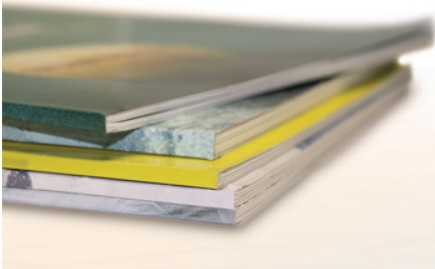


Try, Try and Try Again

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In the Winter 2009 edition of *Resolution*, Kai McGrielle reviewed the Privy Council decision of *Michel v. AG* [2009] UKPC 41. In that case, the Privy Council quashed the Appellant’s conviction on nine counts of money laundering contrary to Article 32(1) of the Proceeds of Crime (Jersey) Law 1999, on the grounds that the number and character of hostile interventions by the judge had been such as to render the trial unfair. The Appellant had been sentenced to six years imprisonment on 18 June 2007, and on 19 October 2007 a confiscation order was made against him in the sum of £9.7 million.

The Privy Council ordered that the matter should be remitted to the Jersey Court of Appeal to determine whether or not the Appellant should be re-tried, and it is this part of the proceedings with which this article is concerned (*Michel v. AG* [2010] JCA 018).

In 1998, an amendment was made to the **Court of Appeal (Jersey) Law 1961** (“the 1961 Law”), which added an additional Article, which provided that the Court of Appeal could order a re-trial if they considered it to be in the interests of justice. Prior to that date it was not possible to be re-tried once a conviction had been quashed. The additional article, namely Article 28, provides that the Court of appeal may order a re-trial:

“... where the Court of Appeal allows an appeal against conviction and it appears to the court that the interests of justice so require, it may order the appellant to be retried on a fresh indictment to be brought in the Royal Court within the period of 2 months of the making of the order or such further period for which it may give leave for the indictment to be brought”.

One of the Appellant’s contentions was that a re-trial could not be ordered in this particular case because the Court of Appeal itself had not allowed the appeal; it had been allowed only by the Privy Council, thus falling outside the ambit of the 1961 Law. The Appellant submitted that as the precondition of the appeal being “*allowed by the Court of Appeal*” was not satisfied and that as the power to order a re-trial rests solely with the Court of Appeal, the Privy Council were acting *ultra vires* in directing the Court of Appeal to act outside their statutory powers (which they were so doing in directing that they should determine whether or not a re-trial should be held).

The Appellant’s advocate also sought to argue that should the Court of Appeal order a re-trial under such direction from the Privy Council, they would risk the “... *violation of the oath of a Court of Appeal judge which obliges a judge to uphold the laws, liberties, usages and ancient customs of the ‘Bailliage’.*”

Ancient Customs

The Court of Appeal held however that Article 30 of the 1961 Law provides that the Court of Appeal has “full power” (subject to the provisions of Part 3 of the Law) to determine “...any question necessary to be determined for the purposes of doing justice in the case before it.” The **Judicial Committee Act 1833**, which had been registered by the Royal Court pursuant to the terms of the **Code of 1771**, and was as much a part of Jersey law as the **Court of Appeal (Jersey) Law 1961**. Section 13 of the 1833 Act gives the Privy Council express power to order that a re-trial is considered and Section 8 provides that:

“... it shall also be lawful for his Majesty in Council on the recommendation of the said Committee, upon any appeal, to remit the matter which shall be the subject of such appeal to the court from the decision of which such appeal shall have been made, and at the same time to direct that such court shall rehear such matter, in such form, and either generally or upon certain points only ...”.

Accordingly, the Court of Appeal held that it did have jurisdiction notwithstanding the fact that they had not allowed the original appeal and under the direction of the Privy Council were able to consider whether or not a re-trial should take place.

Not in the Public Interest

The second contention put forward on behalf of the Appellant was that it was not in the public interest to order a re-trial, as he had already served the majority of his sentence and that particularly it would be unfair on him to have to undergo a third trial arising out of the same set of facts, through no fault of his own.

It was also stated that his health and business had suffered as a result of his conviction and it would be hard to find impartial jurors who had not been tarnished in some way by the media interest in the case. It was further contended that the Appellant had been punished enough and that the passage of

time since the time the alleged offences were committed were likely to prejudice a fair trial “*due to fading memories*”.

In response, the Crown submitted that the interests of justice required the Appellant to be retried as:

- (a) the case was of great importance to Jersey because it related to financial services and the international reputation of the Island;
- (b) this was a very serious case involving a confiscation order of as much as £9,000,000;
- (c) the prosecution case was very strong;
- (d) there was no reason to believe that a fair trial would not be possible and that no issue of witness recollection arose as the evidence was mainly documentary;
- (e) the Court of Appeal was entitled to have regard to the importance of the confiscation order that would result from re-conviction and it would be wrong for the Appellant to escape financial loss if he is guilty of these offences or for the public purse to suffer; and
- (f) the fact that the Appellant had effectively completed his sentence before re-trial was not a compelling argument against a re-trial.

The court concluded that the public interest and the interests of justice demand a re-trial. In light of the £9,700,000 confiscation order (which would have had to be re-paid had a re-trial not been ordered), and the strong prosecution case, it is difficult to see how it could have ordered otherwise.

This publication is intended only to provide a summary of the subject matter covered. It does not purport to be comprehensive or to provide legal advice. No person should act in reliance on any statement contained in this publication without first obtaining specific professional advice.

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