

CRIMEWATCH

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RECENT PUBLICATIONS

Scotland: Confiscation and Forfeiture

The Scottish Law Commission, in its Report on *Confiscation and Forfeiture, 1994*, makes recommendations, *inter alia*, to take into account obligations imposed by the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990; in particular to meet the requirements relating to the taking of provisional measures for the preservation of property before it is confiscated or forfeited; the safeguarding of the rights of the parties with interests in the property; and the making of arrangements for the enforcement of orders or requests by other Parties to the Convention in relation to the confiscation or forfeiture of proceeds or property. The Report, in 2 Volumes (Scot Law Com No.147, Cm.2622), is available from: HMSO, P.O. Box 276, London SW8 5DT, Fax 44-171-873-8200 and costs £27.60.

Commonwealth: money laundering

The Commonwealth Secretariat is pursuing its mandate from Heads of Government and Ministers to work to combat money laundering. The report on the May 1994 Workshop in Trinidad reveals significant advances in global awareness of and action to defeat this crime.

CORRUPTION

Council of Europe: Group on Corruption

The European Ministers of Justice, at their Meeting in Valletta in 1994 recommended the setting up of a multi-disciplinary Group on Corruption within the Council of Europe, under the responsibility of the European Committee on Crime Problems (CDPC) and the Committee on Legal Co-operation (CDCJ). It is proposed that the Group examines measures against corruption suitable for inclusion in a programme of action at the international level; examines the list of subjects appended to the resolution in order to make proposals on the establishment of appropriate priorities; and examine the possibility of drafting model laws or codes of conduct in selected areas including the elaboration of an international convention and follow up mechanisms to implement undertakings contained in such instruments.

LEGISLATIVE DEVELOPMENTS

Hong Kong

The *Dangerous Drugs (Amendment) Ordinance 1994* (No. 62 of 1994) makes amendments to the Dangerous Drugs Ordinance, *inter alia*, to implement the provisions of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; include cannabis resin as a dangerous drug; and provide for the issue of search warrants by a magistrate to any police officer or member of the Customs and Excise Service where there is reasonable cause to suspect that in any place there is an article liable to seizure under the Ordinance or with respect to which an offence has been committed or is about to be committed against the provisions of the Ordinance.

The *Dangerous Drugs (Amendment) (No. 2) Ordinance 1994* (No. 63 of 1994) implements the provisions of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances by enacting a new Part VB to the Dangerous Drugs Ordinance dealing with narcotic offences at sea.

Malta

The *Investment Services Act 1994* authorises the Competent Authority (i.e. the Minister responsible for finance) to exercise the following powers in order to assist an overseas regulatory authority: power to impose, revoke or vary conditions on the grant of any licence for investment services or cancel or suspend such licence; power to require information from any person providing an investment service; power to appoint inspectors; power to issue directives and powers of entry. The competent authority is empowered to communicate information to the overseas regulatory authority whether or not obtained as a result of the exercise of these powers.

The *Financial Institutions Act 1994* regulates the business of financial institutions in Malta by providing for the issuing of licences for such businesses by a Competent Authority having regulatory and investigatory powers. On the basis of international agreements, or upon reciprocity agreements, the Competent Authority may share its supervisory duties with other foreign competent authorities in the case of a financial institution or branch operating in Malta which is fully or partly owned by a foreign person or in the case of a financial institution fully or partly owned by Maltese residents which is operating abroad.

The *Banking Act 1994* is a new law to regulate the business of banking in Malta. Of particular interest to readers is that part of section 34 which complements Malta's other anti-money laundering laws. This provision protects bankers who act in accordance with regulations laid down by the Prevention of Money Laundering Act 1994. Section 25(3) of the *Financial Institutions Act 1994* is similarly worded and ensures immunity from suit for non-bank financial institutions who report transactions suspected of involving money laundering. Among other things the *Banking Act* requires the consent of the Competent Authority for changes in the share holding or share capital in a bank or the sale or disposal of its business; requires a bank to notify the Competent Authority of full particulars of all persons who are controllers of the bank but neither significant shareholders nor qualifying shareholders of the bank; and places conditions on the establishment and operation of representative offices of non-Maltese banks in Malta and on the establishment of banks incorporated in Malta outside of the country.

Scotland: solicitors and money laundering

The Law Society of Scotland has gone further than the English Law Society (see *Crimewatch*, Issue No. 3, June 1994) with the promulgation of the *Solicitors (Scotland) Accounts (Amendment) Rules 1994*. These apply the Money Laundering Regulations 1994 to solicitors whether or not they handle investment business within the meaning of the Drug Trafficking Offences Act 1986.

United Kingdom: money laundering - financial institutions and predicate offences

The provisions of the *Criminal Justice Act 1993*, follow a worldwide trend to broaden predicate crimes to which money laundering is linked. In addition, the Act provides for up to five years' imprisonment for bank employees who are negligent in reporting suspicious activities and up to two years' imprisonment for directors of organisations that are negligent. The Bank of England has also published guidance notes warning financial institutions that failure to take steps to combat money laundering will lead to criminal prosecution. Anyone who assists in concealing the origin of criminal proceeds is liable to 14 years imprisonment. Suggested examples of suspicious transactions include unusually large cash deposits, numerous deposits and withdrawals of cash, and use of night safe facilities to make large deposits. The guidance from the joint money laundering steering group, headed by the Bank but also embracing banks, building societies, insurers and other financial sectors, interprets the Money Laundering Regulations which came into effect on 1 April 1994. These now cover the proceeds of serious crime.

CASE NOTES

Dangerous drugs - Assessing the proceeds of drug trafficking - Whether value of drugs in defendant's possession "benefit"

The appellant was convicted of a drug trafficking offence. In making a confiscation order for £222,000, the Court had found benefit under four heads, *inter alia*, £54,647 as being the value in Turkey of the consignment of heroin. The appellant appealed against the confiscation order.

Held: Allowing the appeal in part and reducing the confiscation order by the sum of £54,647, although the drugs were held by the appellant, there was no evidence that the drugs were a payment or reward in connection with the drug trafficking carried on by him. In this case the probability was that the money to buy the drugs came from proceeds from earlier dealings and they were not a reward for past services. Therefore, in assessing the proceeds of drug trafficking the value of drugs found in the defendant's possession was cost and was not to be regarded as a benefit. The court also emphasised that the trial judges should give a succinct and reasoned judgment as to their findings in respect of disputed benefits and assets.

R v Akengin, Court of Appeal (Criminal Division), U.K. (*The Times*: 20 October 1994)

Drug-trafficking - Computation of benefits - Whether value of seized drugs to be disregarded - Drug Trafficking Offences (Bailiwick of Guernsey) Law 1988

The applicant was convicted of possessing cannabis resin with intent to supply. On appeal it was contended that the court, in determining the value of the proceeds of drug trafficking for the purposes of the 1988 Act, had wrongly taken into account the value of cannabis which had been seized by the police.

Held: In calculating the benefit derived and the sum to be paid under a drug trafficking confiscation order, a court may take into account only the defendant's actual proceeds of drug trafficking and not the value of seized drugs.

Law Officers of the Crown v White Court of Appeal, Guernsey (July-December 1993, *Guernsey Law Journal*, Issue 16, p.49)

Drug trafficking - Conspiracy - Undercover agent agreeing with defendant to export drugs - Whether agent co-conspirator having criminal intent

The defendant was convicted of conspiracy to traffic in a dangerous drug contrary to the Dangerous Drugs Ordinance. An undercover drug enforcement agent had entered into an agreement with the defendant to take heroin from Hong Kong to Australia. The trial judge directed the jury that they should regard the agent as a co-conspirator if they found that he intended to export the heroin. The Court of Appeal dismissed his appeal. On appeal to the Privy Council:-

Held: Dismissing the appeal, whatever his motives, the agent had the necessary intent to be a conspirator even though his motive was to try to arrest drug dealers. While the agent never expected to be prosecuted if he carried out the plan as intended, the fact that the authorities failed to prosecute him did not mean that he did not commit the crime albeit as part of a wider scheme to combat drug dealing.

Yip Chiu-Cheung v The Queen, Privy Council, (Hong Kong), [1994] 3 WLR 514

Drug trafficking - Control and custody - Joint occupancy of house by husband and wife - Whether amounting to joint possession of drugs

Cannabis was found in various parts of a house and the husband and wife living in the house were jointly charged with trafficking in dangerous drugs under s.39B of the Dangerous Drugs Act 1952. As regards the liability of the wife, the prosecution relied on the presumption that as she lived with her husband and was in joint occupation of the house, she was therefore in joint possession of the drugs.

Held: In acquitting and discharging the wife:

1. As a general rule, a wife cannot be deemed to have care and management of the premises where she lives with her husband and family, and therefore, she was not an occupier for the purposes of the presumption under the Dangerous Drugs Act; and
2. Even if the wife was an occupier, the presumption merely imputed knowledge of drugs concealed in the premises, and knowledge in itself was insufficient to establish possession without establishing some kind of control. The correct principle of law was that unless all occupiers had custody or control over the drugs, they were not in possession of them.

Public Prosecutor v Muhamad Nasir bin Shaharuddin and Another, High Court (Kuala Lumpur), Malaysia, [1994] 2 *Malayan Law Journal* 576

Jurisdiction - Foreign ship entering jurisdiction in distress - Possession and importation of drugs - Whether court having jurisdiction

A ship bound for Ghana had arranged to meet another ship in Walvis Bay to transfer cannabis bound for Europe. The rendezvous failed and the ship not having enough fuel for its voyage to Africa, entered St Helena on the pretext of engine trouble. The trial judge ruled that the evidence did not establish that the ship was in distress. The captain, the chief engineer and three members of the crew were convicted of possessing and/or the importation of cannabis resin. In the Court of Appeal it was agreed that the question whether the St Helena court had jurisdiction in circumstances where a ship entered St Helena in distress was a jurisdictional issue to be determined by the judge alone.

Held:

1. It was a general principle of law that a ship driven by distress to enter foreign waters was exempt from the jurisdiction of the foreign country in some matters, but was not exempt from jurisdiction to the criminal law of the host country: *The Eleanor* (1809) Edw 135, 165 ER 1058 applied.
2. In this case the distress was caused by those in charge of the ship, including the appellants, by a reluctance to refuel before reaching St Helena solely attributable to the illegal nature of the enterprise and to the presence of cannabis concealed on board. The appellants had taken a conscious decision to continue to St Helena although insufficiently equipped for the voyage and could not rely on distress to avoid prosecution.

Merk and Djakumah v R, Court of Appeal, St Helena, [1993] 2 *Law Reports of the Commonwealth* 697

Controlled drug - Possession - Police constable forcing suspect to spit out contents of mouth - Whether amounting to "intimate search"

The trial judge posed the following question to the Court of Appeal by way of certificate: "where an officer believes that what a suspect has placed in his mouth is a prohibited substance and attempts to recover it from the suspect's mouth by taking hold of his jaw and nose in order to compel the suspect to spit out whatever was in his mouth, does that amount to an intimate search as defined by section 118(1) of the Police and Criminal Evidence Act 1984?"

Held: This did not constitute an intimate search. Such a search requires some physical intrusion into a body orifice of a person by some physical examination, rather than a mere visual examination in order to cause the person to extrude what was contained in the body.

R v Hughes, Court of Appeal, U.K., [1994] 1 WLR 876

Conspiracy to supply heroin and cocaine - Interception of telephone conversations by police - Whether admissible in evidence

The appellants were convicted of conspiracy to supply controlled drugs. The police had intercepted conversations involving the appellants taking place on a cordless telephone by means of a radio receiver in the adjoining flat which picked up the signals being transmitted between the base unit and the handset and had made recordings of them. The Court of Appeal dismissed their appeal against conviction and granted leave to appeal on a point of law of general public importance: "Whether sections 1 and 9 of the Interception of Communications Act 1985 render inadmissible evidence of the contents of any material intercepted pursuant to the said Act notwithstanding the relevance of such evidence to the issues in a criminal trial."

Held: A cordless telephone which operated through a base unit which was connected to the public telecommunications system was not part of the public system but was a privately run system connected to a public system. Accordingly, interception by the police of telephone conversations on a cordless telephone was not subject to the Interception of Communications Act 1985 (which renders inadmissible any evidence obtained from a public system) and thus evidence at a criminal trial of such conversations was admissible.

R v Effik, House of Lords, [1993] 3 All ER 459

Evidence for use in criminal proceedings - Communications between solicitor and client - Legal professional privilege - Whether communications made in furtherance of an illegal purpose

The applicant required evidence from Malaysia for use in criminal proceedings in Hong Kong. He applied to call a witness, an advocate and solicitor, to give evidence relating to several transactions carried out by a law firm for the firm's client, Lorrain Esme Osman, the respondent. The respondent objected on the grounds that the evidence related to legal professional privilege.

Held: dismissing the objection and ordering the witness to take the stand, according to proviso (a) of section 126 of the Evidence Act 1950, the applicant had to satisfy the Court that such communication was made in furtherance of any illegal purpose. Evidence already found by the chief magistrate in London and the Divisional Court relating to six charges of corruption showed that there was ample evidence for the court to find prima facie that corruption had been made out against the respondent. Further the court could not escape the conclusion that the sending of huge sums of money to Malaysia and then dispersing the sums over a variety of transactions could only be an act or acts of laundering and therefore the communications were made in furtherance of an illegal purpose under proviso (a) to section 126 of the Evidence Act 1950 and, therefore, ceased to be confidential.

Attorney-General of Hong Kong v Lorrain Esme Osman and Others, High Court (Kuala Lumpur), Malaysia [1993] 2 MLJ 347

Director of Serious Fraud Office requiring transcripts of examinations by liquidators - Examinee charged with criminal offences - Whether bar to use of transcripts in criminal proceedings

N was examined by the liquidators of a company under his control and charged with criminal offences. The Director of Serious Fraud Office required the liquidator to produce the transcripts of the examination. A Companies Court judge held that these would not be released to the SFO unless an undertaking was given that they would not be used in evidence against N save for the purpose permitted by section 2(8) of the Criminal Justice Act 1987.

The Court of Appeal released the SFO from that undertaking.

Held: In dismissing an appeal by N, although a judge had a discretion under the Insolvency Rules whether or not to authorise the unconditional release of transcripts of an examination by a liquidator under section 236 of the Insolvency Act 1986, he had no power to seek to prevent the use by the SFO of those transcripts in criminal proceedings. This was a matter for the judge at the criminal trial alone to decide.

Hamilton and Others v Naviede (on appeal from In re Arrows Ltd (No. 4)), House of Lords, [1994] 3 WLR 656

Mareva injunction - Worldwide Mareva injunction - Injunction restraining removal of assets - out of or disposal within jurisdiction - Practice direction

While the granting of a Mareva injunction or Anton Piller order is a matter for the discretion of the judge, in general a consistent approach should be adopted in relation to the form and carrying out of such orders, since they represent serious restrictions on the rights of persons subjected to them imposed after hearing only the applicant's case on an *ex parte* application.

The Court, therefore, has issued a practice direction, which sets out the guidelines for the assistance of judges and those who apply for such orders.

(A) *On an application for either a Mareva or an Anton Piller order*

1. Where practicable the papers to be used on the application should be lodged with the judge at least two hours before the hearing.
2. An applicant should be required, in an appropriate case, to support his cross-undertaking in damages by a payment into court or the provision of a bond by an insurance company. Alternatively, the judge may order a payment by way of such security to the applicant's solicitor to be held by the solicitor as an officer of the court pending further order.
3. So far as practicable, any application for the discharge or variation of the order should be dealt with effectively on the return date.

(B) *On an application for an Anton Piller order*

1. (a) As suggested in *Universal Thermosensors Ltd v Hibben* [1992] 3 All ER 257 at 276, [1992] 1 WLR 840 at 861, the specimen order provides for it to be served by a supervising solicitor and carried out in his presence and under his supervision. The supervising solicitor should be an experienced solicitor, having some familiarity with the operation of Anton Piller orders, who is not a member or employee of the firm acting for the applicant. The evidence in support of the application should include the identity and experience of the proposed supervising solicitor. (b) If in any particular case the judge does not think it appropriate to provide for the order to be served by a supervising solicitor, his reasons should be expressed in the order itself.

2. Where the premises are likely to be occupied by an unaccompanied woman and the supervising solicitor is a man, at least one of the persons attending on the service of the order should be a woman: see para 2(3) of the standard form of order and footnote b.

3. Where the nature of the items removed under the order makes this appropriate, the applicant should be required to insure them: ss Sch 3, footnote e of the standard form.

4. The applicant should undertake not to inform any third party of the proceedings until after the return date: see Sch 3, para 6.

5. In future, applications in the Queen's Bench Division will no longer be heard by the judge in chambers. In both Chancery and Queen's Bench Division, whenever practicable, applications will be listed before a judge in such a manner as to ensure that he has sufficient time to read and consider the papers in advance.

6. On circuit, applications will be listed before a High Court judge or a Circuit Judge, sitting as judge of the High Court specially designated by the Presiding Judge to hear such applications.

If an Anton Piller order or Mareva injunction is discharged on the return date, the judge should always consider whether it is appropriate that he should assess damages at once and direct immediate payment by the applicant.

This practice direction applies to all Divisions of the High Court.

[Attached to the practice direction are new forms for the following orders: *Anton Piller* order; worldwide *Mareva* injunction and *Mareva* injunction limited to assets within the jurisdiction.]

Practice Direction (Mareva and Anton Piller orders: new forms), U.K. [1994] 4 All ER 52

[Editor's note: see also *Crimewatch* Issue 3 on *Mareva* injunctions]