

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA AT DARWIN

(tho93008)

No. 3 of 1992

BETWEEN:

ELDERS RURAL FINANCE LIMITED,
FOSTERS BREWING GROUP LIMITED
and ELDERS LIMITED

Plaintiffs

AND:

WILLIAM TAPP as representative
of the estate of CHARLES WILLIAM
TAPP (deceased)

First Defendant

AND:

WILLIAM REX TAPP, JOE TAPP, BEN
TAPP, WILLIAM TAPP and DANIEL
TAPP

Second Defendants

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 5 February 1993)

This is an application brought on behalf of the receiver Mr Robert William Cowling.

By summons dated 11 January 1993 the receiver sought the following order:

1. That the receiver, Robert William Cowling, do have possession of such plant, equipment, stores and consumable items referred to in the inventories at Annexures A, B and C to the affidavit of Robert William Cowling sworn 22 December 1992.

Counsel for the defendants opposed the making of such an order.

Counsel for the plaintiffs supported the application. Counsel for the plaintiffs suggested the court should make the following order:

Upon the plaintiffs, by their solicitors, undertaking to pay a reasonable hire fee for such of the plant, equipment, stores and consumable items listed in the inventory referred to in the within summons as the court or a judge may hereafter be of opinion should be paid.

The court orders that:

The receiver and manager herein have, and the defendants deliver up, possession of all the items of plant, equipment, stores and consumables listed in the inventory referred to in the summons herein, or presently located on the said stations, with power to use them for the purposes specified in the order dated 22 October 1992 appointing the said receiver and manager.

Counsel for the receiver supported the above and suggested the following be added:

"together with all of the contents of the residences referred to in paragraph 8 of the affidavit of William Tapp sworn 27 January 1993, provided that the receiver and manager may release such items:

- a) agreed by him and the parties to be released; or
- b) which the court or the Master decides and orders should be released."

The addition suggested by counsel for the receiver was supported by counsel for the plaintiff.

The defendants opposed the making of any such orders.

In the event that the court declined to make any of the alternative orders, counsel for the receiver

requested that the court resolve the following questions so as to give a clear direction to the receiver:

Does the receiver have any and what powers over those items listed in Exhibit A of the affidavit of R.W. Cowling dated 22 December 1992 namely:

- a) fixtures
- b) non-fixtures purchased, hired, leased or otherwise acquired by him during the receivership
- c) other non-fixtures alleged by the plaintiffs to be owned by the first defendant.
- d) other non-fixtures.

Counsel for the receiver submitted these questions need to be answered because there is an ambiguity in the order made by His Honour Justice Martin dated 22 October 1992 as to whether plant and equipment are included.

I do not accept that submission. A reading of the order dated 22 October 1992 discloses no ambiguity. In paragraph 2 of the order Mr Cowling is "appointed the receiver and manager of the stations and stock identified and described in the schedule hereto and of the business or businesses now or normally carried on in respect of the said stations and stock".

The schedule to the order particularises and gives details of the stations, the stock and progeny from the stock.

Nowhere in the order of 22 October 1992 or the previous order dated 28 February 1992 or the schedules thereto is there a reference to the receiver being placed in possession of the plant and equipment.

Counsel for the plaintiffs argue that for the purpose of these interlocutory proceedings it is not

appropriate to embark upon a final determination of ownership of plant and equipment. I agree with that submission. In this I follow the decision of *Elders v Tapp* (unreported: Martin J delivered 16 July 1992 at page 5.)

It is the plaintiffs' contention that the mortgagee has sufficient prima facie interest in the business to entitle the appointed receiver to have powers over the assets of the business which includes the plant and equipment. *Leney & Sons Limited v Callingham and Thompson* [1908] 1 KB 79. The plaintiffs further argue that the power to "conduct", "carry on" and "manage" the business reasonably carried on in respect of the stock and stations necessarily includes the power to use the assets of the business. (*Re Rhagg* [1938] 1 Ch 828. *Re White* [1958] 1 Ch 762). The argument of the plaintiffs is that the jurisdiction of the court is to appoint a receiver and manager to preserve the subject matter of the action. The subject matter of the action being the security (station and stock) which are the principal assets of a business carried on on the stations. The plaintiffs argue that use of the plant and equipment by the receiver to carry on business is necessary to preserve the subject matter.

The court can appoint a receiver manager to manage the business to preserve the security and the value of the security - as part of a going concern. In addition counsel for the plaintiffs argue the mortgage documents themselves recognise the necessity of preserving the value of the stock by conferring a power of management on the mortgagee. The court can appoint a receiver manager to preserve that incident of the security.

The defendants accept that plant and equipment that are items that fall within (a) and (b) of the receiver's list of questions are covered by the security. There is no dispute that the receiver has power to use those items

listed in Exhibit A of the affidavit of R.W. Cowling sworn 22 December 1992 that are

(a) fixtures; or

(b) non fixtures purchased, hired, leased or otherwise acquired by him during the receivership

for the purposes specified in order dated 22 October 1992 appointing the said receiver and manager.

The defendants are also in agreement that the receiver needs plant and equipment to look after the land and the stock and therefore to properly carry out the terms of his receivership.

It is the defendant's contention that the plaintiffs are not entitled to insist that the defendants allow the receiver use and possession of the plant and equipment other than plant and equipment referred to in (a) and (b) above free of charge or payment of an allowance. The defendants state it is not sufficient that the plaintiffs give an undertaking to pay a reasonable hire fee for such plant and equipment at some later time when and if a court makes a decision that such hire fee is appropriate. The defendants' claim they are entitled to an allowance to be paid now for any use by the receiver of their plant and equipment. The defendants state and this has not been disputed that the receiver does not suggest that substitute equipment from another source is not available or appropriate.

It is not in dispute that the plaintiffs have not included either in their original claim or further amended state of claim a claim to ownership of the plant and equipment. Neither is it in dispute that plant and equipment is not specifically referred to in the securities taken over the three properties. All security documents are in evidence and they do not include a specific charge over plant and equipment.

I consider that the facts in this case distinguish it from the principles established in *Leney & Sons Limited v Callingham & Thompson* [1908] 1 KB 79, *Re Rhagg* [1938] 1 Ch 828 and *Re White* [1958] 1 Ch 762. The plaintiffs claim to plant and equipment is based essentially on the receiver's right to have possession and use of the plant and equipment to run the business and preserve the security and properly carry out the terms of his receivership. However, the receiver is able to do this by purchasing or hiring the equipment from elsewhere. It is not essential to the running of the business that he use the particular plant and equipment listed in Exhibit A to the affidavit of R.W. Cowling sworn 22 December 1992. It is agreed by the defendants that the receiver is entitled to use and possession of such plant and equipment as are fixtures and entitled to use and possession of non fixtures purchased, hired, leased or otherwise acquired by him during the receivership. It is not appropriate in these proceedings that I make a finding as to ownership of the plant and equipment. However, there is prima facie evidence that a substantial amount of plant and equipment is owned by the defendants. There is no evidence that such plant and equipment is owned by the plaintiffs or was specified as the subject of a security to the plaintiffs. In those circumstances I consider it appropriate that if the receiver wishes to have possession and use of the plant and equipment, the subject of this interlocutory application, that is neither a fixture or a non fixture purchased, hired, leased or otherwise acquired by him during the receivership, then he should pay a reasonable allowance to the defendants. This does not mean the receiver is bound to take possession of and use the plant and equipment the subject of this interlocutory application. It is a commercial decision, within the discretion of the receiver, whether he comes to an arrangement to pay the defendants for use of the plant and equipment, whilst ever it remain on the property or in the control of the receiver, or whether he goes

elsewhere to hire or purchase the plant and equipment required to run the business and preserve the security. Refusing to make the order suggested by the plaintiffs does not render futile the appointment of the receiver to manage the stations and stock described in the schedule to the order of His Honour Justice Martin dated 22 October 1992 and to manage the business or businesses in respect of the said stations and stock.

Counsel for the plaintiffs has referred to the undertaking given by the first and second defendants annexed to the order of His Honour Justice Martin dated 14 January 1992. I accept the first and second defendants continue to be bound by that undertaking. I do not accept this precludes their right to require payment for use of the plant and equipment, the subject of this interlocutory application, by the receiver.

Finally, counsel for the plaintiffs referred to a contract dated 17 October 1991 being Exhibit MAS14 to the affidavit of Malcolm Alan Sparrow sworn 16 January 1992. This is a contract entered into by the first and four of the second defendants with Elders Limited. I do not accept that this contract now precludes the defendants from insisting upon and obtaining an allowance from the receiver for possession and use of the plant and equipment the subject of this interlocutory application.

I have already stated that I do not agree with the submission by counsel for the receiver that the orders made by His Honour Justice Martin on 28 February 1992 and 22 October 1992 in as far as they relate to this dispute are ambiguous. It is clear that the receiver has not been given possession and use of plant and equipment in either of these orders. Accordingly, I do not consider it necessary or appropriate to amend or clarify the orders of His Honour Justice Martin. Nor do I consider there is shown to be a latent ambiguity in those orders arising from the present dispute.

Counsel for the receiver did state from the outset that rather than there be any amendment to the existing order that he supported a further order be made by the court in accordance with the proposed orders set out above.

The further orders proposed by the plaintiffs are supported by the receiver and opposed by the defendants. For the reasons already stated I do not consider it appropriate to make the orders as sought.

I will therefore consider the questions asked by the receiver and to resolve such question.

I answer the question sought by the receiver to be resolved in the following way.

The receiver has power to possess and use for the purposes of his appointment as a receiver those items listed in Exhibit A of the affidavit of R.W. Cowling sworn 22 December 1992 which are either

- (a) fixtures; or
- (b) non fixtures, purchased, hired, leased or otherwise acquired by him during the receivership.

I note that this is not disputed by the defendant.

These powers do not extend to

- (c) other non fixtures alleged by the plaintiffs to be owned by the first defendant; or
- (d) other non fixtures.

I stress that I do not attempt to interfere with or to limit in any way the commercial decision that is within the discretion of the receiver. It is within the discretion of the receiver to make a mutually acceptable arrangement with, the defendants for the possession and use of all or any of the items referred to above as (c) & (d) or make appropriate alternative arrangements to hire

or purchase all or any of the plant and equipment necessary to properly carry out the terms of his receivership.

I have certified this matter fit for counsel.

I grant the parties liberty to apply in respect of costs.