

CRIMEWATCH

Issue No. 24, June 1998

CONTENTS

Law Reform	
- Proceeds of Crime	1
Articles	
- Bribery in Commerce	2
- Evidence (Witness Anonymity) Amendment Act 1997 (New Zealand)	3
- Telemarketing Fraud	3
Case Notes	
- Sentencing	4
- Evidence obtained under compulsion	4
- Drug Trafficking - variation of confiscation order	5
- Drug Trafficking - delay in making confiscation order	6
- Legal Professional Privilege - statutory reports	6
- Anticipatory Search Warrants - Canada	8
Vacancies for Prosecutors	8

LAW REFORM

Proceeds of Crime

In a reference granted in December 1997 to the Australian Law Reform Commission the Australian Attorney-General has the LRC to inquire into and report on the operation of the Proceeds of Crimes Act 1987 and the related forfeiture of employer funded superannuation benefits under the Crimes (Superannuation) Act 1989 and Australian Federal Police Act 1979.

Also included in the matters to be considered by the Commission are the forfeiture provisions in the Customs Act and the operation of Australian state laws relating to proceeds of crime.

Some of the specific issues to be considered by the Commission are:

- whether convicted criminals should be able to benefit from literary proceeds if they "sell the story" of their crime?
- whether victims of a crime should receive compensation or reparation from the proceeds of the crime committed against them?
- what controls should exist on the use of suspected proceeds of crime to fund a legal defence? and
- how are the rights of third parties, such as joint owners of forfeited property and creditors, to be protected?

In addition the Commission will consider police powers to obtain information from financial institutions for the purpose of locating the proceeds of crime and existing provisions for the loss of Commonwealth superannuation entitlements and benefits following conviction for "corruption."

ARTICLES

Bribery in Commerce, article by Frank Quinn, New Zealand Law Journal - April 1998, pages 141-144

The article discusses the adequacy of New Zealand's criminal law in respect of payment of bribes to facilitate commercial transactions. The article contends that while the existing legislation - the Secret Commissions Act, 1910 and the Crimes Act, 1961 - is appropriately focused, there is difficulty with the meaning of the word "corruptly." A clarification of this word is central to criminal sanctions against bribery.

This most interesting article discusses the decisions of courts in New Zealand, Canada, Australia and the United Kingdom on legislation relating to corruption in the private sector. In each of these countries the legislation is similar and each law is designed to deal with agents who secretly accept payments or other valuable consideration from third persons in respect to the business of their principals. Each of the laws uses the word "corruptly" in defining the crime but the decision as to the operation of this word differ. To use the words of the author "The term gives rise to an ambiguity of meaning and the question that arises is whether the term is a "useless appendage" or a "critical ingredient" .

The New Zealand courts have taken the view that the function of the word "corruptly" was to indicate the "mental ingredient" or that deliberate criminal intent necessary. The author suggests that this interpretation ignores that the *mens rea* of the offence is apparent from the express requirement that the payment be made or accepted as an inducement or reward and that, in the absence of express language, the prosecution should not be faced with such an additional burden.

In examining the Canadian cases, the article reports that the Supreme Court of that country found that the word "corruptly" adds to the *actus reus* of the crime and that it means simply "secretly or without the requisite disclosure". The *mens rea* is simply that the agent is aware that the payment and its receipt is unknown to his principal.

To compound the confusion, the author reports that the positions taken in Australia and the UK differ from those of both the New Zealand and Canadian courts. The UK Court of Appeal has held that "corruptly" was at the most a mere designation of the prohibit conduct while an Australian court has held that a payment is corruptly made if paid with the intent that it should result in the prohibit conduct of causing an agent to show favour to the payer in respect of the principal's affairs. If the agent believed the payer had a corrupt intent regardless of whether the agent intended to act in the way expected.

The potential effect of the judicial pronouncements on the meaning of the word "corruptly" in legislation such as the NZ Investment Advisers (Disclosure) Act 1996 is also briefly discussed by the author as is the need for statutory clarification of the intention of provisions which make criminal the offence of bribery in the private sector.

Evidence (Witness Anonymity) Amendment Act 1997, (Criminal Practice - edited by Catherine Cull,) New Zealand Law Journal, May 1998

In this article, the author studies the ramifications of the Evidence (Witness Anonymity) Amendment Act 1997, (the "Act"). The author notes that the Act was passed at a time of significant publicity relating to the intimidation of witnesses in trials involving gang members. The Court of Appeal had just decided a case ruling that the trial Courts did not have the inherent jurisdiction to provide witness anonymity. As a result, the author suggests that the community saw the courts as suggesting that the attempt at avoidance of conviction by some criminals through witness intimidation was an acceptable price for ensuring that innocent people were not convicted. Popular opinion suggested that this approach would allow criminals to place themselves above the law. The

author considers whether the legislation was needed.

Prior to considering specific provisions of the legislation, the author discusses the competing interests involved in determining whether to grant witness anonymity. These include the right of a defendant to a fair trial and the right of the public to protection by the law. The issues involved in determining an application of witness anonymity are identified as including the form in which information is given to the court, the right to cross examine and the opportunity of the accused to answer allegations of intimidation.

Applications under section 13B of the Act which deals with pre-trial anonymity orders can only be made in cases where the offence charged is purely indictable. In cases involving summary offences or whether the accused can elect summary trial orders are not available. In discussing the steps involved in making an application for a s.13B order, the author expresses concern that depositions by witnesses who are the subject of applications for such orders, are not done in the witness's true name and are initialled or marked only. This results, states the author, in the court having to rely on unchallenged evidence or unnamed and unidentified witnesses because there "does not appear to be any provision for there to be a challenge to the affidavit evidence of a proposed witness".

The article outlines the operation of the statutory provisions which determine that pre-trial anonymity orders may be made where the court is satisfied that the safety of the witness or any other person is likely to be endangered or there is likely to be serious damage to property if the witness's identity is disclosed prior to trial and the withholding of identity until trial would not be contrary to the interests of justice. The statute also sets out the matters to be taken into consideration by the judge before whom the application for a s.13B order is made. These include issues relating to the rights of the accused, the seriousness of the offence charged, the importance of the evidence of the witness and the availability of corroborating evidence.

The article contains a useful outline of the separate provisions of the new legislation which deal with witness anonymity for the purpose of a High Court trial and notes that, in addition to matters to be considered before a pre-trial anonymity order is issued, the High Court must deal with questions relating to the relationship between the witness and any of the parties, the interest the witness may have in the outcome of the case and issues relevant to credibility and reliability. The author goes on to consider s.13E which permits the court to appoint an independent counsel to look at issues such as the safety of the witness, his or her reliability and truthfulness and credibility.

An interesting issue considered in this article is the potential ramifications of the Act on the operation of provisions relating to the granting of bail. The author questions how acceptance of witness anonymity could affect applications for bail. In suggesting that often in bail applications, a ground used for opposition is the likelihood of intimidation of witnesses, the author asks if there is a provision to protect witnesses from intimidation other than by keeping the offender in custody, can intimidation continue to be a ground on which bail is opposed?

In conclusion, the article states that it will be interesting to see how this Act operates in practice. The author's view is that any applications made under this Act must be very carefully considered and any decision to make an order should only be made in extreme cases.

Canada and USA act to combat telemarketing fraud: International Enforcement Law Reporter, Volume 14, Issue 2, February 1998, p. 58

Telemarketing fraud activities include defrauding victims, misrepresentation of goods and services and inducement of purchasers to send money in response to advertisements. It is often conducted across borders and therefore poses problems for law enforcement agencies. Officials of the Governments of Canada and the USA, in a report on telemarketing fraud, recommend that the Governments identify telemarketing fraud as a serious crime. The usefulness of remote testimony and teleconferencing are discussed as is the need to consider electronic surveillance and the

possibility of denying telephone services to telemarketer offenders. Public education campaigns are also recommended by the reports authors as part of a bilateral attack on this new form of crime.

CASE NOTES

Sentencing - useful information - reduction of sentence to reflect value of assistance

A and B appealed from sentences of 12 and 14 years respectively following their pleas of guilty to offences contrary to s. 170(2) of the Customs and Excise Management Act 1979 which relates to the importation of a class A controlled drug. The main contention in A and B's appeal against sentence was that inadequate credit had been given for the help they had extended to the authorities, particularly since conviction.

The general sentencing principles outlined by the Court of Appeal in its judgment were:

- (1) Sentences were discounted to reflect pleas of guilty and a plea of guilty at an early stage would usually earn a greater discount than a guilty plea at a late stage in the proceedings.
- (2) Where a plea of guilty was accompanied by testimony or an expression of willingness to testify or make a witness statement incriminating a co-defendant, there would normally be an increased discount of sentence, especially where such conduct led to the co-defendant's conviction or plea of guilty.
- (3) The courts had for a long time recognised by further discount of sentence help given and expected to be given in the detection, investigation, prosecution and suppression of serious crime. The value of the help given determined the discount on sentence. Value involves both the quality and quantity of the information. The sentence would also reflect the fact that a defendant exposed himself or his family to personal danger.
- (4) If a defendant denied guilt but was convicted and sentenced without supplying valuable information the Court of Appeal would not normally reduce sentence to take account of information supplied by him after sentence because the role of the Court of Appeal was to review the sentence imposed by the lower court in light of the information before that court and not to conduct its own sentencing hearing.

Applying these principles to this case the Court of Appeal *held*:

1. Where the value of the information, quantitatively or qualitatively, had not been fully appreciated when sentence was passed, or where the information supplied after sentence greatly exceeded the reasonable expectation of the sentencing judge, it was appropriate for the Court of Appeal to review the sentence and reduce it to reflect the true value of the assistance.
2. A and B were entitled to additional credit for help given which had proved more valuable in terms of quality and quantity than the judge could reasonably have expected when passing sentence and a reduction of two years in each case was made.

Regina v A (Informer: Reduction of Sentence); Regina v B (Same), The Times, May 1 1998

Directors - disqualification orders - use of evidence submitted to DTI inspectors under legal compulsion

An application was made by M for judicial review of the Secretary of State's refusal to review a decision to use transcripts of evidence given under legal compulsion to inspectors charged with investigating the affairs of companies of which he had been a director. The original decision permitted use of the transcripts in proceedings against M under s. 8 of the Company Directors Disqualification Act 1986. M contended that the policy not to use such evidence in the course of criminal proceedings implemented the decision of the European Commission of Human

Rights in *Saunders v. U.K.* (1997) 23 E.H.R.R. 313, should be applied to disqualification proceedings as they could properly be regarded as criminal in nature. M further argued that, even if the proceedings were civil in character, the use of the transcripts was unfair.

Held, dismissing the application:

1. In *EDC v United Kingdom* (Unreported, 1997) the European Commission of Human Rights held disqualification proceedings were disputes over civil rights and obligations for the purposes of Article 6.1 of the European Convention on Human Rights. The view of the Secretary of State that the European Court would be likely to view disqualification proceedings as fundamentally different from the criminal proceedings in *Saunders* was correct.

2. The Secretary of State was entitled to refuse to extend to disqualification proceedings the policy of upholding the privilege against self-incrimination in criminal proceedings .

3. The intended use of the transcripts in civil proceedings was not unfair, since it was important that disqualification proceedings, which were brought in the public interest, were as effective as possible.

R v Secretary of State for Trade and Industry, ex p. McCormick, *The Independent*, January 15, 1998; *Current Law*, February 1998. p. 27

Drug Trafficking - confiscation order - Criminal Justice (International Co-operation) Act 1990 ("1990 Act")

An appeal was made by T against the variation of a confiscation order. T had been convicted of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of cannabis and was sentenced on January 8, 1992 to 5 years imprisonment.

The benefit he had obtained from drug trafficking was assessed as being £479,376.54 and a confiscation order under the Drug Trafficking Offences Act 1986 was made in the sum of £72,841.54. On June 7 1996, on the application of the Crown, a certificate of increased value of the realisable property was granted and the confiscation order was increased to £479,376.

Section 16 of the 1990 Act, (now re-enacted as s. 16 of the Drug Trafficking Act 1994,) provides:

" (4) Where a certificate has been issued under subsection (2) above the prosecutor may apply to the crown court for an increase in the amount to be recovered under the confiscation order; and on that application the court may - (a) substitute for that amount such amount (not exceeding the amount assessed as the value referred to in subsection (1) above) as appears to the court to be appropriate having regard to the amount now shown to be realisable....."

The grounds of appeal, inter alia, were that the judge had erred, in applying s. 16 to assets acquired after the original confiscation order, where the assets had not been shown to be part of the proceeds of criminality or turpitude. It was further submitted that s. 16 did not apply in circumstances where the defendant had come into some money or other assets after a confiscation order was initially made and that the legislation was aimed at depriving a defendant of the benefits of drug dealing, but not to prevent him engaging in commerce years after he had satisfied the order. In the absence of clear words s. 16 should not be construed as referring to assets which were later acquired honestly.

Held:

1. The legislation relating to drug dealing, now mainly enshrined in the Drug Trafficking Act 1994, was draconian. It aimed to strip those who dealt in drugs of any possible profit from so dealing by depriving them of their realistic assets, whether or not those were the proceeds of drug

trafficking, up to the amount by which they had benefited from drug dealing.

2. The process of stripping a person of his assets involved three stages:

- (a) a judicial decision that the defendant had benefited from drug trafficking;
- (b) a judicial assessment of the value of the proceeds of drug trafficking; and
- (c) a judicial decision on the amount of the confiscation order which may not exceed the total value of the defendant's realisable property at the time the confiscation order was made.

If that value at the time the order was made was less than the defendant's benefit from drug trafficking, the court had so to certify.

3. Section 16, which is expressed in the present tense contains no limitation as to the time at which application could be made for an increased confiscation order, and contemplates a continuing state of affairs. Drug dealers can be deprived of their assets until they disgorge the amount equivalent to all the benefit which had accrued to them from drug dealing. An application for an increase in the amount to be recovered under a confiscation order, can take into account all the defendant's realisable assets, whether or not acquired before the original order was made and whether or not shown to be the proceeds of criminality or turpitude.

R v Tivnan, The Times, May 6, 1998

Confiscation orders - postponement of confiscation proceedings beyond statutory limit - ill-health of judge - words and phrases "exceptional circumstances" - Drug Trafficking Act 1994, s.3 (UK)

The applicant was convicted of conspiring to import drugs and proceedings relating to the making of a confiscation order were adjourned, first to allow the obtaining of further information and later on account of the ill health of the judge.

Section 3 of the Drug Trafficking Act 1994 allows six months following conviction within which confiscation proceedings must be held.

At the confiscation hearing the applicant contended that the order postponing the hearing had been made without jurisdiction and that the ill-health of the judge did not provide an exception circumstance which would warrant adjournment.

Held

Confiscation proceedings should normally be held within six months of the date of conviction but a judge may, in exceptional circumstances postpone a hearing beyond that period. In this case the order was made in open court within the statutory period and the judge was entitled to determine that his illness constituted an exceptional circumstance. In addition, the listing officer was entitled to make sensible arrangements for the administration of court business.

R. v. Cole (Andrew Stanley), The Independent, 30 April 1998, Court of Appeal (Criminal Div.)

Discovery - production of documents - objection to production for inspection - legal professional privilege - disqualification proceedings - administrators of bank preparing report on conduct of directors - administrators' report submitted to Secretary of State - applicant seeking discovery of report - whether report privileged - Company Directors Disqualification Act 1986, s. 7(3) (UK)

Barings Bank collapsed in February 1995 following the discovery of huge losses which had been incurred through unauthorised trading on Barings' account by one of its employees, Nick Leeson. Losses incurred amounted to some £827 million. Barings plc and various of its subsidiaries, were placed in administration.

Disqualification proceedings under the Company Directors Disqualification Act 1986 (the Act) were

started against ten directors of the bank including the applicant. Following a 1997 court order relating to discovery the Secretary of State objected to production of some of the documents on the ground that the documents came into existence after the disqualification proceedings had commenced. The applicant applied pursuant to the rules of court for an order requiring, inter alia, the Secretary of State to produce for inspection the administrators' report under the Act. The Secretary of State resisted inspection of the report on two grounds - privilege and lack of sufficient relevance. The basis of the privilege claim was that the report had been brought into existence for the main purpose of use in litigation, either as evidence per se or as part of the material on which the decision whether to commence or to defend proceedings would be taken. It was argued that disclosure would impinge on the inviolability of lawyer/client communications.

Held:

The Act permits the making of an application for a disqualification order where it "appears .. that it is expedient in the public interest that" such an order should be made. A report made by administrators under the Act provides the Secretary of State with the facts and opinions necessary to enable a decision to be made on whether disqualification proceedings should be commenced.

Disqualification proceeds are brought in the public interest in order to protect the public from individuals whose conduct as directors has been sufficiently unsatisfactory to warrant that protection. It is not the purpose of disqualification proceedings to punish respondent directors, still less is it a purpose to bring them to financial ruin.

The rules of court provide that no order for production may be made unless the order is necessary either for disposing fairly of the cause or for saving costs. Although the factual contents of the report could be extracted from other available sources the potential savings of costs that might be achieved by the applicant is significant. It is likely that the production will enable the directors to avoid much of the perusal and analysis of the substantial source documents and underlying facts that they would otherwise in prudence need to undertake. The criteria of fairness and savings of costs have been met.

Legal professional privilege is a fundamental condition on which the administration of justice as a whole rests. Ordinary rights of discovery must, in the public interest, give way to this fundamental condition but this condition is not relevant in this case because the report does not in any sense represent legal advice to the Secretary of State. Public interest immunity constitutes another reason why, in the public interest, the ordinary rights of discovery may have to give way. In this case no claim of public interest immunity is made.

The maker or procurer of a document may have a variety of purposes. But in the case of a statutory report the maker has no choice and is obliged to make a report which is not procured by anyone. The relevant purpose of making the report is the statutory purpose of informing the Secretary of State. The question whether statutory reports are protected by legal professional privilege is not to be determined by reference to the purpose of the administrators in making the report or their expectations as to the use which will be made of the reports. Nor is it to be determined by reference to the "dominant purpose" test developed in cases not involving statutory reports. The question whether statutory reports are privileged depends on whether there is a public interest requiring protection from disclosure that is sufficient to override the administration of justice reasons that are reflected in the discovery rights given to litigants.

Since there was no public immunity claim, there was no public interest that required privilege to be accorded to the report. Therefore the report was not covered by legal professional privilege and, since production of the report was necessary for disposing fairly of the matter and for saving costs pursuant to Ord. 24, r 13(1), its production should be ordered for inspection.

Re Barings plc and others, [1998] 1 All ER 673

(Editors Note: The judgment in this case provides an extremely useful and in depth consideration of the subject of legal professional privilege.)

Anticipatory Search Warrants - Criminal Code, s.487.01 (Canada)

The respondent was arrested and charged with conspiracy to sell manufactured tobacco not packaged and stamped in accordance with the Excise Act. On the same day a search warrant issued under s. 487 of the Criminal Code was executed at the home of the respondent. Items including contraband products, cash, banking documents, telephone bills, and computer equipment and disks were seized. Subsequently the warrant was quashed on the ground that insufficient information had been provided to the issuing justice of the peace. Later application was made for another search warrant by an officer not involved in the issue or execution of the quashed warrant. The new warrant permitted re-seizure of various items and was issued following disclosure of the earlier warrant and its quashing. The second warrant was quashed and the re-seized items again returned. The court quashing the second warrant held that the warrant should only issue where a device or investigative technique or procedure was contemplated.

Section 487.01 of the Criminal Code permits the issue of a warrant by a judge authorising the use of any device or investigative technique or procedure or do anything described in the warrant which, if not authorised, would constitute an unreasonable search. The warrant may issue where there are reasonable grounds to believe either that an offence has already been committed or that an offence will be committed.

The Crown appealed on the ground that the proper interpretation of the provision permitted the issue of an anticipatory search warrant authorising a physical search of a specified location unassociated with the use of any specified device or investigative technique or procedure.

Held

Section 487.01 does not bind judges by the strictures of other warrant provisions but is governed by the best interests of the administration of justice. There is nothing in the context to suggest that the words "any thing" should be read *ejusdem generis*. The provision does not provide simply for seizing things which are evidence, contraband or instrumentalities, but provides for the doing of anything which will yield information concerning an offence.

The section was enacted to provide a flexible range of investigative techniques which would, without approval of a judge, be offensive. The Charter of Rights and Freedoms mandates judicial control of intrusive practices and the provision ought not have been so narrowly interpreted.

The Queen v. Noseworthy Court of Appeal for Ontario, 8 May 1997

VACANCIES FOR PROSECUTORS

The Office of the Director of Public Prosecutions of Fiji has advised the Commonwealth Secretariat that it is seeking to recruit legal staff to work in the Serious Fraud Unit. The vacancies are not positions with the Commonwealth Secretariat or with the Commonwealth Fund for Technical Co-operation and applications must be sent direct to Fiji.

A Principal Legal Officer in the Serious Fraud Unit is required to (a) prosecute in criminal trials in the Magistrates Court and High Courts; (b) argue appeals before the Supreme Court and the Fiji Court of Appeal; (c) liaise with police over cases and render written opinions on evidence, charges, immunity and the institution and discontinuance of cases; (d) prepare papers for appeals in the Supreme Court; and (e) assist with training lecturers; perform some administrative functions and supervise and instruct subordinate officers in their work.

The successful applicant must be qualified under the Legal Practitioners Act of Fiji (details available from the DPP), have at least 5 years experience as a Barrister or Solicitor preferable with experience in criminal advocacy and in conducting prosecutions and have management and supervisory experience.

Details of the salary, benefits and terms of contract should be obtained directly from The Director of Public Prosecutions, Government Buildings, Box 2355, Suva, Fiji. Fax: 679 302 780