

JERSEY / JUDGMENT

AG -v- Michel [2008]

JRC 072A (07 May 2008)

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JUDGMENT

COMMISSIONER: 1. The complex history of this case is taken as read. 2. There was useful discussion and argument yesterday in the absence of the defendant, with his consent for that absence, and today. 3. Mr Baker, Crown Advocate, has substituted for Mr Whelan, who is indisposed, Mr Baker showing understanding and mastery of the facts; Mr Le Quesne appears for Mr Michel. I am grateful to both Counsel for their arguments. 4. The costs issue that is the subject of today's application was raised after the conclusion of the confiscation hearing so far as the Jurats were concerned, though I was on notice by receipt of a letter that such an application would be made. I did not, for one reason or another, draw it to the attention of the Jurats in the course of the confiscation hearings. 5. There are many factors to be considered in resolution of today's application. I describe them for the most part neutrally, but they have all been in my mind. It has to be understood that to speak of "an issue arising" means exactly that, and does not necessarily reflect a conclusion one way or another on that issue for present purposes. 6. This was a very long investigation. It was very costly. 7. Mr Michel was either the only, or the most prominent of individuals prosecuted, under the changed law that reflected a change either in the culture of the financial institutions on Jersey or in the approach to the island's financial institutions. 8. One issue: was Mr Michel in any sense an exemplar, or even, in less attractive parlance, a scapegoat accused? There is absolutely no evidence leading to the conclusion that he was. 9. The Criminal Offences Confiscations Fund ("COCF") was established in 2003. Confiscation monies it is clear go to that fund. 10. A very helpful bundle of materials has been provided by Mr Le Quesne, to which I refer here and hereafter. At tab 7, page 12 in The Report of the Comptroller and Auditor General of an investigation into two funds including the COCF, at paragraph 44 there is this observation:- "The process is open to the criticism that the existence of the two Confiscation Funds and the segregation of their monies has created the impression that there are incentives for both the Law Officers' Department and the Police to go beyond the normal public interest in pursuing cases in which it might be possible to confiscate funds as a means of securing additional funding for their departments." 11. Bundle tab 6, page 10, one of Mr Le Quesne's two printed submissions, paragraph 9.3(b): Referring to the passage that I've read from the Auditor General, Mr Le Quesne argued as follows:- "The defendant makes no assertion that such an impression is justified, but submits that nothing should be done when considering costs

which might lend credence to such an unfortunate impression." 12. I asked Mr Le Quesne for clarification of what he was saying at 9.3(b) and no allegation of the kind identified by the Comptroller General was being made, although Mr Le Quesne stood by his argument that nothing should be done which might lead, or rather lend credence, to the unfortunate impression referred to. 13. In my judgment, and on all the material available to the Court in both the trial and the confiscation hearing, there is no evidence available in this case that would lend support to the unappealing possibility referred to by the Comptroller General and I cannot allow the possibility of what would be an unwarranted impression to affect what would be the otherwise appropriate exercise of my discretion and I thus reject any of the arguments built by Mr Le Quesne on his paragraph 9.3(b). 14. Counsel were given the opportunity to point me to authorities, if they exist, on whether at this stage, I as the judge - as with any judge after a jury verdict - can make observations about the strength of the case in dealing with costs applications. 15. Mr Baker says I can and, I think, went so far as to say I should. Mr Le Quesne says otherwise, but neither counsel has produced authorities in support of either position. 16. The nearest assistance that might be derived can be located at Archbold chapter 6, para 14, dealing with successful defendants who have been acquitted but who have been disallowed their own costs if, but I think on the authorities only if, they both brought the case on themselves and led the Prosecution to believe that the case against them was stronger than it is. 17. I am not sure that those authorities provide much assistance for my deciding whether I should form, or reflect a view I have, of the strength of the case, but I refer to them in the absence of any other authorities. 18. I am satisfied that on a costs application I can consider my own view of the strength of the case, a view I would not act on adversely to the defendant if I knew it to be out of line with any view held by the Jurats. 19. In my judgment the general criminality as revealed in counts 2 to 9 was overwhelming. 20. Count 1, as my summing up in law for the Inferior Number reveals, could have stimulated:- (i) a conceptual problem in light of the way that count was articulated by the Prosecution, especially if consideration was given to the possibility of Mrs Gallichan being innocent of the charge or not being convicted of it; (ii) real problems in relation to those parts of count 1 where the underlying criminality of Michel's clients was not established sufficiently or at all in evidence; thus dealings by Mr Michel in respect of only 10 of the 20 clients subject of count 1 were the subject of the Confiscation order. That apart, the case was overwhelming in a way that had the Jurats and me concerned to test both parties in the trial for an understanding of how the cases for the Prosecution and Defence were joined. 21. Issues arose also as to what extent the business environment in which the defendant operated was really being fully and accurately represented in Prosecution evidence. This arose especially in evidence of the conduct of banks supplying £4,950 in cash time after time generating no suspicions in the banks, so it was said. Without these professional services Michel could not have served his [dishonest] clients in the criminal way he did. 22. A man's failure to face up to the inevitable, to see sense, to take opportunities to tell the truth, may be viewed with some understanding, when set beside such a background picture. 23. Nevertheless there were many points in time when Mr Michel could have seen the folly of his ways that might have become his former ways. 24. His maintaining his right to have the Prosecution prove the case, a right that cannot be criticised in itself in any way or to any degree, no doubt stretched the investigation

and, of course, necessitated the trial. 25. There were two trials. Severance of the first trial into a trial of one count and a trial of nine others was in no way Mr Michel's responsibility. 26. In attempting to reach figures for their application the Prosecution initially suggested percentage deductions from their global investigation costs, elimination of the first trial costs and percentage deduction from the global second trial costs to reach the figure for which they applied of about £3.5 million. 27. Following discussion with Counsel, the difficulties of the Court identifying any precise figure for the Prosecution costs emerged as really insuperable. The Prosecution then suggested that any costs order should be based on the taxed costs of the investigation and second trial overall. The Prosecution suggested that the Court should fix a percentage of these overall costs that would reflect all other factors including that there was a co-defendant. Also to be included, to an extent, was the complicating factors of two trials without, of course, the Prosecution in any way withdrawing their concession that the first trial itself would be the subject of no costs order: I had declined to make such an order where I had not conducted the first trial myself, holding that I probably had no power to do so. 28. This approach by the Prosecution is, to an extent, favourable to the defendant as was identified in discussion. Had the single count on the first trial, of which Michel was convicted, been part of the second trial being dealt with as a single trial, then that second trial would have been longer and more expensive. 29. At the conclusion of the second trial Michel was convicted of all 9 counts. He was subsequently sentenced by the Superior Number in respect of those 9 counts, and the single count on the first trial, to 6 years' imprisonment. 30. At a subsequent confiscation hearing the Superior Number made a Confiscation Order in respect of £9,730,152, having found that Mr Michel had assets then of £13,492,907. Thus, and at that time, there was a surplus or margin of assets over sums confiscated. 31. As a matter of procedural history I should record here, perhaps I could have more conveniently recorded it earlier, that today's hearing follows an exchange of written pleadings by both sides, some of which were in response to an email request of mine. 32. Appeal: Mr Michel has appealed to the Court of Appeal against his convictions. That appeal has been dismissed. It may be that he is seeking to take the matter further to the Privy Council. It emerged, although I am not suggesting that it has ever been obscured, that as long as the case continues on appeal, and until final resolution of any confiscation order, interest on money seized and held by the Viscount will accrue, by one means or another, to the defendant. It will accrue as real money providing that the margin or surplus of assets that I referred to earlier continues to exist. 33. The interest on seized money appears to be running, at present, at roughly £140,000 per annum. It is a bizarre consequence that until the final conclusion of any appeal - or I suppose of any retrial and further appeal providing the defendant is ultimately the subject of a substantial confiscation order - that he can personally benefit, very substantially, from interest on money rightfully seized by a process of the law. It is also worth observing that as to the Confiscation Order presently made there has been no appeal. This may suggest, as Mr Baker does, that in the setting of this trial there is no complaint by the Defence that the Confiscation Order made was excessive. 34. Two other issues on the topic of appeal arise, a Court always being anxious to know that its decisions can be reviewed if they would be incorrect in any way and visit injustice on any party. First, both Counsel assure me, from their own researches, that this decision is one that, although it is not the subject of a statutory right of appeal to the Court of Appeal, might, if unreasonable in

the Wednesbury sense, be reviewed by way of Judicial Review. 35. The second issue of appeal relates to the Williams' Settlement. This is a settlement of monies located in Jersey or other assets to the tune of £7,955,192 - at least that was the figure at the time of the confiscation proceedings. The Williams Settlement assets were counted as assets of the defendant but not in any sense as 'criminal money'. In light of that, and in the light of the scale of that particular element of assets that the Superior Number found to be Michel's assets, it is worth noting at tab 8 - the Judgment of the Superior Number expressed through me, page 14 - that the following general proposition and concern, if it was a concern, was expressed. 36. In relation to drug trafficking, paragraph 28 of that Judgment:- "in drug trafficking cases it is often the case that a Defendant of low personal wealth will have traded in or dealt with drugs of very high value. In these circumstances it has often been inevitable that the determination of 'benefit' in drugs cases has far exceeded a defendant's net realisable assets thus leading to an inevitable order that will leave the defendant penniless on her/his release from prison. The possible significance or influence of these two points will be considered below." On page 31 of the same tab and Judgment at paragraph 43 - and this is the Williams Settlement money to which the Jurats in this Judgment were referring - the following:- "On the other hand, were the court to have been satisfied that the money was actually not the defendant's then it might have had to reconsider the orders made on the grounds that the orders were to strip the defendant of all assets and would have sent him penniless from prison to a life where both his wife and Ms Buckley would have had to suffer sale of the homes they occupy, conclusions or results the Jurats might then have adjusted by exercise of the discretion they have. In the event the Jurats are entirely satisfied that the Williams Settlement is property of the defendant and thus available to meet the confiscation order being made, but they know no more. This bare finding also means that the order being made may be met without the defendant being rendered penniless and dependant on charity when released from prison, but in a somewhat 'hit and miss' way." In light of the conclusion which is, I think, effectively common to both parties, that there is a very substantial margin of asset and cash available to Mr Michel after discharge of the confiscation order, the possibility of his being sent penniless from prison is not something of which I have to worry. But what if the prosecution were wrong to assert, and what if the Jurats were wrong to find, that the Williams Settlement belonged in its entirety to Mr Michel? What if in due course Mr Crosby Jones satisfies the Court that he was the sole beneficiary or the principal beneficiary of the assets of that fund? 37. In those circumstances, and with that as a possibility in mind, should I be concerned to alter the otherwise appropriate exercise at my discretion? I am quite satisfied that I do not have to worry about that and I am quite satisfied that in the particular circumstances of this case, and subject to whatever other factual developments might have happened by the time that such an issue would arise, it would be open to Mr Michel to seek leave to appeal out of time against the confiscation order if it had the effect of his being sent penniless from prison. It would be very difficult indeed in those very particular circumstances for the prosecution to resist the application for leave. Nevertheless I should add, notwithstanding the arguments deployed about the statutory provisions that do exist to give consideration to the interests of victims' contingent financial claims in confiscation proceedings, I can see no reason in theory why at the exercise of their discretion in making confiscation orders contingent liabilities of one kind or another should not be considered by Jurats. As it happens, and in light

of the figures with which we are concerned, it does not arise in this case. 38. Authorities . At tab 6 within the filing of Mr Le Quesne, R v Northallerton Magistrates court ex parte Dove

[2000] Cr App. R. (S) at page 136 is cited. This is a case that deals with the approach to costs in Magistrates court where a defendant is fined. Principles are identified which I will deal with by headline. (i) Having regard to the defendant's means and other financial orders imposed on him reasonableness. (ii) An order not to exceed what the prosecutor has actually and reasonably incurred. (iii) The purpose to compensate not to punish. (iv) Proportionality or disproportionality. (v) The defendant to provide financial information. No authority has been produced dealing with the approach that a court should take to making a cost order against someone who it sends to prison. However, in Current Sentencing Practice (May 2006) Sweet Maxwell "The Referencer " contains at S 1086 the following under the heading " Prosecution of Offences Act 1985 section 18:- "An offender who is sentenced to custody should not be ordered to pay costs unless he has the means to pay immediately or good prospects of employment on release". References are then made to other paragraphs Current Sentencing Practice . The Referencer also refers to Archbold

627 although in

Archbold

627, there is no support for the particular

proposition referred to in the Referencer . (On reading the cross reference in Part J J6 1(a) (01.1) of Current Sentencing Practice I cannot immediately find support for the proposition in the Referencer that I have referred to and therefore remain, to the extent I was, still a little in the dark as to how that proposition is supported and I will hand the Referencer down to counsel to have a look at if they wish to). 39. Nevertheless, if that proposition in the Referencer is correct what follows?, Although it is clear in reality, as Mr Le Quesne says, that gainful employment for Mr Michel on release from prison may be unrealistic - certainly gainful employment at any high level of earnings - the fact of the matter is that he is in a position to pay forthwith any costs as sought or a lesser sum . 40. Referring back to subparagraph 3 of the decision in Northallerton , Mr Le Quesne does not assert that there is disproportionality between the costs orders sought and the gravity of the crimes . 41. Mr Le Quesne seeks to rely on an argument about double recovery saying that as the money that goes to the Criminal Offences Fund may go, and clearly has gone in part, to the Law Officers there is no need to make any costs order because the Law Officers will effectively be compensated adequately by the confiscation order once it take effect. It is an argument that I reject. There is no evidence as to where precisely the money will go. It is not earmarked money. When it goes to the Law Officers it may be used to do different things from those which they might otherwise have (been able to afford to have) done. If this argument was right then it would never be appropriate, it could be argued, to impose costs orders in a case where somebody is fined more than the costs of the case because ultimately, and almost inevitably, both fines and costs will go to the same ultimate recipient. There is no evidence here

of how the money would be allocated. But those observations aside the purpose and character of these moneys is entirely different. Although there are interesting conceptual issues about the nature of confiscation money given the precise wordings of the different (sometime irreconcilable) authorities, it is basically money characterised by criminality that is taken from an accused. It is not taken from him to compensate the costs of his prosecution; it is taken from him for the various reasons identified by the Jurats and it simply falls into a different category (from money needed to cover the costs of prosecuting someone subject to an application of this kind). 42. Tab 8 page 22 para 32. The Jurats found that the purpose of confiscation here was (a) as a penalty, (b) as a deterrent and (c) as a deprivation of profit from criminal conduct to make it impossible for future use. The fact that this confiscation order, large as indeed it was, is in part, or may be viewed in part, on the authorities as a penalty may lend support for the concession that Mr Le Quesne made about proportionality: the Confiscation Order was very large; the penalty element of that order may itself be very large; if so, costs orders of the level proposed here cannot be characterised as disproportionate. 43. Nevertheless the character of the money taken in confiscation is different from money that could be said to be all "ill gotten gains". It is not (like) money that a burglar gets from a "fence" to whom he sells goods. It is different in character from that. 44. The Viscount's costs, whatever the law may say technically, will be taken from the confiscated monies so that they will not be an additional burden on the seized assets. Put another way, subject to any order for costs, the defendant will recover from seized assets everything except that which ultimately goes in confiscation and a costs order. 45. I repeat that I have in mind the £140,000 per annum or thereabouts that has accrued to assets seized from the defendant. 46. I note, and have in mind, that there will be no diminution by sharing of confiscation money with other, perhaps foreign, law enforcement agencies as might have occurred in certain circumstances. 47. It is common ground that "establishment costs", that is the costs of lawyers and investigators who were on the payroll of the prosecution authorities, may nevertheless be part of the taxed costs of a prosecution in respect of which a prosecutor can apply for a favourable costs order. Indeed it was by reference to "establishment costs" that Mr Baker this morning suggested, very late in the day but nevertheless with a document that can be found at tab 5 in support, that there were some ("establishment") blanks in expenditure that could be completed, thus significantly to enlarge the original figure sought of £3,500,000. 48. Third party claims. Mr Le Quesne complains that they should have been dealt with at the confiscation hearings. They have been put off, he says, in a way that prejudices either them or more particularly - his concern - Mr Michel. The procedural details of how these claims will be dealt with have not been agreed, nor have they been the subject of any particular argument. What is clear is that if in respect of any asset that the Viscount seeks, in due course, to convert to cash or that Mr Michel, through his lawyers, seeks to convert into cash, where there is a notified claim then that claim will be resolved, if necessary in Court with the other interested party(ies). It should also be borne in mind that where these claims were known of - and I think they were all known of - at the time of the confiscation hearing, it would have been possible for Mr Michel to be called himself to give further evidence about the nature of those funds. Despite one or two questions or invitations by me to Mr Le Quesne to consider calling his client in light of the arguments he addressed at the Confiscation hearing, no such evidence was called. It would also

have been possible to have called witnesses (the third party claimants) who themselves could have testified to those matters. None was called. On the one hand, it might be argued, to have called such witnesses would, perhaps, have had the effect of extending the confiscation proceedings. On the other hand, and I return to paragraph 47 of tab 8, in respect of the Williams Settlement it would have been worth quite an expenditure of litigation time, it may be thought, to have had resolved the issue of who really has the interest in the nearly 8 million pounds sitting in the Williams Settlement. 49. While on the subject of the Williams Settlement I make as a separate point that at this stage of consideration, in light of the way the case has been put by the prosecution and notwithstanding the concerns expressed by the Jurats, I have to, and do, treat the Williams Settlement simply as the defendant's money without allowing any suspicion to fall upon it or to taint it. It is simply his assets. It has to be so viewed. 50. I am quite satisfied that the vast majority of this case of two defendants concerned Mr Michel and not Mrs Gallichan. Indeed, although this was not a point the Prosecution could articulate and was not referred to in the hearing, without Mr Michel being in the dock it is inconceivable that the Prosecution would have launched a case of this scale - or probably any case - against Mrs Gallichan alone. She was, it was noted in the trial, one among several other Michel staff doing similar work, some of whom were qualified accountants or in other ways more qualified than Mrs Gallichan, none of whom was prosecuted. 51. Taking this and all above factors into account and using the formula Mr Baker suggested I originally announced in court that I would order that "Mr Michel shall pay 65% of the costs of the investigation overall and of the second trial overall, to be assessed or agreed; the order for costs to be paid by Mr Michel not to exceed a "cap" of £1,400,000 as at today's date the, "cap" to increase from today's date by the interest that accrues on assets the Viscount holds until payment of the confiscation order." 52. I realised on further consideration that the 65% calculation was, in reality, redundant as on the basis of the figures provided by the Prosecution - however discounted at Taxation - 65% of the total figure reached at taxation will be a figure greater than £1,400,000. I also judged that the order made in court failed to take adequate account of the possibility that the interest accruing on money held by the Viscount may accrue for a long time and become very substantial indeed if a further appeal is pursued and if Mr Michel decides not to meet the Confiscation Order pending resolution of that appeal. This issue was not discussed in great detail at the hearing, initiatives about it coming largely from the court. I made clear in the hearing that the Defendant should not have any future benefit of interest on monies that in due course will be the subject of the Confiscation Order in preference to those monies going towards a costs order that would otherwise be appropriate. 53. I am quite satisfied that if the total of £1,400,000 plus interest accruing on monies held by The Viscount were to exceed the (now redundant) figure constituting 65% of taxed or agreed costs then that excess should go further to meet the costs of the prosecution and not to enrich Mr Michel. There must be some upper limit of overall taxed (or agreed) costs that I can be satisfied is properly related to Mr Michel and not to Mrs Gallichan in the expenditure on the case. I am quite satisfied, in light of all that has been said about the two defendants, that at least 80% of the overall costs can be regarded as properly to be laid at Mr Michel's door and thus payable by him if there are funds available for him to do so. 54. In the circumstances I am satisfied that the proper order to make is that Mr Michel shall pay towards the Prosecution's costs the lesser of:- (i) £1,400,000 plus an amount

equal to any interest added to the funds held by the Viscount between 7th May 2008 and the date when the confiscation order is discharged in full; and (ii) 80% of the overall costs of the investigation and second trial as taxed or agreed 55. Two points of clarification:- (i) Even if

- extraordinarily - the 65% figure of taxed or agreed overall costs would have been less than £1,400,000 the order formulated at paragraph 53 stands and is the appropriate order (ii) Even if Mr Michel chooses to pay the Confiscation Order from funds other than those seized by the Viscount, the size of the final order will still be subject to enlargement by an amount equal to interest in the way ordered above until the Confiscation Order is fully paid. The interest paid in respect of the monies held by the Viscount is likely to be a fair representation of interest that was earned on such other monies or assets available to Mr Michel - known to the Prosecution or not - from which he may choose to meet the Confiscation Order. It is appropriate that the figure of £1,400,000 should be enlarged wherever the funds come from to discharge the Confiscation Authorities Archbold. Associated Provncl. Picture Houses Ltd. v. Wednesbury Corp. ,

[1948] 1 KB 223 . R -v- Northallerton Magistrates court ex parte Dove [2000] Cr App. R. (S).
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