

*Northern Territory of Australia v Piper* [2002] NTSC 49

PARTIES: NORTHERN TERRITORY OF AUSTRALIA

v

PIPER, ALLEN GEORGE

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT EXERCISING TERRITORY JURISDICTION

FILE NO: 122 of 2002 (20117002)

DELIVERED: 20 August 2002

HEARING DATES: 14 August 2002

JUDGMENT OF: RILEY J

**REPRESENTATION:**

*Counsel:*

Plaintiff: D. G. Alderman  
Defendant: S. Southwood QC

*Solicitors:*

Plaintiff: Halfpennys  
Defendant: Ward Keller

Judgment category classification: A  
Judgment ID Number: ril0224  
Number of pages: 7

ri10224

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

*Northern Territory of Australia v Piper* [2002] NTSC 49  
No. 122 of 2002 (20117002)

BETWEEN:

**NORTHERN TERRITORY OF  
AUSTRALIA**  
Plaintiff

AND:

**ALLEN GEORGE PIPER**  
Defendant

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 20 August 2002)

- [1] The Crimes (Victims Assistance) Act established a scheme to provide assistance to certain persons injured or who suffer grief as a result of criminal acts. In broad terms a “victim” as defined by the Act may make application to the Local Court for an “assistance certificate”. The application is served on the Solicitor for the Northern Territory and, where the identity of the offender is known, upon the offender. The Crown and the offender (where known) are parties to the proceedings.
- [2] For present purposes, upon hearing the application the Court may issue an assistance certificate certifying that the Northern Territory shall pay an identified amount to the victim. By virtue of s 20 of the Act the Northern

Territory shall, within 28 days after the issue of an assistance certificate, pay the amount specified in the certificate to the applicant or as otherwise permitted by the Act.

- [3] Where an offender has been convicted of an offence and the Territory has paid an amount under s 20 of the Act in respect of injury or death resulting from the commission of that offence, the Territory may, pursuant to s 21 of the Act, recover from the offender “as a debt due and payable to the Territory an amount equal to the amount of assistance, costs and disbursements paid under section 20”. The Act includes provisions that facilitate the exercise of the right of recovery. The Solicitor for the Northern Territory is able to file in the Court a notice of payment specifying the amount of assistance, costs and disbursements paid under s 20 and, when that has been filed, the amount specified in the notice shall be deemed to be a judgment of the Local Court against the offender for that amount in favour of the Territory. Judgment may be enforced in the usual way.
- [4] In this matter a question has arisen as to the obligations of the Northern Territory in relation to a person who is entitled to receive a payment under the Act but who is also obligated to make a recovery payment to the Northern Territory as an offender under the Act. The circumstances can be briefly stated. On 23 April 1999 Lawrence Sexton obtained an assistance certificate certifying that the Territory pay him the amount of \$20,000 and costs of \$10,770.74. The total payable to him was \$30,770.74 and that amount was paid by payments made on 14 May 1999 and 13 August 1999.

The offender in that case was the defendant in these proceedings Allen George Piper. The Northern Territory followed the recovery provisions of the Act and obtained a judgment against Mr Piper in the sum of \$30,770.74 on 15 October 1999.

- [5] On or about 22 November 1999 Mr Piper made an application for assistance under the Act in relation to an assault suffered by him. In September 2001 he obtained an assistance certificate allowing assistance in the sum of \$6,000 and costs in the sum of \$4,816.
- [6] It does not come as a surprise to learn that the Northern Territory is reluctant to pay the sum of \$10,816 to Mr Piper when, at the same time, it is seeking to recover from him the sum of \$30,770.74. The question that arises is whether, and if so how, the obligation to make payment to Mr Piper may be avoided.
- [7] The submission made on behalf of the Northern Territory is that it does not have to pay Mr Piper the amount referred to in the certificate until he has paid the amount he owes to the Victims' Assistance Fund pursuant to the judgment obtained in favour of the Northern Territory. It is said that this is so because of the principle of equity illustrated by *Cherry v Boulton* (1839) 4 My & Cr 442. That principle was succinctly described in *In re Peruvian Railway Construction Company Limited* (1915) 2 Ch 144 at 150 where Sargant J said:

“The whole contest has been as to the application to the present case of the much broader principle, enunciated in *Cherry v Boulton*, and given effect to in *In re Akerman* and a series of subsequent cases, that where a person entitled to participate in a fund is also bound to make a contribution in aid of that fund, he cannot be allowed so to participate unless and until he has fulfilled his duty to contribute.”

- [8] The rationale of the equity was described by Young J in *Perpetual Trustees (WA) Ltd v Equus Corp Pty Ltd* (1998) NSWSC 71 as being “that if a person has to contribute to a fund he or she should not be able to have the fund dissipated by collecting from it before he or she has made contribution; that equity will not apply where it is contrary to statute or where it is contrary to the agreement of the parties, or otherwise the circumstances show that it would not be in accordance with conscience that it should apply.”
- [9] The rule in *Cherry v Boulton* is most commonly given application in the situation where a debtor of a deceased person is a legatee under a Will. However, as was observed by Meagher, Gummow & Lehane: *Equity Doctrines and Remedies* (3<sup>rd</sup> ed.), the rule is not limited in its application to executors or deceased estates. It applies to all situations where a person seeks to claim against a fund of which he is a debtor. The learned authors said (at par 3735): “It applies not only to the case of a debtor claiming a legacy from the estate of his creditor, but also to a *cestui que trust* claiming his entitlement under a trust fund to which he is indebted, to the case of a debtor to a bankrupt estate claiming to prove in that estate; to the case of a debenture-holder claiming the debt which the company owes to him if he is

also a debtor to the company; and to any other case in which the beneficiary of a fund is also a debtor to the fund.”

[10] In *Derham: Set-off* (2<sup>nd</sup> ed.) it is said (at 432) that “[t]he essence of *Cherry v Boulbee* is that a person has both a right to participate in and an obligation to contribute to a fund.” The learned author went on to say that:

“The more popular explanation, which can be traced back to the judgment of Sir Joseph Jekyll in 1723 in *Jeffs v Wood*, is that the rule in effect provides a method of payment. The person administering the fund may assert that the debtor already has an asset of the fund in his own hands, in the form of the debt, which should be appropriated as *pro tanto* payment of his right to participate. The administrator in truth does not ‘retain’ anything as payment of the debt. Rather, he directs the debtor to satisfy his entitlement to a share of the fund from a particular source. The rule is better described as a right to appropriate a particular asset as payment, as opposed to a right of set-off or a right of retainer.” (at 434)

[11] In relation to a claim under the Crimes (Victims Assistance) Act, s 20 of the Act simply provides that the Northern Territory shall pay the amount specified in the certificate. It does not, of itself, specify a fund from which payment will be made. However s 25A of the Act establishes a fund known as the Victims’ Assistance Fund and that fund consists of money coming from various sources including money “recovered by the Territory under this Act”. Any money recovered by the Minister under the Act shall be paid into the Fund (s 25) and, by virtue of s 25A(5), any payment made under the Act “shall be debited to the Fund”. In those circumstances it is clear that the Victims’ Assistance Fund is both the fund from which Mr Piper is entitled to be paid the amount due in respect of his assistance certificate and it is also

the fund into which any monies recovered from him must be deposited. In my view the Victims' Assistance Fund is a fund for the purposes contemplated in *Cherry v Boulton*.

[12] The rule in *Cherry v Boulton* is a principle of equity and will give way to any statutory provision to contrary effect: *Fused Electrics Pty Ltd (In Liq.) v Donald* (1995) 2 Qd R 7 at 8. For example the priority of payments in a company winding up is fixed by statute and a general principle of equity cannot interfere with the order thereby established. In the present case there is nothing in the legislation to suggest that the rule in *Cherry v Boulton* is excluded by any provision.

[13] Counsel for the defendant made reference to *Walker v Secretary, Department of Social Security* (1995) 56 FCR 354. That case is readily distinguishable from the circumstances of the present matter. It involved, inter alia, the suggestion that an equitable set-off could apply in relation to funds fraudulently obtained under the provisions of the Social Security Act. It did not involve an application of the rule in *Cherry v Boulton*. There was there no personal obligation upon Mr Walker to contribute to any fund and the legislation itself contained a complete code for recovery. Further there was no fund as is the case under the Crimes (Victims Assistance) Act.

[14] In my opinion the rule in *Cherry v Boulton* has application in the circumstances of this matter. In accordance with the submission of the plaintiff I declare that the defendant is entitled to payment of the amounts

specified in the Assistance Certificate issued pursuant to s 8 of the Act on or about 24 September 2001, only on the basis that the defendant has paid to himself the amount owed to him out of the money he owes to the Northern Territory, being the amount recoverable by the Northern Territory from the defendant pursuant to s 21 of the Act.

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