Attorney General v Bhojwani

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, (Clyde-Smith, Commr.)
Judgment Date:	03 March 2011
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Text

[2011] JRC 49

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Commissioner., sitting alone**.

The Attorney General
and
Raj Arjandas Bhojwani

M. T. Jowitt, **Esq., Crown Advocate**.

Advocate J. D. Kelleher **for the Defendant**.

Authorities

Court of Appeal (Jersey) Law 1961.

Police Procedures and Criminal Evidence (Jersey) Law 2003.

Syvret -v- AG [2009] JLR 330 .

AG -v- Michel [2007] JRC 203 .

Royal Court Law 1948.

The McHarg -v- Universal Stock Exchange Limited (1995) 2 QB 81 .

Halsbury's Laws of England Vol 51.

Dicey, Morris and Collins Conflict of Laws 4th Edition.

R -v- Priestley (2004) EWCA Crim 2237 .

Directions hearing in relation to Crown's application for Confiscation Order and costs.

THE COMMISSIONER:

1 I sat on 27 th January, 2011, and the 16 th February, 2011, to hear submissions from counsel and to give directions in relation to the Crown's application for a confiscation order and for costs. I set out below the reasons for the directions given.

2 It is helpful to recap the history of this matter is so far as it relates to the confiscation order. The defendant was convicted of money laundering offences on 5 th March, 2010, and he was remanded to the Superior Number for sentencing on 23 rd April, 2010. On that date the sentencing hearing was again adjourned to 20 th May, 2010. On the 20 th May, 2010, I heard legal argument for the purpose of sentencing and delivered a judgment in that respect on 28 th May, 2010. Sentencing was adjourned to 24 th June, 2010, at a hearing which extended over to 25 th June, 2010, when the defendant was sentenced to six years' imprisonment. On 24 th June, 2010, however, and quoting from the Act of Court:-

> *"The Court …. granted the Defence's application pursuant to Article 6(4) of the Proceeds of Crime (Jersey) Law 1999, as amended, to postpone the Prosecution's application for a confiscation order;*
>
> *(i) to 2nd July, 2010; and*
>
> *(ii) directed that counsel shall attend upon the Bailiff's Judicial Secretary to fix a date for the said confiscation hearing, such hearing to take place within three months of the said Court of Appeal hearing."*

3. Article 6(4) (5) and (6) of the Proceeds of Crime (Jersey) Law 1999 ("the "Proceeds of Crime Law") is in the following terms:-

> ***"(4) Where the defendant appeals against his or her conviction, the Court may on that account:-***
>
> ***(a) postpone the making of either or both of the determinations mentioned in paragraph (1) for such period as it may specify; or***
>
> ***(b) where it has already exercised its powers under this Article to postpone, extend the specified period*** .
>
> ***(5) A postponement or extension under paragraph (1) or (4) may be made:-***
>
> ***(a) on application by the defendant or the Attorney General; or***
>
> ***(b) by the Court of its own motion*** .
>
> ***(6) Unless the Court is satisfied that there are exceptional circumstances, any postponement or extension under paragraph (4) shall not exceed the period ending 3 months after the date on which the appeal is determined or otherwise disposed of."***

4 On 2 nd July, 2010, the Court further postponed the application for the confiscation order to 13 th December, 2010. The defendant's appeal against conviction and sentence was heard by the Court of Appeal in September 2010, when judgment was reserved.

5 In the light of this, on 22 nd October, 2010, the Court further postponed the application for a confiscation order to 16 th February, 2011, and again, quoting from the Act of Court:-

> *"The Court …. directed that the confiscation hearing be further postponed to 16th February, 2011, at 10.00 a.m. before the Superior Number of the Court, with the caveat that should the Court of Appeal give judgment before 16th November, 2010, the parties agree that an earlier date shall be fixed".*

6 On this occasion, the Crown instigated the first steps in preparation for the confiscation hearing in that it sought and was granted a direction that it should file and serve on or before 2 nd November, 2010, Her Majesty's Attorney General's confiscation statement, pursuant to Article 7(1) of the Proceeds of Crime Law.

7 At a directions hearing convened at the request of the Defence on 15 th December, 2010, in relation to directions it was seeking in respect of the Crown's application for costs, the Crown, at short notice, applied for orders under Articles 7 and 8 of the Proceeds of Crime Law in respect of the confiscation proceedings which were granted in part. The Court

ordered the defendant to indicate the extent to which he accepts each allegation in the Attorney General's statement pursuant to Article 7(6) of the Proceeds of Crime Law and in so far as he does not accept any such allegation, to give the best particulars he can of any matters upon which he proposes to rely and this on the basis that fuller particulars can be filed in due course. The Crown's application for an order under Article 8(2) of the Proceeds of Crime Law that the defendant provide information in relation to his realisable property verified by affidavit was adjourned for a date to be fixed as close as possible to 10 th January, 2011.

8 The defendant filed his response to the Attorney General's statement on 11 th January, 2011. Without going into all the matters raised in correspondence between the parties, the Crown made the assertion (which was not fully particularised) that the defendant's response was incomplete and the Defence raised a number of issues as to the propriety and scope of the orders being sought by the Crown under Article 8(2) of the Proceeds of Crime Law.

9 At the directions hearing on the 27 th January, 2011, I reserved my decision and invited brief written submissions from counsel within 7 days to assist me on the following:-

(i) Whether there was a right of appeal from any decision made by me in law at an interlocutory stage.

(ii) Whether a single judge had the power to make an order under Article 8(2) of the Proceeds of Crime Law.

(iii) What constitutes “exceptional circumstances” in the context of Article 6 of the Proceeds of Crime Law.

(iv) Whether the Court has the power to order costs against the Crown in relation to the confiscation proceedings.

(v) The correct procedure to be adopted in relation to the confiscation hearing.

10 In the meantime the Court of Appeal made it known that it would issue its judgment on the 10 th February, 2011, and I therefore delayed the giving of any directions until then. On 10 th February, 2011, the defendant's appeal against conviction and sentence was dismissed.

11 On the 16 th February, 2011, the Superior Number further postponed the confiscation order until the four days commencing 3rd May, 2011, which is within 3 months of the determination of the appeal. On the same day and following the Superior Number sitting, I sat to hear final submissions on the directions that then needed to be given.

12 At the hearing on 27 th January, 2011, Mr Kelleher addressed me on the difficulties being

faced by the defendant in preparing for the confiscation hearing. At the defendant's trial evidence was adduced by the Crown that of the monies converted/removed by the defendant in October/November 2000, some 74.8% could be traced to his criminal conduct (as defined in the Proceeds of Crime Law). The balance therefore represented his legitimate funds. Mr Kelleher informed me that the Defence anticipated that the Crown would seek to confiscate that proportion of the funds converted/removed traced through to the funds held by the Viscount. The Viscount is currently holding some £37.5M. Although there were no calculations before me, it was thought by the Defence that the funds held by the Viscount would be sufficient to meet such an order.

13 The Attorney General in his statement is in fact asserting that the value of the benefit obtained by the defendant for the crimes for which he has been convicted by this Court is the whole amount converted/removed by the defendant. As a consequence the Crown seeks a confiscation order in the sum of £49.4M – some £11.9M in excess of the funds held by the Viscount. Although it was not clear from the defendant's response to the Attorney General's statement, the defendant will be asserting that he does not have realisable property sufficient to meet that excess, it being common ground that the onus will be upon him to demonstrate that to the Court, a task submitted Mr Kelleher of some magnitude and complexity.

14 We are apparently concerned with a wide range of assets in eight jurisdictions, namely Jersey, the United Kingdom, the USA, Switzerland, the United Arab Emirates, India, Nigeria and Ghana. Mr Kelleher informed me that ascertaining the nature and marketability of these assets requires in many cases issues of local law upon which advice will need to be obtained; for example, in India on the legal concept of joint Hindu family assets. Whilst the defendant can produce a list of assets in which he has an interest within a reasonable period, garnering evidence as to their market value is a much longer and more costly exercise.

15 Article 2(1) of the Proceeds of Crime Law defines “realisable property” as any property held by the defendant, any property to which he is beneficially entitled and any property held by a person to whom the defendant has directly or indirectly made a gift caught by Part 2 of the Law, namely a gift made at any time after the commission of the offence, namely from October/November 2000 to the present date – over ten years. Mr Kelleher estimated that taking into account the numerous entities in the many jurisdictions in which the defendant has had an interest over that long period, it would take some six months to investigate and list all gifts made by him.

16 Whilst at the trial the Defence did not challenge the accounting evidence adduced by the Crown as to the proportion of the funds converted/transferred because it accepted that at least 1 dollar was attributable to the Nigerian contracts, for the purposes of confiscation it wishes to instruct accountants to ascertain the correct percentage attributable to the Nigerian contracts and how that can be traced through to the funds held by the Viscount. That exercise, Mr Kelleher told me, will take three months. The Defence have sought to instruct PWC and Deloittes. PWC declined to act, apparently because the defendant is a

convicted person. It is apparently likely that Deloittes will also decline, leaving no local accountancy firms with forensic capability. The Defence will therefore have to look further afield, but it is of concern to me that local accountants are not prepared to assist in the administration of justice before this Court.

17 Mr Kelleher submitted that a further handicap faced by the defendant is the difficulty in carrying out this exercise from prison. It is probably easiest to describe the difficulties he faces by quoting from his letter of 18 th January, 2011, to the Prison Governor:-

> *"Re: PROVISION OF INFORMATION TO THE ROYAL COURT IN RESPECT OF CONFISCATION – ASSISTANCE OF PRISON AUTHORITIES*
>
> *…….Over the past 2 weeks, I have had a chance, first hand to actually receive from my legal team a small sample of financial and accounting data in 'hard' copy and analyse the same. In fact I showed you one of the documents which was in Excel and ran to 46 pages with almost 400 entries. I also tried to engage with some of my financial advisors, in the first instance, through my own staff, on the phone. This rather frustrating experience has thrown up various real practical problems, which I have reflected upon carefully.*
>
> *I now share these with you and invite your suggestions as to how best we may resolve the problems (if at all) with your kind assistance.*
>
> *a. Use of a lap top computer.* – You did mention that in principle this was OK and I would be able to use one of the lap tops being used by prisoners for educational purposes but unfortunately since there was a shortage of lap tops the education department might object. I suggested that if the prison acquired an additional lap top and allowed me to bear the cost then that would eliminate the objections of the education dept. Alternatively my legal team could provide a lap top which the security dept. could screen before handing in the same.
>
> *b. Receiving data, statements and documents in "soft" form.* This remains a very critical issue for me. You did explain the reluctance of the prison to accede to this request for security reasons and I appreciate the same. In consideration of these concerns may I humbly suggest some simple conditions that would fully address the security issues. The USB zip/flash drive would be handed over to me in the presence of an officer and I would download the data and hand the device back to the officer immediately. (would take only a couple of minutes). It would then be retained in the custody of the prison authorities until I was ready to send out the data after any corrections and comments, in which case the device would be handed to me again in the presence of an officer for a couple of minutes, during which time I would down load the files on to the sip/flash drive and hand back the device immediately to the officer for onward transmission to my legal team. Kindly consider these safeguards and let me have your comments/suggestions.

c. Storage space for my various files, documents and ring binders – this problem has been solved and I am now able to store them in one of the vacant cells next door.

d. Possible time off from work (kitchen job) to attend to urgent legal/court work – this also has been granted.

e. Phone calls –

** Firstly we are only allowed to use the wing PIN phones between 2.00pm and 4.00pm in the afternoons and also between 6.00pm and 8.30pm (on week days).* There is a substantial time difference between Jersey and the following 3 jurisdictions where most of my interactions would occur:-

Dubai – 4 hours – business hours cut off 1:30pm Jersey time

Mumbai – 5 1/2 hours – business hours cut off 12:00 noon Jersey time.

Singapore – 8 hours – business hours cut off 9:00am Jersey time

So I am in your hands as to how and when I may contact any advisors in these 3 places. Kindly let me have your suggestions.

** Secondly the wing phones are very busy at most times and one has to be considerate about other prisoners, so I now normally limit my phone calls to 5 or 10 minutes and give those waiting a chance to use the phone whilst I rejoin the queue.* Only when there is no one waiting I make calls for a longer duration. However legal calls with financial advisors, accountants, bankers which will be pre-arranged for a specific time, will inevitably be quite long specially when discussing facts and figures and points of law etc on complex assets. So again I invite your suggestions on how to address this problem.

** Thirdly the wing phone booths are designed just like public phone booths where one normally makes calls whilst standing.* They are perfectly OK for the purpose for which they were designed. However when speaking to my financial advisors in respect of various assets it goes without saying that I would need to have the data, statements, spread sheets and other legal document files open in front of me to discuss the same. This is simply not possible in the small booths. I invite your practical suggestions on this problem.

** Lastly there is a maximum limit of 9 telephone numbers that can be registered on the prison PIN phone system (plus 1 of the local lawyers) at any given time.* I obviously cannot delete my family, friends and staff from the system so how do I register more numbers and that too at short notice because usually it takes up to 48 hours to process the requests for new numbers to be registered. Kindly suggest how we may overcome this.

f. Meetings with financial advisors:—the visits room is designed for short visits with family and friends. You will agree that one cannot have a meaningful professional meeting with a financial advisor or accountant or banker or tax consultant etc. in the visits room during one of the regular visits sessions. This is true for a number of reasons:-

** Neither the prisoners nor the visitors are allowed to take any documents or writing materials into a visit.*

** The small round tables are too low and too small for any papers or documents to be perused during a discussion.*

** It is fairly noisy and there is no privacy as the adjoining tables are within earshot.*

** The effective duration of a visit is quite short – 40 – 45 mins.*

** the 2 visits per week allowed to an Enhanced prisoner are simply not enough to do justice to both family needs as well as professional meetings for court and legal work.*

So it is fair to assume that the professional meetings with financial advisors as envisaged by the court, would have to be facilitated in the advocates meetings/visits room during he prescribed slots and outside of personal and family visits. Again I am in your hands and would seek your confirmation or otherwise.

I realise that despite your best efforts, the prison most likely may not be able to resolve all the issues enumerated above.

I therefore draw your attention to my discussions with some senior officers, when it was pointed out that there were alternative solutions, applied by the courts to similar situations in the past. In one instance I believe that a prisoner who had serious eyesight problems, was allowed the use of an outside "administrative assistant" who was allowed to come into prison and help him prepare his case papers for court. This option may not be relevant for me.

However, apparently in various other instances, prisoners were at the discretion of the court granted 'temporary bail' or 'day release' to allow them the opportunity to gather evidence or prepare their case fully which they were unable to do from within the prison. If you would kindly shed more light on these instances in the past then we can place all the options before the court and allow it to make an informed decision by which we shall abide.

I shall be grateful if you would kindly let me have a formal response latest by Friday 21st Jan. 2011 so that we may be able to show the court (on Monday, 24th Jan. 2011 during the hearing) the various requests made by me and the best efforts made by the prison so far to address the issues and your limitations.

Thanking you for your kind understanding and co-operation.

Raj A Bhojwani"

18 As at 16 th February, 2011, there had been no written response to that letter. Whilst I can readily appreciate the restrictions ordinarily imposed upon the freedom of prisoners serving a sentence of imprisonment, I am concerned at the current position. The Crown is seeking a confiscation order extending potentially to a sum equivalent to the value of all of his realisable property, with a potential substantial sentence of imprisonment in default of payment. The implications are serious not just to him but no doubt to his family.

19 The Court has no jurisdiction to interfere in the management of the prison and it would be inappropriate for me to comment on whether the current facilities being given to the defendant to allow him to defend these proceedings are reasonable, without at least having heard from the Prison Governor through the Attorney General. However it is appropriate for me to express my concern and to point out that the Superior Number may wish to have regard to the facilities given to the defendant when considering whether he has discharged the burden upon him of proving the extent of his realisable assets or whether the defendant has a reasonable excuse for failing to provide information that may be ordered under Article 8(2).

Preliminary issues of law

20 The parties have identified issues of law which it would be helpful for me to deal with as a single judge in advance of the confiscation hearing. Of those issues it was agreed that two should be heard expeditiously in that my decision in relation to them may either terminate the proceedings altogether or substantially reduce the issues before the Court. I was concerned to be sure that in dealing with issues of law at a preliminary stage no interlocutory right of appeal would lie against my decision, excepting of course that a right of appeal would lie against any confiscation order ultimately made by the Superior Number which would extend to any prior rulings made by me as to the law.

21 In their written submissions, counsel concurred and I accepted that no interlocutory right of appeal lies in criminal matters. Part 3 of the Court of Appeal (Jersey) Law 1961 contains no provision allowing for interlocutory appeals. Under Article 44 "Sentence" is defined as including a confiscation order and under Article 24 the right of appeal lies against any sentence passed. Under Article 45D of Part 4 appeals by the Attorney General are limited to cases where a confiscation order has been made. Exceptionally, Article 90 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 permits appeals against decisions made in preparatory hearings but as made clear recently by the Court of Appeal in *Syvret -v- AG* [2009] JLR 330:-

"There is a right of appeal to the Court of Appeal in relation to criminal proceedings or indictment before the Royal Court. However, even in these

cases, other than in the specific and limited circumstances covered by Article 90 of the **Police Procedures and Criminal Evidence (Jersey) Law 2003**, there is no pre-trial right of appeal in relation to interlocutory decisions .

The statutory policy that underlies the limitation on the right of interlocutory appeal in criminal cases is that criminal proceedings should not be subject to delay as a result of collateral and other interlocutory challenges."

I concluded therefore that in taking preliminary points of law at an interlocutory stage post trial but pre-sentencing, there was no right of interlocutory appeal. Directions were therefore given for those issues to be heard by me as a single judge in advance of the confiscation hearing.

Procedure at confiscation hearing

22 In *AG -v- Michel* [2007] JRC 203 the Court did not deal with issues of law at a preliminary stage but instead invited counsel to assist in preparing directions in law which were given in open court to the Jurats. Following the confiscation hearing, the Court then issued a reasoned judgment.

23 I agreed with Mr Jowitt that in a sentencing hearing (of which an application for confiscation forms part) the judge does not direct the Jurats in open court. A reasoned judgment of the Court on both law and fact is given at the end of the hearing. It is different in a criminal trial because the verdict of the Jurats is simply guilty or not guilty. They do not give reasons for their verdict. It is therefore important in a criminal trial that the Jurats are directed on the law in open court prior to their retirement to consider their verdict.

24 Article 15(1) of the Royal Court Law 1948 provides that in all causes the Bailiff shall be the sole judge of law and Article 15(1A) provides that a question of procedure is one of law. Mr Jowitt therefore submitted, as did Mr Kelleher, that it is a matter of court administration as to whether the Jurats should sit through legal arguments, or whether such arguments should be dealt with separately.

25 Mr Kelleher cautioned that whether an issue is an issue of law or mixed law and fact is not always straightforward and there can be advantages to the Jurats being present to hear all of the substantive arguments.

26 I accepted that ordinarily in sentencing matters the Jurats would be present to hear all of the arguments before the Court. In this case, however, those legal arguments are anticipated to take some two days, with the judgment no doubt being reserved. Furthermore taking those arguments at a preliminary stage will assist in determining the evidence that will be adduced at the hearing before the Jurats. I concluded that the administration of justice in this case was best served by the issues of law identified by the parties being dealt

with by my sitting alone at a preliminary hearing for that purpose.

Orders under Article 8(2) of the Proceeds of Crime Law

27 Turning to the orders for information being sought by the Crown under Article 8(2) of the Proceeds of Crime Law, I asked to be addressed on whether I had the power as a single judge to make such orders or whether the Superior Number needed to be convened for that purpose.

28 Articles 8(2) (3) and (5) are in the following terms:-

> ***"(2) For the purpose of obtaining information to assist it in carrying out its functions, the Court may at any time order the defendant to give it such information as may be specified in the order*** .
>
> ***(3) An order under paragraph (2) may require all or any specified part of the required information to be given to the Court in such manner, and before such date, as may be specified in the order*** .
>
> ***(5) If the defendant fails, without reasonable excuse, to comply with any order under this Article, the Court may draw such inference from that failure as it considers appropriate."***

29 "Court" is defined under Article 1 as meaning "the Royal Court".

30 The question of whether this order can be made by a judge of the Royal Court sitting alone depends on whether it is a matter of procedure. Article 15 (1A) of the Royal Court Law 1948 quoted above makes it clear that questions of procedure are questions of law.

31 Mr Jowitt submitted that an order under Article 8(2) is a procedural order. The closest analogy he said would be a disclosure order in aid of a Mareva injunction, although the consequences of disobeying such an order (committal for contempt) are more severe than the consequences of disobeying an order under Article 8(2). A disclosure order in aid of a Mareva injunction can be made by a judge of the Royal Court sitting alone.

32 In terms of the general law of England, the characterisation of something as substantive or procedural depends, he said, to some extent on the reason the question arises. He gave the following examples in which this characterisation had been made:-

> (i) The characterisation of something as a matter of "practice or procedure" was important for the purpose of appeals in England. In *The McHarg -v- Universal Stock Exchange Limited* (1995) 2 QB 81 the Court referred to ***"This summons was simply***

a step in the cause, a part of the machinery by which the action was to be worked out to its final determination."

(ii) The characterisation of something as a procedural issue is important for the purpose of an appeal to the European Court of Justice. In that context ***"…procedural issues comprise issues relating to the conduct of the case, but not those which concern the merits of the case."*** (*Halsbury's Laws of England Vol 51* paragraph 2.208).

(iii) The law of evidence is regarded as procedural for the purpose of characterisation in the conflict of laws (see Dicey, Morris and Collins Conflict of Laws 4th Edition at paragraph 7–015 and following).

33 Mr Kelleher argued that because an order was made under Article 8(2) to enable the Court to carry out its functions, the reference to the Court in this context must reflect a decision by the Court that information will be relevant and of assistance to the performance of functions which are clearly those to be exercised by the Jurats for the purposes of the determinations to be made under Article 3 and Article 4 of the Proceeds of Crime Law. It would be inappropriate, he submitted, to separate the power to make an order under Article 8(2) from the functions which are exclusively those of the Jurats.

34 Mr Kelleher acknowledged that I had already made an order sitting alone under Article 7(6) of the Proceeds of Crime Law requiring the defendant to indicate the extent to which he accepted each allegation in the Attorney General's statement and if he does not accept any such allegations to give particulars but the Attorney General's statement and the defendant's response where he suggested akin to pleadings and orders for their filing did properly constitute a matter of procedure.

35 I agree with Mr Jowitt that an order under Article 8(2) is a procedural order and therefore within the jurisdiction of a single judge to make. The purpose of the order is to make sure that the Court has before it sufficient information to enable it to carry out its functions; not to carry out those functions. No determination of issues of fact are involved but instead an assessment of the sufficiency of the evidence filed by the defendant and whether further information would assist the Court at the confiscation hearing. Efficient administration of justice would in my view militate against an interpretation of the law that would require the Jurats to be involved in what are preparatory procedural steps aimed at ensuring that the case is in proper shape for determination by them.

36 However, I considered the Crown's application for an order under Article 8(2) of the Proceeds of Crime Law to be premature. It is accepted that the onus falls upon the defendant of establishing his realisable assets to the satisfaction of the Court. The starting point must therefore be for the defendant, if he wishes to advance such a case, to make disclosure. It would be in the interests of the defendant to ensure that disclosure is as comprehensive as he can reasonably achieve and addresses the evidence of assets and trusts to which the Crown has alluded. It will be upon consideration of that disclosure or

failure to disclose that the Court may decide pursuant to Article 8(2) to order the defendant to provide such information as may be specified.

37 I therefore directed as a matter of case management that the defendant should file with the Court and with the Crown a statement of the property (as defined in the Proceeds of Crime Law) which he holds or to which he is beneficially entitled. It would not be reasonable or proportionate pending the outcome of the legal issues to expect the defendant to state within such a time period the market value of those assets, although it will be in his interests to have started work on that process bearing in mind the intention of the legislature that the confiscation hearing should take place within 3 months of the determination of the appeal unless there are exceptional circumstances.

38 As this constituted a case management direction, I did not order the statement to be verified by affidavit. Mr Kelleher submitted that if an order was made under Article 8(2) the Court should not order it to be verified by affidavit. It was, he said, a matter for the defendant to decide what case to adduce, recognising that greater weight would be given to information provided on oath and subjected to cross examination but I note that:-

(i) Under Article 8(3) it is provided that the Court can require the information to be given in such manner as may be specified in the order, which must as a matter of construction extend to requiring the information to be verified by affidavit.

(ii) There is support for Mr Jowitt's contention that disclosure of information under the English equivalent of Article 8(2) is routinely required by the English court to be verified by affidavit– see *R -v- Priestley* (2004) EWCA Crim 2237 at paragraph 24.

39 It would therefore seem clear that when ordering information under Article 8(2) the Court is empowered to and can properly require it to be verified by affidavit.

Gifts

40 Realisable property is defined under Article 2 as including any property held by a person to whom the defendant has directly or indirectly made a gift caught by Part 2 of the Proceeds of Crime Law. Taken literally that would appear to require the defendant to disclose all of the assets owned by a person to whom a gift had been made, however small, since October/November 2000 and irrespective of whether that property is connected in any way to the gift.

41 I note that under Article 2(9) (b) the Court has a general discretion as to whether gifts should be taken into account. I have not heard submissions on this but I presume that, for example, it would be unlikely that the Court would take into account a gift made to charity where the property gifted is still held by that charity, but might wish to take into account a gift to a trust where the trustees might be expected to act in accordance with the defendant's

wishes. Bearing in mind the difficulty the defendant has in accessing his records I directed at this stage that the defendant should file within four weeks a list of any property (as defined in the Proceeds of Crime Law) which to the best of his knowledge and belief and without being obliged to conduct a search of any records is held by a person to whom to the best of the defendant's knowledge and belief and without being obliged to conduct a search of any records the defendant has made a gift (as defined in the Proceeds of Crime Law).

Costs

42 Finally, I turn to costs. Mr Kelleher was very critical of the Attorney General's skeleton argument on costs and in particular on the lack of any local authority; a criticism to some extent accepted by Mr Jowitt in that he conceded that *AG -v- Michel* should have been referred to in the skeleton argument. If the skeleton argument is defective then he informed me that the Crown will live with the consequences. On that basis I declined to order the Crown to enhance the argument already filed. The application for costs was adjourned until the end of the confiscation order or earlier order and directions for the filing of the Defence response and Crown reply put off until a later date. In the meantime it is likely that the Court of Appeal will offer guidance on the issue through another matter where costs awarded in a criminal case have been referred to it.

Issues not covered

43 Of the matters upon which I asked counsel for brief written submission as set out in paragraph 9 above, items (iii) and (iv) were requested because at that stage the conviction of the defendant was under appeal and we were concerned with the extent to which it was reasonable to require the defendant to incur costs in preparation for a confiscation hearing when the conviction might be overturned. As it transpires the conviction has been upheld and there is currently no appeal. Furthermore a date has now been fixed by the Superior Number for a confiscation hearing to be held within 3 months of the determination of the appeal. I will not therefore deal with these two issues in this judgment.