

ASSET CONFISCATION UPDATE – 23 November 2009

by Christian Juebner
Barrister, Victorian Bar
Clerk: Barristers Logistics

24th Trengganu Pty Ltd and Rizzo v DPP

A further word on effective control

On 18 November 2009, the Supreme Court (Kaye J) delivered an important decision concerning effective control.

The House

The decision concerns two applications for exclusion. The first application was brought by Vitina Rizzo, the grandmother of the offender, Bartholomew Rizzo.

In 1966, Vitina Rizzo and her husband were the registered proprietors of a property in Box Hill North. After the husband died, Vitina Rizzo remained as sole surviving proprietor of the property. In 2006, Vitina Rizzo agreed to sell the Box Hill North property to Bartholomew Rizzo. Although the property was worth approximately \$430,000, it was sold to Bartholomew Rizzo for \$250,000. The whole of that purchase price was loaned by Vitina Rizzo to her grandson but the transfer of land recorded a consideration of \$430,000. The loan was documented by a solicitor and, clause 4 of the loan agreement, recorded that “*the borrower acknowledges that the lender shall have the right to lodge at the expense of the borrower a caveat over the title to the property*”.

On 25 October 2006, Bartholomew Rizzo became registered as proprietor of the Box Hill North property. Subsequently, a caveat was lodged on behalf of Vitina Rizzo which claimed “an equitable interest as chargee” in the property. Bartholomew Rizzo made a number of partial repayments of the loan but, at the time of hearing of the application for exclusion, \$185,144 remained outstanding.

Bartholomew Rizzo was convicted of Schedule 2 (automatic forfeiture) offences under the *Confiscation Act* and the Box Hill North property was restrained. It was common ground that the property was tainted property.

The DPP opposed the application for exclusion by Vitina Rizzo on two grounds; firstly it was argued that Vitina Rizzo did not have a relevant interest in the property and, secondly, it was argued that if she did have such an interest, it was subject to the effective control of Bartholomew Rizzo.

Kaye J found that clause 4 of the loan agreement was effective to constitute an equitable charge, in favour of Vitina Rizzo, over the Box Hill North property as security for the outstanding debt owed to her by Bartholomew Rizzo.

As for effective control, Kaye J found that although Bartholomew Rizzo was for all intents and purposes in sole and

exclusive control of the property (as one would expect in respect of the registered proprietor), that did not mean that he had effective control over Vitina Rizzo's interest in that property (being her equitable interest arising under the loan agreement).

In other words, a distinction is to be drawn between being in effective control of property (being the relevant test for a pecuniary penalty order) and being in effective control of an interest in property (being the relevant test in respect of an exclusion application).

His Honour noted that the construction for which the DPP contended "*would give rise to harsh consequences, which would be unlikely to have been intended by Parliament*". Consequently, his Honour made an order excluding Vitina Rizzo's interest in the Box Hill North property.

The Vehicle

The second application for exclusion concerned a motor vehicle registered to a company called 24th Trengganu Pty Ltd. The company conducted the family business trading under the name "Rizzo's House of Linen". Bartholomew Rizzo had been an employee of the company for some time. However, he was not a director or officer of the company at the time of his arrest.

The vehicle had been purchased with money which had been provided by Bartholomew Rizzo to the company. Bartholomew Rizzo kept the vehicle at his address and, for all intents and purposes, exercised substantial control over the vehicle. However, the vehicle was registered to the company and was

used, from time to time, in the transport of products for the company.

The DPP opposed the application for the vehicle exclusion on two grounds; firstly, on the basis that the company was not the true owner of the vehicle and therefore had no interest able to be excluded and, secondly, on the basis that Bartholomew Rizzo was in effective control of the vehicle.

Kaye J held that the company was the true owner of the vehicle and, therefore, had an excludable interest.

In respect of effective control, Kaye J found that although Bartholomew Rizzo had the primary use of the vehicle and had a substantial amount of control over such primary use, he did not have the right to use the vehicle solely for his own personal purpose, nor the right to dispose of the vehicle. On that basis, Kaye J found that the company's interests in the vehicle was not under the effective control of Rizzo at the relevant time and, it followed, that the company's application for exclusion succeeded.

About the author

Christian Juebner is a barrister at the Victorian Bar. Christian practices predominantly in confiscations and proceeds of crime.

Before coming to the Bar, Christian was a partner with Deacons. Through his commercial experience, he has a detailed knowledge of property, equity and trust issues, all of which are relevant to and impact on proceedings under the Confiscation Act.

Christian can be contacted on:
T (03) 9640 3216
M 0410 657 177
cjuebner@melbchambers.com.au

Clerk: Barristers Logistics

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