IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV-2010-419-990
[2013] NZHC 2728

BETWEEN	COMMISSIONER OF POLICE Applicant
AND	RONNIE JOSEPH DE WYS First Respondent
	PENELOPE HELEN LOUISA DE WYS Second Respondent

Hearing: 11 October 2013

Appearances: P V Cornege for applicant
P Gorringe for first respondent
R Laybourn for second respondent

Judgment: 18 October 2013

JUDGMENT OF LANG J
[on application by respondents for orders as to admissibility of evidence]

This judgment was delivered by me on 18 October 2013] at 4.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

[1] During 2010, the police suspected that Mr and Mrs De Wys were involved in money laundering activities. On seven separate occasions between 31 May and 30 December 2010 they obtained and executed search warrants under s 198 of the Summary Proceedings Act 1957 ("the Summary Proceedings Act") seeking evidence relating to those activities.[1] The police searched the farm on which Mr and Mrs De Wys were living on two occasions. They also used the search warrants to gain access to bank accounts in the name of Mr and Mrs De Wys, as well as records held by their accountants, lawyers and the Livestock Improvement Corporation.

[2] The police ultimately elected not to lay criminal charges against Mr and Mrs De Wys. Instead, the Commissioner of Police issued this proceeding, in which he seeks civil forfeiture orders against Mr and Mrs De Wys under Subpart 3 of Part 2 of of the Criminal Proceeds (Recovery) Act 2009 ("the Criminal Proceeds Act"). He seeks assets forfeiture orders in respect of the farm and various vehicles found on the farm on the basis that they are tainted property that was acquired or derived, directly or indirectly, from significant criminal activity.[2] The Commissioner also seeks a profit forfeiture order in the sum of $806,439.97, being the value of the benefit the Commissioner contends Mr and Mrs De Wys have derived as a result of that activity.[3]

[3] In support of the applications the Commissioner proposes to adduce material the police obtained using the search warrants issued under s 198 of the Summary Proceedings Act. Mr and Mrs De Wys oppose the Commissioner making use of the material in that way, and have applied for an order that the material is not admissible in this proceeding. In an argument presented by counsel for Mr De Wys, they submit that the Commissioner acquired the material using search warrants issued for an entirely different purpose. They contend that the Commissioner should not be able to adduce it in this proceeding given the fact that the police obtained it using search warrants issued for the sole purpose of investigating suspected criminal activity.

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1 On one occasion the police also alleged that they believed that Mr and Mrs De Wys were involved in cultivating cannabis.

2 Criminal Proceeds (Recovery) Act 2009, s 50.

3 Ibid, s 55.

The argument

[4] Counsel for Mr De Wys acknowledges that the admissibility of evidence in New Zealand is governed by the Evidence Act 2006 ("the Evidence Act"). The fundamental principle underlying admissibility under the Evidence Act is that, in order to be admissible, evidence must have a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.[4] If evidence is not relevant in that sense, it will not be admissible in any type of proceeding.[5]

[5] The Commissioner seeks to adduce the evidence obtained using the search warrants, in part at least, in order to establish that Mr and Mrs De Wys have been engaged in significant criminal activity. The Act defines "significant criminal activity" as activity consisting of one or more offences carrying a maximum sentence of at least five years imprisonment, from which property or benefits having a value of at least $30,000 have been acquired or derived.[6] The Commissioner will not be able to obtain any of the orders that he seeks unless he establishes that Mr and Mrs De Wys have been involved in activity of that type. There is no dispute for present purposes that the evidence obtained using the search warrants will be relevant to that issue.

[6] The Court is required to exclude evidence if its probative value is outweighed by the risk that it will have an unfairly prejudicial effect on the proceeding,[7]or where it will needlessly prolong the proceeding.[8] Counsel for Mr De Wys submits that the proposed use of the material would have an unfairly prejudicial effect on the present proceeding because of the fact that the police obtained it using warrants issued for an entirely different purpose.

[7] In addition, the Court is required to interpret the Evidence Act in a way that promotes its purposes and principles.[9] One of the purposes of the Evidence Act is to provide rules of evidence that recognise the importance of the rights affirmed by the

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4 Evidence Act 2006, s 7(3).
5 Ibid, s 7(2).
6 Criminal Proceeds (Recovery) Act 2009, s 6(1).
7 Evidence Act 2006, s 8(1)(a).
8 Ibid, s 8(1)(b).
9 Ibid, s 10(a).

New Zealand Bill of Rights Act 1990.[10] Section 21 of the New Zealand Bill of Rights Act 1990 provides that everyone has the right to be secure against unreasonable search and seizure, whether of the person, property, correspondence or otherwise. Counsel for Mr De Wys argues that the searches the police carried out have now become unreasonable because of the fact that the Commissioner wishes to adduce evidence obtained for another purpose in the present proceeding.

[8] Underlying both arguments is a submission that the common law does not permit the police to use evidence obtained using warrants issued under s 198 of the Summary Proceedings Act in a civil proceeding. Counsel for Mr De Wys points out that the Courts are permitted to interpret the Evidence Act having regard to the common law so long as the common law is consistent with the provisions, purposes and principles of the Act.[11] He submits that exclusion of the evidence obtained using the search warrants is consistent with the provisions, purposes and principles of the Act.

The cases

[9] Counsel for Mr De Wys relies on *R v D(CA287/10)*[12] and *Arnerich v R*[13] in support of his argument that the common law does not permit evidence obtained for one purpose to be used for another. Both cases related to criminal prosecutions instituted under the provisions of the Films, Videos and Publications Classification Act 1993 ("the Films Act"). In each case the prosecution had sought to adduce evidence obtained using search warrants issued under s 198 of the Summary Proceedings Act. The Court of Appeal held that the evidence had been improperly obtained in terms of s 30(5)(a) of the Evidence Act, and that the proportionate response to that impropriety was to exclude it from the trial.

[10] Both judgments relate, however, to criminal proceedings and not to civil proceedings. That is an important distinction in the present context, because s 30 of the Evidence Act establishes a specific regime for determining the admissibility of evidence in criminal proceedings where it has been improperly obtained. Evidence

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10 Ibid, s 6(b).
11 Evidence Act 2006, s 10(1)c).
12 *R v D(CA287/10)* [2011] NZCA 69.
13 *Anerich v R* [2012] NZCA 291.

will be improperly obtained for the purposes of s 30 where it is obtained in the circumstances set out in s 30(5) of the Evidence Act. This will generally occur where government agencies or public bodies have obtained the evidence unfairly, or in breach of any enactment or rule of law. Where this occurs, the Court must undertake the balancing exercise prescribed by s 30(2)(b) and (3) in order to determine whether exclusion of the evidence is proportionate to the impropriety in question. Importantly, s 30 only applies to criminal proceedings. It has no application in the present case, because an application for assets and property forfeiture orders is a civil proceeding.[14] The Court of Appeal therefore reached its conclusions in *R v D(CA287/10)* and *Arnerich* in an entirely different context.

[11] Secondly, s 198(1A) of the Summary Proceedings Act expressly prohibits a search warrant from being issued in respect of an offence against any provision of the Films Act. The Films Act has its own search and seizure regime[15] and, as a consequence of s 198(1A), this must be regarded as a code. As a result, the police had obtained the evidence in both cases unlawfully from the outset.

[12] The situation was compounded in *R v D(CA287/10/)* by the fact that the police had obtained the warrant in question from a Deputy Registrar, when the search and seizure provisions under the Films Act require any search warrant to be issued by a Judge. As a consequence, the issuer had no jurisdiction to issue a warrant under the Films Act. These distinctions mean that neither case is of any real assistance in the present context.

[13] Counsel for Mr De Wys also relies on a line of Australian authority relating to the use that government agencies may make of material obtained under search warrants issued for the purpose of investigating suspected criminal offending. The Courts in Australia have held, in a variety of contexts, that it is improper for the agency in question or any other person to use such material for any purpose other than that in respect of which the search warrant was issued.[16] In particular, it will be

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14 Criminal Proceeds (Recovery) Act 2009, s 10(1)(c) and (d).
15 Films, Videos and Publications Classification Act 1993, s 109A.
16 *Donnelly v Amalgamated Television Services Pty Ltd* (1998) 45 NSWLR 570 at 575; *Grollo v Macauley* (1995) 56 FCR 533 at 551.

improper for any person to use the material as evidence in civil proceedings.[17] That will be so even where the events that give rise to the civil proceeding are the same as those suspected to amount to criminal wrongdoing. The principle was succinctly described as follows by Hely J in *Williams v Keelty*:[18]

> 233 If entry is gained to premises by means of the compelling nature of a search warrant, and documents are seized, in my view it would be consistent with general principle to hold that it would be improper for documents seized pursuant to the warrant to be used for any purposes outside those comprehended by the warrant.

[14] It is not necessary for present purposes to analyse the reasoning in these cases, because I am prepared to proceed on the basis that the common law in Australia has established the principles on which counsel for Mr De Wys relies. The issue is whether those principles apply in New Zealand having regard to both the provisions of the Evidence Act and the search warrant regimes established by the Summary Proceedings Act and the Criminal Proceeds Act. Counsel have been unable to refer me to any New Zealand authority dealing with that issue.

Decision

[15] In practical terms most, if not all, police investigations will initially focus upon suspected criminal conduct. During this phase the police are likely to seek search warrants under s 198(1) of the Summary Proceedings Act and its successor, s 6 of the Search and Surveillance Act 2012. In broad terms, these provisions permit the police to obtain a search warrant where they can satisfy the issuer[19] that there is reasonable ground for believing that items or evidence relating to the commission of an offence punishable by imprisonment will be found at or in the place in respect which the warrant is sought.

[16] The Criminal Proceeds Act also contains provisions designed to enable the police to obtain search warrants. Section 101(2) permits the police to obtain a

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17 *Williams v Keelty* [2001] FCA 1301, (2001) 111 FCR 175 at 224; *Australian Securities and Investments Commission v Marshall Bell Hawkins Ltd* [2003] FCA 833 at [6]; *Australian Securities and Investments Commission v Rich* [2005] NSWSC 62, (2005) 188 FLR 416 at [186] and [265]; *Pratten v Commonwealth Director of Public Prosecutions* [2013] NSWSC 594 at [81].

18 *Williams v Keelty*, above n 17 at [233].

19 The issuer may be a District Court Judge, Justice of the Peace, Community Magistrate, Registrar or Deputy Registrar.

warrant from a Judge to search any place or thing in order to locate any instrument of crime, or any evidence regarding the nature and extent of any person's interest in or control over property that is an instrument of crime. In this context an instrument of crime includes property used to commit or facilitate a qualifying instrument forfeiture offence.[20] Although a warrant may be issued before a criminal charge has been laid, that may only occur where the Judge is satisfied that a charge will be laid within 48 hours of the issue of the warrant. Section 101 has no relevance in the present case, because the Commissioner is not seeking an instrument forfeiture order against Mr and Mrs De Wys.

[17] Section 102(1) is, however, potentially relevant. It permits the police to obtain a warrant from a Judge to search any place or thing where the Judge is satisfied that there are reasonable grounds for believing that property or evidence of the type specified in s 102(2) will be found in or on that place or thing. Section 102(2) provides:

> **102 Commissioner may obtain warrant to search for and seize evidence and property**
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> …
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> (2) The property or evidence in respect of which a warrant may be issued under subsection (1) is—
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> (a) tainted property; or
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> (b) evidence establishing the nature and extent of any person's interest in or control over property that is tainted property; or
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> (c) evidence establishing the nature and extent of the interest in or control over property of any person who has unlawfully benefited from significant criminal activity; or
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> (d) property that is the subject of a restraining order (other than a restraining order obtained on the application of a prosecutor).

[18] Counsel for Mr De Wys contends that the search and seizure regime prescribed by the Criminal Proceeds Act is a self-contained code. Relying on the common law principles developed in the Australian authorities, he submits that evidence obtained during a police search will only be admissible in civil forfeiture proceedings under the Criminal Proceeds Act where the police have obtained it

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[20] Criminal Proceeds (Recovery) Act 2009, s 5.

under the authority of a search warrant issued under that Act. Evidence obtained pursuant to a search warrant issued under s 198 of the Summary Proceedings Act will not, he submits, be admissible in civil forfeiture proceedings.

[19] Self-evidently, however, the search warrant regime in the Criminal Proceeds Act is not a code. By way of example, the Commissioner will not be able to obtain any form of civil forfeiture order unless he first establishes that the respondent has engaged in significant criminal activity. Sections 101 and 102 do not, however, permit the police to obtain a warrant authorising them to search for evidence establishing that any person has engaged in significant criminal activity.

[20] Similarly, the police cannot obtain a search warrant under the Criminal Proceeds Act authorising them to search for evidence regarding the extent to which the respondent has unlawfully benefited from significant criminal activity. This is a key element of the jurisdiction to make a profit forfeiture order under s 55 of the Criminal Proceeds Act. Such significant omissions suggest that Parliament intended the police to be able to rely upon evidence obtained lawfully in other ways to establish these pre-requisites to the making of a civil forfeiture order.

[21] It is also noteworthy that ss 101(2)(a) and 102(2)(b) and (c) of the Criminal Proceeds Act permit the police to obtain warrants giving them powers that are wider in some respects than those generally given to the police in a warrant issued under s 198 of the Summary Proceedings Act. They enable the police to obtain evidence establishing the nature and extent of a person's interest in or control over property that might potentially be subject to the civil forfeiture provisions of the Criminal Proceeds Act. A search warrant issued under the Summary Proceedings Act would not generally go that far, because such material would not usually relate to the commission of an offence punishable by imprisonment. This suggests that Parliament has recognised that the police need wider powers in order to obtain evidence relevant to the civil forfeiture regime than they will require when investigating suspected criminal activity.

[22] The relationship between the criminal justice process and the civil forfeiture regime is also important in the present context. The criminal justice process operates

entirely independently of the civil forfeiture regime contained in the Criminal Proceeds Act. Most criminal proceedings will not be accompanied by proceedings seeking orders under the Criminal Proceeds Act.

[23] Sometimes, however, the investigation of suspected criminal activity will unearth the acquisition or derivation of substantial assets or income that is likely to have been produced by such activity. Where that occurs, the Commissioner may elect to issue civil proceedings under the Criminal Proceeds Act in addition to or instead of criminal proceedings. Importantly, the significant criminal activity that underpins any civil forfeiture order made under the Criminal Proceeds Act does not need to have been the subject of criminal proceedings either in New Zealand or overseas.[21] As the present case demonstrates, civil forfeiture proceedings may therefore be issued under the Criminal Proceeds Act regardless of whether or not criminal charges are to be laid.

[24] There will inevitably, however, generally be a very close relationship between the investigation and prosecution of suspected criminal activity, and the issuing of civil forfeiture proceedings under the Criminal Proceeds Act. This arises out of the fact that the police conduct the investigation that leads to both forms of proceeding being issued. The police are also likely to base any decision to issue civil forfeiture proceedings on material they have obtained during the criminal investigation. More often than not, this will include material obtained using search warrants issued under the Summary Proceedings Act.

[25] Parliament must be taken to have been aware of this fact in 2009 when it enacted the Criminal Proceeds Act. It would have been a simple matter for the Summary Proceedings Act to have been amended at that time so as to prohibit search warrants being issued under s 198 in respect of evidence likely to establish significant criminal activity in terms of the Criminal Proceeds Act. Parliament had taken a similar step in relation to the Films Act in 2005.[22] The fact that Parliament did not act in the same way when it enacted the Criminal Proceeds Act suggests that it knew and intended that material obtained using search warrants issued under s 198

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21 Criminal Proceeds (Recovery) Act 2009, s 15.

22 Films, Videos, and Publications Classification Amendment Act 2005, s 23(5).

of Summary Proceedings Act could be adduced as evidence in support of civil forfeiture proceedings under the Criminal Proceeds Act.

[26] If the argument for Mr and Mrs De Wys is correct, considerable practical difficulties will inevitably arise. First, police officers who are investigating suspected criminal activity will often obtain a search warrant under s 198 of the Summary Proceedings Act in circumstances where they genuinely do not know whether the Commissioner is likely to subsequently institute civil forfeiture proceedings. As a result, they may often not turn their minds to the possibility that they should also be applying for a search warrant under the Criminal Proceeds Act. It may also be some considerable time before the police realise that they need to use evidence obtained using a s 198 search warrant in civil forfeiture proceedings.

[27] Taken to its logical conclusion, the argument for Mr and Mrs De Wys would completely prevent the police from using such evidence in that way. In many cases, however, the physical evidence that the police obtain from the execution of a s 198 warrant will form the backbone not only of criminal proceedings but also of civil forfeiture proceedings. In particular, it will be used to establish that the respondent has engaged in significant criminal activity. Common examples would include the discovery of a clandestine methamphetamine laboratory or a substantial cannabis cultivation operation. Both would normally indicate the existence of significant criminal activity in terms of the Criminal Proceeds Act, but on the argument for Mr and Mrs De Wys the police could not use such evidence in civil forfeiture proceedings brought under the Criminal Proceeds Act.

[28] Counsel for Mr De Wys submitted that a middle road might be available. He argued that the police may be able to use material obtained from the execution of a s 198 warrant in a civil forfeiture proceeding by subsequently applying for a further warrant under the Criminal Proceeds Act. That proposition is unattractive. It is difficult to see why the police should be required to apply for a search warrant when they already have in their possession relevant evidentiary material obtained through a lawful search. In reality, the second warrant would not be a warrant at all. The police would have no need to search any place or thing, because they would already be in possession of the object of the search.

[29] These factors persuade me that the argument put forward by Mr and Mrs De Wys cannot be correct. Parliament cannot have intended to produce such an obviously unsatisfactory outcome, particularly when the primary purpose of the Criminal Proceeds Act is to establish a regime for the forfeiture of property and income that has been derived directly or indirectly from significant criminal activity.[23] That regime is designed to eliminate the chance for persons to profit from undertaking significant criminal activity, deter significant criminal activity and reduce the ability of criminals and persons associated with significant criminal activity to continue or expand criminal enterprise.[24] Those objects and purposes would largely be defeated if the Commissioner could not use evidence obtained using search warrants issued under the Summary Proceedings Act in proceedings brought under the Criminal Proceeds Act.

[30] I consider that Parliament intended that the provisions of the Evidence Act should govern the admissibility of evidence obtained by police using a search warrant issued under s 198 of the Summary Proceedings Act. Given that the evidence clearly satisfies the fundamental test of relevance, it remains only to determine whether the evidence should be excluded under the Act.

[31] The primary submission for Mr and Mrs De Wys under this head was that the evidence should be excluded because it was obtained during searches that have now become unreasonable for the reasons set out above.[25] The only ground on which it is argued that the searches should now be regarded as unreasonable is that the Commissioner wishes to use evidence in civil forfeiture proceedings. I do not consider, however, that searches that were lawful and reasonable when they were carried out lose that character because of the use to which the Commissioner subsequently seeks to put material found during the search. This argument fails as a result.

[32] Similarly, the only basis upon which it can be argued that the evidence would have an unfairly prejudicial effect on the proceeding is that the Commissioner now seeks to use material the police originally obtained using search warrants issued for

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23 Criminal Proceeds (Recovery) Act 2009, s 3(1).
24 Ibid, s 3(1) and (2).
25 At [7].

another purpose. I have already concluded that Parliament must have known and intended that this would be the case when it enacted the Criminal Proceeds Act. It could not have intended that the principles developed by the common law in Australia should also apply in New Zealand. For that reason I do not consider that the evidence will have an unfairly prejudicial effect on the proceeding in terms of s 8(1)(a) of the Evidence Act. Nor am I satisfied that the risk of any unfair prejudice would outweigh the probative value of the evidence.

[33] It follows that there is no basis upon which the Court should exclude the evidence under the Evidence Act.

Result

[34] The application is dismissed. The evidence that the police obtained using search warrants issued under s 198 of the Summary Proceedings Act is admissible in this proceeding.

Lang J

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