

ROYAL COURT
(Samedi Division)

7th April, 1993

51.

Before: The Bailiff, and
Jurats Vint and Rumfitt

IN THE MATTER OF THE INVESTIGATION OF FRAUD (JERSEY) LAW, 1991

AND

IN THE MATTER OF CHESTVALE PROPERTIES LIMITED AND
HODDLE INVESTMENTS LIMITED

AND

IN THE MATTER OF THE REPRESENTATIONS OF THE OWNER OF THE ACCOUNT
STYLED "J. & N. MCMAHON" AND RONALD COLIN GEORGE PROBETS

Advocate J. A. Clyde-Smith for the Attorney General
Advocate R. J. Michel for McMahon
Advocate G. R. Boxall for Probets

JUDGMENT

THE BAILIFF: The Court is sitting to consider the Representations of the owners or controllers of two accounts with A.I.B. (C.I.) Limited styled J. and N. McMahon and Ronald Colin George Probets respectively. The matter arises from the issue by Crown Advocate Whelan, with the authority of H.M. Attorney General, on the 24th November, 1992, of a notice to A.I.B. (C.I.) Limited under the powers conferred on him by the Investigation of Fraud (Jersey) Law 1991 (the Law). A slightly less detailed notice had been issued by the Crown Advocate on the 4th September but no point arises here as in a covering letter to the bank of the 24th November the Attorney General withdrew the earlier notice.

The principal request in the McMahon Representation is for an order of certiorari to quash the Attorney General's decision to issue the notice. That of the Probets Representation is to adjudge the lawfulness, or otherwise, of the decision. Both

Representations, of necessity, carry the clear inference that the Royal Court has an inherent power to supervise the exercise by the Attorney General of a discretionary power conferred on him by statute.

The question before the Court, therefore, is whether the Attorney General's decision to issue the notice of the 24th November, and for that matter any similar notice under the statute, is open to judicial review by the Court and, if so, to what extent. The representors say that the Court has the power to examine all the circumstances of the notice, including its merits, which, of course, would include the facts giving rise to the issue of the notice. The Attorney General has accepted that the Court has a power but only to a very limited extent. That is to say, it may examine:-

1. Whether the powers of the Attorney General exist to make a decision.
2. The extent of those powers.
3. Whether or not the powers have been exercised in the appropriate form.

Beyond that the Attorney General says that, because the legislature has made no provision in the statute for an appeal, there are no other means by which the Court can or should judicially review the exercise of the Attorney General's discretion in a matter arising out of a criminal investigation.

The present criminal investigation is in the Republic of Ireland and is being carried out under the aegis of the Director of Public Prosecutions of that country.

There appeared to be some confusion at the beginning whether the Court, if it held it had power to review the Attorney General's decision under the Law, should do so in the instant case. Both counsel for the representors believed that the Court was only being asked to examine its powers and no more. Mr. Clyde-Smith for the Attorney General submitted that the proper question was not "can the Court interfere?" but "should it?". Both counsel for the representors had not come prepared to argue any matters of fact. The Court, in reaching its decision, whilst not advertng in detail to the facts, has taken into account whether, even if it had the power to intervene, it should do so in criminal matters, even those arising in another country, but with investigations to be carried out over here.

The relevant part of the Law is as follows:-

- (1) *The powers of the Attorney General under this Article shall be exercisable in any case in which it appears to him that -*
 - (a) *there is a suspected offence involving serious or complex fraud, wherever committed; and*
 - (b) *there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs, of any person.*
- (2) *The Attorney General may by notice in writing require the person whose affairs are to be investigated ("the person under investigation") or any other person who he has reason to believe has relevant information to answer questions or otherwise furnish information with respect to any matter relevant to the investigation at a specified place and either at a specified time or forthwith.*
- (3) *The Attorney General may by notice in writing require the person under investigation or any other person to produce at such place as may be specified in the notice and either forthwith or at such time as may be so specified any specified documents which appear to the Attorney General to relate to any matter relevant to the investigation or any documents of a specified description which appear to him so to relate; and*
 - (a) *if any documents are produced, the Attorney General may -*
 - (i) *take copies or extracts from them;*
 - (ii) *require the person producing them to provide an explanation of any of them;*
 - (b) *if any such documents are not produced, the Attorney General may require the person who was required to produce them to state, to the best of his knowledge and belief, where they are."*

There are draconian penalties for failing to comply with the requirements of a notice issued under paragraphs two and three.

It is useful to look at the background to the Law. In 1983, the Lord Chancellor in England set up the Roskill Committee to examine how fraud trials could be improved and to recommend improvements "to secure the just, expeditious and economic disposals of such proceedings". In its report on page one the Commission said this :-

"The public no longer believes that the legal system in England and Wales is capable of bringing the perpetrators of serious frauds expeditiously and effectively to book. The overwhelming weight of the evidence laid before us suggests that the public is right. In relation to such crimes, and to the skilful and determined criminals who commit them, the present legal system is archaic, cumbersome and unreliable. At every stage, during investigation, preparation, committal, pre-trial review and trial, the present arrangements offer an open invitation to abuse and delay."

The opening words of paragraph 2.62 are illuminating, they are:-

"There is a paramount need for those charged to the investigation of fraud to be able to move swiftly from the first moment that there is a suspicion of fraud."

The Commission's report bore fruit in the Criminal Justice Act, 1987, which set up the office of Director of the Serious Fraud Office who is appointed by the Attorney General and works under his supervision. Sections (2) and (3) of the Act correspond, mutatis mutandis, to paragraphs two and three of Article 2 of the Law. Section 2.1 of the Act provides that the powers of the Director may be exercised for the purposes of an investigation under Section 1 on a request made by the Attorney General of the Isle of Man, Jersey or Guernsey under legislation corresponding to Section 1 and having effect in the Island whose Attorney General makes the request. It was obvious that that Section would not have been included unless there were to be reciprocal legislation in each of the Dependencies. Accordingly, as an interim measure, Section 2 of the Act was extended by Orders in Council, subject to modification, to Jersey and Guernsey in 1989. Both Orders came into force on the 18th May, 1989, and ceased to have effect on the expiration of two years from that date. The Law was passed by the States on the 26th February, 1991, and sanctioned by Her Majesty in Council on the 16th April, 1991.

The cases in which the Royal Court has exercised its undoubted general supervisory powers under its inherent jurisdiction as a Superior Court, fall into two groups. The first is where a statute provides for a right of appeal from an administrative decision, for example, the Housing (Jersey) Law 1949. In such instances there has been a number of cases over the years where an appellant has found that the Court has exercised its appellate powers under the statute as if it were exercising its powers of judicial review. That matter was touched upon by the Court of Appeal in the Housing Committee v. Phantesie Investments Limited (1985-86) J.L.R. 96.

The second is where the Court is exercising its supervisory powers outside any statute containing rights of appeal. See for example Tett v. The States of Jersey and Rent Control Tribunal (1970-71) J.J. 1805, and Taylor v. Constable of St. Helier (1980) J.J. 29. To the exercise of these powers it may be noted that the Court has added the power to make declaratory judgments: Craven v. IDC (1970) J.J. 1425. Nevertheless, the Court has not refined its supervisory powers in any way, nor sought to constrain them, by attaching to them any particular attributes which encompass the prerogative writs issuing from the High Court, although the Attorney General in Tett suggested that, in that case, the Court should consider acting as if it were considering an application for certiorari. It may be, as Mr. Michel argued, that the prerogative writs, certainly that of certiorari, which had been issued before 1562, were subsumed into the Royal Court's powers by the Charter of that year from Her Majesty Queen Elizabeth I. Be that as it may, the prerogative powers of issuing the equivalent of such writs have been exercised by the Royal Court for too long for its powers in this sphere to be questioned irrespective of the names given to particular examples of those powers. At p.p.668/9 of Sir William Wade's Administrative Law (6th Edition), there are to be found two contrasting statements by Lord Denning showing the swing of opinion from a narrow interpretation of the powers of the Courts in issuing prerogative writs to a much wider general supervisory power. In fact, as the author suggests, making them (the prerogative writs) **"interchangeable under a unified system of procedure, the application for judicial review"**. The Court considers that that unified system has indeed been operating in Jersey for many years.

Three preliminary matters may be mentioned here.

1. The fact that appellate rights are not contained in a statute cannot by itself exclude judicial review in appropriate cases. Padfield v. the Minister of Agriculture, Fisheries and Food, (1968) A.C. 997.
2. An ouster provision in a statute must be in clearest express language. 4 Halsbury 1 p. 57.
3. Whilst a bank is under a duty of confidentiality to its customers, it will not be in breach of that duty if it is compelled to give information under a lawful order. Barclays Bank plc trading as Barclaycard v. Taylor (1989) 1 W.L.R. 1066. In that case Lord Donaldson of Leamington M.R. referred to the four exceptional circumstances where the duty has to give way and which were set out in Tournier v. National Provincial and Union Bank of England (1924) 1 K.B. 461. This Court considers that that is the position in Jersey in relation to a bank's duty of confidentiality, although we are not called upon to decide this point. We note

that qualification (b) in the Tournier case is "whether there is a duty to the public to disclose".

Can it be said that if a fraud was suspected by customers of a particular Bank and the police were investigating that fraud, that that qualification has not applied to the position in Jersey between 1924 and 1991? Mr. Michel cited R. v. Criminal Injuries Board ex parte Lain (1967) Q.B.D. 864 as authority for the proposition that whilst the law has to adjust itself to meet changing conditions, the Court ought not to be put off from exercising its powers merely because the matter has not been the subject for consideration previously. Or as Parker C.J. put it at p. 882 - **"They (the prerogative remedies) have varied from time to time being extended to meet changing conditions"**. With these views this Court concurs but care should be taken to compare like with like.

Provisions relating to a Banker's duty of confidentiality are contained in paragraph (9) of Article 2 of the Law which is as follows:-

"A person shall not under this Article be required to disclose information or produce a document in respect of which he owes an obligation of confidence by virtue of carrying on any banking business unless -

- (a) the person to whom the obligation of confidence is owed consents to the disclosure or production; or**
- (b) the Attorney General has authorized the making of the requirement."**

Article 3(1) deals with matters subject to what may be called statutory secrecy. It may be said therefore that the legislature applied its mind to the question of a banker's duty of confidentiality but nevertheless provided for it to be overridden by the Attorney General exercising his powers under the Law.

The Court does not feel it necessary to examine in great detail all the interesting cases cited by Mr. Michel because they show that the English Courts have, as the Court has noted in the extract from Wade, been prepared to widen the scope of judicial review and Crown Court Judges acting administratively, and even Governors of colonies, have found their decisions subject to judicial review. But the four cases that come nearest in general content to the instant one are these:-

R. v. Director of the Serious Fraud Office ex parte Saunders
(1988) N.L.J. 243

R. v. Director of the Serious Fraud Office ex parte Smith
(1992) 3 All E.R. 456 HL

Moore Stephens v. H.M. Procureur (7th September, 1992) -
Guernsey Unreported Judgment

Richard O. Bertoli and Others v. Sir Denis Malone (Privy
Council and Cayman Island Court of Appeal)

The Saunders case concerned the question whether the Director of the Serious Fraud Office could issue a notice after the applicant had been charged with a criminal offence. The Court held that he could. That decision did not go to the merits of the exercise of the Director's discretion to issue the notice. Smith's case dealt mainly with a suspect's "right to silence" and the effect of the Police and Criminal Evidence Act 1984 and the codes of practice derived there under. These two matters were discussed obiter in Saunders and that decision was subjected to a careful scrutiny in Smith. At page 472 Lord Mustill says this at letters D to E.

"In the light of these unsystematic legislative techniques there is no point in summarising the various statute drawn to our attention. They do no more than show that the legislature has not shrunk where it has seemed appropriate from interfering in a greater or lesser degree with the immunities grouped under the title of the right to silence."

It may be said by analogy that the legislature here has not shrunk from interfering with the right to judicial review.

In Smith's case the House of Lords held that the powers of the Director do not cease as regards the questioning of a person under investigation when he is charged. It did not examine the merits of the decision itself nor the matters that led to the Director deciding to issue the notice. At page 475 Lord Mustill cited with approval an extract from the judgment of Windeyer J. in Rees v. Kratzmann (1965) 114 CLR 63 at 80 -

"If the legislature think that in this field the public interest overcomes some of the common law's traditional consideration for the individual then effect must be given to the statute which embodies this policy".

He added -

"In the present case the only issue is whether there is something in the language of the act or by necessary implication to show that the policy embodied in the act should not be given effect as regards the questioning of a suspect who is being charged."

The same may be said of a third party from whom evidence is required under the Law. It seems to the Court that in essence

both these two cases concern the question of procedure corresponding to Mr. Clyde-Smith's second exception to the exclusion rule, that is to say, the extent of the Attorney General's powers which may be examined by the Court. They do not appear to be authority for the proposition that the merits of the Director of the Serious Fraud Office's decision to issue a notice is subject to judicial review, but the cases may be held, nevertheless, to include a necessary implication to that effect.

Mr. Boxall for the Probets Representor supported Mr. Michel's arguments.

For the Attorney General Mr. Clyde-Smith cited R. v. Controller General of Patents (1899) 1 Q.B. at 912 to 913. There A. L. Smith L.J. referred to the position of the Attorney General. The facts of that case are not germane to the present one. It is, nevertheless, interesting to compare the position of the Attorney General of England with that of Jersey and the Procureur of Guernsey. Each of them is appointed by the Crown and holds office during Her Majesty's Pleasure. Each is a member of the legislature but here the similarity stops. The Attorney General (and Procureur of Guernsey) are not answerable to the States of Jersey or Guernsey for the exercise of their functions including the exercise of their discretion in appropriate cases. It might be said, therefore, that the Courts of Jersey and Guernsey ought to be more ready to examine the exercise by the Attorney and Procureur of their discretion in matters of the present nature. But the short answer is that the Attorney General of Jersey and the Procureur of Guernsey are answerable to the Crown in a manner that the Attorney General of the United Kingdom, in his capacity as a member of the Government, is not. The passage from the judgment of A. L. Smith L.J. is as follows:-

"I wish to say a word or two about the position of the Attorney-General, because in my judgment it is of importance in this case, and his position appears likely to be lost sight of. Everybody knows that he is the head of the English Bar. We know that he has had from the earliest times to perform high judicial functions which are left to his discretion to decide. For example, where a man who is tried for his life and convicted alleges that there is error on the record, he cannot take advantage of that error unless he obtains the fiat of the Attorney-General, and no Court in the kingdom has any controlling jurisdiction over him. That perhaps is the strongest case that can be put as to the position of the Attorney-General in exercising judicial functions. Another case in which the Attorney-General is pre-eminent is the power to enter a nolle prosequi in a criminal case. I do not say that when a case is before a judge a prosecutor may not ask the judge to allow the case to be withdrawn, and the judge may do so if he is satisfied that there is no case; but the Attorney General alone has power

to enter a nolle prosequi, and that power is not subject to any control. Another case is that of a criminal information at the suit of the Attorney-General - a practice which has, I am sorry to say, fallen into disuse. The issue of such an information is entirely in the discretion of the Attorney-General, and no one can set such an information aside. There are other cases to which I could refer to be found in old and in recent statutes, but I have said enough to shew the high judicial functions which the Attorney-General performs. There is one other matter to which I will refer before I come to the facts of this case. In *Van Gelder's Patent* (1) the position of the Attorney-General in these matters is stated in the judgments in the Divisional Court and in the Court of Appeal. I will read a passage from the judgment of Bowen L.J.: "At common law, the Attorney-General is, when he is exercising his functions as an officer of the Crown, in no case that I know of a court in the ordinary sense." It follows that his decisions, when exercising such functions, were not subject to review by the Court of Queen's Bench, and are not now subject to review by the Queen's Bench Division or this Court."

Mr. Michel submitted that insofar as *R. v. Controller General of Patents* is inconsistent with the *Council of Civil Service Unions v. Minister of the Civil Service* (1985) A.C. 374, it should be regarded as overruled. He said that because that case decided, inter alia, that executive action was not immune from judicial review merely because it was carried out from powers derived from the common law or the prerogative rather than from the statutory source, how much more so was this the position of the Attorney General acting under a statute or indeed even under the Crown's prerogative? However, the House of Lords also held that it was for the executive and not the Courts to decide whether in any particular case the interest of national security outweighed those of fairness which was the test the House of Lords applied to the Minister's decision. That case does not, it seems to the Court, do no more in the present context, than show that the Attorney General has to have evidence from a proper source upon which he can act, but the extent of that evidence and the evaluating of it remains a matter for his discretion.

The third case, the *Moore Stephens* case, upon which Mr. Clyde-Smith relies, is almost exactly in point except that the Guernsey statute requires the Procureur to have reasonable grounds that there is a suspected offence. The difference, therefore, Mr. Clyde-Smith submitted, between that statute and the Law is that the test in Guernsey is objective whereas here it is subjective. The judgment of the Deputy Bailiff is as follows:-

"The partners of *Moore Stephens*, a firm of Accountants practising in Guernsey, applied to me to review the decision of Her Majesty's Procureur which was communicated to them by

notice dated the 2nd July, 1992, in exercise of his powers pursuant to section 1 of the Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law, 1991.

At the outset of the case it was made clear that Moore Stephens had in fact complied with the terms of the notice. Their reason for doing so was explained by Advocate Beattie on their behalf as being that failure to comply could result in criminal sanctions being applied against them, a situation which as a firm of professional people they were not willing to countenance. Their having complied with the notice to the satisfaction of Her Majesty's Procureur there is on the face of it nothing for this Court to resolve. However Her Majesty's Procureur did not apply to me to dismiss the action on those grounds and in view of the fact that there has been no consideration given by this Court to the provisions of the Law of 1991 I felt it proper to hear argument from Mr. Beattie on the preliminary point as to whether this Court had any power to review the Procureur's decision.

In recent times Guernsey Laws which give States Committees and other public bodies such as the Financial Services Commission rights to make decisions affecting the rights of individuals regularly contain provisions that any person aggrieved by a decision of the committee or body concerned shall have a right to appeal to the Royal Court on the grounds that the decision was ultra vires or unreasonable (see for example section 40 of the Housing (Control of Occupation) (Guernsey) Law, 1982, as amended).

The Law of 1991 contains no provision for appeal to this Court of a decision of Her Majesty's Procureur to request information under section 1 of the Law. It is clear that the States in approving the Projet de Loi enacting the Law of 1991 and Her Majesty in Council in ratifying it were prepared to sanction the situation whereby a person aggrieved by the exercise of those powers by H.M. Procureur should not have any statutory right of appeal against the Procureur's decision.

On behalf of the applicants Mr. Beattie argued that natural justice could be eroded if there was no power for this Court to question Her Majesty's Procureur as to the grounds for his decision to exercise his powers under the Law of 1991. Mr. Beattie also pointed out that there was no definition of serious or complex fraud. He also sought to draw my attention to certain remarks made by the previous Procureur when he reported to the Advisory and Finance Committee on the need for the legislation, but this is not a case where in any event I feel it proper to look further than the actual wording of the statute.

I can find no authority for the proposition that this Court has any general power of judicial review of administrative decisions akin to what has developed in the English Courts. We do not have the prerogative writs which are the source of much of the English powers of judicial review. In saying this I am not deciding that there are no circumstances where this Court in a suitable case might intervene to give relief in respect of a complaint against the States, a committee thereof or some other statutory body notwithstanding the fact that there is no statutory right to appeal to this Court.

In this case we are dealing with the powers of an officer of this Court who is appointed to his office by Her Majesty The Queen. That fact puts H.M. Procureur in a different position to the other bodies to which I have referred.

In addition to the very specific powers contained in section 1 of the Law of 1991 the holder of the office of Procureur, and in his absence the holder of the office of Comptroller, have under our constitution certain powers notably those involving the direction of charging of people with criminal offences and the subsequent conduct of proceedings against them which have to be exercised without any interference or direction from the Royal Court other than when it is sitting as the court of trial. I therefore do not find it surprising that this Court has no power to review the decision of Her Majesty's Procureur to exercise his powers under section 1 of the Law of 1991. I accordingly dismiss this application.

I have not heard argument as to costs, but as this appears to have been brought as a test case I do not consider it appropriate to make any award of costs in favour of the Crown."

Mr. Michel criticised the judgment and said, firstly, that in the light of the English cases he had cited it was plainly wrong. Moreover the appellant had obeyed the notice and all that remained to be done was not the setting aside of the notice but adjudicating upon its validity. Secondly, there appeared to be no line of cases discernible in the judgment as there is in Jersey where the Royal Court has exercised its general supervisory powers. If Mr. Michel is right in this aspect about the prerogative writs being in force before 1562 in relation to this Island, it is difficult to see why they were not in force in Guernsey, although the Charter of Queen Elizabeth I refers only to Jersey. The Deputy Bailiff distinguished between the Attorney General's exercise of his powers under the Guernsey statute and a complaint against the States of Guernsey or a Committee and kept open for future argument the extent of the power of the Royal Court of Guernsey to intervene in the latter type of case. He drew, therefore, a very clear distinction between Her Majesty's Procureur as the principal Law Officer of the Crown in Guernsey

and the administration of the Island carried out through the States and Committees. Much the same distinction was urged upon the Court by Mr. Clyde-Smith as regards this Island.

The fourth case, which in effect is Mr. Clyde-Smith's main plank, is the Bertoli matter. That case went to the Privy Council but the Judicial Committee adopted in toto the judgment of the Court of Appeal of the Cayman Islands which was delivered by Georges J. A. In this case the appellants, the equivalent of the representors, were United States citizens who had been charged with "racketeering" described by the Judicial Committee as "a term of art in the United States denoting specific criminal conduct". (We hasten to say that the comparison does not mean that we regard the Representors in the same light). Under a Treaty of Mutual Legal Assistance between the United States and the United Kingdom which, for the purposes of the case included the Cayman Islands, a request was made for the production of certain documents and depositions of witnesses resident in the Cayman Islands. The authority to whom an application has to be made in those Islands is the Chief Justice acting in an administrative capacity. The purpose of the Treaty is to enable assistance to be afforded to each of the contracting countries in the investigation, prosecution, and suppression of criminal offences by, *inter alia*, taking testimony from witnesses and providing documents, records and articles of evidence. The relevant issue for the purposes of the instant case was stated by the Judicial Committee to be this:

"It being conceded that contrary to the claim in the amended writ the appellants have no right to demand a hearing. Is the respondent bound before executing a request to consider whether, as a matter of discretion, he should give the appellants an opportunity to make oral representations?"

At page 11 in his judgment Georges J. A. considered the earlier legislation, later repealed, which required the Judge of the Cayman Islands to balance the duty of confidentiality with the interests of justice in criminal cases. However, he continued on the same page, pointing out that under the Law and Treaty the policy of the Cayman Islands in this respect - ***"has clearly been adopted that the sanctions imposed to buttress the duty of confidentiality shall give way to the demands for the suppression of crime."***

Even assuming that the Law requires the Attorney General to have reasonable grounds for saying that an offence has been committed Georges J. A. qualified such requirements as follows at page 12:-

"In deciding whether there are reasonable grounds for believing that an offence has been committed and that the information sought relates to the offence, the authority

(here of course the Attorney General) must assume the correctness of the information laid before him in the request. Clearly he cannot receive evidence to raise doubt as to this, again these are matters for analysis and inference on which the authority (the Attorney General) can confidently and accurately arrive at a decision on the documents placed before him."

Persons required to produce information may or may not be suspects as Article 2(2) makes clear. Also at page 12 Georges J. A. referred to R. v. Leicester Crown Court ex parte Director of Public Prosecutions (1987) 1 W.L.R. 1371 (a case involving the Police and Criminal Evidence Act 1984) and the judgment of Watkins L. J. in the Divisional Court who "stressed the undesirability of notifying a suspect of the steps being taken in the course of an investigation thus affording such a suspect the opportunity to conceal or destroy evidence". A point relied on strongly by Mr. Clyde-Smith.

Mr. Michel (and Mr. Boxall by necessary inference) stressed a passage of the judgment which cited the well known passage of Lord Denning in R. v. Race Relations Board ex parte Selvarajan (1975) 1 W.L.R. 1686, at page 1694 where he said:-

"In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends upon the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress or in some way adversely afflicted by the investigation and report then he should be told the case made against him and be afforded a fair opportunity of answering it."

but Georges J. A. qualified that passage as follows:-

"Of the categories of consequences mentioned above the appellants can conceivably fit only in the final omnibus clause of persons who may be "in some way adversely afflicted by the investigation". It cannot be an affliction to have relevant evidence adduced by the prosecution at ones trial. The "affliction" can only be the rumaging into ones affairs as a result of the execution of the request by the Authority" (Attorney General).

In the instant case, if the owners or controllers of the accounts are suspected persons, the observations of Georges J. A. may very well be applicable. If not the other matters referred to in the paragraph in Lord Denning's judgment should not prevent the disclosure of the required information as being in the public interest under a notice issued by the Attorney General.

Mr. Clyde-Smith submitted that because this was a criminal matter and the English cases were concerned mainly with civil rights of individuals that the public interest could and should in appropriate cases such as this one override those rights. He said in an investigation under the Law (1) speed was essential (2) confidentiality should be maintained so that suspects would not be in a position to destroy or tamper with evidence (3) witnesses had to be protected and (4) there is always the possibility that an early warning to suspected persons would open the way for such persons to manipulate others.

The evaluation of the relative importance of the different aspects of the public interest was considered in the Gouriet case (Gouriet et al v. UPW (1978) AC 435). As Edwards in his work "The Attorney General, Politics and the Public Interest" puts it:-

"Although the larger constitutional issue of accountability to the Courts by the law officers of the Crown had been abandoned by the plaintiff before the case reached the House of Lords it is important to note that each of their Lordships rejected any jurisdiction on the part of the Courts to review and control of the Attorney General's decision in matters affecting public rights and the public interest generally".

The author cited a passage of Lord Wilberforce which explained why, in his Lordship's opinion, the Court should abstain from staking a claim to substitute their judgment for that of the Attorney General in matters affecting the public interests generally. Lord Wilberforce said at page 482:-

"The decisions to be made as to the public interests are not such as Courts are fitted or equipped to make. The very fact that, as the present case very well shows decisions are of the type to attract political criticism and controversy shows that they are outside the range of discretionary problems which the Courts can resolve. Judges are equipped to find legal remedies and administer on well-known principles discretionary remedies. These matters are widely outside those areas."

In DPP v. Humphries (1977) A.C. the House of Lords examined the Courts' judicial powers to review the abuse of process and the restraining influence to be applied by the Courts. Lord Dilhorne, a former Attorney General, said at page 25:-

"If there is a power ... to stop a prosecution on indictment in limine it is in my view a power that should only be exercised in the most exceptional circumstances - a Judge must keep out of the arena. He should not have to appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of Judges must not be

blurred. If a Judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval."

How much more may it be said that these observations are applicable to the exercise of a discretion under a statutory power such as the Investigation of Fraud (Jersey) Law 1991. The Courts are not investigators.

Commenting on submissions of the Attorney General of the day in the Court of Appeal in the Gouriet case Edwards says this:-

"The common thread running through all these discretionary powers is the Attorney General's answerability to Parliament and not to the Courts"

In the Jersey context one should substitute the Crown for Parliament.

Finally the late Professor de Smith in his work The Judicial Review of Administrative Action (4th Ed'n) at p. 297 lists a number of examples where the Courts (in England) show "special restraint" in applying tests of legality such as where an executive power is used and the exercise of which is not subject to appeal. It is fair to say, of course, that the same author reaches the conclusion that very few discretionary powers are found to be absolutely unreviewable when they have a direct impact on private rights (page 296) and at page 281 the author says that the last analysis is whether a Court is of the opinion that judicial intervention would be in the public interest (our emphasis). Running right through the cases and the text books is a constant return to these two important words. The decision to prosecute or not to do so is not, in the opinion of this Court, reviewable by the Royal Court but after a prosecution has been started and the matter is before the Court, it has a general supervisory jurisdiction to put right any matter concerning the prosecution which it considers to be unfair. To anticipate that is to usurp the functions of the Attorney General.

Mr. Clyde-Smith submitted as part of the background of the case, that the Attorney General had listened to representations from both Representors after he had issued the second notice, and took certain steps as regards the matters raised by them, particularly in relation to the persons who were instructing him from Dublin. The Court did not feel it necessary to examine these claims as they should be left to future enquiries, if need be, in the light of the Court's decision.

Having regard to the aims of the Law and the need for the reasons mentioned by Mr. Clyde-Smith to avoid giving suspected persons early warning of enquiries which would stultify the effect

of a notice, the Court felt able to distinguish between a review by the Court of a discretionary power in a civil matter and the investigation of criminal offences. If those served with notices are not suspected persons, the disclosure by them of the information sought ought not to be mere "rummaging about" in the words of Lord Denning, but assisting the proper administration of justice, which, clearly by the terms of the Law, is not confined to this jurisdiction.

Looking at the cases and the text books, the Court has come to the following conclusions.

- (1) It is not in the public interest that the decision of the Attorney General to issue a notice under the Law should be reviewable as to its merits.
- (2) Nevertheless, the Court has the power and in appropriate cases should exercise it to enquire into the three matters concerning the exercise of the Attorney General's discretion mentioned by Mr. Clyde-Smith. That is to say, (1) whether the powers of the Attorney General exist to enable him to make a decision (2) the extent of those powers and (3) whether or not those powers have been exercised in the appropriate form.

Accordingly, the Court dismisses the representations but as this is the first case of this nature to be brought before this Court and relates to an important matter, there will be no order for costs.

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Moore Stephens -v- H.M. Procureur (7th September, 1992) Guernsey
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4 Halsbury 1(1) paras. 1-2; 18-19; 51; 59.

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4 Halsbury 8: para. 1281.

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R. -v- Bristol Crown Court *ex parte* Bristol Press and Picture Agency (1987) 85 Cr.App.R.190, 191.

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