SUPREME COURT OF QUEENSLAND

CITATION:	*Clevemere Pty Ltd v State of Queensland* [2003] QSC 159
PARTIES:	**CLEVEMERE PTY LTD ACN 085 993 059** **(first applicant/applicant)** **SIRAPOT PTY LTD ACN 088 233 701** **(second applicant)** **JOHN ELLIOT WILSON** **(third applicant/applicant)** **ROZMAC INVESTMENTS PTY LTD ACN 099 376 271** **(fourth applicant)** **v** **THE STATE OF QUEENSLAND** **(first respondent/respondent)** **COOKE INVESTMENTS (GOLD COAST) PTY LTD ACN 095 876 814** **(second respondent)** **SUSAN RUTH CARTER** **(third respondent)** **JASON WALTER BETTLES** **(fourth respondent)** **THE PUBLIC TRUSTEE OF QUEENSLAND** **(fifth respondent/respondent)**
FILE NO:	S1135 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	29 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	1 May 2003
JUDGE:	Mullins J
ORDER:	**That the application for the relief sought in paragraphs 13, 14 and 15 of the amended originating application filed by leave on 1 May 2003 be refused.**
CATCHWORDS:	CRIMINAL LAW – CONFISCATION AND FORFEITURE ORDERS – *Criminal Proceeds Confiscation Act* 2002 (*Q*) – exclusion order – where applicant applied pursuant to either s 49 or s 65 of the Act in respect of funds paid to the solicitor's trust account for the company to which the applicant believed it was indebted under a deed of charge – where the funds in the solicitor's trust account became the subject of a restraining order - where applicant bears onus of establishing on balance of probabilities that it had a proprietary interest in the funds in the solicitor's trust account – deed of charge

declared to be void – applicant could not discharge onus – requirement of s 49 or s 65 not satisfied

Bankruptcy Act 1966 (Cth)

Criminal Proceeds Confiscation Act 2002

Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation (1988) 164 CLR 662
David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353

COUNSEL: PW Hackett for the applicants
MD Hinson SC for the respondents

SOLICITORS: Hewlett & Company for the applicants
The Director of Public Prosecutions for the respondents

[1] **MULLINS J:** On 10 January 2003 Mackenzie J made restraining orders pursuant to the *Criminal Proceeds Confiscation Act* 2002 ("the Act") in respect of the property of Charles Edward Cannon ("Cannon") and the property of Cooke Investments (Gold Coast) Pty Ltd ("Cooke Investments") on the basis that Cooke Investments was a company under Cannon's effective control. Pursuant to s 28(3)(a)(iii) and s 31(1) of the Act, it was ordered that none of the property of Cannon be dealt with by any person. Pursuant to s 28(3)(b) and s 31(1) of the Act, it was ordered that none of the property of Cooke Investments listed in paragraph 6 of the order be dealt with by any person. One of the items of property described in sub-paragraph c was:

> "The debt owed by Clevemere Pty Ltd secured by the fixed and floating charge lodged with the Australian Securities & Investment Commission on 20th June 2002;"

Another item of property that was specified in sub-paragraph k of paragraph 6 of the order was:

> "All monies held in trust by Gustafson Solicitors and Attorneys."

[2] The Public Trustee of Queensland ("the Public Trustee") was ordered in paragraph 10 of the order, pursuant to s 35 of the Act, to take control of all the restrained property. The first respondent commenced proceeding S1166 of 2003 on 7 February 2003 seeking a forfeiture order for the restrained property. By letter dated 14 March 2003 the Public Trustee requested Gustafson's to forward all moneys held in their trust account for Cooke Investments to the Public Trustee. On 19 March 2003 in response to that request and pursuant to the order of Mackenzie J Gustafson's forwarded their trust account cheque in the sum of $50,000 in favour of the Public Trustee to the Public Trustee which Gustafson's described as "the sum in question held in our Trust Account in respect to Cooke Investments (Gold Coast) Pty Ltd".

[3] In this proceeding the named applicants obtained an order from Moynihan SJA on 18 February 2003 in relation to specified transactions and securities that had been entered into by the parties. Paragraph 4 of that order provides:

> " The following transactions and securities are declared void:-

(a) the deed made the 24th May 2002 ("the deed") between the First and Third Applicants and the Second Respondent;
(b) the fixed and floating charge dated the 24th May 2002 granted by the First Applicant in favour of the Second Respondent pursuant to clause 3 of the deed;
(c) the guarantee dated 24th May 2002 given by the Second Applicant to the Second Respondent pursuant to clause 3 of the deed;
(d) the charge dated 24th May 2002 given by the Second Applicant to the Second Respondent pursuant to Clause 5 of the guarantee;
(e) the registered mortgage over the interest of the First Applicant in registered lease no 904672555;
(f) the agreement made by the 13th February 2001 between the Third Applicant and the Second Respondent ("the agreement");
(g) the purported exercise of the share options pursuant to clauses 3 and 8 of the agreement;
(h) the purported share transfers executed by the parties pursuant to clause 9(a) of the agreement."

[4] Moynihan SJA adjourned the hearing of the remainder of the relief sought in the named applicants' originating application to a date to be fixed. At the hearing on 1 May 2003 the first and the third applicants ("the applicants") filed by leave an amended originating application which relevantly sought a declaration that the sum of $50,000 held in the Public Trustee's trust account, having been receipted for the second respondent, was the property of the first and second applicants and an order that the said sum be paid from the Public Trustee's trust account into the trust account of the solicitors for the applicants within 7 days of the order.

[5] The relief pursued by the applicants at the hearing on 1 May 2003 was sought only against the first respondent and the Public Trustee.

Relevant facts

[6] The facts relating to the dealings between the first and third applicants, on the one hand, and Cannon and Cooke Investments, on the other, are primarily found in the affidavit of the third applicant which was filed in this proceeding on 6 February 2003. Those facts were not disputed by the first and the fifth respondents.

[7] The third applicant is a shareholder and director of the first applicant. The first applicant had a lease over the Nerang Tavern. In September 2000 the first applicant began to fit-out the tavern, but needed more funds than had been envisaged. Cannon expressed an interest in providing those funds. The third applicant states that in or about late November or early December 2000, it was agreed between Cannon and him that Cannon would lend the sum of $250,000 with the option of converting that sum to a one-quarter share in the first applicant and that Cannon would lend a further $250,000 with an option to convert it into a further one-quarter share in the first applicant. Shortly after that agreement had been made Cannon provided the third applicant with the sum of $250,000 in cash. In January 2001 Cannon provided the third applicant with another $250,000 in cash.

[8] Cooke Investments was incorporated on 12 February 2001. On 13 February 2001 the third applicant signed an agreement in relation to granting two put options to Cooke Investments each of which was in respect of the acquisition of 25 of the 100 shares in the first applicant for the consideration of $250,000. By notices of option dated 18 April 2001 Cooke Investments purported to exercise the share options and share transfers were signed, so that, at least according to the documents that were then in existence, Cooke Investments held 50% of the shares in the first applicant.

[9] The third applicant requested further funds from Cannon in order to buy stock in preparation for the opening of the tavern. On or about 29 March 2001 Cannon attended at the tavern with the sum of $124,000 in cash which he handed to the third applicant and which he said that he would put in as a loan.

[10] The third applicant states that during the latter part of 2001 his relationship with Cannon was deteriorating. In October 2001 the third applicant proposed that the first applicant be liquidated, but states that Cannon was not happy about that possibility. The third applicant states that in or about November 2001 he was threatened by Cannon.

[11] In late November or early December 2001 the third applicant underwent an emergency heart operation. In early 2002 the third applicant states that he agreed with Cannon that he would buy him out for $750,000 and that Cannon would leave the money in the tavern and take security over the tavern. As a result the applicants and Cooke Investments entered into the deed of settlement dated 24 May 2002 that provided for the option agreement and purchase of shares by Cooke Investments in the first applicant to be rescinded *ab initio* and the first and third applicants acknowledged that the total amount owed by the first applicant to Cooke Investments, as a result of the deed of settlement and as a result of further advances made to the first applicant by Cooke Investments, was $750,000. The third applicant states that while the amount of the debt that was acknowledged was $126,000 in excess of the amounts actually paid by Cannon, the third applicant executed the deed of settlement because of the threats which had been made to him by Cannon.

[12] Pursuant to the deed of settlement the first applicant was required to grant Cooke Investments a fixed and floating charge over its assets including a mortgage over its lease of the tavern and to ensure that its wholly owned subsidiary Sirapot Pty Ltd, which is the second applicant and was the holder of the liquor licence in respect of the tavern, guaranteed the payment of the debt of $750,000 supported by a fixed and floating charge over its assets. All those documents were executed as required by the deed of settlement. The fixed and floating charge granted by the first applicant and the fixed and floating charge and guarantee and indemnity granted by the second applicant are each dated 24 May 2002.

[13] On 1 November 2002 the first and third applicants executed a management agreement with CBD Hotel Group Pty Ltd ("CBD") which provided for CBD to conduct the business of the tavern and provided for payment of a future contract price by instalments. Cooke Investments relied on the agreement entered into between the first applicant and CBD as an event of default under the deed of charge and appointed receivers and managers to the first applicant on 11 December 2002. The receivers and managers were named as the third and fourth respondents in this proceeding. The first applicant was unsuccessful in this court in its challenge to the

entitlement of Cooke Investments to appoint the third and fourth respondents as receivers and managers of the first applicant's assets and undertakings. The judgment in which the first applicant's claim against Cooke Investments was dismissed was delivered on 20 December 2002.

[14] The receivers and managers had received some payments from CBD pursuant to the management agreement and therefore had funds in order to make a payment on account of the debt claimed by Cooke Investments to be owing by the first applicant pursuant to the deed of charge. There is no suggestion by the third applicant that any earlier repayment had been made by the first applicant to Cooke Investments.

[15] The receivers and managers sent a letter to Gustafson's Solicitors dated 7 January 2003 which enclosed a cheque for $50,000 in favour of Gustafson's trust account. Their letter, which was Ex 2, stated:

> "**Clevemere Pty Ltd (Receivers and Managers Appointed) ("the company") ACN: 085 993 059**
>
> I refer to our telephone discussion and enclose a cheque for $50,000 as part payment of the secured monies owing to Cooke Investments (Gold Coast) Pty Ltd ("Cooke").
>
> As discussed we are unsure at this time as to the position with respect to the monies received by the receivers and managers from CBD Hotel Group Pty Ltd ("CBD") under the agreements CBD has with the company. If for some reason we are required to repay the monies to CBD then your client will need to repay this $50,000 to us. If Cooke is not prepared to receive the money on this basis then we request that you return the cheque to us."

[16] The restraining order against Cannon and Cooke Investments was made on 10 January 2003, before the funds could be disbursed from Gustafson's trust account.

[17] The orders made by Moynihan SJA on 18 February 2003 were conditioned on the undertaking of the receivers and managers to resign as receivers and managers of the first applicant on or before midday on 19 February 2003. Moynihan SJA also ordered that the receivers and managers after deduction of their remuneration, expenses and legal costs in respect of this proceeding pay the balance of the funds held on behalf of the first applicant to the trust account of the solicitors for the first applicant.

[18] The applicants subsequently ascertained that at the respective times that the large amounts of cash was handed by Cannon to the third applicant, Cannon was an undischarged bankrupt. He filed his statement of affairs in connection with his bankruptcy on 22 January 1999. His bankruptcy ended on 23 January 2002 when he was automatically discharged pursuant to s 149 of the *Bankruptcy Act* 1966 (Cth).

Issues

[19] The application for the specific relief that was pursued by the applicants at the hearing on 1 May 2003 was made pursuant to either s 49 or s 65 of the Act. In order to be successful with this application the applicants bear the onus of showing

on the balance of probabilities that the specific sum of $50,000 which was held in Gustafson's trust account belonged to the first applicant. The first applicant must establish a proprietary right to the specific fund of $50,000 held in Gustafson's trust account in order to satisfy the requirement of either s 49(1) or s 65(2) of the Act. It is not sufficient for the first applicant to show that it may have a right to bring a personal action against Cooke Investments in respect of the payment of the amount of $50,000.

[20] The issues that were raised on the hearing of the application were:

(a) the effect of paragraph 4 of the orders made by Moynihan SJA on 18 February 2003;
(b) the effect of Cannon's bankruptcy; and
(c) whether the payment of the sum of $50,000 by the receivers and managers was subject to a condition which was not satisfied;
(d) whether the funds in Gustafson's trust account belonged to the first applicant.

Effect of the order made on 18 February 2003

[21] Paragraph 4 of the orders made on 18 February 2003 must be considered in the context of the factual background against which they were made which was primarily the same affidavit of the third applicant on which the hearing on 1 May 2003 was conducted. It is therefore common ground for the purpose of this application that there were 3 occasions between late November or early December 2000 and 29 March 2001 on which cash totalling over the 3 occasions the sum of $624,000 was physically handed by Cannon to the third applicant.

[22] It is submitted by Mr Hackett of Counsel on behalf of the applicants that the consequence of the transactions and securities being declared void by paragraph 4 of the orders made on 18 February 2003 is that there is no debt owing by the first applicant to Cooke Investments. It is argued that the underlying debt between those parties was the transaction that was set aside on 18 February 2003.

[23] Mr Hinson of Senior Counsel on behalf of the first and fifth respondents submits that it was the transactions and the securities set out in paragraph 4 of the order made on 18 February 2003 that were set aside and that the underlying indebtedness arising from the payment of the total sum of $624,000 in cash by Cannon to the third applicant was not dealt with by the orders.

[24] The approach of the applicants, however, was that it was irrelevant to consider the nature of that indebtedness in respect of the sum of $624,000, if it could not be characterised as the debt of the first applicant owed to Cooke Investments. Although there was common ground in respect of the fact of the 3 cash payments, the parties differed as to how the third payment should be characterised. The applicants relied literally on the statement attributed by the third applicant to Cannon that he would put the cash "in as a loan" to claim that the debt in respect of that payment was owed to Cannon. The first and fifth respondents point out that by the time the third payment was made, Cooke Investments had been incorporated and was under the effective control of Cannon and that the third payment may be able to be characterised as either a loan from Cannon or a loan from Cooke Investments.

[25] The result of declaring the deed of settlement dated 24 May 2002 to be void is that the acknowledgement of indebtedness to Cooke Investments by the first and third applicants of $750,000 and the agreement to repay that acknowledged debt has been set aside. The setting aside of each of the securities granted in support of that indebtedness of $750,000 acknowledged by the first applicant to Cooke Investments in the deed of settlement means that those securities have no effect and cannot be enforced. The agreement made on 13 February 2001 between the third applicant and Cooke Investments in relation to the option agreement and the acquisition of shares by Cooke Investments in the first applicant was presumably made to give Cooke Investments which had been incorporated only the previous day the benefit of the funds to the extent of $500,000 previously handed by Cannon to the third applicant. The setting aside of that agreement together with the setting aside of the purported exercise of the share options and the purported share transfers has the effect of reversing the attempt by Cooke Investments to become a shareholder in the first applicant.

[26] Nothing in paragraph 4 of the orders made on 18 February 2003 or any of the other orders made on that date had any effect on or altered in any way the fact that the sum of $624,000 in cash was handed by Cannon to the third applicant in circumstances where it is not suggested that there was an intention to confer a gift in respect of that amount or any part of it. Of that sum of $624,000, only the last amount of $124,000 was handed over by Cannon to the third applicant after Cooke Investments was incorporated.

[27] It is also submitted on behalf of the applicants that the 2 payments each of $250,000 paid by Canon were to acquire equity in the first respondent. It is pointed out on behalf of the first and fifth respondents that the effect of the third applicant's evidence is that each of those payments was a loan with an option to convert the loan into a one-quarter share of the equity in the first applicant. There is no evidence, however, of that option being exercised by Cannon and no evidence of any transfer in favour of Cannon of shares in the first applicant. On the basis of the third applicant's evidence, unless and until the option to convert to equity in the first applicant was exercised, each payment of $250,000 by Cannon was a loan. The submission now made on behalf of the applicants that the intention of Cannon was to acquire in his name equity in the first applicant by each of the payments of $250,000 is not consistent with the third applicant's evidence.

Effect of Cannon's bankruptcy

[28] It was argued by the applicants that if the debt was due to Cannon, he was bankrupt at the time of making the loans and that neither Cannon nor his trustee in bankruptcy has ever called up the loan, so that nothing was due to be paid on account of the debt to Cannon when the sum of $50,000 was paid by the receivers and managers to the solicitors for Cooke Investments.

[29] No doubt Cannon's trustee in bankruptcy would have been interested in being provided with information at the time about the handing over of large amounts of cash by Cannon during the period of his bankruptcy. Upon Cannon's discharge from bankruptcy, his trustee in bankruptcy no longer had any interest or rights in pursuing recovery of any assets which Cannon may have failed to disclose during his bankruptcy, because of the effect of s 153(1) of the *Bankruptcy Act* 1966 (Cth).

Whether the payment of $50,000 was conditional

[30] The first applicant claims that the sum of $50,000 remained the funds of the first applicant as they were paid by the receivers and managers to Gustafson's trust account under cover of the letter dated 7 January 2003 on the basis that it was intended to be paid in reduction of the indebtedness secured by the deed of charge dated 24 May 2002 granted by the first applicant to Cooke Investments. There is no doubt that it was the intention of the receivers and managers to pay that sum of $50,000 in respect of that specified debt. It is also not in issue that the sum of $50,000 was received by Gustafson's into their trust account on account of Cooke Investments. Payment to Gustafson's trust account amounted to receipt of the payment by Cooke Investments, even though it was not passed on by Gustafson's to Cooke Investments. At the time the moneys were paid, there was an existing deed of charge. The moneys were not forwarded, however, by the receivers and managers on condition that they were to be returned, if the deed of charge were declared to be void, as that was not an event in contemplation of the receivers and managers and Cooke Investments at the time the payment was made.

[31] The only condition expressly set out in the letter dated 7 January 2003 was that if the receivers and managers were required to repay moneys to CBD, they would require Cooke Investments to repay the sum of $50,000. There is no suggestion that CBD did require the moneys to be repaid.

Whether the funds in Gustafson's trust account belonged to the first applicant

[32] The applicants sought to rely on the fact that Cooke Investments appointed the receivers and managers who made the payment of $50,000 from the first applicant's funds to reduce the debt of Cooke Investments, so that it meant that the payment was orchestrated by Cooke Investments pursuant to a security that was subsequently declared to be void. There is no suggestion, whatsoever, that the receivers and managers were acting other than in a bona fide manner, believing that they had been validly appointed pursuant to a valid deed of charge. There is no dispute that at all times the receivers and managers were the agents of the first applicant. The fact that Cooke Investments appointed the receivers and managers is irrelevant to the issue of determining the ownership of the funds in Gustafson's trust account.

[33] The applicant's submissions were based on an assumption that the funds in Gustafson's trust account had to belong either to Cooke Investments (as that was the intended payee) or to the first applicant (as the payer) and that if they did not belong to Cooke Investments, then the funds could belong only to the first applicant.

[34] It was therefore submitted by the applicants that as the deed of settlement dated 24 May 2002 and supporting securities were declared to be void, there was no debt owing to Cooke Investments, the payment of $50,000 therefore could not belong to Cooke Investments and the only result was that it must still belong to the first applicant as the payer.

[35] First, although the acknowledgment by the first applicant of the debt of $750,000 was set aside, it is not clear on the existing material as to how the third payment of $124,000 should be characterised. It is equally open to conclude that that payment resulted in a debt owed by the first applicant to Cooke Investments or a debt owed by the first applicant to Cannon.

[36] Second, it does not necessarily follow from a payment by a debtor to a creditor in purported reduction of a secured debt which turns out not to be owing to that particular creditor and not, in fact, secured that the property in the funds comprising the payment does not pass to the creditor who was paid. The payment was intended to be made to a particular creditor and the funds passed to the creditor. In the normal course the property in those funds would pass upon payment. Whether the debtor had a right to claim compensation for a mistaken payment in the light of subsequent events is a completely different matter to asserting that the property in the funds did not pass upon payment: cf *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662, 673; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 379.

[37] The assumption underlying the appellant's submissions that if the funds do not belong to Cooke Investments, they must belong to the first applicant is not sound. It ignores the circumstances in which the payment of the funds was actually made. It seeks to graft the benefit of the first applicant having obtained paragraph 4 of the orders made on 18 February 2003 onto the circumstances of the making of the payment under cover of the letter dated 7 January 2003.

[38] The first respondent relies on the fact that, if there was no debt owed to Cooke Investments, there was a debt owed by the first applicant to Cannon which was reduced by the payment of $50,000 and that those funds are then covered by the restraining orders made on 10 January 2003, whether the debt was owed to Cooke Investments or Cannon.

[39] The issue, however, is whether the first applicant has a proprietary right to the funds of $50,000 that were held in Gustafson's trust account. On the material relied on by the applicants, I am not satisfied that the first applicant has discharged the onus which it bears to show that those funds remained its property in the circumstances when there may have been an existing debt of $124,000 owed to Cooke Investments by the first applicant or, if there were no debt owing to Cooke Investments, at the time the payment was made by the first applicant, it was intended to be paid in reduction of the debt that was believed by the first applicant to be owed to Cooke Investments at that time.

Order

[40] It follows that the order which should be made is:

> That the application for the relief sought in paragraphs 13, 14 and 15 of the amended originating application filed by leave on 1 May 2003 be refused.

[41] I will hear submissions from the parties on the question of costs.