



Précis Paper

Fraud and Dishonesty

Troy discusses the running of a jury trial in the District Court of New South Wales. He appeared for the Crown. It is very interesting.

Discussion Includes

- What issues arise when prosecuting fraud and dishonesty cases?
- What evidence needs to be collected?
- How are the mental or fault elements of offences proved?
- What are the key steps in the prosecution?
- What is the current test for dishonesty for Commonwealth and NSW offences?

Précis Paper

Fraud and Dishonesty

1. In this edition of BenchTV, Troy Anderson (Barrister) and Ian Benson (Solicitor) discuss the trial of Stephen Hill for fraud offences arising out of his provision of mortgage brokering services and real estate advice without a licence. The trial took place in the NSW District Court before Acting Judge Garling, where Mr Anderson acted for the successful Commonwealth DPP. Mr Anderson considers that in many respects, the trial was a typical fraud prosecution.

Background

2. Mr Hill had developed a network of clients in Bathurst whom he would provide with investment advice. Over a period of time, his clients had grown to like him and trust him, investing money as he directed. In 2006, he reached out to his clients with a particular property investment proposition in Queensland and he received multiple sums from his clients of around \$100,000 each. The issue was that that was not where the money went and Mr Hill spent some of it maintaining his own personal lifestyle.

Preparation for the Trial

3. One of the issues with fraud cases is that there is often a voluminous amount of materials to present to a jury and narrowing down on precisely what the charge is can also be difficult. In order to confine the issues and limit confusion for the jury, Mr Anderson recommends approaching the other party in order to determine what is really in dispute. For example, there was no dispute as regards the significance of certain banking documents in the Hill trial, nor was there a dispute that Mr Hill had received the relevant money. The real dispute surrounded how Mr Hill was obliged to use that money.
4. Mr Hill said he had not taken the money specifically for the Queensland property (his clients understood that to be the purpose) but rather for general investment activities in any way he considered. Hill argued that he spent most of the money on investments in Melbourne and although the investment there went bad and he lost it all, he was entitled to have distributed the monies in this way. Often the state of mind of the accused is the central issue in these fraud cases.
5. Mr Anderson considered that the case was really decided on the jury believing the evidence of the investors who said that their monies were to be used for the Queensland property

over Mr Hill who said he could exercise a discretion as to the distribution of the monies to any investments.

The Trial

6. Seven charges were brought against Mr Hill under the now repealed s 178A of the *Crimes Act 1900* (NSW). Mr Anderson explains that the section was repealed because it was very cumbersome in that it was difficult to understand precisely what facts needed to be established to give rise to a conviction.

SECTION 178A (NOW REPEALED):

Fraudulent Misappropriation of Moneys Collected or Received

Whosoever having collected or received any money or valuable security upon terms requiring him or her to deliver or account for or pay to any person the whole or any part of:

- (a) such money or valuable security or the proceeds thereof, or*
- (b) any balance of such money, valuable security, or proceeds thereof after any authorised deductions or payments have been made thereout,*

fraudulently misappropriates to his or her own use or the use of any other person, or fraudulently omits to account for or pay the whole or any part of such money, valuable security, or proceeds, or the whole or any part of such balance in violation of the terms on which he or she collected or received such money or valuable security, shall be liable to imprisonment for seven years.

7. Mr Anderson explained that the phrase fraudulent misappropriation means dishonesty.
8. An issue that arose as to the meaning of the provision was that it seemed to require that the relevant monies were meant to go to a particular "person" and in this case there was never a specific person who was designated to receive the monies. Here the money was given for a *purpose* rather than to a *person*. However, the decision in *Sinanovic* [2002] NSWCCA 292 noted that money being given for a purpose (rather than for a person) was sufficient to enliven the provision.
9. Another preliminary issue that arose related to Mr Hill engaging in a compulsory interview commenced under s 19 of the *Australian Securities and Investments Commission Act 2001* (Cth):

SECTION 19:

Notice requiring appearance for examination

- (1) *This section applies where ASIC, on reasonable grounds, suspects or believes that a person can give information relevant to a matter that it is investigating, or is to investigate, under Division 1.*
- (2) *ASIC may, by written notice in the prescribed form given to the person, require the person:*
 - (a) *to give to ASIC all reasonable assistance in connection with the investigation; and*
 - (b) *to appear before a specified member or staff member for examination on oath and to answer questions.*

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

- (3) *A notice given under subsection (2) must:*
 - (a) *state the general nature of the matter referred to in subsection (1); and*
 - (b) *set out the effect of subsection 23(1) and section 68.*

- 10. The issue was whether the proceedings should be stayed because Mr Anderson and his instructing solicitor had read the record of interview and there was some authority that this was an unfair advantage for the prosecution. Ultimately, this issue was not significant because more recent authority, *R v OC (Oliver Curtis)* [2015] NSWCCA 212, provided that it was appropriate for the prosecution to see a record of a s 19 examination.
- 11. A live issue in the trial was whether or not there was anything in this interview that was worth playing to the jury. The decision was taken to play the record of interview, not because any significant admissions were made but because it was considered that it might be necessary to tie Mr Hill down to a particular story. In Mr Anderson's experience he has found that fraudsters tend to give evidence and they have the capacity to resile from a previous story. If that had happened, Mr Anderson could have simply turned to the record of interview and noted that although the accused is saying one thing now, they said something completely different earlier.
- 12. Mr Anderson noted that this matter took a very long time to prosecute. The activities which gave rise to the offense took place in 2006, the s 19 interview occurred in 2010 and the trial only occurred in 2016. This is not unusual in fraud matters because many of the investors here were initially unwilling to cooperate with authorities and there is often difficulty for the prosecutors to determine exactly what charges to bring and how they would be framed.

The Proceedings

13. The key elements in a prosecution for fraud offences are:
 - (i) Identify the 'fraudulent conduct' of the accused.
 - (ii) Identify the witnesses required to prove it.
 - (iii) Identify the alleged 'knowledge, belief or intent' held by the accused at the time of engaging in the fraudulent conduct said to render it dishonest.
14. The fraudulent conduct (element (i)) alleged were the acts of taking monies from the investors for the purpose of investing in Queensland property and then subsequently directing the funds elsewhere.
15. In cases of fraud, identifying witnesses (element (ii)) will often be simply a case of approaching the investors whose money was misappropriated. However, Mr Anderson notes that this task can sometimes be complicated by witnesses passing away and their evidence can die with them. In complex fraud cases such as this it may also be necessary to employ a forensic accountant to "crunch the numbers" and determine what monies came to Mr Hill and where it went. Documents produced by such investigators neatly corroborate the evidence of the investor witnesses.
16. Mr Anderson notes that determining the relevant mental element (element (iii)) that needs to be proved can also be quite difficult because there is a tension between the common law and statutory tests of "dishonesty" applying in Commonwealth and NSW charges. As of 2010, there is a two-step test that needs to be satisfied for the mental element per s 4B of the NSW *Crimes Act*:
 - (i) The conduct was "dishonest according to the standards of ordinary, decent people", and it was
 - (ii) "known by the person to be dishonest according to the standards of ordinary people".
17. Previously, only the first limb (the objective dishonesty criterion) from *Peters v The Queen* (1998) 192 CLR 493 was required to be proven under the common law. The second, subjective limb was developed in the UK case of *Ghosh* [1982] QB 1053. In *Hill*, it was only necessary to meet the *Peters* requirement because the offending occurred in 2006.
18. Mr Anderson noted that avoiding the second limb made this prosecution comparatively simple because it is very hard to prove what the accused was thinking and resort is almost always made to circumstantial evidence and inferences. However, Mr Anderson

nevertheless made submissions to the jury that Mr Hill knew what he was doing was dishonest on the basis that there was evidence he tried to cover his tracks by backdating correspondence.

Accused Fraudsters Giving Evidence

19. Mr Anderson found that Mr Hill was a very bad witness. His demeanor indicated that he thought he was a victim in these proceedings. He tried to explain his conduct by saying he was a great financial advisor and had made significant sums for his clients in the past. He said that the monies were provided to him with no indication that he had to invest them in the Queensland property and he could invest however he wanted. He admitted that he spent some money on things associated with his lifestyle but argued that he could do that.
20. Mr Anderson notes that it was interesting to see the jury react to this evidence because there contempt for him was palpable, with a lot of crossed arms and an occasional muffled laugh at some of his answers. Mr Anderson notes that often fraudsters will think that they can talk their way out of trouble but it is a different matter when everything they have ever done or said has been ventilated at the same time for them to be talking their way out of trouble and thus fraudsters giving evidence rarely works. In Mr Hill's case, his angry demeanor at even having been charged meant that even when he provided evidence which was positive for his defence, it was rarely assigned much weight by the jury. His demeanor was particularly problematic given the demeanor of prosecution witnesses being very much genuine and without axes to grind, indicating that they had given Mr Hill monies to invest as a result of various promises he had made and they had clearly been ripped off.

Conviction and Sentence

21. Mr Anderson was successful in reaching convictions on 6 out of the 7 charges brought against Mr Hill. Mr Anderson considers that he was unsuccessful on the last charge because the particular investor was not as strong when questioned about what their initial agreement was. That witness was unable to clearly recall a conversation with Mr Hill where Hill said 'give me your money for investment in Queensland property', unlike many of the other witnesses.
22. Mr Hill was given a custodial sentence of 2 years and 9 months with a non-parole period of 1 year and 9 months, which is standard for an offence of this nature. The 6 offences were to be served concurrently. Although victim impact statements were not allowed to be before his Honour during sentencing, Mr Anderson considers that the sentence reflected the notion that Mr Hill's actions had adversely affected the lives of many people, some of whom had to work longer than they might have before retiring and with all having to suffer significant stress.

BIOGRAPHY

Troy Anderson

Barrister, Queens Square Chambers, Sydney

Troy Anderson was admitted as a solicitor in 1998 and came to the Bar in 2007. He specialises in criminal law and he has a particular interest in Commonwealth criminal law, fraud and narcotics offences. He is the author of Commonwealth Criminal Law and the editor of the LexisNexis online and loose leaf service, ABC of Evidence. He is an occasional lecturer in criminal law at the University of New England. Mr Anderson is routinely briefed by the Commonwealth DPP and is on the Legal Aid panel for complex offences. He is a member of the Australian and New Zealand Association of Psychology and the Law. He is on the NSW Bar Association Criminal Law Committee.

Ian Benson

Ian Benson is a solicitor at AR Conolly and Company and holds a First Class Honours degree in law.

BIBLIOGRAPHY

Cases

Ghosh [1982] QB 1053
Peters v The Queen (1998) 192 CLR 493
R v OC (Oliver Curtis) [2015] NSWCCA 212
Sinanovic [2002] NSWCCA 292

Legislation

Australian Securities and Investments Commission Act 2001 (Cth)
Crimes Act 1900 (NSW)