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Continuing Legal Education for Criminal Lawyers

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PRESENTED AT LEGAL EAGLES CLE CONFERENCE
NHA TRANG VIETNAM 16/1 – 22/1/2013

HOW TO DEFEND SERIOUS FRAUD AND CORRUPTION CHARGES

Introduction

1. I will speak today on several topics concerning the proper defence of serious fraud and corruption charges, whether the charges are to be tried in the Local, District or Supreme Courts.

A. Prosecution evidence collected to be in admissible form: documents and electronic data

2. By way of introduction to this topic, it is probably the experience of all those in the audience who have in any way been involved in the investigation, prosecution or defence of fraud and corruption cases, that it is one thing to know that a fraud has been committed, and even to know the identity of the perpetrator, but quite another thing to successfully prosecute the perpetrator.

3. The best advice I can ever give you is that from the time you first commence defending a case of alleged fraud or corruption, you should keep firmly in mind the need for the prosecutor to present the prosecution evidence collected in admissible form, whether it be by way of hard copy documents or electronic data, or the narrative of the essential witnesses whose testimony may be required to prove the case beyond reasonable doubt. If, at the end of the day, guilt cannot be proven beyond reasonable doubt, then all the hard work expended by the police in the investigation stage comes to nought. And I can tell you from my decades of experience in both prosecuting and defending fraud and corruption charges, one of the major ways of successfully defending these types of case is to challenge the admissibility of the documentary evidence sought to be adduced by the prosecutor.

4. In the time available today I can only touch upon a few of the more important issues concerning the admissibility of evidence by way of documents and electronic data.

5. As a general observation before moving into this topic, I should emphasise at the outset that it is crucial to the success of any investigation and prosecution for a fraud type offence that the police keep two essential things firmly in mind from the very beginning of the investigation. Firstly, the nature of the particular offence/s thought to have been committed, so that thepolice investigation can then be focused on obtaining credible evidence in admissible form sufficient to prove beyond reasonable doubt each of the essential elements of those offence/s. Secondly, the actual powers the investigator has to search for and seize evidence, and to question witnesses and/or suspect/s. Anything done without power in a criminal investigation might lead to evidence gathered being held inadmissible. So, the first thing to emphasiseto the defence solicitor and barrister is that you should ensure that any documentary evidence, computer equipment and the like seized by the police from your client's premises have been seized pursuant to the execution of a valid search warrant. It is

not good practice to advise your client to consent to a search without a valid search warrant first being obtained by the police. You should also ensure that police only seize items that come within the terms of the search warrant.

6. Our 'route map' on the admissibility of hard copy documents and/or electronic data in court proceedings for a state crime is the NSW Evidence Act ('the Act'), and for proceedings for a Commonwealth crime, the Commonwealth Evidence Act. There are only slight differences between the two Acts. The Dictionary found at the end of the Evidence Act defines a document to be not only *'anything on which there iswriting'* (ie, a traditional handwritten or typed document) but also *'anything from which sounds, images orwritings can be reproduced with or without the aid of anything else'* (eg, a computer hard disc, thumb drive, a CD or a tape recording).

7. Some of the more important sections of the Evidence Act that you should always keep in mind when examining and challenging the admissibility of documentary evidenceare as follows:

a) S.51 of the Actabolishes the 'original document' rule, which rule at common law imposed an obligation on a party tendering a document to tender the original of the document as a prerequisite to it being admissible in evidence. This was known as the 'best evidence' rule. The contents of a document can now be proved otherwise than by tendering the original of the document. A copy will suffice.
b) S.48 of the Act provides for the introduction into evidence of the contentsof documents in a number of ways, including; tendering a document that purports to be a copy of the document (where such a copy purports to be produced by a *'device that reproduces the contents of documents'* (eg, a photocopy machine)); tendering a document that forms part of the records of or kept by a business; tendering a document (eg, a download) that has been produced from a device used to retrieve information stored in electronic form (be it words or sound).
c) S.50 of the Act allows for the proof of voluminous or complex documentsby way of a summary of the documents where it would not otherwise be possible conveniently to examine the evidence because of the volume and complexity of the documentation.
d) S.69 of the Act dealing with 'business records', allows for the introduction into evidence of documents which form part of the records of a business without the need to call the maker of the document, where the document contains representations made or recorded in the course of or for the purposes of the business where the maker of the document might reasonably be supposed to have had personal knowledge of the facts asserted in the document.
e) S.71 of the Act allows for hearsay evidence to be given of a representation contained in a document recording an electronic communication (eg, an email) where the representation is as to the identity of the sender or the receiver of the communication and when it was sent (see also s.161 of the Act, which section raises a presumption that the details in such communications of the sender, receiver, date etc are accurate).
f) S.183 of the Act dealing with inferences, which allows the court to draw any reasonable inference from a document in relation to its admissibility.

When reviewing the prosecution brief of evidence, the defence solicitor and/orbarrister should examine each and every document sought to be adduced in evidence by the prosecutor and ensure its admissibility.

8. But with any document, be it a traditional hard copy document seized from an offender or witness, or one in electronic form (such as a computer hard disc, CD, USB stick and/or printout therefrom), it is of vital importance to the integrity of the investigation and ultimate success of the prosecution that police accurately record/log, inter alia, the following information:

a) Where, when and by whom the document was seized,
b) The source of the power under which the document was seized (eg, search warrant),
c) The chain of handling of the document from the time when it was first seized,
d) Where the document has been stored since it was first seized, and
e) Who has had access to the document (and for what purpose) since it was first seized.

Errors identified by the defence in relation to one or more of the above issues may support a defence submission that one or more documentary exhibits are inadmissible.

9. Further, where forensic examination of a document has taken place (such as for fingerprinting or DNA analysis) after its initial seizure, the defence solicitor and/or barrister should check to see whetherthe integrity of the document has been maintained from the time of its initial seizure (ie, a proper chain of custody).

10. Also remember the old adage repeated by the seasoned prosecutor, *'people lie, documents don't'.* The significance of this to the prosecutor of course is that in conducting an investigation it is vital forthe police to obtain/seize all likely relevant and available documentation from all possible sources ASAP after the commencement of the investigation. Not surprisingly, if this is not done, relevant documents may disappear. If a client suspects a police investigation may soon commence and comes to you for advice, it is not improper to advise the client to remove possibly incriminating documents to a neutral venue for safe custody. It is not an offence to refuse or fail to divulge information or produce evidence (but see also sections 315 and 317 of the Crimes Act covering the offences of "hindering an investigation" and "tampering with evidence"). Check these sections before giving advice on the removal of documents for storage at a neutral venue.

B. Contents of witness statements

11. In compiling/obtaining witness statements, the prosecutor will have in mind a few basic practical points (set out below) which defence counsel should also keep in mind when considering challenges to the admissibility of evidence.

a) Obtain the witness statement as soon as practicable after the events in question, so as to enable the witness the opportunity to revive his/her memory of events in court (which is only allowable where the statement *'was written or made by the witness when the events recorded in it were fresh in his or her memory'* (S.32 of the Evidence Act). The statement, of course, should be signed and witnessed on each page and read over by the witness and checked for accuracy and truthfulness by the witness prior to its signature. An introductory or concluding paragraph to this effect should be included at the beginning or end of the statement. Under S.33 of the Evidence Act, police officers are permitted to have their witness statements read out as their evidence in chief provided their statement was made *'at the time or soon after the occurrence of the events to which*

it refers'. The enactment of this section emphasizes the importance of taking witness statements at a time when the events are fresh in the mind of the witness.

b) The statement should be a direct and comprehensive account of the events in question to the best of the witness' memory, containing a detailed account of what the witness saw, did, said and heard (and when). If it is impracticable to take a statement from a witness when the witness is 1st interviewed, the investigator should, at the very least, make a detailed notebook entry of the account given by the witness and have this account adopted by the witness as accurate by way of signing the notebook entry. Obviously, the later the taking of a witness statement from the events in question the more room for challenging the reliability of the account given by the witness. The defence solicitor and/or barrister should always request the police to provide any notebook entries of police interviews with prosecution witnesses so as to check for inconsistencies with the content of formal witness statements.

c) Dialogue should, wherever possible, be given in direct speech, such as 'I said, he said' (see ***Commonwealth v Riley*** (1987) 5 FCR 8 at 34). Where a witness cannot remember exactly what was said in any particular conversation, a qualifying phrase such as*'he said words to the following effect'* should be used (see ***Hamilton-Smith v George*** [2006] FCA 1551 at [83]). Indirect speech is given less weight in the courtroom.

d) Wherever possible, witnesses should refrain from making conclusions or giving opinions in the body of their witness statements (or in the courtroom for that matter!). Any statements by a witness to this effect should be the subject of objection by the defence.

e) Statements should be typed and double spaced, with numbered paragraphs and new paragraphs for each new occurrence being mentioned.

f) When a witness is shown a document and in the witness statement comments on or refers to the document and/or its contents, the subject document should be properly identified in the body of the witness statement, and if need be, a copy of the document should be annexed to the statement. The phraseology adopted is usually something like *'I have been shown a 10 page document marked AB123. I say that I drafted and signed this document on xxx (date). A true copy of the document is annexed to this my witness statement.'*

g) The original signed copy of the witness statement should be kept in a safe place by the investigator, as it may need to be shown to the witness in court if the witness is used as a 'live' witness in later court proceedings (such as when being cross examined by defence counsel on a prior inconsistent statement).

h) When questioning the suspected perpetrator, once the investigator forms the belief that there is sufficient evidence to establish that the person has committed an offence, then the investigator should, before commencing (or continuing) the questioning, caution the person that the person *'does not have to say or do anything but that anything the person does say or do may be used in evidence'* (S.139 of the Evidence Act). Failure to caution the suspect at this stage would normally render any following conversation inadmissible. Defence counsel should keep firmly in mind the need for police to caution a suspect at the appropriate time, and challenge the admissibility of any admissions made by a suspect without caution.

i) Any questioning of a suspect (particularly under caution) should be recorded by video (or tape recorder) whenever possible. Failure to do so

might well render inadmissible the product of such questioning (see S281 of the NSW Criminal Procedure Act). At the very least any admissions made by a suspect should be recorded in the investigator's official notebook and adopted by signature of the suspect in the notebook.Defence counsel should check the admissibility of any admissions made by a defendant.

C. Methods of presenting evidence in the courtroom

12. The prosecution of fraud and corruption charges often involves the presentation, examination and interpretation of voluminous business and banking records. The task is frequently one of a detailed 'paper chase'.

13. The Evidence Act allows for a degree of flexibility in the presentation of the prosecution evidence. But one example is S.29 of the Evidence Act. S.29(4) of the Act allows evidence to be given *'in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given'.* This section codifies the modern common law principle that aids such as charts and summaries prepared by a witness (most often an expert witness) can be used to explain complicated business transactions. The case law on the area is usefully outlined in theWA Court of Appeal decision of ***Caratti v The Queen*** [2000] WASCA 279 at [300-347]. The task of defence counsel when confronted with such charts and summaries etc is to, firstly, argue they are unnecessary and may well be given undue weight by a jury, beyond that which the primary evidence justifies. And secondly, they should be checked for accuracy.

14. I have already referred to S.50 of the Act which allows for the proof of voluminous or complex documents (or a series of them) in the form of a summary. S.79 of the Act gives a court wide latitude in allowing for expert opinion evidence to be given by experts bankers, forensic accountants, document examiners and IT experts. Similarly, S.80 of the Act abolishes the 'ultimate issue' rule and allows an expert to opine on the ultimate issue in a trial (eg, that the flow of funds through various banks went to the accused etc).Defence counsel should examine carefully the purported expertise of each prosecution expert and the opinions given by them and, where necessary, consult with defence experts in order to challenge the opinions and conclusions of the prosecution experts.

15. The stark reality of recent fraud prosecutions is that they involve the close examination of numerous documents and business records. Expert forensic accountants are now allowed to present the results of their examination of literally thousands of documents by the use of charts, summaries, diagrams and the like. Because of this, it is now essential in the proper defence of any fraud prosecution of any complexity to engage the services of an expert forensic accountant and/or analyst soon after charging and then through to trial. Any forensic accountant engaged by the defence should scrutinize the prosecution evidence with care. Incorrect or misleading assertions or opinions should be the subject of challenge at trial.

16. Frequently, we now have the use of 'e' courts where judge, counsel, witness and jury each have in front of them a computer screen whereby individual documentary exhibits can be shown to them and particular entries highlighted by pointer and/or colour by the participants in the trial. The conduct of a trial in this way does away with the need for thousands of hard copy exhibits and allows for a clear and simple presentation of what might otherwise be a lengthy and burdensome task. Defence

counsel should check the admissibility of each and every document sought to be put before the jury by the prosecutor.

17. Even before presentation of the case in court, it is now open to the prosecution to present its brief of evidence to the defencein electronic form (ie, on disc). Provided the disc is properly indexed such that by clicking on an individual item in the index on the disc that item is then opened on the screen, there can be no real objection to this course. But the police should always be asked to serve a 'hard copy' brief as well as a soft copy. Further, make sure the software used by the police is compatible with the software being used by the defence counsel briefed to appear.

D. Selection of appropriate charges

18. Selection of appropriate charge/s to lay against an offender is one of the most contentious issues arising today. I say contentious because one of the major changes I have seen in my 35 years in practice as a criminal lawyer is the increase in 'overcharging' by all prosecuting agencies, whether it be on the part of the DPP or the Police. The facts surrounding the commission of nearly every crime on the statute books allow for the prosecuting agency to charge a variety of charges. But the question should not be 'how many charges can be laid?',but rather 'what are the most appropriate and least number of charges that can be laid that reflect the overall criminality of what has taken place?'.

19. No judge instructing a jury on the law relating to each separate count on an indictment will thank the prosecutor for 'overloading' the indictment with unnecessary additional charges. The number of charges will not necessarily result in an increased overall sentence because of the sentencing principles of totality and concurrency. So my clear message to you today is to urge the police and/or DPP to lay as few charges as possible, or selectthe fewest number of charges that reflect the overall criminality of what has taken place.

20. In this regard, useful reference can be made to the NSW DPP's prosecutorial guideline 6, where in relation to ***'Settling Charges'***the following comment is made:

> *'Charges are to be selected that adequately and appropriately address the criminality alleged and enable the matter to be dealt with fairly and expeditiously according to law…Prosecutors must in all cases guard against the risk of hearings becoming unduly complex or lengthy'.*

21. The practice of 'overcharging' by prosecuting authorities is often justified by them by reference to the principle in the seminal case of ***The Queen v De Simoni*** (1981) 147 CLR 383. At page 389 of the judgment of the High Court, the then Chief Justice, Sir Harry Gibbs, sated:

> *'However, the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted.'*

22. Defence counsel frequently argue that the comments of the High Court mean that facts outlined in a Summary of Facts which disclose the commission of offences not charged should be excised from those facts. But this argument is flawed, as it ignores other remarks of the High Court in ***De Simoni***. In the judgment of the High Court, Sir Harry Gibbs went on to say:

'A judge in imposing a sentence is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence'.

23. A number of recent decisions of the NSW Court of Criminal Appeal have made clear that the principle in ***De Simoni*** should not be taken beyond its immediate context. Importantly, the CCA has stated quite clearly that a course of unlawful conduct may well give rise to a number of possible charges. If the prosecution proceeds on one count only, it does not follow that surrounding conduct cannot be taken into account in sentencing. Although the surrounding conduct cannot give rise to a more serious offence, it can demonstrate the degree of seriousness with which the charged offence should be viewed (see ***Einfeld v Regina*** [2010] NSWCCA 87 at [146] and ***Edwards v R*** [2009] NSWCCA 199 at [53]). In this regard, when engaging in 'plea bargaining' with the police and/or DPP, useful reference can be made to this jurisprudence in corresponding with the prosecuting agency. The defence should suggest to the prosecutor that "one charge will suffice" while conceding to the prosecutor that evidence of less serious uncharged criminal acts can form part of an Agreed Statement of Facts.

24. I need to make one further but very important point concerning the selection of appropriate charges. Frequently in fraud and corruption cases you find the offender committing the same crime (eg, obtaining money by deception) time and time again over a period of time, and sometimes over a number of years. Long accepted judicial authorities allow prosecutors in these situations to lay a 'rolled up' charge averring fraud between particular dates. Such a charge is not bad for duplicity (see generally ***R v Moussad*** [1999] NSWCCA 337 and the cases cited therein). Alternatively, sample counts can be selected from over the whole course of the subject criminality. Again, defence counsel should articulate this principle when engaging in plea bargaining with the prosecution.

E. Prosecution success rates

25. In doing the research whilst preparing this paper I had little success in locating actual statistics breaking down success rates for trials specifically dealing with fraud charges. The figures just aren't available.

26. But I think it's the experience of all of us involved in the criminal justice system, that by and large juries struggle with the complexities of fraud trials. And it is perhaps for this reason that the great majority of fraud trials take place summarily in the Local Court without a jury. I have little doubt that the success rates for fraud and corruption prosecutions in the Local Court are far higher than in the Superior Courts. The anecdotal evidence supports that assertion.

27. In the NSW DPP's Annual Report for the 2009/10 year, I did find statistics covering the proportion of matters dealt with at trial in the Supreme and District Court for jury verdicts of guilty and not guilty after a defended trial. 53% of the trials resulted in 'not guilty' verdicts and only 47% in verdicts of guilty. I must say, I was somewhat surprised at these figures, but wearing my hat (or wig!) of a criminal defence barrister, it was a pleasant surprise.

28. I advise you all, that in order to increase the chances of success in the defence of any fraud or corruption matter, put the Crown to strict proof of all the elements of the offences charged.

F. Problems for the prosecutor proving charges flowing from ICAC hearings

29. In recent years in general and in recent months in particular we have all read of criminal charges having been laid against individuals as a result of recommendations being made from ICAC hearings. When advising clients on the merits of defending such charges, defence solicitors and barristers should keep firmly in mind the need to scrutinize the prosecution evidence with care. Some of the evidence may be based on evidence gathered by ICAC investigators and/or evidence given at ICAC hearings themselves. It should be remembered that most evidence given by witnesses at ICAC hearings is given "under objection" and subject to s38 ICAC Act declarations (and see s37 also) with the effect that what the witness says cannot generally be used in later criminal proceedings. When scrutinized carefully, the briefs of evidence flowing from ICAC hearings are frequently of a poor standard such as to give rise to many valid arguments on admissibility. Further, the very holding of an ICAC hearing gives rise to lengthy delay in the prosecution of offences such as to increase the prospects of success of an application for a permanent stay of proceedings.

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