IN THE ROYAL COURT OF GUERNSEY

Between **THE LAW OFFICERS OF THE CROWN** **Prosecution**

-v-

DANIEL HERCULES DE KOCK **Defendant**

Before: Richard James McMahon Esq., Deputy Bailiff

Hearing date: 24th March 2016

Judgment handed down: 6th April 2016

Advocate for the Prosecution: **Advocate R J Calderwood**
Advocate for the Defendant: **Advocate C M Fooks**

Cases and materials referred to in the Judgment:-

The Prevention of Corruption (Bailiwick of Guernsey) Law, 2003
The Criminal Evidence and Miscellaneous Provisions (Bailiwick of Guernsey) Law, 2002
The Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003
Blackstone's Criminal Practice 2016
Archbold: Criminal Pleading, Evidence and Practice 2016
R v Jones [1997] 2 Cr App R 119
Blackstone's Criminal Practice 2001
The Criminal Justice Act 2003
Tripodi v R (1961) 104 CLR 1

Introduction

1. On 24 March 2016, I heard Counsel's submissions on the question of whether certain documents in the proposed trial bundle supplied by the Prosecution in the summer of 2015 (when the Defendant was not represented by an Advocate) should be admitted for use at the trial or whether, on the grounds advanced on behalf of the Defendant by Advocate Fooks, any of them should be ruled inadmissible. The Court has taken this approach as a means of avoiding what would otherwise probably have been frequent interruptions to the flow of the trial. In other words, rather than waiting until the point in the prosecution's case where the document or documents objected to were to be produced and dealing with the objection, in the absence of the Jurats, at that time, I agreed that it would be a sensible case management step to address the objections by way of a preliminary hearing.

2. In the end, the approach I directed should be taken was for Advocate Fooks to provide an initial list of the documents in section D of the proposed trial bundle (ie, the exhibits to be

produced by live witnesses) to which the Defendant raised objection, to which Advocate Calderwood would indicate why he argues the document is admissible and to summarise its relevance to the prosecution case. I took the view that such an approach would then enable Advocate Fooks to articulate the Defendant's objections to the material in a more focused manner. Indeed, by way of a letter dated 24 March 2016, Advocate Fooks narrowed a little the number of documents in respect of which objection has been made.

3. During the hearing, I gave a series of rulings about whether or not I regarded the documents to which reference had been made as being capable of being adduced on behalf of the prosecution. I expressly reserved my decision on four items (documents numbered 47, 49, 56 and 59 on the index) and this judgment briefly sets out my conclusions on each of those matters. In doing so, I am also able to clarify the approach I took to some of the other documents where I rejected the submissions of Advocate Fooks and ruled that they can be used by the prosecution.

4. As Advocate Fooks has noted in correspondence passing since the hearing, further consideration needs to be given to a number of other issues in order for the Court, and the Defendant, to be satisfied that the documents to be adduced are the best copies available. Because some of the documents are e-mail strings, I take the view that there is a strong argument for presenting these in an intelligible manner. Many of them have been produced by DC Wright. He will explain the process he has adopted, but it is, I think, possible that he could re-visit the material and extract e-mail messages in another way. The best solution would be to set these out chronologically so that the documents and the oral testimony to be given surrounding them present the versions of events, as far as possible, sequentially. I should add that I do understand why the material is presented in the way it is because it amounts to a series of documents exhibited by the witnesses, but I would encourage Counsel to see if there can be agreement to the production of a bundle of documents where the core of those documents, ie, messages extracted in a way that avoids unnecessary duplication and consists principally of the last message in the document printed (perhaps) with the preceding message only, rather than the full string, assists understanding rather than potentially giving rise to confusion. As I will proceed to explain in a moment, piecing together what happened at which time or on which date, especially where context is arguably all-important, is not as straightforward as it might be.

Background

5. I do not propose to repeat in this judgment matters that I have addressed in previous decisions or to refer to the background to the current application in anything other than the barest detail. In doing so, I largely adopt the abbreviations I have used before and which are readily understandable by the parties.

6. The Defendant faces an indictment containing a single count of corruption, contrary to section 1 of the Prevention of Corruption (Bailiwick of Guernsey) Law, 2003, as amended. The Particulars of Offence are:

> "*DANIEL HERCULES DE KOCK, being an agent of SG Hambros Private Bank, on or about the 4th day of June 2013, did corruptly accept or obtain for himself a Jaguar motorcar from Sam Alaia, as an inducement to, or reward for, doing an act in relation to his principal's affairs, namely for facilitating the application of the said Sam Alaia for a loan of £975,000 by the said SG Hambros Private Bank.*"

7. I have already given a broad interpretation to the term "*business document*" for the purposes of section 2 of the Criminal Evidence and Miscellaneous Provisions (Bailiwick of Guernsey) Law, 2002 (see my decision of 15 March 2016). In the light of that ruling, Advocate Fooks

has sensibly modified her stance in relation to some of the documents on which the prosecution wishes to rely. In doing so, she has acknowledged that the document concerned can be regarded as forming part of the business records of a person capable of producing it. As a result, the objection in some cases has been much less about whether the document is in itself admissible but more about whether it is unfair evidence capable of being excluded pursuant to section 78(1) of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003:

> "*In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.*"

8. Putting the question succinctly, the Court will rule that a piece of evidence on which the prosecution wishes to rely must be excluded if, after conducting a balancing exercise, the prejudicial effect of it outweighs its probative value (see, eg, *Blackstone's Criminal Practice 2016*, para. F2.11). Section 78 is also available where it is suggested that the evidence has been obtained by improper or unfair means, although that aspect has not really been advanced on behalf of the Defendant in respect of the current application.

Discussion

9. Document 47 is a string of e-mails taken from the Defendant's personal e-mail account to which he authorised the Police to have access. The e-mails are between the Defendant and David Barrow of Cherry Godfrey and start on 20 September 2013 and run through to 25 September 2013. It is the first of those e-mails that contains passages written by the Defendant which he now seeks to have redacted. In particular, the Defendant mentions the vehicle by reference to having "*my Jag E Type for sale*" and provided the link to the listing on the website known as "Trade It Guernsey". The Defendant's explanation of why he is selling this vehicle is that he "*"inherited" the car from a friend that move to Australia and owed me money*". The Defendant offered to sell the vehicle to Mr Barrow for £20,000, being the amount he said he was owed.

10. Advocate Calderwood contends that this document, including this particular message, is a business document, which Advocate Fooks accepts, and also that the content amounts to a confession because it constitutes an admission by the Defendant that the Jaguar motor vehicle belongs to him. Accordingly, Advocate Fooks submits that the prejudicial nature of the document is that it can be seen as laying the foundation for a criminal offence that is not the subject to these proceedings. She referred to it as some type of fraud offence, involving the making of a misrepresentation for the purpose of securing a loan. However, when one looks at what was written carefully, it can be seen that the vehicle is not being offered as any form of security for the loan, but is mentioned in the context of the Defendant's apparent financial needs and how the sale proceeds may go towards meeting those needs. Mr Barrow's response draws a distinction between what he could approve on an unsecured basis and whether the Defendant needs an additional tranche of borrowing pending sale of the car, to which the Defendant replied that he was content to wait until the car sold, but would like to accept Mr Barrow's offer of an unsecured loan for the other amount. Accordingly, I am satisfied that this exchange is not prejudicial to the Defendant in the sense of disclosing an offence with which he is not charged.

11. It is in the nature of this type of message that there will be some prejudice to the Defendant. That is the very reason why the prosecution wishes to rely on it. The message must, in my view, be put into the context that the Defendant had chosen to advertise the Jaguar for sale through Trade It Guernsey. The documentation relating to this listing (document 45) is clearly

admissible. During the hearing, Advocate Fooks questioned the provenance of document 45, but acknowledged that it amounts to an admissible business document. In interview, the Defendant accepted that he had caused the vehicle to be advertised through this medium. As such, the message to Mr Barrow is consistent with the rest of the prosecution case relating to steps taken by the Defendant to sell the vehicle at that time, which it alleges supports its case that the vehicle was being treated by the Defendant as his to deal with as he wished. I am, therefore, satisfied that the objection raised to its use at the trial must be rejected. It is probative and there is, in my view, no prejudice to the Defendant that outweighs that probative value.

12. Document 49 is an example of an e-mail string where the messages contained in it are not sequential (by which I mean that one has to look elsewhere to see what happened between some of the dates shown). As a result, if one looks at this document in isolation, it would appear that Sam Alaia contacted the Defendant, using his bank e-mail address, in July 2013 enquiring about the progress of his loan, albeit that the Bank had taken the decision not to provide it and had written to Mr Alaia about that. There is then a gap until a message from Mr Alaia dated 28 October 2013, in which he wrote *inter alia* "*Niel no one has been able to help me with my loan so what do you want to do about the car*". The final message at the top of the string is also from Mr Alaia and dated 31 October 2013, but is no more than a chaser.

13. The presentation of this document in its current form is something about which Advocate Calderwood is making further enquiries. However, unless it transpires that the message dated 28 October 2013 was not sent to the Defendant at his Bank e-mail address, I am proceeding on the basis that it falls within the broad definition of a business document which I consider appropriate to apply. (If it were shown to be a private communication unrelated to the business of the Bank, ie, outside the scope of the employment relationship the Defendant worked under, then I might well not have been willing to treat it in that way, as I will explain further in due course.) Advocate Calderwood has suggested that the message in this document is not, in any event, hearsay because it is not being relied on as evidence of the matters stated in it. Alternatively, he suggests that it is an act or declaration in pursuance of a common purpose, which is an issue to which I will return in greater detail in due course. Come what may, I am satisfied that this document is prima facie admissible so that, once again, the question of whether it can be used by the prosecution turns on the application of section 78 of the 2003 Law.

14. Although Advocate Fooks submits that the message is highly prejudicial because Mr Alaia will not be a witness and so there is no opportunity to cross-examine him on its content, I disagree that there is so much prejudice to the Defendant that I should exercise the power under section 78 of the 2003 Law to exclude this evidence. Unless I have missed something from the documentation contained in the trial bundle, I understand this message to be the first occasion on which Mr Alaia raises the question of the car in his correspondence. As Advocate Calderwood pointed out, the message supports the prosecution case because it links the car and Mr Alaia's loan application; therefore, it has probative value. Despite the likely unavailability of Mr Alaia to face cross-examination on it, the statement, in my view, is sufficiently ambiguous that it cannot be said to have such a prejudicial effect for the Defendant as to outweigh its probative value. Quite how the submissions on it will be put by Advocate Fooks is a matter for the Defendant, but the passage of time since Mr Alaia learnt that his loan application had failed and that the Defendant's efforts to put Mr Alaia in touch with alternative lenders had also been fruitless might be capable of being developed on behalf of the Defendant in a positive way. Further, the open-ended nature of Mr Alaia's enquiry potentially begs the question as to the nature of the relationship that he had with the Defendant from the outset, eg, on what basis would a person making an outright gift of an item make such an enquiry about it? In those circumstances, I am not persuaded that the inclusion of this message in the overall scheme of the communications between the Defendant and Mr Alaia as part of the Defendant's

ongoing employment-related activities has the degree of prejudicial effect for which Advocate Fooks contends and I have concluded that its probative value outweighs any prejudicial effect there is. As such, the document does not fall to be excluded (or redacted to remove the comment on which Advocate Fooks concentrated) under section 78 of the 2003 Law.

15. Turning to document 59 before tackling document 56, this comprises a set of e-mails between the Defendant, Mr Alaia and Joe Castellino of Le Riche Automobile Restorers (CI) Ltd. I do not know why these messages have been collected into a single exhibit rather than being separated into a series of distinct documents. They are all produced as exhibits by Mr Castellino. I am satisfied that each of the messages falls within the business document exception to the hearsay rule set out in section 2 of the 2002 Law because they are all obviously created or received in the course of the trade or business of Le Riche Automobile Restorers (CI) Limited.

16. The messages concern the explanations offered to Mr Castellino about the Jaguar. They explain the provenance in a way that clarifies how the sale of the Jaguar to another person on behalf of Mr Alaia was achieved. Advocate Fooks was keen that the documentation relating to that sale (included within document 58, albeit that there was common ground that the description on the Exhibit Label is inaccurate and so misleading) should be before the Court. As Advocate Calderwood noted, the problem with that approach is that it appears to lead to an element of cherry-picking from those documents that form part of the overall transaction relating to the car, potentially offering an incomplete picture. However, in respect of each document to which objection has been raised, I have applied the same tests, namely whether it is admissible as evidence and, if so, whether it falls to be excluded under section 78 of the 2003 Law. One further consequence of combining into one exhibit a number of messages is that some portions of the documents have been included in other items to which there has been no objection or any objection raised has already been rejected. I have, therefore, concentrated on the passages on which Advocate Fooks founded her submissions rather than viewing the document exhibited as a whole.

17. The messages within this document start with the Defendant contacting Mr Alaia on 15 November 2013. Mr Castellino was also a recipient. That message also appears as document 52, in respect of which Advocate Fooks acknowledged that it was one of the business documents that is admissible. On 18 November 2013, Mr Castellino responded to Mr Alaia, mentioning that "*We have been asked by Neil De Kock to sell your above motor car.*" The next day, Mr Alaia responded to Mr Castellino indicating that "*I am very happy for you to sell my Jaguar*". Unsurprisingly, no objection is taken to the prosecution relying on these exchanges. On 23 November 2013, Mr Castellino sent to Mr Alaia an invoice for the works carried out to the vehicle to prepare it for sale. A copy of this message was forwarded to the Defendant minutes later. Document 56, to which I will return, was sent by Mr Alaia to the Defendant on 24 November 2013. On 28 November 2013, Mr Castellino enquires by e-mail of Mr Alaia as to when the latter will settle the invoice. There is then a gap until 15 January 2014 when Mr Alaia responds to Mr Castellino. It is this message to which the Defendant particularly objects. Included within the message, Mr Alaia stated that "*for doing all the above i agreed to give Niel the e-type*" and, after explaining about a telephone call with the Defendant added that the Defendant "*told me he still would like to keep the car and would sort something out*". The message further explains that "*i am not responsible for the work Neil had done but i am happy for you to take it from the sale*" and "*Hope this sorts things out regards who owns the car*". Mr Castellino forwarded this message on 15 January 2014 to the Defendant asking him to settle the account, albeit that the Defendant would be reimbursed out of the sale proceeds. The Defendant responded to both Mr Alaia and Mr Castellino on 17 January 2014 setting out his different version of the situation. There is no objection to that message being used at the trial. The final message exchange in this document is between Mr Castellino and Mr Alaia. On 10 February 2014, Mr Alaia provided details of his wife's bank

account in the United Kingdom to which the net proceeds of sale were to be remitted. He commented that "*This affair with niel has been a drama*". In doing so, it appears that Mr Alaia was responding to an undated message from Mr Castellino in which he thanked Mr Alaia for clearing up the ownership issue with the Jaguar. This exchange is also something to which objection has been raised.

18. I have set out these messages in the detail I have, and sought to present them chronologically, because this shows that they all have probative value. As Advocate Calderwood explains, the sequence of who wrote what and when is important because it supports the prosecution case that the vehicle was gifted to the Defendant. The reason for the gift is expressed to be as a reward for what the Defendant had done for Mr Alaia. It may be that in Mr Alaia's mind the vehicle was a reward for more than just the loan application process with the Bank. It helps to clarify why Mr Castellino was looking to the Defendant for payment of the invoice associated with the works undertaken to the vehicle. It explains why the proceeds of sale of the vehicle were remitted to Mr Alaia's order and not to the Defendant's. That is an issue on which submissions can be made. It is clearly important to the Defendant that the Court understands that he did not benefit financially from the transaction relating to the Jaguar and I accept Advocate Calderwood's submission that it is difficult to appreciate what was taking place if there are gaps in the narrative to be derived from this documentation.

19. In my judgment, each message in this sequence has probative value to the prosecution. I do not accept that the prejudice to the Defendant of not being able to cross-examine Mr Alaia on what he has written outweighs that probative value. In relation to the explanation about the provenance of the vehicle contained in Mr Alaia's message of 15 January 2014, the Defendant accepts that he took possession of the Jaguar when it was brought to Guernsey and that he was given the documentation associated with the vehicle by Mr Alaia. What he does not accept is that Mr Alaia asserts that the vehicle was a gift to him. That is the foundation of the prosecution case. I do not consider that this document provides the only evidence of this issue and so the case does not appear to me to stand or fall on the admissibility of this one message. The Defendant's response on 17 January 2014 explains his involvement. That response cannot, in my view, be properly understood unless the material to which it is responding is seen by the Jurats. Accordingly, any prejudice to the Defendant is less than the probative value of the material contained, when read as a whole, in this sequence of messages. Similarly, I do not regard Mr Alaia as referring to what he describes as an affair with the Defendant being a "*drama*" as prejudicial to him. It is, in my view, a sufficiently neutral statement, which could be construed as referring to the entirety of the process of getting Mr Alaia's car sold and the proceeds of sale remitted to his order as having been more difficult that he originally envisaged. It does not allege that the Defendant is a criminal. Further, because the outcome is that Le Riche Automobile Restorers (CI) Ltd accepted that its client was Mr Alaia and not the Defendant, this may even be of some assistance to the Defendant, rather than prejudicial at all. For these reasons, I reject the Defendant's argument that the two messages on which I have concentrated should be excluded under section 78 of the 2003 Law.

20. I am treating document 56 as a single e-mail message sent by Mr Alaia to the Defendant's personal e-mail account. The layout of the messages is a little odd. This is because it appears to be a response to a message not bearing any date. However, the text of the message to which it appears to respond is the same as the text of a message sent by the Defendant on 14 November 2013 to Mr Alaia from his personal e-mail account (as part of document 51, to which Advocate Fooks has raised no objection). Mr Alaia's response was sent on 24 November 2013. As I have just noted, it was sent after Mr Alaia had received the bill for work to the Jaguar from Mr Castellino. The message begins "*I have to tell you that I am very upset about the e.type .niel I let you have that car for all your help. But nothing has happened I didn't get my loan that you said was all approved."*

21. Advocate Calderwood advances two bases on which document 56 is admissible. He accepts that the document is hearsay and so seeks to show that there is at least one exception to the hearsay rule. The first is that it is a business document. The second is that it is an act or declaration in pursuance of a common purpose. At the hearing, this argument was developed by reference to the way it had been put in Advocate Calderwood's Skeleton Argument on these issues at para. 23:

> "*Finally when two people are engaged in a common enterprise, acts and declarations of one in pursuance of that common purpose are admissible against the other (Archbold 2016 at 33-63). It does not matter whether the maker is present or absent from the trial (33-64). Such acts and declarations may provide evidence not only of the existence, nature and extent of the conspiracy, but also of the participation in it of persons absent when those acts or declarations were made. This principle applies when the charge is one of a crime committed in pursuance of a conspiracy, whether the indictment contains a count for conspiracy or not, and whether the co-conspirator be indicted or not (33-69). In the present case the conspiracy in question was the Defendant taking a bribe from Mr Alaia and Mr Alaia receiving a mortgage in return. This correspondence is an act in pursuance of that common enterprise.*"

22. Because this issue arose in a way that had not been fully addressed in written submissions by Advocate Fooks and seemed to me to raise questions of law where further time for reflection was needed, I directed that both Advocates should have the opportunity to provide more detailed written submissions after the close of the hearing to assist me. In Advocate Fooks' case, she was to respond to para. 23 of the Advocate Calderwood's original Skeleton Argument and Advocate Calderwood would, if he wished, have an opportunity to reply. I am grateful for the submissions received from Advocate Calderwood and Advocate Fooks on 1 and 4 April 2016 respectively.

23. The passages in *Archbold: Criminal Pleading, Evidence and Practice 2016* to which Advocate Calderwood has referred appear in Chapter 33 on Conspiracy, Encouragement and Attempt. Paragraph 33-63 sets out the principle:

> "*Ordinarily, acts done or words uttered by an offender will not be evidence against a co-accused absent at the time of the acts or declarations. However, it is now well established that the acts and declarations of any conspirator made in furtherance of the common design may be admitted as part of the evidence against any other conspirator. Such acts and declarations may provide evidence not only of the existence, nature and extent of the conspiracy, but also of the participation in it of persons absent when those acts or declarations were made. …*
>
> *The extent to which declarations made and actions done by a person in furtherance of a conspiracy are admissible is never an easy problem to solve: R. v. Donat, 82 Cr.App.R 179 at 180, CA. However, the authorities are conveniently reviewed in R. v. Devenport and Pirano [1996] 1 Cr.App.R 221, CA; and R. v. Jones [1997] 2 Cr.AppR. 119, CA.*"

24. The importance of looking at the furtherance of a common design is summarised in para. 33-65 of *Archbold*:

> "*The act or declaration may also be in furtherance of the common design. That means "no more than that the act must be demonstrated to be one forming an integral part of the machinery designed to give effect to the joint enterprise": R. v. Reeves, unreported, December 4, 1998, CA (97253251). …*

> *Matters recorded by one conspirator for his convenience, mere narratives, descriptions of past events or records made after the conclusion of the conspiracy are not in furtherance of the common design and are thus not admissible against anyone other than the maker: R. v. Blake (1844) 6 Q.B. 126; R. v. Jones, ante. Usually the question of admissibility will relate to directions, instructions or arrangements or to utterances accompanying acts: Tripodi v. R. (1961) 104 C.L.R. 1 at 7, approved by Glidewell L.J. in R. v. Gray and Liggins [1995] 2 Cr. App.R. 100, CA, R. v. Jones, ante. However, an aide memoire might be admissible if it enabled the author to do something pursuant to the note which was intended to advance the agreement: see R. v. Reeves, ante.*"

25. By reference *inter alia* to *R v Jones* [1997] 2 Cr App R 119, it is apparent that three things must be established: (i) that the act or declaration was made by a conspirator; (ii) that it was reasonably open to the interpretation that it was made in furtherance of the alleged agreement; and (iii) that there is some further evidence beyond the document or utterance itself to prove that the other was a party to the agreement. Paragraph 33-68 also clarifies that:

> "*The principle stated in § 33-63 applies when the charge is one of a crime committed in pursuance of a conspiracy, whether the indictment contains a count for conspiracy or not, and whether the co-conspirator be indicted or not, or tried or not: Phillips, Treatise on Evidence (4th ed., 1820), pp. 96-100; Phipson on Evidence (18th ed.), para. 31-46; R. v. Jones, ante; R. v. Murray [1997] 2 Cr.App.R. 136, CA. The principle does not, however, extend to cases where individual defendants are charged with a number of separate substantive offences and the terms of a common enterprise are not proved or are ill-defined: R. v. Gray [1995] 2 Cr.App.R. 100, CA, as explained in R. v. Murray, ante.*"

26. Although Advocate Fooks has also advanced an alternative reason for not admitting document 56, she has analysed the cases cited in the passages in *Archbold* (and in *Blackstone's Criminal Practice 2001*, where the positon is set out before the exception was preserved by section 118 of the Criminal Justice Act 2003) and suggests that the prosecution has failed to show that this document is an act or declaration "*in furtherance of a common purpose*". In reply, Advocate Calderwood submits that the common design alleged by the prosecution is that Mr Alaia was to gift the Defendant the Jaguar in return for a loan from the Bank. This involved both in committing the offence of corruption. Although the moment that the Defendant took possession of the vehicle was when these offences crystallised, he further submits that the common design was still ongoing because Mr Alaia had not yet received his part of the deal. Accordingly, when the loan process at the Bank failed, the common design altered in that the Defendant was then tasked with obtaining a loan for Mr Alaia from elsewhere. Moreover, when that second process also failed, the common design altered once again, in that Mr Alaia was to take the Jaguar back from the Defendant, or that Mr Alaia's wife was to benefit from the proceeds of sale.

27. In my judgment, Advocate Calderwood's submissions take matters beyond what is put in issue by the indictment faced by the Defendant. The Particulars of Offence are explicit in that the Jaguar was a gift "*for facilitating the application of the said Sam Alaia for a loan of £975,000 by the said SG Hambros Private Bank*". Because of the way in which the case is put, I do not accept the way Advocate Calderwood now seeks to justify what happened thereafter. Anything done by the Defendant to seek a loan facility for Mr Alaia from some entity other than his employer is not within the terms of the corruption charge the Defendant is resisting. The common design, in so far as it relates to criminal activity, is, in my view, necessarily confined to what happened in relation to the Bank and nothing beyond it. In circumstances where there is no count of conspiracy, I take the view that it is necessary to look at what the conspiracy alleged could have been to see what the common design was. Given that Advocate

Calderwood has quite accurately referred to the facts of the offences of corruption as being the common design on which he relies, he is unable to expand the common design in the manner he has attempted to in order to put this message from some six months or longer after what would otherwise have been the conclusion of the conspiratorial acts into the principle enunciated in *Archbold*.

28. In reaching that conclusion, I have applied the same principles that are set out in the English law cases to which I have been referred. I regard the document in the same light as if it were a statement or account of some event that has already taken place (see, eg, Dixon CJ in *Tripodi v R* (1961) 104 CLR 1 (at page 7), quoted in *R v Jones* (*supra*)). There is simply nothing in November 2013 that could be said to be advancing the common purpose where the nature of the allegation against the Defendant (and the nature of the allegation that would be levelled against Mr Alaia were he facing prosecution) is that any common purpose had already run its course. Whilst what Mr Alaia has written would amount to an admission against him, it is not, in my judgment, admissible evidence against the Defendant. As was explained by Dixon CJ in *Tripodi v R* (at page 6, quoted with approval by Glidewell LJ in *R v Jones* (at page 129):

> "*It must be remembered that the basic reason for admitting the evidence of the acts or words of one against the other is that the combination or preconcert to commit the crime is considered as implying an authority to act or speak in furtherance of the common purposes on behalf of the others. From the nature of the case it can seldom happen that anything said by one which is no more than a narrative statement or account of some event that has already taken place, that is to say, some statement which would be receivable in evidence against the man who made it as an admission and not otherwise, can become admissible under this principle against his companions in the common enterprise. Usually the question of admissibility will relate to directions, instructions or arrangements or to utterance accompanying acts. It is customary at criminal trials simply to treat the presence of absence of the prisoner as decisive of the admissibility of things said and it is a pity to rob that empirical and convenient test or any of its usefulness. But often enough in an ordinary case where there is no confederation or preconcert, directions, instructions and the like although spoken in the absence of the prisoner may, according to the circumstances of the case, be admissible as res gestae or relevant facts. It is easy to understand therefore that preconcert confederacy or combination may make such directions and the like admissible when they are given by one of several acting in preconcert with the prisoner and are given in furtherance of the common design.*"

The Court of Appeal in England and Wales adopted that passage as an accurate exposition of the law and I do so on the same basis in Guernsey. However, I consider that the underlying rationale for the principle is singularly absent in respect of document 56. It is no more than an after the event statement and does not, in my view, amount to furthering any common purpose at all. Instead, I find that it amounts to a narrative statement or an account of some event that has already taken place and so is not admissible against the Defendant.

29. In the light of that conclusion, I am not persuaded that this document is admissible under the exception to the hearsay rule, which I accept would in principle be available in Guernsey law to the prosecution, that this is a statement in furtherance of a common design (or purpose). Accordingly, I do not need to consider whether the other elements that need to be established for the principle to apply have been satisfied. However, I do need to go on and consider whether the alternative basis advanced by Advocate Calderwood that this is a business document renders document 56 admissible, in which case I would still have to consider whether it should be excluded pursuant to section 78 of the 2003 Law.

30. I have re-visited section 2 of the 2002 Law for this purpose. Subsection (1)(a) requires that "*the document was created or received by a person in the course of a trade, business,*

profession or other occupation, or as the holder of a paid or unpaid office". Advocate Calderwood has argued that the way the Defendant was continuing to act was as part and parcel of his employment with the Bank. Mr Alaia was a client of the Bank and may at this time have remained a client of the Bank so any dealings the Defendant had with Mr Alaia was in the course of the Bank's business.

31. I do not think that that analysis is correct. In that regard, I consider it proper to draw a distinction between correspondence using the Defendant's work e-mail address (where I take the view that there is a presumption that the document is a business document unless shown otherwise) and an exchange from the Defendant's private, or personal, e-mail address (where I consider that there is a presumption that it is not a business document unless the contrary is shown, perhaps by reference to the contents and it being shown that it was convenient to use a different e-mail account but for a business purpose). In this instance, the message to which objection is taken was a response (as far as I can tell from the way it is presented in the proposed trial bundle) to a message the Defendant chose to send from his personal e-mail address. Looking at what the Defendant wrote, there is nothing, in my view, giving an indication that this was a business-related message. The closest the Defendant came was when he indicated that he would telephone Mr Alaia, but the remainder of his message was about family matters and so I am not prepared to draw the inference that the reason for the Defendant indicating he would telephone Mr Alaia related to the business of the Bank. As can be seen from the various e-mail exchanges in which Mr Alaia participated, he was ready to use the Defendant's work e-mail address when it suited him. In the absence of him explaining why he chose on this occasion, especially when it appears that he had other messages from the Defendant available to him at the time to which he could have pressed the reply button which would have gone to his work e-mail account, I have concluded that I should regard this exchange as being outside the Defendant's working environment. Document 56 is not, therefore, a business document in respect of which the exception to the hearsay rule in section 2 of the 2002 Law applies.

32. Although it is not described as such by Advocate Calderwood when he set outs the basis for asserting admissibility, he has from time to time claimed that the *res gestae* doctrine can be used to make some of the documents admissible. I have asked myself whether the possibility of concoction or distortion exists or whether that possibility can be disregarded. Mr Alaia has blown hot and cold over whether the car remained his or not. He does not appear to have been consistent in what he has written to the Defendant and what he has written, for example, to Mr Castellino at times. On the one hand, what Mr Alaia wrote on 24 November 2013 reflects what he then wrote to Mr Castellino on 15 January 2014 (in document 59, which I have just ruled to be capable of being relied on by the prosecution). However, because of the passage of time since the events of April 2013 and even the first raising of the car by Mr Alaia on 28 October 2013, I cannot find that this statement was made as part of any drama leading up to a climax and so can be regarded as part of the event or transaction. As I have just indicated, I do not regard this message as even part of any common purpose to act corruptly that existed in or around April 2013. It also has nothing to do with any contemporaneous bodily or mental state. In summary, it lacks the touchstone of spontaneity generally associated with *res gestae*. As such, I do not consider that the doctrine of *res gestae* assists the prosecution here. Instead, I find that document 56 is inadmissible hearsay and so cannot be relied on by the prosecution. It is, of course, quite possible that this ruling will make little or no difference to the prosecution because of the admissibility of document 59. I am also satisfied that preventing reliance on this one document will not break the flow of information forming the prosecution case and on which the Defendant will be able to comment in the manner I have already set out. In other words, it will not, in my view, create a gap leaving the Jurats questioning anything.

Conclusion

33. Despite the efforts of Advocate Fooks, the outcome of this application to have the various documents on which the prosecution wishes to rely excluded, the only document in respect of which she has succeeded is document 56. The other documents are all, in my judgment, properly capable of being adduced as part of the prosecution case in the event that use of them by the witnesses producing them is still desired. Naturally, as I have indicated in relation to other applications, this is a provisional view and if the situation develops differently at trial any of these rulings is potentially capable of being re-opened in the light of those changed circumstances. I should also add that I would like to see the material being presented in a more intelligible fashion, but that is a matter for the prosecution to consider.

34. In order to be consistent, however, and so of my own motion, I have decided that the same outcome as I have found in respect of document 56 must potentially apply to document 51. I may, however, have to review that decision if the further information I have sought about the first e-mail in time in document 51 shows that it was sent to the Defendant's work e-mail address rather than his home address. If, as seems to be the case, the exchange was actually commenced by Mr Alaia writing to the Defendant at his personal e-mail address, I would similarly confirm that this is not a business document and nor is it something written in furtherance of a common design. In this instance, Advocate Calderwood has also suggested that the document is admissible because it is not hearsay because it is not admitted as evidence of the matters stated therein. However, given that the first e-mail in the string of messages from Mr Alaia on 12 November 2013 already features in document 50, which was something provided by the Defendant to Ms Le Maitre as part of the internal Bank investigation into Mr Alaia's complaint (and where I can be satisfied that it is, therefore, a business document), there is no prejudice to the prosecution in ruling that document 51 (referring principally to the subsequent exchange) should be treated as inadmissible for the reasons I have given. In short, it adds nothing further to the material on which the prosecution can already rely.