

JERSEY / JUDGMENT

AG v Smith [2004] JRC 168A (23 September 2004)

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judgment

Deputy bailiff: 1. This application raises a short point of law concerning the proper interpretation of Article 3(2) of the Proceeds of Crime (Jersey) Law 1999 ("the 1999 Law"), which relates to the power of the Court to make confiscation orders in criminal proceedings. The background 2. The defendant appeared before the Royal Court on 12 th April 2004 and pleaded guilty to 13 counts of fraudulent conversion. These counts showed that between March 1996 and March 2003 he converted some £1,070,625. These funds were taken from various trust and company structures he was responsible for administering. On 29 th April 2004 the defendant was sentenced to 5 years imprisonment. The issue of confiscation was postponed under provisions of the 1999 Law. Since then Clearwater International Limited ("CIL"), Carey Olsen Trustees Jersey Limited ("COT") and Mr Paul Chilcott have been given leave to intervene on the basis that one or more of them are the victims of the defendant's fraud. They do not wish the defendant's assets to be applied towards a confiscation order; on the contrary they wish them to be applied towards repaying the amounts which have been lost by the victims. CIL and COT have initiated civil proceedings against the defendant reclaiming their losses. The defendant's wife has also been given leave to intervene in the confiscation proceedings in relation to certain assets which she contends belong to her rather than to the defendant. 3. Counts 1 to 8 of the indictment relate to offences which were committed before 1 st July 1999, which was the date upon which the confiscation provisions contained in Article 3 of the 1999 Law came into effect. All the parties are agreed that no confiscation order may be made in relation to those offences. The remaining offences (counts 9-12 and 14) took place from March 2000 onwards, i.e. after the confiscation provisions came into effect. The Attorney General asks for a confiscation order in respect of those offences. The issue 4. So far as material, Article 3 of the 1999 Law provides:- "Confiscation orders (1) Where a defendant appears before the Court to be sentenced in respect of one or more offences specified in the First Schedule and he has not previously been sentenced or otherwise dealt with in respect of his conviction for the offence or (as the case may be) any of the offences concerned:- If the Attorney General asks the Court to proceed under this Article; or If the Court considers that, even though the Attorney General has not asked it to do so, it is appropriate for it to proceed under this Article, the Court may act in accordance with this Article. (2) However this Article shall not apply in the case of any proceedings against any defendant where he is convicted in those proceedings

of an offence which was committed before this Article comes into force. (3) Where the Court is proceeding under this Article, it may first determine whether he has benefited from any relevant criminal conduct. (4) If the Court determines that he has so benefited it may, before sentencing or otherwise dealing with him in respect of the offence or (as the case may be) any of the offences concerned:- (a) determine in accordance with Article 4 the amount to be recovered in his case by virtue of this Article; and (b) make a confiscation order, to the effect that he pay that amount....."

5. CIL and COT, to whom, for convenience, I shall refer as "the intervenors", submit that the effect of Article 3(2) is that, because some of the offences of which the defendant was convicted were committed before Article 3 came into effect ("pre-Law offences") no confiscation order may be made even in respect of those offences which were committed after Article 3 came into effect (post-Law offences). The Attorney General, on the other hand, submits that this interpretation would lead to absurd results and that Article 3(2) does not have this effect; it simply prohibits a confiscation order being made in respect of pre-Law offences but does not prohibit it in respect of post-Law offences contained in the same indictment. 6. The underlying reasoning for the differing interpretations can be shortly stated. The intervenors submit that the reference to 'proceedings' in para (2) of Article 3 means the proceedings as a whole. There is thus one set of proceedings which encompasses all the offences charged in those proceedings. The Attorney General, on the other hand, submits that 'proceedings' in para(2) means proceedings for a single offence, such that each offence has separate proceedings. This would then allow confiscation in respect of post-Law offences but not in respect of pre-Law offences. The intervenors' submissions 7. Mr Grace prepared detailed and helpful submissions, both written and oral. I have carefully considered them although I propose only to summarise them briefly in this judgment. He began by drawing my attention to a passage in *Re Ostroumoff*

(1999) JLR 238 where, at 246, the Court listed twelve propositions for the construction of statutory provisions which counsel in that case had extracted from the earlier case of *New Guarantee Trust Finance Limited -v- Birbeck*

(1980) JJ 117 . It is not clear how far the Court in fact approved these twelve propositions as it went on to say, immediately after the last of them at 248:- "Overall, of course, although Advocate Dessain did not say so in so many words, it may be better for us (bearing in mind all the valuable judicial authority above) to remember what is said by Bennion in his seminal work *Statutory Interpretation* at 259 (1984) where he says:- "The basic rule of statutory interpretation is that it is taken to be the legislator's intention that the enactment shall be construed in accordance with the general guides to legislative intention laid down by law; and that where these conflict the problem shall be resolved by weighing and balancing the factors concerned."" In my judgment the twelve listed propositions are helpful but they are certainly not to be taken as exhaustive. There are a number of principles of construction which are not included in those propositions. 8. Mr Grace's primary submission was that the plain and ordinary meaning of the words in Article 3(2) was that, if any of the offences of which a defendant was convicted in the proceedings was a pre-Law offence, the confiscation powers conferred by Article 3 could not be exercised. The reference to 'proceedings' took its colour from paragraph (1) of Article 3 which,

although not specifically saying so, effectively provided a definition of the word 'proceedings' and clearly referred to the proceedings as a whole. The use of the word 'However' at the beginning of para (2) clearly linked that paragraph to the 'proceedings' envisaged in para (1). 9. He accepted that there was no statutory definition of 'proceedings' in the 1999 Law but submitted that the interpretation which he put forward was consistent with its clear meaning elsewhere in the statute. He took me through a number of provisions of the 1999 Law in order to support this assertion. An example was Article 6(11) which reads:- "In this Article "the date of "conviction" means:- (a).....

- (b) where he was convicted, in the same proceedings but on different dates, of two or more offences that are comprised in relevant criminal conduct, the date of the latest of those convictions." The Attorney General conceded that in numerous other parts of the 1999 Law, the expression 'proceedings' bore the meaning contended for by the intervenors rather than by him. Mr Grace therefore relied upon the well known presumption that the same word or phrase bears the same meaning throughout a statute. 10. In support of his submission as to the plain and ordinary meaning of the paragraph, Mr Grace referred to the Explanatory Statement which accompanied the Projet of the 1999 Law when it was presented to the States for debate. When commenting on Article 3 the Explanatory Statement said:- "Article 3 provides that where a person appears for sentence for one or more offences specified in the first Schedule, the Court may first determine whether he has benefited from relevant criminal conduct. If it finds that he has, it may then (before sentencing him) decide the amount of the benefit to be recovered, and make a confiscation order. These powers may not be exercised, however, if any of the offences of which he has been convicted in the proceedings occurred before Article 3 came into force." I was also referred to certain comments which the President of the Finance & Economics Committee made when proposing the Bill, but I do not consider that these add anything or assist me in the task which I have to undertake. 11. Mr Grace did not accept that his interpretation would lead to absurd or unreasonable consequences as the Attorney General submitted. If the Crown wished to ensure that it could apply for a confiscation order in respect of post-Law offences where a defendant also faced pre-Law offences, the charges could be split into two separate proceedings with one indictment charging the pre-Law offences and a separate indictment charging the post-Law offences. 12. He submitted that if the Court agreed that his interpretation was the plain and natural one, that was the end of the matter. But, as a secondary argument, he submitted that, if the Court concluded that there were two possible interpretations, his should be preferred because it would avoid any element of retrospective legislation. This was particularly important in a penal statute. He accepted that, even on the Attorney General's interpretation, a confiscation order could not actually be made in respect of a pre-Law offence but he submitted that there was potential retrospective prejudice if a confiscation order could be made in respect of post-Law offences which were tried in the same proceedings as pre-Law offences. This arose because, in such circumstances evidence upon which a defendant was convicted of post-Law offences might depend upon evidence in relation to pre-Law offences. Conviction of post-Law offences might be made more likely by

conviction of pre-Law offences. There was often a greater emphasis on the earlier acts in a chain of linked offences. He accepted that this was a very indirect form of retrospective legislation as it related to the conviction of a defendant and had nothing directly to do with the making or otherwise of a confiscation order. However a conviction was a pre-requisite for making a confiscation order and the defendant could therefore be indirectly prejudiced if the Attorney General's interpretation of Article 3 were correct. Decision 13. In *Carter -v- Bradbeer*

(1975) 1 WLR 1204 at 1206 Lord Diplock said:- "If one looks back to the actual decisions of [the House of Lords] on questions of construction over the last 30 years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions". That process has accelerated in the quarter of a century since Lord Diplock wrote those words. In my judgment it is the modern approach. The objective is to ascertain the intention of the legislature. 14. Furthermore it is a longstanding principle of statutory construction that the Court will seek to avoid a construction which produces an absurd result. This principle is summarised in Section 312 of *Bennion - Statutory Interpretation* (4th Ed'n) as follows:- "(1) The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have intended by Parliament. Here the courts give a very wide meaning to the concept of 'absurdity', using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief. (2) In rare cases there are overriding reasons for applying a construction that produces an absurd result, for example where it appears that Parliament really intended it or the literal meaning is too strong." *Maxwell on Interpretation of Statutes* (12th Ed'n) at 201 states:- "Where possible a construction should be adopted which should facilitate the smooth working of the scheme of legislation established by the Act which will avoid producing or prolonging artificiality in the law, and which will not produce anomalous results." 15. In *R -v- Sekhon*

(2003) 1 WLR 165 Lord Woolf C J said at para 1 of the judgment:- "One of the most successful weapons which can be used to discourage offences that are committed in order to enrich the offenders is to ensure that if the offenders are brought to justice, any profit which they have made from their offending is confiscated. It is therefore not surprising that Parliament has repeatedly enacted legislation designed to enable the courts to confiscate the proceeds of crime." That case involved the question of whether defects in the procedures laid down for the making of confiscation orders led to the orders being invalid. At paragraph 31 Lord Woolf said:- "Notwithstanding the actual language of Section 72(1) which read literally is mandatory in its terms, we would not regard it as likely that Parliament would, for example, be concerned to deprive the court of jurisdiction because of defects in the contents of the written notice which is required by Section 72(1)." The court went on to hold, according to the headnote, that Parliament had been attaching increasing importance to courts being in the position to make confiscation orders and it was unlikely that Parliament had intended to exclude the jurisdiction of the court in

relation to the making of such orders because of procedural defects of a technical nature that caused no injustice to the defendant. 16. Similarly in *R -v- Batalla-Esquivel*

- (2001) JLR 160 , Bailhache, Bailiff, when deciding whether an order in rem was an external confiscation order for the purposes of enforcement in Jersey, said at paragraph 21 of his judgment that the whole purpose of the applicable legislation was to curb the menace of drug trafficking and that, in furtherance of that end, it was undesirable for the Court to adopt a restrictive view. 17. In my judgment, it is clear that the purpose of the 1999 Law was to enable the proceeds of crime to be confiscated with a view to removing a criminal's ill-gotten gains. Furthermore the general principle as to commencement of the power of confiscation emerges very clearly. In the case of a single charge a confiscation order may be made if the offence was committed after the commencement of the Law but cannot be made in respect of an offence committed before then. The same principle applies in the case of multiple offences. If all the offences were committed post-Law, a confiscation order can be made; if they were all committed pre-Law, an order cannot be made. Thus the basic intention which emerges is that a confiscation order may be made in respect of an offence which is committed after the Law came into force. 18. I accept that, on first reading, the construction contended for by the intervenors is the first which springs to mind. However, I consider that the construction contended for by the Attorney General is also perfectly possible and does not require doing any violence to the wording. It is quite common to talk of the 'proceedings' for an offence, even in the context of an indictment containing several counts. Simply by way of example I would refer to the judgment of Le Quesne, Commissioner in *AG -v- Young* (12th January 1998) Jersey Unreported; [1998/4] . In that case the defendant was indicted on a number of charges and a question arose as to whether some of these were prescribed. At paragraph 3 of the judgment the Commissioner said:- "I have therefore to decide upon what date each of the offences charged in the indictment was committed, assuming it to have been committed, and upon what date proceedings for each offence were instituted." Thus the Commissioner referred to 'proceedings for each offence' even though all the offences were charged in one indictment i.e. one set of proceedings. 19. Other examples spring to mind. It is perfectly normal to talk of granting 'a stay of proceedings in respect of Count 1 but allowing the proceedings in respect of Count 2 to continue'. In my judgment the expression 'proceedings' can be used interchangeably to refer to the proceedings as a whole or to proceedings for a particular offence where several are included in one indictment. Indeed the expression is often used in both senses in the same sentence e.g. 'These proceedings include ten counts against the defendant although the proceedings for Count 1 have been stayed'. 20. I conclude that each of the competing interpretations is possible and it is therefore proper to have regard to the consequences of each interpretation. On this aspect I have no hesitation in agreeing with Mr Whelan on behalf of the Attorney General that the intervenors' interpretation would lead to absurd and illogical consequences which cannot have been intended by the legislature. For example:- (i) If a defendant has only committed offences after the Law came into force, his benefit from those offences may be

confiscated. However, if he happens also to have committed some offences before the Law came into force (so that his overall conduct is more reprehensible) his benefit from the post-Law offences cannot be confiscated if he is also charged with the pre-Law offences. (ii) If a defendant is charged with both pre-Law and post-Law offences on one indictment and is convicted of all of them, no confiscation order may be made in respect of the post-Law offences. However, if he is acquitted of the pre-Law offences, his benefit from the post-Law offences can then be confiscated. 21. In my judgment these are absurd and illogical consequences for which there is no sensible justification. They cannot have been intended by the legislature. Mr Grace submitted that there was a simple answer to these difficulties. If the Attorney General wished to be able to confiscate the benefit of post-Law offences in circumstances where an offender had also committed pre-Law offences, he should simply separate the charges and have two separate indictments and trials, one relating to the pre-Law offences and the other to the post-Law offences. There could then be no objection to a confiscation order in respect of the post-Law offences. But again, it is very hard to attribute such an intention to the legislature. In a case like the present, where there is a series of offences of a similar nature arising out of essentially the same circumstances, it would be absurd to split the trial into two parts. There would be an enormous amount of repetitive evidence and additional costs incurred, the defendant would have to face two trials instead of just one, the witnesses would have to attend twice and give up more of their time and so forth. As Mr Whelan put it, if Mr Grace's interpretation is correct the Attorney General would be faced with three equally unpalatable choices in a case such as the present:- (i) He could prosecute only in respect of the post-Law offences which would enable him to obtain a confiscation order but would result in the offender escaping prosecution for what are perhaps serious offences. (ii) He could prosecute all the offences in the same indictment but on the basis that he would be foregoing the possibility of a confiscation order in respect of the post-Law offences; or (iii) He could separate the charges and put the defendant and the public to the trouble of two trials as suggested by Mr Grace. It is hard to attribute an intention to the legislature that the prosecuting authorities should be faced with such a choice 22. A court might be driven to adopt an interpretation which had such consequences if the alternative interpretation caused injustice or prejudice to a defendant in a criminal trial. But it is hard to see any prejudice which arises from the Attorney General's interpretation. When pressed, Mr Grace could only come up with the element of possible retrospectivity and prejudice summarised in paragraph 12 above. In other words, the existence of pre-Law offences on an indictment might render it more likely that a defendant was convicted of the post-Law offences so that a confiscation order in respect of those latter offences could be made. In my judgment this is no prejudice at all. Whether the person is convicted of post-Law offences depends entirely upon the evidence. The laws of evidence and procedure will determine whether evidence in respect of pre-Law offences can be heard at the same time as evidence in respect of post-Law offences. Furthermore the alleged prejudice to which Mr Grace refers could equally arise even if his interpretation is correct. Thus, even if an indictment contained only post-Law offences it would be perfectly possible for similar fact

evidence of pre-Law offences (which had not actually been charged) to be adduced as evidence in respect of the post-Law charges assuming that the requirements for similar fact evidence were met. Thus the alleged 'prejudice' upon which Mr Grace relies is quite unrelated to his interpretation of Article 3(2). In my judgment there is no element of retrospectivity and no prejudice to the defendant caused by the Attorney General's interpretation of Article 3(2) as opposed to the intervenors' interpretation. 23. I should add that I have not forgotten that, under Article 5, there can be an element of retrospective effect in certain circumstances; but both parties agreed that this arose whichever interpretation of Article 3(2) was correct and the provisions of Article 5 were therefore not material to the issue in this case. Interestingly, the 1999 Law is very favourable towards a defendant in terms of retrospectivity as compared with the Drug Trafficking (Jersey) Law 1988 and the Criminal Justice Act 1998 of the United Kingdom (which introduced confiscation orders in that jurisdiction for non-drug trafficking offences). Under those statutes confiscation orders may be made in respect of pre-Law offences provided that the proceedings were not instituted before the Law came into force. I see no reason to infer an intention on the part of the legislature that, even where offences were committed after the 1999 Law came into force, there should be a block upon the ability to confiscate the offender's benefit from those offences merely because he happens also to have been charged and convicted of some pre-Law offences at the same time. 24. I agree that the Attorney General's interpretation means that the word 'proceedings' has a different meaning in Article 3(2) from that which it has in other parts of the Law (including other parts of Article 3 itself). But the presumption that words bear the same meaning throughout a statute is not a strong one. As Hamon, Commissioner said in *Le Monnier -v- AG*

- (1989) JLR 170 at 179:- "As a preliminary step it seems to be necessary to consider whether 'special reasons' can have a different meaning in the two articles. There is a presumption that the same word or phrase bears the same meaning throughout the same statute. That this presumption is easily rebutted is shown by Cross on Statutory Interpretation at 100 (1976) where the author states:- "The presumption is, however, of the mildest kind for it is easy to point to cases in which the same word has been held to have different meanings in different sections, or even the same section of a single statute."" 25. I also accept that the Attorney General's interpretation is not consistent with the Explanatory Note to the *Projet* referred to earlier. However it is for the courts to construe a statute, not the proponent of the legislation. The Court has the advantage of hearing detailed adversarial argument on the various possible interpretations and the consequences which may flow from such interpretations. The Explanatory Note reflects essentially the views of the writer as approved by the proponent of the legislation but without necessarily having been referred to alternative interpretations. In my judgment little weight can be placed on the Explanatory Note. 26. I am quite satisfied that the arguments put forward by the Attorney General are compelling. Article 3(2) is capable of bearing either of the meanings contended for by the parties. However that put forward by the Attorney General is

consistent with the intention of the legislature to allow confiscation in respect of offences committed after the Law came into force and does not lead to any injustice, unfairness or retrospectivity. On the other hand the interpretation put forward by the intervenors leads to absurd and illogical results which cannot have been intended by the States. 27. I hold therefore that there is jurisdiction to make a confiscation order in respect of Counts 9 to 12 and 14 of this indictment notwithstanding that the indictment also contains, at Counts 1 to 8, offences which were committed before the confiscation provisions of the 1999 Law came into force. The future course of these proceedings 28. I would like to take the opportunity of repeating certain observations which I made at the conclusion of the oral hearing. This is a case where the defendant stole a total of £1,070,625. According to the indictment, £773,250 was taken from CIL and £105,000 from COT. Count 14 involves £192,375 and the victim in that case is not clearly identified. It follows that, according to the indictment, CIL and COT between them, have lost £878,250. According to the Attorney General's statement filed in the confiscation proceedings, the defendant's realisable property (as defined in the 1999 Law) is in the region of £550,000. CIL and COT have instituted civil proceedings against the defendant to recover their losses. As can be seen, even if all the defendant's realisable property is utilised towards repaying their losses, there will be a substantial shortfall. It is therefore hardly surprising that the intervenors are not keen on the Attorney General obtaining a confiscation order, as any such order would presumably reduce yet further the percentage of their losses which they can recover from the defendant. The State would be receiving money at their expense. 29. The confiscation hearing was originally set down for two days. However the Attorney General has submitted a statement to the effect that, now that he has delved into the files in greater detail, he wishes to raise the issue of whether the structure set up by Mr Chilcott (of which CIL and COT as trustee are part) is a sham. If it is a sham, the real loser, says Mr Whelan, is Mr Chilcott and he has not brought any civil proceedings. In his application for an adjournment made before Commissioner Le Cras the Attorney General estimated two weeks for the hearing before the Superior Number of the confiscation proceedings because, as I understand it, he will wish to go into the question of whether this structure may be a sham and the effect that this would have on the likelihood of a civil recovery by CIL and COT. 30. It seems to me at least questionable whether it is open to the Attorney General to go back on the particulars which were the clear basis of the charges set out in the indictment and of the pleas of guilty entered by the defendant so as to raise the possibility that the victims may be someone other than the victims stated in the indictment. Furthermore it must be questionable whether confiscation proceedings are an appropriate venue for an investigation on whether structures may or not be a sham. I would therefore wish there to be a preliminary hearing in early course at which this question can be ventilated so that all parties will know well in advance what issues they will be allowed to raise before the Superior Number at the confiscation proceedings. Authorities Proceeds of Crime (Jersey) Law 1999 Proceeds of Crime (Jersey) Law 1999 (Appointed Day) Act 1999 Article 1(3) Drug Trafficking Offences (Jersey) Law 1988 Criminal Procedure (Taking Offences into Consideration) (Jersey) Rules 2000 Indictments (Jersey)

Rules 1972 AG -v- Young (12 th January 1998) Jersey Unreported; [1998/4] Le Vannais v Island Development Committee [1987/88] JLR 662 Lesquende Limited v Planning and Environment Committee

[1996] JLR 254 Representation of Mauger

[2000] JLR 112 Le Monnier v AG

[1989] JLR 170 In the matter of Ostroumoff

[1999] JLR 238 Denny v Hodge

[1973] JJ 2429 Macready v Amy [1950] JJ 11 Overseas Insurance Brokers Limited

[1963] JJ 325 New Guarantee Trust Finance Ltd v Birbeck (1980) JJ 117 Criminal Justice Act 1988, as amended: ss. 72AA & 102(4) R v Chrastny (No2) [1991] 1 WLR 1385 R v Sekhon (2003) 1 WLR 165 Phillips v Eyre (1870) LR 6 QB 1 Secretary of State v Tunncliffe

[1991] 2 All ER 712 In re Barretto [1994] QB 392 Carson v Carson [1964] 1 WLR 511 Yew Bon Tew v Kenderaan Bas Mara

[1983] 1 AC 553 Carter v Bradbeer (1975) 1 WLR 1204 States' debate on Proceeds of Crime (Jersey) Law 1999 Halsbury's Laws Vol. 44(I) 14 th ed. House of Commons Debates 14 th April 1993 vol. 22 col. 870 Francis Bennion 'Statutory Interpretation' (4 th Ed'n): s.312 AG -v- Batalla-Esquivel

(2001) JLR 160 Maxwell on Interpretation of Statutes (12 th Ed'n): p.201. Page Last Updated: 24 Jun 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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