SUPREME COURT OF QUEENSLAND

CITATION:	*R v Rigney-Hopkins* [2005] QCA 275
PARTIES:	**R** **v** **RIGNEY-HOPKINS, Christopher Bradley Grzegorz** (applicant/appellant)
FILE NO/S:	CA No 163 of 2005 DC No 1306 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	5 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	15 July 2005
JUDGES:	Williams, Jerrard and Keane JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for extension of time in which to appeal against conviction granted** **2. Appeal dismissed**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – PARTICULAR CASES – CONTROL OVER PROCEEDINGS – REFUSAL OF ADJOURNMENT – appellant convicted after jury trial of dishonestly obtaining a chose in action worth $66,021.13 from a Canadian citizen via transfer of funds – appellant represented himself at trial – prosecution disclosed 3,000 documents seized from appellant's computer to the appellant less than 10 days prior to the trial commencing – appellant complained of this at the commencement of the trial but did not ask for an adjournment – appellant refused judge's suggestion to obtain legal representation – prosecution only relied on 36 of these documents – appellant later submitted to the judge that a second person was involved whom he was unable to identify for fear of harm to his family – whether the judge's failure to order an adjournment at particular stages of the trial despite the appellant's lack of request for one caused a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – judge admitted documents seized under two search warrants – warrants declared both that the appellant was suspected of an offence of fraud and (mistakenly) that the property was to be used in forfeiture proceedings – issuing justice of the peace gave evidence that he knew the property was not to be used in forfeiture proceedings – seized documents included evidence of appellant changing identities – whether the justice of the peace issued warrants that were beyond his power – whether the judge erred in admitting evidence seized by these warrants – whether the evidence of a new identity not alleged to be used in committing the offence had probative value

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – OTHER MATTERS – appellant submitted that prosecution had not identified any "chose in action" dishonestly obtained by the appellant – complainant arranged to transfer funds from his Canadian bank account to an account linked to the appellant in Australia – no evidence led on whether choses in action recognised under Canadian law – whether appropriate to assume Canadian law same as Australian law – whether credit amount obtained by appellant from complainant could be defined as a chose in action

Criminal Code 1899 (Qld), s 408C, s 509AB, s 596
Criminal Proceeds Confiscation Act 2002 (Qld), s 16, s 99, s 104, Sch 6
Police Powers and Responsibilities Act 2000 (Qld), s 68, s 113, Sch 4

Bensted v Edwards [2003] QCA 145; (2003) 138 A Crim R 552, cited
Coco v R (1994) 179 CLR 427, distinguished
Damberg v Damberg [2001] NSWCA 87; (2001) 52 NSWLR 492, cited

COUNSEL: P E Smith for the applicant/appellant
D L Meredith for the respondent

SOLICITORS: Legal Aid Queensland for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **WILLIAMS JA:** I agree with the reasons prepared by Jerrard JA for concluding that the appeal against conviction should be dismissed.

[2] **JERRARD JA:** On 20 May 2005 Christopher Bradley Grzegorz Rigney-Hopkins was convicted by a jury of having dishonestly obtained a chose in action from Jason

Hart (or another) on a date or dates unknown between 20 January 2003 and 20 June 2003 at Brisbane or elsewhere in the State of Queensland. The chose in action was an amount of $66,021.13 swindled from Jason Hart on or about 23 January 2003. Mr Rigney-Hopkins was born on 20 June 1985, and was 17 years old when the money was obtained, although he had turned 18 by the end of the period alleged in the indictment. He was still 19 when sentenced, and his age at the time of the commission of the offence resulted in the learned trial judge imposing an otherwise very lenient sentence of 18 months imprisonment, suspended after Mr Rigney-Hopkins had served four months of that sentence, for an operational period of two years. Mr Rigney-Hopkins has applied by notice dated 21 June 2005 for an extension of time within which to appeal his conviction.

[3] That notice described three intended grounds of appeal, which are that the learned trial judge erred:

- "to adjourn the trial"; undoubtedly a complaint that the learned trial judge erred in not adjourning the trial;
- in admitting documents seized under two search warrants;
- in admitting documents prejudicial to Mr Rigney-Hopkins with "no or slight probative value".

The grounds of appeal do not identify the documents complained about in the third ground of appeal. They would be some of the documents complained about in the second ground; most (if not all) of the documents admitted had been seized under the search warrants. Nor did those grounds identify when the trial should have been adjourned. Mr Smith, for the appellant, argued that this should have happened towards the end of the Crown case, at the stage when the self-representing appellant had told the trial judge (in the jury's absence) that a second person was involved, whom Mr Rigney-Hopkins could not identify, for fear of bringing harm to his family.

Circumstances of the offence

[4] The offence committed on Jason Hart revealed a degree of persistent and ruthless deception of a vulnerable individual. Mr Hart is a Canadian resident and citizen, whose mother and father had died respectively on Boxing Day 2001 (from cancer) and some seven months later (by suicide). Those circumstances resulted in Mr Hart receiving insurance moneys in the amount of approximately $120,000 (Canadian), and in the latter half of 2002 Mr Hart used the Internet to do research on how he would invest the money he now had.

[5] Mr Hart was a hospital orderly, who had been involved with the Seventh Day Adventist Church, and through another church member was directed to a computer program called Pal Talk. Mr Hart's use of that facility resulted in his communicating through the Internet with a person using the name "Carlotta"; the Crown alleged Mr Rigney-Hopkins was Carlotta. Carlotta described herself as an elderly woman in ill health and of Jewish extraction, and she and Mr Hart communicated both on the Internet, by text messages, and also by telephone. Their communications began in or about December 2002 and ended in mid-April 2003.

[6] Mr Hart's understanding was that Carlotta was a wealthy woman living in Australia with an elaborate house and some servants, that she drove a very expensive car, and she had two dogs, named "Chubby" and "Checkers". She smoked, and needed a breathing apparatus of some sort to help her with her emphysema. He told her of his parents' death "and everything else", and this led to telephone conversations which began in the early part of January 2003. He sent her a photograph of himself, and she sent him one of her.

[7] Their communications arrived at a point at which she revealed to him an apparently extraordinary degree of success in trading on the stock-market. She had a university background in accounting and law, but share trading was her primary means of obtaining income. For his part, Mr Hart hoped to establish a child youth worker program, and wanted sufficient funds to do that; he asked Carlotta to manage some of his money and increase his capital base. He understood that $60,000 (Canadian) placed in her hand "would hopefully in a year's time be around like $300,000 or something like that".[1] He could recall her revealing only one incident where she had lost "some miniscule amount" in trading. "Pretty much all she does is watch monitors and do all this type of stuff".[2]

[8] On 22 January 2003 Mr Hart went to the Bank of Montreal in Komoka, Ontario, and instructed that bank to transfer $60,000, via Citibank at Toronto and the ANZ Bank, to the benefit and credit of a D Shulman of 2/76 Richmond Road, Morningside in Queensland, and to a Suncorp account number in that person's name.[3] It appears from a bank statement exhibited at the trial[4] that Mr Hart had deposited $60,000 into an account held with the Bank of Montreal on 20 January 2003, and the $60,000 which he instructed be transferred to D Shulman in Queensland was credited to that account in Queensland, and debited to Mr Hart's Bank of Montreal account. The prosecution called evidence by telephone from an assistant manager and financial services manager of the Bank of Montreal in the Komoka, Ontario, branch where the transaction was initiated; and established that the transaction occurred as instructed.

[9] The Crown case was that Mr Rigney-Hopkins was the person then using the identity of D Shulman, and that he received the credit into that Suncorp account under D Shulman's control. Mr Rigney-Hopkins had opened a Suncorp account on 17 September 1999 in the name of Christopher Rigney, another on 3 January 2002 in the name of Christopher Bradley Hopkins, and on 5 December 2002 a Suncorp Metway Bank account (with the account number given to Mr Hart, and to which his $60,000 was credited) was opened in the name of Dovi Chaim Shulman, by a person under 18 years of age, who provided as his identification a Queensland birth certificate in the name of Christopher Bradley Rigney-Hopkins. Dovi Shulman gave his address, when applying to open the Suncorp Metway account, as 2/76 Richmond Road Morningside, which was Mr Rigney-Hopkins' address. On that same date, 5 December 2002, Mr Rigney-Hopkins applied for a child passport in the name of Dovi Chaim Shulman, describing (accurately) in the application that his Australian Birth Certificate showed the name Christopher Bradley Grzegorz Rigney-Hopkins.[5]

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1 At AR 258
2 At AR 257
3 The instruction is exhibit 18, reproduced at AR 516
4 At AR 517 – exhibit 19
5 His Birth Certificate is reproduced at AR 525

[10] It was not in issue at the trial that the Crown had established that Mr Rigney-Hopkins was the person using the name Dovi Shulman who had opened that Suncorp Metway bank account, and into which account, on Mr Hart's instructions, an amount in Australian dollars of $66,021.13 was credited on 23 January 2003. The prosecution established, and it was not contested at trial, that Mr Rigney-Hopkins, then using the name Dovi Shulman, applied those funds to his own purposes over the next two months or so. Mr Hart has not been repaid any of his $60,000.

[11] At a stage unidentified in the evidence, Mr Hart appreciated that Carlotta was named Dvora Shulman, and he probably learned that before his first telephone conversation with her. There were about nine such calls, all reverse charges from him to her, to a telephone number in Brisbane which she had given to him. Her voice sounded gruff, and he thought she sounded very intelligent; as he described it "Eventually after the funds were transferred there was a continual breakdown of all communication,"[6] and their last email exchange was on 14 April 2003. She had become increasingly unavailable either by telephone, text message, or email, and he could recall on one occasion speaking, on the telephone number she had given to him, with a woman with a Polish accent who was very unhelpful. He also spoke on another day with a male person named "Eliezer", and was provided by Eliezer with a cell phone number on which to speak with Dvora. Eventually Mr Hart hired a private investigator in Australia, and ultimately instructed them to attend at the address about which they informed him, 2/76 Richmond Road, Morningside. The investigator did go there, and spoke there with a woman in her late 50's to 60's, with a very heavy accent, apparently Polish, and then with Mr Rigney-Hopkins, who emerged from another part of the unit. The investigator had inquired at the residence for Victoria Odette, the name in which the telephone service used by Mr Hart to call Dvora Shulman was recorded with Telstra. It was registered to the address of 2/76 Richmond Road, Morningside from 3 January 2003 until 8 July 2003, when the service was terminated. The account for it remained unpaid.[7] The woman with the Polish accent told the investigator that Victoria Odette was "away for two weeks,"[8] and then Mr Rigney-Hopkins approached the investigator and aggressively demanded that she stop harassing his family and leave his property. The investigator left.

[12] That visit was on 13 September 2003. Mr Rigney-Hopkins had declared on 27 August 2003 that he lost the passport in the name of Dovi Chaim Shulman, and on 15 September 2003 he applied for an Australia adult passport in the name of Eliezer Yechezkel Yisrael Goldman, advising in the application that he had previously been known as Christopher Bradley Grzegorz Hopkins. He gave his address as 2/76 Richmond Road, Morningside, and, his application being considered in order, a passport in that name was issued. He had described in the application a then present intention to change his name by deed poll to the name Eliezer Goldman.

[13] That evidence makes a formidable series of links between Mr Rigney-Hopkins and the D Shulman who got Mr Hart's $60,000. It also provides an apparently irresistible link between Mr Rigney-Hopkins and the Dvora Shulman who instructed Mr Hart on the telephone number he used to contact her, and provided him with the

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6 At AR 262

7 This evidence is at AR 118

8 At AR 230

Suncorp account number identical to that actually opened by Mr Rigney-Hopkins in the name of Dovi Shulman. It was a strong Crown case.

The course of the trial

[14] Mr Rigney-Hopkins represented himself. For a 19 year old without formal legal qualifications and defending a strong case of fraud, he did extremely well. The transcript shows that he is articulate, intelligent, has excellent research skills, and a capacity to manipulate events in his own favour. The Crown Prosecutor and the experienced trial judge each went to great lengths to ensure that the trial was fair, and that he understood each stage of the proceedings. It is possible their decency led Mr Rigney-Hopkins into the error of assuming that he could mislead the jury without adverse consequences to himself, an error which resulted in the Crown case getting even stronger.

The motion to quash

[15] The trial began with the prosecution presenting an amended version of the previously presented indictment, and entering a nolle prosequi on the previously presented one. Mr Rigney-Hopkins immediately made an articulate and well argued motion to quash the indictment pursuant to s 596 of the *Criminal Code*. In the course of the submission he cited authority, including *R v Maria* [1957] St R Qd 512, and he complained that he had received a CD-Rom containing some 3,000 documents or files taken from his computer less than 10 days prior to the start of the trial, although the prosecution had had possession of those items since February 2004. He submitted that 10 days notice to examine 3,000 documents did not constitute the early disclosure required by s 509AB of the *Code*.

[16] Those capably presented submissions resulted in the learned judge seeking and obtaining particulars of the chose in action from the prosecution. The Crown contended it was a line of credit ultimately extended to, and availed of, by Mr Rigney-Hopkins, exercising his right against Suncorp Metway held in the name Dovi Shulman. The learned judge also established that the prosecution intended to put in evidence only some 39 emails from those 3,000 documents. Mr Rigney-Hopkins agreed that that vastly reduced number no longer presented him with a problem. He did not ask for an adjournment, and explained that he had not applied for legal aid, in part because of an anticipated difficulty in obtaining it (because of his means – he did not expect to be eligible), and partly because "I felt that I could do the matter better myself".[9] The learned trial judge inquired whether Mr Rigney-Hopkins would consider an adjournment and obtaining the services of a barrister, and Mr Rigney-Hopkins explicitly declined the possibility of an adjournment for legal aid, and advised that he was ready to proceed without legal representation.[10] The Crown Prosecutor also informed the learned judge that the prosecutor had recently spent some time explaining the basis of the Crown case to two different barristers (named by the prosecutor), each of whom were apparently then advising Mr Rigney-Hopkins. In those circumstances there is no merit in any complaint that the learned judge should have adjourned the trial on the day it started, if that complaint was what the relevant ground of appeal was intended to assert.

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[9] At AR 18

[10] At AR 23

A *McKenzie* friend application

[17] After the learned judge had established that the Crown intended to put in evidence only 39 emails, and not the 3,000 documents, Mr Rigney-Hopkins had requested permission to have a *McKenzie*[11] friend. The discussion between Mr Rigney-Hopkins and the learned trial judge concerning the advisability of his obtaining legal representation occurred during the judge's consideration of that application. It was rejected, particularly because the person Mr Rigney-Hopkins nominated was an Anthony Hoad, a gentleman who was sentenced to a long term of imprisonment on 24 February 1989 in the Brisbane District Court. That was on a total of 85 counts, principally of involvement in organised and significant car theft.[12] Another ground of objection was the Crown contention that Mr Hoad was probably a co-offender. The email address to which Mr Hart had communicated with Carlotta was held in the name of CAHoad@yahoo.com.

The challenge to the search warrants

[18] After the learned judge had declined to allow Anthony Hoad to act as a *McKenzie* friend, and after Mr Rigney-Hopkins had assured the judge he was ready to proceed, the next event was Mr Rigney-Hopkins' application to challenge both search warrants relied on by the prosecution to seize evidentiary material tendered in the trial. Warrant 04/2278 issued on 23 January 2004 (and executed on that date), authorised the search of Suncorp Metway's offices at Wickham Terrace in Brisbane, and the seizure of:

- statement of account for account number 050829374 in the name of Dovi Chaim Shulman for the period of 1 January 2003 to present;
- account application forms;
- 100 point application check list; and
- cheque dishonour register.

That warrant[13] contained both the declaration that it was issued in relation to an offence (namely that on or about the 23rd day of January 2003 at Brisbane in the State of Queensland one Dovi Chaim Shulman dishonestly applied to his own use property namely $60,000 Canadian dollars belonging to another namely Jason Ryan Hart and the money yield to Dovi Chaim Shulman from the dishonesty was of a value of more than $5,000 namely AUS $66,021.13), and the declaration that the warrant was issued in relation to a forfeiture proceeding authorised under the *Police Powers and Responsibilities Act* 2000 (Qld) ("the *Police Act*").

[19] It is probable that the declaration that the warrant was issued in relation to an offence, and the declaration that it was issued in relation to a forfeiture proceeding, are expected to be exclusive of each other in an ordinary case; that is, a warrant would ordinarily be issued either in relation to an offence or in relation to a forfeiture proceeding, but usually those would be different reasons for the issue of a search warrant. The necessity for choice between those reasons when a warrant is sought lies in the provisions of s 68(2) of the *Police Act*. Section 68(2) provides

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11 The name derives from *McKenzie v McKenzie* [1970] 3 WLR 472; [1970] 3 All ER 1034

12 His appeal is reported in *R v Hoad* (1989) 42 A Crim R 312

13 Reproduced at AR 368

that an application by a police officer for a search warrant may be made to any justice of the peace, unless the application must be made to a magistrate or a Supreme Court judge pursuant to s 68(3) or (4). Section 68(4) provides that an application must be made to a judge if it is intended (when entering and searching the place to be searched) to do anything to cause structural damage to a building; and s 68(3) provides that unless the application must be made to a Supreme Court judge under 68(4), the application must be made to a magistrate if the thing to be sought under the proposed warrant is:

> "(a) evidence of the commission of an offence only because –
>
> (i) it is a thing that may be liable to forfeiture or is forfeited; or
>
> (ii) it may be used in evidence for a forfeiture proceeding; or
>
> (iii) it is a property-tracking document; or
>
> (b) evidence of the commission of an indictable offence committed in another State that, if it were committed in Queensland, would be an indictable offence in Queensland; or
>
> (c) confiscation related evidence."

[20] Section 68(3) presents considerable difficulty for any busy police officer or justice of the peace. Experienced police officers often demonstrate an extremely good understanding of what will constitute admissible and relevant evidence, but s 68(3) imposes on each of a police officer and a justice of the peace the necessity to make an accurate assessment of whether a thing sought under a proposed warrant is "evidence" of a commission of an offence, and such evidence "only because" it satisfied one of three separate descriptions, each of them quite difficult to apply. The first requires a judgment of whether the thing "may" be liable to forfeiture, or the judgment that it is a thing that may be forfeited, which requires a sophisticated opinion on the probable application of the *Criminal Proceeds Confiscation Act* 2002 (Qld), ("the *Confiscation Act*"), or any other Act under which property may be forfeited or its use restrained. (Those conclusions follow from the definitions appearing in Sch 4 of the *Police Act*).

[21] The second test requires a judgment whether the thing evidences the commission of an offence only because it "may" be used in evidence in a proceeding under the *Confiscation Act*, or a proceeding for a forfeiture or restraining order under any other Act. Schedule 4 of the *Police Act* provides:

> **"forfeiture proceeding** means –
>
> (a) a proceeding for a forfeiture order or a restraining order under the Confiscation Act; or
>
> (b) a proceeding for an order forfeiting or restraining the use of property under another Act."

Deciding if s 68(3)(a)(ii) applies requires a judgment as to whether the thing (not yet found) may be used in evidence in a forfeiture proceeding, and a second judgment as to whether, that being so, it is evidence of the commission of an offence only because it may so be used. That requires judgments to be made about both a prosecutor's and presiding judicial officer's discretion, and a judgment as to whether the thing is evidence of the commission of an offence, even if it would not be used in evidence.

[22] The third matter for judgment, again identifying a category of things for which only a magistrate may permit a search, is whether the things sought are evidence of the commission of an offence only because they are property tracking documents. Property tracking documents are defined in Sch 4 of the *Police Act* in very broad terms. Schedule 4 of the *Police Act* provides:

> "**property tracking document** means –
>
> "(a) a document relevant to identifying, locating or quantifying –
>
> (i) property of a person who committed a confiscation offence; or
>
> (ii) property of a person a police officer reasonably suspects committed a confiscation offence; or
>
> (iii) tainted property in relation to a confiscation offence; or
>
> (iv) property of a person a police officer reasonably suspects is or has engaged in a serious crime related activity; or
>
> (v) property a police officer reasonably suspects is serious crime derived property; or
>
> (b) a document relevant to identifying or locating a document necessary for the transfer of –
>
> (i) property of a person who committed a confiscation offence; or
>
> (ii) property of a person that a police officer reasonably suspects committed a confiscation offence; or
>
> (iii) tainted property in relation to a confiscation offence; or
>
> (iv) property of a person a police officer reasonably suspects is or has been engaged in a serious crime related activity; or
>
> (v) property a police officer reasonably suspects is illegally acquired property derived from a serious crime related activity."

[23] Those expansive definitions also refer a busy police officer to the terms of the *Confiscation Act*, and via Sch 6 of that Act, to various other of its sections.[14] It suffices to say that a serious crime related activity is anything done by a person that was, when it was done, a serious criminal offence; a serious criminal offence includes any indictable offence which has a maximum penalty of at least five years imprisonment; and a confiscation offence includes any serious criminal offence. Mr Rigney-Hopkins was convicted of the offence of fraud provided by s 408C of the *Criminal Code*, and the maximum penalty absent any circumstance of aggravation is imprisonment for five years. He was convicted of the aggravating circumstance of having obtained a chose in action of a value greater than $5,000, and accordingly faced a maximum of 10 years imprisonment. It follows that any document relevant to identifying, locating or quantifying his property (which would include the dishonestly obtained chose in action), or property reasonably suspected by a police officer of being derived from that offence he committed, is a property tracking document. Likewise any document relevant to identifying or locating a document necessary for the transfer of his property, or property derived from the commission of his fraud, was a property tracking document.

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[14] Section 16, s 99, and s 104

[24] Documents identifying Mr Rigney-Hopkins as the offender would undoubtedly include documents relevant to identifying his property and property derived by him from committing the offence. They would also include documents relevant to identifying or locating documents necessary for the transfer of his property, and property derived by him from committing the offence. This means that an application for a search warrant searching for documents linking Mr Rigney-Hopkins to the commission of that offence of fraud – such as documents demonstrating his use of the name and identity of Dovi Shulman, his connection with the telephone number Mr Hart telephoned and the email address with which Mr Hart communicated, his connection with the bank account to which Mr Hart was instructed the money be credited, and his application of those funds to his own use – ran the risk of being an application to search for things that were evidence of the commission of the offence by him only because they were documents relevant to identifying or locating Mr Rigney-Hopkins' property (the chose in action of $60,000), or documents relevant to identifying or locating documents necessary for the transfer of that chose in action, or of other property derived from it.

[25] Where the purpose of a search warrant is to obtain evidence of the commission of an offence, such as fraud, believed to have resulted in the suspected offender obtaining property from another, it will frequently, if not invariably, be the case that documents identifying a particular person as the offender include documents identifying the possession by that person of the property derived from commission of the offence. Fortunately for police officers applying for warrants in that common variety of case, it will very rarely be the case that the documents are admissible in evidence *only* because they are property tracking documents; usually the documents, whether admissible as property tracking documents or not, and whether actually admissible in evidence at all, will be relevant because they form part of a chain of circumstances linking a particular person with the commission of the offence. That is, the documents searched for will be relevant because of their capacity to identify a person as an offender irrespective of the legal effect of the document searched for or discovered on the search, and irrespective of the fact that those documents when discovered may identify the property of the now identified offender. Those documents would link that person to the commission of the offence, and therefore be relevant, even if they had no legal effect.

[26] That is the position applicable in this case. Although Mr Rigney-Hopkins argued otherwise, the documents searched for at Suncorp Metway, and produced on the search, were relevant (and some of them were admissible in evidence) because they linked Mr Rigney-Hopkins with the commission of the offence, and identified the source of his chose in action as Mr Hart. The chose in action Mr Rigney-Hopkins had had was the enforceable right of action against Suncorp Metway to have it apply the $66,021.13 as Mr Rigney-Hopkins ordered it to do. The second search warrant, 04/2279[15], authorised a search of 2/76 Richmond Road, Morningside, and it also bore on its face the declaration both that it was issued in relation to an offence, and in relation to a forfeiture proceeding authorised under the *Police Act*. Those two declarations appearing in each warrant did so because the police officer obtaining the warrant had omitted to strike through the second declaration in each case, namely that the warrant was issued in relation to a forfeiture proceeding. That declaration appears on the printed form of the warrant, and it continues to appear

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15 Reproduced at AR 366

despite the warning and reasons of this Court in *Bensted v Edwards* [2003] QCA 145. In that case this Court wrote that:

> "It is clearly highly desirable that the standard form of search warrant, made available for issuing both by Justices of the Peace and by Magistrates, already have deleted from it those declarations of what the warrant authorises which are beyond the respective powers of Justices or Magistrates. Police officers executing warrants, and persons whose premises are searched, should not be exposed to the risk of doing or suffering unauthorised and unlawful conduct. Obviously, Justices and Magistrates issuing warrants should equally understand what they are not empowered to authorise."

[27] The fact that that warning has been ignored, and that the standard form of search warrant continues to have both declarations printed on the face, enabled Mr Rigney-Hopkins to take the point that the justice of the peace (it was the same one each time) had purported to issue two warrants to conduct searches which were beyond the power of the justice to authorise, namely for a thing which was evidence of the commission of an offence only because it was in relation to a forfeiture proceeding. Opportunities for arguments of that sort would not arise if the standard form contained only one declaration.

[28] Mr Rigney-Hopkins had a second, and intelligent, argument based on the fact that on the voir dire held to determine the validity of each search warrant, the justice of the peace, whom the prosecutor called as a witness, swore that he had in the past authorised searches for forfeiture proceedings; Mr Rigney-Hopkins submitted to the learned trial judge that that admission made it clear the justice regularly enough, and incorrectly, assumed the right to exercise a power in law not given to him. That submission did reflect the evidence of the justice of the peace, but overlooked his earlier evidence in cross-examination that after reading each application for a search warrant, he had seen that it was for an offence of a fraudulent nature and not for a forfeiture proceeding.[16] It follows that the justice was not purporting to authorise a search for anything other than proof of the commission of the offence alleged against Mr Rigney-Hopkins. The inclusion of the inaccurate declaration that the warrant was issued in relation to a forfeiture proceeding did not lead the justice to any intent, in Mr Rigney-Hopkins' matter, to exercise a power not given to the justice; and accordingly did not lead to any misapprehension of the power of the justice. That made this case the opposite of the one considered by the High Court in *Coco v R* (1994) 179 CLR 427, at 443; and made this case similar to that considered in *Bensted v Edwards*.

[29] Mr Smith repeated on the appeal some of the complaints about the search warrant being granted, and the documents seized under the second warrant, which had been made by Mr Rigney-Hopkins to the learned trial judge. The learned judge ruled that the police officer quite clearly had grounds for suspecting that Mr Rigney-Hopkins was involved in fraud, and also in fraud as to his correct identity, and that the seizure of the documents had been authorised, irrespective of whether all documents seized were admissible in evidence. I respectfully agree with that conclusion. Mr Rigney-Hopkins had also argued that some documents which had been seized did not answer the description of documents sought by the warrant, and had only been seized because, as the police officer conducting the search explained, that officer's

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16 That evidence was at AR 44

understanding was that if he had a search warrant for a relevant place and while at that place found evidence of the commission of another offence, he could seize that other evidence.[17] The officer was correct; such seizure is authorised by s 113 of the *Police Act*. That section was overlooked in argument before the learned trial judge; it provides:

> "(1) This section applies if a police officer lawfully enters a place, or is at a public place, and finds at the place a thing the officer reasonably suspects is evidence of the commission of an offence.
> (2) The officer may seize the thing, whether or not as evidence under a warrant and, if the police officer is acting under a warrant, whether or not the offence is one in relation to which the warrant is issued."

It follows that seizure of documents which the police officer thought were evidence of other offences of fraud, and fraud as to identity, found by the officer when conducting his lawful search under either of the warrants, was authorised by s 113. That section reproduces the general effect of the common law.[18] The ground of appeal complaining of error in admitting documents seized under the search warrants should be dismissed.

Relevance of seized documents

[30] The learned trial judge heard a good deal of complaint from Mr Rigney-Hopkins about the seizure of documents which Mr Rigney-Hopkins argued were of little or no relevance to the charge now brought against him. Those submissions resulted in the learned judge requiring the prosecutor to identify the documents the Crown sought to tender at the trial, and the basis for tender of each. That process took all of the first afternoon of the trial. It involved the prosecutor explaining the Crown's contention why each document, or set of documents, was relevant and admissible, and the learned judge ascertaining if Mr Rigney-Hopkins objected to the document and, if so, the grounds. As the process evolved, what became the norm was that the prosecutor would identify a document and explain its asserted relevance, and Mr Rigney-Hopkins would usually make no objection to it being admitted. That procedure served the very useful purpose of identifying and explaining the exact nature and strength of the circumstantial case the Crown made on those documents linking Mr Rigney-Hopkins to the obtaining and expenditure of the money.

[31] On this appeal Mr Smith objected to the admission only of two "classes" of documents, those being the "Odette" documents and "Goldman" documents. The former documents were not objected to by Mr Rigney-Hopkins, and Mr Smith conceded on the appeal that they were relevant. Those were the documents seized at Mr Rigney-Hopkins' unit,[19] and were essentially accounts or demands for payment by Telstra or Optus, addressed to Victoria Odette or Mrs Victoria Odette, at Unit 2/76 Richmond Road, Morningside. Those documents were admissible.

[32] The "Goldman" documents, conceded as having some relevance,[20] evidence an intended change of identity from the name Christopher Bradley Grzegorz Rigney-Hopkins to "Eliezer" Yechezkel Yisrael Goldman, and included bank account

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17 This evidence was given at AR 37 and AR 38

18 See the judgment of Lord Denning MR in *Chic Fashions (West Wales) v Jones* [1968] 2 QB 299 at 313

19 The documents, and an index describing them, are reproduced at AR 498-507

20 These documents are reproduced in the appeal record at AR 478-497

statements and travel documents obtained in the latter name. Mr Smith contended those documents had limited relevance, because their dates began at 15 September 2003, post dating the commission of the offence, and covered only the last part of that year. That latter point is accurate, but Mr Rigney-Hopkins' use of the name "Eliezer" as the preferred first name for his new identity of Eliezer Goldman is relevant because of the use of that same first name by a person who answered the telephone registered in the name "Odette" in Mr Rigney-Hopkins' unit, and to whom Mr Hart spoke when attempting to contact Dvora Shulman. That person's responsive answer could be used by the jury as a circumstance both identifying Mr Rigney-Hopkins as the person to whom Mr Hart spoke, and also showing that Mr Rigney-Hopkins knew why Mr Hart wanted to contact "Dvora" by ringing that phone number.

[33] As to the prejudice said to flow from evidence of the use of another identity ("Goldman"), the prosecution evidence already disclosed that Mr Rigney-Hopkins used the identity of Dovi Shulman, and his opening explanation of his proposed defence to the jury, described below, included a description of how he wanted to use a Jewish name. There appears to be little extra prejudice in the evidence that he actually was using a new (Jewish) name of Goldman; and the prosecution were entitled to point to the circumstance that he actively sought that identity two days after being visited by the private investigator inquiring about Odette.

The opening statement by the defence

[34] When the procedure had been completed in which the admissibility and relevance of each seized document had been made clear to the learned judge and Mr Rigney-Hopkins, the jury was selected; and the learned trial judge then explained the foreshadowed trial procedure to Mr Rigney-Hopkins, and advised him of his rights. Mr Rigney-Hopkins adverted[21] to advice that judge had given the preceding day, namely that he could make an opening statement himself as well after the Crown opened its case, and he was appropriately advised by the judge as to the benefits and dangers of his doing that. He elected to make one, and after the Crown opened it case, he opened his. The essence of his account – not on oath – was that he had visited some Jewish chat rooms on the internet, because of an interest in Judaism and encountered "Carlotta", who after some time had revealed to him that her real name was Dvora Shulman, and who advised him that if he wished to be Jewish he should take a Jewish name. She suggested Dovi Chaim Shulman, which name he took and actually adopted by deed poll on 5 December 2002. She had told him in early January 2003 that she was receiving some money from overseas, but would have to pay tax on it in Israel, if it arrived there, and she suggested instead that the money come to him in Australia where tax would not be imposed. She offered to give him $15,000 for his trouble.

[35] That money arrived, namely the $66,000, into his bank account, and he dealt with it in the belief that it was partly his and partly money held for her. As it happened, he was visiting Europe in March 2003 and advised her of that, and she requested he bring some of her money with him, which he did. She also requested he bring his computer for her to use (they had arranged to meet in Europe, which they did). He stayed at a hotel in Paris at which she also stayed, and by agreement made in Paris he left his computer with her for a period, and with his permission she put data from

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21 At AR 106

her computer into his. When he arrived back in Australia (he had travelled overseas as Dovi Shulman from 12 March 2003 until a date in June 2003) he sent $5,000 to her in Israel via Western Union. He occasionally telephoned her, on either her home or a mobile phone number. In October 2003 when investigators came to his home he contacted "Carlotta" by telephone and she told him not to worry about matters, and that she would sort them out. Thereafter contact ceased. He explained to the jury that, like Mr Hart, he too had been duped by Dvora Shulman.

Evidence rebutting the defence opening

[36] That opening statement made plain enough that much of the Crown circumstantial case would not be challenged by Mr Rigney-Hopkins' defence, but the Crown still established the facts described in this judgment by evidence which it called. Mr Rigney-Hopkins asked very little in cross-examination of the witnesses, consistent with the position his opening statement described, which accepted much of their evidence. The prosecution also led further evidence, not originally opened to the jury, but which became relevant as a result Mr Rigney-Hopkins' opening statement to the jury. This included evidence from an officer of Western Union, to which evidence the learned trial judge established that Mr Rigney-Hopkins did not object, establishing that the names Christopher Hopkins, Christopher Rigney-Hopkins, Dovi Shulman, and Dvora Shulman, were not recorded in relation to any money transfer records for the years 2003 and 2004 held by Western Union Financial Services. The name Eliezer Goldman was recorded, in relation to money sent on 15 September 2004 from the Morningside Australia Post to a Lawrence Banenberg in Washington. The sum sent equated to $1,000 US.

[37] The prosecution also called evidence from a forensic computer analyst employed by the Queensland Police Service, a Tony Patrick, which evidence was heard first on a voir dire, at Mr Rigney-Hopkins' request. Mr Rigney-Hopkins was given time to prepare his cross-examination of that witness, because he said he had been told that more than 500 emails might be referred to by the witness, and he could not otherwise prepare for the evidence. The prosecutor then explained that it was intended to refer at most to 13 emails, and outlined the nature of the evidence to be called from the witness. The effect of it was intended to be that it was extremely unlikely that the emails to and from Mr Hart, beginning in December 2002, and in chronological order, stored on Mr Rigney-Hopkins' computer which the police had seized, had actually all been placed there while he was overseas and still apparently receiving and transmitting some of them. It will be recalled that the email communications between Carlotta (or Dvora Shulman) and Mr Hart had continued until mid-April 2003; on the account Mr Rigney-Hopkins had given in his opening statement, all emails had all been put into his computer by Dvora Shulman in Paris some time after mid-March 2003, all in their proper order.

[38] Evidence from Mr Patrick was led on a voir dire, and the essence of it was that while it was theoretically possible for one person to use another's email address in a different country for the receipt and sending of messages, to do so without the other knowing this was being done would require the person receiving and transmitting the messages to monitor the incoming emails 24 hours per day, seven days a week on a second to second basis, so that person could delete them before the person ordinarily using the computer noticed them on his or her computer in the far distant remote location. That was different from the opening the prosecutor gave, but the explanation was sensible enough. It concentrated on the emails sent before Mr

Rigney-Hopkins took his computer overseas in mid-March 2003, and examined whether "Carlotta" could have surreptitiously abused Mr Rigney-Hopkins' email address in Australia before he left while "she" was in Israel or not in Australia. Effectively the evidence in rebuttal meant that it would be highly unlikely that a person in Israel (or elsewhere) could receive and transmit email messages through an email address operated by a person in Australia without the person in Australia noticing those emails on the screen. Finally, two particular emails transmitted on 1 April 2003 were examined, with the expert expressing the opinion that it was also highly unlikely that could occur if the computer was being used by another person in Paris; that is, Mr Rigney-Hopkins appeared to have been using the computer himself on that particular date.

[39] Mr Rigney-Hopkins made a limited cross-examination of that witness, and after it ended, he informed the learned judge in the jury's absence that it was quite apparent a second party was involved in the matter, but that he could not reveal that other person's identity. That statement was close to a confession to the commission of the offence, albeit as a party to an offence committed by another, but that was all that Mr Rigney-Hopkins told the judge. He did not ask for an adjournment, and he did not suggest that he needed more time to study the emails or other documents reproduced from his own computer, or that they could in any way assist his defence to the charge. He made that statement to the judge at a time when the Crown case had become somewhat overwhelming, both from its original force and now from the rebuttal of claims he had made in his opening statement; but he did not ask for any adjournment.

Was an adjournment required?

[40] The lengthy description given of the trial process in this judgment should reveal that Mr Rigney-Hopkins appeared at all times fully alert to his rights, was carefully told about them by the judge, and exercised them. There is no doubt that had he needed or wanted an adjournment, he would have asked for it at that stage. Mr Smith submitted on the appeal that Mr Rigney-Hopkins' youth, and the fact that the prosecution were referring now to some of the 3,000 documents stored on the computer, should have prompted the learned judge to adjourn the trial, without any request, at that point, but I respectfully disagree. The prosecution had in fact relied on the voir dire on only two extra emails taken from the computer; and had only exhibited some other documents on the voir dire to demonstrate that Mr Rigney-Hopkins was very knowledgeable about computers. His (limited) questioning of the witnesses had made that clear in any event. Mr Rigney-Hopkins did not suggest at the trial, nor in the careful written submissions on the appeal, or in any affidavit, that after the voir dire he needed any adjournment or time to refer to any of the other documents on his computer to assist him in his defence or to cross-examine Mr Patrick again; although Mr Smith submitted that it was possible he did so need. That suggestion was the basis of the argument that at that time Mr Rigney-Hopkins had needed an adjournment, the absence of which meant the trial had miscarried. Mr Smith could not point to anything in the evidence which was given to suggest that any examination of other documents stored in Mr Rigney-Hopkins' computer could have helped his defence at all, had he had time to study them, or was relevant now. Without some evidence to support this ground of appeal, either by affidavit or by reference to the contents of the record, the argument should be rejected, and that ground dismissed.

[41] I observe that when Mr Patrick gave evidence before the jury, only the 36 emails originally described by the Crown Prosecutor at the start of the trial, as the ones on which the Crown could rely, were exhibited,[22] and that Mr Patrick's evidence before the jury very much followed his evidence on the voir dire. The prosecution once again produced and exhibited only the two extra emails sent on 1 April, with Mr Patrick advising it was possible but unlikely that those had been sent that day by someone in Paris using his computer. Mr Rigney-Hopkins did not cross-examine the witness at all. The jury took little time in finding Mr Rigney-Hopkins guilty, and his submissions in mitigation of penalty actually admitted committing the offence, although he did not specify if he was any more than just a party to it, and implied that was all he was.

Was there a chose in action dishonestly obtained from Mr Hart?

[42] That leaves only one other matter argued by Mr Smith as a ground of appeal, a submission that the prosecution had not identified any chose in action which Mr Rigney-Hopkins had dishonestly obtained in Australia from either Mr Hart or any other person. The submission included the arguments that there had been no evidence that there was a chose in action held by Mr Hart and recognised under Canadian law, no evidence as to the terms and conditions of the banking arrangements between Mr Hart and his bank, and that such evidence had been necessary because a chose in action must be regarded as situated in a country where it is enforceable.[23] He also submitted that the agreement by Mr Hart to give money to Mr Shulman to invest did not create any chose in action, citing *May v Lane*,[24] and argued in any event where a liability which could be otherwise characterised as a chose in action had been brought about by fraud, that liability could not be properly so described, where the action to enforce it was capable of immediate defeasance as soon the fraud was pleaded.[25]

[43] Mr Smith's arguments overlooked that the prosecution had actually called evidence from the Bank of Montreal officer establishing the transaction which occurred in Canada, which resulted in transmission to an account in the name of D Shulman in Queensland of a credit of $66,021.13. That same amount in Canadian dollars had stood to Mr Hart's credit on 20 January 2003 with the Bank of Montreal in its Komoka Branch, and in the absence of any contrary information, this Court is entitled and bound to assume that the common law of Canada, like the common law applicable in this State and the rest of the Commonwealth,[26] treated that credit as a chose in action enforceable against the Bank of Montreal.[27] It is both appropriate and safe to assume that the Canadian principles of banking law are unlikely to differ from the Australian ones, both being common law countries, that being one of the

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22 They were made exhibit 34

23 Mr Smith cited *Sutherland v Administrator* [1934] 1 KB 423 at 431 per Scrutton CJ and 434 per Greer CJ; *Jabbour v State of Israel* [1954] 1 All ER 145; *Re Maudslay* [1900] 1 Ch 602; *Re Banque Des Marchands De Moscou (Koupetschesky) (No 3)* [1954] 2 All ER 746. I respectfully observe that those cases support his proposition

24 (1894) 64 LJ QB 236

25 Relying on the decision in *R v Thompson* (1984) 75 Cr App R 191 and [1984] 1 WLR 962 at 967

26 Heydon JA (as His Honour then was) wrote an authoritative and lengthy analysis describing the circumstances in which the proposition would apply that where foreign law was not proved, it would be presumed to be the same as the lex fori; and when it would not apply, in *Damberg v Damberg* (2001) 52 NSWLR 492 at [118]-[147]; at NSWLR 522 he declined to assume that German law in relation to the avoidance or evasion of capital gains tax was the same as Australian law

27 The topic is discussed in the majority judgments in *R v Capewell* [1995] 2 Qd R 64

situations accepted by Heydon JA (as His Honour then was) in *Damberg v Damberg* (at [144]) as appropriate for the application of the presumption that the foreign law is the same as that of the lex fori.

[44] At the point on 23 January 2003 when the D Shulman account in Brisbane was credited with the same amount, Mr Hart could have countermanded his earlier instructions to the Bank of Montreal, but he did not do so; while that sum stood to the credit of the D Shulman account, Mr Rigney-Hopkins had a chose in action enforceable against Suncorp Metway for that sum, and he exercised the right without any earlier revocation by Mr Hart of his instruction. Mr Rigney-Hopkins applied those amounts to his own use over time, appropriating all of the chose in action he had.

[45] The evidence earlier described established that the chose in action Mr Rigney-Hopkins enjoyed in Queensland had been obtained from Mr Hart, who had given it to D Shulman just as much as if Mr Hart had gotten on a plane in Canada carrying $66,021.13 in Australian money, personally carried that money into this country and then into the Suncorp Metway building in Brisbane, and had personally deposited it in cash to the credit of that D Shulman account. Mr Hart had given it to Mr Rigney-Hopkins when Mr Hart exercised the rights he had to direct the Bank of Montreal on the application of the credit in Mr Hart's account with that bank, and directed it to create a chose in action for D Shulman, which then left Mr Hart without any chose in action of his own. Mr Rigney-Hopkins now had a chose in action, the source of which traced directly back to the one Mr Hart previously had. The evidence also showed that chose in action was dishonestly obtained.

[46] Irrespective of whether or not Canadian law recognised that Mr Hart had what Australian law calls a chose in action, the evidence established that Mr Rigney-Hopkins obtained from Mr Hart a credit amount in an account Mr Rigney-Hopkins controlled. I would grant the application for an extension of time, but dismiss that ground of appeal and all other grounds, and the appeal itself.

[47] **KEANE JA:** I agree with the reasons of Jerrard JA and with the order proposed by his Honour.