

Property Rights to Stolen Money

JOHN TARRANT[†]

If money is stolen the common law provides the thief with a property right to the stolen money. In addition a trust is created so that the thief holds this property right on trust for the true owner. This paper explores the property right the thief acquires to stolen money and how that property right co-exists with the property rights of the true owner. The author argues that the position taken by the courts can only be understood if it is appreciated that it is not the stolen money that is held on trust but the thief's property right to the stolen money.

WHEN money is stolen a number of possible legal responses could follow. The courts could take the view that the thief should acquire no property rights at all to the stolen money. Alternatively, the courts could create a property right in favour of the thief but recognise the superiority of the continuing property rights of the true owner. This latter alternative has been the traditional response adopted by the courts. The thief acquires possession of the stolen money but can only enforce that right against everyone other than the true owner. However, additional flexibility is provided in our legal system through the use of a trust and creation of equitable property rights. This flexibility allows the courts to utilise a combination of legal and equitable property rights to protect the true owner, while at the same time providing limited property rights to the thief. The more flexible approach was taken by the High Court in *Black v S Freedman & Co Ltd*,¹ a case concerning the theft of money by an employee. This paper will explore the approach taken by the courts on this issue, including a detailed examination of *Black v Freedman*, and explain what legal and equitable property rights are created by a theft of money and how the property rights co-exist.

To understand how they co-exist, it is necessary to examine the conceptual nature of property rights. This involves making a distinction between a property right and the thing that is the object of a property right. Property rights are rights to things.² Any particular thing can be subject to a number of property rights at any given time.

[†] Lecturer, The University of Western Australia. I am grateful to an anonymous referee for the helpful comments on an earlier draft of this article.

1. (1910) 12 CLR 105.

2. *Yanner v Eaton* (1999) 201 CLR 351, Gleeson CJ, Gaudron, Kirby & Hayne JJ 365-366.

Money is no exception. The property right created by law in favour of a thief co-exists with the property rights of the true owner and any other property rights held by third parties prior to the theft – for example, security interests. It will be shown that after a theft, in the absence of any third party rights like security interests, stolen money is subject to two legal property rights. The first property right is the true owner's right to possession. The second property right is the thief's newly acquired property right of possession. It will be argued that the thief does not acquire legal ownership of stolen money. This is critical to understanding the property rights created. In addition to the legal property rights to the money, an equitable property right is created for the benefit of the true owner. That equitable property right is a beneficial interest in the money. The trust property is the thief's legal property right of possession of the money; the money itself is not trust property. It will be shown that despite a thief acquiring a legal property right to stolen money there are no adverse consequences arising in the law of bankruptcy. Because the thief's property right to the money is held on trust that property right is specifically excluded from the property of the bankrupt.³

The thesis is that property rights created by a theft can only be understood when it is appreciated that, when money is stolen, it is not the stolen money that is held on trust but the thief's property right to the stolen money. In addition, the respective legal property rights to stolen money can only be understood by reference to possession and rights to possession.

Before exploring the issues it is necessary to recognise that money can exist in two forms – tangible and intangible. Money in its tangible form is represented by banknotes and coins. Money in its intangible form is referred to as money in the bank and is represented by an obligation that a bank or other financial institution pay to an account holder a certain sum. When it is in this latter form it is intangible personal property, but capable of being transformed into the physical form of money. An account holder does this by requesting that the bank withdraw a sum from his or her account and meet that withdrawal by the delivery of notes and coins. This transforms their money from the form of intangible personal property into tangible personal property.

Money in its intangible form is a chose in action and cannot be stolen.⁴ Nor can a chose in action be converted.⁵ This paper is concerned with the property rights that

3. Bankruptcy Act 1966 (Cth) s 116(2).

4. See *R v Preddy* [1996] AC 815. The decision in *Preddy* that a chose in action cannot be stolen resulted in amendments to the Theft Act 1968 (UK). By the Theft (Amendment) Act 1996 a new s 15A was inserted into the Theft Act creating an offence of dishonestly and by deception obtaining a money transfer: see A Ashworth *Principles of Criminal Law* 3rd edn (Oxford: OUP, 1999) 415; JC Smith *Criminal Law* 10th edn (London: Butterworths LexisNexis, 2002) 600; Law Commission (Eng) *Offences of Dishonesty: Money Transfers* Report No 243 (1996).

5. *OBG Ltd v Allan* [2005] 2 WLR 1174.

arise when money in its physical form is stolen. The rights that arise when stolen money is used to acquire or create other property rights are beyond the scope of this paper. Such rights arising from substitutions made by the thief or third parties raise issues of tracing and the creation of new property rights in the substitute assets. Cases dealing with substitutes will only be discussed to the extent necessary to examine the property rights to the stolen money and the type of trust created by a theft.

PROPERTY RIGHTS

There are conflicting views as to whether property rights are actual rights between persons or are rights to things. Hohfeld argued that property rights must always be actual rights between persons.⁶ Penner argues that property rights are rights to things.⁷ The thinghood approach has been expressly recognised as the correct approach by the High Court. In *Yanner v Eaton*, the High Court directly addressed the question of what is a property right. The appellant had been charged with the taking of crocodiles in contravention of section 7(1) of the Fauna Conservation Act 1974 (Qld). The legislation provided that all fauna, with certain exceptions, was 'the property of the Crown'. A significant issue in the case was the meaning of the word 'property'. Gleeson CJ, Gaudron, Kirby and Hayne JJ held that:

'[P]roperty' does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing.⁸

The approach of the majority is confirmation that a property right is a relationship between a person and a thing. That relationship might be actual possession, a right to possession, ownership or some lesser right such as the limited rights of control created by the legislation. This is consistent with Bentham,⁹ who observed that referring to a person's property rather than the object of a person's property conflates the *object* with the *property* and results in focusing on the thing rather than the rights to the thing.¹⁰ The approach taken by the High Court in *Yanner v Eaton* is an implicit rejection of Hohfeld's view that property rights are always actual rights between persons.

The analysis in this paper will be approached from the perspective that property rights are rights to things. The thing itself is not property. When dealing with

6. WN Hohfeld 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale LJ 710.

7. JE Penner *The Idea of Property in Law* (Oxford: OUP, 1997).

8. *Yanner v Eaton* above n 2, Gleeson CJ, Gaudron, Kirby & Hayne JJ 365-366 (footnote omitted).

9. J Bentham (JH Burns & HLA Hart (eds)) *An Introduction to the Principles of Morals and Legislation* (London: Athlone Press, 1970).

10. *Ibid*, 211.

money, the money itself is not property. The analysis must focus on property rights to the money. Numerous property rights, both legal and equitable, can co-exist in relation to the same money at the same point in time.

THE DECISION IN *BLACK v FREEDMAN*

The traditional position

The traditional position at common law was that when money was stolen no equitable remedy was available and no trust was created by the theft. A victim of a theft of money would rely on their common law remedies available for the theft of any tangible thing. These remedies comprised the self-help remedy of recaption and damages for conversion. This traditional position was taken a step further in Australia when the High Court decided *Black v Freedman*. The High Court introduced the notion that stolen money is trust money in the hands of the thief. However, the High Court did not explain how the trust arose or precisely what property rights were created by the theft. The purpose of this section is to examine *Black v Freedman* in detail and explain how the position in *Black v Freedman* can be reconciled with the traditional position. It will be concluded that *Black v Freedman* is a development of the traditional position and not a rejection of it. The theft itself creates new property rights and these property rights co-exist. There is not a single property right to the stolen money but a number of property rights to the stolen money including both legal and equitable property rights.

Facts of *Black v Freedman*¹¹

Freedman & Co was owned by three brothers, Solomon, Harry and Abraham Freedman. The company owned a number of retail drapery and clothing stores in Perth. The defendant, John Black, was an accountant employed by Freedman & Co from some time in 1906 until April 1910. In April 1910, Black took leave and travelled to Sydney. While Black was on leave Solomon Freedman noticed one of his clerical staff entering details of the daily takings in a small receipt book rather than the large cash book normally used by Black. Upon inspecting the two books, Solomon Freedman noticed that the small receipt book recorded the actual daily cash receipts from each store while the larger cash book recorded a smaller amount for some of the daily takings. It transpired that Black had ensured that the auditor was not aware of the existence of the smaller book containing the correct daily cash takings.

11. The detailed facts of *Black v Freedman* have been extracted from the judgment at first instance and the appeal book filed in the High Court of Australia. The judgment at first instance (*Freedman v Black* (unreported) WA Sup Ct, 2 Sep 1910, McMillan J) can be obtained from the archives of the State Library of WA, Perth. The appeal book filed in the High Court can be obtained from the National Archives of Australia, Canberra (Ref: Series A10078, Item 1910/7).

Upon discovery of the two books Solomon Freedman engaged the company's auditor to conduct a special audit. The audit revealed how Black had stolen from his employer. Black regularly recorded different amounts for the daily takings in the two books. For example, on 4 December 1909, Black recorded £131 6s 2d in the receipt book, but only £31 6s 2d in the cash book, thus retaining £100 for himself. The evidence showed that Black used this system to steal £1 394 from his employer. From the stolen money Black deposited £465 into his own bank account of which £460 was later withdrawn. Black also deposited £754 into Mrs Black's bank account and used £250 to buy circular notes (an early form of traveller's cheque¹²) in the name of Mrs Black. The £754 was deposited into Mrs Black's account between November 1909 and April 1910. The money remained in the account, which had a balance of £759 at the time of the trial. There was evidence that Black had booked himself, Mrs Black and their three children on a ship to London departing on 2 May 1910. However, before they could depart Black was arrested in Sydney and found to be in possession of £250 of circular notes in Mrs Black's name. By the time of the civil trial Black had been convicted of theft and was serving his sentence in Fremantle prison.

The proceeds of Black's theft existed in two forms: the money in Mrs Black's bank account and the circular notes. The plaintiffs claimed a declaration that £754 of the money in Mrs Black's bank account was their property and that the £250 of circular notes was also their property. The framing of the claim by the plaintiffs in this way turned out to be critical. Instead of claiming a money remedy for conversion, they sought a declaration that they had a continuing legal property right in the proceeds of the stolen money. Because the claim was framed in this way the trial judge proceeded to determine whether Freedman & Co had any legal property rights to the proceeds of the theft.

The decision at first instance

In *Freedman v Black*,¹³ the trial judge, McMillan J, held that the proceeds of the stolen money in the form of the money in Mrs Black's bank account and the circular notes were always the legal property of the plaintiff. In contrast to the approach later taken by the High Court, McMillan J did not determine that any trust was created, nor did he refer to any equity decisions or principles in his judgment. He based his decision on a single common law case of *Foster v Green*.¹⁴ In *Foster v Green*, the manager of a bank obtained the signature of a customer on one of the customer's cheques drawn on the bank. The manager used the cheque to take cash from the bank till and hand it to the customer. The customer understood it to be repayment by the manager of a private debt due by the manager to the customer. The customer was illiterate and thought he was signing a receipt. The manager

12. See W Thomson *Dictionary of Banking: A Concise Encyclopaedia of Banking Law and Practice* 8th edn (London: New Era Publishing, 1936) 157.

13. *Freedman v Black* above n 11.

14. (1862) 158 ER 726.

recorded the transaction as a loan from the bank to the customer. The bank then took action to recover the loan from the customer. Pollock CB held that the bank could not recover the money from the customer because the cheque had been obtained by the fraud of the bank's agent. McMillan J used *Foster v Green* to demonstrate that an innocent person who receives the proceeds of a fraud and provides valuable consideration is not liable for receiving the proceeds of the fraud. However, McMillan J determined that Mrs Black was not an innocent recipient because she should have been suspicious as to how her husband had access to substantial sums of money when his income from Freedman & Co was only £4 per week. In addition, although Mrs Black filed an affidavit claiming the money was her own, Mrs Black declined to give oral evidence or to be cross-examined.

When Black used the stolen money to make deposits to Mrs Black's bank account and to acquire the circular notes in her name, Mrs Black acquired new property rights represented by the additional balance in her account and her ownership of the circular notes. McMillan J concluded that the money in Mrs Black's bank account and the circular notes in her name were at all times the property of the plaintiffs. But McMillan J did not explain how these property rights were to be considered as the plaintiffs' property rights when Mrs Black had legal title to the bank account and the circular notes. Although the decision in *Foster v Green* was relevant in determining that Mrs Black had an obligation to make restitution to the plaintiffs for receipt of the proceeds of the stolen money, the decision did not provide any authority for a victim having a property right in the proceeds of a theft.

The High Court decision

The High Court did not specifically reject the reasoning of McMillan J. However, it is clear from the judgments of Griffith CJ and O'Connor J that they took a different approach. After outlining the facts, Griffith CJ proceeded immediately to determine whether the claim against Mrs Black could succeed. In doing so Griffith CJ proceeded on the basis that the stolen money could be traced in equity as trust property. He made no attempt to explain why it was trust property other than to refer to property being disposed of by a person in a fiduciary position.¹⁵ Black was an employee and thus a fiduciary and therefore it may have been that Griffith CJ considered that the money was trust property because of this fiduciary relationship and not solely because of the theft. O'Connor J agreed with Griffith CJ but observed that where money is stolen it is trust money in the hands of the thief.¹⁶ The significance of O'Connor J's statement is that it suggests that a trust will arise from a theft even in the absence of a fiduciary relationship. He also held that, when given to a third party without consideration, the 'money' retained its character as trust money.¹⁷

15. *Black v Freedman* above n 1, Griffith CJ 108-109, referring to *Re Hallett's Estates* (1880) 13 Ch D 696.

16. *Ibid*, O'Connor J 110.

17. *Ibid*, 111.

The High Court judges offered no explanation as to why they rejected McMillan J's common law reasoning and adopted an equitable approach. Although they reached the same outcome that Freedman & Co could recover from Mrs Black it was on a very different basis. McMillan J held that the money was always the money of the plaintiffs and made no reference to any trust being created. The High Court, however, reasoned that a trust arose at the moment of the theft. The conclusion of the High Court that a thief becomes a trustee of stolen money has been described as heretical.¹⁸ However, heretical or not, it is the position in Australia.¹⁹ The next section of this paper will examine what property rights arise when money is stolen, whether there is a fiduciary relationship or not, and will consider what is held on trust.

PROPERTY RIGHTS TO STOLEN MONEY

A thief's legal property right

Smith argues that it cannot be technically correct to hold that a thief is a trustee because 'the thief has no proprietary rights in what he has stolen'.²⁰ But that is not correct. A thief does obtain a property right to stolen money and it is critical to understanding *Black v Freedman* to identify exactly what right the thief does acquire. To identify the property right acquired by a thief and how that property right co-exists with other property rights to the stolen money it is necessary to make an important distinction between ownership and possession. A thief does not acquire an ownership right to stolen money; a thief only acquires possession. It is possible for a thief to acquire the property right of possession without acquiring ownership and without depriving the true owner of their full ownership rights. To correctly identify the relevant property rights arising from a theft it is necessary to examine the rights from the perspective of both possession and ownership.

Possession

When a thief acquires possession of money the thief has a property right to that money. But the right acquired is not an ownership right; there is only a presumption that the thief is the owner. In *Field v Sullivan*,²¹ the police had statutory power to confiscate goods and used this power to confiscate certain goods from the plaintiff believing that they were stolen. The plaintiff was not prosecuted and later took action to recover the goods from the police. Macfarlan J held that when the police took possession of the goods, they *only* took possession:

18. PJ Millett 'Tracing the Proceeds of Fraud' (1991) 107 LQR 71, 76.

19. *Black v Freedman* has been followed on a number of occasions: see eg *Creak v James Moore & Sons Pty Ltd* (1912) 15 CLR 426; *Evans v European Bank Ltd* (2004) 61 NSWLR 75; *Cashflow Finance Pty Ltd (in liq) v Westpac Banking Corporation* [1999] NSWSC 671; *Commonwealth v Official Trustee in Bankruptcy* [2004] NSWSC 1155.

20. LD Smith *The Law of Tracing* (Oxford: Clarendon Press, 1997) 345.

21. [1923] VLR 70.

Their [the police] taking possession took away from him [the plaintiff] *nothing except possession*, and the only right in the police is to retain possession during the period during which they were lawfully authorised to retain. It cannot be suggested that anything they did changed the property in the goods. He [the plaintiff] therefore *prima facie* remains the owner.²²

This is consistent with the approach taken recently in *Costello v Chief Constable of Derbyshire Constabulary*.²³ The claimant was in possession of a car which he knew to be stolen and the court held that once the period of detention of the car by the police ended the claimant had a right to immediate possession of the car. Once the power of the police to retain the goods expires the possessory rights of the previous possessor are immediately revived.²⁴ While the police had possession of the car, both the thief and the true owner each had a right to possession. As between the thief and the police, as soon as the statutory basis for the police's possession ended, the thief was able to assert his right to possession.

Possession and a right to possession are two different property rights. A right to possession can only ever be held by a person out of possession. As Pollock and Wright explained:

Right to possess ... is ... that which remains to a rightful possessor immediately after he has been wrongfully dispossessed.... Unlike Possession itself, it is not necessarily exclusive. A may have the right to possess a thing as against B and every one else, while B has at the same time a right to possess it as against every one except A.²⁵

Although a person with immediate possession and a person wrongfully dispossessed both have a right to possession there is a difference in the content of their rights. A person with possession has the actual enjoyment of possession whereas a person out of possession is denied that enjoyment. As a result their previous right of possession has been reduced to a right with a lesser content. Despite its lesser content, the right of the person wrongfully dispossessed is a stronger property right in any dispute over priority or property rights.

These long established principles relating to possession were examined recently by the House of Lords in *JA Pye (Oxford) Ltd v Graham*.²⁶ Lord Browne-Wilkinson observed that acquiring wrongful possession is not an intention to own, or an intention to acquire ownership, but an intention to possess.²⁷ Although possession

22. Ibid, 86 (emphasis added).

23. [2001] 3 All ER 150.

24. *Webb v Chief Constable of Merseyside Police* [2000] QB 427.

25. F Pollock & RS Wright *An Essay on Possession in the Common Law* (Oxford: Clarendon Press, 1888) 27.

26. [2003] 1 AC 419.

27. Ibid, Lord Browne-Wilkinson 436.

involves a concept of exclusivity it will not always give rise to ownership. As Lord Hope explained, 'Only one person can be in possession at any one time. Exclusivity is of the essence of possession'.²⁸ To acquire possession requires both an intention to possess and some act demonstrating that intention to possess.²⁹ The required act 'is the intent to exercise exclusive control over the thing for oneself'.³⁰ Therefore the acquisition of possession will not necessarily create a new ownership right. The person with possession is only presumed to be the owner and that is not sufficient to make them the owner. The person wrongfully dispossessed does not lose their rights entirely. They lose the property right of possession but their rights are protected by the creation of a new property right, a right to possession.

Ownership

Property rights to stolen money can now be examined from the perspective of ownership by reference to *Black v Freedman*. Despite being dispossessed of the money Freedman & Co remained the owners of the money. However, their right to the money was no longer exclusive as Black now had a property right to the money. Although Freedman & Co were wrongfully dispossessed it is possible to draw an analogy with circumstances where an owner voluntarily gives up possession. An example is where a legal owner chooses to reduce their full legal ownership rights by leasing or hiring their goods. In such circumstances they nevertheless remain the true owner. However, they no longer have a full right to the immediate exclusive enjoyment and benefit of the goods. An owner in these circumstances is best described as the *residual legal owner* to distinguish their rights from that of a *full legal owner*. Their residual legal ownership will revert to full legal ownership at the expiry of the lease or hire period unless they dispose of their residual ownership right before then. Residual ownership reflects the fact that some incident of ownership has been transferred to another person. This leaves the legal owner with rights less than full legal ownership. But with the passage of time that residual ownership may again revert to full legal ownership. Pollock recognised the concept of residual ownership and commented as follows:

[T]he owner of a thing is not necessarily the person who at a given time has the whole power of use and disposal; very often there is no such person. We must look for the person *having the residue* of all such power when we have accounted for every detached and limited portion of it; and he will be the owner even if the immediate power of control and use is elsewhere.³¹

Legal ownership can therefore be full legal ownership or residual legal ownership. In cases of theft the true owner remains the owner albeit with a residual ownership

28. Ibid, Lord Hope 445.

29. Ibid, 445-446.

30. Ibid, 446.

31. F Pollock *A First Book of Jurisprudence: For Students of the Common Law* 4th edn (London: MacMillan, 1918) 179-180 (emphasis added).

right rather than full ownership. One incident of ownership, possession, has been wrongfully acquired by the thief. Prior to the theft the true owner had a single property right. That property right could be described in two ways – possession or ownership. After the theft the true owner has a single property right to the money but it is a residual right. Again that property right can be described in two ways – a right to possession; or a residual ownership right. After the theft in *Black v Freedman* there were two legal property rights to the money – Freedman & Co's right to the money (a right to possession) and Black's right to the money (possession). In terms of priority between Freedman & Co and Black, Freedman & Co's *right to possession* is superior to Black's *possession*.

After a theft, the true owner's right to possession, or residual ownership right, is vulnerable and will be lost if the money is passed into currency by the thief. The recipient of the money when it is passed into currency obtains full legal ownership of the money even though the thief did not have full legal ownership. The rule operates as an exception to the principle that no one can give what he or she does not have (*nemo dat quod non habet*). While the money is in the hands of the thief the true owner has a right to possession. But at the moment that the money passes into currency both the true owner *and* the thief lose their property rights to the money. The sole property rights to the money are now with the recipient of the money when it passes into currency. The critical point is that from the moment of the theft until the passing into currency the money is the subject of two legal property rights and ownership does not pass until the money passes into currency. This point was recognised by Wilson and Dawson JJ in *Ilich v The Queen*:

Money in most circumstances cannot be followed, which is to say that property, or ownership, generally passes with possession.... Money is, of course, capable of being stolen and if it is stolen, property in the notes or coins does not pass to the thief. But if the thief passes the money into currency, which he may do by making payment with it, ownership will pass with possession notwithstanding the thief's lack of title providing the transaction was bona fide and for valuable consideration.³²

The word 'property' here is used in a very specific sense. It is used as the equivalent of ownership. If money is stolen, 'property' or ownership does not pass to the thief. Ownership will only pass if the thief passes the money into currency. The stolen money can be recovered from the thief before the thief passes the money into currency. But the fact that it can be recovered does not mean that the thief has no property right to the money. It only means that the true owner's property right to the money is superior to, and has priority over, the thief's property right to the money. The observation of Wilson and Dawson JJ only deals with the issue of ownership and does not consider all the property rights that can arise.

32. (1987) 162 CLR 110, Wilson & Dawson JJ 128. See also *Miller v Race* (1758) 97 ER 398, 401.

When these principles are applied to *Black v Freedman* a number of property rights can be identified. Black originally had lawful custody of the money when it was handed to him in his capacity as an employee. He did not steal the money when he first received it. Having custody is a state of fact and not a property right. Black only obtained possession when he formed an *intention to possess* the money for himself *and* put that intention into action. It is not clear exactly how Black removed the money from the premises of Freedman & Co. He may have placed it in his pocket or in a bag. Whatever method he used, at some moment he must have committed an act that reflected his intention to possess the money. Whenever he committed that act his control over the money changed from custody to possession. At that moment he stole the money and obtained possession. But his new property right to the money created by the theft was not the only property right to the money. He obtained *a* property right to the money, not *the sole* property right to the money. Because Freedman & Co were wrongfully dispossessed the law creates a new property right in the form of a right to possession. This right to possession can be described as residual legal ownership. After the theft both Black, and Freedman & Co, had property rights to the money. While the money was still physically in the possession of Black these two legal property rights to the money co-existed. Black's property right was possession and Freedman & Co's property right was a right to possession, or residual legal ownership.

Black then passed the stolen money into currency in a number of ways – he used part of the money to make deposits into his own bank account and into Mrs Black's bank account and he used part of the money to buy the circular notes in Mrs Black's name. In each case the bank, and not Black or Mrs Black, provided valuable consideration when they received the money. When Black passed the money into currency, *both* Black *and* Freedman & Co lost their property rights to the money. In relation to Mrs Black's bank account new property rights were created between the bank and Mrs Black. At law, Freedman & Co had no basis for claiming any legal title to those new property rights. Those new property rights were held by Mrs Black. An action in conversion against Mrs Black was not possible because Mrs Black did not convert anything. It may have been possible for Freedman & Co to claim a non-proprietary remedy based on money had and received on the basis that Mrs Black was unjustly enriched. But Freedman & Co did not pursue a claim for money had and received; they sought a vindication of property rights. They sought a declaration that both the £754 in Mrs Black's bank account and the £250 of circular notes were their property. McMillan J found for Freedman & Co and declared that the property rights held by Mrs Black were the legal property of Freedman & Co. However, McMillan J did not cite any authority in support of that conclusion and the High Court took a different approach. The Court held that a thief holds their rights to stolen money on trust. The reasoning of the High Court will now be examined to determine what equitable property rights arise and what is held on trust.

Freedman & Co's equitable property right

In *Black v Freedman*,³³ O'Connor J made reference to the fact that the stolen money had become 'trust money'. But Black had possession and not ownership so it needs to be determined what Black held on trust. It cannot be the stolen money because Black did not have legal ownership of the money, nor did he have the sole property right to the money. Black acquired only *one* property right to the money. To correctly identify what is held on trust it is necessary to recognise that a trust fund comprises one or more property rights. These property rights do not need to be ownership rights. A trust fund can comprise one or more property rights including possession, rights to possession and security interests. It is not possible to hold *things* on trust. It is property rights *to* things that are held on trust.

Accordingly, in *Black v Freedman* what Black held on trust was *his* property right to the money – not the money, and not Freedman & Co's property right to the money. Black's new legal property right to the money became an asset of the trust. At all times Black's property right to the money was actually worthless as against Freedman & Co. However, once the property right became an asset of the trust, if it was then exchanged for a new property right, that right may become a valuable asset of the trust. That is precisely what happened when Black used the stolen money to deposit money into Mrs Black's account and when the circular notes were acquired.

Three property rights to stolen money

The analysis above has shown that a number of property rights to stolen money can co-exist. In *Black v Freedman*, prior to the theft there was only a single property right to the money. That property right was Freedman & Co's possession of the money, which can also be described as full legal ownership of the money. At the moment of the theft two additional property rights were created. One was Black's possession, which is a legal property right and the second was Freedman & Co's equitable property right in the form of a beneficial interest in the money. These two property rights exist in addition to Freedman & Co's legal property right to the money, which was possession but became only a right to possession after the theft. The money was the object of all three property rights. Freedman & Co as the sole beneficiary of the trust did not have equitable ownership of the stolen money. They had the benefit of Black's legal property right to the money. Black's property right was only possession, not ownership. Accordingly, Freedman & Co had an equitable interest in the money but not equitable ownership. Freedman & Co had two property rights to the money – the right to possession (or residual legal ownership) and a beneficial interest represented by Black's property right to the money being held on trust for their benefit.

33. Above n 1, O'Connor J 110.

The decision in *Black v Freedman* demonstrates the flexibility inherent in a legal system that has two levels of property rights. A thief can obtain a legal property right but have that property right effectively stripped from him or her by the use of the second level of property rights. The thief has a property right to the stolen money but holds it for the benefit of the true owner. The co-existence of these property rights is only possible in a system that has two levels of property rights.

Bankruptcy

The above analysis has implications for understanding the rights of an owner of stolen money in cases where the thief becomes bankrupt. It has been shown that there are three rights to the stolen money that exist after the theft; two legal rights and one equitable right. Only one of these rights is held by the thief: the right of possession. If the thief was to become bankrupt the property rights held by him or her would be subject to the provisions of the Bankruptcy Act 1966 (Cth) (the Act). Pursuant to section 58(1) of the Act the 'property of the bankrupt' vests in the thief's trustee in bankruptcy. However, section 5 of the Act limits the definition of the 'property of the bankrupt' to the property divisible among the bankrupt's creditors. Section 116(2) excludes from the definition of property divisible among the bankrupt's creditors any 'property held by the bankrupt in trust for another person'. Clearly, as a thief holds his or her property rights to stolen money in trust for the true owner, the thief's property rights to the stolen money are not available to the thief's creditors. Thus, no adverse consequences arise in relation to bankruptcy from the decision in *Black v Freedman*.

THE TRUST CREATED

The final issue to be examined is the trust created by a theft of stolen money. Two issues arise in relation to the trust. First, what type of trust is created? Secondly, when does a third party recipient of stolen money or the proceeds of stolen money become a trustee?

The type of trust created

In relation to the type of trust created it is arguable that either a constructive trust or a resulting trust arises. Part of the difficulty in determining what type of trust arises is that there are differing views on when constructive trusts and resulting trusts arise.³⁴ In relation to resulting trusts these have been justified on two alternative grounds. The first is that resulting trusts arise only where there is an intention to create a trust. This view was expressed by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC*.³⁵ The second view is that resulting

34. For a discussion of these different views, see S Gardner *An Introduction to the Law of Trusts* 2nd edn (Oxford: Clarendon Press, 2003) 117-137.

35. [1996] AC 669, Lord Browne-Wilkinson 708.

trusts arise where the provider of property did not intend to benefit the recipient.³⁶ Constructive trusts have been explained on the basis that they arise to reverse unjust enrichment.³⁷ A constructive trust was held to have arisen when an errant fiduciary received bribes.³⁸ It is therefore possible to argue that when money is stolen a resulting trust arises because there is no intention by the true owner to benefit the thief, or that a constructive trust arises to prevent the thief being unjustly enriched.

The reasoning in *Black v Freedman* supports a conclusion that the trust that arises is a resulting trust and not a constructive trust. In support of their reasoning, both Griffith CJ and O'Connor J referred to the notes to *Dyer v Dyer*³⁹ in White and Tudor's *Leading Cases in Equity*.⁴⁰ *Dyer v Dyer* was a case that dealt with whether a resulting trust had arisen when a copyhold was acquired in the joint names of the plaintiff's father, mother and one of his brothers. The plaintiff's father had provided all of the purchase money for the copyhold. The outcome of *Dyer v Dyer* was not discussed in *Black v Freedman*, only the notes to *Dyer v Dyer* in White and Tudor. Griffith CJ made reference to White and Tudor to support the contention that when following trust property there is no distinction to be made between real property and personal property.⁴¹ O'Connor J referred specifically to *Dyer v Dyer* in the context of whether the proceeds of the stolen money could be recovered from Mrs Black. O'Connor J held that if a thief pays the stolen money to another person 'then it may be followed into that other person's hands'⁴² unless they can show that they are a bona fide purchaser for value without notice of the trust.⁴³ The references by both Griffith CJ and O'Connor J to *Dyer v Dyer* (a case concerned with resulting trusts) and the notes to that case in White and Tudor point to the conclusion that the trust created is a resulting trust.

Recent cases applying *Black v Freedman* also support the conclusion that the trust created is a resulting trust. In *Evans v European Bank Limited*,⁴⁴ a number of credit card holders had been the subject of a fraud. The money defrauded from them had passed through several bank accounts. The case therefore involved money in its intangible form as money in a bank account. However, for current purposes the form of the money is unimportant. Spigelman CJ, with whom Handley JA and Santow JA agreed, followed *Black v Freedman* and held that the fraudster held the funds on

36. R Chambers *Resulting Trusts* (Oxford: Clarendon Press, 1997) 2.

37. DWM Waters *The Constructive Trust* (London: Athlone Press, 1964).

38. *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324.

39. (1788) 30 ER 42.

40. FT White & OD Tudor *A Selection of Leading Cases in Equity* Vol 2 (London: Sweet & Maxwell, 1897).

41. *Black & Freedman* above n 1, Griffith CJ 108. See also White & Tudor above n 40, 810.

42. *Ibid*, O'Connor J 110. See also White & Tudor above n 40, 833.

43. *Ibid*.

44. Above n 19. Special leave to appeal to the High Court was refused: see [2005] HCA Trans 142.

trust. Importantly, Spigelman CJ opined that the ‘trust so created is, in my opinion, better described as a presumed or resulting trust, rather than as a constructive trust’.⁴⁵ Spigelman CJ also held that the trust should be seen as arising automatically.⁴⁶ Further support for an automatic resulting trust is found in *Cashflow Finance Pty Ltd v Westpac Banking Corporation*⁴⁷ where Einstein J expressed the view that the trust arises ‘as soon as the thief takes the property’.⁴⁸ A similar interpretation was adopted by Young CJ in *Commonwealth v Official Trustee in Bankruptcy*,⁴⁹ although Young CJ described the trust that arose automatically as a constructive trust rather than a resulting trust.

A recipient of stolen money as trustee

The second issue is, when does a recipient of stolen money or the proceeds of the stolen money become a trustee or assume the duties of a trustee? In *Black v Freedman*, Mrs Black received the proceeds of the stolen money. Mr Black was a trustee the moment he committed the theft. Some or all of the money that was paid into Mrs Black’s bank account, however, may have been paid in without her knowledge. In these circumstances, was she a trustee from the moment the money was deposited into her account or only later when she became aware of the deposit? The High Court did not have to decide this issue in *Black v Freedman*. However, in *Westdeutsche*, Lord Browne-Wilkinson held that it would be inappropriate to hold that a recipient of a mistaken payment was a trustee until the recipient was aware of the factors that gave rise to the trust.⁵⁰ Mrs Black was the recipient of the proceeds of stolen money and not the recipient of a mistaken payment, but similar issues arise from Mrs Black’s position. When someone in Mrs Black’s position receives money it is immaterial whether it has been paid to them by mistake or from the proceeds of a theft. In either case, if they have provided no consideration they are liable to make restitution unless they have a valid defence. Accordingly, the reasoning of Lord Browne-Wilkinson supports a conclusion that in Mrs Black’s case she would not be considered a trustee until she was aware of the money in her bank account.

But if Mrs Black was determined not to be a trustee until she became aware of the deposit, this would result in the position that trust property existed without there being any trustee. That is because in *Black v Freedman* O’Connor J held that once the thief’s property right to the stolen money was trust money it could not lose that character until the recipient showed that they received it for valuable consideration and without notice of the trust.⁵¹ So in *Black v Freedman* the trust existed from the

45. Ibid, 100.

46. Ibid.

47. Above n 19.

48. Ibid, para 465.

49. Above n 19, para 18.

50. *Westdeutsche* above n 35, Lord Browne-Wilkinson 709.

51. *Black v Freedman* above n 1, O’Connor J 110.

moment of the theft and extended over Mrs Black's bank account and the circular notes in her name. This creates a situation where there may be no trustee for the period that the money was in Mrs Black's bank account without her knowledge. This is not problematic because there are a number of limited circumstances where trust property exists without there being any trustee. This commonly occurs where the trustee is an individual and the trustee dies.⁵² In such circumstances the legal representative of the deceased trustee holds the trust property until a new trustee is appointed at which time the trust property vests in the new trustee.⁵³ A similar situation can arise if a corporate trustee is deregistered. When this occurs, the property rights of the corporation vest in the Australian Securities and Investment Commission (ASIC).⁵⁴ But ASIC does not become a trustee unless they exercise the power under section 601AE(1)(a) of the Corporations Act 2001 (Cth) to act as trustee. This situation arose in *Danich Pty Ltd re Cenco Holdings Pty Ltd*,⁵⁵ where Barrett J held that from the period when a corporate trustee is deregistered until a new trustee is appointed, or ASIC exercises the power to become the trustee, the office of trustee remains vacant.⁵⁶

These principles can be applied by analogy to the circumstances of Mrs Black. If any of the stolen money was deposited into her bank account without her knowledge then during that period her property rights to the money in its intangible form remains trust property. Mrs Black would have held part of the bank account as trust property but she was not trustee until she became aware that the money had been deposited in her account. This approach has the advantage of providing for continuity of the trust without imposing trustee duties on a recipient until they are aware that a property right they have is trust property.

CONCLUSION

The rule that a thief of money is a trustee has remained unchallenged in Australian law since *Black v Freedman* was decided almost 100 years ago. This paper has outlined how the property right of the thief co-exists with the property rights of the true owner of the stolen money. The true owner does not lose their ownership rights and the thief does not acquire ownership. It has been argued that the property rights created by a theft can only be understood when it is appreciated that it is not the stolen money that it held on trust but the thief's property right to the stolen money. In addition, the respective legal property rights to stolen money can only be understood by reference to possession and rights to possession.

52. See RP Meagher & WMC Gummow *Jacobs' Law of Trusts in Australia* 6th edn (Sydney: Butterworths, 1997) 397.

53. *Ibid.*

54. Corporations Act 2001 (Cth) s 601AD(2).

55. (2005) ACSR 484. See also *Chalker v Barwon Coast of Management Inc* [2005] VSCA 101.

56. *Ibid.*, 490.

The reasoning in *Black v Freedman* provides an example of the courts using the flexibility available in a legal system that has two levels of property rights. A thief might obtain a property right at the first level of legal property rights but have that right limited by the use of the second level of equitable property rights. The benefit a thief might derive from the legal property right of possession is reduced by the automatic response that that property right is held on a resulting trust for the benefit of the true owner. This provides the maximum protection for a victim of a theft. It also provides a mechanism for a victim of theft to obtain automatic rights to the proceeds of the theft even if those property rights are held by third parties unless the third party is a bona fide purchaser for value without notice.
