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LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Report 51

Dishonestly Procuring Valuable Benefits

December 1998
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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21 December 1998

Dear Minister

I am pleased to submit to you Report 51 of the Law Commission, *Dishonestly Procuring Valuable Benefits*.

Because this matter is both urgent and within a narrow compass the procedure adopted by the Commission in preparing this report was to circulate a draft and invite comment from the Solicitor-General, the New Zealand Police, the New Zealand Law Society, the Criminal Bar Association, interested trade organisations, High Court judges (including the judges of the Court of Appeal), District Court judges with jury warrants, and at least one academic lawyer specialising in criminal law from each of the five university law schools. There was no opposition to our proposal but we have been assisted by suggestions that enabled us to fine-tune the report in certain relatively minor respects.

We recommend the urgent adoption of the proposals contained in this report.

Yours sincerely

The Hon Justice Baragwanath
President

The Right Hon Douglas Graham MP
Minister of Justice
Parliament Buildings
WELLINGTON

Dishonestly procuring valuable benefits

R v Wilkinson

1 THE COURT OF APPEAL DECISION IN *R v Wilkinson* (13 October 1998, CA 122/98) demonstrates that certain dishonest actions which constitute the offence of theft or obtaining by false pretence, if they result in payment being made to the accused by cash or cheque, are not offences if the mode of payment employed is a direct transfer of funds from one bank account to another. Appellants in *Wilkinson* had by means of various dishonest representations induced financial institutions to advance moneys on the security of vehicles and machinery. The mechanics of payment of the advances are described in the court's judgment as "electronic transfer, direct credit and cheque deposit". The debiting of the financier's bank account and the crediting of appellants' account was in each case brought about by the action of the financier in instructing a communication directly between bankers or, in the case of the one cheque deposit, by its agent lodging the cheque with the appellants' banker.

2 The Court of Appeal quashed the appellants' convictions of offences under the Crimes Act 1961 s 246 (2) which provides as follows:

> (2) Everyone who, with intent to defraud by any false pretence, either directly or through the medium of any contract obtained by false pretence, obtains possession of or title to anything capable of being stolen, or procures anything capable of being stolen to be delivered to any person other than himself, is liable . . .

The expression "capable of being stolen" is defined in s 217 in the following terms:

> Every inanimate thing whatsoever, and every thing growing out of the earth, which is the property of any person, and either is or may be made movable, is capable of being stolen as soon as it becomes movable, although it is made movable in order to steal it.

The court in construing that definition had regard to its use in the definition of theft in s 220; that definition is in the following terms:

> (1) Theft or stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person, anything capable of being stolen, with intent–
>
> (a) To deprive the owner, or any person having any special property or interest therein, permanently of such thing or of such property or interest;

The historical reason for terminology appropriate to larceny being employed in defining the offence of obtaining by false pretences is that the latter offence was created by a 1757 statute to do away with subtle distinctions between larceny and fraud. It was not the purpose of the 1757 statute to add to the classes of property capable of being stolen (Griew, "Stealing and Obtaining Bank Credits" [1986] Crim LR 356, 357). The court based its decision on two points which it is convenient in this report to refer to as the capability of being stolen point and the transfer point.

The capability of being stolen point

3 The four basic elements of the offence of larceny at common law were

- asportation or taking
- without the possessor's consent
- of something capable of being stolen
- *animo furandi*, with intent to steal it.

The survival of these elements in the New Zealand statute is plain. All five Court of Appeal judges in *Wilkinson* held, consistently with received opinion, that because under s 217 a thing must be movable to be capable of being stolen, the definition was confined to choses in possession (ie, tangible things) and did not extend to such an intangible chose in action as a credit in a bank account. (Hence the need in s 218 to make special provision for another intangible, electricity.)

The transfer point

4 A majority of the court (Thomas J dissenting) accepted the analysis of the House of Lords in *R v Preddy* [1996] AC 815. Where the bank account of the financier was in credit, what the financier owned was a chose in action, a debt from the bank. When on its client's instructions the bank debited the financier's account with

an amount that was credited to the appellants' account with that or some other bank the correct analysis is not that the financier's chose in action was transferred but that it was cancelled *pro tanto* by the bank's performance of its obligation. There then came into existence in each case a new chose in action, namely the debt to the appellants of the appellants' bank. The situation, if the effect of the debiting of the financier's account was that it was overdrawn tells even more strongly against there having been any transfer. In such circumstances all the financier owned was a right to draw down pursuant to a promise of accommodation which may or may not have been contractually enforceable.

5 The situation in the one case where the financier drew a cheque for the amount of the advance was no different, for the chose in action represented by the cheque had never belonged to the drawer.

The problem

6 So (said the Court of Appeal) there was no offence under s 246(2), because nothing had been obtained that was capable of being stolen. The decision in *Wilkinson* (as to which the prescience of an article by Frank Quin, "*Preddy* – Issues for New Zealand's law of Theft and Fraud" [1996] NZLJ 459, should be acknowledged) points to a yawning gap in the criminal law which in the view of the court requires attention; in our view the need for attention is urgent. It is manifestly wrong that criminal liability on a charge of obtaining by false pretences should turn on the chance of the particular mechanics of payment employed. It was pointed out by the Court of Appeal in *Wilkinson* that the facts of that case would have supported a charge under s 229A which deals with using a document with intent to defraud. But this is of no help in other cases; consider the dishonest person who obtains a financial benefit by means of oral misrepresentations or the use of someone else's Personal Identification Number. There is an increasing readiness on the part of banks and other financial institutions to transfer funds in reliance on telephoned instructions conveyed either by voice or by using telephone dial numbers (subject of course to various identification protocols). We were advised by the Financial Services Federation of the increasing preference for direct debiting or electronic crediting over paper-based payments, and that "[a] number of members have indicated that they could no longer handle loan payments on any other basis". We were advised by the New Zealand Bankers' Association that the proportion of non-

cash payments made by Magnetic Ink Encoded Paper (mainly cheques) fell from 54 percent in 1993 to 27 percent in 1997.

The solution

7 So what is to be done? The capability of being stolen point is dealt with well enough by the English Theft Act 1968 and legislation from other jurisdictions framed in imitation of it. The Victorian Crimes Act 1958 as amended by the Crimes (Theft) Act 1973 is a convenient example. Under that statute the word *property* is defined to include choses in action (s 71), the definition of theft uses the expression *appropriates property* (s 72) and s 73(4) provides that "any assumption by a person of the rights of an owner amounts to an appropriation". So, for example, one who withdraws money from another's bank account by misuse of a signing authority, as in *R v Kohn* (1979) 69 Cr App R 395, or by means of a forged cheque, as in *Chan Mon-sin v A-G of Hong Kong* [1988] 1 All ER 1, assumes the rights of the owner of the account and so appropriates. But this solution leaves unresolved the transfer point.

8 The solution to *Preddy* adopted in England has been the enactment of an amendment to the Theft Act 1968. Judgment in *Preddy* was delivered on 10 July 1996. The terms of the report by the Law Commission of England and Wales, *Offences of Dishonesty: Money Transfers* (Law Com 243, 1996), were settled on 18 September 1996 and ordered to be printed on 14 October 1996. The Act received the royal assent on 18 December 1996. It inserts the following new ss 15A and 15B:

> **15A Obtaining a money transfer by deception**
> (1) A person is guilty of an offence if by any deception he dishonestly obtains a money transfer for himself or another.
>
> (2) A money transfer occurs when–
> (a) a debit is made to one account,
> (b) a credit is made to another, and
> (c) the credit results from the debit or the debit results from the credit.
>
> (3) References to a credit and to a debit are to a credit of an amount of money and to a debit of an amount of money.
>
> (4) It is immaterial (in particular)–
> (a) whether the amount credited is the same as the amount debited;
> (b) whether the money transfer is effected on presentment of a cheque or by another method;
> (c) whether any delay occurs in the process by which the money

transfer is effected;

(d) whether any intermediate credits or debits are made in the course of the money transfer;

(e) whether either of the accounts is overdrawn before or after the money transfer is effected.

(5) A person guilty of an offence under this section shall be liable on conviction on indictment to imprisonment for a term not exceeding ten years.

15B Section 15A supplementary

(1) The following provisions have effect for the interpretation of section 15A of this Act.

(2) "Deception" has the same meaning as in section 15 of this Act.

(3) "Account" means an account kept with–

(a) a bank; or

(b) a person carrying on business which falls within subsection (4) below.

(4) A business falls within this subsection if–

(a) in the course of the business money received by way of deposit is lent to others; or

(b) any other activity of the business is financed, wholly or to any material extent, out of the capital of or the interest on money received by way of deposit;

and "deposit" here has the same meaning as in section 35 of the Banking Act 1987 (fraudulent inducement to make a deposit).

(5) For the purposes of subsection (4) above–

(a) all the activities which a person carries on by way of business shall be regarded as a single business carried on by him; and

(b) "money" includes money expressed in a currency other than sterling or in the European currency unit (as defined in Council Regulation No 3320/94/EC or any Community instrument replacing it).

With necessary changes, in particular the substitution of references to local in the place of British and European measures, similar sections inserted into the Crimes Act 1961 would go some way towards solving the problem. But there seems no advantage in confining the reform to money and banking. Consider the case of a person alleged without the use of documents to have dishonestly directed to that person's benefit electronically recorded trader's loyalty inducements such as "Fly Buy Points". Or consider a share-broker who under the current scriptless Securities Transfer System relies on oral instructions dishonestly given by someone who has learned the true owner's Shareholder Number.

9 We believe that the problem can be solved far more comprehensively and neatly. We repeat the definition of obtaining by a false pretence contained in s 246(2):

> **246 Obtaining by false pretence**
>
> . . .
>
> (2) Everyone who, with intent to defraud by any false pretence, either directly or through the medium of any contract obtained by false pretence, obtains possession of or title to anything capable of being stolen, or procures anything capable of being stolen to be delivered to any person other than himself, is liable . . .

Section 229A is in the following terms:

> **229A Taking or dealing with certain documents with intent to defraud–**
>
> Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to defraud,–
>
> (a) Takes or obtains any document that is capable of being used to obtain any privilege, benefit, pecuniary advantage, or valuable consideration; or
>
> (b) Uses or attempts to use any such document for the purpose of obtaining, for himself or for any other person, any privilege, benefit, pecuniary advantage, or valuable consideration.

10 It seems to us that the neatest solution is to insert in s 246(2) the general words "obtains for himself or for any other person any privilege, benefit, pecuniary advantage, or valuable consideration" already used in s 229A, so that s 246(2) would read:

> Everyone who, with intent to defraud by any false pretence, either directly or through the medium of any contract obtained by the false pretence,
>
> (a) obtains possession of or title to anything capable of being stolen; or
>
> (b) procures anything capable of being stolen to be delivered to any person other than himself; or
>
> (c) obtains for himself or for any other person any other privilege, benefit, pecuniary advantage or valuable consideration
>
> is liable . . . .

In other words it seems to us that to specify the types of benefit as in the English statute runs the risk of gaps being discovered in the future. It is better in our view to employ the general and all embracing terminology already used in s 229A (drafted by the Criminal Law Reform Committee in a 1972 report on the theft and fraudulent use of credit cards and airline tickets). We recommend that the Crimes Act 1961 be amended accordingly.

Afterword

11 Our consultation processes have revealed some disquiet with the present state generally of Part X of the Crimes Act 1961 relating to crimes against rights of property. Concern, for example, has been expressed to us at the absence from New Zealand criminal law of any comprehensive protection for intangibles. Again, it was suggested to us that the current widespread reliance on s 229A in fraud cases involving use of a document is unsatisfactory because the necessary mental element, defined in such cases as *R v Firth* [1998] 1 NZLR to be dishonesty, lacks the specificity appropriate to the definition of a criminal offence.

12 General review of the Crimes Act 1961 seems at present to be in some sort of limbo. A 1989 Bill to replace the 1961 statute was not proceeded with following widespread opposition (including publicly expressed judicial opposition) to what was seen as gratuitous tinkering with provisions of the 1961 Act whose meaning was well settled. The Crimes Consultative Committee, chaired by Justice Casey, reported to the Minister of Justice in April 1991 and was generally thought to have knocked the 1989 Bill into acceptable shape, but nothing more seems to have happened (see *Crimes Bill 1989: Report of the Crimes Consultative Committee*, Wellington, 1991).

13 It may be that a sensible way forward would be for the Crimes Act 1961 to be reviewed bit by bit, commencing with Part X. If conduct of this part of the review were entrusted to this Law Commission the task would mesh well with work currently being done by us in relation to electronic commerce.
