

PARTIES:	DIRECTOR OF PUBLIC PROSECUTIONS
	v
	MATTIUZZO, Silvio David
	AND
	MATTIUZZO, Silvio David
	AND
	ADAMS, Lisa Louisa
	v
	DIRECTOR OF PUBLIC POSECUTIONS
	AND
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	141 of 2009 (20931671)
DELIVERED:	11 AUGUST 2011
HEARING DATES:	25 & 26 JULY 2011
JUDGMENT OF:	RILEY CJ

CATCHWORDS:

STATUTORY INTERPRETATION – *Criminal Property Forfeiture Act 2002* – whether legislative scope of the Act is limited by the objective – whether wider operation of legislation is apparent from other provisions of the Act.

CRIMINAL PROPERTY FORFEITURE – whether property was crime-used property – meaning of “crime-used” property – residential property had a substantial connection with commission of forfeiture offence – objection by innocent party – de facto relationship between objectors.

REPRESENTATION:

IN THE MATTER OF THE *Criminal Property Forfeiture Act* AND
IN THE MATTER OF **SILVIO DAVID MATTIUZZO**

Counsel:

Applicant: R Jobson
Respondent: G Phelps

Solicitors:

Applicant: Solicitor for the Northern Territory
Respondent: Ward Keller Lawyers

IN THE MATTER OF **OBJECTION PROCEEDINGS PURSUANT TO
Section 59 of the *Criminal Property Forfeiture Act***

Counsel:

Objectors: G Phelps
First Respondent: R Jobson
Second Respondent: R Jobson

Solicitors:

Objectors: Ward Keller Lawyers
First Respondent: Solicitor for the Northern Territory
Second Respondent: Solicitor for the Northern Territory

Judgment category classification: B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

DPP v Mattiuzzo [2011] NTSC 60
No 141 of 2009 (20931671)

IN THE MATTER OF
the *Criminal Property Forfeiture Act*
AND
IN THE MATTER OF
SILVIO DAVID MATTIUZZO

BETWEEN:

**DIRECTOR OF PUBLIC
PROSECUTIONS**
Applicant

AND:

SILVIO DAVID MATTIUZZO
Respondent

AND

IN THE MATTER OF
**OBJECTION PROCEEDINGS
PURSUANT to Section 59 of the
*Criminal Property Forfeiture Act***

BETWEEN

SILVIO DAVID MATTIUZZO
Objector

AND

LISA LOUISA ADAMS
Objector

AND

**DIRECTOR OF PUBLIC
PROSECUTIONS**

First Respondent

AND

**NORTHERN TERRITORY OF
AUSTRALIA**

Second Respondent

CORAM: RILEY CJ

REASONS FOR JUDGMENT

(Delivered 11 August 2011)

- [1] On 10 May 2010 Silvio David Mattiuzzo was convicted of four counts of possession and supply of cannabis and was sentenced to imprisonment for a term of two years suspended after two months. He was also fined \$500.
- [2] On 1 October 2009, prior to the entry of the convictions, a restraining order had been made by consent in the Supreme Court, pursuant to sections 41(2), 43(2)(a) and 51(1) of the *Criminal Property Forfeiture Act*, in relation to a residential property in Woodleigh Gardens (sometimes referred to as Leanyer) registered in the name of Mr Mattiuzzo. The basis of the order was that the residential property was crime-used property for the purposes of s 11 of the Act. Other items of property were also made the subject of a restraining order, but no issue remains in relation to those items.

The Objections

- [3] Mr Mattiuzo and Lisa Louisa Adams have each lodged objections to the restraining order. The objection of Mr Mattiuzo was dated 15 April 2011 and included the following grounds relevant for present purposes:
- (a) the restraining order was invalid in failing to set out each ground the Court finds is a ground on which the order is made;
 - (b) the objective of the Act, as described in s 3 of the Act, would not be served in the prosecution of the forfeiture of the property because the order did not relate to proceeds of crime or to unjust enrichment of persons involved in criminal activities;
 - (c) the residential property was not used in the commission or facilitation of a forfeiture offence and was not used for the storage of property acquired unlawfully in the commission of a forfeiture offence;
 - (d) in equity, were the residential property to be forfeited pursuant to s 96 of the Act, there would result unfairness and injustice in the administration of the powers conferred on the Court; and
 - (e) the power to restrain crime-used property under the Act and the power to forfeit crime-used property are beyond the legislative powers of the Northern Territory.
- [4] Ms Adams lodged an objection on 29 September 2009 claiming that her interest in the property was not crime-used. She lodged an amended

objection in July 2011 in which she repeated and adopted the grounds contained in the objection of Mr Mattiuzzo. In addition she sought to have the restraining order set aside on the grounds contained in s 63(1)(a), (b) and (c) of the Act.

- [5] The matter is now before the Court for the hearing of the objections. At the time of the hearing counsel for both objectors did not press the claim that the restraining order was invalid for failing to set out each ground in compliance with s 45(1)(b) of the Act. Further, it was agreed between the parties that it was premature to consider the claim to equitable relief, referred to in para 3(d) above, as the making of a forfeiture order pursuant to s 96 of the Act could not be pursued until the objection proceedings were complete.¹ The parties also agreed that a consideration of whether the relevant forfeiture provisions of the Act went beyond the legislative powers of the Northern Territory should not be undertaken at this time and should be deferred until the same issue had been considered by the Court of Appeal in the matter of *DPP v Dickfoss*.²

The offending

- [6] The offending of Mr Mattiuzzo came to light when police executed a search warrant at his business premises in Winnellie. At those premises police located a quantity of cannabis. Later on the same day police executed a warrant at the residential property in Woodleigh Gardens

¹ Section 95(3) of the *Criminal Property Forfeiture Act*.

² *DPP v Dickfoss* [2011] NTSC 04.

registered in the name of Mr Mattiuzzo. There they discovered a hydroponic grow room which, along with an ensuite bathroom, was situated off the master bedroom. In the ensuite bathroom police located four cannabis plants growing under grow lights. A total of 2497.9 g of cannabis plant material was located at the premises.

- [7] The Crown facts, accepted at the hearing, included a statement that the "offender commenced supplying cannabis in or about May 2009 to persons unknown" and that "he did so for commercial gain". In a record of interview Mr Mattiuzzo advised that he had engaged in the enterprise of growing cannabis at his residence in order to sell it. He commenced operations in January/February 2009 "so I could keep the business going through the hard times". His evidence was that the first crop failed and, in relation to the second crop, he had managed to "barter some and gave some to a friend as a birthday present". His claim that he had not actually sold any cannabis was not challenged. The balance of the cannabis was seized by police.

The relationship between the objectors

- [8] Ms Adams and Mr Mattiuzzo have been in a relationship for a period of some 11 years. They have a child who is aged four years. The relationship was described as "difficult" and the objectors have lived apart for significant periods of time. At the time of the offending Ms Adams had lived at the Woodleigh Gardens residence for about a month. She occupied

a room which she shared with the child. Her evidence was that Mr Mattiuzzo lived separately and kept his bedroom locked. There was “no access to his half of the house”. There was no suggestion that Ms Adams was aware of the offending and the DPP did not dispute that she was "an innocent party" for the purposes of the *Criminal Property Forfeiture Act*.

[9] At the time of the hearing Ms Adams lived separately from Mr Mattiuzzo in rented premises in Jingili. Whilst living apart the parties said they were endeavouring to reconcile.

[10] The restrained residential property was purchased in the name of Mr Mattiuzzo in 2004. His mother provided \$110,000 to assist in the purchase. The balance was borrowed from a bank. Ms Adams did not contribute to the purchase price or to the mortgage repayments. When she lived in the house she assisted with domestic chores and she looked after the child of the relationship. She “sometimes” and “infrequently” helped out with the business by answering the phone or running errands but was never paid for so doing. She was not employed by the business. When she was not living at the house she was not maintained by Mr Mattiuzzo and was generally in receipt of payments from Centrelink.

The objective of the *Criminal Property Forfeiture Act*

[11] Counsel for the objectors submitted that the present proceedings fell outside the legislative scope of the *Criminal Property Forfeiture Act*.

Reliance was placed on s 3 of the Act which is in the following terms:

The objective of this Act is to target the proceeds of crime in general and drug-related crime in particular in order to prevent the unjust enrichment of persons involved in criminal activities.

[12] It was argued that, because the objective of the Act is expressed to be specifically targeted at property possessed as the proceeds of crime or as a consequence of unjust enrichment from criminal activity, its operation is limited to property which fits that description.

[13] It was submitted that s 3 of the Act created a "threshold" in relation to all provisions of the Act and those provisions were to be invoked only when the prosecution of the matter targeted the proceeds of crime; and to prevent the unjust enrichment of persons involved in criminal activities. It was submitted that the threshold was not crossed in the current matter. Counsel argued that the property, the subject of the restraining order, was validly held by the objectors through "legal and bona fide acquisition ... in the absence of criminal profits" and could not be the subject of a forfeiture application.

[14] Whilst it is arguable that the objective identified in s 3 of the Act is narrowly described, reference to the whole of the Act makes it clear that

the purpose of the legislature extended beyond such a narrow focus.³ The approach to objects clauses has been held to be much the same as the approach to preambles in legislation.⁴ Such a clause cannot cut down the plain and unambiguous meaning of a provision if that meaning in its textual and contextual surroundings is clear.⁵

[15] The intended wider operation of the legislation is readily apparent from other provisions of the Act. For example, s 10 is in the following terms:

(2) The property (real or personal) of a person who is involved or taken to be involved in criminal activities is forfeit to the Territory to the extent provided in this Act to compensate the Territory community for the costs of deterring, detecting and dealing with the criminal activities.

(3) Crime-used or crime-derived property (real or personal) is forfeit to the Territory to deter criminal activity and prevent the unjust enrichment of persons involved in criminal activities.

(4) For the purposes of this Act, a person is taken to be involved in criminal activities if:

(a) the person is declared under section 36A of the *Misuse of Drugs Act* to be a drug trafficker;

(b) an unexplained wealth declaration or a criminal benefit declaration is made in relation to the person; or

(c) the person is found guilty of a forfeiture offence.

³ *Director of Public Prosecutions v Green* [2010] NTSC 16 at [24].

⁴ See discussion in DC Pearce and RS Geddes: *Statutory Interpretation in Australia* (seventh edition) at par 4.49.

⁵ *S v ACC* (2005) 144 FCR 431 at 439; *Re an Application under the Aboriginal and Torres Strait Islander Commission Act 1989*; *Re Yanner* (2000) 100 FCR 551 at 586-587; see also *Wacando v Commonwealth* (1981) 148 CLR 1 at 15-16 and 23.

[16] The Act provides for the forfeiture of two classes of property namely crime-used property and crime-derived property. In relation to crime-used property there is no suggestion in the legislation that such property will only be liable to forfeiture if ownership resulted from the proceeds of crime or was a part of the unjust enrichment of a person involved in criminal activities. It is sufficient if the property concerned meets the statutory definition of crime-used property. The submission made on behalf of the objectors cannot be sustained.

Crime-used property

[17] Section 63(1)(c) of the Act provides that, at the objection stage, the burden of proving that property was not crime-used property rests on the objectors. It was submitted on their behalf that it was more likely than not that the residential property was not crime-used for the purposes of the Act. The nature of crime-used property is described in s 11 of the Act in the following terms:

(1) For the purposes of this Act, property is crime-used if:

(a) the property is or was used, or intended for use, directly or indirectly, in or in connection with the commission of a forfeiture offence or in or in connection with facilitating the commission of a forfeiture offence;

(b) the property is or was used for storing property that was acquired unlawfully in the course of the commission of a forfeiture offence; or

(c) an act or omission was done, omitted to be done or facilitated in or on the property in connection with the commission of a forfeiture offence.

(2) Without limiting subsection (1), property described in that subsection is crime-used whether or not:

- (a) the property is also used, or intended or able to be used, for another purpose;
- (b) any person who used or intended to use the property as mentioned in subsection (1) has been identified;
- (c) any person who did or omitted to do anything that constitutes all or part of the relevant forfeiture offence has been identified; or
- (d) any person has been charged with or convicted of the relevant forfeiture offence.

[18] The nature of crime-used property has been considered by courts in this jurisdiction and in other jurisdictions with similar legislation.

[19] In *Director of Public Prosecutions v Green*⁶ the Full Court of the Supreme Court of the Northern Territory held that the meaning of "property" within the Act depends upon the context in which it is found. The Court held that in relation to s 11(1)(a) of the Act the reference is to the physical land. Whether or not it may also encompass an interest in the land was not resolved.

[20] Section 146(1) of the *Criminal Property Confiscation Act (WA)* is in terms which are *in pari materia* to s 11(1)(a) and (b) of the Northern Territory Act. The Western Australian Court of Appeal considered the provision in *Director of Public Prosecutions v White*.⁷ McLure P, with whom Owen and Buss JJA agreed, expressed doubt that deliberate access over or presence on land in order to commit a confiscation offence was, by itself,

⁶ *Director of Public Prosecutions v Green* [2010] NTSC 16 at [24].

⁷ *DPP (WA) v White* (2010) 199 A Crim R 448.

sufficient to bring the conduct within the relevant provision.⁸ Her Honour observed that the criminal activity must go beyond mere physical access to or presence on land. The involvement of the land must be more than merely incidental to the unlawful activity. An appeal to the High Court was unsuccessful.⁹

[21] In the present case the DPP identified the offences of which Mr Mattiuzzo was convicted, being the possession and supply of cannabis, along with the admitted fact that he was cultivating cannabis at the residential premises, as being the relevant forfeiture offences. Although Mr Mattiuzzo was not convicted of an offence of cultivating cannabis, nevertheless s 10(5)(c) of the Act provides that property is liable to forfeiture whether or not any person has been charged with, or found guilty of, the relevant forfeiture offence. The right of the DPP to rely on the identified offending as relevant forfeiture offences was not disputed in these proceedings.

Was the residence "crime-used property"?

[22] The evidence in relation to the so-called grow room was that this room had been constructed as an addition to the existing residence. It was located off the main bedroom and access to it was obtained through sliding glass doors from that bedroom. The grow room was built under an existing verandah and had no external windows or doors. Mr Mattiuzzo stated that the room was originally a study/office/studio which he had constructed for

⁸ *DPP(WA) v White* (2010) 199 A Crim R 448 at [29] – [31].

⁹ *White v Director of Public Prosecutions (WA)* [2011] HCA 20.

the use of Ms Adams. Mr Mattiuzzo converted it to a grow room when he and Ms Adams separated. When she returned she was not permitted to enter that part of the house and the bedroom was kept locked.

[23] The grow room was connected to the same power and water supply as the remainder of the house and it had its own air-conditioner. The air-conditioner was used in the growing of cannabis. Within the room was a substantial amount of equipment used for the purpose of hydroponically cultivating cannabis. The entrance to the room was covered with black plastic. The inside walls of the room were lined with white plastic. Lines were stretched from wall-to-wall and photographs admitted into evidence showed cannabis hanging from some of the lines for the purposes of drying. Transformers, power fittings, chemicals and other items were stored in the room for use in the growing of cannabis. Lighting had been set up with reflectors hanging from the ceiling. In the ensuite bathroom, adjacent to the main bedroom, cannabis plants were located in a vanity unit and situated under a growing light. Perlite, plastic and plastic sheeting were located in a wardrobe in another bedroom.

[24] Counsel for the objectors submitted that the residential property was not property used in the offending but rather that description was applicable only to “specific property” such as the equipment found in the grow room. It was submitted that any connection between the criminal undertaking and the residential property was incidental and not instrumental to any offending. Further, it was submitted that only parts of the residential

property were used in the offending and, therefore, the whole residential property should not be the subject of a forfeiture order.

[25] In my opinion the residential property does fit the statutory requirements of crime-used property in the circumstances of this case. The evidence placed before the Court revealed that the room had been especially adapted for the purpose of growing cannabis. The walls and ceiling had been lined with plastic, a special lighting system had been installed and drying lines had been erected from one wall to another. The room was connected to the mains power used for the remainder of the house. Similarly, the water supply was the same as was used for the rest of the house. The air-conditioning unit was used in the growing process. The room provided both privacy and security for the illegal activity being undertaken. Mr Mattiuzzo exercised strict control over access to the room and, upon the return of Ms Adams to the premises, did so by locking the exterior bedroom door.

[26] The residential property had a real and substantial connection with the commission of the offence of cultivating cannabis. It was not merely an incidental or tenuous involvement but rather was directly related to the ability of the offender to carry out the offence. It was not simply a place where the crime occurred. It was used to facilitate the offending. The property was used as a tool in the commission of the crime. The grow room was but part of the property, but it was a significant part of the property, and the use of it to cultivate cannabis was over a significant

period of time. The argument that the property was mainly a residence and should therefore not be subject to forfeiture is met by the terms of s 11(2)(a) of the Act which provides that property may be crime-used even if it is also used for another purpose.

[27] This was not a case where the crime could have been committed anywhere. The grow room provided a private and suitable location and facility which permitted the carrying out of the crime. There was a strong nexus between the property and the offending. There was a substantial connection between the two.

[28] Counsel for the objectors submitted that it is not sufficient for part of the property to be used for the purposes of crime but rather that it was necessary that the whole of the property be so used. I do not accept that submission. This was not a situation where the use of the premises involved a trifling or insignificant part of the property. The grow room was a significant part of the entire property and use was made of other rooms for storage of items related to the process of cultivation and of some of the cannabis so produced.

[29] By reference to the requirements of s 11(1)(a) of the Act it can be seen that the property was used directly in connection with the commission of the forfeiture offence of cultivating cannabis. In relation to s 11(1)(b) of the Act the residential property was also used for housing the cannabis plants

under cultivation and storing the cannabis that was acquired unlawfully from the cultivation.

[30] Finally, in relation to s 11(1)(c) of the Act, the relevant physical acts in relation to the forfeiture offences of cultivation, possession and supply of cannabis were carried out on the residential property. The question is whether or not there was a direct and immediate connection with the property, albeit not a substantial connection.¹⁰ There was such a connection in this case.

[31] In my opinion the property was crime-used in accordance with each of the subsections of s 11 of the Act.

The grounds of objection

[32] The grounds available for objection in relation to a restraining order imposed regarding crime-used property are found in s 63 of the Act. In order to succeed in an application to set aside a restraining order, the objector must establish at least one of the sets of requirements referred to in s 63(1)(a), (b) or (c) of the Act.

[33] Section 63(1) of the Act is in the following terms:

(1) The court that is hearing an objection to the restraint of property on the ground that the property is crime-used may set aside the restraining order if:

(a) the objector establishes that:

¹⁰ *Director of Public Prosecutions v Dikfoss* [2011] NTSC 04 at [85].

(i) the objector is a spouse, de facto partner or dependant of an owner of the property;

(ii) the objector is an innocent party or is less than 18 years old;

(iii) the objector was usually resident on the property at the time the relevant forfeiture offence was committed or is most likely to have been committed;

(iv) the objector was usually resident on the property at the time the objection was filed;

(v) the objector has no other residence at the time of hearing the objection;

(vi) the objector would suffer undue hardship if the property is forfeited; and

(vii) it is not practicable to make adequate provision for the objector by some other means;

(b) the objector establishes that:

(i) the objector is the owner of the property or is one of 2 or more owners of the property;

(ii) the property is not effectively controlled by a person who made criminal use of the property;

(iii) the objector is an innocent party in relation to the property; and

(iv) each other owner (if there are more than one) is an innocent party in relation to the property; or

(c) the objector establishes that it is more likely than not that the property is not crime-used.

[34] In relation to her notice of objection Ms Adams sought to have the restraining order set aside pursuant to s 63(1)(a) and also s 63(1)(b) of the Act. The DPP submitted that those provisions contained distinct classes of objections and the objector was not entitled to proceed under both. It was submitted that s 63(1)(a) was confined to dependants of the owner of the alleged crime-used property and that s 63(1)(b) was confined to the owners of the property. Whilst that may be so I do not accept a construction of the section that precludes an objector seeking relief under each of the three available provisions.

[35] There is nothing in the section to suggest that an objector cannot seek to bring him or herself within one or other of the classes of objection without electing between them. Where an objection is pursued the question to be considered by the court is whether the objector has established the factors that are contained in one or more of the classes of objection, whether it be that provided for in s 63 (1)(a), (b) or (c), so as to enable an order setting aside a restraining order to be made. If one class of objection is established the restraining order will be set aside.

[36] If the objector fails in relation to an objection under s 63(1)(b) relief may still be available by operation of subsections 63(2) – (4) of the Act which provide:

(2) If the objector fails to establish for the purposes of subsection (1)(b) that each other owner is an innocent party, the court that is hearing the objection may:

(a) order that, when the property is sold after forfeiture, the objector is to be paid an amount from the proceeds of the sale that is in proportion to the objector's share of the property; or

(b) set aside the restraining order in relation to the property if it also orders the objector to pay to the Territory the value of the share of the property that the court finds is attributable to the owner or owners who are not established to be innocent parties.

(3) In an order under subsection (2), the court must specify:

(a) the proportion that it finds to be the objector's share of the property; and

(b) the proportion that it finds to be the share of any owner who is not established to be an innocent party.

(4) On application by the DPP or an owner of the property, the court that made a restraining order on the ground that the relevant property is crime-used may set the order aside if the court also orders the objector to pay to the Territory the value of the property.

[37] It is to be noted that the matters to be established by an objector in support of an objection under s 63(1)(a) are conjunctive, each of the seven criterion must be established. The same observation applies to the matters referred to in s 63(1)(b).

The objection of Mr Mattiuzzo

[38] Mr Mattiuzzo is not an innocent party and for that reason cannot bring himself within s 63(1)(a) or (b). Further, for the reasons set out above, it has not been established that it is more likely than not that the property

was not crime-used. Mr Mattiuzzo has not established a basis for setting aside the restraining order pursuant to the terms of s 63 of the Act.

The objection of Ms Adams

[39] Ms Adams argued additional grounds of objection beyond those discussed above in relation to Mr Mattiuzzo. In my opinion Ms Adams has not satisfied any of the classes of objection.

(a) Section 63(1)(a) of the Act

[40] In relation to the objection under s 63(1)(a) of the Act, the evidence reveals that, at the time of hearing the objection, she had another residence. She did not establish that she had no other residence at the time.¹¹ It was submitted on her behalf that she did not “own” a residence. However, the issue is not one of ownership but rather whether she “has no other residence.” In this case she admitted she had the rented residence at Jingili which she then occupied with her children.

[41] In addition, the circumstances of Ms Adams at the time of the hearing made it plain that it was practicable to make adequate provision for her by some other means. She was living separately and apart from Mr Mattiuzzo in accommodation which was suitable for her purposes. Nothing was identified which would lead to a conclusion that it was not practicable to make adequate provision for her by other means.¹²

¹¹ Section 63(1)(a)(v) of the Act.

¹² Section 63(1)(a)(vii) of the Act.

[42] Finally, it is necessary to consider whether Ms Adams established that she would suffer undue hardship if the property was forfeited.¹³ The expression "undue hardship" is not defined in the Act. The expression has been said to require a judgement about the impact of confiscation upon the innocent objector in the particular circumstances of the case.¹⁴ It must be remembered that, of necessity, the Act will cause a measure of hardship in achieving its objectives. As was observed in *R v Lake*:

The provision for relief on that ground must not be so interpreted as to frustrate the achieving of the purpose of Parliament in enacting the exceptional provisions of the Act. Something more than ordinary hardship in the operation of the Act is therefore meant. Otherwise the Act would have, within it, the seeds of its own (in)effectiveness in every case.¹⁵

[43] In *BJF v The State of Western Australia* Murray J said:¹⁶

In the context of this legislation, an objector may be held to suffer undue hardship if the property is confiscated because that person would, more likely than not, suffer greater hardship or deprivation than would ordinarily flow from the confiscation, to a degree or of a kind that causes the court to conclude that such hardship should not be imposed on the objector.

[44] In my opinion Ms Adams has not established that she would suffer undue hardship of the kind described. She has not identified any hardship beyond the loss of the residence which may or may not have been occupied by her at some future time. She did not occupy the residence at the time of the

¹³ Section 63(1)(a)(vi) of the Act.

¹⁴ *BJF v The State of Western Australia* [2011] WASC 163 at [46].

¹⁵ *R v Lake* (1989) 44 A Crim R 63 at 66.

¹⁶ *BJF v The State of Western Australia* [2011] WASC 163 at [49].

hearing and she had satisfactory alternative accommodation which she then occupied and was entitled to continue to occupy.

(b) Section 63(1)(b) of the Act

[45] In relation to the objection under s 63(1)(b) of the Act the evidence does not establish that Ms Adams was an owner of the property. For the purposes of the Act an “owner” means a person who has a legal or equitable interest in the property.¹⁷ The registered owner of the property is Mr Mattiuzzo. He purchased the property with a loan of \$110,000 from his mother and a loan for the balance of the purchase price obtained from a bank. Ms Adams was not part of the financial arrangements. Mr Mattiuzzo made all payments in relation to the property and it is acknowledged that Ms Adams made no financial contribution.

[46] The submission made on behalf of Ms Adams was that she contributed to the relationship by acting as a homemaker, caring for the child of the relationship, providing comfort and support to Mr Mattiuzzo and, on infrequent and unidentified occasions, helping out in the business run by Mr Mattiuzzo. It was submitted that Ms Adams’ contributions, whilst non-financial, were "critical to the joint endeavour". It was contended that Ms Adams holds an equitable interest in the residential property in the form of a constructive trust. Reference was made to numerous authorities

¹⁷ S 5 *Criminal Property Forfeiture Act*.

dealing with the circumstances in which a constructive trust may be created.¹⁸

[47] The effect of the submission was that, in the circumstances of this case, equity would imply a trust in such circumstances because it would otherwise be unconscionable to allow Mr Mattiuzzo to retain sole legal and beneficial ownership of the residential property.

[48] Whilst it is clear that Ms Adams took primary responsibility for the care of the child, the evidence in support of the submission as to any other contribution was vague and unsatisfactory. The existence of the so called "joint endeavour" is not supported by any evidence of discussion or agreement between the objectors that in any way involved the residential property. This was not a case where the parties had pooled their resources in an endeavour to add to their material wealth for their mutual benefit. It seems likely the suggestion of a "joint endeavour" arose, for the first time, in the course of these proceedings prior to which there was no evidence of any suggestion that Ms Adams had or would obtain any interest of any kind in the residential property.

[49] It was acknowledged on behalf of Ms Adams that the relationship was "difficult" and featured many substantial periods of estrangement including periods where both objectors "considered that their personal relationship

¹⁸ For example *Lloyd v Tedesco* (2002) 25 WAR 360; *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Green v Green* (1989) 17 NSWLR 343; *Willis v Western Australia* [No3] [2010] WASCA 56.

had ended". During periods of separation Ms Adams maintained her own premises and was supported by payments from Centrelink.

[50] Observations made by Murray J in *Lloyd v Tedesco*¹⁹ are pertinent to this case:

The guiding principle is unconscionability. In this, as in every such case of a failed de facto relationship, there must be more than simply the performance by the plaintiff of the valuable role of the provision of love, care and support. The provision of such a contribution will be sufficient only if it is related in some factual way to the generation of wealth as part of a joint effort or endeavour to provide for the parties mutual material welfare and security. That need not, of course, be the only purpose of the provision of such assistance to the defendant, but it must be one of the material purposes because it is that which marks out the character of the joint endeavour as being one which will generate a claim, upon the failure of the relationship, without the fault of the plaintiff, to a share in the property created, acquired, maintained and improved during the course of the relationship.²⁰

[51] In the present case, and leaving aside the evidence of the objectors that, in any event, there was no failed relationship, in my opinion the evidence falls far short of establishing a joint endeavour of the necessary kind. Ms Adams provided love, care and support on occasions, but there was nothing in the evidence that would allow me to infer that her actions were related to the generation of wealth as a joint endeavour.

[52] Reference was made by counsel for Ms Adams to entitlements she may have under the *De Facto Relationships Act* (NT). As the DPP points out, proceedings in relation to the alteration of property interests in a de facto

¹⁹ *Lloyd v Tedesco* (2002) 25 WALR 360 at [5] to [46], Hasluck J agreed with Murray J; see also the judgment of Pullin J to the same effect.

²⁰ *Lloyd v Tedesco* (2002) 25 WALR 360 at [30].

relationship are now dealt with under the provisions of the *Family Law Act*. Whilst the Supreme Court of the Northern Territory continues to have jurisdiction to deal with such matters it does so pursuant to the provisions of the *Family Law Act*.²¹ Such applications proceed on the basis that a declaration may be made after the breakdown of a de facto relationship.²² In the present case the objectors maintain that their relationship has not broken down. The provisions of the *Family Law Act* do not apply.

[53] Ms Adams has not shown that she has a legal or equitable interest in the residential property. She is not an owner for the purposes of the *Criminal Property Forfeiture Act*.

[54] Even if Ms Adams was an owner for the purposes of the Act, she could not succeed under s 63(1)(b) because the residential property was effectively controlled by Mr Mattiuzzo, a person who made criminal use of the property, and he was not an “innocent party in relation to the property”.²³

(c) Section 63(1)(c) of the Act

[55] In relation to the objection under s 63(1)(c) of the Act, for the reasons addressed above, it has not been established that it is more likely than not that the property was not crime-used.

²¹ S 90RC of the *Family Law Act*.

²² S 90SM of the *Family Law Act*.

²³ s 63(1)(b)(ii) of the *Criminal Property Forfeiture Act*.

Conclusions

[56] In my opinion the residential property was crime-used property for the purposes of the *Criminal Property Forfeiture Act*.

[57] The objection of Mr Mattiuzzo must fail because he has not established that the property was not crime-used and, further, he has not established the necessary grounds of objection identified in s 63 (a) or (b) of the Act. The objection of Ms Adams must also fail because she has failed to bring herself within the ambit of the provisions of s 63 (1) of the Act and, further, I find that she was not an owner of the property for the purposes of the Act.

[58] I will hear the parties as to the orders that should be made and as to the future conduct of these proceedings.
