

CRIMEWATCH

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LEGISLATIVE DEVELOPMENTS

Malta

The Prevention of Money Laundering Act 1993 has been passed by the Parliament of Malta. The Act criminalises the laundering of the proceeds of any crime specified in Article 3(1)(a) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances AND any listed offence. The listed offences include crimes listed in various multilateral conventions together with serious personal injury offences and "white collar" crimes.

St Vincent and The Grenadines

Two pieces of legislation which facilitate adherence to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances were passed by the St Vincent and the Grenadines Parliament late last year. The first is the Drugs (Prevention of Misuse)(Amendment) Act 1993 which creates new offences related to the manufacture and supply of scheduled substances. The second is the Drug Trafficking Offences Act 1993 which deals with the recovery of the proceeds of drug trafficking, the laundering of drug proceeds and illicit trafficking at sea.

St Lucia

The Proceeds of Crime Act 1993 of St Lucia permits the making of conviction based forfeiture and confiscation orders and contains detailed provisions for facilitating investigations and preserving property liable to confiscation or forfeiture. It criminalises money laundering and organised fraud and allows the registration and enforcement of forfeiture orders of states party to the 1988 Drugs Convention. At this time the offences to which the Act applies are drug offences, money laundering and organised fraud.

United Kingdom

Dealing with Transnational Crimes

Part I of the ***Criminal Justice Act 1993*** tackles jurisdictional problems which have arisen in cases where part only of the conduct constituting the offence takes place within the United Kingdom. The Part applies to specified property offences including theft, obtaining by deception, making of false statements by company directors, etc. Section 2 provides that a person may be guilty of a specified offence if *any of the events which are relevant events* occurred in England and Wales. Relevant events are defined as acts or omissions or other events proof of which is required for conviction of the offence. Section 3 deals with conspiracy to commit any of the specified offences. Section 4 sets the rules for determining jurisdictional questions relating to the location of events. Section 5 makes it an offence under English law to conspire or attempt in England or Wales to commit a specified offence abroad while section 6 applies what is, in effect, a dual criminality pre-requisite to offences created by section 5.

Solicitors and Money Laundering

From 1 April 1994, the responsibility on solicitors in the U.K. to identify 'dirty' money deals was significantly heightened because on that date - the ***Criminal Justice Act 1993*** and the ***Money Laundering Regulations 1993*** - came into force.

The U.K. Law Society strongly advised solicitors to become familiar with the Act. The legislation provides fines or imprisonment for a range of offences including: assisting in a money laundering deal; tipping off clients or others about an investigation into money laundering; or failing to report suspicions of money laundering in cases of drug trafficking or terrorism, unless certain exceptions apply. The Criminal Justice Act 1993 modifies the client's right to confidentiality from the solicitor.

Solicitors who carry on investment business within the meaning of the Financial Services Act 1986 will commit criminal offences unless they take the steps required by the new money laundering regulations. They are required to train staff to recognise suspicious transactions, establish procedures for obtaining satisfactory evidence of identity of clients, and keep detailed records.

The Law Society has issued guidance notes on circumstances in which a solicitor should go on red alert - where, for example, a client wants to use cash to settle a major transaction, where the solicitor does not meet the client in person, or where a client is referred by overseas banks or other investors based in countries where drug trafficking is prevalent.

United Kingdom authorities advise that solicitors are taking advantage of the opportunity to report suspicious transactions. They have been surprised by the regularity with which reports are made.

CASE NOTES

Drug Trafficking - Presumptions - Mens Rea

The Appellant was discovered in possession of 679 grammes of diamorphine, a controlled drug specified in Class A of Schedule 1 of the Misuse of Drugs Act (Cap 185). By s.17 of that Act the possession of over 2 grammes of such a drug gives rise to a presumption that the offence of trafficking has been committed.

Counsel for the Appellant contended that the presumption in s.17 could be rebutted where the absence of the actus reus or mens Rea of trafficking could be shown. Here, the Appellant was charged in terms that he, "on or about 29 April 1990, between 8.20 pm and 9.06 pm did traffic...". It was not disputed that the appellant was taking a bath between 8.20 - 8.40 and was in the custody of Central Narcotics Bureau officers 8.40 - 9.06 pm.

Held: The proper interpretation of s.17 is that the actus reus of possession is presumed to be the actus reus of trafficking. Thus the only way the s.17 presumption could be rebutted would be for the accused person to adduce satisfactory evidence that he was not in possession of the drug in question for any of the overt acts of trafficking defined in s.2 of the Act.

Koh Aik Siew v Public Prosecutor [1993] 2 SLR 599 (CA)

Bribery - Fiduciary Duties - Crown Servants

The first defendant was a former member of the legal service of Hong Kong. In breach of the fiduciary duty he owed as a servant of the Crown he had accepted bribes to use his position to obstruct the prosecution of certain criminals. Among the assets owned by the first defendant were certain properties in New Zealand which were found by the trial judge to have been acquired with money derived from the bribes. The trial judge refused to grant an order that caveats registered against the properties should not lapse pending proceedings claiming the properties on a constructive trust. The Appellant's appeal was dismissed by the New Zealand Court of Appeal.

Held:

1. Any person in a fiduciary position who accepts a bribe in criminal breach of trust holds the bribe and the property representing it on constructive trust for the person injured.
2. If the property representing the bribe increases in value the fiduciary is additionally accountable for the increased value of that property.
3. The fiduciary remains personally liable for the amount of the bribe if, in the event, the amount recovered by the injured person proved to be less than that amount.

The New Zealand properties were for the above reasons held in trust for the Crown in right of Hong Kong and the appeal would be allowed.

Attorney-General for Hong Kong v Reid and Others (The Times 12.11.93 (PC))

Legal Aid - Words and Phrases "Criminal Proceedings" - forfeiture proceedings - restraining orders

The applicant sought review of a decision that he was not entitled to criminal legal aid to contest proceedings brought under s.25(3) of the Criminal Justice (International Co-operation) Act 1990 (UK). (That section permits the seizure and detention of cash being imported or exported where there is reasonable suspicion that it is proceeds of crime ■ being used in drug trafficking).

Held: Where moneys are seized and detained under Section 25 they can be forfeited following proceedings under s.26 of the Act. The standard of proof required by that section was that applicable to civil proceedings. The applicant in this case appears as a person claiming money and as such was neither an accused or convicted person who would have been entitled to be legally aided under the Legal Aid Act 1988 (UK).

R v Crawley Justices; Ex parte Ohakwe The Times 26 May 1994

Royal Prerogative - Prerogative of Mercy - Pardons - Conditional Pardons - Posthumous Pardons

In 1952 the applicant's brother was convicted of murder and sentenced to death. The then Home Secretary declined to exercise the prerogative of mercy despite a recommendation for mercy from the jury and from Home Office officials, and the applicant's brother was executed in 1953. In 1992 the Home Secretary refused to recommend a posthumous free pardon. The applicant applied for judicial review of this decision.

Held:

1. The court was not precluded from reviewing the decision because it was made under a prerogative power. Nor was the particular nature of the prerogative of mercy such that in no circumstances could a court review its exercise, despite a dictum to the contrary by Lord Roskill in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935. The approach was rather to determine whether the nature and subject matter of the decision is amenable to the judicial process.
2. On the facts the applicant's case was that the Home Secretary failed to recognise the range of circumstances in which the prerogative of mercy can be exercised and thus failed to consider the form of pardon which might be appropriate. Such a failure is reviewable.
3. The Home Secretary had indeed failed to give sufficient consideration to the grant of some form of pardon other than a free pardon eg a conditional pardon. The court could not direct the Home Secretary to exercise his power in any way but it invited him to look at the matter again. No order or declaration would be made.

R v Secretary of State for the Home Department, ex parte Bentley [1993] 4 All ER 442

Proceeds of Crime - Confiscation Order - Scope of s.16 Criminal Justice (International Cooperation) Act 1990 (UK) - Retrospectivity

A confiscation order was made against the defendant pursuant to the Drug Trafficking Offences Act 1986. The Order was made before the entry into force of s.16 of the 1990 Act. That section permits the court, upon application, to vary a confiscation order when realisable property is found to exceed that which was taken into account when the original order was made. A receiver appointed to recover the outstanding balance of the payment due applied for the sum contained in the Order to be increased pursuant to s.16. His application was refused and he appealed.

Held: Appeal dismissed. Neither the express wording or the context of s.16 showed that the section was intended to have retroactive effect. Further, this was not a case in which the "procedure" exception to the presumption against retroactivity arose; s.16 was not merely procedural but could lead to a substantial increase in a defendant's financial obligation and to a lengthened term of imprisonment in default.

In re Barretto - [1994] 1 All ER 447 (Court of Appeal)

Constitutional Law - Trial by Jury - Summary Trial

The respondents were convicted before a Magistrate in the Bahamas of, inter alia, the possession of dangerous drugs with intent to supply contrary to s.22(1) and (2)(b) of the Dangerous Drugs Act. Under s.22(2)(b) the maximum penalty on summary conviction was a fine of up to \$100,000 and up to five years in prison. The Act as amended however provided by s.22(8)-(11) for committal to the Supreme Court for sentence and a maximum penalty of life imprisonment.

The respondents contended in their appeal to the Privy Council that s.22(8)-(11) were unconstitutional and void as they were contrary to art 20(2)(g) of the Constitution. This provides that every person who is charged with a criminal offence "shall, when charged on information in the Supreme Court, have the right to trial by jury." They also argued that the penalties provided for by s.22(2)(b) were unconstitutional and void for a court of summary jurisdiction.

Held:

1. s.22(8)-(11) insofar as they related to summary convictions were unconstitutional and void in purporting to vest in inferior courts part of the jurisdiction reserved for the Supreme Court. However applying the test of substantial severability the subsections remained valid insofar as they related to convictions on information.
2. The power to impose the fine provided for by s.22(2)(b) did not infringe the Constitution. The power of imprisonment given to Magistrates therein was a matter for the judges and legislators in the Bahamas and no opinion would be expressed.

Commissioner of Police v Davis and another [1993] 4 All ER 476 (Privy Council)

Drug Trafficking - Internal Concealment - Detention Period - Statutory Interpretation - Parliamentary intention.

The suspect was detained by police who suspected that he had concealed in his rectum a condom containing 50g of heroin. Under the relevant legislation a maximum period of 21 days from the original detention was permitted. After 18 days the suspect had not passed any bowel motion. The police applied for a declaration that they were permitted, under s.13A of the Misuse of Drugs Amendment Act 1978, to detain the person for a further period of 21 days.

Held It was clear from the Parliamentary records that it was thought that detention for up to 21 days would cover the period adequately. To hold that detention period could restart from day one was clearly beyond the intent of the statute.

O'Fagan v. S. High Court, Christchurch, Coram Tipping J. Judgment delivered 19 April 1994 (*This case was reported in the Capital Reporter from New Zealand*)

Mareva injunction - worldwide injunction - need for leave to commence proceedings abroad

Following allegations of fraud BCCI was wound up in the UK and Luxembourg and an associated company was wound up in the Cayman Islands. Compensation was sought by the liquidators from a former director of one of the companies and an associate: *Mareva* relief was granted ex parte. The injunctions were continued upon receipt of undertakings that enforcement of the injunctions would not be sought outside the United Kingdom without the leave of the court.

The applicants contended that the undertaking was inadequate to prevent a multiplicity of suits. They sought further undertakings that, without the leave of the court (a) no orders of a like or similar nature would be sought and (b) no proceedings would be commenced against the applicants based on the same or similar subject matter as these proceedings (including for the avoidance of doubt the making of any new complaints laying of any information or similar procedure to criminal authorities.)

Held: On the first of the additional undertakings sought the Court granted the application on the ground that it was reasonable to require the liquidators to obtain leave to start further proceedings so as to avoid possible oppression. (This decision did not affect applications to be made in Luxembourg).

In relation to the second of the further undertakings sought the court decided that it was highly undesirable that the part that liquidators can play in providing material for a prosecution of fraud and the enforcement of regulatory procedures should, in international cases, be fettered by undertakings just because the liquidators seek worldwide *Mareva* relief. It does not follow from the fact that liquidators have chosen to litigate their civil claims in England that English courts should decide in what foreign countries prosecutions should proceed. The court refused to require the liquidators to give an undertaking in the terms of the words in brackets (underlined above).

In re Bank of Credit and Commerce International SA; In re Bank of Credit and Commerce International (Overseas) Ltd. [1994] 1 WLR 708