IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2005 409 31

IN THE MATTER OF	an application pursuant to the Proceeds of Crime Act 1991
BETWEEN	SOLICITOR-GENERAL OF NEW ZEALAND Applicant
AND	AARON JOSEPH UREN Respondent

CIV 2005 409 1662

AND IN THE MATTER OF	an application pursuant to the Proceeds of Crime Act 1991
BETWEEN	SAUL JACOB UREN First Applicant
AND	JOHN DAVID DICKSON Second Applicant
AND	WILHELMUS-CHRISTIAAN RUIFROK Third Applicant
AND	JANETTE ANNE UREN Fourth Applicant
AND	SOLICITOR-GENERAL OF NEW ZEALAND Respondent

Hearing: 10 April 2006

Appearances: H C Matthews and T W Evatt for Applicants
A M Toohey for Respondent

Judgment: 11 April 2006

ORAL JUDGMENT OF CHISHOLM J

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[1] Aaron Uren pleaded guilty to, and was sentenced to imprisonment for, importing and selling cocaine between 14 July 2003 and 25 November 2004. He also pleaded guilty to a number of subsidiary offences arising from the same events. The Solicitor-General seeks a forfeiture order in relation to various items and the four applicants have made applications for relief. This judgment concerns those applications.

[2] A forfeiture order is sought pursuant to s15 of the Proceeds of Crime Act 1991 in relation to a piece of rural land located at Dismal Stream, Blenheim (Dismal Stream), a Toyota Hi-Lux, bonus bonds having a face value of $10,000, cash of NZ$114,000 and US$3,400, and six paintings. This application is not opposed by Aaron Uren, whose counsel has earlier been granted leave to withdraw.

[3] Relief is sought by the various individuals under ss 17 and 18 of the Proceeds of Crime Act. Saul Uren claims an interest in Dismal Stream. His application is opposed by the Solicitor-General. John Dickson abandoned his claim in relation to the Hi-Lux before the hearing commenced. Wilhemus-Christiaan Ruifrok seeks relief in relation to four paintings. His application is opposed by the Solicitor-General. And Janette Uren's application for relief in relation to a painting entitled *"Head Study"* is not opposed.

[4] Each applicant for relief has sworn at least one affidavit. Detective Bell has sworn three affidavits on behalf of the Solicitor-General. Saul Uren, Mr Ruifrok and Mr Dew, a Blenheim solicitor, were cross-examined by Ms Toohey. Detective Bell was cross-examined by Mr Matthews. Aaron Uren has not given any evidence.

Paintings

[5] When the police executed a search warrant of the premises occupied by Aaron Uren they located six paintings by Mr Ruifrok. Of those paintings it is accepted that there should be no forfeiture order in relation to *"Head Study"* which belongs to Janette Uren. It is also accepted by Mr Ruifrok that *"Ray of Light"* was sold to Aaron Uren during the period of his offending with the result that there can be no opposition to a forfeiture order in relation to that painting.

[6] The four paintings that are in dispute have been independently valued: *"The Kingdom"* is worth $5,000; *"Speak to the Stunning Sphinx"* $2,000; *"Great Great Grandmother"* $1,500; and *"Death and the Maiden"* $3,000.

[7] In essence Mr Ruifrok's evidence is that the first three paintings were on loan to Mr Uren on the basis that he would purchase them when he had money. Mr Ruifrok believed that Mr Uren would pay in time, but no payment has been received and for that reason Mr Ruifrok contends that the paintings have remained his property. He said that he was unaware that Mr Uren was involved in offending. Under cross-examination Detective Bell frankly acknowledged that apart from the fact that the paintings were in Mr Uren's possession, there was no other information to suggest that the paintings belonged to Mr Uren.

[8] I accept Mr Ruifrok's evidence and that the paintings were on loan. Given that there was no payment from Mr Uren for the paintings they could not have been *"tainted"* by the proceeds of the offending in terms of s2 of the Act. It follows that there is no jurisdiction to make a forfeiture order in relation to these paintings, and an order is refused.

[9] The situation is slightly more complicated in relation to "*Death and the Maiden"*. According to Mr Ruifrok an artist friend of his sold this painting to Mr Uren for $500 without Mr Ruifrok's knowledge or authority. Mr Ruifrok said that his friend was short of money, has never accounted to him for the $500, and is now overseas. Although this is a somewhat extraordinary situation, I have no reason to doubt Mr Ruifrok's evidence. Effectively the painting was converted and good title

did not pass to Mr Uren. I also have reservations about whether the painting could properly be regarded as tainted for the purposes of s2. Either way it is not appropriate to make a forfeiture order in relation to this painting, and I decline to do so.

Background To The Dismal Stream Property

[10] This is obviously the most contentious issue. Dismal Stream is a largely bush clad property comprising 13.6 ha. Its rating value as at 1 September 2002 was $54,000.

[11] Aaron Uren and his then girlfriend purchased the property during 2002 for $48,000. That has been verified by the affidavit evidence of a bank officer and also by the evidence of Mr Dew. Mr Uren and his girlfriend provided cash of $14,400 and the balance of $33,600 was provided by way of an ANZ mortgage advance. When the relationship broke up Aaron Uren purchased his girlfriend's interest in the property for $8,000 and took over the ANZ mortgage pursuant to a written agreement dated 1 July 2003.

[12] The bank officer comments in her affidavit that at the time this transaction was being arranged she recalled Aaron Uren saying that his brother may come in on the deal as he was not sure if he could afford to "*do it by himself*". She deposed, however, that things changed when Aaron Uren found out that he was able to pay the mortgage by himself and his brother was never mentioned again.

[13] It can be seen from the Dew & Co trust account that the $8,000 required to settle the purchase of the half share was paid into that firm's trust account on 11 July 2003 which was, of course, before Aaron Uren's offending commenced. Settlement of the purchase was effected on 15 July 2003.

[14] Saul Uren maintains that soon after this he and his brother agreed that he would purchase a half share in the property. His evidence is that he made an initial

payment of $10,000 by transferring a motorcycle to his brother and that he agreed to take over the mortgage which at that time stood at $27,000. This translates into a purchase price for an undivided half share of $37,000. He maintains that this purchase arrangement is confirmed by Exhibit E to his first affidavit, which reads:

> *"I Aaron Uren acknowledge money paid from Saul Jacob Uren. Ten thousand Dollars received. Part payment for North Bank Property*
> *Address.*
> *Dismal Stream 4080*
> *North Bank Road*
> *Renwick*
> *Blenheim.*
> *Also in agreement he will pay the remainder of mortgage. Twenty Seven Thousand Dollars. In return he will become half owner."*

The document purports to be signed by Aaron Uren and is dated 6 August 2006. Saul Uren maintains that it is signed by his brother who gave it to him as a receipt. Given that there is no evidence from Aaron Uren about the authorship of, and signature on, the document, it is hardly surprising that Ms Toohey has challenged the document on the basis that it is hearsay.

[15] Another document, this time undated and unsigned, is also attached to Saul Uren's affidavit. This is Exhibit F. According to Saul Uren this document was also prepared by his brother and given to him. It confirms that Saul Uren has made a payment of $10,000 cash and that between 6 August 2003 and 29 September 2004 he also made 28 payments of $90 totalling $2,520. This document also states:

> *"We are making an agreement for Saul to pay half the mortgage $27,000. I kept my $90 mortgage payment going until our agreement was made. He paid me cash in hand of $2,500 from 03 to 04 this money I deposited to my account to cover AP's to my mortgage account…".*

The document then refers to some other payments made by Saul totalling $2,390. It then records that a proposed agreement has been made by Dew & Co and that Saul has a copy. Again, the admissibility of this document is challenged on the basis that it is hearsay.

[16] Bank accounts produced by Saul Uren verify, first, that a joint account in the names of himself and his brother was opened on or about 12 August 2003 and, second, that regular fortnightly payments of $90 came out of Saul Uren's account and went into the joint account from 20 August 2003 through to 5 January 2005.

Salary payments into the account also enable his employment history to be traced. It can also be verified that there was a deposit into Saul Uren's bank account in excess of $4,000 during the period under consideration. This information dispels any suggestion that Saul Uren would not have been able to afford the mortgage payments.

[17] Mr Dew acted for Aaron Uren. In his second affidavit he has provided a copy of the documents on his file. It seems that most of the work on the file was carried out by a legal executive under his supervision. The first recorded e-mail communication between Aaron Uren and the legal executive is dated 17 October 2003, although Mr Dew thinks there was probably a meeting before that. There does not appear to have been any mention of Exhibit E to Mr Dew but it is, of course, possible that it was mentioned to the legal executive.

[18] In any event, the e-mail of 17 October 2003, which contemplates a three way agreement between A J Uren, S J Uren and S R Rooke involving equal shares in Dismal Stream, seems to have been followed by the first draft of a deed between those parties. The general structure of the draft deed is that Aaron Uren acknowledges that he holds the land in trust for his brother, Mr Rooke and himself as tenants in common in equal shares. While the draft deed is reasonably detailed, it is not necessary for present purposes to refer to the other provisions.

[19] There is also a further draft of this deed (the second draft) comprising handwritten alterations to the first draft which have the effect of eliminating Mr Rooke from the deed. In other words, it becomes a deed between Aaron and his brother but with that exception the structure of the deed remains the same.

[20] Curiously the following note appears between pages 1 and 2 of the second draft:

> *"1. Growing marijuana*
> *On the property 3 zones – pot to be grown on the zone. If the property is to be taken off us, the person who is growing it should recompense the other two owners.*
>
> *2. Improvements in each zone – to be given a credit for the amount of improvements."*

This seems to be a file note. With reference to the growing of pot it seems highly likely that the word *"not"* has been accidentally omitted. Under cross-examination Saul Uren explained that cannabis growing is not uncommon in this locality and it was for that reason that they were anxious to address the topic in case some unauthorised person grew cannabis without their knowledge. I do not read anything sinister into this file note or the fact that the issue of illegal activities was raised with Dew & Co.

[21] A third draft of the deed is also on the file. In broad terms this document implements the handwritten alterations in the second draft. It provides for Aaron Uren to hold the land is held in trust for himself and his brother in equal shares. Mr Dew was not able to throw much light on how it came about that Mr Rooke was excluded from the arrangement. Saul Uren's explanation was that Mr Rooke was a friend of his brother's and that although he (Saul Uren) was concerned when his brother brought Mr Rooke into the arrangement, he did not express his concern to anyone because within a relatively short time there had been a fall out between his brother and Mr Rooke which led to Mr Rooke being excluded from the purchase.

[22] On 16 February 2004 Aaron Uren sent an e-mail to the legal executive commenting:

> *"i've read the agreement. very good. i have to run it past my brother as he has no email. that will give me time to have a better look.*"

He then pointed out a spelling mistake and also asked about compensation in the event that one of the parties did something illegal on the property. There seems to have been little if any activity until the beginning of December 2004 when there is what appears to have been an internal message for the legal executive that Saul Uren had called and indicated that he is happy with the document that had been forwarded but that he thought there may be a mistake in relation to the bracketing of names. An e-mail from Saul Uren to the legal executive the next day broadly confirms that message.

[23] Finally, there is a letter of 9 February 2005 from Dew & Co to Saul Uren forwarding a copy of the draft agreement. The document was never signed. Mr

Dew's view was that more information would have been required before the deed could have been signed.

Competing Submissions

[24] In support of the application for relief Mr Matthews effectively advanced three submissions: first, that Saul Uren was able to establish a legal interest in the property by virtue of Exhibit E which satisfied the requirements of the Contracts Enforcement Act 1956; second, that if that submission was not accepted there was evidence of part performance upon which a legal interest could be established; and, if those submissions were not accepted, an equitable interest could be established on the basis of constructive trust principles explained in *Lankow v Rose* [1995] 1 NZLR 377.

[25] In relation to the first submission Mr Matthews submitted that Exhibit E satisfied s2 of the Contracts Enforcement Act because: there was certainty as to the parties, the land, the purchase price and the interest to be acquired and the document had been signed by Aaron Uren, the owner of the land. All other details, submitted Mr Matthews, could be implied. On Mr Matthews' analysis of this document and the surrounding evidence there was sufficient to support a caveat or an action for specific performance.

[26] Part performance is said to have arisen by virtue of four factors: Saul Uren took possession of at least part of the land and made improvements; he transferred a motorcycle, which constituted a payment of $10,000, to his brother; mortgage payments had been made by him; and Dew & Co had prepared a draft agreement to reflect the agreement entered into between Saul Uren and his brother. Given that part performance and the surrounding circumstances, Mr Matthews again submitted that it would be very difficult for Aaron Uren to resist an application for specific performance.

[27] As to the submission that Saul Uren could establish an equitable interest in the land by virtue of a constructive trust, Mr Matthews cited *Solicitor-General v Smith & Ors* (High Court, Wellington Registry, CIV 2004 454 041, 28 April 2004) as an example of the *Lankow v Rose* principles being applied in a context similar to that under consideration. He claimed that on the evidence before the Court each of the four requirements described by Tipping J in *Lankow v Rose* were satisfied.

[28] Mr Matthews' final point was that there were no disqualifying factors in terms of s18(2). He noted that paragraph (a) of ss(2) was not relied upon by the Solicitor-General and that on the evidence it would be open to the Court to find that in terms of paragraph (b) Saul Uren had acquired his interest in good faith, for value, and without knowing or having good reason to believe that the property was tainted at the time he acquired his interest. Mr Matthews also observed that in any event s18(2) does not impose a mandatory requirement to refuse relief if the requirements of the subsection are not met. Rather refusal is discretionary.

[29] Now I turn to the Solicitor-General's case. As the Solicitor-General sees it, Saul Uren's application for relief is fundamentally flawed because Aaron Uren has not given any evidence. This means that Exhibit E, which is central to the application for relief, is hearsay and thereby inadmissible. Once Exhibit E is excluded Saul Uren is left without a case.

[30] Ms Toohey urged the Court to approach Saul Uren's claim with extreme caution. Factors relied on by her included: failure to mention the agreement of 6 August to Mr Dew; the three way split reflected in the first draft deed was incompatible with Saul Uren's claim that only he and his brother were to be the purchasers; Saul Uren's claim that he was taking over the whole mortgage and all the mortgage instalments is inconsistent with his evidence that he also helped his brother out with mortgage payments; and the fact that years later there was no signed agreement counts against there having been any agreement in the first place.

[31] With reference to the claim based on the Contracts Enforcement Act, Ms Toohey submitted that there is no prospect of a claim for a legal interest getting off the ground if Exhibit E is inadmissible. It should also be recorded, however, that Ms

Toohey responsibly conceded that if that document was admitted as evidence and the Court was prepared to place weight on it, the provisions of s2 of the Contracts Enforcement Act could probably be satisfied.

[32] As to the suggestion that there was part performance, Ms Toohey poses the question *"Performance of what?"* She notes that a trust was contemplated and contends that there was no agreement. In her submission there are far too many gaps and contradictions for part performance to be seriously considered as a mechanism for obtaining a legal interest in the property.

[33] Finally, with reference to Saul Uren's claim based on a constructive trust, Ms Toohey made a number of responses. She cited *Solicitor-General v Toman* (High Court, Wellington Registry, CIV 2001 485 116, 23 July 2004) as an example of an unsuccessful attempt to establish a constructive trust within a Proceeds of Crimes context. *Solicitor-General v Piper* [2004] DCR 22 was cited by Ms Toohey to illustrate the difference between an expectation of *an interest in an asset* which is capable of supporting a constructive trust, on the one hand, and a situation where there is simply *a personal obligation* to repay an advance, on the other. In her submission the best Saul Uren can hope for is the recognition of a personal obligation to repay advances which would not establish an interest in the Dismal Stream property, only an obligation to repay those advances.

[34] Ms Toohey also submitted that the first real drafting of the agreement did not occur until after Aaron Uren's arrest on 25 November 2004 which supported the view that Saul Uren in collaboration with his brother had concocted an arrangement to avoid the Dismal Stream property being forfeited. She also cautioned the Court about accepting Saul Uren's claims that he had done work on the property. Finally, some emphasis was placed on *Solicitor-General v de Bruin & Anor* (High Court, Auckland Registry, CIV 2002 404 003302, 28 May 2004) to support the proposition that if a constructive trust is established the Court must carefully explore the contributions that have been made to the property before determining the interest that should be recognised.

Determination

[35] Given that the payment into the solicitor's trust account was on 1 July 2003 and the offending did not begin until 14 July 2003, Dismal Stream could not have been purchased from the proceeds of the offending. But plainly the property was tainted for other reasons. Cocaine and cash were found on the property. It follows that the foundation has been laid for a forfeiture order and that the crucial issue is whether Saul Uren can establish an interest under s18. The onus rests on him to establish such an interest on the balance of probabilities.

[36] In my view s18(2) can be quickly eliminated from consideration. As Mr Matthews correctly observed, the Solicitor-General does not rely on paragraph (a). And in terms of paragraph (b), having read the heard the evidence I am satisfied that if a legal or equitable interest can be established it would have been acquired in good faith for value, and without knowing or having reason to believe that the property was tainted property at the time of the acquisition. I accept Saul Uren's evidence that he did not know about his brother's offending and that he did not involve himself in his brother's affairs.

[37] Can Saul Uren establish a legal or equitable interest in Dismal Stream? Exhibit E is the logical starting point. If that document is admissible it must provide a powerful piece of evidence that Saul Uren is entitled to a legal interest on the strength of an agreement that satisfies the requirements of s2 of the Contracts Enforcement Act. In this respect I accept Mr Matthews' analysis which was not seriously challenged by Ms Toohey. The problem is, however, that I do not see how I can avoid recognising that in the absence of evidence from Aaron Uren, Exhibit E is nothing more than blatant hearsay. There is no authentication of the signature or authorship of the document. Moreover, there was no obligation on the Solicitor-General to call Aaron Uren. Any such obligation clearly rested on Saul Uren. It follows that there is no foundation for the claim to a legal interest based on Exhibit E.

[38] Now I turn to the possibility that there is part performance. This brings me face to face with the issue of Saul Uren's credibility. If his evidence concerning part

performance is rejected then there is not the slightest chance that he can establish part performance. Nor could he establish a constructive trust. Overnight I have reflected on his credibility, particularly the following aspects.

[39] First, the apparent contradiction between Saul Uren's evidence that he and his brother had an agreement that they were to have undivided half shares in the property, on the one hand, and the fact that the first instructions to Dew & Co involved a three way arrangement. Contrary to Ms Toohey's submission, the documentary record indicates to me that Mr Rooke was in fact on the scene for a relatively brief period. He must have been out of the arrangement by the time Aaron Uren sent his e-mail to the legal executive at Dew & Co on 16 February because the e-mail refers to Aaron running the agreement past his brother, there being no mention of Mr Rooke. This interpretation is supported by the fact that in the e-mail he points out an error in the drafting which still remained in the third draft. If the e-mail had been sent before the second or third drafts the error would surely have been corrected. The fact that Mr Rooke was only in the arrangement for a short time is consistent with Saul Uren's evidence which tends to boost his credibility.

[40] Second, the apparent contradiction between Saul Uren accepting an obligation to pay the whole of the mortgage instalments and his evidence indicating that he assisted his brother to pay his contributions. This is puzzling. But I suspect that the answer lies in an understanding that Aaron Uren would continue paying his half share until a formal agreement was signed. Again I do not read much significance into the alleged contradiction.

[41] Third, the fact that an agreement has not been signed. Naturally this must be assessed in context. Obviously it is not uncommon for there to be an element of informality where siblings are involved, and this case is no exception. Indeed, the fact that the finalisation of the deed drifted probably supports the interpretation that the parties were not attempting to circumvent a forfeiture order. By the end of 2004 there seems to have been agreement about the essential terms of the deed. Saul Uren said that after his brother was arrested he tried to get the agreement signed but was unsuccessful. Given the restraining order, that is hardly surprising. So I do not read too much into the fact that the deed was not signed.

[42] Fourth, and I consider this to be a highly significant factor, it has been verified by bank statements, first, that a joint account was opened for the brothers and, second, that over a very lengthy period Saul Uren made payments into that account. Having pondered this matter, I have concluded that those actions simply do not make sense unless there was some underlying arrangement along the lines asserted by Saul Uren. In particular, it would be an extraordinarily odd way for Saul to make advances to his brother.

[43] Finally, my assessment of Saul Uren in the witness box. He is certainly not sophisticated, but his responses to cross-examination did not leave me with the impression that he was being shifty or evasive. I believed him and I am prepared to accept his evidence.

[44] Given Saul Uren's evidence I am satisfied that his part performance in this case would prompt a Court of equity to order specific performance. This is particularly so when there is no opposition from the other owner. In this respect I observe that the Solicitor-General's opposition is not equivalent to opposition from Aaron Uren. As I have already observed, there was no obligation on the Solicitor-General to call Aaron Uren because their interests are not the same and this carries through to the issue of part performance. It follows that Saul Uren has established a legal interest in the property.

[45] In case I am wrong in that conclusion I should add that I would reach the same result by applying constructive trust principles. In terms of the four matters mentioned by Tipping J in *Lankow v Rose* I am able to reach the following conclusions. First, Saul Uren made direct or indirect contributions to Dismal Stream. He made improvements to the property, admittedly some of those before he acquired an interest. He also contributed $10,000 by way of the motorcycle plus the mortgage instalments. Finally, and most importantly, he accepted responsibility for the principal sum under the mortgage. Second, there was an expectation of an interest. That was why an agreement was being drafted by Dew & Co. It is clearly not a situation like *Solicitor-General v Piper* where there was only a personal obligation. The fact that the drafting technique used by Dew & was based on a trust does not alter my view because the ultimate intention was for Saul to have an equal

share in the property. In all the circumstances the expectation of an interest in the property was reasonable. The price being paid by Saul Uren was $37,000 which, given the other transactions that preceded it, was certainly not an under value. Fourth, in all the circumstances Aaron Uren should reasonably be expected to yield an interest to Saul. Indeed, that was the whole thrust of the draft deed drawn by Dew & Co and it would be unconscionable for this Court to deny Saul Uren that interest.

[46] In my view the two other cases cited by Ms Toohey are distinguishable. *Solicitor-General v Toman* involved an entirely different situation in which Gendall J rejected the claimant's evidence that there was a contribution. That can be contrasted with this case where I have accepted the claimant's evidence. *Solicitor-General v de Bruin & Anor* is also well removed from the situation under consideration. In that case the property was purchased for $435,000. The party opposing forfeiture had only contributed $15,000, the balance having been contributed by the offender from the proceeds of his drug activities. Moreover, that case fell to be determined under s15(1) of the Act.

[47] The next step is to declare the nature, extent and value of Saul Uren's interest in terms of s18(1)(c). In my view he has an undivided half share in the Dismal Stream property with such half share being charged with the mortgage in favour of ANZ. Adopting a purely pragmatic approach I also think that the agreement to purchase the half interest must have included the chattels. Thus both the parties are entitled to a half share of the chattels. As at 1 September 2002 the rating value was $54,000. It is unnecessary to declare the current market value. According to Detective Bell's affidavit sworn on 10 January 2005 the ANZ mortgage stood at $21,579 at that time.

[48] Finally, it is necessary to determine the order that should be made in terms of s18(1)(d). It seems to me that there should be an order directing that Saul Uren's interest is to be excluded from the forfeiture order.

Outcome

[49] The application for forfeiture of Mrs Uren's *"Head Study"* painting is dismissed. Subject to the following there will be an order for the forfeiture of:

- an undivided half share in Dismal Stream
- Toyota Hi-Lux
- bonus bonds
- cash (New Zealand and United States currency)
- painting *"Ray of Light"*.

For the avoidance of doubt this order does not include Saul Uren's undivided half share which is, however, charged with the mortgage registered against the property.

[50] The Dismal Stream property is to remain under the control of the Official Assignee. If Saul Uren wishes to make application to the Court for the matter to proceed other than by way of open sale he will need to do so within one month from today.

Costs

[51] Costs to the applicants for relief in the sum of $9,500 plus disbursements of $2,110. Such costs are to be paid out of the proceeds of sale of the forfeited share of the Dismal Stream property.

Solicitors:	Crown Solicitor, Christchurch White Fox & Jones, Christchurch