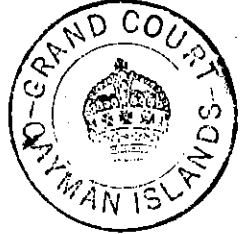


14/6/2002



1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2
3 CRIMINAL SIDE
4
5 INDICTMENT 6 OF 2001
6

Submit file

THE QUEEN

V

DONALD STEWART
BRIAN CUNHA
IVAN BURGES
JUDITH DONEGAN



19 **Appearances:**

20 Mr. Andrew Mitchell Q.C. and Mr. Kennedy Talbot instructed by Miss Cheryl Richards
21 Crown Counsel on behalf of the Crown.
22 Mr. Michael Hill Q.C. instructed by Mr. Marcus Thompson of Walkers for the defendant
23 Stewart.
24 Mr. Geoffrey Cox instructed by Mr. Lee Freeman of Campbells for defendant Cunha
25 Mr. Trevor Burke Q.C. instructed by Mr. David McGrath of Quin & Hampson for the
26 defendant Burges.
27 Mr. Neil Sharkey Q.C. instructed by Mr. John Furniss for the defendant Donegan.

30 **Before:** Hon. Chief Justice Anthony Smellie

33 **Date:** 14.6.2002

36 **RULING ON PRELIMINARY ISSUES OF LAW**

38 The jury having been selected for the trial of this indictment, I now have before me a
39 number of arguments giving rise to issues of law which need to be resolved as
40 preliminary issues in order to ascertain and clarify the basis upon which the Crown's case
41 might be put to the jury.

1 The indictment contains eight counts. The first alleges a conspiracy, about which much
2 of the arguments developed. The other seven allege substantive offences of money
3 laundering contrary to section 22 of the Proceeds of Criminal Conduct Law. A ninth
4 substantive count has been withdrawn on the basis of a concession by the Crown, relating
5 to tax evasion as a predicate offence to money laundering, about which more is said
6 below.

7
8 1. Ambit of Count 1, the Conspiracy Count.

9 (i) Ingredients of the conspiracy: this issue was resolved during the course
10 of arguments when certain amendments to the particulars were
11 allowed.

12 The particulars of the count will now read (with a further obvious
13 amendment which I direct by the insertion of the word "and" after the
14 name "Fraser"):

15 "Donald Stewart, Brian Leslie Cunha, Ivan Richard Burges, Judith
16 Mary Donegan between the 23rd day of December 1996 and the 31st
17 day of May 1999 within the jurisdiction of the Cayman Islands
18 conspired together with Donald Fraser and Eurobank Corporation to
19 enter into or otherwise be concerned in arrangements whereby the
20 retention or control by persons of property which was those persons
21 proceeds of criminal conduct was facilitated knowing or suspecting
22 that those persons' are engaged or had been engaged in criminal
23 conduct or had benefited from criminal conduct".
24
25

26 (Words in emphasis indicating the effect of amendments)

27 The amendment reflects the statutory requirement of the element of mens rea of the
28 alleged conspiracy to launder money. That is the knowledge or suspicion in the minds of
29 the defendants that during the period of the conspiracy, the persons with whom they

1 dealt were either then engaged or had been engaged in criminal conduct or had benefited
2 from criminal conduct.

3 In light of subsequent arguments from counsel on both sides seeking clarification of this
4 ruling, I recognise the need to clarify this question of intent and the importance here also
5 of addressing the nature of another pivotal element of the alleged conspiracy; ie: the
6 alleged agreement. It is an element which cannot be divorced from the crucial element of
7 knowledge or suspicion.

8 As the indictment avers, the allegation of the Crown is that the defendants and the bank
9 agreed that they would enter into or be otherwise concerned in arrangements whereby
10 "money laundering" (to use the statutory shorthand of section 24(6) of the PCCL) would
11 be facilitated.

12 In the course of the latter discussions it became clear, however, that the prosecution did
13 not understand the Court's view of what constitutes, and what should be the evidential
14 requirements for proof of, this important element of the agreement which lies at the heart
15 of the conspiracy count.

16 Mr. Mitchell argued that the prosecution need not prove that any of the accounts dealt
17 with by the defendants at the bank actually held the proceeds of any predicate crime in
18 order to prove the agreement to enter into or otherwise be concerned in arrangements for
19 money laundering purposes. That all the prosecution needs to establish is that the manner
20 of dealing with accounts within the bank was such that the jury could properly infer that
21 the defendants had agreed to do so. On that basis, it would matter not whether the
22 defendants ever did in fact deal with a single dollar of "dirty money".

1 On that basis also, it would be wrong for the Court to insist upon proof of the existence of
2 predicate criminal activity. It is the agreement within the bank to so conduct the business
3 of the bank that is the unlawful conspiracy. Not necessarily the actual entering into the
4 unlawful arrangements.

5 While I recognise the earnest forcefulness with which that argument is presented, I am
6 unable to accept it in the particular circumstances of this case.

7 First of all, one might not lose sight of the actual wording of the conspiracy count.

8 It does not allege a conspiracy by which the defendants and the bank had agreed that they
9 would enter into or be otherwise concerned in arrangements by which money laundering
10 *might* be facilitated.

11 It alleges, in effect, a conspiracy by which they agreed to enter into or be otherwise
12 concerned in arrangements by which money laundering *would actually* be facilitated.

13 The crucial difference is the positive definite intent or state of mind. That, importantly, is
14 what the indictment alleges where it reads

15 "*-- arrangements whereby the retention or control by persons of property which*
16 *was those persons proceeds of criminal conduct was facilitated knowing or*
17 *suspecting that those persons are engaged or had been engaged in criminal*
18 *conduct or had benefitted from criminal conduct.*"
19

20 So what is alleged is that the defendants agreed that they positively would facilitate the
21 laundering of money knowing or suspecting that *it was* the proceeds of persons criminal
22 conduct. Not that it *might be* the proceeds of persons' criminal conduct. The crucial
23 prerequisite is that the persons assisted must have been known or suspected to be or have
24 been engaged in criminal conduct. Not that they might be or might have been.

25 This element of intent will require, it follows in my judgment, proof from which the jury
26 might reasonably conclude that proceeds in accounts with which the defendants dealt - to

1 the extent the prosecution seeks to adduce evidence of such accounts - were in fact the
2 proceeds of some person's criminal conduct.

3 In the circumstances of this case and in the context of the particulars of this conspiracy
4 count, it simply would be wrong for the prosecution as they propose, to adduce evidence
5 only of account activity within the bank, for the purpose of inviting the jury to conclude
6 that the defendants' manner of dealing with the accounts, was sufficient in and of itself to
7 show that they were prepared and willing to and so were agreed amongst themselves to
8 launder the proceeds of crime. And this on the basis that they were open to all comers
9 and this inferentially to those who might be seeking to launder the proceeds of crime.

10 If such evidence of account activity is to be relied upon in proof of the conspiracy, there
11 must also be some evidential basis upon which the jury can properly conclude that the
12 defendants must have known or suspected that the underlying predicate activity was
13 criminal.

14 If, as a matter of law, I am wrong in that conclusion, there is another equally important
15 basis upon which I arrive at the same result: Fairness.

16 The prosecution very much intends to adduce evidence about activity relating to specific
17 accounts. They have identified 162 such "suspicious" accounts. The case is therefore not
18 to be based merely upon hypothesis derived from lax business practices within the bank.

19 I therefore say again at the risk of repetition:

20 It would, in my judgment, be unfair in the circumstances of this case to adduce evidence
21 about the activity within the bank about specific accounts, leaving the jury to infer that
22 the defendants must have agreed to launder dirty money as alleged, knowing or
23 suspecting that they were in fact dealing with the proceeds of crime, without some

1 evidence from which it could be inferred that the accounts in fact held the proceeds of
2 crime.

3 Here an observation by Mr. Burke was especially poignant: prior to the amendments to
4 the conspiracy count which were allowed; the prosecution had alleged that the defendants
5 and the bank had conspired with "other persons unknown." That averment, before it was
6 deleted, may well have implied that the alleged conspiracy involved the account holders
7 whose criminal proceeds the prosecution was about.

8 The defendants had been entitled to assume from that, the real nature of the case in the
9 conspiracy count which they had to meet; as being one about which the predicate activity
10 outside the bank would be considered.

11 I am obliged to note that Mr. Mitchell later expressly disavowed such intention on the
12 basis that any such averment implicating the multiplicity of account holder would have
13 been to raise a multiplicity of conspiracies as between the defendants, the bank and each
14 of them - an impermissibly duplicitous averment. Thus the deleted averment was
15 intended to be a reference to other employees of the bank who may have joined in on the
16 conspiracy when it indicted (citing R v Greenfield 57 Cr. App R.849).

17 Even if I accept that explanation as I think I am obliged to give Mr. Mitchell's assurance
18 of it, it does not disabuse the primary concern that the prosecution should seek to
19 prosecute in respect of secondary activity with the bank to be regarded as suspicious,
20 without their being evidence of primary predicate criminal activity external to the bank,
21 upon which the finding of a predicate crime could be based.

22 This indictment is, moreover, being brought years after the events relating to the
23 accounts. Those events are therefore amenable to being ascertained. The jury should not

1 be left in the dark on this crucial and sensitive issue. Worse, the defendants should not be
2 left with the evidential burden of showing that there was no such predicate criminal
3 activity, if in fact there was not. It seems to me, in the absence of clarification of this
4 issue by the prosecution, that the defence would be obliged to do so for the purpose of
5 showing that there was no basis for the requisite knowledge or suspicion on their part.
6 That, to my mind - even for the purposes of the prosecution of the count of conspiracy to
7 launder money - as distinct from a substantive offence of money laundering - would be
8 too much like reversal of the onus of proof.

9 The conclusions which follow in this ruling, in particular those which relate to the
10 applicability of the El Kurd principle (infra) are to be read in light of the foregoing
11 conclusions as to the evidential prerequisites in proof of the agreement and of the
12 prerequisite knowledge or suspicion on the conspiracy count.

13 2. Admissibility of evidence

14 I have taken the trouble to set out the particulars of the conspiracy count above, also
15 because it sets the context for another issue: The admissibility in proof of the alleged
16 conspiracy, of evidence of events pre-December 23rd 1996; the commencement date of
17 the Proceeds of Criminal Conduct Law. ("the PCCL").

18

19 The starting point as Mr. Cox and Mr. Hill submitted, must be with the particulars of the
20 count. They allege a conspiracy which was entered into and participated in between the
21 23rd December 1996 and 31st May 1999.

22 The question then is why should evidence of events prior to the 23rd December 1996 be
23 admissible?

1 The opening date of the conspiracy alleged is important because it coincides with the
2 coming into force of the PCCL which created the offence of the laundering of the
3 proceeds of indictable criminal conduct, apart from drug trafficking.

4 That is the offence which the conspirators are alleged to have agreed to commit being
5 aware that it had become an offence to do so.

6 That being the allegation, evidence of events pre-December 23rd 1996 because they were
7 not then criminalised, is, ex facie, not relevant. That, indeed, must be the starting point.

8 The prosecution, however argues strongly to the contrary.

9 Mr. Mitchell says that evidence of such prior events will be very relevant to show the
10 manner in which the defendants had conducted the business of the bank in the past,
11 without, as the prosecution would say, any proper regard for whether the source of funds
12 coming to the bank may have been criminal conduct and therefore as a matter of
13 inference, being willing to assist criminals to retain or control their proceeds of crime.

14 Moreover, that that conduct in the past had been pursued despite warnings to the contrary
15 from the regulators and despite the earlier change in law in 1989 - the Misuse of Drugs
16 Amendment Law - which had created a statutory obligation of due diligence against the
17 laundering of the proceeds of drug trafficking and which, by December 1996; had given
18 rise to established Codes of Conduct against money laundering.

19 Finally, in this regard - and as to the pivotal issue of relevance - the prosecution submits,
20 that the evidence of prior conduct and events is necessary and important to the jury's
21 understanding of the nature of the conduct of the defendants after the 23rd December
22 1996 being unchanged from before, despite the advent of the PCCL.

1 In other words, that the evidence of prior conduct and events is probative of the
2 understanding as between the defendants running the bank that if they were to receive
3 proceeds of crime, they would carry on as they had done before.

4 The immediate matter of concern to be recognized is this: inherent in that approach being
5 advanced by the prosecution, is the proposition that the jury should be invited to arrive at
6 a condemnatory view of the prior conduct and events.

7 Without that view - as to the immoral or reproachable nature of the pre-December 1996
8 conduct - such conduct would be irrelevant.

9 There would be no "carrying on as before" going to prove the mens rea of the conspiracy
10 to launder the proceeds of crime after it became criminal to do so.

11 Viewed in that light, the issue before me over whether the evidence should be regarded as
12 in reality evidence of similar fact but without the prerequisite "strong probative force or
13 nexus" for admissibility (D.P.P. v - P [1991] 2 A.C. 447) or as evidence of background
14 that is "necessary" in order that the account placed before the jury is not "incomplete" or
15 "incomprehensible" (Reg v Pettman (unreported, 2 May 1985); becomes moot.

16 The truth is that, as Mr. Cox and Mr. Hill submit, the evidence of pre -1996 conduct
17 would be prejudicial and a species of similar fact evidence: While not then a crime to run
18 the bank in the way the prosecution says the defendants did, the jury would be invited
19 nonetheless to say that they did so knowing or suspecting that they were dealing with the
20 proceeds of crime; contrary to warnings, contrary to the established Codes of Conduct
21 and thus, in a morally reprehensible way - the way in which they continued
22 notwithstanding the change in the law making it an offence to do so.

1 That proper analysis of the prosecution's theory does not however, by itself, render the
2 objective impermissible. For, as Mr. Mitchell reminded in the truism of old: all relevant
3 evidence going to prove an offence is prejudicial. The issue is whether such evidence
4 would be unfairly prejudicial.

5 The same fundamental test was stated in the seminal judgment in Makin v AG for N.S.W.
6 [1894] AC 57 PC in which their Lordships recognised what has continued to be the
7 perennial difficulty facing the Courts - concerns whether prejudicial evidence falls on the
8 fair or the foul side of the line of fairness. The dicta from Makin cited below has
9 received the recent reaffirmation of the Privy Council in AG of Hong Kong v Siu Yuk
10 Shing [1989] W.L.R. 256. It was dicta that was quite appropriately advisory and
11 hortatory in terms, avoiding the inclination to be definitive or categoric and recognising
12 that the categories of circumstances under which it might or might not be fair to admit
13 evidence of past criminal conduct are not closed:

14 "It is undoubtedly not competent for the prosecution to adduce evidence tending
15 to show that the accused has been guilty of criminal acts other than those covered
16 by the indictment, for the purpose of leading to the conclusion that the accused is
17 a person likely from his criminal conduct or character to have committed the
18 offence for which he is being tried. On the other hand, the mere fact that the
19 evidence adduced tends to show the commission of other crimes does not render it
20 inadmissible if it be relevant to an issue before the jury, and it may be so relevant
21 if it bears upon the question whether the acts alleged to constitute the crime
22 charged in the indictment were designed or accidental, or to rebut a defence which
23 would otherwise be open to the accused. The statement of that general principle
24 is easy, but it is obvious that it may often be very difficult to draw the line and to
25 decide whether a particular piece of evidence is on the one side or the other".
26

27 The traditional way of drawing that line has become to ask the question: does the
28 probative value of the evidence outweigh its prejudicial effect?

1 If, for the words "evidence tending to show that the accused has been guilty of criminal
2 acts" are substituted the words "evidence tending to show that the accused had carried on
3 reproachable banking practices"; the dicta from Makin would be readily applicable to this
4 case.

5 It would in my view, be equally "not competent" here for the prosecution to rely upon
6 past reproachable conduct for the purpose of leading to the conclusion that the defendants
7 are persons likely to have committed the conspiracy alleged in Count 1.

8 As Mr. Hill puts it: "What similar fact evidence is never admissible to prove is that the
9 conduct of a defendant was criminal simply because he had behaved "in this way"
10 previously.

11 Mr. Mitchell implicitly accepted that principle when he argued that that was not the
12 purpose sought to be relied upon by the prosecution. The purpose to be advanced is also
13 recognised as permissible in Makin and expanded upon in the cases since then: The
14 evidence is admissible even if prejudicial, if it is relevant to an important issue before the
15 jury. And it is relevant Mr. Mitchell says because it shows the "background" to the
16 conspiracy; relying upon the dictum from Reg v Pettman (supra) which has been cited
17 time and again with approval (most notably in Reg v M (P.A.) [2000] 1 WLR 421 C.A. at
18 426, 427, Reg. Sawoniuk [2000] 2 Cr. App 220 and Reg.v Asif (1986) 82 Cr. App. R.
19 123).

20 The prosecution say that it is necessary for the jury to have the evidence of pre -1996
21 conduct and events as background in order that they might see the complete picture - the
22 ongoing culture of complicitous management of the bank post -1996 - and to fully

1 comprehend the state of mind of the defendants in their continuing dealings with the
2 proceeds of crime; notwithstanding the change in the law.

3 Considering this as sympathetically as I might - the extent and nature of the prosecution's
4 argument for admissibility - I am not persuaded. Neither as to the probative value of the
5 evidence of pre -1996 conduct outweighing its manifest potentially prejudicial effect; nor
6 as to the need for it to make the post -1996 conspiracy allegations complete and
7 comprehensible to the jury.

8 As to the potential prejudice: it would be patently difficult if not impossible for the jury
9 to have regard to pre -1996 evidence for any purpose but to conclude that the defendants
10 had behaved complicitously - even if not illegally - in the past and were likely so
11 continuing to behave even after the PCCL had made that behaviour criminal.

12 Indeed, it is difficult to see what else evidence of the defendants having dealt in the past
13 knowingly with the proceeds of criminal conduct could go to show.

14 If the prosecution cannot sustain the allegation of conspiracy by reference to conduct
15 committed after that conduct was criminalised, it cannot be permissible for the
16 prosecution to bolster the allegation by reference to conduct committed before it was
17 criminalised. The theory that that conduct had become endemic and institutionalised
18 provides no justification, it only serves to emphasise the danger.

19 As was said in R v Butler (Diana) 2000 Criminal Law Review 835 CA, "a limit must be
20 set" even if evidence of background might be useful to the jury's understanding of the
21 issues in the indictment.

22 There is always an inherent danger that the jury's focus could be distracted away from
23 the central issue in the indictment. Here I consider that danger to be stark and can be

1 described in yet another way. The allegation is of an agreement involving the individual
2 defendants as persons who ran the bank. It also involves the bank itself. The allegation
3 is that they and the bank conspired that it would be run with an open invitation to
4 criminals to launder the proceeds of crime. The prosecution must prove these allegations
5 in respect of the time-frame of the indictment, a time-frame which is of crucial
6 importance because of the change in the law.

7 Yet, reference to the past conduct of the defendants and of the bank in the running of the
8 business of the bank would be relevant only, as the Crown says, to show the continuum
9 of behaviour.

10 The jury would thus be left to and doubtless would be inclined to judge the events of the
11 period of the indictment by reference also to the events of the past. No longer would the
12 past be simply a matter of background. The inclination would be when considering
13 subsequent events, to conclude that simply because of the behaviour in the past, the same
14 conduct and state of mind continued.

15 On the other hand, if the evidence of events and conduct during the period covered by the
16 indictment is probative in and of itself - as it needs to be to sustain a conviction for the
17 conspiracy alleged - the jury should have no difficulty in accepting or comprehending the
18 intentions or motives of the conspirators.

19 If that evidence is insufficient for those purposes, the jury ought not to be left in a
20 position of possibly convicting by reliance also on the evidence of prior conduct and
21 events. That is precisely the risk which the dicta from Makin eschews. The prevention
22 of that risk is a fortiori the correct approach here, where the prior conduct or events were
23 not yet criminalised but are nonetheless to be ascribed the character of wrongfulness.

1 Having so decided, I must now explain just what evidence of conduct and events pre -
2 December 23rd 1996, I regard as inadmissible. I will do so by reference to three
3 categories of accounts.

4 Evidence of conduct or events involving the dealings with clients or accounts, known or
5 suspected to have the proceeds of criminal conduct, where such criminal conduct and
6 dealings were concluded by 23rd December 1996 must be excluded. This excluded
7 category I will refer to as "category A" accounts.

8 Where all that takes place post - 23rd December 1996 is the retention of accounts without
9 any further predicate activity; I would regard such accounts as falling within category A.
10 This entirely excluded category I identify by reference to the principles of admissibility
11 of evidence discussed above - possible probative value outweighed by potential
12 prejudicial effect - in so far as the conspiracy count is concerned.

13 Where prior predicate criminal activity and dealings with accounts continued beyond the
14 23rd December 1996, for instance by the making of further deposits to accounts which
15 existed before that date; the proof of that continuum, from beginning to end, is in my
16 view legitimate and such evidence is admissible - "category B".

17 This category of accounts I regard as coming within the exception identified by the Court
18 of Appeal in the case of In Re McCorkle 1998 CILR 214 at pp234 -235, discussed in
19 more detail below.

20 Category C accounts would be those which came into existence for the first time after
21 23rd December 1996, allegedly involving the proceeds of predicate crime committed
22 before the 23rd December 1996. Evidence relating to such accounts would be admissible.

1 It should plainly be a question of fact for the jury whether evidence relating to category C
2 accounts goes to prove the alleged conspiracy. As with Category B accounts, the
3 important issue would be the prior knowledge or suspicion of the predicate criminal
4 nature of the proceeds with the dealing nonetheless.

5 Evidence of accounts which came into existence only after 23rd December 1996 and
6 involving alleged proceeds of predicate crime committed post - 23rd December 1996 -
7 category D - would clearly be admissible.

8 So much, I think for evidence which may be referenced by categories of accounts.

9 Events prior to 23rd December 1996, having no direct relationship with dealings with
10 particular clients or particular accounts but which may nonetheless be relevant especially
11 to show the defendants' state of mind as parties to the alleged conspiracy, would be
12 admissible. This category might be generically described as "regulatory evidence".

13 Examples of this would be evidence of warnings by the regulators, by external or internal
14 auditors or employees; evidence of the absence of systems pre - December 23rd 1996 to
15 prevent money laundering continuing post-December 23rd 1996; evidence going to show
16 that the defendants or the bank were positively aware that practices such as the repeated
17 taking of large sums of cash deposits, made the bank prone to abuse by those who sought
18 to launder the proceeds of crime.

19 I should explain, to avoid ambiguity, that this evidence of being aware that certain
20 practices would expose the bank to the risk, would not be evidence in respect of specific
21 accounts which are excluded by the foregoing ruling. There would need to be other
22 sources of evidence of that kind of knowledge.

23

1 3. Retrospectivity

2 Before passing from this issue of admissibility, I should further clarify the basis for my
3 ruling. It is not based primarily upon any application of the principles of non-
4 retrospectivity which were argued.

5 I do not hold that the admission of evidence of conduct or events prior to the 23rd
6 December 1996 would offend the spirit of the Proceeds of Criminal Conduct Law section
7 2(4) where it provides:

8 “Nothing in this Law confers any power on any court in connection with
9 offences committed before the commencement of this Law or proceedings
10 against a person for an offence instituted before the commencement of this
11 Law”.

12
13 I regard that provision as confining the exercise of the powers conferred upon the Courts
14 by the PCCL so as to apply only to offences committed after the PCCL commenced and
15 to ancillary proceedings enabled by the PCCL in respect of such offences.

16 The jurisdiction and powers of the Court by which it determines the admissibility of
17 evidence do not depend upon the provisions of or the powers vested by the PCCL.

18 During the course of the arguments, I did express a certain conclusion at which I had
19 arrived on the issue of retrospectivity and which I must record here.

20 The conclusion was that the prosecution might not seek to prosecute any of the
21 substantive counts on the indictment for the offence of money laundering, where the
22 predicate criminal activity relied upon had *entirely* taken place before the 23rd December
23 1996.

24 That conclusion, which coincides with my conclusion on the evidential value of category
25 A accounts; was based upon what I regard as the plain meaning of section 2 (4) of the

1 PCCL and upon the determination of the Court of Appeal in In Re McCorkle (supra) at
2 page 233 where the Court said:

3 "Section 2 (4) - - is a basic section defining the jurisdiction conferred on
4 the Court and making clear that it does not extend to offences committed
5 before the commencement of the Law or proceedings against a person for
6 an offence committed before the commencement of the Law".
7

8 And later at pp234 – 235

9 "There can be no doubt that where a single offence is committed
10 prior to the coming into force of the PCCL and a sum of money
11 obtained as a result of that offence is deposited immediately into a
12 Cayman bank account, S. 2(4) would prohibit a court from
13 restraining in any way the control of that fund. Any attempt to do
14 this would fall within the prohibition of "traveling through past
15 transactions" mentioned by the Attorney General in his
16 presentations [(Hansards on the passage of the PCCL)]. Where,
17 however, as in this case, the investigation of an ongoing activity
18 which falls within the definition of criminal conduct inevitably
19 involves related activity taking place before the commencement of
20 the PCCL, the whole being part of a common design, then a
21 purposive interpretation of the PCCL would not require the denial
22 of assistance by reason of a broad interpretation of the prohibition
23 against retroactivity."
24

25 This latter qualification upon the prohibition against retroactivity came in the arguments
26 to be called "the McCorkle exception". It is as explained above, the basis upon which
27 evidence in respect of "category B" accounts would be admissible as described above.

28 The prohibition against retroactivity must however be applicable with immediate force,
29 where the issue is not whether the powers of restraint of assets may be exercised (as in
30 McCorkle itself) but whether - as here - the jurisdiction and power to try and charge
31 someone for a substantive offence under the PCCL is at issue.

32 There is a final issue to be addressed having regard to the McCorkle exception. It is
33 whether that exception may be relied upon in order to prosecute any count on the

1 indictment for a substantive offence of money laundering which depends upon predicate
2 criminal activity which occurred before and continued after the PCCL came into effect.

3
4 My conclusion is that the McCorkle exception might be relied upon as the basis for
5 prosecution of a substantive offence of money laundering based upon predicate activity
6 which commenced before and continued after 23rd December 1996.

7 The provisions of S.2 (4) the PCCL notwithstanding, the applicability in that way of the
8 McCorkle exception is in my view, plain enough from the wording of section 22(1) itself
9 (the provision which created the offence of money laundering in respect of the proceeds
10 of all predicate indictable offences; apart from drug trafficking):

11
12 "Subject to subsection (3) a person who enters into or is
13 otherwise concerned in an arrangement whereby -

14
15 (a) the retention or control by or behalf of another ("A") of property which
16 is the proceeds of A's criminal conduct is facilitated (whether by
17 concealment, removal from the jurisdiction, transfer to nominees or
18 otherwise); or

19
20 (b) property which is the proceeds of A's criminal conduct-
21 (i) is used to secure that funds are placed at A's disposal; or
22 (ii) is used for A's benefit to acquire property by way of investment,
23 knowing or suspecting that A is a person who is or has been
24 engaged in criminal conduct, shall be guilty of an offence."

25
26
27 If after the 23rd December 1996, one enters into or is otherwise concerned in a money
28 laundering arrangement in respect of the proceeds of prior predicate criminal activity
29 which is still ongoing, the prohibition against retroactivity could not be offended by
30 treating the entire activity as a whole, evidencing one common design; for the purpose of
31 criminalising the laundering of its proceeds.

1

2 Schedule of Accounts

3 By way of demonstrating the practical effect of all the foregoing conclusions, I have
4 indicated on the primary Schedule of Accounts provided by the prosecution, opposite
5 each account, whether evidence about it may be relied upon by the Crown in proof of the
6 indictment.

7 That Schedule of Accounts lists 162 accounts which are described by the prosecution as
8 "suspicious". I assume the accuracy of the comments made by the prosecution about the
9 provenance of and activity in these 162 accounts as indicated on the Schedule. There is
10 further reference to another list of 250 accounts and to what I take to be a random list of
11 36 of those.

12 The foregoing conclusions will apply equally to those further 286 accounts.

13 In summary, my ruling is that the prosecution are directed to restrict evidence which they
14 intend to adduce in respect of accounts relating to events prior to the 23rd December 1996
15 for the purpose of showing the history or background to accounts, only where relevant
16 underlying predicate criminality continued to occur after the 23rd December 1996.

17

18 4. Random Selection

19 The prosecution has stated that the accounts it intends to rely upon represent a random
20 cross-section of the accounts at the bank. If the prosecution is to rely upon a genuine
21 cross-section such that the jury is to be asked to conclude that it represents the
22 institutionalised nature of the agreement alleged in the conspiracy count and from the
23 manner in which the defendants dealt with those accounts; I must express sympathy now

1 with Mr. Hill's complaint, that the prosecution should only so state its case if the accounts
2 were selected by a demonstrably random method. Some, perhaps arithmetical method,
3 that ensures genuine representation.

4 If the accounts selected represent instead only a concentration of those accounts which,
5 after extensive audit, were found to relate to or contain questionable activity or proceeds;
6 the jury should be told that. It will then be a matter for the Court whether they might be
7 directed to rely on them to conclude as to the institutionalised nature of the alleged
8 unlawful agreement. The defence will no doubt argue to the contrary.

9 This is not an issue over which the defence and the Court should be left to speculate. If
10 left to do that, the whole ambit of the prosecution unused material will likely be the
11 subject of enquiry for the defence; seeking to show that the remaining 2552 accounts of
12 the 3000 which the bank held, contain evidence going to refute the inference of an
13 institutionalised agreement.

14 That approach to this case would, in my mind, once more elevate the concerns over the
15 manageability of the trial and the possible resultant prejudice to the defendants.

16 If it is the case that the prosecution will be inviting the jury to take that view of the
17 accounts it presents and if it is the case that it cannot assert otherwise than the defence
18 would assert in respect of the remainder, then the prosecution must concede that the
19 remaining accounts contain no evidence to support the inference of an institutionalised
20 agreement.

21 That admission would eliminate the need for the defence to seek to establish the fact by
22 adducing what would be inestimable numbers of documents.

1 These directions in respect of inferences which the jury may be invited to draw from the
2 representative nature of accounts will also be subject to the further conclusions which
3 follow.

4

5 5. Election, Severance and Manageability and

6 The El Kurd principle [unreported Court of Appeal U.K. Criminal Division: Appeal

7 No: 199901848/23 26th July 2000].

8 In the El Kurd case it was decided that a jury can properly convict upon an indictment for
9 alternative counts of conspiracy to launder the proceeds of drug trafficking or of criminal
10 conduct other than drug trafficking; without the evidence specifying precisely what
11 predicate offence had been committed but where, from all the circumstances - including
12 the vast sums of money laundered (£70 million) and the regular and structured manner of
13 deposits to a particular bureau de change - the jury was bound to conclude that the money
14 was the proceeds of one crime or the other.

15 It seems to me that the prosecution has placed heavy reliance not only upon the ratio but
16 also upon further dicta from the El Kurd case both as reflected in the manner in which the
17 conspiracy count has been cast and in the manner in which they seek to invite the jury to
18 approach the evidence.

19 Here I have specifically in mind paragraph 47 of the judgment from that case which
20 states:

21 "Before we leave this appeal we would express some concern that the
22 matter proceeded before the jury on an indictment which, perhaps
23 understandably, reflected the dichotomy that we have referred to [(whether
24 money was the proceeds of one or another crime)] when it seems to this
25 Court that the appropriate course to take when confronted with problems
26 in relation to the provenance of the proceeds in relation to which it is said

1 that the defendant has carried on activity of money laundering, is by way
2 of a compendious count of conspiracy which would avoid the necessity for
3 any choice to have to be made so that in a case such as the present, if the
4 jury were satisfied, as they would have been bound to have been, that the
5 proceeds were the proceeds of illicit activity; the jury should be provided
6 with the opportunity to conclude that the conspiracy was a conspiracy by
7 the conspirators to launder money illicitly obtained, whether it be by way
8 of drug trafficking or other criminal activity. That seems to us to have
9 been the reality in the present case and would, therefore, perhaps have
10 been more appropriately reflected by a count drawn in such terms".
11

12 While I can well understand the reasons the prosecution would seek to adopt that advised
13 approach in this case, I record at least two further caveats now.

14 The first is that that dicta must be construed in the light of and subject to the other more
15 established dicta in the decided cases which govern the circumstances under which the
16 bringing of a conspiracy charge or joinder of a conspiracy charge with substantive counts
17 in an indictment may or may not be allowed.

18 Not surprisingly, the most fundamentally important consideration which those cases
19 advise, is that a count for conspiracy should not be included with counts charging
20 substantive offences if the inclusion will result in unfairness to the defence. See R v
21 Jones (J) and others 59 Cr. App. R 120 C.A.

22 Further, as a general rule, where there is an effective and sufficient charge for a
23 substantive offence, a charge of conspiracy is undesirable. See for example Verrier v
24 DPP [1967] 2. A.C. 195, HL and Archbold 2002 Ed. paragraphs 33-54 -33-57.

25 Those fundamentals being noted, I must also note the exceptions which may be
26 applicable here.

27 An exception would be a case of complexity in which the interests of justice can only be
28 served by presenting to a jury an overall picture which cannot be achieved by charging a

1 relatively small series of substantive offences: R v Hammersly 42 Cr. App. R. 207 CCA
2 and R v Simmonds [1969] 1Q.B. 685 at 690.

3 As an illustration of this, a count for conspiracy as well as sample substantive counts may
4 be permissible where the sample counts would not reflect the overall criminality which is
5 alleged. See Archbold 2002 Ed. para. 33-53.

6 Further, on the assumption that the conspiracy count is to be properly included, it may be
7 just to allow the substantive counts to cater for the possibility that one or the other of the
8 alleged co-conspirators may be acquitted of the conspiracy. A jury might properly
9 conclude that - to take the allegations in this case - he or she nonetheless committed a
10 particular substantive offence of money laundering.

11 What this all comes back to is the basic principle which has been emphasised by all the
12 defence Counsel and about which I am at this juncture most concerned. In a complicated
13 case, the trial judge has the ultimate responsibility for ensuring that the indictment is one
14 about which a manageable trial can be conducted. I am advised by the case law to be
15 robust in the use of the power of severance to secure this: R v Cohen and others, The
16 Independent, July 29 1992 C.A.

17 As held in R v Simmonds (supra) - re-affirmed in R v Kellard, Dwyer Wright [1995] 2
18 Cr. App. R. 134 - if a judge, on examination of the material before him, considers that the
19 prosecution's presentation of the case proposed will impose an undue burden on the
20 Court and jurors and is therefore contrary to the interests of justice; he has a duty to
21 require the prosecution to recast their approach, even if this entails an adjournment.

1 That is how I would further describe the difficulties I perceive over the prosecution's
2 approach to the inclusion of the conspiracy count in this indictment and the thinking
3 behind the conclusions and directions already expressed and which follow below.
4 Before I turn to my decision as to the final practical resolution of the difficulties, I will
5 now examine the second difficulty which I see will likely attend what I will describe as
6 the "El Kurd" approach to the prosecution of this case (supra).
7 I begin by noting what I regard as an important distinction between the basis upon which
8 much of the evidence in this case is sought to be presented and that in the El Kurd case.
9 Here, while the prosecution will doubtless be pointing to some instances of money
10 laundering based upon what they will say is proven or irrefutable evidence of predicate
11 criminal activity; it appears they will also be seeking to rely upon "suspicious
12 circumstances" arguably capable of adverse as well as innocent inferences. This will be
13 the basis that the underlying predicate activity was criminal - without specifying what
14 crime - but in the sense of being indictable under Cayman law, had it been committed
15 within these Islands.
16 That to my mind would be casting far too wide a net and would place an unfair burden
17 upon the defence to establish the favourable inference and disabuse any unfavourable
18 inference of underlying predicate activity.
19 Nor was it the basis, as I understand it, upon which the El Kurd case was decided.
20 The circumstances of that case clearly were such, as the Court said, that the "jury would
21 have been bound" to conclude that the proceeds were the proceeds of illicit activity.
22 That I consider to be the indispensable basis for the admission of evidence in respect of
23 predicate criminal activity in support, not only of substantive counts, but also of the

1 conspiracy count in this trial. As to the conspiracy count, I have already above, in light
2 of the discussions which took place following the delivery of the earlier version of this
3 ruling, set out my final conclusions, largely in clarification of the ruling.

4 Before the prosecution might invite the jury to conclude in respect of any substantive
5 count that the underlying activity was predicate criminal activity, it will not be sufficient
6 for the prosecution to invite the jury to conclude that the defendants or any respective
7 defendant, must have suspected and so be on guard in the absence of evidence from
8 which it might first be inferred that there was in fact some predicate crime. On the
9 particular facts of the El Kurd case that primary inference was not only permissible but
10 also irresistible. Here the prosecution will have to be able to demonstrate that the jury
11 would first "be bound to conclude" that the predicate activity was such indictable
12 criminal activity.

13 Only then will the prosecution be allowed to invite the jury to conclude that the necessary
14 knowledge or suspicion - as a matter of inference - must have resided in the defendant's
15 mind.

16 This will mean that the prosecution must adduce evidence to prove that the underlying
17 predicate activity was indeed criminal, or inescapably as a matter of inference criminal,
18 within the meaning of the PCCL.

19 So far as conspiracy is alleged, I say again by way of emphasis and with a slightly
20 different manner of expression; what the prosecution may not lose sight of here is that
21 they have charged a conspiracy - a positive agreement - to launder the proceeds of crime.
22 Not a conspiracy to launder proceeds irrespective of whether or being reckless as to
23 whether they might be the proceeds of crime.

1 Leaving the issue of whether the predicate activity was criminal to the jury merely to
2 infer from different possibilities having regard only to what I might call the "secondary"
3 activities within the bank - and however narrow the number of possibilities - would place
4 what I consider to be an unacceptable burden upon the defendants to convince the jury
5 that the more favourable inferences are to be drawn.

6 I arrive at these conclusions having also considered especially the case of Colle (1992) 95
7 Cr. App. R. 67 in which the English Court of Appeal confirmed that where a defendant is
8 charged for a substantive offence of money laundering (under the comparable drug
9 trafficking provisions there) it is for the prosecution to prove the state of knowledge
10 required by the law in accordance with the normal standard of proof. That is the primary
11 burden of proof. It remains on the prosecution notwithstanding that if the defendant
12 wishes to rely on the special statutory defences allowed by the law, the defendant has the
13 onus of proving such defence; ie: not having the particular state of mind mentioned in the
14 law, on the balance of probabilities.

15 In any event, whatever the legal predicate basis permitted by section 22 (1) of the PCCL
16 for prosecuting substantive charges of money laundering may be, I consider that such a
17 basis for prosecuting the conspiracy count in the circumstances of this case would be
18 unfair and therefore impermissible.

19 Impermissible, I also emphasise, because it would engender the sort of scope of enquiry
20 and evidence which would likely lead to the trial becoming unmanageable and in my
21 view, "would impose an undue burden upon the court and jurors and therefore contrary to
22 the interests of justice" (R v Simmonds (supra)).

1 The prosecution are therefore required to recast their approach to the prosecution of the
2 conspiracy count; by not seeking - to the extent they intended to - to rely upon accounts
3 which they deem merely "suspicious". That is those in respect of which they are unable
4 to assert that the jury are bound to conclude that the underlying predicate activity was
5 criminal and by reference to circumstances external to the bank.

6 The prosecution will indicate the number of accounts from among those described as
7 "suspicious" it will seek to rely upon in keeping with the foregoing conclusions.

8 I am also concerned that the prosecution should understand that this conclusion relates
9 not only to the primary 162 accounts of the schedule, but also possibly to the other 286.

10 Any invitation to the jury to examine the manner of dealing with those accounts can only
11 be relevant if the prosecution seek to assert either that the activity, not only internal to the
12 bank but also external; was questionable.

13 Here too, I should indicate the further benefit of the discussions which followed on the
14 delivery of the earlier version of this ruling.

15 During them, Mr. Mitchell explained more fully the prosecution's intention. It is that
16 these 286 accounts will not be referred to for the purpose of inviting the jury to conclude
17 that they involved the proceeds of crime or that the circumstances surrounding them were
18 "suspicious". They will be invited to consider them as generally representing the account
19 activity at the bank during its latter 36 months of operation and as evidencing the gross
20 failure of the defendants and the bank to conduct even the minimum exercise of due
21 diligence which sound banking practices required. All from which to conclude that all
22 the circumstances were consistent only with the unlawful agreement alleged in the
23 conspiracy count.

1 I have accepted that that is a permissible basis upon which to adduce that evidence
2 subject to this caveat: That the prosecution in their opening statement (and the Court at
3 the appropriate time) will advise the jury that they are nor being invited to conclude from
4 these 286 accounts (or from the random selection of 36 from those, one for each of the
5 banks last 36 months of operation) that the failure to conduct due diligence meant that
6 there was necessarily anything "suspicious" about these accounts.

7

8 6. Duplicity - Abuse of Process; particularisation and specificity

9 These other grounds of objection to the conspiracy count raised important concerns
10 which I consider to have been addressed, at least for these preliminary purposes of the
11 trial, by earlier directions given in these proceedings and by the decisions which now
12 follow.

13 By the narrowing of the ambit upon which pre - December 1996 evidence might be
14 adduced, there should no longer be any issue whether the conspiracy alleged is
15 duplicitous as being at once one pre - December 1996 and one post - December 1996.

16 The particularisation which has been given by the prosecution in the so - called "Scotch"
17 Schedule, should serve to show that the primary allegations to be relied upon post-date
18 the PCCL.

19 It should also serve to specify what acts, omissions or declarations of each defendant will
20 be relied upon as showing that he or she did join in the alleged conspiracy and at what
21 time or stage.

22 I allow the conspiracy count to proceed on that basis being mindful of the dicta of Paull J.
23 in R v Griffiths and others [1966] 1 Q.B. 589.

1 "-- in law all conspirators must join in the one agreement, each with the others, in
2 order to constitute one agreement; any one of them may not know all the other
3 parties but only that there are other parties; any one of them may not know the full
4 extent of the schemes to which he attaches himself; but what each must know is
5 that there is coming into existence or is in existence, a scheme which goes beyond
6 the illegal act which he agrees to do".
7

8 The question is always whether there was a common criminal purpose: Archbold 2002
9 Ed. para. 33-48.

10 At the end of the prosecution case, the court can be invited to say whether a jury could
11 properly convict any particular defendant as a participant in the alleged conspiracy.

12 At that stage also the court must consider and it will be a question of fact, whether the
13 evidence reveals one conspiracy or more than one conspiracy. If the matter is left to
14 them, the jury will be told that in order properly to convict on the count as charged,
15 which alleges against a number of people a single conspiracy to commit an offence, the
16 evidence must show that they all had joined in one agreement, each with the others.

17
18 7. Severance of defendant Judith Donegan from the conspiracy count

19 This argument is put primarily on the basis that the inclusion of the defendant in the
20 conspiracy count was contrary to the prosecution's own theory of its case - and here I
21 paraphrase - that the conspiracy was perpetrated as amongst those responsible as the
22 mind and management of the bank, intending to run it as a money laundering enterprise.

23 The prosecution has however stated its case as against her that "whilst it cannot be said
24 that she was a controlling mind of the (bank) - - she lent herself willingly to the bank's
25 corrupt practices".

1 I conclude that it must be a matter of fact for the jury whether she did so and so became a
2 party to the agreement which is alleged.

3

4 8. Exclusion of Judith Donegan's diary entries

5 While I do not accept the pretext given for the seizure of Miss Donegan's diary in the first
6 place - given the specific and narrow ambit of the warrant which was then being relied
7 upon - I acknowledge that the law is such that there is no basis for exclusion of the
8 relevant entries found in it or in her computer e-mails.

9 Those which will be relevant can be readily separated from those which will not and,
10 failing agreement between the prosecution and her defence team, I am prepared to specify
11 by reference to the copies of the entries which were provided to the court.

12 This decision follows from the well -established principles of R v Sang [1980] 2 A.C.
13 402, which have been applied by this court time and again in the past. See for instance
14 R v Powell 1980 -83 CILR 277. The principle is that there is no discretion to exclude
15 evidence (save in the case of admissions, confessions and evidence obtained from the
16 accused after commission of the offence) on the grounds of unfairness in the manner of
17 its obtainment, unless its quality was or might have been affected by the manner in which
18 it was obtained.

19 As to what inferences the jury might draw from Miss Donegan's diary and e-mail entries -
20 they will of course be directed to consider whether any innocent explanation she may
21 proffer is true or leave them in doubt about her state of mind in making those entries.

22 See R v Keen unreported Nov. 5. 1999 C.A. (990571152).

1 It will be a matter, so far as the conspiracy count is concerned, whether the jury might
2 properly infer that the entries reveal her state of mind as someone who lent herself to the
3 agreement being aware of the common design.

4

5 9. Public Interest Immunity, Legal Professional Privilege and Class Immunity

6 I have issued a written ruling on this issue save for consideration of certain documents
7 which I was unable to access from the database provided.

8 I now have hard copies of those and will give my final decisions on them in due course.

9

10 10. Tax evasion as a predicate offence

11 Having regard to a concession which the prosecution will make for the purposes of this
12 trial, I am not required to give a ruling in law on this issue now.

13 In effect, the concession as I understand it will be that at the appropriate time, I might
14 direct the jury that if they accept or are left in doubt that a particular defendant's dealing
15 with clients or accounts was on the basis that the defendant believed or suspected no
16 more than that the client was seeking to evade taxes; then the jury might not convict
17 based upon that evidence.

18 Mr. Cox for the defendant Brian Cunha who first raised this challenge, has not given
19 unreserved acceptance of that as the appropriate way to deal with any issue of tax evasion
20 arising. He might yet seek a definitive ruling as a matter of law, whether tax evasion is a
21 predicate crime for the purposes of the PCCL. I note however, that it is difficult to see
22 how that might improve his client's position in light of the prosecution's concession.

1 The only further comment I make now, is that the prosecution will be mindful of the
2 directions I have given against seeking to invite the jury to draw adverse inferences of
3 knowledge or suspicion that proceeds were the proceeds of predicate crime in the absence
4 of primary evidence of the predicate criminality.

5 If the prosecution merely intends to leave the matter to the jury to infer whether the
6 predicate activity was tax evasion or some indictable criminal activity, they might seek to
7 do so only if from that primary evidence, the jury will be bound to conclude that it was
8 the latter.

9 During the discussion which followed the delivery of the earlier version of the ruling
10 seeking clarification; Mr. Mitchell made certain further trenchant observations which I
11 consider require some response. Of course it is correct that the prosecution cannot be
12 expected to know before hand what evidence a jury will be bound to accept.

13 The point of my final observation above, reflecting my concerns about the prosecutions
14 intention to rely upon the principle from the El Kurd case; is that the prosecution might
15 not seek to invite the jury to draw the adverse inference of the existence of predicate
16 criminal activity, if, upon any objective view of the evidence, an inference of innocent
17 predicate activity can equally be drawn. When for instance, the circumstances within the
18 bank may be suspicious because a foreign client brought regular large sums of cash
19 which were accepted, it would be impermissible for the prosecution, without more, to
20 invite the jury to infer that it was the proceeds of predicate criminal activity, when, in

21
22
23

1 light of the aforementioned concession, the circumstances may be equally consistent with
2 an objective to evade or avoid taxes abroad.

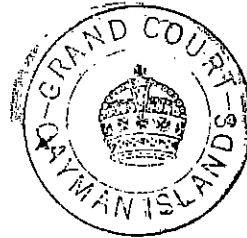
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5

6 Anthony Smellie
7 Chief Justice

8



9 Dated the 14th June 2002
10 Amended 19th June 2002