

JERSEY / JUDGMENT

Trant v AG and Others [2007]

JCA 073 (22 March 2007)

[2007] JCA 073

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COURT OF APPEAL 22nd March 2007 Before : The Hon. Michael J. Beloff, Q. C., President; Peter D. Smith, Esq., Q. C.; and Michael S. Jones, Esq., Q. C. Between Patrick Trant First Appellant Timothy Trant Second Appellant Simon Trant Third Appellant And HM Attorney General First Respondent Peter Wilson Michel Second Respondent Simone Anne Gallichan (née Rabet) Third Respondent Advocate P. C. Sinel for the Appellants Crown Advocate A. J. Belhomme Esq. for the Attorney General Application for leave to appeal by the Plaintiffs/Appellants against those parts of the judgment, as defined in the Notice of Appeal, given by the Royal Court (Samedi Division) on 29 th November, 2006. First Respondents Notice in accordance with Rule 5(1) of the Court of Appeal (Civil) Rules 1964 following the Notice of Appeal lodged by the Appellants on 27 th December, 2006.

JUDGMENT

THE PRESIDENT: 1. There is before us an application for leave to appeal by the Appellants (strictly Applicants) - leave having been refused by the Deputy Bailiff on 29th November 2006 against a decision of the Royal Court (Samedi Division) on the same date acceding to an application by the Attorney General to strike out a substantial part of the order of justice of the Appellants pursuant to Rule 6/13(1)(a) and/or (b) and/or (d) and/or pursuant to the Court's inherent jurisdiction on the grounds that the order of justice discloses no reasonable cause of action, is scandalous or frivolous or is otherwise an abuse of the process of the Court, and a cross application by the Attorney-General against a decision of the same Court to allow the remaining part to go forward to trial. We have jurisdiction to hear the Attorney-General's application notwithstanding that it was not first made to the Deputy Bailiff, since the Appellants have had ample opportunity to deal with the points raised. Each side had to satisfy one of the tests in *Glazebrook v Housing Committee* [2002] JLR N 43 at p.43, inter alia , that there is a clear case that something had gone wrong, in the first instance Court's decision or that an important question of law is involved. Each side, in accordance with the usual good practice, came prepared to (and did) argue the substantive appeals (ditto). Factual background 2. The background sufficient to set the issues which we have to decide in context is as follows. 3. Peter Michel is an accountant and was the principal of Michel & Co (accountants). At the material time he lived and worked in Jersey. Simone Gallichan was an employee of Michel & Co (also living and working in Jersey). Mr Michel and Mrs Gallichan ("the Defendants") were charged in Jersey with various offences of

money laundering. They were found guilty by the Royal Court on a single count on 11th August 2006 and their appeal was dismissed by this Court on 25th October 2006. The remaining counts are currently the subject of a second trial which commenced before the Royal Court on 23rd January ("the second trial"), was adjourned on 22nd February 2007 and is scheduled to restart on 26th March 2007. 4. The relevant count for the purposes of these proceedings has been described as Count 2 and charges the Defendants with assisting another to retain the benefit of criminal conduct contrary to Article 31(1)(a) of the Proceeds of Crime (Jersey) Law 1999 . The particulars allege that the Defendants:- "Between 1 July 1999 and 8 July 2001, in the Island of Jersey, knowing or suspecting that Simon Trant, Timothy Trant and Somerley Plant & Haulage Limited were persons engaged in criminal conduct, namely, cheating the UK Public Revenue and/or theft, were concerned in an arrangement whereby the retention or control by Simon Trant, Timothy Trant and Somerley Plant & Haulage Limited of their proceeds of criminal conduct, namely a credit balance at HSBC and cash, was facilitated." Count 2 which, as can be seen, expressly refers to alleged criminal conduct by Simon and Timothy Trant (two of the three Appellants) is being considered in the context of the second trial. 5. Patrick, Timothy and Simon Trant are brothers. They have a business called Trant Construction Limited ("the Company") formerly known as P Trant Limited. At the material time Patrick was the chairman of the Company, Timothy was its managing director and Simon was a director. 6. On 22nd July 2003 as a result of a request by the Attorney General, the Serious Fraud Office ("SFO") served notices under Section 2(2) of the Criminal Justice Act 1987 ("CJA 1987") on Timothy and Simon requiring them to attend the offices of the SFO for interview. 7. On 18th August 2003 pursuant to these notices they were interviewed by a member of the SFO, a lawyer (Anwar Nashashibi of Junior Counsel) instructed a forensic accountant, both instructed on behalf of the Attorney General. At the beginning of the interview they were each given appropriate warnings. They were also told that if a prosecution was subsequently brought against anyone as a result of the investigation, they might be asked to make a formal witness statement. The interviews were tape recorded and the papers before us include transcripts of those interviews, apparently prepared by Messrs Sinels, who represent the Appellants. No objection has been taken to the procedures on that date. 8. On 5th March 2004, arrangements were made for Timothy and Simon to attend at 7 Bedford Row, London, the chambers of Counsel (who included Mr Nashashibi) assisting the Attorney General in the prosecution of Mr Michel and Mrs Gallichan,. 9. It is the Appellants case, as reflected in the Order of Justice in both its original and Amended form that: (i) Timothy was contacted by telephone by DS Gay of the Jersey Police and informed that he and Simon were required to attend for a further interview, which would be a continuation of the earlier interviews of 18th August 2003 and would involve clarification of points from those interviews (ii) as a result of what was said by DS Gay, both Timothy and Simon believed that they were being required to attend for further interview under the same statutory provision as before, namely Section 2, CJA 87 and that the same provisions applied so that they had no choice but to comply with this compulsory process and that refusal to do so would amount to a criminal offence (iii) they held this belief at all material times up to and including 19th March 2004, which was the day on which the witness statements were taken. This version of events is contradicted by evidence adduced on behalf of the Attorney General to the effect that on the 19th March 2004 the Appellants attended voluntarily, and in any

event were not misled into believing that they were compelled to do so. 10. Her Majesty's Revenue and Customs ("the Revenue") operates a procedure known as the Hansard procedure. Taxpayers who may have been guilty of tax evasion make full and frank disclosure about their affairs to the Revenue, pay all tax and penalties due after which the Revenue may elect not to take any criminal proceedings. In 2002 the Appellants had taken advantage of this procedure. 11. On 15th March 2004, pursuant to a letter of request from the Attorney General, the Revenue lawfully supplied various materials to the Attorney General including documents relating to the Hansard procedure in respect of the Appellants. DS Gay was in possession of such material at the time of the interviews on 19th March 2004. The Hansard material has subsequently been disclosed to the Defendants as part of the prosecution duty of disclosure in a criminal case in respect of unused material. 12. On 19th March 2004 Simon and Timothy duly attended at 9 Bedford Row. They were seen by DS Gay and Mr Nashashibi. DS Gay's affidavit dealing with what occurred on that occasion states that there was a short initial discussion summarised in a handwritten note by Mr Nashashibi and countersigned by Timothy. It reads as follows: "They asked if they might get into trouble. I explained that we were only interested in Michel. I explained that it was only IR who prosecuted for tax evasion. I said that the IR files suggested payments for inducements. If there were corrupt payments some UK agency might be interested, we were not liaising with any such agency. The Trants emphasised that they had made full disclosure to the IR under Hansard and had paid tax and fines in full. They had made their peace with IR." 13. Short tape recorded interviews then took place with each of Timothy and Simon. We have seen the transcripts of these interviews. In essence each was asked about possible inconsistencies about what they had said in their Hansard interviews with the Revenue as compared with what they had said in the Section 2 interviews with the SFO, on the basis that the answers in the Hansard interviews could have been interpreted as referring to corrupt payments in Jersey to obtain contracts for work. This was denied by both Timothy and Simon. 14. DS Gay further stated in his affidavit that witness statements had been prepared in advance based on the Section 2 interviews with the SFO in August 2003. These were read, amended and then signed by Timothy and Simon. Prior to signing their respective witness statements they were advised that they could obtain legal advice if they wished and were also told that the protection given to them under the SFO Section 2 interviews did not apply here and that they were open to prosecution on anything in their witness statements. DS Gay made a note to this effect in his pocket book which was countersigned by Mr Nashashibi. 15. The trial against the Defendants was fixed to commence on 26th June 2006. It was expected to last a number of weeks. Prior to that there had been correspondence between Sinels, on behalf of the three Appellants, and the Attorney General. 16. On 1st March 2006 Sinels confirmed that Simon and Timothy would come to Jersey for the trial. On 18th April 2006 the Attorney General's department wrote to the brothers suggesting that they would be required to give evidence on 6th July 2006. On 27th April 2006 Sinels responded on behalf of all three Appellants confirming that they would be so available. 17. However, on 22nd June 2006 Sinels wrote saying that, unless compelled by law to do so, none of the brothers would voluntarily attend in Jersey for the proceedings nor would they voluntarily give evidence in such proceedings. 18. Faced with this volte face, the Attorney General issued a request to the UK authorities under Article 4 Criminal Justice (International Co-operation) (Jersey) Law 2001

seeking assistance in the obtaining of evidence. The Secretary of State nominated Southampton Magistrates Court under Section 30(3) of the Crime (International Co-operation) Act 2003 for the purpose of evidence being given through a live television link. 19. On 29th June 2006 summonses were issued by the Southampton Magistrates Court to all three brothers summoning them to attend that court on 10th July 2006 in order to give evidence through a live television link in the criminal proceedings before the Royal Court. 20. On 6th July 2006 the Appellants issued the Order of Justice seeking the relief described below and essentially designed to avoid their having to do so. In the event, for entirely unrelated reasons of case management, the trial judge in the criminal proceedings severed the indictment with the result that Count 2 (featuring two of the Appellants) was ordered to be tried at a subsequent date. 21. On Friday 7th July 2006 the Appellants were informed that they would no longer be required to attend Southampton Magistrates Court the following Monday 10th July 2006. 22. The issues raised by the Order of Justice are said to remain live because of, in particular, the potential role of the Simon and Timothy as witnesses in the second trial and the risks, said to be inherent in such status, of criminal charges being subsequently brought against them. (Patrick has given evidence on 24th January 2007 and has only a vestigial, if any, interest in the resolution of those issues.) The Order of Justice 23. The prayer of the original Order of Justice merely asked that the Court may:- "Grant to [the plaintiffs] declarations, orders and injunctions in the terms of paragraph 1.1 above." 24. Paragraph 1.1 reads as follows:- "1.1 The plaintiffs (Patrick, Timothy and Simon Trant) apply for declarations/orders/injunctions that, in relation to criminal proceedings brought by the first defendant (the Attorney General) against the second defendant (Peter Michel) and the third defendant (Simone Gallichan) in the Royal Court of Jersey, and which proceedings began to be tried on 3 July 2006 and are continuing to be tried before Sir Richard Tucker (the "proceedings"):

- (i) they are under no obligation, and cannot be compelled, to attend in Jersey for the proceedings;
- (ii) they are under no obligation and cannot be compelled to give evidence in Jersey in the proceedings;
- (iii) in relation to the proceedings, Timothy and Simon Trant are entitled to claim the privilege against self-incrimination;
- (iv) in relation to the proceedings, Timothy and Simon Trant having claimed the privilege against self-incrimination, such claim is validly made, and is upheld;
- (v) in relation to the statements dated 19 March 2004 (said to have been taken by the Jersey authorities from Timothy and Simon Trant in England), the taking of such statements violated the rights of Timothy and Simon Trant under (at least) Article 8 of the European Convention on Human Rights (the "Convention") and/or the common law;
- (vi) in relation to the statement of Patrick Trant, dated 19 November 2003 and taken by the Jersey authorities in England, the taking of such statement violated his rights under (at least) Article 8 of the Convention and/or the common law.
- (vii) in relation to the statement dated 19 November 2003, taken by the Jersey authorities from Patrick Trant in England, as Patrick Trant had no and has no contemporaneous knowledge of or involvement in any matters relevant to the proceedings and which are or may be in dispute, and cannot give any admissible evidence in relation to such matters and as the only evidence he could give on any matters possibly relevant to the proceedings would be formal evidence (which is not or is unlikely to be in dispute or, even if it is, cannot sensibly be disputed) there is no necessity for him to give evidence in the proceedings and/or any attempt by or on behalf of the Jersey authorities to obtain evidence from him for the

proceedings would be an abuse of the process; (viii) in relation to the plaintiffs' (and Trants') Hansard material (apparently provided at his request to the Attorney General by Her Majesty's Revenue & Customs) the Attorney General's failure to inform the plaintiffs at the material time of the fact that disclosure of such confidential material by him to the parties to the proceedings was to be made or had been made violated the plaintiffs' rights under (at least) Article 8 of the Convention and the common law; (ix) in relation to the request made by the Attorney General to the United Kingdom authorities for the plaintiffs' evidence to be taken before a court in England (which request had led to summonses being served on the plaintiffs requiring them to attend on 10 July 2006 before Southampton Magistrates Court to have their evidence taken before that court for the proceedings) the Attorney General acted unlawfully in making such a request because at the time of it he knew or ought to have known that none of the plaintiffs could give any material evidence. Paragraph 1.1 of the order of justice referred, in the case of each of these subparagraphs, to subsequent paragraphs of the order of justice in which the particular point was elaborated. The Royal Court was in any event prepared to proceed on the basis of supplementary contentions not embraced by the original order of justice in anticipation of its amendment. The amended Order of Justice was ultimately served on 16th February 2007. It might more accurately be described as a reformulation to take account both of the conclusions of the Royal Court and of further cogitation by Mr Sinel of the best way of putting his clients' case, which has developed with a certain fluidity. The application 25. On 15th August 2006 the Attorney General issued a summons to strike out the order of justice on the grounds referred to in paragraph 1 of this judgment. The application was heard by the Royal Court on 15th September 2006 at which time judgment was reserved. Only declaration (v) survived the cull. Judgment was given, as noted, on 29th November 2006. Various submissions were filed by each side both before and after judgment, and the Court has been furnished with no less than 11 volumes of factual and legal material. 26. Despite the wealth of material and the copious written submissions, we were able to identify, with Mr Sinel's assistance, three key and interrelated elements of the Appellants' case which he submitted were fit to go to trial and which we may summarise as follows: (i) the Attorney General had obtained (and thereafter used) confidential material wrongfully, namely by misleading the Appellants to believe that they were compelled to make statements on 19th March 2004, whereas they were not ("the first issue"); (ii) the Attorney General had wrongfully procured the issue of Summonses to the Appellants to give evidence before the Southampton Magistrates for the purposes of the second trial when it was apparent that they could (or would) give none ("the second issue"); (iii) the Appellants were entitled now to assert their privilege against self-incrimination so as (in consequence) to make any appearance before the Southampton Magistrates unnecessary ("the third issue"). 27. The test on an application to strike out is well established. It is only where it is plain and obvious that the claim cannot succeed that recourse should be had to the Court's summary jurisdiction to strike out. Particular caution is required in a developing field of law. Provided that a pleading discloses some cause of action or raises some question fit to be decided by a judge, jurats or jury, the mere fact that a case is weak is not a ground for striking it out. These propositions are vouched for by a wealth of Jersey authority embracing principles deployed by the Courts of United Kingdom, see e.g. *Re Esteem Settlement and the No.52 Trust*

- [2000] JLR 119 at p.142 (we note en passant that a new régime, arguably more favourable to an application to strike out, has been introduced in England and Wales by the Civil Procedure rules). 28. On an application to strike out under sub-paragraph (a) of Rule 6(13)(i) (that there is no reasonable cause of action) evidence is not admissible. The facts alleged in the order of justice must be taken as correct. However, where an application is made under sub-paragraph (b) (scandalous, frivolous or vexatious) or sub-paragraph
- (d) (abuse of process) or where the application to strike out is made out under the inherent jurisdiction of the Court, evidence is admissible and may be considered by the Court. It follows that, on this application, evidence was and is admissible. The First Issue 29. The amended claim alleges misuse of confidential information, being (i) The Hansard material; (ii) The SFO interviews in so far as to be used to the Appellants' detriment. (Their use in the second trial is not as such controversial); (iii) The short interviews on 19th March 2004; (iv) The witness statements dated 19th March 2004 ("the confidential information") in breach of confidence and/or by abuse of power under common law and/or Article 8 of the European Convention on Human Rights (IECHR) incorporated into Jersey law by the Human Rights (Jersey) Law 2000 in December 2006, but into English law by the Human Rights Act 1998 on 2nd October 2000. (The relevance of the ECHR might be open to debate in the light of the chronology but Mr Sinel could possibly pray in aid obiter dicta of this Court in *Cole v States of Jersey* PAC
- [2004] JCA 087 para 29). 30. The essential foundation of the claim under this head was, I repeat, that the Appellants were misled into providing statements on 19th March 2004 in the erroneous belief that they were compelled to do so. In my view without the establishment of this foundation the interesting question of whether, if the Appellants had been misled in the manner alleged, they would have had such a private law cause of actions and what the consequences would be (declaration? compensation? an injunction restraining the use of the confidential material to their detriment, or even in the second trial of the Defendants?) would not fall for decision. Confidential information belonging to a witness often has to be given to the defendants as part of the prosecution process. See *Taylor v Serious Fraud Office*
- [1988] 3 WLR 1040 [AC] per Lord Hoffman at 1049 and *Marcel v Commissioner of Police*
- [1992] Ch 225, Dillon LJ at p.256: but no authority has been cited to us as to whether and to what extent this position is varied if the information was in some manner unlawfully procured. 31. I therefore focus intently on the material relied on by the Appellants to sustain their factual allegations. It is important to note at the outset that in this context the Appellants rely merely on the assertions contained in the Orders of Justice. The Attorney General relies by contrast upon actual evidence which included the affidavit from DS Gay, and supporting documentation. 32. On the facts of this evidence the following matters emerge: (i) DS Gay confirmed that he arranged the March interviews. He deposed: "6. I made arrangements by telephone for Timothy and Simon Trant to attend 7 Bedford Row, London, in order to record witness statements from them. From my recollection, my

conversations with the Trants were unremarkable as far as I was concerned they were attending voluntarily - I certainly did not suggest that they were obliged to come by law." (ii) Contrary to the allegation in the original Order of Justice, the transcripts of the short interviews carried out on 19th March 2004 before the statements were taken show that the Appellants were asked questions relating to the Hansard material, which (at its lowest) casts doubts on their recollection; as (presumably) reflected in that order; (iii) Contrary to the allegation in the original and amended Order of Justice, DS Gay's notebook, and countersigned by Mr Nashashibi states that Timothy and Simon were advised that they could obtain legal advice if they wished, as to which the same comment may be made; (iv) The transcripts of the SFO interviews on 18th August 2003 and of the interviews on 19th March 2004 (whose authenticity is not in doubt) show that a very different approach was adopted in each. In the Section 2 interviews, the SFO representative stated specifically that it was a Section 2 interview and then informed each of Timothy and Simon that they were obliged by law to answer truthfully etc and that they could be prosecuted if they withheld any information or gave false or misleading information. They were also told that if a prosecution was brought against anyone as a result of the investigation, they might be asked to make a formal witness statement. By contrast in the March interviews, the tape recording of the 19th March 2004 interview with Simon Trant began by Junior Counsel saying: "Mr Trant, thank you for coming to see us again , as you know er we've invited you here to make a witness statement which is basically based on your, the last interview you gave us er at the office of the Serious Fraud Office a few months ago [emphasis added]." The introduction to Timothy Trant's interview in March, 2004, was to like effect. Invitation is the antithesis of requirement. (v) Mr Nashashibi's notebook, vouched for by Timothy's signature shows that the Appellants were concerned about possible charges, to which, however, they would not, as they would have known be exposed under the Section 2 procedures. (vi) DS Gay's contemporaneous notebook entry, countersigned by Mr Nashashibi recorded that Simon and Timothy Trant were told that the protection against prosecution afforded under the Serious Fraud Office section 2 interviews did not apply to witness statements and they were open to prosecution on anything contained in them. This warning was given before the statements were signed. In our view if the Appellants knew the section 2 protection did not apply to those witness statements they could not sensibly have been under the impression they were under any compulsion, pursuant to section 2, to sign the same: at any rate the Attorney General could not fairly be charged with misleading them to believe that they were under the same. The Police Officer would, if the allegations in the Order of Justice be correct, be guilty of perjury and concoction of false documents and Junior Counsel (at the least) of serious professional misconduct. 33. The Appellants had ample opportunity to put in evidence in rebuttal of DS Gay's affidavit and the exhibits but chose not to do so before the Royal Court nor, in the light of the Royal Court's expressed concerns, did they seek to do so before us. 34. This is not an application brought solely under the rules of Court asserting that there is no cause of action when (as we accept) no evidence would be admissible and the pleaded allegations would be assumed to be true. We are entitled to

take into account the state of the evidence when considering whether to strike out under the Court's inherent jurisdiction or on the basis that the claim is frivolous or vexatious or an abuse of process. *Le Cocq v Gillespie*

- [1991] JLR N5a. 35. Where evidence (even in affidavit form) is admissible, it should be considered in its totality (*Sharma v Browne-Antoine PC Appeal No. 75 of 2006 para 25*). If only one side has adduced evidence, unless it is manifestly implausible, a Court will have little, if any, choice but to accept it. If a party chooses not to adduce evidence when able to do so (especially when faced with a case to meet), his decision not to do so permits adverse inferences to be drawn. *Herrington v BRB*
- [1972] AC 877 per Lord Diplock at 930. 36. The Royal Court did not identify in what way (if at all) the evidence adduced by the Attorney General fell short of answering the allegation that he obtained the Appellants' witness statements by misrepresentation. Had the Royal Court thought that such evidence was itself deficient as an answer, the Appellants would not have been, as the Royal Court put it, " well advised to put in evidence dealing with those key aspects of the claim " (para 67): they would certainly not have needed to do so. The Royal Court indeed drew attention to aspects of the evidence which suggested that some of the allegations of the Order of Justice could not be correct (para 64). 37. We consider that the "clear error" in the Royal Court's analysis was at the end of the process not to evaluate the state of the evidence as it stood, but rather to speculate that the Appellants might be able to adduce evidence at trial to sustain their (so far wholly unsupported) allegations. Despite Mr Sinel's forceful assault on the Attorney General's evidence, I consider that there is no basis on what is before us to conclude that the Appellant's claim that they were misled into provision of the confidential information would succeed. The Second Issue 38. As to the propriety of the procurement by the Attorney General of the issue of summonses I can be brief. Mr Belhomme for the Attorney General accepted for present purposes that if the Attorney General was not free to use the confidential information, the summonses served no perceptible purpose, since there was otherwise no grounds for the Attorney General to consider that the Appellants could provide relevant evidence in the second trial. However since, as I have held, it is not arguable that the Attorney General should be so inhibited, the challenge to the summonses falls away. (If, of course, the Attorney General has other (i.e. than the confidential) material relevant to the second trial, which would justify calling the Appellants as witnesses, the summonses would equally be unimpeachable). 39. I would add that this particular challenge should strictly have been brought by way of an application for judicial review. Rule 16/1(1) of the Royal Court rules states that any application for a declaration injunction or other order in any public law matter must be brought in such a manner and paragraph (2) of that Rule provides that an application is made in a public law matter if the application relates to the validity of a decision or other action of a public authority. The Attorney General in this context is clearly a public authority and what is alleged is that his action in seeking assistance from the UK authorities is invalid. 40. This Court in *Durant Corporation v Attorney General*

- [2006] JLR 112 after a careful review of the authorities held that proceedings in the Royal Court by way of judicial review are proceedings in a civil cause or matter for the purposes of the Court of Appeal (Jersey) Law even if the subject matter relates to criminal proceedings. In my judgment it is necessarily the case that the expression 'civil proceeding' has the same meaning in the Royal Court Rules. I note that in *Durant* itself the matter had proceeded under Part 16 of the Royal Court Rules even though it related to assistance given by the Attorney General in criminal proceedings; yet no one seems to have suggested that this was erroneous. The Third Issue 41. On the privilege against self-incrimination, the Royal Court said this: "There is no doubt that the law of Jersey recognises a privilege against self-incrimination in the same way as English law. That principle is, in our judgment, accurately summarised in *Phipson on Evidence* (16th Edition) at para 24-40 as follows:- "No person is bound to answer any question in civil or criminal proceedings if the answer thereto would in the opinion of the judge have a tendency to expose him to any criminal charge, penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for ." The principle can be seen to have two elements:- (i) The answer must be one which incriminates him i.e. has a tendency to expose him to a criminal charge etc; (ii) The danger of prosecution must be real and appreciable with reference to the ordinary operation of law and in the ordinary course of things. The risk must not be remote or insubstantial. See *May, Criminal Evidence* (5th Edition at para 11-06) and passages to like effect in *Phipson on Evidence* (16th Edition) (para 24-49) and *Blackstone, Criminal Practice*
- (2005) at para F9.11. See too the decision of the Court of Appeal in *Den Norske Bank ASA v Antonatos*
- [1999] QB 271 at 286 approving the statement of principle by Kirby P in *Accident Insurance Mutual Holdings Limited v McFadden* (1993) 31 NSWLR 412 (para 30). 42. I accept and endorse this summary of the general law of Jersey which was not indeed in issue. 43. Mr Sinel submitted before us that both of these elements were satisfied in the present case. Count 2 was predicated upon the assertion that Simon and Timothy were persons engaged in criminal conduct, namely cheating the UK Revenue and/or theft and that the Defendants were assisting them to retain the proceeds of that criminal conduct. 44. Mr Belhomme, on behalf of the Attorney General, submitted that Timothy and Simon had indeed made their peace with the Revenue under the *Hansard* procedure and that accordingly there was no serious possibility of their being prosecuted in relation to tax offences simply because they would be giving evidence in the second Trial that they had cheated the Revenue. There was additionally placed before us a witness statement recorded by Mr David Hughes of the Revenue on the 19th January 2007, in which he confirms the Appellants are at no risk of prosecution from the Revenue. 45. I am prepared to proceed on the basis that Mr Sinel has the better of this particular argument. At present it seems that the Attorney General's concern is to deploy the Appellants as witnesses against the Defendants in the Second Trial. However the English prosecuting authorities (apart it may be from the Revenue) have not provided any cast iron guarantees that the

Appellants may not at some stage be prosecuted for the crimes (at any rate of theft) referred to in Count 2. 46. The controversial issue is whether Simon and Timothy entitlement to refuse to answer questions on the grounds that they might incriminate themselves is a matter which falls to be decided by the trial judge in the criminal proceedings when they are called to give evidence; or a matter for this Court at this time. 47. There are in this context two distinct points to be considered. The first is to timing: the second to forum. In my view any claim to such privilege must, save exceptionally, be taken by a witness after he has gone into the witness box and therefore necessarily be considered by the court before whom the witness is giving evidence. The commentaries speak with one voice Phipson at para 24-50 May at para 11-01. 48. An authoritative statement of principle at odds with Mr Sinel's approach is that of Kirby P in *Accident Insurance Mutual Holdings*, [1993] 31 NS WLR 412 at [para 3 v]: "It is for the presiding judicial officer to determine whether the objection taken is good and whether there are reasonable grounds for the belief on the part of the witness that he or she is, or may be, in peril of future criminal or like proceedings if the answer is given is justified. ... The proper procedure in a claim for privilege is to object to each question as it is asked ... It is not proper to refuse to be sworn or to decline to answer any questions at all or to claim a global protection from the privilege. Such a refusal may amount to a contempt of court. Nevertheless, a point will be reached in questioning where it will be unnecessary to persist with an entire cross-examination which is clearly futile by reason of the invocation of the privilege against self-incrimination. To demand a tedious repetition of questions, rebuffed every time by a claim of privilege which is upheld, would be pointless ..." [emphasis added] 49. However in *Den Norske Bank ASA v Antonatos*

[1999] QB 271 ('*Den Norshe*') where a Mareva injunction had been obtained against the defendant with the usual disclosure order requiring him to provide information on affidavit about his assets, the defendant claimed not to be obliged to provide certain information on the grounds that he might incriminate himself. The plaintiff sought leave to cross-examine the defendant on his affidavit and the trial judge refused to deal with the issue of self-incrimination as a discrete issue before allowing cross-examination but decided to proceed by considering any claim of privilege as it arose in relation to individual questions. 50. In the Court of Appeal Waller LJ (who gave the sole reasoned judgment) indicated that in appropriate circumstances the general rule followed by the judge could yield to considerations of convenience. He said: " But it seems to me clear that it would have been helpful if further consideration had been given to self-incrimination before commencing any examination. It is true that in normal circumstances where a witness is giving evidence at a trial, the usual course is to take the questions one at a time and see whether any objection is taken, and whether the objection is well founded. But where the question is whether the examination should take place in relation to an affidavit sworn pursuant to a Mareva injunction, and where self-incrimination is raised as in this instance in the affidavit, a ruling on that aspect would assist in deciding whether the examination would be of any purpose and will further assist in defining those areas to which

examination should be limited." [p 286]. 51. Whether or not the present case supplies another illustration of such exception as to timing, we do not need to decide, because even on the premise that it does, the Court of Appeal in *Den Norske* clearly envisaged that it was the judge before whom the defendant was to give evidence who would have to consider the issue of the privilege against self incrimination immediately before the witness went into the witness box, and not some other court. We have not been referred to a single case where a court other than the court of trial has ruled on the claim to such privilege. This is obviously rational. It is that Court alone which will have the necessary familiarity with the litigation overall, and be able to identify whether there is a real and appreciable risk of prosecution of a witness who claims such privilege. 52. In any event the existence of such risk must in our view be assessed at the time when the witness is asked to give the evidence which he says may expose him to that risk. Circumstances may change, in this matter between now and the time when the Appellants are called into the witness box, either enhancing or eliminating the risk. They may even (unlikely though that may now appear) then choose to waive their rights. 53. In any event for us to make a pre-emptive ruling of the kind sought would involve a trespass contrary to well-established principle across the boundary which lies between the rôles of civil and criminal courts. The criminal courts should be permitted to control their own proceedings (See *Imperial Tobacco v Attorney General*

[1981] AC 718 at p.733, 742. *Sharma v Browne-Antoine* cit sup para 14(v). 54. A subsidiary issue as to whether such a claim for privilege should be decided by the trial judge in the second trial or the Southampton Magistrates Court I equally do not consider is for us, and for the same principled reason. It involves questions of the construction of the schedules to the Crime (International Co-operation) Act 2003 of the United Kingdom. They can be dealt with as and when they arise, initially before one or other of those Courts (depending on whether or when any point is taken) and, if need be, thereafter by engaging the appropriate machinery of appeal or review. 55. For that reason we dismiss the Appellant's application for leave to appeal, grant the Attorney General's application to cross appeal and allow the cross appeal itself with the consequence that the entirety of the amended Order of Justice must be struck out. To the extent that the Appellants enjoy rights either of confidentiality or not to incriminate themselves the Royal Court was not the place, nor this the time, to enforce them. Smith JA I agree and have nothing to add. Jones JA I also agree and have nothing to add. *Authorities Glazebrook v Housing Committee* [2002] JLR N 43 at p.43. *Proceeds of Crime (Jersey) Law 1999*. *Criminal Justice (International Co-operation) (Jersey) Law 2001*. *Crime (International Co-operation) Act 2003*. *Esteem Settlement and the No.52 Trust*

[2000] JLR 119 at p.742. *Cole v States of Jersey PAC*

[2004] JCA 087 . *Taylor v Serious Fraud Office* [1988] 3 WLR 1040 [AC] per Lord Hoffman at 1049. *Marcel v Commissioner of Police* [1992] Ch 225, Dillon LJ at p.256. *Le Cocq v Gillespie*

[1991] JLR N5a. Sharma v Browne-Antoine PC Appeal No. 75 of [2006] para 25; para 14(v).
Herrington v BRB

[1972] AC 877 per Lord Diplock at [930]. Durant Corporation v Attorney General

[2006] JLR 112 . Den Norske Bank ASA v Antonatos

[1999] QB 271 at 286. Accident Insurance Mutual Holdings Limited v McFadden [1993] 31 NSWLR 412 (para 30). Imperial Tobacco v Attorney General [1981] AC 718 at p.733, 742. Page Last
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