

12/12/2005



IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 1 of 1999

IN THE MATTER OF AN APPLICATION BY THE ATTORNEY GENERAL  
PURSUANT TO THE PROCEEDS OF CRIMINAL CONDUCT LAW (2001  
REVISION ("the PCCL") - Civil

AND

IN THE MATTER OF DONALD FRASER

IN CHAMBERS

THE 16<sup>TH</sup> and 17<sup>TH</sup> NOVEMBER, 2005  
BEFORE THE HON. CHIEF JUSTICE

**Appearance:** Mr. Nigel Sanders of Walkers for the Receivers, Mr. Richard Forgary and Mr. Jim Cleaver  
Mr. Stephen Hall Jones for the Attorney General  
Mr. James Leabeatar of Campbells for the Cassarina Trust  
Mr. Ramon Alberga QC and Mr. Brian Ashenheim for Mrs. Gillian Fraser (observing)

### RULING

1. Donald Fraser was the subject of charges under the PCCL in respect of money laundering offences. On the basis of those charges a restraint Order was made on 25<sup>th</sup> October 2000 restraining all his then known assets.
2. The Order was subsequently amended to include the assets of various trusts and trust companies in respect of which he was said to be the owner, beneficiary or in any other way interested. The Order of 25<sup>th</sup> October 2000 as amended will hereinafter be referred to as "the Order".
3. Included among the assets which it restrained were the assets of the Cassarina Trust, a trust in respect of which, on the evidence then considered by the Court, it had been prima facie accepted that Mr. Fraser was the settlor.

4. That evidence, in the form of the investigating officer's affidavit, also alleged that the various trusts and companies were merely shams behind which Mr. Fraser sought to hide his true beneficial ownership and by which he was able to control and use the assets while appearing not to have legal ownership of them.
5. In addition to restraining all the assets, the Court then appointed Mr. Michael Wright as Receiver (later succeeded by the present Receivers) over them. In that respect the Order provided in paragraphs 3, 4 and 6:

“And the Court appoints –

3. Michael Wright of Arthur Anderson as receiver and manager (the Receiver) of the realisable assets of the defendant...and in particular but without affecting the general nature of the appointment by reference to the realisable property of the defendant (more fully described elsewhere in the Order).
4. The Receiver shall have the following powers from the date the Order is made without prejudice to any existing powers vested in him whether by statute or otherwise:-
  - a. power to take possession of, manage, realise and sell the assets of the defendant;
  - b. power to draw every month from the assets under his management such sums as are required by him to pay the costs of the Receivership provided that the Receiver gives 14 days notice to the Attorney General and to the defendant of the period to which the costs relate, the amount of the costs and the source from which the costs will be drawn.

....

- e. power in addition to any other power herein to sell any asset deemed by the Receiver to be appropriate to so sell for the purpose of application of the proceeds of sale in satisfaction of his costs provided for by paragraph 6 The Order.
- f. power to discharge from the proceeds of the realisation of the assets of the defendant the costs of and incidental to such realisation....”

6. The costs of the Receivership shall be paid out of the assets received, managed, realised or sold by the Receiver and in priority to any other payment required or provided for by this Order (other than the costs of realisation provided by paragraph 4.f. above) but if no assets or insufficient assets are so received, managed, realised or sold, the costs of the Receivership, to the extent of the deficiency shall be paid by the Attorney General.”

- 6. The Order was made in exercise of powers vested in the Court by Section 11 of the PCCL which provides that the Court may, by order, prohibit any person from dealing with any realisable property; that is: property held by the defendant or of which the defendant had made a gift to any other person. Subsection 11(8) further specifically provides that where the Court has made a restraint order, it may, at any time appoint a receiver to take possession of realisable property and, with the Court’s directions, manage or otherwise deal with any property in respect of which he is appointed.
- 7. The powers in paragraphs 4 and 6 of the Order as extracted above, were given to the Receivers in reliance upon that subsection (8).

8. These are provisions which were never sought to be set aside by way of appeal or by way of an application for their variation or discharge. They must now, for all present purposes therefore, be regarded as valid and binding. Having regard also to similar provisions seen in at least one other recent case, I think it is appropriate to consider their general implications.
9. That said, the anticipatory nature of those provisions of the Order may not be overlooked now that there is the benefit of hindsight and what follows is proffered for practical guidance in future cases.
10. Those early anticipatory provisions of the Order are now in question as having been too far-reaching in the absence of the clear need to have allowed the Receivers to “sell assets” and to “draw every month from the assets such sums as may be required by them to pay their costs”.
11. At the restraint stages of the proceedings, the powers should be framed, in order to meet other statutory requirements to be considered below; to preserve assets which would still, at that early stage, be regarded as the putative realisable assets of a defendant. Only where it is necessary for the management of assets that costs and fees be incurred, would it be appropriate for a Receiver to “realise” or sell assets during the restraint stages of the proceedings. Appointments can often be made with a view simply to preserve assets. Careful consideration should therefore be given to the powers necessarily to be vested in a receiver. If necessary, they may, as the need arises, be expanded upon by the Court. Equally, the need to liquidate assets to meet such costs or fees as may be necessarily incurred can be accommodated by the Court as the need arises. Restraint orders should be worded accordingly.

12. The need to sell or “realise” appears not to have arisen in respect of the assets which are in dispute here. And while section 11 subsection (8) as shown above, does allow the Court, even at the early restraint stages, to direct a receiver to “manage or otherwise deal with any property in respect of which he is appointed, thereby connoting very wide powers; I consider that I am reinforced in the foregoing view of the legislative intent of the PCCL, by sections 13 and 15 in particular.
13. Section 13 provides that where a confiscation order is made - that is: after a defendant is convicted - that order is not subject to appeal and the proceedings in which it was made have not been concluded; the Court may appoint a receiver in respect of realisable property. Subsection (3) goes on to provide that the Court may then empower a receiver, whether appointed under section 13 itself, under section 11 or pursuant to a charging order (section 12) to realise any realisable property in such manner as the Court may direct. Note the sequence of events contemplated.
14. Then, of importance to all matters such as these, section 13(8) goes on to provide that the Court shall not, in respect of any property; exercise any of those powers unless a reasonable opportunity has been given for persons holding an interest in property to make representations to the Court. This opportunity must be afforded notwithstanding the right such persons may have had to challenge a restraint order at the earlier stages. See *In Re Fraser* and *In Re Norris* (both fully cited below).
15. Finally, in this context and of pivotal importance in my view to the answer to the question posed here; section 15 provides that the powers conferred upon the Court or on a receiver appointed under the PCCL shall be exercised with two different and competing objectives in mind.

16. The first, according to subsection 15(2) - with a view to making available for satisfying the confiscation order, or as the case may be, any confiscation order that may be made in the defendant's case, the value for the time being, of realisable property held by any person by the realisation of that property.
17. The second, according to subsection 15 (4) - with a view to allowing any person other than the defendant or the recipient of a gift caught by the Law, to retain or recover the value of any property held by that person.
18. The importance of this second objective is reinforced by subsection 12(4) where, in respect of charging orders, it is provided that they may be imposed only on any interest in realisable property, being an interest held beneficially by the defendant or by a person to whom the defendant has made a gift caught by the Law; or where the interest in realisable property is held upon trust. In other words, there is no power to make a charging order over the assets of a trust, which do not include assets which may be regarded as the realisable property of a defendant.
19. From all the foregoing, it is manifest that the scheme of the restraint, charging and confiscatory provisions of the PCCL is designed to preserve the realisable assets of a defendant to ensure that, upon his conviction, the assets are available to be realised and confiscated. This is so even while seeking to ensure that the proprietary rights of other persons are not diminished.
20. The rights of persons who may be affected – including even a convicted defendant – to be heard before property is finally confiscated, clearly must include the right to the preservation of as much as possible of that property until the final determination is made.
21. In an earlier context, in *In Re Fraser [2003] CILR 227, 230*, this Court was informed that Mr. Fraser was regarded here as a fugitive from justice and that he

had been convicted and awaited sentencing on certain fraud offences in the United States. Nonetheless, the charges here against him were never prosecuted or proved; instead they were discontinued by the entry of a *nolle prosequi* by the Attorney General. Consequently, the restraint and receivership provisions of the Order were discharged by further Order of the Court on 20<sup>th</sup> April 2004; save that the Order of 20<sup>th</sup> April 2004 provided for the retention by the Receivers of certain assets. Those assets are corporate share certificates and are the subject of the present application and dispute. They represent valuable shares in a water producing company identified as having been amongst the assets of the Cassarina Trust and held through another company – Boulder Corporation – also earlier listed in the restraint Order as an asset of Mr. Fraser (hereinafter called “the water shares”). There are 13,400 water shares and the certificate for the shares is still held by the Receivers. It represents what the Receivers describe as the only asset of significant value of which they remain seized since the time of the discharge of the Order. Significant other assets had been earlier released in satisfaction of a claim brought by Mrs. Gillian Fraser, Mr. Fraser’s wife. As to the true beneficial ownership of the water shares, there was a letter written by Mr. Fraser on 18<sup>th</sup> June 2004 in which he asserted that the assets of the Cassarina Trust belong to a Mr. Philp, a personal friend of his; on whose behalf he stated that he had set up and settled the assets upon the trust. The Receivers nonetheless assert a lien over the water shares, by which they say they are entitled to realise the value of the shares and apply that towards meeting their own fees and other costs of the Receivership. In this they are supported by the Attorney General.

22. For their arguments, reliance is placed upon the terms of the Order as originally framed set out above; the relevant provisions of the PCCL and the applicable

principles of common law governing the rights of a receiver to look to the assets of his estate under receivership, for the satisfaction of his fees and other costs of his receivership. The Receivers also note as being important - given the statutory scheme to be further examined below - the fact that no application was made to the Court, prior to the discharge order of 20<sup>th</sup> April 2004, for the release of the water shares from restraint. And this is notwithstanding that that was expressly allowed by the terms of the Order and by section 11(7) of the PCCL. In this respect paragraph 25 of the Order, in keeping with that subsection of the PCCL, provided:

“The defendant (or anyone notified and affected by the terms of this Order) may apply to the Court at any time on giving two clear days notice to the Attorney General to vary or discharge this Order (or so much of it as affects that person).”

23. It is part of the arguments now on behalf of the Attorney General and the Receivers, that in failing to make any such application for the release of the water shares, the Cassarina Trust acquiesced in the continued treatment of them by the Receivers as assets forming part of the Receivership estate. It is said that the Receivers continued, therefore, to deal with them as being under their control and management in keeping with the Order of the Court and so they must be able now to look to those shares, as they would have to any other assets which were under their control or management, for recovering of their fees and expenses.
24. The trustees of the Cassarina Trust object on the basis that the water shares are held for the benefit of their beneficiaries (putatively Mr. Philp and those to take under him) who, they assert, are entirely innocent third parties and entitled to have the assets of their trust restored intact.

25. Against that background, the following question of law has been raised by summons brought by the Receivers and agreed by the trustees of the Cassarina Trust and the Attorney General for resolution by the Court:

“whether a Receiver appointed by the Court pursuant to the Proceeds of Criminal Conduct Law over assets of an accused, is entitled to such reimbursement of receivership fees and expenses incurred in the exercise of the Receiver’s powers and duties under the Restraint Order from all assets listed in the relevant Restraint Order and, accordingly, exercise a lien over those assets upon discharge of the Restraint Order, regardless of whether those assets constitute the realisable property of the defendants named in the restraint Order [or regardless of whether they constitute the property of innocent third parties].

26. The words in parenthesis at the end were not included in the question as originally framed between the parties. They were added by the Court during the arguments for the reasons which will be apparent from the background circumstances described above; that the incidents of the costs of the receivership would have to be separately considered from the point of view of third party interests. In this regard the trustees acknowledge, however, that there will need to be an enquiry, if the point of construction is resolved in their favour, into whether the assets belonged beneficially to Mr. Fraser or, as he asserted, beneficially to others.
27. Given the recent developments in the case Law, this will be the pivotal issue. Were the assets to be regarded as having been throughout and now still the assets of the defendant Fraser, even though because of his discharge, no longer to be

realisable as property to meet a confiscation order; there would be little difficulty in providing the answer to the question.

28. There is highly persuasive authority in judgments of the English Court of Appeal, construing the equivalent legislation there very much on point and which I am prepared to adopt and apply. HUGHES AND OTHERS v CUSTOM AND EXCHANGE COMMISSIONER [2002] 4 A.L.J.R. 633 is the most recent and definitively on point. The facts and the decision may be taken as presented in the head note of this reported judgment. In conjoined appeals by the prosecuting authorities, the Court of Appeal was required to determine whether receivers appointed by the Court pursuant to the restraint and receivership provisions in the Criminal Justice Act 1988 and the Drug Trafficking Act 1994, were entitled to use the assets under their control, which were assets of unconvicted or acquitted defendants, to meet the costs of the receiverships. In contending that the receivers were not so entitled, the respondents submitted that the legislative scheme provided for the prosecution to pay the receivers' remuneration unless and until a confiscation order was made and that, accordingly, the position of such a receiver was not to be equated with that of a common law receiver. They also relied on the right to property under Article 1 of the First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Schedule 1 to the Human Rights Act 1998 U.K.). In particular, they contended, in this regard, that it would be disproportionate and arbitrary to deprive an unconvicted or acquitted defendant of his assets in the absence of compensation.

29. Sections 80 and 81 of the UK Criminal Justice Act (the equivalent of sections 13 and 14 of the PCCL) as well as the other provisions equivalent to our Misuse of Drugs Law, fell to be construed by the Court. It was held:

*“A receiver appointed by the court pursuant to the restraint and receivership provisions in the 1988 Criminal Justice Act of the 1994 Drug Trafficking Act was permitted to use the defendant’s assets under his control to meet the costs of the receivership whether or not the defendant had been convicted and a confiscation order made against him. Such receivers were to be treated precisely as their common law counterparts save to the extent that the legislation expressly provided otherwise. The legislation was not to be regarded as an entirely self-contained code incorporating nothing from the common law. Although unusually, the prosecutor could not be required to give a cross-undertaking in damages, that did not constitute so fundamental a difference between statutory and common law receivers so as to give rise to wholly discrete schemes for their remuneration. Such a conclusion did not infringe an acquitted or unconvicted defendant’s rights under Article 1 of the First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.*

*Save in the most exceptional circumstances, acquitted defendants were not entitled to compensation for being deprived of their liberty whilst on remand or for any other heads of loss suffered through being prosecuted. It was no more unfair,*

*disproportionate or arbitrary that they should also be uncompensated for any adverse effects that restraint and receivership orders might have had upon their assets. The proportionality of the restriction on compensation for unconvicted defendants had to be viewed in the light of Parliament's view that restraint and receivership orders, properly made, were in the public interest. So viewed, the restriction was proportionate."*

30. The stated over-riding public interest that drives the confiscatory provisions of the legislative scheme in the United Kingdom must be recognised to be the same in the Cayman Islands. Stated briefly, and I hope without over-simplification, it is that persons who commit serious crimes shall not be permitted to benefit from the proceeds of their crimes. It is therefore paramount in the public interest that where there is credible evidence that such persons, or those who assist them, are in possession of assets illicitly obtained, proceedings under the Law be instituted to confiscate them. A requirement that the costs of such proceedings, including those associated with receiverships appointed over the assets, should be met from the public purse whenever a defendant is acquitted; would place an undue fetter upon the prosecutorial decision-making process as to whether appropriate proceedings should be instituted. Such a requirement, save in exceptional circumstances, would therefore not be in the public interest.
31. Moreover, reflecting upon and adopting the common law principles which govern receiverships, it is important to have regard to the fact that receivers are appointed as officers of the Court and the estates over which they are appointed thus fall under the control of the Court. The seminal pronouncements at common law to

this effect are to be found in GARDNER v LONDON CHATHAM AND DOVER RAILWAY CO. NO. 1 [1867] L.R. 2. CH. App. 201 per Cairns L.J. at 211-212.

32. And, in BOEHM v GOODALL [1911] 1 Ch. 155, at 161-162, per Warrington J. the following pronouncement laid the foundation for the later development of the principles in the case Law:

*“Such a receiver and manger [(appointed by the Court)] is not the agent of the parties, he is not a trustee for them, and they cannot control him. He may, as far as they are concerned, incur expenses or liabilities without their having a say in the matter. I think it is of utmost importance that receivers and managers in this position should know that they must look for their indemnity to the assets which are under the control of the court.*

*The Court itself cannot indemnify receivers, but it can, and will, do so out of the assets, so far as they extend, for expenses properly incurred; but it cannot go further.*

*It would be an extreme hardship in most cases to parties to an action if they were to be held personally liable for expenses incurred by receivers and managers over which they have no control”.*

33. In Evans v Clayhope Properties [1998] 1 WLR 358, the English Court of Appeal in holding that a receiver and manager was entitled to recover his remuneration and expenses only from such funds as were under the control of the court pursuant to the receivership stated (at page 363 per Norris LJ):

*“Boehm v Goodall (above) was a decision based on statements of principle of high authority. In my judgment it was correctly decided and it applies to this case.*

*Moreover, the decision is one of jurisdiction and, unless any part of the receiver and manager’s remuneration and expenditure can be treated as costs [(and so liable to be paid by the unsuccessful party)] no question of discretion arises.”*

34. Receivers’ fees and costs incurred in managing their estates are, therefore, applying these principles in the statutory context, in no wise to be regarded as costs incurred at the behest of the party - here the prosecution - seeking their appointment. They are an incident of that management assumed by appointment by the Court (here in the public interest) and so they are to be properly recoverable from the assets under management. Where, however, there is no sum available to meet those fees and costs from the receivership estate, pursuant to a confiscation order, the common law position is augmented by the statute in that provision is made for payment from public revenues or by a prosecutor who obtained the appointment but failed to institute proceedings – see section 19(2) of the PCCL.
35. As the primary legislative objective of the PCCL is to preserve the assets so that they are available to meet eventual confiscation orders, a receiver’s stewardship of the assets should be intended to be such as to maximise their ultimate value. In that way also, the interests of an innocent defendant in the assets would be protected and so, in a proper case, the appointment of a receiver could also enure, at least in theory, to the benefit of an innocent defendant. Therefore, to be

reinforced here again, the importance of a conservative attitude being adopted by the Court and by a receiver at the earlier restraint stages of proceedings.

36. The conclusion that a receiver is entitled to look to the assets of his receivership estate for his fees and expenses and that he has a lien over them for those purposes was also the conclusion arrived at in RE ANDREWS [1999] 1 WLR 1236, an earlier decision of the English Court of Appeal. There a father and son were both charged with offences to which Part VI of the Criminal Justice Act 1988 applied. Restraint orders were obtained and a receiver appointed over money which had been seized from the father and over other assets belonging to companies with which father and son were associated. The son was eventually convicted but the father completely exonerated and the question became whether the father should be entitled to be compensated for the costs of the receivership which had been taken from the monies which had been seized from him and which had been under management by the receiver as part of the estate over which she had been appointed. Ward LJ, in giving the lead judgment of the Court, answered the question in a manner applicable here, having regard to our similar statutory scheme:

*The true position, as it now appears to me, is that the investigation of whether or not the defendant has suffered loss by reason of the receivership is an investigation which should be and ordinarily would be conducted in deciding whether or not damages should (be) awarded against the plaintiff [(the prosecution)] for breach of the usual undertaking as to damages (which) a plaintiff would normally be required to give. Such an investigation would enable justice to be done. Here no undertaking was given and none ordinarily is. [Counsel for the*

*prosecution] submits that section 89 of the Act provides a defendant with the only relief to which Parliament thought he was entitled. Section 89 provides:*

*“(1). If proceedings are instituted against a person for an offence or offences to which this Part of the Act applies and ... (a) the proceedings do not result in his conviction for any such offence...the High Court may, on application by a person who held property which was realisable property, order compensation to be paid to the applicant if, having regard to the circumstances, it considers it appropriate to make such an order.*

*(Emphasis supplied)*

*2. The High Court shall not order compensation to be paid in any case unless the court is satisfied – (a) that there has been some serious default on the part of a person concerned in the investigation or prosecution of the offence concerned, being a person mentioned in subsection (5) of the Order; (b) that the applicant has suffered loss in consequence of anything done in relation to the property by or in pursuance of ... (i) an order under this Part of the Act.”*

37. Subsection 20 (1) and (2) of the PCCL are in practical terms, the same as section 89. In the present case there was also an Agreement, appended to the Order, in which it was explained to the Receiver (then only one) that his primary recourse for the payment of his fees and expenses would be to the assets coming

within his receivership. In terms which do no more than reflect the terms of section 19 (2) of the PCCL itself, the Agreement also stipulated that in the event the Receiver's remuneration and expenses exceed the sum realised (that is: the amounts brought into the Receivership) he will be indemnified out of the revenues of the Islands.

38. The foregoing examination of the case law not only provides the answer to the question as it relates to the effect upon the property of defendants who have been exonerated; it also explains the meaning to be ascribed to that Agreement insofar as it contemplated the realisable property of the defendant. The fees and costs of receiverships appointed over the assets of defendants are to be borne by those assets. While they are to be regarded as innocent for all the purposes of the Law, exonerated defendants are entitled to compensation for loss in consequence of anything done in relation to their property only in the event of "serious default" on the part of the prosecutorial authorities: section 20 of the PCCL. Otherwise, it is in the public interest that such incident of fees and costs as would reduce the value of their property be borne by them.
39. The remaining issue relates to the position of innocent third parties whose assets may be caught by the receivership order.
40. The words in subsection 20(1) of the PCCL (and which are in emphasis in the equivalent section 89(1) of the U.K. Act quoted above) plainly do contemplate the rights of persons; including innocent third parties, who may have held property which was restrained or charged as realisable property. Subsection 20 (1) does so by allowing them to seek compensation for loss resulting from the restraint or receivership orders. However, in that regard, their rights are circumscribed, as would an innocent defendant's, by the precondition of subsection (2) requiring the

showing of “serious default” – words which connote malice, wilful or gross neglect – on the part of the authorities responsible for having obtained the restraint or receivership order in the first place.

41. Such accusations against the authorities have not been raised here. In that light, Mr. Hall Jones contended that this limited right to compensation and the right given by section 19(1) of the PCCL to sue a receiver for loss or damage to non-realizable property caused by his negligence, are the only recourses available to an innocent third party and, however unfortunate, it would simply be a consequence of the public policy of the PCCL, if such a person’s assets were otherwise diminished by the costs and fees of a receivership appointed over them. To my mind, it is in this context that the provisions of section 15 of the PCCL, already identified above, come to the fore. They require of being cited here in full:

*“15(1) This section applies to the powers conferred on the Grand Court by sections 11 to 14, or on a receiver appointed under this Law or in pursuance of a charging order.*

(2) *Subject to subsections (3) to (6), the powers shall be exercised with a view to making available for satisfying the confiscation order, or as the case may be, any confiscation order that may be made; in the defendant’s case, the value, for the time being, of realisable property held by any person by the realisation of that property. (emphasis supplied)*

(3) *In the case of realisable property held by a person to whom the defendant has directly or indirectly made a gift caught by this*

*Law, the powers shall be exercised with a view to releasing no more than the value, for the time being, of the gift.*

(4) *The powers shall be exercised with a view to allowing any person other than the defendant or the recipient of any such gift to retain or recover the value of any property held by him.*

(5) *An order may be made or other action taken in respect of a debt owed by the Crown.*

(6) *Subject to section 3(1) and (3), [(which limit the amount to be realised to the amount of the defendant's realisable property as defined, less pre-existing obligations)], in exercising those powers, no account shall be taken of any obligations of the defendant or of the recipient of any such gift which conflict with the obligation to satisfy the confiscation order.*

42. It is clear that section 15 mandates competing but equal imperatives. These are imperatives aimed at the preservation, realisation and ultimate confiscation of the proceeds of crime, even while mandating that the interests of innocent third parties are to be protected.

43. The mandate of subsection 15(4) to allow them to retain or recover the value of their property makes it plain that it simply is not part of the legislative intent to confiscate or otherwise diminish the value of the assets of innocent third parties. To my mind, the words in emphasis in subsection 15(2) identify the true legislative intent and preference in that regard.

44. From all the foregoing, I feel compelled to conclude that there is no provision in the PCCL mandating that Receivers are entitled to have their costs paid from assets under their control irrespective of whether those assets are the realisable

property of the defendant, including where they belong bona fide to an innocent third party.

45. While the point has not been specifically decided before, there are compelling words from the English Court of Appeal in support of this conclusion. These are found most recently in one case already cited dealing with the rights of defendants who have been acquitted. While only obiter dicta they emphasise the important duty of the Court, while recognising the competing imperatives of the statute, to be astute to protect the assets of innocent persons which are not regarded by the statute as coming within the definition of a defendant's realisable assets.
46. From Hughes v HM Customs (above) at paragraph 58 page 650, per Simon Brown LJ:

*“The court should, in my judgment, be astute wherever possible to protect the rights and interests of third parties. As persons affected by a restraint order they have, of course, the right...to seek its variation or discharge.... The court can if necessary expedite such an application.... The court is required too....[(see section 15(4) PCCL)] to exercise its powers “with a view to allowing [an innocent third party] to retain or recover the value of any property held by him”. Note also the possibility in certain cases of compensating a third party under section 88(1)[(see section 19(1) of the PCCL)] if a receiver has acted negligently in relation to non-realizable property. It is difficult to regard this legislation as riding roughshod over the rights of innocent third parties.”*

47. Similar views were expressed by the House of Lords in *In Re Norris* [2001] 1 WLR 1388. There it was held that the wife of a defendant who had had her claim rejected upon an earlier application, had a right also to be heard to assert her interests in property at the later stage of the confiscation proceedings. The relevant dicta comes from Lord Hobhouse's speech (at p1394 para. 18F):

*“The drafting of the relevant sections of the (Drug Trafficking Offences Act 1986 U.K.) acknowledges that others besides the defendant and the donee of a gift caught by the Act may have an interest in the relevant property and that, whilst the receiver is given the power to take possession of the relevant property and realise its value, the order does not override or confiscate the interests of others in the value of that property. Section 13 (4) expressly provides that the powers shall be exercised with a view to allowing any person, other than the defendant or a recipient of a gift caught by the Act “to retain or recover the value of any property held by him”. This would be implicit even in the absence of an express provision since the confiscation order only applies to the convicted defendant, and, indirectly through such defendant, donees caught by the Act. To apply it so as to confiscate the property of innocent third parties would be not only exorbitant but also outside the purpose of the Act.”*

48. *In Re Norris* is an authority which was already considered and applied by this Court in related proceedings. See in *Re Fraser (Mrs. Gillian)* [2003] CILR 227 where it was recognised that section 15(4) of the PCCL (section 14(4) as it then was) “mandates the court to exercise its powers – (the primary objective of

confiscation of realisable property notwithstanding) – so as to ensure that an innocent owner shall be able to retain or recover the value of his or her property”.

49. In that case, Mrs. Fraser claimed, as an innocent third party, to have the right to an early determination of her proprietary interests in assets restrained by related orders in these proceedings, notwithstanding that the criminal proceedings here against her husband were still then extant. In that regard she was ultimately successful.

50. She, it appears, moreover managed to extricate her assets from the proceedings, free of the impact of the costs of the Receivership.

51. I can see no reason why, if the true beneficial ownership of the water shares resides in others equally to be regarded as innocent of and unimplicated in the allegations which had been raised against Mr. Fraser, the outcome should be any different.

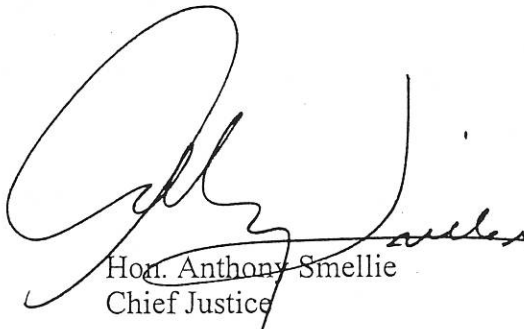
52. In the result, my answers to the question posed are as follows:

(i) A receiver appointed by the Court is entitled to reimbursement of fees and expenses reasonably incurred in the conduct of the receivership from assets covered by a relevant restraint order as being the realisable property of a defendant, whether or not that defendant is convicted. A receiver is thus entitled to exercise a lien over those assets notwithstanding the subsequent discharge or variation of the restraint order (subject to any further order the Court might make in that regard) and notwithstanding the subsequent acquittal of the defendant;

(ii) Where, however, the assets restrained are shown to the satisfaction of the Court, not to be or never to have been the realisable property of a defendant but instead the property of an innocent third party, the receiver

shall have no such right of reimbursement from or lien over such property. Instead the receiver shall look to the Crown (or other party on whose application he was appointed) pursuant to section 19(2) of the PCCL.

53. It follows that the final disposition of the water shares will depend on the outcome of the enquiry into the true beneficial ownership of the assets of the Cassarina Trust.
54. As to the timing and manner of payment of the remuneration and expenses of a receiver appointed under the PCCL, only section 14 makes specific provisions. In that respect, subsection (4) provides that a receiver shall be paid from the proceeds of realisable property by the Accountant General in priority to all other payments, if money was paid to the Accountant General by the receiver.
55. While these provisions do not preclude payments to a receiver from assets held by him at the earlier restraint stages that, it would seem, can only be done by the express order of the Court. In this case such a provision was contained in the Order from the outset. It would follow, from all the foregoing, that those could only have applied to the property which were properly or could now be regarded as the realisable property of the defendant Fraser.

  
Hon. Anthony Smellie  
Chief Justice



December 12, 2005