Supreme Court Notes

by Anita Del Medico

LEGAL PRACTITIONERS - ss 103, 115 *Legal Practitioners Act*; ss 7, 8 *Legal Practitioners (Incorporation) Act* - whether provisional liquidator of company of practising solicitors can question receiver's accounts where company deemed a partnership for the purposes of the *Legal Practitioners Act* - who may prove in the liquidation of the company.

Le Fevre v Rogerson (Mildren J) 29/4/93.

An application was made pursuant to s 115(1) of the *Legal Practitioners Act* (the "Act") for an order determining the fees of a receiver appointed by the Court pursuant to s 103(1) of the Act. A receiver had been appointed in relation to trust property of A.G. Rogerson, trading as Loftus and Cameron, until further order, and in relation to the trust property of Lofra Pty Ltd trading as Loftus and Cameron, and of the partnership between W.A. Raby and A.G. Rogerson (both directors of Lofra Pty Ltd). The Court had also appointed a provisional liquidator of Lofra Pty Ltd. The Registrar had filed two reports recommending payments be made to the receiver for his fees and disbursements, and these were referred to a Judge for consideration. Before the filing of the second report, the provisional liquidator applied for an adjournment of any further consideration of the receiver's fees and disbursements. He sought an order allowing him 21 days to file with the Registrar any Notices of Objection, thus affording himself the opportunity to query the receiver's accounts.

Held, refusing the application of the provisional liquidator and approving the receiver's remuneration in accordance with the Registrar's recommendation:

(1) It is central to the intention of the legislature that Lofra Pty Ltd never change its corporate personality. Section 7(2) of the *Legal Practitioners (Incorporation) Act* ("Incorporation Act") deems Lofra Pty Ltd, a practising company, to be a partnership comprised of its directors, but only for the purposes of the Act. Section 103 of the Act specifically envisages the situation where a receiver of trust property of a partnership may be appointed where that partnership is deemed to exist pursuant to s 7(2) of the Incorporation Act.

(2) Section 115(3) of the Act relating to remuneration of the receiver makes it clear that the fees and disbursements paid to the receiver from the Fidelity Fund are recoverable as a debt from the legal practitioner/s in respect of whose trust property the receiver was appointed -- not from the practising company those legal practitioners may control as directors. Lofra Pty Ltd, the practising company, is not a "legal practitioner" for the purposes of s 115(3). The fact that Lofra Pty Ltd is deemed a partnership for the purposes of the Act does not entitle the Fidelity Fund Committee to claim against Lofra Pty Ltd, nor prove in the ultimate liquidation. There is therefore no foundation in the provisional liquidator's fears.

(3) If recovery were made by the Committee against Rogerson and Raby, neither would have a right to prove in the liquidation of Lofra Pty Ltd. It is true that by s 8 of the Incorporation Act, the directors guaranteed Lofra's debts, but the right to recover under s 115(3) of the Act is a right given by that section against the legal practitioners concerned and it is not a right to recovery which arises by virtue of s 8 of the Incorporation Act against those practitioners as guarantors of a debt due by Lofra Pty Ltd. Even if the directors were subsequently sued in their capacity as guarantors, it is hard to see how they could be permitted to prove in the company's winding up in competition with the company's creditors and to the detriment of those creditors whose debts they have guaranteed, although once all other creditors have been paid, no doubt they could prove then, and there may then be some purpose to this if between them they did not hold all the shares in the company in equal shares.

Re Fenton (No 1) [1931] 1 Ch 85;

Re Bruce David Realty Pty Ltd [1969] VR 240, referred to.

Application by provisional liquidator to adjourn determination of receiver's fees and disbursements in relation to a company deemed to be a partnership for the purposes of the *Legal Practitioners Act*.

J Neill, for the Master and the Fidelity Fund Committee, on instructions from *Ward Keller*.

J Moore, for the Receiver of the Trust Property of Lofra Pty Ltd, on instructions from *Barr Moore & Co.*

D Francis, for the Provisional Liquidator of Lofra Pty Ltd, on instructions from *D Francis & Associates*.

CRIMINAL LAW - FORFEITURE - s 5 *Crimes (Forfeiture of Proceeds) Act* - application for forfeiture of the proceeds of crime by the DPP - application of equitable doctrines.

DPP v K Durgutovski (Mildren J) 8/6/93.

The DPP sought an order for forfeiture to the Northern Territory of monies alleged to be the proceeds of crime ("tainted property") pursuant to s 5 of the *Crimes (Forfeiture of Proceeds) Act* (the "Act"). On 15 November 1990 Asche CJ had made restraining orders pursuant to s 14 of the Act restraining the defendant and RGB, joint account holder, from dealing with the account to which the monies had been credited. On 24 March 1992 the defendant had pleaded guilty to five counts of stealing contrary to s 210(1) of the *Criminal Code* and had asked, pursuant to s 396 of the Code, that the Court take into account fourteen similar offences. The charges against the defendant had arisen out of a fraud perpetrated upon the PAWA by him and several others including RGB. during the period 24.1.90 and 24.10.90, twenty motor vehicles belonging to the PAWA, which were to be sold at public auction, were in fact passed into the possession of the defendant and/or the co-offenders and false paperwork was prepared to establish that these vehicles were "regularly" auctioned. The vehicles were "sold" at low prices and all but one were resold at higher prices. Monies in the defenant's account were used to

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finance the fictitious purchases of the vehicles; the proceeds of the actual resale profits were banked in the same account. The profits of the fraud were not less than $130,000.00. On 24 October 1990 approximately $52,600.00 remained in the account after distribution of profits to two of the co-offenders. This amount represented less than the defendant and RGB's share of the profits of the fraud. The defendant opposed the making of the forfeiture application. It was submitted that the Court could not be satisfied that the monies were tainted property within the meaning of ss 3(1) and 5(3) of the Act. An amount of $21,238.05 deposited into the account on 20 August 1990 was in fact the legitimate proceeds of a sale unconnected with the offences, and it was argued therefore that the DPP could not rely on the presumption raised by s 5(3)(a) and had to prove on the balance of probabilities that this money was "used in, or in connection with, the commission of the offences."

Held, order that all of the monies in the joint account be forfeited to the Territory and be vested in the PAWA; restraining order of 15 November 1990 be set aside.

(1) Section 5(3) of the Act has no bearing on a case where the plaintiff establishes or seeks to prove that the property is tainted because it is "derived or realised, directly or indirectly, by a person as a result of the commission of a serious offence". (s3(b) definition of "tainted property".) Section 5(3) is directed only to the alternative means by which proof that the property is tainted may be established, namely that the property was used in, or in connection with, the commission of an offence. Here, the plaintiff had established that the series of deposits made to the joint account represented the proceeds of the sales of the motor vehicles, and was property within the meaning of s 3(b) of the Act.

(2) Applying the rule in *Clayton's case* ("first in, first out") the "legitimate" deposit made on 20 August 1990, which was largely dissipated before the first of the deposits of the proceeds of the fraudulent sales was made, was completely expended by the subsequent withdrawals of funds from the account in the course of the scheme. It therefore follows that by the time the funds were frozen by the restraining order, all that remained in the account was the procceeds of the sales of the stolen motor vehicles.

Devaynes & Ors v Noble & Ors (1816) 1 Mer 572; 35 ER 781, applied.

(3) The same result is reached if the rule in *Re: Hallet's Estate* (1880) 13 ChD 96; [1874-80] All ER 793, is applied. The PAWA is deemed to be the beneficiary of the proceeds of the sales of its motor behicles and it may trace these proceeds even though they have been mixed with other monies. The defendant would be deemed to have drawn on his own monies first, even if they were the most recently paid in, and to draw on the trust funds only after his own money had gone. However, the rule is subject to the limitation that where the defendant had paid in a sum of money, as here, shortly before the injunction granted by Asche CJ, and that sume of money came from his own funds, the PAWA could not claim more than the last balance in the account at the time when that deposit was made, unless they could also show that the payment was intended to replace the trust money: *Snell's Equity 29 Ed* (1990) at 301.

(4) The PAWA is incorporated pursuant to s 4 of the *Power and Water Authority Act* 1987. In the exercise of its powers and in the performance of its functions it is subject to the directions of the Minister; its members are appointed by the Administrator and it is a prescribed statutory corporation within the meaning of the *Financial Administration Audit Act*. It is simply the Northern Territory in another guise. It is therefore appropriate to order that the property be forfeited to the Territory pursuant to the Act, at least to the extent to which the PAWA would be able, in a civil court, to trace those funds. The definition of "interest" in the Act includes "a legal or equitable estate or interest in; or a right, power or privilege over, or in connection with, the property".

Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation & Ors (1987-88) 76 ALR 173 at 178, referred to.

(5) In any event, it is not necessary to rely upon equitable doctrines to support the making of a forfeiture order in this case. The defendant's account came within the Act's definition of "property". The account was used in order to deposit the proceeds of the crimes and to disperse therefrom monies to finance the fictitious purchases of the vehicles and to distribute the profits to co-offenders. The funds that remained in the account were "tainted property" within the first part of the Act's definition in that they were "used in, or in connection with" offences. Furthermore, the total amount of the monies paid in, being the proceeds of the realisation of the sale of the stolen motor vehicles, vastly exceeded the account balance as it stood when the restraining order was made.

(6) It could not be said that any "hardship" would flow to the defendant should the order for forfeiture be made (s 5(1)(b) of the Act), as the use ordinarily made or intended to be made of the property was to operate the fraudulent scheme, and the "legitimate" deposit of 20 August 1990 had been expended in the course of this scheme. As to the account being in joint names of the defendant and RGB, RGB was in part a party to the frauds, and in any event, had no personal interest of an honest kind in the monies. Although she was put on notice of this application as required by the Act, she advised her solicitor that she did not wish to be heard. Accordingly, it could not be said that any hardship would flow to her.

Application by DPP for forefeiture order pursuant to Crimes (Forfeiture of Proceeds) Act.

RJ Wallace, Deputy Senior Crown Prosecution, on instructions from the DPP for the Plaintiff.

P McQueen, on instructions and on behalf of the Defendant & RGB.