48/85

SUPREME COURT OF VICTORIA

R v CLARKSON and ORS

Hampel J

16 October 1985

CRIMINAL LAW – THEFT - APPROPRIATION - DIRECTOR DRAWING CHEQUES ON BUILDING SOCIETY'S ACCOUNT FOR OWN BENEFIT – DIFFERENCES BETWEEN COMPANY AND BUILDING SOCIETY – WHETHER SOCIETY CAN CONSENT TO UNAUTHORIZED APPLICATION OF ITS PROPERTY – WHETHER APPROPRIATION – CHOSES IN ACTION – WHETHER THEFT OF MONEY EQUAL TO AMOUNTS OF CHEQUES DRAWN ON SOCIETY'S ACCOUNT: *CRIMES ACT* 1958, SS71, 72, 73: *BUILDING SOCIETIES ACT* 1976, SS2, 7, 24, 53; *COMPANIES (VICTORIA) CODE*, SS67, 68.

C. and others were charged with a number of counts of theft of Bank bills and moneys belonging to the Athena Permanent Building Society ('Society'). After C. became the Director Chairman of the society, a series of transactions occurred whereby moneys were transferred from the Society's account to an account controlled by C. at another Bank. Cheques were then drawn on this account and applied for purposes other than those of the Society. At the close of the prosecution case, it was submitted that the element of appropriation of the moneys had not been made out, and there can be no theft of choses in action.

HELD: The accused had a case to answer.
(1) The element of appropriation requires proof that there has been an adverse interference with or usurpation of some right(s) of the owner.

(2) Whilst in some respects a proprietary company is similar to a Building Society, the fundamental difference in the present case concerned the power of each to act as an independent legal entity. The Society was entirely a creature of statute and was incapable of disposing of its property otherwise than in accordance with the provisions of the *Building Societies Act* 1976.

(3) Accordingly, the application of its moneys and property for unauthorized purposes could not have been a consensual transaction, and was capable of being construed as an adverse interference with or usurpation of its rights.
***R v Roffel* [1985] VicRp 51; [1985] VR 511; (1984) 9 ACLR 433; (1985) 14 A Crim R 134; (1985) 3 ACLC 339, discussed and distinguished.**

(4) Notwithstanding the allegation that choses in action were stolen from the Society, the circumstances of the transaction were capable of supporting charges of theft of sums of money equal to the amounts referable to the choses in action.
***R v Holt* [1983] 12 A Crim R 1; [1983] 2 Qd R 462, distinguished.**

HAMPEL J: *[After setting out in brief the Crown case, His Honour continued]:* … **[3665]** In substance, it was submitted first that the accused could not be convicted of theft of Athena's bank bills or of its money because there was no appropriation of them. This was so, it was argued, because the taking and the application of both the bills and the money was done with the full concurrence of the owner, namely the Society. It was said that Athena, being a corporation, could act only through its directors and the acts of the directors, or those of them to whom such authority was delegated, were the acts of the Society. In that way it could not be said that there was any usurpation of Athena's rights as owner in relation to the acts of pledging its bills as security or the taking of its moneys.

This submission was based on the reasoning of the majority of the Full Court in *R v Roffel* [1985] VicRp 51; [1985] VR 511; (1984) 9 ACLR 433; (1985) 14 A Crim R 134; (1985) 3 ACLC 339 which decision binds me. In that case the applicant was charged with four counts of stealing money and one of stealing a cheque, the property of a family company of which he and his wife were the sole directors and shareholders. The applicant, who was also the secretary of the company, signed cheques, as he was authorised to do, and used the proceeds of the cheques for his own purposes rather than **[3666]** those of the company. The prosecution relied on the receipt of the money from the company's bankers as the act of appropriation. After posing the question (at p514): "…

where is the element of usurpation of the company's rights in the act of receiving the money?" the Chief Justice pointed out that the cheque was the company's cheque made payable to cash and in possession of the applicant who was the *de facto* controller of the company. There was no evidence to suggest that the company did not intend the applicant to have the money and to use it for his own purposes. His Honour concluded in the circumstances of that case that even if the act of giving the money to the applicant was *ultra vires* of the company

> "the directing mind and will of the company still occurred in the applicant's receiving the money for his own benefit and thereby precluded his receipt of it from being an appropriation within the meaning of the *Crimes Act*."

Crockett J considered that there can be no assumption of the rights of another if that other agrees to be dispossessed. In the context of the applicant's case he posed the question thus (at p518):

> "Was there, then, evidence that his writing of the cheques was, in the relevant sense, a unilateral act of the applicant or was it the result of a 'transaction' between him and the company? That is to say, did he or did he not have an untrammelled right to do what he did?"

His Honour set out the applicant's contention to the effect that he was the embodiment and the mind of the company and as such could make out cheques payable to himself even if in so doing the applicant was acting to defeat the company's creditors or breaking statutory provisions. He went on to **[3667]** find that the evidence admitted of no finding other than that the applicant was identified with the company and said (p519):

> "If ever there were a case in which a natural person could be said to be the embodiment of a corporate entity then this is that case. Once that conclusion is reached then his actions in relation to the company's affairs must be treated as being the company's actions. The cheque dealings were thus 'transactional'."

His Honour found that the transactions were consensual and it did not matter if they were void or voidable. By virtue of the consent of the company even if unlawfully and dishonestly given, it could not be asserted that the applicant had assumed the rights of the owner adversely. His Honour continued (at p521):

> "The company in a sense relevant for the penal law must be treated as having a 'right' unlawfully to give away its own property. The director who, no matter how dishonestly or unlawfully, as 'the mind' of the company causes its property to be transferred to himself must necessarily be doing so pursuant to a transaction that is consensual."

Finally His Honour concluded that as the applicant was identified with the company, then the company by the instrumentality of the only person through whom it could effectively act consented to enter into the impugned transactions. He expressed the proposition in terms of *R v Morris* [1984] UKHL 1; [1984] AC 320; [1983] 3 All ER 288; (1983) 77 Cr App R 309; [1983] Crim LR 813; [1983] 3 WLR 697; that by reason of its very acquiescence in the drawing of the cheque on its funds, the company was not acting so that it could be said that the applicant was adversely interfering with or usurping some right of ownership possessed by it. I have had the advantage of hearing full argument from both sides as to the applicability of *Roffel's case* to the present one. The submissions are transcribed and **[3668]** need not be fully restated. In addition, I have had a helpful summary of Mr Clarkson's submissions and his lists of authorities. At first the defence submission appears attractive but on further reflection and after giving the matter anxious consideration I have come to the conclusion that *Roffel's case* can have no application to the present situation. To apply it would, in my view, amount to an extension of the reasoning by the majority of the Court from considerations relevant to a proprietary company to those of a building society. Such an extension is untenable.

A company comes into existence by incorporation pursuant to the *Companies (Victoria) Code*. Div 3 of Pt III deals with the "Powers and Status" of companies. By virtue of s67(1) a company has the rights, powers and privileges of a natural person as well as other specified powers. The memorandum and articles of association may restrict the exercise of these powers. It is left to those who incorporate a company to determine the extent of such restrictions. Once incorporated the company becomes a separate legal entity limited in its powers to the extent provided in the

memorandum and articles of association. Sub-s(5) of s35 provides that it is capable forthwith of performing all the functions of a body corporate, is capable of suing or being sued; has perpetual succession and a common seal, and has power to acquire, hold, and dispose of property. If the company acts as an independent legal entity as empowered by s67(1) but outside the limits set by its memorandum and articles of association it acts *ultra vires* (see s68(1)). An officer of a company shall not knowingly be a party to such a contravention by the company. **[3668A]** However, if a company does act *ultra vires*, it does not, nor does any officer, commit an offence. Furthermore, its act does not thereby become invalid. The fact that a company has acted *ultra vires* may be asserted or relied on only in the very limited circumstances described in sub-s(6) of s68.

The Athena Permanent Building Society was registered pursuant to the provisions of the *Building Societies Act* 1958. Section 6 of that Act provided that upon registration the Society became a body corporate capable forthwith of exercising all the functions of an incorporated society and having perpetual succession and a common seal. **[3669]** Section 8 prescribed the matters that were required to be contained in the rules of the Society. The 1958 Act was repealed by the *Building Societies Act* 1976. Section 2(2) of that Act provides that such repeal shall not disturb the continuity of status, operations or effect of any incorporation or registration of a building society or of any rule made under the 1958 Act. Nevertheless, as from its commencement the 1976 Act controls the conduct of all building societies formed and registered under that Act or any corresponding previous enactment. So far as presently relevant, s7(7) of the 1976 Act provides:

> "Every society registered under the repealed Act and in existence immediately before the coming into operation of this Act and every society for which a certificate of incorporation is issued under this Act—
> (a) shall be a body corporate with perpetual succession and a common seal;
>
> (b shall in its corporate name be capable of suing and being sued;
>
> (c) shall, subject to this Act and the rules of the society, be capable of holding, acquiring, dealing with and disposing of real and personal property;
>
> (d) shall have the powers, rights, duties and functions conferred, imposed or prescribed by or under this Act or the rules of the society ...

Section 5 sets out that the objects of a society shall be only to raise funds by subscription or otherwise, as authorized by the Act, and to apply those funds subject to the Act and the rules of the Society in making advances and in such other ways as are authorized by the Act and those rules. Sub-section (9) of s7 provides that subject to the Act a Society may acquire any real or personal property for any of the objects of the Society or for any purpose ancillary to those objects and may sell or lease any such real or **[3670]** personal property. Pursuant to section 24(2) the powers of the board of directors are made subject to any restrictions imposed by the Act and by the rules. The Act in subsequent sections lays down requirements for the keeping of accounts, audits, and the regulations of the monetary policies of societies. Sub-s53(1) provides that:

> "a society shall not advance, invest, use, apply, pledge, encumber or otherwise deal with any of its moneys or other real or personal property of any kind except as authorized by this Act, the regulations or the rules of the society."

It is evident from that analysis that the two bodies, a company and a building society, which, because of their incorporation have a separate legal existence from their members, and which are in some respects similar, are in other respects fundamentally different. Insofar as it is relevant to the present purpose, the decisive difference is in the power of each to act as an independent legal entity. Once incorporated, a company is empowered to act as a natural person without additional statutory limitations. The only limitations can be those imposed by the memorandum and articles of association. Insofar as it acts outside those limitations, it does so not in contravention of the legislation which created it, but contrary to its self-governing rules. It is for this reason that the doctrine of *ultra vires* can be relied upon only in the limited circumstances set out in s68(6).

A building society is entirely a creature of statute. It derives all its power and suffers all its limitations by virtue of the very Act of Parliament which gives its existence. **[3671]** Its ability to function is strictly limited by the Act to the narrow objects for which it is created. All functions which can be performed by the Society and its directors are expressed to be subject to the Act. Failure to comply with the provisions of the Act or the rules of the Society results in the Society

and its officers committing offences. Further, if breaches are not remedied within a specified time, the Society is liable to be wound up.

The submission based on *Roffel's case* is predicated on the proposition that Clarkson, as the directing mind and will of the Society, consented to the transactions which are said to be thefts and therefore there was no appropriation because the Society through him had consented to such disposition of its property. In that sense, it was argued that there could not be usurpation of the rights of the owner. It is understandable that in *Roffel's case* such a submission was accepted in the context of the company there under consideration and the acts of the director there in question. The same considerations cannot apply to a building society and the acts of its directors because the Society is incapable by the limits of its statutory existence, of disposing of its property otherwise than in accordance with the Act. It follows that the Society cannot consent to acts which it has no power to perform and its directors can have no greater power than the Society. It cannot therefore be said that the handing over of its bank bills to Westpac as security in the circumstances in which it is alleged to have been done, or the application of its moneys for unauthorized purposes, could have been consensual. **[3672]** The Society could not have intended that its property be used in that manner.

In addition, although the prosecution case is that Scott and Shiells acted with Clarkson in a way which renders them criminally responsible, while Clarkson masterminded the plundering of Athena's assets, I have considerable doubt whether in the circumstances of the present case it can be said that Clarkson was the embodiment of the Society in the same sense and for the same purposes as that concept was used in *Roffel's case*. In my opinion the submission based on *Roffel's case* must fail.

It was next submitted that the counts which charge the theft of Athena's money cannot be sustained as a matter of law because in each case the evidence led by the prosecution is capable at best of proving the theft of a chose in action and not of a sum of money, and probably not even that. Those submissions were developed by reference to such cases as *Croton v R* [1967] HCA 48; [1967] 117 CLR 326; [1968] ALR 331; (1967) 41 ALJR 289, *R v Kohn* [1979] 69 Cr App R 395; [1979] Crim LR 675, *R v Pearlberg and O'Brien* [1982] Crim LR 829 and *R v Baruday* [1984] VicRp 59; [1984] VR 685; (1984) 13 A Crim R 190.

The prosecution case in relation to the thefts of Athena's money is formulated on the basis that in each case what was in fact stolen was a chose in action of a specific monetary value referred to in each count. In a typical case a cheque was drawn on Athena's account at the Commonwealth Bank at Fairfield payable to Athena's account at the Westpac Bank at Brunswick. As the cheque was signed by authorized signatories it had the effect of transferring Athena's right to that amount against the Commonwealth Bank to a **[3673]** right against the Westpac Bank. An appropriately signed cheque was then drawn on Westpac in favour of the Mortimer Newsome and Ferguson Investments Pty Ltd account thus tranferring Athena's chose in action to Mortimer of which Clarkson had control. Cheques were then written by Mortimer on its account made payable to cash or to designated payees for purposes other than those of Athena. In other cases although the *modus operandi* was different the result was the same.

The Crown case is therefore that what was stolen in each case was a chose in action, that is, Athena's right to recover that amount of money from the Commonwealth Bank. The Crown contends that this series of transactions evidences the intention permanently to deprive Athena by dishonestly usurping its rights as an owner. It was then argued that the decision of the Full Court in *R v Holt* [1983] 12 A Crim R I insofar as it decides that the prosecution is able to charge a theft of money where what is in fact stolen is a chose in action should be distinguished on its facts mainly because in that case the actual cheques were appropriated. In the circumstances relied on in the present case, although the method used was different to that in *Holt's case* it is difficult to see why the prosecution relying on the extended definition of "property" in s71(1) and the reasoning in *Holt's case*, cannot charge the thefts of sums of money referable to the chores in action allegedly stolen. It follows that the submission that the theft counts are bad cannot succeed.

It was Mr Clarkson's further submission that the theft counts relating to the bank bills are bad because it was legally impossible for the bills to be lodged as **[3674]** security. The argument

was based on the proposition that as the bills were "open" bills mere possession of them was insufficient to pass title in them or to their proceeds. Only a holder in due course for the value without knowledge of a defect in title could acquire title in a bill of exchange or its proceeds. It was argued that that was not the position in the circumstances of this case. This submission is based on a misunderstanding of the law relating to theft which is concerned not with title but with the dishonest interference with the rights of the owner. The submission cannot succeed.
