

JERSEY / JUDGMENT

AG v Byrne [2018] JRC 221 (30 November 2018)

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JUDGMENT

THE COMMISSIONER: 1. I am first of all going to read out what is an agreed order relating to the confiscation proceedings. Confiscation is postponed pursuant to Article 6 of the Proceeds of Crime (Jersey) Law 1999 to the 26 th March, 2019. The court finds that there are exceptional circumstances for postponement beyond six months from the date of conviction. Those circumstances being the impracticability of listing a hearing before that date. I make the following directions:- (i) The defendant is to provide a sworn affidavit setting out his worldwide assets and liabilities by 18 th January, 2019. (ii) The Attorney General is to serve and file the prosecutor's statement by 22 nd February, 2019. (iii) Parties to file bundles by 19 th March, 2019, to be agreed if possible. 2. On 13 th September, 2018, Christopher Byrne was convicted by Jurats of fifteen offences. Fourteen related to the making of false or misleading statements or failing to disclose relevant information to induce clients to invest in a company called Providence. 3. There were ten separate individuals or couples who invested between them a total of just under £3m in Providence, in part induced by false statements made by Mr. Byrne or because of his failure to disclose relevant information. At the time of committing the offences Mr. Byrne worked as an Independent Financial Advisor. 4. In addition Mr. Byrne has admitted carrying on an unauthorised financial services business between May 2014 and April 2015 when a significant number of the investments were made and he pleaded guilty to one count of providing false information to the Jersey Financial Services Commission (the "JFSC")(Count 4). By his plea to that count, Mr Byrne admitted telling the JFSC two lies about his relationship with Providence. He denied telling a further lie which was split off into a separate count of which he was found guilty by the Jurats. 5. Providence was a company which was set up ostensibly to make money by factoring debts in Brazil. It operated locally through Guernsey based subsidiary companies which raised money for the debt factoring business through investors. The money raised went into a Guernsey registered, though unregulated, fund known as Providence Investment Funds, or PIF. The company in Guernsey ran what appears to have been a very successful and high profile sales promotion. It offered a higher than average return which was explained by the nature of the debt factoring business in Brazil which, it was said, made those kind of returns possible. 6. The evidence suggests that a large number of people and or companies were convinced not only that the investment scheme operated via PIF was legitimate but also that the returns were possible.

Providence were represented by a well-respected firm of lawyers and their auditors were one of the top firms of accountants. Mr Byrne told the Court that the names of these professional firms in the prospectus gave him comfort and was seen by him as evidence that the business was an honest one. 7. Mr. Byrne had worked as a financial advisor for NatWest and rose to a responsible position. He was well respected by the Bank and he advised a number of retail clients over their investments. He gave them good advice which was suitable for their circumstances, and which mainly involved making safe investments via well-known investment companies. His clients at the Bank received a good service; grew to trust him and, in some cases, to become friends. A number of those that he had advised at NatWest were victims of these offences. 8. Mr. Byrne had left the bank sometime before these offences. Initially he took a sabbatical, but he was then persuaded to join a Jersey firm of independent financial advisers called Orbital. Some of the clients who he had advised whilst working at NatWest followed him to Orbital. It was whilst working at Orbital that he became aware of Providence and, in spite of scepticism about PIF on the part of some of the directors at Orbital, Mr Byrne decided to promote it as a suitable investment for some of his clients. The Managing Director of Orbital was particularly concerned about PIF and it was agreed that clients should not be permitted to invest more than 10% of their investible wealth in PIF. In addition it was agreed that they should sign a disclaimer to acknowledge the high risk of investing in PIF. Mr Byrne was not happy with these restrictions, and decided, for that and other reasons, to leave Orbital to set up his own business. 9. By this time Mr Byrne had met and apparently was very impressed by Antonio Buzanelli, who owned and controlled Providence. Mr Byrne and Mr Buzanelli reached an agreement that Providence would provide financial support for Mr Byrne's new business, which was called Lumiere Wealth, by Providence investing in Lumiere and becoming the controlling shareholder, whilst Mr Byrne was the minority shareholder. The agreement would enable Mr. Byrne to become very rich if he succeeded in getting substantial investment paid by his clients into Providence. While the JFSC were aware of the connection between Lumiere and Providence and were keen to ensure that Lumiere gave independent advice to its clients, they were not made aware of the substantial amount of money that Mr. Byrne stood to gain from investments made through him in Providence. Those additional payments were set out in a side agreement entered into by Mr. Byrne and Providence which was separate from the main agreement and was never shown to the JFSC. Mr. Byrne said in the trial that the reason for the side agreement was so that that part of the agreement could be kept from the JFSC. It took time for Mr Byrne to set up Lumiere and apply for and obtain a licence from the JFSC; Lumiere was not granted that licence until April 2015. In the period between his departure from Orbital in May 2014 until April 2015, Mr Byrne continued to meet clients and to recommend that they invest in PIF, even though during this period he had no licence to give investment advice. This is the basis of Count 18. 10. As a result of advice given by Mr. Byrne, clients invested a large amount of money in PIF which they lost when in June or July 2016 the Providence group collapsed. In total Mr Byrne had invested £11.8m of client funds in PIF. It is important to have in mind that not all of that was represented in the charges on the Indictment. It collapsed because it was a Ponzi scheme, that is, it used new investors money to pay interest to existing investors while siphoning off money for the owners of Providence. The money was not being used in the main to finance the Brazilian debt factoring activity. 11. Mr.

Byrne was not convicted on the basis that he persuaded his clients to invest in what he knew was a Ponzi scheme. Mr. Byrne had invested a large amount of his own money in the fund as well as money from his family and it was unlikely he would do that if he knew it was a Ponzi scheme which was bound to fail. Mr. Byrne had been alerted by the JFSC to the possibility that this was a Ponzi scheme and towards the end of the period covered by the Indictment when Buzanelli was clearly desperate to get in new investment to keep the Providence group afloat, Mr. Byrne must or should have had suspicions, but that is not the basis of the convictions. 12. What Mr. Byrne was convicted of was that he told his clients that Providence was a safe investment when it was, to his knowledge, high risk. It was not just high risk with the benefit of hindsight. The particulars in the prospectus made it clear that it was high risk and only suitable for sophisticated and experienced investors and that never changed. None of the investors, the subject of the Indictment, come into that category. They were persuaded by Mr Byrne to invest in PIF because they trusted his assurances that PIF was a suitable fund for them to invest in and that it was safe. Of course they were attracted by a higher rate of return than was generated by the safe investments that they were used to, but above all they wanted security. Many of the victims are elderly, had stopped working, and were dependent on income from their savings to fund their retirement. Some of them, acting upon Mr Byrne's advice, invested in PIF a much higher proportion of their investible wealth than any truly independent financial adviser would have recommended. 13. The difficulty for Mr. Byrne was that, having entered into a commercial relationship with Mr Buzanelli on which his firm depended, his client base was completely unsuited for investing in Providence. Either he had to change his client base or he had to sell Providence to his existing client base as a low risk investment. He tried to persuade Providence to describe investments in PIF as medium or low risk. Perhaps because of the advice of the professionals advising them, Providence were not prepared or able to do that. Instead Mr. Byrne sold the investment to his clients as a safe and low or medium risk investment even though he knew it was not. 14. During December 2015 and January 2016 Mr Buzanelli became more desperate to get money to keep Providence from collapse and put pressure on Mr. Byrne to get in more money. As a result of this pressure Mr. Byrne resorted to even more dishonest measures to help Buzzanelli, presumably for his own financial reasons. Mr. Byrne persuaded a client, who had very poor eyesight, to sign a document that was in fact an unsecured personal loan to him by telling her that she was signing to invest in an investment bond. Having obtained her signature, Mr. Byrne took both copies of the document with him so as to prevent anyone else discovering the fraud that he had perpetrated. He later tried to cover up what he had done by forging documents which he said untruthfully he had given to this client at the time. The forged documents contained a different rate of interest to the original. A further forged document was prepared, which purported to show that this was a secured rather than an unsecured loan and that his client had been advised to get legal advice before she signed. None of this was true. The client had been a client for many years; she regarded Mr. Byrne as a personal friend and had complete trust in him. Mr. Byrne betrayed that trust. 15. Not only was Mr. Byrne giving misleading advice but he was keeping from his clients and the JSFC the extent of his personal benefit from getting investments paid into PIF. He was not giving independent advice because of the money that he stood to gain from getting his clients to invest in PIF but he never told his clients that. 16. We have read a large number of victim impact

statements. The victims of this fraud have lost a great deal of money, which in many cases represents a substantial proportion of their savings. Many are elderly and had retired. Many of them had been clients of Mr. Byrne for some time and trusted him implicitly, partly because the investments they made when he worked for the bank had been successful. The consequences for them have been severe. Some, having retired, have had to go back to work in order to make ends meet. Others who have retired have had to abandon plans for their retirement which they had been making for a long time. Others are worried that their money will run out or they will not be able to pay for the necessities of life. The worry will always be there and that is something they should not have to cope with. It is clear that many have been affected a great deal by Mr. Byrne's offending. 17. It is not just financially that victims have been affected. Many have lost confidence in themselves and are reluctant to trust others. 18. Mr. Byrne himself lost a great deal of money but he is, as has been pointed out, a sophisticated and experienced investor. He was aware of the risks and he took them. What his investment in Providence does mean is that it was unlikely that Mr. Byrne was aware of the true nature of the fraud and lends support to his claim that he never intended his clients to lose their money. That does make the offence less serious than someone who has stolen from his clients knowing and intending that the clients will lose all their money. Whatever he may have thought, however, the choice should have been for the clients to make on the basis of proper information and the Jurats were quite satisfied that probably all of these investors would not have invested at all in PIF had they known that it was a high risk investment. Even those few who might have invested something would have invested far less. The fact that Mr. Byrne may not have intended his clients to have lost money is no comfort to those who have suffered the loss. 19. There is no evidence of high living by Mr. Byrne during the time that these offences were being committed, but the Jurats are in no doubt that he committed the offences in the expectation of very high financial returns in the future. 20. On 8 th November, 2018, the Superior Number considered very detailed submissions made on sentence including detailed conclusions on sentence from the prosecution. It has been submitted that we should select a starting point and then increase or reduce the sentence from that starting point based on the aggravating and mitigating factors that we find. While that is clearly appropriate where a sentencing guideline or a guideline case has to be considered, as they are likely to be structured in that way, that does not apply in this case. We prefer to first decide on a range of sentence. That will take into account the maximum sentence and the factors that are relevant to all offences of this type: the amount of money obtained and the loss caused, the number of investors and the period over which the offences were committed. Having selected the range by reference to other cases, we will then decide where in the range this case comes by considering the factors which are individual to this case: the breach of trust, the surrounding dishonesty, the position of the defendant and matters of mitigation personal to Mr Byrne. 21. We have had our attention drawn to a number of sentences passed in this jurisdiction on previous occasions for this type of offence. The prosecution have suggested that drawing on those authorities the appropriate range is one of 4½ to 6 years. The defence do not disagree but would favour a wider range of 4 to 6. A wider range would seem to us to be appropriate. The maximum sentence is 7 years and the top of the range of 6 years was selected by both the prosecution and the defence to allow for head room in the length of sentence, as it is always possible to think of more serious cases. That used to be

the approach adopted by the Courts in England and Wales but now it is recognised that it is not the correct. We agree with their new approach. The legislature has provided a maximum sentence as suitable for the worst cases and there may be a number of cases where the maximum sentence is appropriate. It is unnecessary always to pass a sentence on the basis that there will always be a more serious case so the bracket should not reach the maximum. That is even more likely to be the case when the court is considering passing concurrent sentences for a series of offences each of which has a maximum sentence of 7 years. In our judgment for this kind of offence, involving as this case does ten different investors investing between them several millions of pounds, the appropriate range is between 4 and 7 years. 22. We have been referred in particular by the defence to the case of AG-v-Lewis, Foot and Cameron

[2012] JRC 177 . We have taken the sentences and the reasoning in that case fully into account in deciding the sentence in this case. There are differences in the nature of some of the offences of which the Defendants were convicted in that case and the amount of money involved in the charges is different. 23. When deciding where within the range to place the sentence the court has to consider a number of aggravating and mitigating factors. The aggravating factors in this case are the age of many of the investors and the serious consequences they have suffered. This was in the view of the Jurats a serious breach of trust. Many of the victims had come to rely on Mr. Byrne as a key trusted adviser, as many people do on their financial advisor. Many of them regarded him as a friend and would not feel it necessary to check his recommendations as they trusted him implicitly. Such breaches of trust are of particular significance in Jersey as investment business and other financial services involving a high degree of trust are of greater importance here than in some other countries. The offences carried on for some two years and only ended when Providence crashed. Some of the offending involved further dishonesty by Mr. Byrne in trying to cover up what he had done. 24. It is submitted by the prosecution that Count 1, which was the obtaining of £1m from his client by pretending that she was signing to invest in a bond when she was in fact agreeing to an unsecured loan to Mr. Byrne, is more serious than the other offences. The Jurats agree with that submission and are satisfied that Mr. Byrne took advantage of that client's trust in him as well as her failing sight to trick her into signing the loan. The amount of money involved together with the attempts to cover up the true nature of the agreement not only from the JFSC but also from Providence increase Mr. Byrne's culpability to a level above that of the other offences. 25. As far as mitigation is concerned, Mr. Byrne can properly rely on his good character. He has committed no other offences. His good record in the investment business is of limited significance as it was that good character that he relied on to gain the trust of the clients who became victims of his offending. 26. The Jurats have received letters from Mr. Byrne's family and another referee who all speak very highly of him as a good family man who has done a great deal for them. He is a good father to his two children and all of his family. He has also benefitted the community, particularly with his involvement in sport. 27. At the conclusion of the last hearing, the defence placed before the Court an e mail from officers attached to Guernsey Law Enforcement, financial crime team. That e mail contained

sparse details. The officers had interviewed Mr. Byrne subsequent to his conviction as part of their investigation into the Providence group of companies based in Guernsey. They described Mr. Byrne as being 'very forthcoming' during those discussions and answering all questions 'candidly'. It included the information that Mr. Byrne was prepared to make a written statement and attend court proceedings if required. They said he has provided a 'myriad of information' which was still being evaluated, but some of the information had already proved useful. Mr. Blakeley informed us that he was seeking a reduction of 30% of the total sentence because of this assistance given by Mr. Byrne. This information had only become available on the day of sentencing and had not been investigated by the prosecution nor had the Attorney General had the chance to make submissions as to the Jurats' approach. This was not a matter which could be dealt with properly with such little notice. Reluctantly we considered that we had no alternative but to adjourn to obtain further information from the officers and allow the Attorney General an opportunity to make further submissions. 28. We have now received and considered a transcript of the interview that the Guernsey police had with Mr. Byrne and statements from both officers. The content of their statements are different from the e mail to some extent in that in one of the statements it is said " in terms of the usefulness of the information so far...it has only had minimal impact' on their investigation." 29. The principles as to when and to what extent a discount on sentence should be considered for assisting the police that we have applied are these. Normally a discount will only be appropriate when the defendant has or is admitting his own guilt. This is because he is unlikely to be of assistance as a witness if he himself is denying his guilt and has been convicted of the offences. Where a defendant admits his own guilt and is prepared to tell the whole story even when it involves others that may be seen as demonstrating remorse which is capable of being an additional mitigating factor over and beyond a plea of guilty. 30. Neither of those considerations apply in this case as Mr. Byrne continued to maintain his innocence throughout the interviews with the Guernsey police. On the other hand an admission of guilt is not a pre-requisite of a discount for assistance to the police. A discount can and most often is given on pragmatic grounds. Catching criminals, particularly serious ones, is difficult and criminals should be encouraged to give information to the police about the participation of others in crime. 31. Before a discount is given on this basis it is necessary for the court to assess the reliability of the information that has been given and its significance in assisting the police bringing other criminals to justice. In this case there is no reason to doubt the reliability of the information given by Mr. Byrne to the Guernsey police. It is largely narrative setting out the details of his dealings with Providence in Guernsey. It names the people that he dealt with and how he got involved with Providence. Having considered for ourselves what he told the Guernsey police there is very little in the interviews which was not included in the evidence he gave at court. 32. So what has been the value of this information to the police? While it was no doubt helpful to have the narrative that Mr. Byrne provided, it is difficult to believe that much was contained which would not inevitably have been found out during routine enquiries. It would not be difficult to find out the names of the people involved with Providence in Guernsey. The

more difficult matter would be to prove that those operating the fund in Guernsey knew or suspected that a fraud was being committed by Mr Buzanelli and others. Mr. Byrne does not assist with that issue. 33. Large discounts on sentence for information to the police are normally only given in those cases where the information relates to criminals who are capable of extreme violence. A defendant who gives information against violent criminals puts himself and his family at risk of serious injury. It is also likely to mean that that a career criminal will not be able to return to a life of crime as no other criminal would ever trust him again. In those cases discounts of 60% have been considered appropriate. This is a very different type of case but that does not mean that no discount can be given. 34. The Jurats have considered a detailed Social Enquiry Report which assesses that there is a low risk that Mr. Byrne will re-offend. While accepting that assessment, the Jurats take the view that sentences for this type of offence have to include an element of deterrence. They are satisfied that the motive for them was financial gain. People in Mr. Byrne's position are intelligent and need to understand that if they take the risk of committing this sort of serious breach of trust for financial gain, the penalty will be severe. 35. The principle mitigation in this case is Mr. Byrne's good character. In normal circumstances that would count for little as it was at least in part because of his good character that he was able to gain the trust of the investors. But the fact that he has co-operated with the Guernsey police indicates to the Jurats that he is normally a responsible and respectable man who is trying to make some amends for what he has done. The Jurats do not consider that the value of the assistance that he has given to the police has been significant. The Jurats have allowed for it in the credit that has been given to him for his good character. The assistance that he has given does not, in the Jurats' view, reach the level where it is appropriate to specify a percentage discount on the total sentence. The Jurats have taken it into account as part of the general mitigation. It is not necessary to assess the reduction separately in every case. It can be incorporated, as it will be in this case, into the general mitigation. 36. In relation to the offences relating to obtaining money from investors except for Count 1, that is Counts 2, 3, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17, the Jurats consider, by a majority, that the appropriate sentence is one of 5 years imprisonment. All those sentences to be concurrent to one another. While it is possible to differentiate between the different victims, the Jurats consider that it is undesirable to do that on the facts of this case. All the victims have suffered as a result of their loss, but often in different ways, and to try and evaluate those differences may not be a helpful or necessary process. 37. The Jurats have concluded that the offence on Count 1 is the most serious for the reasons already outlined. It is suggested by the Attorney General that the Jurats should mark that by passing a sentence that is consecutive to the other sentences for similar offences. While that could be done, if the Jurats were satisfied that the total sentence for those offences should exceed the maximum sentence for one offence, it is not without difficulty. Normally a series of similar offences would be marked by concurrent sentences unless the resulting sentence was inadequate. If we did pass a consecutive sentence it would have to be shorter than the offence deserves because the Jurats would need to consider whether the totality of the sentences was too long. That is capable of being

misunderstood. Moreover, Count 1 is similar to the other counts, involving as it does a serious breach of trust to induce a client to sign the loan document. 38. The Jurats have decided that taking into account the total sentence which they are going to pass, it is possible to mark the seriousness of Count 1 with a concurrent sentence of 6 years. 39. In relation to Counts 4 and 4A which relate to providing false information to the JFSC and Count 18 which relates to giving investment advice while unauthorised, they clearly merit consecutive sentences, as is accepted by the defence, because of the different nature of the offending. 40. The Jurats take a serious view of Count 18. It is important that the giving of investment advice is supervised by the JFSC in order to preserve the reputation of investment business in Jersey. If unauthorised investment advice is given, it makes proper supervision impossible. It is also of note that when Mr. Byrne did apply for a licence he withheld from the JFSC significant information about his relationship with Providence which would undoubtedly have affected the JFSC's view of whether to grant a licence at all and if so on what terms. The sentence on Count 18 is 12 months imprisonment which will be served consecutively to the other sentences. The Jurats have reduced the sentence by 3 months, from 15 months, for the late guilty plea. The sentence on Count 18 has also been reduced substantially to reflect the fact that it is to be served consecutively and the Jurats have had to look at the totality of the other sentences which are imposed 41. In relation to Counts 4 and 4A which are offences of misleading the JFSC the Jurats have borne in mind the particular facts of the case. The offences were telling lies during the course of the investigation by the JFSC and were maintained for a relatively short period of time before the lies were corrected. The sentences would have been 5 months but has been reduced to 4 to give credit for the late guilty plea. Those sentences will be concurrent to the sentences on Count 18. The Jurats have taken into account all the available mitigation in reaching that sentence. 42. Mr. Byrne, the effect of what I have said is that the total sentence that the Jurats pass on you is one of 7 years' imprisonment, made up in the way I have described. 43. In addition you will be disqualified from being directly or indirectly in the management of a company for a period of 12 years. Authorities Proceeds of Crime (Jersey) Law 1999. AG-v-Lewis, Foot and Cameron

[2012] JRC 177 . AG v Arthur

[2018] JRC 129 Arthur v AG

[2018] JCA 217 AG v Fleming

[2015] JRC 132 AG v Young (1998/147) AG v Renouf (2001/125) AG v Hanley (1993/134) AG v Akehurst 1996/142 R v Higgs [1986] 8 Cr App R (S) 440 R v Barrick [1985] 81 Cr App R (S) 78 K v A; AG v F

[2016] JCA 219 R v Jamieson and Jamieson [2008] EWCA R v Debbag & Izzet [1990-1] 12 Cr App R (S) 733 R v Z [2016] 1 Cr App R (S) 15 R v X [1994] 15 Cr App R (S) 750 R v A

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