

JERSEY / JUDGMENT

Self -v- AG [2010] JCA 061 (25 March 2010)

[2010] JCA 061

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COURT OF APPEAL th March 2010 Before : Dame Heather Steel, D. B. E., President; M. S. Jones, Esq., Q. C.; and J. W. McNeill, Esq., Q. C. Paul Andrew Self -v- The Attorney General Application for leave to appeal against the conviction by the Royal Court on 17 th December, 2009, and the sentence passed by the Royal Court on 22 nd January, 2010, on the charges of forgery and obtaining money by false pretences. D. M. Cadin, Esq., Crown Advocate. Advocate O. A. Blakeley for Self.

JUDGMENT

Mcneill ja 1. This is the judgment of the Court, to which we have all contributed. On 17th December, 2009, the applicant was convicted by a unanimous jury in respect of counts 1, 3, 4, 5, 7 and 9 of an Indictment, as amended as at 9th June, 2009. On 22nd January, 2010, the applicant was sentenced before the Inferior Number. 2. The applicant seeks to appeal against both conviction and sentence. We shall set out the terms of the respective counts when dealing with the individual grounds of appeal. We shall set out the sentence when dealing with that section of the proposed appeal. In essence, however, the counts particularised actions of dishonesty by way of forgery and obtaining money by false pretences in respect of a related series of alleged dishonest actings in 2006. 3. The grounds of appeal and submissions in respect of each of the salient counts were presented upon the basis of very specific submissions and we propose to deal with them likewise. Count 1 4. This Count is in respect of an allegation of forgery whereby the applicant was said to have created a letter, bearing to be sent by BNP Paribas purportedly confirming balances on accounts held by that bank on the applicant's behalf; when no funds were in fact held by them on his behalf, and with the intention that the applicant should thereby induce a further bank, Royal Bank of Scotland International ("RBSI"), to accept the letter as genuine and, by reason of so accepting it, act to the prejudice of RBSI by granting an overdraft facility to a company of which the applicant was chairman. 5. The ground of appeal was that there was insufficient evidence for the jury properly to have convicted on the basis of the Indictment as laid. Mr. Blakeley submitted that the final version of the evidence of Mr. Hebenton, Manager of RBSI, Jersey, was to the effect that his bank would grant (and did grant) an overdraft facility to the company in question on the strength of a facility by Lombard Finance C. I. Limited ("Lombard") and not on the strength of the applicant having a particular bank balance at another bank. 6. In our opinion this ground of appeal has no merit. Mr. Hebenton agreed that this personal guarantee featured in the bank's consideration as to whether or not to grant an overdraft. The overdraft was to be used to fund a renovation project and, once the funds utilised

had reached a sum of £50,000, invoices were to be presented to Lombard which would then provide financing for the purchases. The bank's facility was a bridging facility. Mr. Hebenton was not cross examined on these statements in his evidence in chief. In any event, in such circumstances it is clear that a guarantee would be a desirable, if not a mandatory part of the whole arrangement. 7. The applicant was not led as a witness. In our view the evidence of Mr. Hebenton, to which we have referred, was a perfectly sufficient basis for a jury to have properly convicted to the effect that, as stated in the Indictment as laid, RBSI acted "to the prejudice of RBSI by granting Octa Group Limited an overdraft facility." Counts 3 and 5 8. Count 3 was a count of forgery, the particulars of which were that the applicant "criminally and fraudulently and falsely wrote the signature of Bryan Williamson on a cheque bearing the serial number 00007, on account number 20490107, held with RBSI for the sum of £11,509 and this with the intent to defraud Octa Group Limited." 9. An identical ground of appeal arises in respect of Count 5, where the applicant was charged that he "criminally and fraudulently and falsely wrote the signature of Bryan Williamson on a cheque bearing the serial number 00008, on account number 20490107 held with RBSI for the sum of £13,000, and this with the intent to defraud Octa Group Limited." 10. The substance of the proposed grounds of appeal was twofold. In the first place, that there was no evidence to show that the sum of the cheque was not properly owing by the Company. The second was that there could have been no intent to defraud Octa Group Limited because, the cheque having been forged, if the bank paid it, it acted outside the terms of its mandate and the bank was therefore liable for the amount debited, and must repay that amount, to the customer. 11. Again, in our opinion, neither point has any merit whatsoever. As to the first line of argument, there is no contention to counter the finding that the cheque was a forgery. Having been presented with evidence sufficient to identify that an instrument is a forgery, it is the most natural inference for a jury that, the instrument being a means of payment, the payment was not due to the payee. There might indeed be singular circumstances whereby an individual created a forged document notwithstanding that an amount was in fact due and resting owing to a payee. But no evidence was led to counter the natural inference. 12. As to the second line of argument, it seems to us completely to turn on its head the factual matrix, insofar as one can call it that, in the mind of the person charged. Assuming for present purposes that the amount was not owing to the payee, the forger must, we think, be inferred to have anticipated that the forgery might evade the surveillance of the paying bank. It is indeed the case that, where a forgery is identified, and the bank has paid on the forged instrument, the bank has acted outside the terms of its mandate and is liable to meet the amount paid from its own funds. But the issue here is the intention of the forger; and the natural inference, unless countered, is that there was an intention to prejudice or to take the risk of prejudicing another. Those were precisely the terms in which the Learned Commissioner addressed the jury. Count 4 13. Count 4 charged that the applicant "criminally and fraudulently obtained money to the value of £11,509 by falsely pretending that a cheque numbered 00007 drawn on the RBSI bank account held by Octa Group Limited and bearing account number 20490107 was a good and valid order for the payment of the said sum of £11,509." 14. Mr. Blakeley submitted, firstly, that there was no evidence that the applicant obtained money and, secondly, that there was neither evidence that the applicant's action operated on the mind of the bank nor that the cheque had been verified against what was

referred to at the trial as a mandate from Octa Group Limited to RBSI. 15. In respect of the first line of argument Mr. Blakeley suggested that there was no evidence upon which a jury, properly directed, could find that the applicant obtained money. Indeed he submitted that there was no evidence that the applicant had obtained anything at all. 16. In our opinion this argument is without merit. The cheque was produced and put in evidence to Mr. Hebenton. The cheque was payable to "Paul Self" and bore the signature, along with another, of the applicant. In default of evidence that there was another "Paul Self" to whom a cheque might have been made out in January 2006, the obvious inference was that it was payable to the applicant. 17. Again by reference to the cheque and the bank statements for Octa Group Limited put to Mr. Hebenton, it was shown that the cheque was honoured, the Octa account debited and a transfer made to an account with Barclays Bank on or about 20 January, 2006. As the reverse of the cheque bears no other payment instructions, the obvious inference is that funds were transferred to an account held in the name of "Paul Self". 18. Put shortly, the proper legal characterisation of such a transaction is that the holder of the cheque instructs his bank to present the cheque to the paying bank, to collect the funds on his behalf and to place the funds in an account held in his name by his bank. Thus the collecting bank, as agent for the holder, collects money, holds it for him and, on the holder's instruction, pays that money into an account held by it for its client where the money becomes the bank's money: see, for example, *Joachimson-v-Swiss Bank Corporation*

[1921] 3KB 110. The applicant therefore obtained money. 19. Turning to the second line of argument, forgery is not part of this Count; but fraudulence is. In Mr. Blakeley's submission this means that it is necessary to show a prejudice to a person or entity. 20. As we understood Mr. Blakeley's argument it was that, by reference to certain evidence of Mr. Hebenton regarding the way in which the bank operated a system which might not have detected all breaches of mandate, there was no prejudice. In our view this argument has no logical basis. Mr. Blakeley does not argue that there was a lack of evidence entitling the jury to find a false pretence that the cheque was a good and valid order. In other words the circumstances showed that the cheque was not a good and valid order. Having been paid it follows that Octa Group Limited were prejudiced. Having been prejudiced by the applicant's actions, it matters not that it might also have been prejudiced by actings or omissions on the part of RBSI as to which, we emphasise, we express no view whatsoever. Count 7 21. By this Count the applicant was charged with forging a letter and attached receipted invoices with the intention of inducing Lombard Finance C. I. Limited to accept them as genuine and "by reason of so accepting them to act to the prejudice of Lombard Finance C. I. Limited by enabling [the applicant] to withdraw funds purportedly to settle the false invoices." 22. As regards that part of the Count which we have quoted in the preceding paragraph, Mr. Blakeley submitted that there had been no evidence for a jury to have concluded that the applicant intended the instruments to induce Lombard to part with funds and, secondly, that there was no evidence that the applicant intended to withdraw funds. 23. As we understand the first line of argument it is that, because Lombard was always operating under the impression that the invoices had already been settled by use of an overdraft facility from RBSI, the forged documents could not have

been intended to induce Lombard to part with funds to settle the invoices. 24. In our opinion, whilst the actual mechanics of the arrangements, spoken to by Mr. Hebenton, were that the bank overdraft would be used to meet the required payments in the first instance and the Lombard finance would be available to meet the overdraft once the overdraft had reached its limit of £50,000, it was clear from his evidence that the arrangement between Octa Group Limited and RBSI was agreed in conjunction with the agreement between Octa Group Limited and Lombard. The agreement between Octa Group Limited and Lombard was not merely an agreement to pay off or refinance an overdraft, it was an agreement wholly dependent upon the presentation of invoices. The commercial reality of the arrangements, as spoken to by Mr. Hebenton was that the overdraft was merely a bridging to assist Octa Group Limited rather than approaching Lombard with small bills to be individually funded. This evidence was, in my opinion, perfectly sufficient to entitle the jury to conclude that the applicant's intention was to induce Lombard to part with funds to settle false invoices. 25. The second line of argument was that, whilst, on receipt of the invoices, Lombard credited the account of Octa Group Limited with RBSI, there was no evidence that the applicant intended to withdraw funds. 26. Again, in the absence of other evidence, it seems to us that the obvious inference to be drawn in the whole circumstances was that the applicant was enabling himself to withdraw funds. He forged documents purporting to show that Octa Group Limited was under an obligation to make payment to trade suppliers when that was not the case. He presented those documents to Lombard in the expectation of payment to the company account which, in various ways, he sought to operate. The obvious inference is that he expected to be able to control those funds and the most obvious way of controlling them would be to withdraw them. Count 9 27. The particulars of Count 9 are that the applicant, on 21 September, 2006, "criminally and fraudulently and falsely wrote the name of Bryan Williamson on a letter addressed to RBSI, which letter purported to remove the name of Bryan Williamson as signatory on the company bank account held with RBSI, in the name of Octa Group Limited, and this to the prejudice of Octa Group Limited." 28. In his first point, Mr. Blakeley returned to one which he had made in his closing submissions to the jury to the effect that Mr. Williamson had been removed as a signatory on 29 May, 2006, by the applicant when he filed the "mandate" with the bank. 29. The totality of the evidence regarding the proper characterisation of the document referred to as the "mandate", which evidence came from Mr. Hebenton, was not particularly clear; but the terms of the document were before the jury. The document is a bank form, the completion of which purports to incorporate a company excerpt minute incorporating authority given to directors. That part bore to be an excerpt from a minute of a meeting of the directors of Octa Group Limited held on 29 May, 2006. Among other matters it bore to instruct the bank to honour cheques signed by "any one director for the time being". The only specimen signature given was that of the applicant. But resolution 5 in the purported minute was in terms that the bank be supplied with a list of the names of the directors, secretary and other officers of the company and advised of any alterations to the list. The form is a bank form, but the purported resolution purports to come from the directors of the company.

There is nothing in the excerpt minute to restrict authorised signatories only to the applicant. Nor is there any link between the excerpt minute and the specimen signature sheet. Further, the signature sheet is headed " Specimen Signatures " and not, for example, " authorised signatures ". Accordingly, properly carried out, one might have expected an exchange between the bank and the company for obtaining further specimen signatures upon the assumption that there was more than one director. 30. It is further important to note the tolerably clear evidence from Mr. Hebenton, both in examination in chief and cross examination, that the original instructions to the bank had included three authorised signatories, that the applicant had approached Mr. Hebenton in about May 2006 with a proposal that the applicant be the sole signatory on the bank account, that Mr. Hebenton indicated that he would require authority from Mr. Williamson and that this appeared to have eventually been provided in the letter of 21 September, 2006. Further, in the summing up of the Learned Commissioner reference was made to the applicant's admission to the police that he had typed out the letter, but had stated that this was done at the request of Mr. Williamson. 31. In our opinion the jury were entitled to rely on the totality of the evidence of Mr Hebenton and the applicant's admission as countering Mr. Blakeley's submission that there could have been no prejudice to the company because Mr. Williamson had disappeared as a signatory some four months previously. 32. Mr. Blakeley further submitted that, as no cheques or other transactions requiring signatories other than the applicant's were debited to the account after 29 May, 2006, and no cheques at all were debited after 15 September, 2006, it was impossible to state that the letter had any such prejudicial effect on the company. 33. In our opinion this submission misunderstands the nature of the offence particularised. It is, quite simply, that there was a criminal, fraudulent and false purported removal of a signatory on a company bank account. Such an act clearly was to the prejudice of Octa Group Limited in that there was a potential for cheques to be signed by only one authorised signatory whereas, according to Mr. Hebenton's evidence, the instructions to the bank prior to receiving that letter was that two signatures were required. 34. Mr. Blakeley also sought to submit that the summing up of the Learned Commissioner gave directions which were not in keeping with the Indictment. 35. In particular, Mr. Blakeley laid emphasis on the following paragraph of the summing up:- "If [the applicant] did forge it, did he forge it with a fraudulent intent? Do the words (and I am looking at the letter) " but understand my liabilities to the bank as a guarantor to the original agreement " help you on that? Did the [Applicant] intend to prejudice Mr. Williamson's position with the bank? Again, that is a matter for you." 36. Mr. Blakeley speculated that the Learned Commissioner was redrafting the Prosecution's Indictment and saying what, perhaps, the Prosecution ought to have drafted rather than what it had in fact drafted. He submitted that the direction was not in keeping with the Indictment for two reasons. First, the summing up referred to liabilities under the guarantee whereas the Indictment referred to signatories to the account. Secondly, the summing up referred to prejudice being caused to Mr. Williamson; whereas in the Indictment prejudice was alleged to be occasioned to Octa Group Limited. 37. In our opinion this submission fails to give due weight to the whole context within which the

words were being used, namely, as the Learned Commissioner's opening words indicate, the search for fraudulent intent; the alternative being that, albeit an alleged forgery, it was merely an ill-judged means of removing Mr. Williamson as a director. 38. It seems to us that, as part of this search, the Learned Commissioner was directing the jury that they might gain assistance in considering the whole terms of the letter. In other words, the Learned Commissioner was pointing to the fact that the letter did not simply seek to remove Mr. Williamson as a signatory but sought to emphasise that, whilst removing Mr. Williamson from the position of being an authorised signatory, there was no suggestion that his position vis-à-vis the bank was otherwise affected. 39. In the whole circumstances, the point might be thought to be somewhat a small one: but it is often from small points that one gains an understanding of true intention. 40. In our opinion the Learned Commissioner's words constituted no misdirection and were not, as Mr. Blakeley put it, a summing up relating to a different factual matrix to that contained in the Indictment. Appeal against Sentence 41. The applicant seeks to appeal against sentence on five allegations:- (i) A failure to take account of the content of the social enquiry report; (ii) Failure to give proper consideration to aspects of mitigation; (iii) Apparent failure to take into account the importance of the link between a non-custodial sentence and the ability to repay sums due; (iv) That the Court as a whole appeared to accept that three years' custody was the appropriate starting point which, being the eventual sentence, demonstrated a view that no mitigation was available; and (v) Reference to an exchange between the Crown Advocate and the Commissioner at the end of the sentencing hearing. 42. The jurisdiction of this Court to interfere with a sentence pronounced below was set out by Nutting JA, in the judgment of a court of five judges, in *Harrison-v-Attorney General*

[2004] JLR 111 at paragraph 31. There, this court adopted the resume in *Archbold Criminal Pleading, Evidence & Practice* (2003 ed.) para 7-136, at 966. Circumstances in which we may interfere are therefore restricted to (a) where the sentence is not justified by law, in which case it will interfere not as a matter of discretion but of law; (b) where a sentence has been passed on the wrong factual basis; (c) where some matter has been improperly taken into account or there is some fresh matter to be taken into account; or (d) where the sentence was wrong in principle or manifestly excessive. The allegations go nowhere near meeting those criteria. 43. Mr. Blakeley's grounds of appeal had been twofold. In the first, it was that the sentence was manifestly excessive having regard to all the circumstances. In view of the fact that Prosecution and Defence had agreed that the appropriate starting point was three years' imprisonment, we fail to see how that can be. 44. The second line was that there was available mitigation which the sentencing court either did not consider or to which it did not give sufficient weight when passing sentence. As Mr. Blakeley cannot suggest that all relevant material was not before the court below and as he does not suggest that some matter was improperly taken into account and as he does not suggest that there are some fresh matters to be taken into account, his contention can only be that the court below did not give sufficient weight to the potential mitigating circumstances. That is not a matter into which this Court can delve. Appeal against Costs 45. Mr. Blakeley

submitted that the Commissioner failed to give any reasons as to why the applicant's costs application be rejected and further failed to give any reasons why the Prosecution should be awarded £30,000 of its costs or how the court had arrived at that figure. He further submitted that the court had simply acceded to the total cost put forward by the Prosecution without any question whatsoever. 46. It is only in the most exceptional circumstances that an appellate court will interfere with an award of costs. This part of the applicant's appeal did not appear even in the amended Grounds of Appeal and appears to have been a very last minute consideration. 47. Leaving aside instances where the applicant is successful on appeal, it is only in the most exceptional circumstances that an appellate court will interfere with an award of costs in the court below. Again, it is only in the most exceptional circumstances, usually when the disappointed party requests the court below to do so, that the court awarding costs will give written reasons for the decision. Accordingly, it is only where it is manifest that no court acting reasonably could possibly have reached the determination made by the court below that an appellate court will interfere. That standard is not reached here. 48. We accept that, as stated in *Michel and Gallichan-v-Attorney General*

[2007] JLR N 13, this Court indicated, at least as regards costs on appeal, any order against an unsuccessful applicant or applicant should not exceed the sum the Attorney General had actually and reasonably incurred. 49. That said, in a case such as the present, involving moderately complex investigations, the figure of £60,000 does not seem manifestly unlikely. In any event, Advocate Blakeley did not challenge the figure as requiring justification at the sentencing hearing. Social Enquiry Report 50. Whilst we have dealt in detail with the grounds of appeal against conviction, we have great difficulty in understanding the general basis upon which that appeal was to be made. As reported in the Social Enquiry Report, based on two interviews with the applicant, the applicant by then admitted that he had illegally moved money between his companies during 2005-2006 through forging and falsifying documents and letters. He also acknowledged that he signed Mr. Williamson's name on two company cheques. Indeed this admission of guilt was put forward by Advocate Blakeley, at the sentencing hearing, as a mitigating factor. Indeed, the acceptance of forging his partner's signature on two cheques was separately and specifically referred to both by the Commissioner and by Advocate Blakeley. Presentation of Applications and Appeals 51. Although there are occasions where, as here, the Court does not find it necessary to call upon the learned Crown Advocate or other Respondent, we cannot leave this matter without expressing our deep concern as to what appeared to us to be the applicant's lack of systematic consideration to the true issues of law and procedure relevant to this application and potential appeal. The principal issue in many appeals will be a point of law. When a point of law is addressed on appeal the facts as found below will usually require to be carefully assessed, thereafter various propositions of law appropriate to those facts will be appraised. When presented to the Court the propositions relied upon will be supported by authorities or statements of principle vouching those propositions. 52. This Court is entitled to expect, and does

expect, presentation of applications and appeals, both on paper and orally, which reflect a proper consideration of such issues. Unless such matters are properly and carefully considered, both in preparation and in decision as to whether or not to proceed with an application, the time of the Court and its staff can be wasted, to the prejudice of all who seek to have access to them. 53. The applications are refused. Authorities Joachimson-v-Swiss Bank Corporation

[1921] 3KB 110. Harrison-v-Attorney General

[2004] JLR 111 . Archbold Criminal Pleading, Evidence & Practice. Michel and Gallichan-v-Attorney General

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Prepared on 25 October 2026 · Esheria