

25.10.02



IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS *Civil*  
HOLDEN AT GEORGE TOWN, GRAND CAYMAN  
CAUSE NO. PCCL1/99 & PCCL 2/02

IN THE MATTER OF SECTION 10 OF THE PROCEEDS OF CRIMINAL  
CONDUCT LAW (2001 REVISION)

AND IN THE MATTER OF EURO BANK CORPORATION (IN LIQUIDATION)

AND IN THE MATTER OF CRYSTAL LTD.

IN THE MATTER OF THE PROCEEDS OF CRIMINAL CONDUCT LAW (2001  
REVISION)  
AND

IN THE MATTER OF A RESTRAINT ORDER UNDER SECTION 10 OF THE  
PROCEEDS OF CRIMINAL CONDUCT LAW (2001 REVISION)

Before Henderson, J.



Appearances:

Mr. Andrew Mitchell, Q.C. for the Crown, instructed by Miss Richards for the  
Attorney-General  
Mr. Michael Briggs, Q.C. for Crystal instructed by Del Magner of Ritch & Conolly  
Mr. Colin McKie of Maples & Calder for the Liquidators of Euro Bank

JUDGMENT

This pair of applications arises from the liquidation and criminal prosecution of  
Euro Bank Corporation. The Attorney-General seeks a restraint order under  
section 10 of the Proceeds of Criminal Conduct Law (2001 Revision) ("the  
"PCCL") restraining Euro Bank Corporation (In Liquidation) from dealing in way

with funds which are or may become due to Crystal Limited in the course of the bank's liquidation. The Attorney-General also seeks a similar restraint order against Crystal Limited, one of the bank's depositors. The threshold issue raised in each application is the same – are there reasonable grounds for thinking that money deposited by Crystal at Euro Bank is the proceeds of criminal conduct? The Attorney-General has also brought a companion application in Euro Bank's liquidation proceeding, but that application is now withdrawn.

### Procedural History

By summons dated November 7<sup>th</sup>, 2001 Euro Bank Corporation is charged with 8 offences. The general format of these offences is as follows:

“Between the \_\_\_\_\_ and \_\_\_\_\_ conspired together with (defendants' names omitted) and with other persons to enter into or otherwise be concerned in arrangements whereby the retention or control by persons of property which was those persons' proceeds of criminal conduct was facilitated knowing or suspecting that those persons would engage or had been engaged in criminal conduct or had benefited from criminal conduct.”

Crystal is not named in the Euro Bank summons. I approached this ruling on the basis that Crystal is one of those “other persons” whose proceeds of criminal conduct are the subject of the charge. The bank's trial has not yet commenced; certain individuals have also been charged and, by agreement, their trial has proceeded first.

On November 2<sup>nd</sup>, 2000 the Crown obtained an ex parte order of this Court restraining the Crystal Limited account at Euro Bank on the basis of an allegation that the sum credited to Crystal is the proceeds of criminal conduct. The Crown alleged that the monies in the Crystal account were generated by John Einoder, J.T. Einoder Inc., and Tri-state Industries Inc. from the operation of an illegal land fill in the State of Illinois, USA. It was alleged that the corporate entities accepted fees from third parties for the dumping of waste at a site in the Chicago area. Since the appropriate permit had never been issued by the Illinois Environmental Protection Agency ("the IEPA"), the dumping of this waste was illegal and criminal. Crystal is owned by John Einoder and his wife.

At the instance of Crystal, the Chief Justice heard a review of the ex parte restraint order in May, 2001. The Attorney-General argued that the conduct of Mr. Einoder and his companies would, if it had occurred in the Cayman Islands, have amounted to an indictable offence under section 167 of the Penal Code (1995 Revision) relating to pollution. It was also argued that the conduct would, if it had occurred here, have amounted to an indictable conspiracy to commit a public nuisance.

After a four day hearing, the Crown, in recognition of the weakness of its position, withdraw the application and conceded that it could not establish that the conduct in Illinois would amount to the indictable offences which had been identified in argument. The result was an order varying the ex parte order so as

to lift the restraint imposed upon the Crystal account. The liquidators of Euro Bank had already admitted Crystal as a creditor in the liquidation in the amount of US\$2,470,910.71 (exclusive of interest) and that admission to proof was confirmed. The Court declared the liquidator at liberty to pay a dividend to Crystal in the ordinary course of the liquidation.

The liquidators paid an interim dividend in the amount of US\$24,390.24 to Crystal in February, 2000. They have now declared a further dividend which would result in a payment to Crystal of approximately US\$2,000,000.

The parties agreed that this abortive attempt by the Crown would not stand as a bar to a fresh application on new evidence. The Chief Justice was advised of that and his order contemplates the possibility.

In February, 2002, the Grand Jury of the Circuit Court of Cook County, Illinois, returned two bills of indictment against John Einoder, Tri-state Industries, Inc., and J.T. Einoder, Inc. alleging the criminal disposal of waste, which is an indictable offence in Illinois. They are charged with conducting "a waste disposal operation by disposing, [sic] to wit; concrete containing protruding rebar, construction debris, demolition debris and general refuse, in a quality [sic] that exceeded 250 cubic feet of waste" without the permit required by section 21(d) of the Illinois Environmental Protection Act, on land owned by J.T. Einoder Inc. and Tri-State Industries Inc. Their trial has not yet been held.

Crystal has now been charged with two indictable offences in the Cayman Islands. It is alleged that:

“Between the 23<sup>rd</sup> day of December 1996, and the 11<sup>th</sup> May 1999 at George Town, Crystal Limited together with John Einoder entered into or was otherwise concerned in an arrangement whereby the retention or control by or on behalf of Tri- state Industries and/or J.T. Einoder Company’s proceeds of criminal conduct were facilitated knowing or suspecting that Tri-State Industries and/or J.T. Einoder Company were or had been engaged in criminal conduct or had benefited from criminal conduct, contrary to section 22(1) of the Proceeds of Criminal Conduct Law (2001 Revision) and;

Between the 23<sup>rd</sup> day of December 1996 and the 11<sup>th</sup> May 1999 at George Town, Grand Cayman, Crystal Limited together with John Einoder concealed or disguised property, namely cheques, negotiable instruments and other funds which were in whole or in part directly or indirectly the said John Einoder’s proceeds of criminal conduct, for the purpose of avoiding prosecution for an offence or the making or enforcement of a confiscation order, contrary to section 24 (1) of the Proceeds of Criminal Conduct Law (2001 Revision).”

The present applications were launched in May, 2002. Some additional evidence has been placed before the court and the argument of the Attorney-General has been cast in an entirely different way.

#### Applicable Law

The two charges track closely the language of the PCCL, which creates the following money laundering offences:

"22 (1) Subject to subsection (3), whoever enters into or is otherwise concerned in an arrangement whereby:-

- (a) the retention or control by or on behalf of another (A) of property which is the proceeds of A's criminal conduct is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise); or
- (b) property which is the proceeds of A's criminal conduct-
  - (i) are used to secure that funds are placed at A's disposal; or
  - (ii) is used for A's benefit to acquire property by way of investment.

knowing or suspecting that A is a person who is or has been engaged in criminal conduct or has benefited from criminal conduct, is guilty of an offence."

"24 (1) Whoever:-

- (a) conceals or disguises property which is, or in part directly or indirectly represents, his proceeds of criminal conduct;  
or
- (b) converts or transfers that property or removes it from the jurisdiction.

for the purpose of avoiding prosecution for an offence or of avoiding the making or enforcement of a confiscation order is guilty of an offence."

Each of the two sections, and the charges, requires that the property which is the subject of the allegation be proven to be the "proceeds of criminal conduct".

Section 22(2) of the PCCL contains this gloss on that phrase:

Section 22(2) "In this section, references to any person's proceeds of criminal conduct include property which, in whole or in part, directly or indirectly represents in his hands his

proceeds of criminal conduct.”

Section 22(10) In this Law:-  
 “Criminal conduct” means conduct which constitutes an offence to which this Law applies or would constitute such an offence if it had occurred in the Islands.”

The definition in Section 22 (2) has not found its way into Section 24 of the PCCL, although it would be equally relevant there. In my view, having regard to the overall legislative intent embodied in the PCCL, the definition in Section 22(2) should be regarded as having equal application to prosecutions under Section 24.

“Property” is defined in Section 2(1) of the Law as including “money and all other property, real or personal, including things in action and other intangible or incorporeal property.” Section 2 (8) provides that “references to property held by a person include a reference to property vested in his trustee in bankruptcy or liquidator.”

The Grand Court has jurisdiction to make a confiscation order against anyone found guilty of an offence “to which this Law applies”, which would include the offences now alleged against Euro Bank and Crystal: PCCL, Section 5(1) and (2) (a). Before making such an order, this Court must be satisfied that the offender has “benefited from that offence” to at least the minimum amount:

PCCL, Section 5(2)(b). A person benefits from an offence if he “obtains property as a result of or in connection with its commission, and his benefit is the value of

the property so obtained”: PCCL, Section 5(3). Section 5(5)(a) of the Law provides that the sum which a Court may order confiscated shall not exceed “the benefit in respect of which” the confiscation order is made. “Benefit” means the whole amount obtained, or the aggregate value received, and is not merely the profit derived from the transaction: **A.G. v. Euro Bank Corporation. July 15<sup>th</sup>, 2002 (C.A)**; affirming, on this point, **In Re Euro Bank Corporation, [2001] CILR 405, (Grand Court)**.

The phrase “as a result of or in connection with its commission” raises the same question of causation implied by the phrase “proceeds of criminal conduct”. However, the provisions of the PCCL relating to confiscation, restraint and charging orders, where the operative words are “as a result of or in connection with”, are significantly different from those provisions of the PCCL creating money laundering offences, where the operative concept is “proceeds of criminal conduct”. For example, the High Court of Justice (Q.B.D.) has held in **Re Randle and Pottle, CJA 14/90**, that a book written about assisting the escape of a convict was written “in connection with” the authors’ aiding of the escape and conspiring to assist the escape. It could not, however, be argued that the revenue from the book represented the “proceeds” of the escape.

Section 5 of the PCCL, which provides for confiscation orders, contains this additional provision:-

“Where a person derives pecuniary advantage as a result of or in connection with the commission of an offence, he is to be treated for the purposes of this Law as if he has obtained as a result of or in connection with the commission of the offence a sum of money equal to the value of the pecuniary advantage.”

Section 2(5) of the PCCL contains this additional provision:-

“References in this Law to property obtained, or to a pecuniary advantage derived, in connection with the commission of an offence include a reference to property obtained or to a pecuniary advantage derived both in that connection and in some other connection.”

The confiscation order can only be made where the Grand Court is “satisfied” that the offender has benefited from the offence. The burden of proof rests with the party seeking the confiscation order but the standard of proof is the balance of probabilities: PCCL, Section 5 (6). In other words, it need only be established to the civil standard that the offender has benefited from the offence by obtaining property “as a result of or in connection with its commission.”

This contrasts with the duty of the prosecution in seeking criminal convictions under sections 22 and 24 of the PCCL for money laundering. Proof that the property in question is the “proceeds of criminal conduct” is an essential element of each of these two money laundering offences. The result is that the Crown must establish this element by proof beyond a reasonable doubt, or fail in its attempt to obtain a conviction.

There is a marked difference in language between the quoted provisions of the PCCL relating to confiscation orders and those defining the elements of money laundering offences. This difference in phraseology is more than a mere drafting anomaly. The confiscation provisions have, and were intended by the Legislature to have, a somewhat broader reach than the concept of the proceeds of criminal conduct. That has an important bearing on the result of the present applications. Moreover, because the phrase "proceeds of criminal conduct" appears in the sections of the PCCL which define a criminal offence, it must be construed in accordance with the cardinal rule of construction pertaining to criminal legislation – the phrase is to be construed strictly, with any ambiguity being resolved against the Crown and in favour of the liberty of the subject: **Sweet v. Parsley [1969] 1 All. E.R. 347, (H.L.)** By contrast, legislation relating to confiscation orders and restraint orders is civil in nature and thus free of any constraint this rule of construction would otherwise impose: **U.S.A. v. Montgomery [2001] 1 WLR 196.**

By Section 10(1) of the PCCL, the Grand Court "may by order (referred to in this Law as a "restraint order") prohibit any person from dealing with any realizable property, subject to such conditions and exceptions as may be specified in the order." "Realizable property" is a defined term:-

3(1) "In this Law –

"Realizable property", subject to subsection (2), means –

- (b) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Law.”

No argument has been advanced on the present applications that funds standing to the credit of Crystal at Euro Bank are not realizable property.

Where proceedings have been instituted, the jurisdiction to make a restraint order is limited by Section 9(1) of the Law:-

“The powers conferred on the Grand Court by sections 10(1) and 11(1) are exercisable where –

- (a) proceedings have been instituted against the defendant for an offence to which this Law applies;
- (b) the proceedings have not been concluded; and
- (c) either a confiscation order has been made or it appears to the Court that there are reasonable grounds for thinking that a confiscation order may be made in them.”

Proceedings have been instituted against both Euro Bank and Crystal for offences to which the PCCL applies, but neither of those proceedings has been concluded.

The question of substance on these applications is whether “there are reasonable grounds for thinking” that a confiscation order will be made eventually in either or both of these prosecutions. That requires a principled assessment of

the likelihood, not only of a finding after conviction that the offender has benefited from the offence, but of the likelihood of conviction. The case for the Crown cannot be assessed with the same rigor that it would be subjected to in a criminal prosecution. That is manifestly inappropriate in what is, essentially, an interlocutory, civil proceeding. However, there must be a realistic analysis of the evidence adduced by affidavit on the applications, and the result of that analysis must leave the Court satisfied, on reasonable grounds, that each of the essential elements of the offence charged is likely to be proved at trial, resulting in conviction.

The burden of persuasion on the interlocutory application for a restraint order is the balance of probabilities; the analysis which is applied to the essential elements of the alleged offence, however, must take into account the criminal standard of proof beyond a reasonable doubt. Where there are no reasonable grounds for thinking that an essential element of the case will or can be proved beyond a reasonable doubt, then a precondition for the making of a restraint order is absent.

#### The Affidavits

GCR Order 41, rule 5 (2) provides that, in an application of this type, the evidence may be adduced in affidavits which set out the information and belief of the deponent. In other words, hearsay evidence is admissible, but with the

important proviso that the deponent must swear that the hearsay assertions are true to the best of his knowledge, information and belief.

The Attorney-General has placed a good deal of evidence before the Court in the form of letters from the Illinois authorities. In the case of several of these letters, there is no evidence from any deponent that he believes the contents of the letters to be true. In light of the fact that the applicants took no objection to the evidence being adduced in this form, and in view of the conclusion I have reached, I am prepared to accept these documents as admissible hearsay evidence. In different circumstances, the Court would consider striking this material from the record.

#### The Facts

The two charges against Crystal allege that it dealt with property which was the proceeds of criminal conduct, but the conduct in question is not identified. For the purpose of the present application, the Attorney-General argued that the property represented the proceeds of either or both of two predicate offences which are crimes in the State of Illinois and in the Cayman Islands. He alleged that Mr. and Mrs. Einoder, Tri-state and J.T. Einoder Company committed the offences of dishonestly obtaining property by deception (an offence in the Cayman Islands by virtue of Section 235 (1) of the Penal Code (1995 Revision)); and providing false information to a person employed in the public service, intending to cause that person to do something which, if the true state of facts

respecting which the information was given were known to him, he ought not to do (which is an offence in the Cayman Islands by virtue of Section 118 of the Penal Code (1995 Revision)).

Essentially, the Attorney-General says that Mr. Einoder and his companies induced the Cook County Zoning Board of Appeals (the "Board"), by false representations, to rezone the land fill site so as to permit it to operate a recycling plant. The allegation is that neither Mr. Einoder nor his companies had any intention of operating a recycling plant at that location, or of obeying the applicable regulatory provisions relating to recycling, although they repeatedly represented the contrary to the Board.

The charges against Euro Bank also contain no express description of any predicate offence. The Attorney-General said in argument that, insofar as the money on deposit to the credit of Crystal is concerned, the same two predicate offences fall to be considered on these charges.

The land in Illinois was the subject of an earlier Special Use Ordinance in 1980, permitting the excavation of sand and gravel from the property and the regrading and refilling of the excavated areas with dry land fill. There were limits on the type and amount of materials that could be deposited.

For a number of years prior to the time of the alleged predicate offences, Mr. Einoder and his companies operated a land fill at the site. In doing so, they relied upon the 1980 Special Use Ordinance and were required to comply with its terms.

They were also bound to comply with the Illinois Environmental Protection Act, which permitted the use of "clean construction and demolition debris" as fill material (see sections 3.78, 3.78(a), 21 (d) (1) (ii), and 22.38 ). They were permitted to do this without a waste disposal permit because "clean" construction and demolition debris is not treated by the Act as being "waste". In addition, they were exempted from the need for a waste disposal permit if they operated a "facility" used exclusively for the "transfer, storage or treatment of general construction and demolition debris". "General" construction and demolition debris is amenable to recycling.

Upon receipt of a complaint, the IEPA inspected the site in 1995 and formed the opinion that the Einoder companies were in violation of the existing regulatory regime. Mr. Einoder told them that he wanted to operate a recycling facility at the site. The inspectors say they found approximately 500,000 cubic yards of wood, asphalt, brick, concrete and scrap metal on the property. They decided that Mr. Einoder was operating an illegal land fill. In a subsequent inspection, in December, 1995, the IEPA confirmed its earlier opinion and identified a number of violations of the Illinois Environmental Protection Act.

Anyone wishing to dump material at the site paid a "tipping fee" to the Einoder companies for permission to do so. I assume, for the purpose of this Ruling, that the money standing to Crystal's credit at Euro Bank represents the proceeds of these fees. I assume also (although this is denied by Crystal) that most of the income generated from tipping fees represents the proceeds of the illegal dumping of waste, which is a criminal offence in the State of Illinois but not in the Cayman Islands.

In April, 1996 Mr. Einoder and J.T. Einoder Company applied to the Board for permission to conduct a special use by operating a facility for the "recycling/reprocessing of construction and demolition materials at existing sand and gravel excavation and dry land fill site". Extensive documentation was put before the Board, which then conducted a formal hearing and heard from a number of witnesses.

The evidence made it abundantly clear to the Board that the application was for an additional use, to be conducted alongside the existing sand and gravel excavation and land fill operation. In the course of his application, Mr. Einoder (and J.T. Einoder Company) represented that he intended to operate a recycling facility, and do so in compliance with any applicable zoning and environmental constraints.

Because of the conclusion I have reached, I will assume that these representations were untrue (although that is denied), and that neither Mr. Einoder nor his company had any intention of operating a recycling facility or complying with the zoning and regulatory provisions applicable to such facilities.

The existing land fill operation was of some relevance to the Board, but it was unnecessary for Mr. Einoder to make representations or promises to the Board about that business. Zoning permission for the operation of a land fill had been in place for approximately 16 years. The continuing existence of that permission was not in issue. The Board was concerned solely with the question of whether recycling should also be a permitted use.

The result of the Board's deliberations was approval for the recycling of construction and demolition materials at the existing land fill site, in the form of a Special Use Permit contained in a zoning Ordinance adopted July 2<sup>nd</sup>, 1996.

The adoption of this Ordinance by the Board was (I assume) caused, at least in part, by Mr. Einoder's representations and promises concerning his intention to generate a recycling facility and willingness to comply with all zoning and environmental provisions.

I accept, for present purposes, that the individual members of the Board were deceived by these false representations, and that the representations were

material to their decision (although I note that the Attorney-General has provided no direct evidence of this from any member of the Board).

Crystal's account at Euro Bank in the Cayman Islands was opened shortly after the Special Use Permit was obtained. Money began to flow into the account from the land fill operation. Over a thousand cheques and money orders deposited to the account were payable to third parties, not to Crystal. Many of these cheques and money orders were for amounts under \$10,000, meaning that no report of the deposit to governmental authorities was necessary.

The evidence of Detective Sergeant Woods, the primary deponent relied upon by the Attorney-General, is that:

“...the site was not operating as a recycling/reprocessing facility and in the manner suggested by Mr. Einoder in his application to and at the zoning hearings. Further that after the Special Use Permit was granted the site continued to be operated in the way in which it always had.” (underlining added)

In other words, the revenue generated from the site by Mr. Einoder and his companies was earned in the same way both before and after the zoning Board hearing and the issuance of the Ordinance containing the Special Use Permit. At all material times, the activity which generated the revenue was the illegal dumping of waste – the charging of tipping fees for the disposal of waste material in a manner contrary to the Illinois Environmental Protection Act.

Crystal contends that Mr. Einoder did proceed with his plan to set up a recycling facility. There is evidence that he invested a significant amount of money in recycling machinery. Some recycling may have been done. In his affidavit evidence, Detective Sergeant Woods says that the police in Illinois and the IEPA allege that "the site has never been used as a recycling operation. It has been used as an illegal land fill." He also says that the inquiries he has made cause him to believe that "the monies received by Crystal Limited were generated as a result of the operation by Mr. Einoder of an illegal land fill site in Illinois."

The Attorney-General says that the recycling scheme was a mere pretext, designed for the purpose of covering up the illegal dumping activity at the site. There is evidence that, when Mr. Einoder was asked for a list of companies for whom he had done recycling, he provided a bogus list.

If the recycling plan was designed to cover up the underlying criminal activity, the evidence indicates it was a failure. The number and nature of the environmental inspections intensified after the adoption of the zoning Ordinance. There is no suggestion in the evidence that the zoning permission contained in the Ordinance in any way hindered the inspection process or lessened the degree of scrutiny which the environmental authorities brought to bear on the site.

Moreover, there is no evidence that the rezoning permission could, or might, have resulted in fewer or less diligent environmental inspections or enforcement.

Analysis

For the Attorney-General to succeed in obtaining a restraint order against Crystal or Euro Bank, he must show that there are reasonable grounds for thinking that the money deposited by Crystal at Euro Bank is the proceeds of criminal conduct. That requires credible evidence that the money represents the proceeds of one or both of the predicate offences, both of which involve the deception of the Board to obtain rezoning approval.

I have not been referred to any authority which proposes a definition of "proceeds of criminal conduct". In my view, the phrase does not pose any particular difficulty of interpretation: it should be given its natural and ordinary meaning.

To prove that money or property is the "proceeds of criminal conduct", the Crown must show that the commission of the predicate offence contributed in some material way to its acquisition. There must be some causal link between the unlawful activity and the resulting income or assets. Where, as here, the alleged proceeds are payments received from third parties, there must be evidence that the unlawful activity alleged in the predicate offence in some way caused or contributed to the transfer of funds from the third party to the party engaged in the criminal activity. Moreover, there must be reasonable grounds for thinking that this essential element of the money laundering charges can be proved beyond a reasonable doubt at trial.

In reaching this conclusion, I have not lost site of the fact that a confiscation order can be made to confiscate money or property obtained "in connection with" the commission of one of the predicate offences. There is nothing inconsistent in according a somewhat wider ambit to the power of confiscation (which is in the nature of a civil remedy) than to that of an essential element in a criminal offence. In any event, as I have said above, the marked difference in language between the offence sections of the PCCL and the confiscation and restraint order sections suggests that the Legislature intended just such a distinction. As was the case in **Re Randle and Pottle** (supra), a person may benefit from an offence by obtaining money in connection with its commission (and thus be liable to restraint and confiscation orders) in circumstances where the money does not represent the "proceeds of the criminal conduct".

The Attorney-General has failed to establish that the money in the Crystal account represents the proceeds of the alleged criminal conduct arising from the deception of the Board. The illegal dumping of waste which generated that money began before the Board application and continued on afterwards. The earning of that money was not "caused" by the rezoning of the land to permit a recycling facility; neither was the rezoning a contributing factor. The conduct which generated the income was the acceptance by Mr. Einoder and his companies of waste (for a tipping fee) and the dumping of it in violation of Illinois regulations. The 1980 zoning Ordinance permitted the operation of a land fill.

The 1996 Ordinance added an additional special use, but not one that was necessary in any way to the illegal dumping operation.

It should be noted that the Board is not concerned with the enforcement of environmental regulations. It determines what uses are permitted on land within its jurisdiction. Once a rezoning ordinance is adopted, the benefit of it runs with the land. If the current owner or tenant of the land is in breach of an environmental regulation, he may be prosecuted, but that cannot fetter his right to transfer the land itself. A subsequent purchaser could utilise the benefit of the zoning Ordinance and Special Use Permit without being fettered in any way by the prior criminal violations of the previous owner or tenant, whose liability for those is personal. This, also, tends to obliterate any alleged causal link between a zoning change and income derived from unlawful activity on the land.

I find it unnecessary to decide whether a predicate offence which is committed to cover up or deflect suspicion from some other offence could, in other circumstances, be said to contribute causally to the earning of income from the latter offence. In the present case, the evidence falls well short of satisfying me that the alleged deception of the Board contributed in this way or was even intended to have such an effect.

There is not enough evidence (in the Crown's affidavits alone) to provide reasonable grounds for thinking that the Crown will prove at trial that the

deception of the Board assisted Mr. Einoder and his companies to earn the money in the Crystal account. Absent proof of this essential element, there is no reasonable ground for thinking that the Crown will succeed in proving either charge against Crystal beyond a reasonable doubt, thereby permitting this Court to make a confiscation order in due course. The same conclusion applies to the charge against Euro Bank insofar as that charge is concerned with money deposited to the Crystal account.

The application for restraint orders against Crystal and Euro Bank are dismissed.

Is the Ordinance "Property"?

The allegation that Mr. Einoder and his companies, in deceiving the Board in Illinois, committed an offence which would contravene Section 235 (1) of the Penal Code (1995 Revision) if it had occurred in the Cayman Islands suffers from an additional infirmity. That Section requires proof that the defendant has "by any deception dishonestly [obtained] property belonging to another, with intention of permanently depriving the other of it." "Property", for the purposes of this Section, is defined in section 3 of the Penal Code to include "money and all other property, real or personal, including things in action and other intangible property." That is the same definition which appears in Section 4 (1) of the Theft Act 1968.

While the definition is broad, it cannot extend to what was obtained by the alleged deception in this case. Assuming that false representations were made to the Board and that they induced the Board to adopt a rezoning Ordinance, no property has been obtained or even created. An ordinance is a legislative act. It cannot be owned, bought, sold, or transferred. It is not analogous to a thing in action. It is wholly unlike anything that may be stolen or obtained by fraud. It has none of the characteristics of intellectual property or confidential information. Like any other legislative act, an ordinance is reduced to writing upon a piece of paper. Interested parties may obtain a copy of the ordinance. In doing so, they are simply acquiring evidence (usually for a small fee) of the ordinance but are in no sense obtaining any property interest in it, because none can exist.

Mr. Mitchell, for the Crown, said that the piece of paper upon which the Ordinance is written has value, and drew an analogy to a cheque. The analogy is not apt. A cheque is a thing in action. The property interest it represents may be transferred by endorsement and delivery of the piece of paper. Nothing of the kind can be done with a paper copy of an ordinance. This conclusion is supported by the decisions in **Oxford v. Moss (1979) 68 Cr. App. R. 183 (Divisional Court)**, where confidential information (proof of an examination paper) was held not to fall within the definition of "intangible property" in Section 4 (1) of the Theft Act, 1968; and in **Regina v. Preddy and others [1996] AC 815 (HL)**, where it was held that causing a payment to be transferred

electronically from one bank account to another did not amount to the obtaining of "property belonging to another".

For this reason, also, I dismiss the applications for restraint orders against Crystal and Euro Bank in relation to the alleged predicate offence under Section 235(1) of the Penal Code.

Order

I pronounced my decision in this case orally, immediately after the arguments ended. While in the course of preparing these Reasons for Judgment, I was advised by counsel to the Attorney-General and Crystal that they have reached a settlement. The Attorney-General has consented to the dismissal of both applications and has conceded that Crystal is entitled to the dividend which has been declared recently. The Attorney-General and Crystal have agreed that each will bear his or its own costs.

The liquidators of Euro Bank Corporation are at liberty to apply for costs.

*Henderson, J.*

A. Henderson  
Judge of the Grand Court (Actg.)



25<sup>th</sup> October, 2002