SUPREME COURT OF QUEENSLAND

CITATION:	*State of Queensland v Hirst* [2003] QSC 266
PARTIES:	**STATE OF QUEENSLAND** (applicant) v **CHARLES ANTHONY HIRST** (respondent)
FILE NO/S:	SC No 621 of 2001
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	15 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	13 June 2003
JUDGE:	McMurdo J
ORDER:	**1. Application for a forfeiture order made pursuant to s 146 *Criminal Proceeds Confiscation Act* 2002 (Qld) is dismissed.** **2. Respondent to pay $126,700 to the applicant as a pecuniary penalty pursuant to s 184 *Criminal Proceeds Confiscation Act* 2002 (Qld) .** **3. Respondent's application made pursuant to s 139 *Criminal Proceeds Confiscation Act* 2002 (Qld) is dismissed.** **4. Application by Donna Simpson Filed by leave on 13 June 2003 is dismissed.**
CATCHWORDS:	CRIMINAL LAW – CONFISCATION OF PROPERTY - where respondent convicted of trafficking in dangerous drugs – where trafficking is a 'confiscation offence' under the *Criminal Proceeds Confiscation Act* 2002 (Qld) (the "Act") – where application for forfeiture of cash sum seized during course of investigation of respondent – where respondent gives conflicting evidence as to his ownership of the sum – whether sum subject to automatic forfeiture CRIMINAL LAW – PECUNIARY PENALTY - where application for pecuniary penalty order – where court must assess the benefit derived by the respondent from the commission of the offence – where evidence does not permit precise assessment of benefit obtained CRIMINAL LAW – RESTRAINING ORDER AGAINST

PROPERTY - where application by respondent to exclude certain property restrained – whether in the public interest to exclude property from restraining order

CRIMINAL LAW –RESTRAINING ORDER AGAINST PROPERTY where application by respondent's de facto spouse to exclude certain property from automatic forfeiture – where property not susceptible to automatic forfeiture – where property subject to restraining order – where property may be charged to secure payment of pecuniary penalty order - whether sufficient hardship to warrant exclusion of property from restraining order

Acts Interpretation Act 1954 (Qld), s 36
Crimes (Confiscation) Act 1989 (Qld) (repealed), s 40, s 275
Criminal Proceeds Confiscation Act 2002 (Qld), s 12(2), s 146
Property Law Act 1974 (Qld)

R v Fagher (1989) 16 NSWLR 67

COUNSEL: M Conrick for the applicant
P Nolan for the respondent

SOLICITORS: Director of Public Prosecutions (Qld) for the applicant
Harris Sushames Lawyers for the respondent

[1] **McMURDO J:** There are four applications, each under the *Criminal Proceeds Confiscation Act* 2002. The State of Queensland applies for a pecuniary penalty order and for a forfeiture order. There is an application by Mr Hirst to amend a restraining order to exclude certain property. The fourth application is one made by Mr Hirst's de facto partner, Donna Simpson, to exclude her interest in certain real property from the restraining order.

[2] On 17 January 2001 a restraining order was made pursuant to s 40 of the *Crimes (Confiscation) Act* 1989 (repealed) in relation to property of Mr Hirst, including a house at 33 Gunalda Street, Underwood, and two motor vehicles. Mr Hirst purchased the house in 1987 and he has since been the sole registered owner, residing there with Ms Simpson and their two children, born in January 1988 and October 1989. The restraining order was extended from time to time, and most recently on 6 December 2002, when it was extended until further order. It was varied to specifically cover a third motor vehicle on 30 January 2001.

[3] On 16 September 2002 Mr Hirst pleaded guilty to trafficking in dangerous drugs between 1 January 2000 and 18 January 2001 and to offences involving the supply and possession of a dangerous drug on 7 January 2001. On 1 January 2003, the *Criminal Proceeds Confiscation Act* 2002 commenced. The restraining orders made under the previous Act are taken to be orders under this Act: s 275. By s 12(2) of the present Act, the proper applicant for a restraining order, forfeiture order or pecuniary penalty order is the State of Queensland. By consent, at the

commencement of the hearing of these applications, I substituted the State of Queensland for the Director or Public Prosecutions as the applicant.

Forfeiture Order

[4] The application is made pursuant to s 146, Mr Hirst having been convicted of a confiscation offence.[1] The subject property is a total of $24,500 of cash seized during a search of premises in the course of the investigation of Mr Hirst and others. Those premises belonged to Mr Hirst's father who was unaware that this money was there. Mr Hirst was recorded, in intercepted telephone conversations, discussing the cash as money to be paid by another person to Mr Hirst's amphetamine supplier. Mr Hirst gave evidence in the course of his sentencing hearing last September. The evidence in that hearing has been tendered as evidence in these applications.[2] In relation to the sum of $24,500, his evidence in chief in that hearing included the following:[3]

> "Q. You have heard mention of a figure of $24,500 or you've seen reference to it in the chronology. What can you tell the court about that amount?
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> A. That was – that was the payment from Christensen to Beutel and …
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> Q. What was your involvement with it?
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> A. My part was on the phone I said to the fellow picking it up to wrap it up so pop didn't know what was in it. Like, the money had nothing to do with me, it was just going from – it was from what he bought off him for his payment, you know. Like, the part I played – I know it was probably wrong. You know, I wasn't thinking of that at that time, but I just said, "Wrap it up so pop doesn't know what it is." I never ever had it in my hand because …"

Mr Hirst had been arraigned upon six charges, to each of which he had pleaded not guilty. Later that day, he pleaded guilty in relation to the three offences I have mentioned, and the Crown did not proceed with the other charges, one of which was that he had in his possession the sum of $24,500 for use in connection with drug trafficking. On 22 May this year, Mr Hirst swore an affidavit in support of his application in relation to property the subject of the restraining order, which was certain specific property as well as all other property of Mr Hirst. The specific property did not include this sum of $24,500. In paragraph 20 Mr Hirst said that he was "also seeking to have the sum of $24,500 returned to me as that charge was not proceeded with". Despite that evidence, in this hearing Mr Hirst disclaimed any entitlement to it saying "that has nothing to do with me, that money" and that "I have nothing to do with that money. That wasn't mine …". When this evidence was challenged, Mr Hirst endeavoured to explain its inconsistency with his affidavit by difficulties in giving instructions as a result of his being in custody. I

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1 See s 17, s 99 and s 100

2 As it must be: s 182

3 Transcript p 60

am unable to accept that explanation. The affidavit claims an ownership to the cash in the plainest of terms. There is no circumstance which indicates a potential for confusion on his part when he swore that affidavit. For example, he does not suggest that he confused this cash with some other funds. Upon any of his versions, this cash was used in connection with his trafficking, and he claimed that it was an intended payment (although not by him) to his supplier. At the commencement of this hearing, counsel for Mr Hirst read the affidavit with no indication that Mr Hirst would give evidence to contradict it. Mr Hirst first claimed that there was this error in his affidavit when he was cross examined. There is no indication of a claim by anyone else that he or she is entitled to this money. Upon any view, Mr Hirst's trafficking generated from time to time large amounts of cash. I am, of course, concerned only with whether it is more probable than not that it was his money. I have concluded that when he claimed in his affidavit that this money should be "returned to me" he believed that it belonged to him and not someone else, and I reject his assertion to the contrary when giving his oral evidence.

[5] Having reached that conclusion, it follows that this sum of $24,500 is part of the property restrained. The result is that it would form part of the property forfeited to the State at the end of the forfeiture period pursuant to s 163.

[6] As this sum of $24,500 is automatically forfeited to the State, I dismiss the State's application for a forfeiture order.

Pecuniary Penalty Order

[7] The application is for an order requiring Mr Hirst to pay to the State the amount of the benefits derived from the commission of the offence of trafficking. In deciding such an application, the court must have regard to the evidence given in any proceeding against the person for the relevant offence: s 182. Accordingly, I have had regard to the evidence before the sentencing judge, and in particular the transcript of the oral evidence in that hearing. As the defence constitutes a "serious drug offence",[4] the court must assess the value of the benefits derived under Division 3. The court must have regard to evidence before it about matters of the kind specified in s 187(1). By s 190, there is a rebuttable presumption that all property of the offender when the application of the pecuniary penalty order is made is property that came into the possession or under the control of that person because of the commission of the offence. Expenses or outgoings in, or in connection with, the commission of the offence must be disregarded: s 193.

[8] According to s 187(1)(c), the court must have regard to evidence before it about the market value of the relevant drugs and the amounts ordinarily paid for the doing of a similar act or thing. Mr Hirst's business involved the drugs methylamphetamine and cannabis sativa. There is evidence of the market value of those drugs in certain quantities. However, the evidence does not provide for any reliable assessment of the quantity of drugs involved in Mr Hirst's case. In the sentence hearing, the Crown submitted that by an analysis of the evidence of transcripts of intercepted telephone conversations involving Mr Hirst, his trafficking in methylamphetamines could be seen to have involved something in the vicinity of $111,000. In this hearing Mr Conrick, who appeared for the State but who had not been the

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4 Defined in Schedule 6

prosecutor, told me that he was unable to undertake the same analysis from those transcripts. Mr Conrick identified, in my view correctly, several difficulties in using the evidence of the intercepted conversations in this way. First, it is difficult to assess whether several conversations related to the same transaction, or instead to several distinct transactions. Second, it is uncertain as to whether the conversation did result in a supply, although there was evidence in the sentence hearing to the effect that Mr Hirst had few complaints that he was unable to deliver what was sought. Thirdly, it is unclear in many cases as to which of Mr Hirst's two drugs was the subject of discussion. There is also in some cases an ambiguity as to the quantity being discussed. The transcripts do show that Mr Hirst was a very active trafficker but as the State concedes, they do not provide a reliable basis for the required assessment.

[9] The application is based upon evidence of his other income and the extent of his expenditure over the period of approximately twelve months in which the trafficking occurred. The excess of this expenditure over his other income is then attributed to his trafficking. The income is not controversial. In the relevant period, 1 January 2000 to 17 January 2001, social security payments of $8,563.31 were paid to Mr Hirst, and Ms Simpson received social security of $14,610.61. As a household, they borrowed $3,500 as cash advances upon a credit card. The only bank account had a balance of $23.13 at the commencement of this period. Neither Mr Hirst nor Ms Simpson was in any employment or had any other income. So apart from Mr Hirst's trafficking, their household, which included two children, had funds of $26,697 available during a period of just over twelve months. Mr Hirst owned a number of motor vehicles although none was very expensive. The controversy concerns Mr Hirst's expenditure at the Brisbane Casino. In the way Mr Hirst's case was conducted, it seems to be accepted that the relevant benefits from his drug trafficking could be reliably assessed by the extent to which the proven expenditure of Mr Hirst and his household exceeded the amount of funds otherwise available, that is $26,697. Upon any view of the evidence, Mr Hirst was a regular and heavy gambler at the Casino. The substantial contest is as to the extent of his losses at the Casino during this period.

[10] The Casino has records apparently showing the extent of his losses on gaming machines over the relevant period. These are prepared from records of the use of cards issued to gamblers, by which they can earn rewards according to their gambling turnover. The rewards are in the form of accommodation and meals at the Casino, but also in what are described as bonus dollars, which can be used for further gambling. It is possible for one person to have several of these cards at the same time. The card is placed in a gaming machine and thereby enables the Casino to record the extent of that person's turnover, as well as the details of each gambling transaction. An analysis of the Casino's records in relation to the use of cards issued to Mr Hirst demonstrates gambling resulting in a net loss for the period in question of $254,104.57. This was partly funded by bonus dollars of $42,295. Accordingly, amounts totalling $211,809.57 were paid to the Casino for losses incurred by gambling with the use of Mr Hirst's cards.

[11] There was no challenge to the accuracy of the Casino's records or to this analysis of them. Mr Hirst accepted that he was a regular gambler at the Casino. His case is that this was not all his gambling, but that some of it represents gambling by others with his cards. He says that friends used his cards, because although they were themselves frequent patrons of the Casino, they were happy to let Mr Hirst have the

benefit of these rewards, including the bonus dollars. There is also evidence to the effect that Mr Hirst would sometimes place one of his cards in a machine played by a stranger unaware that he or she was earning reward points for Mr Hirst. Evidence of these uses of his cards was given by Mr Hirst and three of his gambling friends or associates in the sentence hearing. Mr Hirst gave oral evidence before me, but not as to this matter. The other witnesses at the sentence hearing did not give evidence before me. I must regard to the evidence at the sentence hearing, although I have not had the advantage of seeing the witnesses give the evidence. Not surprisingly, Mr Hirst has not volunteered any estimate of the extent to which the recorded gambling with his cards is due to his own gambling. Similarly, he has not volunteered any assessment of the benefits he received from his admitted trafficking. Indeed, in his May 2003 affidavit he asserted that "out of the transactions to which I pleaded guilty I got no money". That was disavowed through his counsel in this hearing, who conceded that there should be some pecuniary penalty order.

[12] The questions then arising are whether there was use by other persons of Mr Hirst's cards and if so, what was the extent of Mr Hirst's losses? There is nothing to suggest that there was any technical obstacle to the use by another person of these cards. Nor is there anything unlikely in there being *some* use during this period of a Hirst card by one or more of his friends, with his encouragement. But it is relatively unlikely that a regular gambler at the Casino would routinely use Mr Hirst's card rather than his own. The evidence shows that these cards can be immediately obtained at the Casino at least if the customer is a frequent gambler as these persons were said to have been. Mr Hirst's friends may have been happy to leave the accommodation and meals awards for him, but it is difficult to see why they would not want the benefit of the bonus dollars for their own gambling. There is no suggestion that any of these other persons would have had some difficulty in obtaining or using his own card. I can accept that there was some use of his card by others during this period. However, I am not persuaded that this occurred on a regular or routine basis.

[13] The evidence of his gambling colleagues shows that whatever was the extent of their gambling, Mr Hirst was a very frequent gambler at the Casino because he is said to have been there when they were. The intercepted telephone conversations show him to have been a busy trafficker. Quite apart from the $24,500 mentioned earlier, he was found to be in possession of substantial sums of cash. He claims that they were the result of winnings at the Casino, but that is not supported by the Casino's records. His assertion that he made nothing from trafficking in drugs over this twelve month period is unbelievable. He had good reason to lie or exaggerate in his evidence as to the use by others of his Casino cards, both in the context of his being sentenced and in the present context. There are very many betting transactions recorded against his name which were in amounts of more than $10,000. He did not deny that he gambled in such sums. Had it been the case that his gambling was in much lower sums, he would have been expected to say so. Further, there is nothing inherently unlikely in the losses for this period, totalling in excess of $200,000, being entirely or almost entirely due to his own gambling, and funded by his drug trafficking business.

[14] Allowing for some likelihood that his card was used by others on some small number of occasions, some allowance should be made for this in assessing the extent to which the Casino's records record his own gambling. The present

uncertainty, of course, is caused by Mr Hirst. It is Mr Hirst who ought to be able to estimate how much, if any, of this gambling is not his own. Yet his evidence is in my view deliberately vague and, in its assertion that there was no benefit from a year's trafficking, unbelievable. As Allen J said of the operation of similar legislation in *R v Fagher* (1989) 16 NSWLR 67 at p 80:

> "… the court should not lose sight of reality that the court, to fulfil its statutory obligation, often will have to assess the value of the benefits derived by the defendant on material which is far less satisfactory than what it normally would expect to have in litigation. It is not in the nature of criminals to keep records of such a kind as to assist the court; nor is it in the nature of criminals to tell the truth when telling a lie would seem more advantageous."

I cannot assess with any precision the extent of these gambling losses attributable to others. What I can conclude is that it is probably a proportion comfortably below 50 per cent, because Hirst was a frequent and heavy gambler and it is improbable that his cards were lent on a routine basis. The true extent of the contribution by others is likely to be very much less than 50 per cent but I find that more probably than not, Mr Hirst's gambling losses were at least half of those recorded against his name. It is of some significance that Mr Hirst did not assert that most of the losses were those of others.

[15] Upon the premise that half of the recorded losses were his, but allowing for all of the "bonus dollars", it follows that his nett losses for the period were at least of the order of $85,000.

[16] There is no evidence from Mr Hirst or Ms Simpson to the effect that the expenses of their household was significantly less than the legally derived income of about $26,000 mentioned earlier. In consequence, I find that the benefits derived by Mr Hirst from the trafficking offence comprised at least the nett amount paid to the Casino, being not less than $85,000, together with certain cash sums, one of which is the amount of $24,500 discussed earlier. Consistently with my finding that this was his property, it should be brought into account in this assessment. There are further sums of $4,200 and $3,000 which are the subject of evidence from Paula Sharp, whose evidence was unchallenged. In his evidence in the sentence hearing, Mr Hirst acknowledged his payment of this $4,200. There is also an amount of $10,000 in cash seized from Mr Hirst on 17 January 2001. When these various amounts of cash are added to the (minimum) Casino losses of $85,000, it appears that there are outgoings of the order of $126,700 over the period of this offence for which there is no apparent source of funds other than the offence itself.

[17] I find that the value of benefits derived by Mr Hirst from the commission of his offence of trafficking is $126,700. He will be ordered to pay that sum to the State of Queensland as a pecuniary penalty.

Mr Hirst's Application

[18] Pursuant to s 139, Mr Hirst has applied to amend the restraining order to exclude the real property at Underwood and three motor vehicles. There is a power to exclude property from a restraining order if the court is satisfied as to each of the matters set out in s 139(2), or if it is satisfied it is in the public interest to amend the order

having regard to all the circumstances, including those described in s 139(3). Mr Hirst cannot discharge the onus in relation to the matters in at least paragraphs (b) and (c) of s 139(2). Accordingly, he must establish that it is in the public interest to amend the order in these respects.

[19] The Underwood house was not susceptible to automatic forfeiture, because although it was restrained, it was acquired long before six years before the commission of the offence. According to a letter from his solicitors to the Director of Public Prosecutions dated 23 May 2001, the Ford Falcon utility (PXY 351) had been owned by Mr Hirst "for the last 5-6 years". It therefore appears that this vehicle was acquired within the six year period, and so was susceptible to automatic forfeiture. The Ford Falcon GT bearing registration plates PRO 351 was purchased in 2000.[5] The third vehicle is the 1999 Ford Falcon registered No OXR 99, obviously purchased within the six year period. Each of the vehicles was susceptible to forfeiture to the State at the end of the "forfeiture period" as defined in s 161 as meaning the later of:

> "(a) a period of 6 months starting on the day of the prescribed respondent's conviction of a serious criminal offence; or
> (b) the 6 months mentioned in paragraph (a) as extended under s 163; or
> (c) if the prescribed respondent appeals against the conviction and the appeal is not decided within the 6 months after conviction, the period ending when the appeal is finally decided."

Section 163 provides for the extension of that period of six months as follows:

> "(4) However, before the end of the first 6 months of the forfeiture period, the prescribed respondent may apply to the Supreme Court for an extension of the forfeiture period for up to 3 months.
>
> (5) The Supreme Court may extend the forfeiture period by not more than 3 months if it is satisfied it is in the interests of the administration of justice to extend the period in the special circumstances of the case."

[20] The forfeiture period in the present case started on 16 September 2002, so that the period of six months ended on 16 March 2003. Within that period, Mr Hirst successfully applied for an extension. On 11 March 2003 it was ordered that the forfeiture period "be extended for three months from today". The period was thereby extended until 11 June. These applications came before me on 13 June. However, a consent order was issued by the Registry on 6 June 2003, by which the forfeiture period was purportedly extended for a period of three months from that date. As the court had previously extended the forfeiture period, I doubt that it had power to order, even by consent, that the forfeiture period be extended by a further three months. It may be then that the motor vehicles were automatically forfeited on 12 June. It is unnecessary, however, to decide that question, because in my view there is no case for excluding the vehicles from the restraining order, assuming that the forfeiture period has been extended. It does not at all appear to be in the public

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5 Mr Hirst's affidavit filed 23 May 2003, para 8(e)

interest to amend the order to exclude these vehicles, and no hardship is demonstrated.

[21] The house property will be required to satisfy the pecuniary penalty order, because after allowances made for the cash sums which have been seized, there is no basis for believing that the motor vehicles, or any other property, could satisfy that order. The effect of the restraining order in relation to the house property is that it would be charged to secure the payment to the State of the amount of the order: s 196. There is an obvious public interest in ensuring that an offender satisfies a pecuniary penalty order, regardless of whether he does so from property itself derived from the offence or from other property. The case for excluding the house comes from the circumstance that it is the family house of Ms Simpson and her children. For reasons set out below, I am of the view that this consideration is not sufficient to require the house to be excluded. The result is that Mr Hirst's application made pursuant to s 139 is dismissed.

Ms Simpson's Application

[22] By her application filed by leave during the hearing, she sought an order to exclude the house property from automatic forfeiture. However, the house is not susceptible to automatic forfeiture and the State makes no application for an order for its forfeiture.

[23] Her application is made under s 140, under which the property to be excluded must be "the applicant's property". The first question is whether Ms Simpson does have any property in the house. The term "property" is defined in s 19 in terms which appear not to exclude the operation of s 36 of the *Acts Interpretation Act* 1954 which defines property in these terms:

> ""property" means any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes things in action."

[24] Mr Hirst is the sole registered owner of the house. Ms Simpson claims an equitable interest under a constructive trust arising from circumstances of her relationship with Mr Hirst.[6] They have lived as a family in this property for more than 15 years. Ms Simpson makes no claim to have made any financial contribution to the acquisition, maintenance or improvement of the house. She has "been purely a homemaker" having "helped improve and maintain the house and garden". Her brief affidavit does not establish a clear case that Mr Hirst holds the property to any extent upon trust for her, or that she has some interest in the property through the potential operation of part 19 of the *Property Law Act* 1974 (Qld).[7]

[25] Assuming, however, that Ms Simpson has rights in relation to this house, either in equity or under the *Property Law Act*, I am not persuaded that the house should be excluded from the restraining order. Because the house is not susceptible to automatic forfeiture, the purpose of excluding it would be to prevent it from being charged to secure payment of the pecuniary penalty order. Her application is in

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6 *Muschinski v Dodds* (1986) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137

7 No application under that Act has been filed nor is it said that the de facto relationship has ended: see s 283

apparent reliance upon s 140(5). As to s 140(4), I am satisfied that she was not in any way involved in the commission of the offence: her evidence to that effect is not challenged. There is an apparent power then under s 140(4) to exclude the property, as well as under s 140(5). However, in a case such as this it is relevant to consider the impact of the orders sought upon a pecuniary penalty order notwithstanding the absence of a reference to that consideration in s 140(4). The competing considerations are the impact upon Ms Simpson and her children of the likely sale of the family home and, on the other hand, the likely irrecoverability of the pecuniary penalty order if that property is excluded. Unfortunately, there is no evidence as to the value of the house. It was purchased in 1987 for $50,000. According to Mr Hirst's affidavit filed 23 May 2003, he was able to purchase the property with his own funds, although an earlier affidavit[8] was to the effect that some monies came from a loan from his father. There is no evidence to the effect that it is encumbered. Assuming that the three motor vehicles have a combined worth of (say) $15,000, then together with the amounts of cash seized ($34,500), there would be approximately $50,000 available to satisfy the pecuniary penalty order before enforcement of the charge over the house. Therefore it seems likely that there would be some surplus remaining after payment of the balance from the proceeds of a sale of the house. Ms Simpson is unlikely to be left with no funds if the house remains subject to the restraining order. On the evidence, it is quite likely that the house is worth at least $150,000, in which case the application of $75,000 of the proceeds of sale would leave the current value of her interest still available to her. The court should not be too demanding of an applicant in Ms Simpson's position as to proof of hardship, but there does have to be some evidence as to her likely financial position in the event that she does not obtain the order which she seeks. I am not satisfied that there is sufficient hardship to warrant a result which would leave the pecuniary penalty order unsatisfied to a substantial extent. The application by Ms Simpson should be dismissed.

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[8] Filed 7 March 2003