article 6 under the Act did not infringe Article 6. Lord Bingham said:

> *"The jurisprudence of the European Court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within Article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for". (emphasis ours.)*

15.5 The basis of the Court's decision was therefore a clear public interest in the enforcement of road traffic legislation and section 172 was not disproportionate response to the serious social problem of the high incidence of death and injury on the roads caused by the misuse of motor vehicles. The section permitted a single, simple question to be put, the answer to which cannot by itself incriminate the suspect, and the penalty for non-compliance is moderate and non-custodial. Furthermore, all who own or drive motor cars know that by doing so they subject themselves to a regulatory regime which was imposed because the possession and use of cars are recognized to have the potential to cause grave injury.

16.0 Has the apparent conflict between the E.C.H.R. case of Heaney and McGuinness v Ireland now been resolved?

16.1 Apparently yes. Brown v Stott was considered by the Grand Chamber of the European Court in O'Hallaran and Francis v U.K. (2007) 46 EHRR 397 and found to be compatible with Article 6. The summary of this case set out in paragraph 16.2 below is extracted from Blackstone's Criminal Practice, 2001 Edition. The European Court held that, in order to determine whether the essence of those rights was infringed it was necessary to focus on the nature and degree of compulsion used to obtain the evidence, the existence of any relevant safeguards in the procedure and the use to which any material obtained was put.

16.2 It was held that the privilege against self-incrimination is not an absolute right, being part of the broader right to a fair trial in Article 6. Cases of direct compulsion do not necessarily lead to violation; other factors may be relevant in deciding whether the essence of the privilege against self-incrimination has been violated. Thus in addition to (a) the direct nature of the compulsion (s. 172, for example provides compulsion in the form of a fine of up to £1,000 and disqualification from driving or three penalty points), account should be taken of (b) the fact that the compulsion was part of a regulatory scheme that fairly imposes obligations on drivers in order to promote safety on roads, (c) the fact the

information required is the simple specific and restricted fact of who was driving, (d) that the offence under section 172 has a defence of due diligence, and (e) that in the case of O'Hallaran the identity of the driver was only one element of the offence and the speeding still had to be proved.

17.0 Is the approach in the E.C.H.R case of O'Hallaran and Francis v U.K. and the U.K. case of Brown v Stott of assessing whether the restriction on the right to silence and the privilege against self incrimination are proportionate to a legitimate aim "the proportionality test", an appropriate approach in the interpretation of Jamaican legislation requiring co-operation in investigations?

17.1 The proportionality test was considered by the Full Court in Jamaican Bar Association v The Attorney General and The Director of Public Prosecutions et al., a decision delivered on October 30, 2003. This case concerned among other things the constitutionality of the Mutual Assistance (Criminal Matters) Act pursuant to which search warrants were issued and documents seized at attorney's offices. The attorneys challenged the legislation submitted that the provisions were not reasonably required for which the statute was promulgated.

17.2 It was argued that a proportionality test should be applied and in this regard it was pointed out that other methods existed which were not as extreme as the search and seizure to obtain oral or documentary evidence for use in a foreign jurisdiction.

17.3 The Full Court did not accept that the provisions failed the proportionality test but did not say that it was inapplicable or inappropriate to use this test in determining the constitutionality of the provisions in question. The Full Court however, applied several Privy Council decisions which held that in the interpretation of statutes there is a presumption of constitutionality and further that the burden of proof to the contrary is in the party alleging unconstitutionality.

The Court of Appeal upheld the Full Court judgment and in so doing balanced the object of the legislation against the aim of combating "illegal drug activity." It is arguable that this approval in substance is a proportionality approach in determining the constitutionality of the legislation.

17.4 The Court of Appeal in its judgment delivered on 14 December, 2007 said:

> *"Legislation which seeks to deal with such situations may not be described as being other than reasonably required in the interests of public morality. Such legislation may also be regarded as reasonably required in the interests of public*

order and public health. It is also for the purpose of "detecting crime" [section 19(2) (c) of the Constitution]. The appellants' stance in this respect is clearly unsustainable and without any merit whatsoever. The Act is perfectly in keeping with our Constitution."

17.5 However, it is arguable that the new Charter of Fundamental Rights and freedoms allows for a proportionality test. This is so because section 13 (2) (a) of the Charter provides that the trial, "… save only as may be demonstrably justified in a free and democratic society…" This paves the way for a proportionality approval because section 13 (2) (a) obviously involves a balancing exercise in relation to the needs of society which replicates a proportionality approval in substance.

17.6 It is arguable that the presumption of constitutionality ought not to apply when considering the constitutionality of the privilege against self incrimination. It may be arguable that the court should start from the presumption that it is not Parliament's intention to take away the privilege without clear words. The case of In R. (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax [2003] 1 A.C. 563, HL. supports this approach. The House of Lords considered whether a statute had abrogated a different form of privilege, namely legal professional privilege. The exercise there is analogous because, as Lord Hoffmann said, in each case the court starts from the principle that:

"The courts will ordinarily construe general words in a statute, although literally capable of having some startling or unreasonable consequence, such as overriding fundamental human rights, as not having been intended to do so. An intention to override such rights must be expressly stated or appear by necessary implication."

18.0 Is there a distinction between the application of the privilege in relation to legislation requiring the production of documents under legislation requiring their production in statutory investigations as distinct from answers to questions? Are the E.C.H.R. cases consistent on this issue?

18.1 The E.C.H.R. cases are not consistent on this issue. In the landmark case of Funke v France the European Court of Human Rights held that Article 6 (1) applied to the documents in question, namely bank statements. The case of Funke v France was approved in the subsequent E.C.H.R. case of Heaney and McGuinness v Ireland referred to above.

18.2 However in the subsequent E.C.H.R. case of Saunders v U.K., concerning answers to questions, the European Court explained that the privilege did not apply to material, such as documents which had an existence

independent of the will of the suspect. At paragraph 69 the European Court said:

> *"The right not to incriminate oneself is primarily concerned however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood, and urine samples and bodily tissue for the purpose of DNA testing."*

18.3 In the U.K. Court of Appeal case of Attorney General's Reference (No. 7 of 2000) [2001] EWCA Crim 888; [2001] 2 Cr. App.R. 19 the Court addressed the conflict between Funke v France and Saunders v U.K. The case concerned documents delivered to the official receiver by a bankrupt defendant in relation to his gambling activities. The defendant was subsequently charged for a criminal offence of material contribution to his insolvency by gambling. The defendant applied for a stay of the prosecution or for a ruling that the documents delivered by him to the official receiver should be ruled inadmissible on the basis that they would violate Article 6 (1) of the E.C.H.R. The Court of Appeal held that the documents were admissible and did not breach Article 6 (1).

18.4 This case, the authors submit, involves initial administrative investigations under legislation requiring cooperation in such investigations. To this end it will be referred to again in Part III of this paper dealing with administrative investigations. Its significance now however is that the Court recognized a possible conflict between the E.C.H.R. cases of Funke v France and Saunders v U.K. The Court agreed with counsel:

> *"…that there is nowhere in the European jurisprudence any express statement that Funke was wrongly decided, or that Saunders was to be preferred…"*

18.5 The Court further noted that:

> *"It seems to us that the distinction made in paragraphs 68 and 69 the European Court's judgment in Saunders, between statements made and other material independent of the making of a statement, is not the only one to which we should have regard, but is one which, as it seems to us, is jurisprudentially sound… If and in so far as there is a difference of view in the European Court of Justice between Funke, on the one hand, and Saunders and L on the other, the*

approach in Saunders and L commends itself to this Court.... In so far as Funke has been reaffirmed in Heeney that does not divert us from the conclusion which we have reached that the Saunders approach is to be preferred"

18.6 The conflict between the E.C.H.R. Funke v France and Saunders v U.K. still exists as demonstrated by the ECHR judgment in JB v Switzerland [2001] Crim. L.R. 748. The applicant was subject to tax evasion proceedings. The District Tax Commission requested that he submit all documents in his possession relating to investments in a number of companies. He refused to submit these documents and consequently disciplinary fines were imposed totalling 3,000 Swiss francs. The applicant reached an agreement with the tax authorities whereby the tax evasion proceedings would be closed upon payment by him of 20,000 Swiss francs.

18.7 The European Court held that Article 6(1) applied and had been violated given the amount of the fine imposed and its punitive character, the proceedings could be characterised as "criminal" for the purposes of Article 6 (1). It held that the right to a fair trial under Article 6(1) includes the right to silence and the privilege against self – incrimination, and the fines imposed for non production of possibly incriminating documents violated these rights.

18.8 Ian Dennis in his text the Law of Evidence criticizes this judgment. He states:

"The judgment is very poorly reasoned. It does little more than set out the facts, rehearse the contentions of the parties and then state that the Court considers there to have been a violation. The little more is a citation from Saunders of the distinction between material having an existence independent of the person concerned and material obtained by means of coercion in defiance of the will of the person concerned. In making this citation the Court failed to notice that the documents in issue in the case fell into the first category (where the privilege does not apply) rather than the second (where it does). This is yet another example of the failure of Strasbourg to resolve the problems created by the inconsistency between Funke and Saunders"

19.0 Is there a distinction between the application of the privilege to disclose knowledge of a document and the production of the document itself?

19.1 Yes. In R v S and A [2008] EWCA Crim 2177, the Court of Appeal had to decide whether the privilege applied to a requirement to disclose the encryption key to certain files. The Court noted that although the key

itself existed independently of the defendant's will and the disclosure in a statement of his knowledge of it might be incriminating in itself. On that basis the privilege was held to apply although it would not apply to data held in the computer files.

20.0 Is the requirement to provide real evidence, e.g. bodily samples, under legislation requiring cooperation in criminal investigations, a breach of the privilege?

20.1 The answer to this question is no. As pointed out previously in Saunders v U.K. the E.C.H.R. explained that the privilege does not apply to the use in criminal proceedings of material obtained compulsorily but which has an existence independent of the will of the suspect. The European Court specifically mentioned breath, blood and urine samples and bodily tissue for the purpose of bodily testing as some examples of such material.

21.0 Will the use of force to obtain such material make the privilege applicable?

21.1 Yes. In Jalloh v Germany [2007] 44 E.H.R.R 32. Drugs which had been swallowed by the defendant were obtained by forcibly administering an emetic. The evidence was used against him. The European Court held that the privilege was applicable and had been violated by the procedure to retrieve the evidence. The court reasoned that although the drugs hidden in the defendant's body were real evidence and had an existence independent of his will, force was used to obtain them in defiance of his will and the degree of force used differed significantly in gravity from the degree of compulsion normally required to obtained the types of material differed to in Saunders as existing independently of the defendant's will.

21.2 It should be noted that in the E.C.H.R case of O'Halloran and Francis v United Kingdom, referred to above, the European Court considered Jalloh v Germany as not turning on the distinction drawn in Saunders v U.K. between real evidence obtained independent of the suspect's will and otherwise. It said:

> *"The applicants maintained that the Jalloh case was distinguishable from the present in that it concerned not the obtaining by compulsion of incriminatory statements but rather the use of "real" evidence of the kind indicated in the Saunders judgment such as breath , blood and urine samples and thus was an exception to the general rule laid down in that judgment. The Court accepts that the factual circumstances of Jalloh were very different from the present case. If is nevertheless unpersuaded by the applicants' argument. Even if a clear distinction could be drawn in every case between the use of compulsion to obtain incriminatory statements on the one hand and "real" evidence of an*

incriminatory nature on the other, the Court observes that the Jalloh case was not treated as one falling within the "real" evidence exception in the Saunders judgment; on the contrary, the Court held that the case was to be treated as one of self-incrimination according to the broader meaning given to that term in the cases of Funke and JB v Switzerland to encompass cases in which coercion to hand over incriminatory evidence was in issue."

22.0 Can information or documents obtained by an authority under legislation requiring this be shared with other authorities without breaching the privilege?

22.1 Yes, whether or not there is legislation allowing for the sharing of information.

22.2 The Court of Appeal case of Regina (Kent Pharmaceuticals Ltd) v Director of the Serious Fraud Office [2004] EWCA Civ 1494 is an example of a case involving legislation which allowed the sharing of information. Documents were seized by the Serious Frauds Office during investigations under search warrants. The documents were disclosed to another government department to assist with civil litigation. The Serious Fraud Office had a discretion to do so under legislation namely the Criminal Justice Act 1987.

22.3 The disclosure of the information was challenged. On appeal the challenge was dismissed and it was held that the discretion under the Criminal Justice Act 1987 was necessarily worded in wide terms and any attempt to give further guidance as to the circumstances in which the discretion to make further disclosure might be exercised would introduce undesirable rigidity and that the discretion had to be exercised reasonably and in good faith. Also, if there were improper disclosure the person affected could challenge that in proceedings for judicial review on public law or proportionality grounds and if that if the material were used against him in criminal or civil proceedings he might be able to challenge its use in the context of those proceedings. In the circumstances, disclosure was clearly appropriate and that accordingly the disclosure of documents under section 3(5)(a) was in accordance with law for the purposes of the Convention.

22.4 The Court also held, per curiam that:

> *"In some cases it may not be appropriate or practicable to give notice of proposed disclosure either at all or in time to enable the owner of the documents to have an opportunity to respond. The documents may be urgently required elsewhere or it may appear that disclosure would hamper investigations. In such a case the designated member of the SFO would not be acting unfairly if he decided to go ahead without giving the*

sort of notice which in other circumstances would be required. But, having disclosed the documents, he would then have to consider whether the owner of the documents should be told what had taken place. The starting point should always be that the owner of the documents is entitled to be kept informed rather than the reverse. What is important is to recognise the approach that fairness demands."

22.5 In the Court of Appeal Case, R v Brady [2004] EWCA Crim 1763; [2005] 1 Cr. App.R.5, Company office holders compulsorily provided a statement to the official receiver under insolvency legislation. The statement was disclosed subsequently to the Inland Revenue at their request. An investigation followed by Inland Revenue into possible offences which led to the appellant being arrested and charged for revenue offences.

22.6 The trial judge overruled the appellants challenge that the disclosure of the statement to Revenue was unlawful and that since the prosecution for the revenue offences originated from and was tainted by that disclosure it was an affront to justice. On appeal the appellant accepted that on of the purpose for which the statement could be obtained was the investigation of crime. The Court of Appeal held that once the official receiver was satisfied that the material was required by another prosecuting authority for the purpose of investigating crime he was free to disclose it without an order of the court or notice to the person who provided it. Accordingly the disclosure of the material by the official receiver to the Revenue was lawful and did not involve an abuse of power.

23.0 Can compelled information/documents obtained by court order requiring this breach the privilege?

23.1 Arguably yes. In Regina (Bright) v Central Criminal Court [2001] 1 WLR 662, the police sought court orders against newspapers to produce confidential journalist information which may have incriminated the journalist in question. The information that was sought related to a suspect under investigation by the police for alleged breaches of the Official Secrets Act. Court orders were made under legislation which allowed for applications by the police to the court for Court orders requiring production of information. The newspapers in question sought judicial review of the Judges production order contending that the relevant access conditions for the court order to be made under the legislation in question was not met and that the court order infringed the correspondent's privilege against self incrimination.

23.2 Under application for judicial review the court held that since the privilege against self incrimination was not absolute, the legislation allowing for the court order, by necessary implication gave the court the

power to make production orders which actually or potentially infringed a person's right against self incrimination.

23.3 The court also held however that the access conditions under the legislation provided a safeguard and that those access conditions had to be satisfied before a court order could be made". Some of these access conditions included:

a) That a serious arrestable offence has been committed;

b) That the material is likely to be of substantial value to the investigation in connection with which the application is made;

c) That the material is likely to be relevant evidence;

d) That other methods of obtaining the material have been tried without success; and

e) That it is in the public interest, having regard to the benefit likely to accrue to the investigation if the material is obtained; and having regard to the circumstances under which the person in possession of the material holds it, that the material should be produced or that access to it should be given.

23.4 In this particular case the Court held that the judge erred in finding that the access conditions had been satisfied

PART III - ADMINISTRATIVE INVESTIGATIONS

24.0 Are the E.C.H.R. and U.K. cases consistent on the issue of whether a person can be required by legislation to give answers in administrative investigations?

24.1 Yes, once the investigation does not involve the determination of a criminal charge a person can be validly required to give answers under such legislation. In the E.C.H.R. case of IJL, GMR and AKP v United Kingdom (2001) 33 E.H.R.R. 11. The applicants were interviewed by DTI inspectors in relation to alleged misconduct in the takeover of a company. They gave information under legislation requiring them to cooperate. The DTI shared the information with the police. The applicants were subsequently charged, tried and convicted of offences in relation to the takeover. At trial the transcripts of their interviews with the DTI inspectors were admitted into evidence.

24.2 The court held that although there was a violation of Article 6 (1) in relation to the use of the answers in the prosecution concerning the takeover, there was no violation in relation of the compulsory powers of questioning. The court held that the privilege was not applicable because the DTI, was not engaged in the determination of a criminal charge.

> *"The Court states that whether or not information obtained under compulsory powers by such a body violates the right to a fair hearing must be seen from the standpoint of the use made of that information at the trial. The court rejects the argument that, at the stage of interview, the Inspectors were in effect determining a "criminal charge" within the meaning of Article 6(1) , and on that account the guarantees laid down in Article 6 should have been applied to them… Their purpose was to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities—prosecuting, regulatory, disciplinary or even. A requirement that such a preparatory investigation should be subject to the guarantees of a judicial procedure as set forth in Article 6(1) would in practice unduly hamper the effective regulation in the public interest of complex financial and commercial activities. The Court in Saunders v. United Kingdom impliedly confirmed this approach."*

24.3 So too in the U.K. House of Lords case of R v Hertfordshire City Council ex parte Green Environmental Industrial Limited and another [2000] 1 All ER 773, a local authority requested a company to provide information about clinical waste found at sites used by the company. The authority did so by serving a request for information under Section 7(2) of the legislation in question. The legislation provided that failure to comply with that request without reasonable excuse was itself a criminal offence. The company asked for confirmation that the information would not be used against it in a prosecution but the company refused and the authority issued a summons alleging contravention of the legislation.

24.4 The company challenged the validity of the request in judicial review proceedings. The challenge was rejected by the Divisional Court and was upheld by the Court of Appeal. On appeal to the House of Lords the company sought to rely on the privilege against self incrimination. The House of Lords held that Article 6 (1) of the Convention did not entitle a person to invoke the privilege against self incrimination when served with a request for information.

> *"Mutatis mutandis, it seems to me that this reasoning is applicable to the powers of investigation conferred by section 71(2). Those powers have been conferred not merely for the purpose of enabling the authorities to obtain evidence against*

offenders, but for the broad public purpose of protecting the public health and the environment. Such information is often required urgently and the policy of the statute would be frustrated if the persons who knew most about the extent of the health or environmental hazard were entitled to refuse to provide any information on the ground that their answers might tend to incriminate them. Parliament is more likely to have intended that the question of whether the obligation to provide potentially incriminating answers has caused prejudice to the defence in a subsequent criminal trial should be left to the judge at the trial, exercising his discretion under the Act of 1984. For these reasons, I would regard the case for implied exclusion of the privilege as even stronger than it was in the cases under the Banking and Companies Acts…" "Thus the European jurisprudence under art 6(1) is firmly anchored to the fairness of the trial and is not concerned with extra-judicial inquiries."

24.5 The distinction between a judicial trial and extra-judicial enquiries was again a central issue in the U.K. Court of Appeal case of R v Kearns [2003] 1 Cr. App.R.7. In this case, the appellant, a bankrupt, was required to produce information demanded by the official receiver under the Insolvency Act. The legislation forced the appellant to give information to the Official Receiver, and if he failed to do so, an offence was automatically committed.

24.6 The appellant refused to give information and was convicted for failing to provide the information having been required to do by the Official receiver. On his appeal, he argued that the section of the legislation in question breached his right to remain silent.

24.7 The appeal was dismissed. It was held the section of the legislation did not infringe the appellant's right to a fair trial, since an examination of United Kingdom cases and the case law of the European Court of Human Rights showed that Article 6 was concerned with the fairness of a judicial trial. It was not concerned with extra-judicial enquiries as such. The Court said:

"The decisions of the European Court of Human Rights (at least from the Saunders case) and the House of Lords' decision in R v Hertfordshire County Council, ex p Green Industries Ltd [2002] 2 A.C 412 have, in our view, drawn this distinction between two situations. The first is where a

person is, by law, compelled to give information but is not for use in a criminal trial; the second is where the person is compelled to give information that has been or could be used in a criminal trial."

24.8 Further on, the Court said:

> *"What conclusions can be drawn from the Strasbourg cases and the U.K. cases on the scope of the right to silence and the right not to incriminate oneself? In our view the following is clear… Article 6 is concerned with the fairness of a judicial trial where there is an "adjudication". It is not concerned with extra-judicial enquiries as such…"A law will not be likely to infringe the right to silence or not to incriminate oneself if it demands the production of information for an administrative purpose or in the course of an extra-judicial enquiry. However, if the information so produced is or could be used in subsequent judicial proceedings, whether criminal or civil, then the use of the information in such proceedings could breach those rights and so make that trial unfair…"*

25.0 Can an administrative investigation involve the determination of a criminal charge so as to raise the issue of the privilege against self-incrimination at the stage of preparatory investigations?

25.1 In Saunders v U.K. the court seemed to acknowledge this possibility. The court observed:

> *"The Court first observes that the applicant's complaint is confined to the use of the statements obtained by the DTI Inspectors during the criminal proceedings against him. While an administrative investigation is capable of involving the determination of a "criminal charge" in the light of the Court's case law concerning the autonomous meaning of this concept, it has not been suggested in the pleadings before the Court that Article 6 (1) was applicable to the proceedings conducted by the Inspectors or that these proceedings themselves involved the determination of a criminal charge within the meaning of that provision".*

26.0 How can one distinguish between a judicial trial and extra-judicial enquiries for these purposes?

26.1 The case of R v Kearns referred to above is helpful on this issue. In that case the Court concluded that the demand for information by the official

receiver under the legislation was made in the course of an extra-judicial procedure. The Court took into account several factors. Firstly, the official receiver was carrying out his statutory duty under the section of the legislation in question to investigate (and if appropriate report to the Court) on the estate of the bankrupt. Secondly, at the time that the demand was made there was no other charge against Kearns. Therefore, the information demanded under the legislation was not being obtained to enable another charge to be proved "contrary to the will of the accused". Thirdly, there was no possibility that any information that was obtained as a result of the statutory demand could be used in subsequent criminal procedures against Kearns. This was so, because there was a prohibition on the use of answers given under compulsion under the legislation in any subsequent criminal trial except where charges were brought against the person as a result of his failure to comply with the statutory demand itself.

26.2 Ian Dennis in his text, The Law of Evidence, fourth edition, states:

> "*The distinction is reasonably clear where investigators have only a factfinding role and have no powers to adjudicate on a person's liabilities or take decisions on prosecution…Where investigating officials do have adjudicative powers the courts will have to examine the substance of the investigation to decide whether it involves the "determination of a criminal charge".*

27.0 Can the use of answers given under requirement to do so by legislation in administrative investigations breach the privilege against self-incrimination if used in subsequent criminal proceedings?

27.1 Yes. The case of Saunders v U.K. is an example of a case where answers given in administrative investigations were used in subsequent criminal proceedings. This was held to breach the privilege against self-incrimination.

28.0 Are there any West Indian cases distinguishing between criminal proceedings and other proceedings in so far as the privilege against self-incrimination is concerned?

28.1 Yes. The Privy Council case of Bethel v Douglas and Others [1995]46 W.I.R 15, an appeal from the Bahamas, is relevant. The Governor General of the Bahamas appointed a commission of inquiry under the Bahamian Commissions of Inquiry Act with terms of reference to inquire

into allegations of fraud, corruption, breach of trust, conflict of interest or any wrongdoing arising out of the affairs of the three named corporations. The appellant, was summoned to appear and give evidence to the commission. He challenged on various grounds, the validity of the appointment of the commission and its power to summon him to give evidence. The Chief Justice dismissed the challenge. The appellant's appeal to the Court of Appeal was dismissed and he appealed further to the Privy Council.

28.2 The Privy Council dismissed the appeal. It held that an objection to the appointment of a commission to inquire into allegations of fraud could not be sustained on the ground that the commission superseded the ordinary courts of justice. This was because the commission had no power to find anyone guilty of any offence.

28.3 It also held that the right of the commission of inquiry to compel a witness to attend and give evidence under the Commission of Inquiry Act did not contravene Article 20(7) of the Constitution of the Bahamas. Under that Article no person on trial for a criminal offence could be compelled to give evidence as proceedings before the commission could not be equated to a criminal trial. The Privy Council also considered whether section 131 of the Evidence Act of the Bahamas, which preserved the privilege against self-incrimination, applied. It held that it did not apply since the Commissions of Inquiry Act made it clear that no answers given by a witness to a commission could be used in criminal proceedings against him, other than in proceedings for perjury before the commission.

29.0 Is the approach of the Courts in assessing the proportionality of legislation requiring cooperation in criminal investigations relevant to administrative investigations?

29.1 Yes. The case of R v Kearns is relevant. In that case, referred to above the Court of Appeal held that the requirement of the appellant, a bankrupt, to give information to the Official Receiver, under legislation requiring this did not breach the privilege against self-incrimination.

29.2 It held in the alternative that there was ample justification for the limited restriction to the right to silence and not to incriminate oneself imposed by the legislation which was designed to deal with the social and economic problems of bankrupts. The Court held that the regime was:

> *"…a proportionate legislative response to the problem of administering and investigating bankrupt estates. The*

bankrupt is obliged to give information and to that limited extent he cannot exercise a right to silence or not to incriminate himself."

30.0 Is there a distinction between the application of the privilege in relation to production of documents or material on the one hand and answers to questions on the other hand?

30.1 Yes. The distinction in the approach of the Courts was pointed out above in relation to criminal investigations. The same distinction applies in relation to administrative investigations in that, the production and or material do not engage the privilege against self-incrimination in administrative investigations because such documents or material exist independent of the will of the suspect.

30.2 The case of Attorney-General's Reference (No. 7 of 2000) [2001] 2 Cr. App.R. 286, referred to above, illustrates the principle in relation to administrative investigations. The facts are referred to above. The case concerned administrative investigations in relation to a bankrupt defendant. The defendant was charged with a criminal offence and documents produced by him at the stage of the investigations under legislation requiring him to do so were used against him in the prosecution of the offence.

30.3 It was held that the use of the documents did not breach the privilege against self-incrimination on the basis that the documents existed independently of the will of the suspect.

PART IV – CONCLUSION

31.0 The principles enunciated above in relation to constitutional issues arising from legislation have of necessity been derived from E.C.H.R and U.K. cases because of the absence of West Indian authorities. The authors have deliberately refrained from expressing opinions on how these principles should be applied in relation to Jamaican legislation because at the time of writing the issue is likely to be raised in the Jamaican court. On the one hand, it is regrettable that the issue has not been raised beforehand having regard to the number of Acts passed requiring cooperation in investigations. On the other hand, with the recent passage of the Charter of Rights it is an opportune time for our courts to examine the issue with reference to the Charter.