JERSEY / JUDGMENT

AG v McDermott [2020] JRC 005 (10 January 2020)

[2020] JRC 005

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JUDGMENT

THE COMMISSIONER: 1. On 23 rd August, 2019, this Court, differently constituted, sentenced the Defendant to a total of 3 years imprisonment on an indictment containing 31 counts of larceny, 2 counts of transferring criminal property contrary to Article 31 of the Proceeds of Crime (Jersey) Law 1999 , 4 counts of fraudulent conversion, 3 counts of forgery and 3 counts of uttering a forged document. The sentencing remarks of the Court are to be found at AG v McDermott

[2019] JRC 157A . The Defendant was the Honorary Treasurer of each of the two victim institutions, both of them charities, and indeed he was the only person who had online access to their bank accounts. The funds which he obtained were used for the benefit of Professional Fulfilment Services Jersey Limited (PFS) where he was employed as Chief Financial Officer. The Royal Court noted in its sentencing remarks that PFS was at that time experiencing financial difficulties and " whilst the directors were unaware that the defendant was propping up the business, the money taken from the two charities enabled it to continue to trade. The Crown takes the view that the crimes maintained the employer and thus secured the employment and salary of the defendant, and we have not heard this challenged by the defence." 2. The Court noted from a witness statement of a director of PFS that " the directors of the employer company are clearly devastated, and will have [to] refund substantial monies that they were wholly unaware that the business had received." We return to the witness statement which has been shown to us later in this

judgment.

3. At the conclusion of the sentencing hearing, the confiscation and compensation applications were adjourned to a later date. The application for a confiscation order was withdrawn in September, and the application for a compensation order was heard by us on 12 th December. We gave judgment exercising our discretion to refuse the grant of a compensation order with reasons reserved and this judgment contains those

reasons.

4. A witness statement was made by Mrs Linda Vautier of PFS on 14 th August 2019. The statement is made with specific regard to the repayment of the monies in question to the charities involved. Mrs Vautier says this:- "3. In relation to the crimes Mr McDermott is being sentenced for, it is clearly the charities that are the immediate victims of his actions and we fully accept that monies were received (unknowingly) into the company's bank accounts. With hindsight, it looks like these actions were the final layer covering up other deceptions Mr McDermott was propagating, for reasons still not understood.

4. We have always said that we would do all we can to ensure that any of the charities' monies remaining within the company be repaid and we can confirm that this continues to be our position and intent.

5. We understand that the net amount that was placed in the business bank accounts from direct transactions with the Ace of Clubs was £151,000 and that no monies are due to Kids Club.

6. Repaying of funds of this magnitude to Ace of Clubs will prove immensely difficult in the short term as, despite a distinct turnaround in the company's stability and profitability, we are still having to deal with catch up of significant historic debts, as described in my victim personal statement. ...

9. We have no insurance that will cover the criminal actions and so any repayment will have to come from further business/personal borrowing or company profits.

10. In all the circumstances we believe that the best way for the company to repay the amounts it received into its accounts from the Ace of Clubs should be through ongoing group profits and suggest that repayments could be best made on a monthly basis to reflect the business cycle. £2,500 per month initially could be guaranteed which we should be able to increase in amount with continued improvements in cash flow." 5. We are informed that notwithstanding this statement, PFS has not in fact yet made any payments to the Ace of Clubs since the date of the statement in August this year. 6. The Defendant has filed an affidavit of means. There appears to be no dispute that he does not have substantial assets, but he does have the following:- (i) A Spanish property valued at €93,585.51, with a mortgage liability of €54,235.88 leaving equity of €39,349.63 which is equivalent to £33,120.58, converted to sterling at the conversion rates obtained from the Financial Times website on 9 th February 2019. (ii) The Defendant is entitled to an annual pension payment of £3,358.51. In 4 years and 1 month the residual fund value will fall below £35,000 which will enable him to withdraw the remaining fund as a lump sum subject to 10% tax. This would give him a cash value of pension (through income payment and residual fund value) of just over £45,000. 7. There would be costs incurred in the sale of the Spanish property, and it is probable that there would be a residual equity of something in the region of £23,000. His total available assets, over an extended period, would be in the order of £68,000. The Crown's case is that there is no reason why the Defendant should benefit from these assets when a

compensation order could be made restoring some of the loss which Ace of Clubs which has sustained. The possibility that PFS might make monthly repayments to the Ace of Clubs is regarded by the Crown as immaterial and a matter for those parties only. Accordingly, it is said that no question of double recovery arises. 8. We are not satisfied that this is necessarily so. If a compensation order is made, for the sake of argument, in the sum of £68,000, and that sum is paid, over a period, by the Defendant to Ace of Clubs, the question remains as to what the position is in relation to the monies in the hands of PFS, which it has said it will repay to the Ace of Clubs, albeit also over a period. It seems to us that there are 3 possibilities:- (i) PFS would pay the amount of the compensation payment (£68,000) to the Defendant and the balance of the monies it had wrongly received to Ace of Clubs in accordance with its expressed intention to reimburse the latter for its losses; (ii) PFS would pay Ace of Clubs the full amount of £151,000 which they have lost; or (iii) PFS would not account to either the Ace of Clubs or the Defendant in respect of the compensation monies and hold on to those monies itself. 9. If the second of those possibilities came to pass, Ace of Clubs would make a double recovery in the sum of £68,000. It is not obvious that the Defendant would be able to recover that sum from the Ace of Clubs - after all, he would have paid that sum under a compensation order made by the Court. In addition, the monies reflect sums which he had unlawfully taken from the Ace of Clubs in the first place. Nor indeed is it obvious that he would have a claim against PFS for monies which that company had repaid to the Ace of Clubs. In other words, there would be an overpayment or double recovery in the hands of the Ace of Clubs. 10. If the third possibility were to be the outcome, namely that PFS would simply hold on to the balance of monies received

- in other words they would make repayment of £151,000 less the £68,000 which had been paid by the Defendant pursuant to the compensation order - then it would follow that PFS had made a wholly unmerited windfall of £68,000, paid by the Defendant into its account in the first place. Perhaps the Defendant would be able to formulate a proper claim against PFS for the recovery of this money, although it is not necessarily obvious that he could do so. They were stolen monies which he put into the PFS account. What is clear to us, however, is that if this were to be the outcome and PFS were able to keep the windfall in question, that would be most unjust; the company never had any right to those monies, and ought not in equity to be permitted to keep them. 11. If the first possibility came to pass, namely that PFS repaid the Defendant with the amount of £68,000 that at least would have the merits of fairness - Ace of Clubs would not be out of pocket, PFS would not be in possession of monies to which they were not entitled, and the Defendant would not have lost the underlying value of his assets in order to make the compensation payment. However, it is not clear that the Court would have a basis for ensuring that PFS made these payments. It appears to us that while it is an option that the Court makes a compensation order on the basis that PFS will repay those sums to the Defendant and will review the compensation order if PFS did not do so, the timescale for that review would almost certainly fall outside the reasonable ambit of the present proceedings - the time allowable to the Defendant to make his compensation payments would perhaps be in the order of 3 or 4 years, but full repayment by PFS under the

programme contemplated in Mrs Vautier's witness statement would suggest that such would not take place until 5 or more years have elapsed. It will likely be too late for the Defendant to come back to Court and seek a review of the compensation order in those circumstances. 12. These difficulties arise because, unusually in cases of this kind, the Defendant has not kept for himself the monies which represent the proceeds of crime, but has rather paid them into the account of another party. No doubt he benefitted from that payment, because it secured his continuing employment at a time when his employer was in financial difficulty; but that was part of the crime for which he has been sentenced to 3 years imprisonment. The fact remains that the Defendant has not received, or if he has received has not retained, the monies in his own account. The power in the Court to make a compensation order under Article 2 of the Criminal Justice (Compensation Orders) (Jersey) Law 1994 is to require a person " to pay compensation for any ... loss or damage resulting from [the] offence" . Here we have a position where the victim of the crime, the Ace of Clubs, has suffered a loss which is quantifiable as of now, but is the subject of a commitment on the part of the Defendant's employer to reimburse at a later stage. If that reimbursement happens, there will be no loss. 13. While we think that the Court has jurisdiction to make a compensation order in these circumstances, in the exercise of our discretion we do not think it is appropriate to do so. The evidence before us suggests that Ace of Clubs will not in fact sustain a loss over the period in question because PFS have committed to repay the money. Furthermore, it would appear to be the case that if Ace of Clubs were to action PFS in the civil court for repayment, whether for vicarious responsibility for the default of its Chief Financial Officer who had stolen monies from Ace of Clubs, or whether for unjust enrichment or money had and received, it is not apparent that there would be any obvious defence. Conversely, if Ace of Clubs were to take civil proceedings against the Defendant for the same losses, one might well expect that the Defendant would seek to convene in equity his employer which had received the proceeds of his crime, claiming some relief in those third party proceedings. 14. It is well established that the purpose of a compensation order is not to impose an additional penalty on a defendant

- rather it is to provide a short circuit of civil proceedings where the victim of the crime would clearly have a claim against the Defendant. Advocate Bell submits that where questions of causation and loss are complicated, the Court should not make a compensation order. He relies in that respect on Christmas -v- AG

[2013] (2) JLR 174 at paragraph 78 where the Court of Appeal accepted the principle that the court does not make a compensation order other than in simple cases, and it also accepted the principle that it was inappropriate for criminal courts to embark upon complicated investigations in order to determine questions as to fact or the amount of loss. On the facts of Christmas , the Court of Appeal was satisfied that that was not a particularly complicated case raising issues of causation and quantum. In our case, we do not see the question of causation as being particularly complicated because unquestionably the Defendant caused the loss which Ace of Clubs has currently sustained. However the issue does become more complicated because it is unclear whether that is a loss which will be

made good in the future, and in any event the offender has not benefitted directly from the crime because he did not retain the proceeds. 15. For these reasons, in our discretion, we consider that it would not be right to make a compensation order in this case. Authorities Proceeds of Crime (Jersey) Law 1999. AG v McDermott

[2019] JRC 157A . Criminal Justice (Compensation Orders) (Jersey) Law 1994. Christmas -v- AG

[2013] (2) JLR 174. Page Last Updated: 17 Jan 2020 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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