[2003] QSC 459

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Date: 10 December, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WHITE J

No S1166 of 2003

THE STATE OF QUEENSLAND — Applicant

and

CHARLES EDWARD CANNON — Respondent

BRISBANE

..DATE 05/12/2003

JUDGMENT





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HER HONOUR: Orders were made by Justice Muir on the 7th of July 2003 setting aside orders by Justice Mackenzie on the 10th of January this year and making restraining orders in respect of property of Charles Cannon and property of the other applicants, some of which are corporations. His Honour also ordered that the applicants attend on a date to be fixed for examination before the Court pursuant to section 38(1)(f) of the Crimes Proceeds Confiscation Act 2002-----

...

HER HONOUR: -----and file a sworn statement of particulars of the property in which they had an interest. By another order made the same day his Honour extended the time within which an application for an exclusion order in relation to the restrained property might be made.

The time has continued to be extended by Judges of this Court until the 16th of September 2003 when McMurdo J set aside those orders on the basis that those interested in property can bring an application relevantly at any time. They have not yet done so. The sworn statements were made between the 8th and the 13th of October 2003. Notices of examination have issued on the 28th and the 31st of October for appearances before the Court on the 8th, 9th and 10th of December - that is next week.

In their applications today the applicants seek a stay or an adjournment of those notices until after the criminal

proceedings involving Charles Cannon and his daughter Angela have concluded. Charles Cannon has been charged with trafficking in dangerous drugs and production of dangerous drugs and Angela Cannon with drug-related offences. The committal proceedings are part heard. The other applicants are family or related persons and companies associated with them.

The essence of Mr Byrne QC's submission on behalf of Mr Cannon is that the protection afforded by section 40(2) of the Criminal Proceeds Confiscation Act concerning making statements or disclosures under the compulsory provisions of section 40(1), would not cover derivative evidence or information thereby obtained. Therefore the Court in the exercise of its inherent powers to ensure the proper administration of justice should order the stay or the adjournment of the examinations.

Reliance is placed on observations of Lord Wilberforce in Rank Film Limited v. Video Information Centre 1982 Appeal Cases 380 at 443 where his Lordship said:

> "Moreover whatever direct use may or may not be made of information given, or material disclosed, under the compulsory process of the Court, it must not be overlooked that, quite apart from that, its provisional disclosure may set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character. In the present case, this cannot be discounted as unlikely: it is not a possible but probably the intended result."

Section 93 of the Criminal Proceeds Confiscation Act provides:

> "The fact that a criminal proceeding has been started against a person, whether or not under this Act, is not a

> ground on which the Supreme Court may stay a proceeding against or in relation to the person under this chapter that is not a criminal proceeding."

In Mule v. Western Australia (2002) 29 State Reports Western Australia 95 Hammond Chief Judge of District Courts concluded that there was still a residual discretion where there was such a legislative provision in order to allow the Court to grant a stay. In that case the applicant would have been required to produce an affidavit or affidavits to defend a forfeiture order which would require him to swear to relevant matters associated with a pending criminal trial. No such exposure is required here.

Analogous considerations have been raised in the case of a liquidator's compulsory examination where there are pending charges. Mason Chief Justice in Hamilton v. Oades (1989) 166 CLR 486 noted that the legislature may overrule a long-held common law practice relating to such matters as the right to silence. His Honour said at 498:

> "The Court retains its power to give directions and to restrain questions in cases where the examination is being conducted for an improper purpose or constitutes an abuse of process: section 451(5). Thus if a liquidator were to conduct an examination directed to compel the examinee to disclose defences or to give pre-trial discovery or to establish guilt this examination may be restrained as an abuse of process.
>
> ...
>
> Again the inherent powers of the Court are retained and the duty of the Court to ensure the proper administration of justice may require that orders be made of types other than those which restore the privilege against self-incrimination or which serve to defeat the purposes of the section."

It is clear in his judgment that his Honour was mindful of the dangers of derivative evidence at 496 of his judgment.

In New South Wales Crime Commission and Murchie, 2049 New South Wales Law Reports 465, the legislation was materially the same as the present legislation in Queensland.

Greg James J said at 479:

> "I therefore conclude that the examination is intended to allow the eliciting of information of such activities as might be relevant to the existence of serious crime related activity within the six year period or illegal activities as might be relevant to the making of a proceeds assessment order, or the assessment of the amount of that order.
>
> Those matters might be elicited as well as matters which might go to ascertain, identify and locate property to which the restraining order might be extended by variation or which might become a forfeit or which might assist the making assessment or recovery of a proceeds assessment order.
>
> This construction allows the examination to supplement the effect of the order in its full statutory operational effect. That is, it allows assistance to the operation of the order not only as freezing property interests but as potentially triggering forfeiture or as assisting the making and enforcement of proceeds assessment orders."

In McMahon v. Gould (1982) 7A CLR 202 Wootten J in the equity division of the Supreme Court of New South Wales gave some guidelines for liquidators examinations which continue to be well regarded, see Yuill v. Spedley Securities Ltd (1992) 8 ACSR 272.

But I think it unnecessary to spell those out in detail, save to indicate that references to the so called right of silence do not extend to give a defendant as a matter of right the

same protection in contemporaneous civil proceedings. In other words, to suggest that what are often held to be important rights enshrined in the criminal process may well be set aside by the clear legislative intent.

Justice Fryberg in the State of Queensland v. Henderson, unreported decision of 16 May 2003, dealing with this same legislation and in particular an application before him in respect of forfeiture orders and examinations, in dealing with a similar submission to that raised by Mr Byrne said at page 5 of his reasons:

> "It seems to me that before Henderson can be entitled to substantive relief, it is incumbent on him to demonstrate either or both that he has a matter which he wishes to raise in defence of the forfeiture proceedings which if raised would prejudice the criminal proceedings and/or that he has a matter which he would wish to raise in exclusion proceedings to a like effect."

Justice Mackenzie accepted that approach in State of Queensland v. Bush, unreported decision of the 15th of September 2003.

No specific prejudice is pointed to by Mr Cannon, apart from the generally held fear that something might come out in his examination which will help the prosecution in a derivative sense in the prosecution of the criminal charges against him.

Whatever view one might have about the heavy handedness of this legislation, nonetheless the legislature has evinced its intention that an examination of the kind which is sought to be held here may occur even if there are criminal proceedings

on foot. And no further matters have been raised by Mr Cannon which would suggest that the inherent powers of the Court would come into play.

Similar arguments have been raised by Mr Bradley on behalf of Angela Cannon who, as I have mentioned, has been charged with criminal offences.

As to the other respondents, although this also in part includes Angela, she and her sister Cassie Cannon gave evidence under examination on the 28th of March 2003. Justice McMurdo adjourned that examination.

Thereafter, section 30 of the Criminal Proceeds Confiscation Act was declared invalid by the Court of Appeal. And while the submission has been made by Mr Bradley that in effect there has already been an examination of those two persons, his submission did not indicate that it had been an adjournment of that examination. The new order was made out of caution for fear that the order made by Justice Mackenzie under a provision which had been declared invalid would suggest that the examination orders were also invalid.

As Mr Hinson SC for the State has submitted, an examination is not a "free for all" and the persons appearing at the examination can object if the same ground is traversed again. That would be oppressive and such proceedings must, at the very least, accord natural justice.

There is otherwise, so far as I can ascertain, no reason adverted to as to why those other applicants should not be examined, except a general complaint that they will be "locked in" to their evidence and open to cross-examination on any evidence inconsistent with it which they might give in any application for exclusion of property. That argument need only be stated to be rejected.

Angela Cannon is the sole director of Goldfinger Proprietary Limited but so far as that examination is concerned it will be confined to questions about that company's affairs when she gives evidence on that company's behalf.

Although there is no application to exclude property from the forfeiture order it is worth noting the provisions of section 65(8) and 66(8) of the Act which envisage that an application for exclusion from a forfeiture order may not be heard until the DPP has had a reasonable opportunity to examine the applicant under an examination order, whether or not such an order has already been made.

As will be apparent I am not, therefore, persuaded that in the light of the clear provisions of the Act and no specifically identified prejudice or issues of justice would require the examinations to be stayed or adjourned until the criminal proceedings have concluded. Dismiss the applications.

...

HER HONOUR: Well the Uniform Civil Procedure Rules, of course, make it perfectly plain that costs follow the event unless the Court is persuaded that some other order is the appropriate order and it seems to me that this is an application that has been brought and been lost and, accordingly, costs ought to follow the event and I so order then that the applicant pay the respondent's costs of and incidental to the application to be assessed on the standard basis.

...

HER HONOUR: Mr Bradley, you can withdraw.

...

MR BRADLEY: Do I have leave to withdraw?

HER HONOUR: You do. I make that order. The firm is - your name - Bernard Bradley and Associates?

MR BRADLEY: Bernard Bradley is my firm. The new firm or the new solicitor will be Julie Deverey of Mermaid Beach.

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