

CITATION: *Director of Public Prosecutions v Burrell & Ors* [2018] NTSC 34

PARTIES: DIRECTOR OF PUBLIC PROSECUTIONS

v

BURRELL, Michael Andrew

v

CAPPA, Camilla, BURRELL, Leroy & BURRELL, Bill Mick

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: CRIMINAL PROPERTY FORFEITURE ACT

FILE NO: 21651786 (No 111 of 2016)

DELIVERED ON: 18 May 2018

DELIVERED AT: DARWIN

HEARING DATES: 2 June 2017

JUDGMENT OF: BLOKLAND J

**CATCHWORDS:**

CRIMINAL PROPERTY FORFEITURE – drug offences – supplying cannabis from property – restraining order made over property – objection to forfeiture by innocent de facto and children – restraining order set aside under *Criminal Property Forfeiture Act* (NT), s 63(1)(a)

CRIMINAL PROPERTY FORFEITURE – whether objectors usually resident on the property – “usually resident” to be given ordinary meaning – objectors usually resident at property despite trial separation and spending weekdays at another property – de facto and respondent reconciled – *Criminal Property Forfeiture Act* (NT), s 63(1)(a)(iii)-(iv)

CRIMINAL PROPERTY FORFEITURE – whether objectors had no other residence – ownership irrelevant – objectors not required to search out other potential places of residence – not practicable for objectors to live long term at property owned by de facto’s son and respondent – objectors not in financial position to establish themselves elsewhere – objectors had no other residence – *Criminal Property Forfeiture Act* (NT), s 63(1)(a)(v)

CRIMINAL PROPERTY FORFEITURE – whether objectors would suffer undue hardship if property forfeited – “undue hardship” to be given ordinary meaning – must be beyond inevitable or ordinary hardship implicit in forfeiture – relief must not frustrate objectives of *Criminal Property Forfeiture Act* – factors in hardship test considered – particular circumstances of the case relevant – property is family home – extremely poor financial circumstances – child objectors’ significant mental health issues – objectors more likely than not to suffer greater hardship than ordinarily flows from forfeiture – *Criminal Property Forfeiture Act* (NT), s 63(1)(a)(vi)

CRIMINAL PROPERTY FORFEITURE – whether practicable to make adequate provision for objectors by other means – factors overlap with undue hardship and no other residence tests – not possible to make adequate provision – *Criminal Property Forfeiture Act* (NT), s 63(1)(a)(vii)

TRUSTS – alternative ground – whether de facto had equitable interest in property – whether de facto and respondent were in joint endeavour giving rise to common intention constructive trust on principles in *Muschinski v Dodds* (1985) 160 CLR 583 and *Baumgartner v Baumgartner* (1987) 164 CLR 187 – length and nature of relationship and significant financial contributions made by de facto founded joint endeavour with respondent – respondent’s acquisition of property prior to relationship commencement no bar to inferring constructive trust – constructive trust found – *Criminal Property Forfeiture Act* (NT), s 63(1)(b)(i)

CRIMINAL PROPERTY FORFEITURE – whether property not effectively controlled by respondent – full legal and beneficial ownership relevant but not determinative – property effectively controlled by respondent – alternative ground under *Criminal Property Forfeiture Act* (NT), s 63(1)(b) rejected

*Criminal Property Confiscation Bill 2000* (WA)

*Criminal Property Forfeiture Act* (NT)

*Misuse of Drugs Act* (NT)

*Police Administration Act* (NT)

*Baumgartner v Baumgartner* (1987) 164 CLR 187; *BJF v The State of Western Australia* [2011] WASC 163; *Connell v Lavender* (1991) 7 WAR 9; *Director of Public Prosecutions v Ali (No 2)* [2010] VSC 503; *Director of Public Prosecutions v Dickfoss* (2011) 28 NTLR 71; *Director of Public Prosecutions v Mattiuzzo* (2011) 29 NTLR 189; *Director of Public Prosecutions (WA) v White* [2010] WASCA 47; *Harrison v Commissioner of Police & Anor* (2012) 32 NTLR 84; *Muschinski v Dodds* (1985) 160 CLR 583; *R v Lake* (1989) 44 A Crim R 63; *The State of Western Australia v Bowers* [2009] WASC 136; *Willis v The State of Western Australia (No 3)* [2010] WASCA 56 referred to.

## **REPRESENTATION:**

### *Counsel:*

Applicant:	R Brebner
Respondent:	A Vasta QC, K Payne
Objectors:	A Vasta QC, K Payne

### *Solicitors:*

Applicant:	Solicitor for the Northern Territory
Respondent:	Simpliciter Legal Solutions
Objectors:	Simpliciter Legal Solutions

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

*Director of Public Prosecutions v Burrell & Ors* [2018] NTSC 34  
No. 21651786

BETWEEN:

**DIRECTOR OF PUBLIC  
PROSECUTIONS**  
Applicant

AND:

**MICHAEL ANDREW BURRELL**  
Respondent

AND:

**CAMILLA CAPP, LEROY BURRELL  
& BILL MICK BURRELL**  
Objectors

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 18 May 2018)

**Ruling on the Amended Notice of Objection**

**Background**

- [1] On 27 September 2016, Michael Burrell (at times referred to below as the respondent) entered pleas of guilty in this Court to two counts of supplying a dangerous drug, namely cannabis plant material, in a commercial quantity, contrary to ss 5(1) and (2)(b)(iii) of the *Misuse of Drugs Act*. The amount of

drugs supplied was 857 grams and 1417, grams for counts 1 and 2 respectively. The date of the offending for count 1 was on or about 29 February 2016 and for count 2, 19 May 2016.

- [2] On 4 October 2016, the respondent was sentenced to 2 years and 3 months imprisonment, suspended on the same date with an operational period of 2 years. The sentence was backdated to commence on 17 May 2016, the date he was arrested and remanded in custody. He spent just under 5 months in custody.<sup>1</sup>
- [3] In his record of interview following his arrest, the respondent admitted to having sold cannabis from his property, located at 70 Osbeck Road, Virginia (“the Osbeck property”).<sup>2</sup> This admission was included in the agreed facts tendered to the Court during the plea hearing.<sup>3</sup> The respondent had previously been convicted of one count of cultivating cannabis, one count of possessing cannabis and one count of supplying cannabis from the Osbeck property in 2006. An aggregate fine of \$1,000 was imposed.<sup>4</sup> At that time, his de facto wife, Ms Camilla Cappa, who is one of the objectors in this matter, was convicted as a co-offender.
- [4] On 17 May 2016, which was the same day as the search of the Osbeck property which resulted in the location of evidence that formed the basis of count 2 against the respondent, police conducted a search of 63 Affleck

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<sup>1</sup> Supplementary Affidavit of Kenneth Bradshaw, sworn 24 May 2017, Annexures KRBC and KRBD.

<sup>2</sup> Affidavit of Kenneth Bradshaw, sworn 18 October 2016, Annexure KB 4.

<sup>3</sup> Affidavit of Kenneth Bradshaw, sworn 18 October 2016, Annexure KB 6.

<sup>4</sup> Affidavit of Kenneth Bradshaw, sworn 18 October 2016, Annexure KB 1.

Road, owned by the respondent and Ms Cappa's adult son Nathan Cappa. As will be seen, Ms Cappa was staying at those premises at the time. Ms Cappa admitted ownership of 10 cannabis plants that were found by police during the search of 63 Affleck Road. She was not present for the search. She was dealt with by the imposition of fines for that offending.<sup>5</sup> Nathan Cappa was also charged with a number of drug-related matters as a result of the investigation and search of 63 Affleck Road on 17 May 2016.<sup>6</sup> He was dealt with by way of fines and an aggregate term of imprisonment for 28 days.<sup>7</sup>

- [5] On 4 November 2016, the Director of Public Prosecutions (the applicant) applied for a restraining order, pursuant to ss 41(2) and 43(2)(a) of the *Criminal Property Forfeiture Act* ("CPFA"), in relation to the Osbeck property, on the basis there were reasonable grounds for suspecting that the property was crime-used. A restraining order over the Osbeck property was granted by her Honour Justice Kelly on 29 November 2016.
- [6] It was not disputed in these proceedings that the Osbeck property was properly considered "crime-used". Section 11 of the *CPFA* provides property is crime-used if it was used, directly or indirectly, in connection with a forfeiture offence, was used for storing property acquired unlawfully, or an act was done on the property in connection with the commission of the forfeiture offence. With respect to count 1, the respondent supplied 857 grams of cannabis to another offender. The cannabis was packaged in 28 clip

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<sup>5</sup> Affidavit of Kenneth Bradshaw, sworn 24 May 2017 at [13], Annexures KRBF and KRGB.

<sup>6</sup> Affidavit of Kenneth Bradshaw, sworn 24 May 2017 at [12].

<sup>7</sup> Affidavit of Kenneth Bradshaw, sworn 24 May 2017, Annexure KBRE.

seal bags. When the Osbeck property was searched by police on 17 May 2016, the following items were found: 13 large clip seal bags each containing 28 grams of cannabis, totalling 364 grams, two cryovac bags containing 908 grams of cannabis, a further clip seal bag containing 5 grams of cannabis, five large clip seal bags containing a total of 140 grams of cannabis, \$4,300 cash in one location and \$255 cash in another location. As mentioned above, in a record of interview with police conducted on 17 May 2016, Michael Burrell made admissions to supplying the cannabis from the Osbeck property.<sup>8</sup> The relevant “forfeiture offences” for the purposes of s 6(a) of the *CPFA* were the two offences the respondent was convicted of and sentenced for on 4 October 2016. Both offences meet the requirements of s 6(a) of the *CPFA*, as the maximum penalty under the *Misuse of Drugs Act* is greater than imprisonment for two years, namely 14 years imprisonment.

- [7] The applicant has clearly established the Osbeck Road property is “crime-used” within the meaning of the *CPFA*.<sup>9</sup> The involvement of the land (the property) in the offending was more than merely incidental physical presence or access to the land.<sup>10</sup> The connection need not be substantial to establish that property is “crime-used”.<sup>11</sup>

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<sup>8</sup> Affidavit of Kenneth Bradshaw, sworn 18 October 2016, Annexure KB 4.

<sup>9</sup> Section 136(1) of the *CPFA* provides the proceedings are taken to be civil proceedings, therefore the civil onus applies.

<sup>10</sup> *Director of Public Prosecutions (WA) v White* [2010] WASCA 47; 199 A Crim R 448 discussed in *Director of Public Prosecutions v Dickfoss* [2011] NTSC 4, 28 NTLR 71.

<sup>11</sup> *Director of Public Prosecutions v Dickfoss* (2011) 28 NTLR 71; *Director of Public Prosecutions v Mattiuzzo* [2011] NTSC 60; 29 NTLR 189.

- [8] The respondent is the sole registered owner of the Osbeck property. The property is a one-hectare rural property comprising a residence, a separate dwelling described as a granny flat or donga, a workshop, and extensive gardens including a driveway, lawns, patio, garden beds and bushland.
- [9] On 23 January 2017, the respondent and three objectors, Camilla Cappa, Leroy Burrell and Bill Burrell, filed Notices of Objection with the Court, pursuant to s 59 of the *CPFA*. Leroy and Bill Burrell are the two dependent children of the respondent and Ms Cappa. Leroy Burrell was born on 7 March 2001 and was 16 years old at the time of the hearing. Bill Burrell was born 28 July 2003 and was 14 years old at the time of the hearing. The respondent withdrew his objection on 12 April 2017. An Amended Notice of Objection was filed on behalf of Ms Cappa, Leroy and Bill Burrell on 12 April 2017.

### **Grounds for the objections**

- [10] The objectors seek to have the restraining order set aside pursuant to s 63(1)(a) of the *CPFA*. Alternatively, Ms Cappa seeks to have it set aside pursuant to s 63(1)(b) of the *CPFA*. An objector may rely on all grounds under s 63, but need only establish one to succeed.<sup>12</sup> Section 63 provides as follows:

- (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:

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<sup>12</sup> *Director of Public Prosecutions v Mattiuzzo* (2011) 29 NTLR 189 at [34]-[35].

- (a) the objector establishes that:
  - (i) the objector is a spouse, de facto partner or dependant of an owner of the property; and
  - (ii) the objector is an innocent party or is less than 18 years old; and
  - (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; and
  - (iv) the objector was usually resident on the property at the time the objection was filed; and
  - (v) the objector has no other residence at the time of hearing the objection; and
  - (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; or
- (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; and
  - (ii) the property is not effectively controlled by a person who made criminal use of the property; and
  - (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.

(2) If the objector fails to establish for 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.
- (5) The court that is hearing the objection or application must assess the value of property:
- (a) For subsection (2)(b) – at the time of hearing the objection; and
  - (b) For subsection (4) – at the time of hearing the application;
- and must specify the assessed value in the order.

[11] For an objection to be upheld under s 63(1)(a), *all* enumerated factors must be established. For the purposes of s 63(1)(a), the applicant accepts that Ms Cappa is the de facto partner of the respondent and that the children are dependants, that Ms Cappa and the children are innocent parties, and that they were usually resident on the property at the time the objection was filed.

[12] The applicant relied principally on the Affidavit of Kenneth Bradshaw sworn 18 October 2016 and his Supplementary Affidavit sworn 24 May 2017.<sup>13</sup> An affidavit by Ms Cappa sworn 20 March 2017 in support of the objections was read. Ms Cappa was required by the applicant for cross-examination and consequently gave oral evidence at the hearing. The objectors also relied on the affidavit of Michael Andrew Burrell sworn on the 20 March 2017 and the affidavit of Annie Whybourne sworn 22 May 2017.

[13] At the commencement of the hearing, objection was taken to paragraph [10] of Kenneth Richard Bradshaw's supplementary affidavit of 24 May 2017 on the grounds it purported to implicate Ms Cappa in certain offending in 2011, in circumstances where it was all but conceded she was not involved. That paragraph relates to a search of the Osbeck property when a small amount of cannabis was found. Paragraph [10] states Ms Cappa admitted ownership of the cannabis, however, she was not charged. Her son Nathan Cappa was charged. In my view the portion objected to, together with other evidence, may be of some limited relevance to one issue. Counsel for the applicant submitted the evidence tended to show the child objectors had exposure to certain drug activities in the household, particularly in respect of their brother Nathan Cappa. In my view the evidence is admissible for that limited purpose as it is relevant to the circumstances that may inform

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<sup>13</sup> The applicant also relied on the affidavits of Justin Bentley affirmed 16 November 2016, Jeremy Paul McKinley sworn 3 April 2017 and Syndee Galati sworn 6 April 2017, however those affidavits are principally concerned with service.

considerations under ss 63(1)(a)(v)-(vii) of the *CPFA*. One aspect of the applicant's argument is that there is nothing to prevent the child objectors from residing at their brother's residence, notwithstanding their previous exposure to offending of this kind and given the overall circumstances they were brought up in. The search of the Osbeck property in 2011 does not impact on the question of whether Ms Cappa is an "innocent party" for the purposes of these proceedings.

[14] There is no dispute that Ms Cappa is the de facto partner of an owner of the Osbeck property, or that Leroy and Bill are dependants of an owner. The Court can readily find s 63(1)(a)(i) is satisfied in respect of all three of the objectors. There is no dispute that Ms Cappa is an "innocent party" in the terms of s 63(1)(a)(ii). An "innocent party" is defined by s 66 of *CPFA*:

Innocent party

- (1) A person is an innocent party in relation to crime-used property if:
  - (a) he or she did not know and had no reasonable grounds for suspecting:
    - (i) that the relevant forfeiture offence was being or would be committed; or
    - (ii) that the property was being or would be used in or in connection with the commission of a forfeiture offence; or
  - (b) he or she took all reasonable steps to prevent:
    - (i) the commission of the offence; or
    - (ii) the use of the property in or in connection with the commission of the offence; and the person was not

in any way involved in the commission of the relevant forfeiture offence.

- (1) A person who owns or effectively controls crime-used property is an innocent party in relation to the property if:
  - (a) the person did not acquire the property or its effective control before the time that the relevant forfeiture offence was committed or is likely to have been committed; and
  - (b) at the time of acquiring the property or its effective control, the person did not know and had no reasonable grounds for suspecting that the property was crime-used; and
  - (c) if the person acquired the property for valuable consideration – the consideration was lawfully acquired; and
  - (d) the person did not acquire the property or its effective control, whether by gift or for valuable consideration, with the intention of avoiding the operation of this Act.

[15] Leaving aside the applicant’s reasonable concession in this regard, the preponderance of the evidence leads clearly to the conclusion Ms Cappa was an innocent party in the terms of s 66 of the *CPFA*. It is the case that Ms Cappa had previously committed cannabis offences including those mentioned above. She also pleaded guilty to cannabis offences committed on 17 May 2016, but this offending was not of the same magnitude as the respondent’s offending and was not committed at the Osbeck property. The respondent’s offending was clearly of the type that attracts the operation of the *CPFA*. Section 63(1)(a)(ii) is well satisfied in respect of Ms Cappa. There is no dispute and it can be readily found Leroy and Bill are innocent parties and are less than 18 years old. However, a significant area of dispute is whether s 63(1)(a)(iii) is satisfied, namely that “the objector was usually

resident on the property at the time the relevant forfeiture offence was committed”.

**Usually resident on the property at the time the relevant forfeiture offence was committed**

[16] As indicated above, the relevant forfeiture offences were committed “on or about 29 February 2016” and “on 17 May 2016”. For these purposes it is important to note s 63(1)(a)(iii) uses the phrase “usually resident”. The term “usually resident” is not defined by the *CPFA*. I agree with the submission made on behalf of the objectors that the phrase is to be given its ordinary meaning. It does not require satisfaction for instance, that the objector has not briefly stayed elsewhere. It means no more and no less than “usually resident”. Some further background is required to consider the application of this provision.

[17] Mr Burrell and Ms Cappa commenced their relationship in approximately 1989 or 1990. Ms Cappa had a son, Nathan Cappa from a previous relationship. At that time he was two years old. Ms Cappa and Mr Burrell initially spent time living at each other’s residences but Ms Cappa states she moved permanently into the Osbeck property in 1999.<sup>14</sup>

[18] In February 2016 Mr Burrell and Ms Cappa began what they describe as a trial period of separation that lasted until June or July 2016. Ms Cappa,

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<sup>14</sup> Affidavit of Camilla Cappa, sworn 20 March 2017 at [8]; Affidavit of Michael Burrell, sworn 20 March 2017 at [10].

Leroy Burrell and Bill Burrell began living at the residence of Nathan Cappa at 63 Affleck Road (“the Affleck property”). The Affleck property is owned by Michael Burrell and Nathan Cappa as tenants in common. It is a 20-acre block of land that contains a 14 metre x 10 metre shed.<sup>15</sup> A portion of the shed contains a living space, which is 4.5 metres wide. On the ground level is a kitchen and open-plan lounge. Upstairs are two bedrooms and a toilet/shower.<sup>16</sup> The Supplementary Affidavit of Kenneth Bradshaw describes the shed having been “converted into a presentable modern living space”. The bedrooms are air conditioned and the upstairs bathroom is new and modern. The kitchen is described as “very presentable” and the open-plan living area connects to the shed area.<sup>17</sup> The overall impression I have formed from the descriptions given and the photos<sup>18</sup> is that the living area of the converted shed is of a reasonable standard, but due to its small size could not reasonably accommodate all objectors or the whole family for an extended period or be reasonably considered as a permanent residence for all three objectors.

[19] Ms Cappa states that during the trial period of separation, she and her two younger sons lived at the Affleck property during the week but returned to live at the Osbeck property most weekends. She said that the reasons for returning on weekends were twofold. Firstly, it gave Nathan Cappa and his de facto partner space in their own home. During the week, Nathan Cappa’s

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<sup>15</sup> Affidavit of Michael Burrell, sworn 20 March 2017 at [11]; Affidavit of Camilla Cappa sworn 20 March 2017 at [11], [12].

<sup>16</sup> Affidavit of Camilla Cappa, sworn 20 March 2017 at [13], T24.

<sup>17</sup> Supplementary Affidavit of Kenneth Richard Bradshaw, sworn 24 May 2017 at [14].

<sup>18</sup> Supplementary Affidavit of Kenneth Richard Bradshaw, sworn 24 May 2017, Annexure KRBH.

partner spent time at her own property in Palmerston and Nathan worked in Jabiru.<sup>19</sup> The effect of this was that Ms Cappa and her two younger sons were staying at the Affleck property by themselves Monday to Friday and returning to the Osbeck property on weekends when Nathan and his partner were at the Affleck property. The second reason for returning on weekends was that it gave herself, Leroy and Bill the opportunity to spend time with Mr Burrell. Ms Cappa states that she and Mr Burrell continued to share their bedroom on weekends.<sup>20</sup>

[20] Ms Cappa testified that the separation was never intended to be permanent. She said she “wanted Michael and the boys to stop drinking so much and I just was trying to make him appreciate what he had and without us being there he was improving”.<sup>21</sup> She did not remove her personal property from the Osbeck property and only took enough clothes for the week and would regularly do washing during the week. She did not take any furniture, nor did she take the boys’ toys or bikes. Mostly the boys only had their school uniforms with them. She did not redirect her mail to the Affleck property. She said she had full access to go back to the Osbeck property at any time.<sup>22</sup> She told the Court all her “stuff” was still at the Osbeck property.

[21] According to Ms Cappa, Michael Burrell’s arrest and time in custody led to them both realising they wanted to reconcile.<sup>23</sup> Prior to him being taken into

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<sup>19</sup> Affidavit of Camilla Cappa, sworn 20 March 2017 at [13].

<sup>20</sup> T19.

<sup>21</sup> T19.

<sup>22</sup> T19.

<sup>23</sup> T20.

custody, she said they were communicating. While he was in custody, Ms Cappa deposited money into his account each week. Receipts were tendered at the hearing in support of this.<sup>24</sup> She also visited him twice a week when he was in custody and Leroy and Bill would accompany her on one of those visits.<sup>25</sup> She was responsible for picking up his wallet and personal effects when he was first taken into custody. They spoke regularly on the phone.<sup>26</sup> On an application for enrolment into the prisoner telephone system, Ms Cappa's address was listed as the Osbeck property.<sup>27</sup>

[22] Michael Burrell participated in a record of interview with police on 17 May 2016 following his arrest. In the interview he said, "I get the boys on the weekends. ... Camilla lives with Nathan ... And the boys are there during the week."<sup>28</sup> At a later point in the interview, he said that "my wife has just left me and has gone to [the Affleck property], and I've basically said that she can have it",<sup>29</sup> meaning have his share of the property. He confirmed that Ms Cappa had been gone "since February".<sup>30</sup>

[23] The applicant relies on this part of the record of interview as evidence that at the time the relevant forfeiture offences were committed, Mr Burrell and Ms Cappa were separated and were making plans to negotiate a property settlement. It was pointed out that Mr Burrell did not mention during the

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<sup>24</sup> Exhibit 1.

<sup>25</sup> T20.

<sup>26</sup> T21.

<sup>27</sup> T22.

<sup>28</sup> Affidavit of Kenneth Bradshaw, sworn 18 October 2016, Annexure KB 4, 32-33.

<sup>29</sup> Affidavit of Kenneth Bradshaw, sworn 18 October 2016, Annexure KB 4, 34.

<sup>30</sup> Affidavit of Kenneth Bradshaw, sworn 18 October 2016, Annexure KB 4, 36.

record of interview that Ms Cappa attended the Osbeck property on the weekends with the children. He referred only to the children staying at the Osbeck property. Further, he did not say anything to indicate that the separation was a trial or was anything other than a permanent separation.

[24] The focus of the record of interview was not on Ms Cappa's and the respondent's relationship over the relevant period. The focus, for completely understandable reasons, was on the respondent's offending. It was while he was in custody that a more concrete decision appears to have been made that they would reconcile. In any event, the respondent's affidavit deals with the relevant matters of separation in more detail and is consistent with other evidence to the effect that this was a trial separation. At the time of the record of interview, he may have perceived the circumstances of the relationship in a different light. I would not give the record of interview, made principally for another purpose, significant weight on this particular issue. It cannot have greater weight than the sworn evidence directly on the subject. The weight to be given to it does not diminish the other evidence tending to show that Ms Cappa's ordinary place of residence was the Osbeck property. She had lived there for a very lengthy period and it is not disputed that she returned to reside there. The only times she did not reside there full-time was during relationship difficulties.

[25] In her oral evidence Ms Cappa rejected the suggestion that only the children returned to the Osbeck property on weekends.<sup>31</sup> She agreed that Mr Burrell had offered her his share in the Affleck property but qualified that answer saying “it wasn’t his to really give”.<sup>32</sup> She denied that she was focused on the Affleck property and that it was going to be their new home.<sup>33</sup>

[26] Ms Cappa agreed that when she, Leroy and Bill were staying at the Affleck property, they were sleeping three to a room.<sup>34</sup> She was asked about the two additional dongas at the Osbeck property and agreed that at the time, sleeping three to a room was preferable to going home.<sup>35</sup> She said, however, that she and Mr Burrell were trying to reconcile.<sup>36</sup> On behalf of the applicant it was submitted Ms Cappa and the younger boys could have moved into one of the dongas at the Osbeck property, and that the move to the Affleck property indicated that she had relocated to the Affleck property because that was where the property settlement was being negotiated for her.<sup>37</sup>

[27] On 8 November 2016 Ms Cappa was sentenced in the Darwin Local Court for the two offences related to the cultivation of cannabis at the Affleck property. She pleaded guilty and was convicted of both offences. An aggregate fine of \$2,310 was imposed. Two victim’s levies were imposed. In the sentencing proceedings she was described by her counsel as a “single

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<sup>31</sup> T15  
<sup>32</sup> T16.  
<sup>33</sup> T16.  
<sup>34</sup> T15.  
<sup>35</sup> T15.  
<sup>36</sup> T15.  
<sup>37</sup> T39.

mother” who “went through a rough patch with the separation from her former partner” and who resided at the Affleck property with Nathan Cappa and Leroy and Bill Burrell.<sup>38</sup> When asked about this submission made on her behalf, Ms Cappa said that at the time of her sentencing proceedings, she had reconciled with Mr Burrell and they were all living back at the Osbeck property however, in essence, her lawyer thought it would be better to portray her as a single mother.<sup>39</sup>

[28] Before the Local Court on 8 November 2016 the prosecution facts that were admitted by Ms Cappa relevant to 17 May 2016 (the date of her offending) commence as follows:

Who resides at 63 Affleck Road Acacia Hills. The defendant lives at the address with her son Nathan Cappa. On Tuesday 17 May 2016, police executed a search warrant issued under s 120D of the *Police Administration Act* at 63 Affleck Road Acacia Hills. Neither the defendant nor her son were home while the search warrant was being executed.<sup>40</sup>

[29] That statement of facts substantially reflects what was the case at the time of her offending. Other material before the Local Court which refers to her living circumstances at the time of the offending and sentencing was that she “has been a stay-at-home mum as well as working in various jobs over an extensive and prolonged period of time”. Further, her counsel told the Local Court she was looking after two children on a full-time basis and on

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<sup>38</sup> Supplementary Affidavit of Kenneth Richard Bradshaw, sworn 24 May 2017, Annexure KRB at 6; Transcript of proceedings before the Local Court, 8 November 2016 at 3-6.

<sup>39</sup> T16.

<sup>40</sup> Supplementary Affidavit of Kenneth Richard Bradshaw, sworn 24 May 2017, Annexure KRBG; Local Court Transcript at 3.

some occasions a third. Referring to the “rough patch” remark mentioned above, her counsel said she started smoking cannabis again to help her sleep and relax. He said things had been extremely tight financially and she took the risk to grow a few bush plants. It was said her time was taken up looking after her children, going to school assemblies and providing assistance on excursions. She was described as lucky to have enough flexible employment to work when required and to also be with her family. The Local Court was also told she had one child with learning difficulties, namely ADHD, which was challenging. She was said to be a single mum, a sole carer, who regularly volunteers, has good references and is held in high regard by her peers and workmates.

[30] While Ms Cappa’s evidence in this Court initially appeared somewhat surprising in that she maintained it was her lawyer who determined to portray her as single mother, it is reasonable to regard her living circumstances as somewhat fluid over the relevant period. At the date of her own offending that she was being dealt with, 17 May 2016, she was separated from the respondent. As noted, that was also the date of the arrest of the respondent. They clearly did reconcile and were reconciled by the time of the Local Court hearing. As to whether she had instructed her lawyer in terms of being a single mother in November 2016, part of her answer was “this was even prior to the Court appearance” and “my solicitor then had known that Michael and I had reconciled, but he thought it would be better

if he portrayed me as a single mother and had suggested that Mick not come in the court room”.<sup>41</sup>

[31] In my view it is unlikely that Ms Cappa’s solicitor would have engaged in knowingly misleading the Court. Indeed, it would be a very serious matter if that is what occurred. However, when the period of time in question is seen in the broader context, being described as a single mother and a sole carer, while in my view not a completely accurate characterisation, is not totally at odds with the living circumstances as Ms Cappa described it, particularly around the time of her own offending in May 2016. Ms Cappa lived for the best part of the week with the children during the relevant period. She was effectively their sole carer at the Affleck property, although they were at the Osbeck property during weekends for some time, probably up until June or July 2016. Her personal recent history may have led to the characterisation of her circumstances in a shorthand manner by her counsel in the Local Court. It was not, however, Ms Cappa’s characterisation.

[32] The explanation for the potentially misleading submission to the Local Court and the inconsistency between a part of those submissions when compared with Ms Cappa’s evidence before this Court gives rise for serious consideration as to the truth of her evidence. However, the remaining circumstances and evidence about the separation point strongly to the conclusion that there was a trial separation throughout the relevant period,

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<sup>41</sup> T16.

but that factor did not alter the position that her usual residence was at the Osbeck property.

[33] There is nothing to suggest Ms Cappa and the respondent did not in fact reconcile. There is nothing to suggest she had not resided full-time at the Osbeck property for a very lengthy period prior to February 2016. I found Ms Cappa to be a credible witness, although given the effluxion of time since many of the relevant events occurred, and in particular issues concerning precise dates and when payments for expenses were made and received, it is understandable her memory was not entirely accurate on some points. She was however cooperative, direct and not defensive in the answers she gave when under cross-examination. She readily conceded when some of her answers may not have been accurate. She gave reasonable explanations for matters she was challenged about in evidence. Considering the evidence in its totality, in my view the residence at the Affleck property was clearly an interim arrangement for the objectors during a period of separation between Ms Cappa and the respondent. It was probably not particularly ideal to be living three in one room. They had not moved their possessions out of the Osbeck property. Ms Cappa had not changed her formal address. It is likely the respondent's incarceration was something of a catalyst towards reconciliation. There is supporting evidence indicating the objectors were residing at the Osbeck property while the respondent was in custody. I conclude the objectors have established they were usually resident at the Osbeck property during the period of offending.

[34] In terms of s 63(1)(a)(iv) of the *CPFA*, it is not disputed that the objectors were usually resident at the Osbeck property on 23 January 2017, which was the date the Notice of Objection was filed. In any event the available evidence is that upon the respondent's release from custody in October 2010, he lived with the objectors at the Osbeck property. It is likely the objectors resided there from June or July 2016. Ms Cappa and the respondent continue in a de facto relationship.<sup>42</sup>

### **No other residence at the time of hearing the objection**

[35] The objectors submit they have no other residence, while the applicant argues the objectors do have another potential residence, being the Affleck property. As indicated, the Affleck property is owned by Mr Burrell and Nathan Cappa as tenants in common. In 2012 Mr Cappa constructed a shed on the property and converted part of it into a living space where he continues to live with his de facto partner. The shed has two bedrooms and one other room that is used as a kitchen/living/dining area. It is zoned as a "Shed" - Class 10A. There are no other dwellings or structures on the property. The property is zoned "R-Rural" and zoning requirements mean that subdivision is not permitted and only a single dwelling on the block is allowed. Nathan Cappa hopes to build a house on the block for himself and his partner.<sup>43</sup>

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<sup>42</sup> Affidavit of Camilla Cappa, sworn 20 March 2017 at [17]-[18]; Affidavit of Michael Burrell, sworn 20 March 2017 at [15].

<sup>43</sup> Affidavit of Camilla Cappa, sworn 20 March 2017 at [40]-[41].

[36] The objectors submitted that the fact an alternative premises was available on a temporary, non-commercial basis in 2016 cannot reasonably support the view that it is now available as a permanent residence.<sup>44</sup> Nathan Cappa's partner had previously maintained a separate property in Palmerston that she lived in during the week, but that lease ended in July and she now resides at the Affleck property permanently.<sup>45</sup>

[37] I agree with his Honour Riley CJ's approach taken in *Director of Public Prosecutions v Mattiuzzo*.<sup>46</sup> In that case his Honour found that an objector, the de facto partner of the respondent, had another residence available at the time of hearing. She had rented accommodation at the relevant time which she occupied with her children. Importantly, it was irrelevant that she did not "own" other premises. As his Honour pointed out, the issue is not one of ownership, but whether the objector "has no other residence".

[38] Section 63(1)(a)(v) does not require the objectors to search out or identify other potential places of residence at the time of hearing. At the time of the hearing in this matter, the objectors were residing where they had primarily historically resided – the child objectors for most of their lives – at the Osbeck property, the usual family home which differs significantly from the circumstances in *Mattiuzzo*.

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<sup>44</sup> Objectors' written submissions at 5-6.

<sup>45</sup> T24.

<sup>46</sup> (2011) 29 NTLR 189 at [40].

[39] The Affleck property was available only on a temporary basis when Nathan Cappa was residing there, bearing in mind it was a non-commercial arrangement in 2016. It is not reasonable to conclude the Affleck property was available at the time of the hearing. Although the respondent and Nathan Cappa own the Affleck property as tenants in common, there were practical limitations on the extent of the use of the property by the objectors. The property is not solely under the control of the respondent. Nathan Cappa resides on the property with his de facto partner. The residence, as has already been described, is a converted shed with two bedrooms, a living/kitchen area and a bathroom. It is not feasible that it be considered a residence for another adult or likely two adults and two children in the longer term. The Affleck property has a dwelling on it and cannot be subdivided.<sup>47</sup> The circumstances were such at the time of the hearing that it cannot be concluded the Affleck residence is available to the objectors. Ms Cappa has no legal or equitable interest in the Affleck property. The financial circumstances of the objectors make it unlikely that they would be in a position to establish themselves reasonably in another residence, be it the Affleck property or elsewhere. Ms Cappa's financial circumstances and those of the respondent are set out in her affidavit and I will not detail those matters in full here.<sup>48</sup> In short, the income comprises various government benefits, and Ms Cappa obtains casual work from time to time. The respondent, due to significant medical issues, has not worked

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<sup>47</sup> Affidavit of Camilla Cappa, sworn 20 March 2017 at [40].

<sup>48</sup> Affidavit of Camilla Cappa, sworn 20 March 2017 at [42]-[55].

for some time. There are living expenses representing the principal financial outgoings. There are no assets of significance that can be reasonably realised, beyond the Osbeck property. I am satisfied the objectors had no other residence at the time of hearing.

### **Undue hardship**

[40] Under s 63(1)(a)(vi) an objector must establish they would suffer undue hardship if the property is forfeited. It is accepted the phrase “undue hardship” is to be given its ordinary meaning. It means more than difficult or inconvenient as a result of the forfeiture of a residence. It is the case, as the applicant points out, that to achieve its objectives, the *CPFA* contemplates there will be hardship created. The Court must consider whether the hardship to be experienced by an objector(s) is beyond the inevitable or ordinary level of hardship implicit in a forfeiture order.

[41] In *Mattiuzzo*,<sup>49</sup> Riley CJ noted the expression “undue hardship” is not defined in the *CPFA*. His Honour adopted what was said in *BJF v The State of Western Australia*,<sup>50</sup> to the effect that the expression requires a judgment about the impact of the confiscation upon the innocent objector in the particular circumstances of the case. The *CPFA* will necessarily cause a measure of hardship in achieving its objectives.<sup>51</sup> Relief on this ground must not be interpreted to frustrate the objectives of the *CPFA*. Something more

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<sup>49</sup> (2011) 29 NTLR 189.

<sup>50</sup> [2011] WASC 163; 210 A Crim R 262 at [46].

<sup>51</sup> *Director of Public Prosecutions v Mattiuzzo* (2011) 29 NTLR 189 at [42].

than ordinary hardship is required to be established.<sup>52</sup> The phrase is not to be interpreted in a manner which “sow[s] the seeds of its own ineffectiveness”.<sup>53</sup>

[42] In *BJF v Western Australia*<sup>54</sup> Murray J said:

[i]n 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.

[43] On analysis of the facts in *BJF*, Murray J referred to the objector’s broader family, having regard to the location of the residence of family members, the need for the objector to travel to support her mother, the fact that none of the members of the extended family were wealthy, and that there was illness in the family.<sup>55</sup> It was also noted that an investment property that at the relevant time had been rented was unavailable for the purpose of residence for the objector.<sup>56</sup> His Honour also referred to the relevant part of the Second Reading Speech upon the introduction of the Western Australian *Criminal Property Confiscation Bill 2000* and particularly emphasised the following statement:

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<sup>52</sup> *R v Lake* (1989) 44 A Crim R 63 at 66, cited in *Director of Public Prosecutions v Mattiuzzo* (2011) 29 NTLR 189 at [42].

<sup>53</sup> *R v Lake* (1989) 44 A Crim R 63.

<sup>54</sup> (2011) 210 A Crim R 262 at [49].

<sup>55</sup> *BJF v Western Australia* (2011) 210 A Crim R 262 at [29]-[31].

<sup>56</sup> *BJF v Western Australia* (2011) 210 A Crim R 262 at [32].

[t]his provision recognises the unjust consequences of confiscating a house used in an offence when it is the residence of the spouse or dependant of the person who used it in the offence.<sup>57</sup>

[44] It is well established there are strong correlations between the Western Australian and the Northern Territory Acts. Both the Western Australian decisions and the preparatory legislative materials are helpful in the construction and application of the *CPFA*. Murray J recognised in *BJF* that it was appropriate that the term “undue hardship” should be construed having regard to the essential thrust of the section and the protection it was designed to afford to a person in the position of the particular objector.<sup>58</sup> His Honour concluded the question of “undue hardship” requires a judgment about the impact of confiscation upon the innocent objector in the particular circumstances of the case.<sup>59</sup> In my view the analysis of Murray J is relevant to the application of the provision here. It may also be noticed Murray J concluded the term “undue hardship” bears its ordinary meaning. Referring to a dictionary meaning, he noted it refers to “hardship being the quality of being hard to bear, painful, difficult, involving suffering or privation”. Further, with respect to “undue” he said:

[t]he adjective “undue”, in its dictionary meaning, requires a combination of the hardship found with what might ordinarily be encountered from the occurrence of the event which creates the hardship, so that the hardship suffered goes beyond what is warranted and becomes excessive or disproportionate.<sup>60</sup>

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<sup>57</sup> *BJF v Western Australia* (2011) 210 A Crim R 262 at [33]-[34].

<sup>58</sup> *BJF v Western Australia* (2011) 210 A Crim R 262 at [34].

<sup>59</sup> *BJF v Western Australia* (2011) 210 A Crim R 262 at [46].

<sup>60</sup> *BJF v Western Australia* (2011) 210 A Crim R 270 at [48].

[45] Although under different legislation, when discussing the “hardship discretion” in the Victorian legislation, Hargrave J in *Director of Public Prosecutions v Ali (No 2)*<sup>61</sup> referred to the hardship discretion being enlivened when something more than ordinary hardship is demonstrated. Further, where the property in question is a family home, the circumstances of the family and the effect upon the family will always be relevant and may be decisive, but each case must depend on its own facts. The test applied in *Ali* was not “undue” hardship, however in my view the fact the property is a family home as opposed to, for instance, commercial premises is not irrelevant to the assessment of “undue hardship”.

[46] Clearly, the state of health and financial position of innocent party objectors are relevant factors when assessing undue hardship.<sup>62</sup> The applicant submitted that the impact of forfeiture upon Ms Cappa and the children will be tempered by the fact that the respondent owns a half share in another property, in which they have resided for some prior period.<sup>63</sup> The objectors note that there is no legal obligation on the part of Nathan Cappa and his partner to accommodate others in the two bedroom dwelling at Affleck Road.<sup>64</sup>

[47] Reference was made to Ms Cappa’s financial circumstances. At the time of the hearing Ms Cappa was unemployed and received a total of \$449 per

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<sup>61</sup> [2010] VSC 503 at 102.

<sup>62</sup> Although in a different context see *The State of Western Australia v Bowers* [2009] WASC 136, per Templeton J at [29].

<sup>63</sup> Applicant’s written submissions at [46].

<sup>64</sup> Objectors’ written submissions at [8].

fortnight in government assistance.<sup>65</sup> As at 5 February 2017, she had a balance of \$771.54 in her bank account.<sup>66</sup> She owes \$2,000 to the Northern Territory government in fines and owes approximately \$500 to Centrelink for overpayments of government assistance.<sup>67</sup> She owns a 2009 Holden Commodore station wagon worth approximately \$8,000 and is the sole registered owner.<sup>68</sup> As indicated, she has worked in casual work from time to time.

[48] The respondent has been unable to work since his release from custody and he receives a Newstart allowance of \$504 per fortnight.<sup>69</sup> As at 15 March 2017, he had a balance of \$15,755 in his bank account.<sup>70</sup> He owns a 1994 Toyota Hilux Twin Cab ute valued at approximately \$1,000.<sup>71</sup> In his affidavit, Mr Burrell states he and Nathan Cappa bought the Affleck property in May 2007 for \$240,000, with his half being \$120,000. He said he had paid approximately \$50,000 of the mortgage payments.<sup>72</sup> An additional complication is that in her evidence during the hearing of the objections, Ms Cappa said that Mr Burrell had had to sign over the Affleck property to Nathan Cappa to pay their legal fees.<sup>73</sup> As this evidence was given in re-examination it was untested and I give it little weight. However, given the difficult financial circumstances of the family as a whole, it would

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<sup>65</sup> Affidavit of Camilla Cappa, sworn 20 March 2017 at [42].

<sup>66</sup> Affidavit of Camilla Cappa, sworn 20 March 2017 at [45].

<sup>67</sup> Affidavit of Camilla Cappa, sworn 20 March 2017 at [48].

<sup>68</sup> Affidavit of Camilla Cappa, sworn 20 March 2017 at [47].

<sup>69</sup> Affidavit of Michael Burrell, sworn 20 March 2017 at [21].

<sup>70</sup> Affidavit of Michael Burrell, sworn 20 March 2017 at [22(a)].

<sup>71</sup> Affidavit of Michael Burrell, sworn 20 March 2017 at [22(d)].

<sup>72</sup> Affidavit of Michael Burrell, sworn 20 March 2017 at [22(c)].

<sup>73</sup> T26.

not be surprising if surrender of the interest in the Affleck property is required at some stage for necessary legal and related expenses.

[49] In addition, it was submitted on behalf of the objectors that Ms Cappa is the primary carer for Leroy and Bill Burrell who have significant mental health needs that go well beyond that of their peers. Leroy Burrell was diagnosed with ADHD in June 2007, when he was aged 6 years and 3 months.<sup>74</sup> Annie Whybourne, a senior paediatric specialist at the Royal Darwin Hospital provided an expert report to the Court on Leroy Burrell's condition. She has treated him since he was 9 years and 8 months old. She noted that:

[h]e has significant concentration difficulties, behavioural problems and does not cope well with change. He is an extremely sensitive and gentle young man. Stressors such as a change of home, school and a familiar environment could worsen his symptoms... Leroy is very likely to be distressed with a change in his home, school and environment, more so than a child without ADHD. These difficulties will be further heightened by ongoing relationship stress between his parents.<sup>75</sup>

[50] In February 2017, Leroy attended a 16<sup>th</sup> birthday party at a friend's house. Later that night there was a car accident in which two of his friends who had been at the party died after they were run over and killed by another friend. Four days later, a close friend attempted suicide and five days later she was withdrawn from life support and died. Leroy was a pallbearer at her funeral. In her report Ms Whybourne states that:

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<sup>74</sup> Affidavit of Annie Whybourne, sworn 22 May 2017, Annexure AW 1.

<sup>75</sup> Affidavit of Annie Whybourne, sworn 22 May 2017, Annexure AW 1.

[u]nderstandably he is in a very fragile state of mind with very heightened emotions. I have not reviewed Leroy since these events but his mother reports that he is isolated and depressed. He would find it extremely difficult to suffer the further loss of his home, his familiar school environment and his social network, and would be at significant risk of more detrimental mental health problems.<sup>76</sup>

[51] Ms Cappa also asserts that Bill “suffers from anxiety and anger issues” and “finds changed circumstances very stressful and difficult to manage and deal with.” She notes that during the period when they were living at the Affleck property and his father was incarcerated, Bill’s behaviour deteriorated significantly. She is concerned about the impact on his psychological state if they were forced to move.<sup>77</sup>

[52] The applicant points out that the children have been exposed to the criminal proceedings, having attended court for Mr Burrell’s sentencing proceedings. Further, Leroy Burrell was present when police executed a search warrant over the Affleck property in 2016 and over the Osbeck property in 2006 when Mr Burrell and Ms Cappa were convicted of drug offences. The applicant further notes that the living arrangements at Affleck Road were considered suitable in 2016.

[53] While I bear the factors in mind that have been pointed out on behalf of the applicant, I have come to the conclusion that this is a case where, if the Osbeck property were to be confiscated, the objectors would more likely than not suffer greater hardship or deprivation than would ordinarily flow

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<sup>76</sup> Affidavit of Annie Whybourne, sworn 22 May 2017, Annexure AW 1 at [7].

<sup>77</sup> Affidavit of Camilla Cappa, sworn 20 March 2017 at [72].

from confiscation of a family residence. The degree of hardship that would be attendant on forfeiture leads to the conclusion that the hardship that would flow should not be imposed on the objectors. The objectors are of extremely modest means. The ability of Ms Cappa to provide for the children and additionally pay rent is minimal. The ability of the respondent to provide for them is minimal. The Affleck property is not a viable alternative. Even if there were not more recent complicating financial factors, there is not sufficient room for all objectors to live there. Renting another property is not viable. There are significant health problems with at least one child objector, and although not to the same degree, the disruption to the child objector Bill may reasonably be thought to have a negative impact on his wellbeing, given what he has been exposed to and required to cope with already. Further disruption given the family history and financial circumstances in my view would be unduly harsh on each of the objectors Leroy and Bill for additional reasons.

**Not practicable to make adequate provision for the objector by some other means**

[54] Section 63(1)(a)(vii) requires an objector to satisfy the Court it is not practicable to make adequate provision for the objector by some other means. Although a separate question, there is some overlap with the factors relevant to s 63(1)(a)(v) and (vi).

[55] The applicant submits that adequate provision can be made through an agreement between the respondent and Nathan Cappa.<sup>78</sup> The objectors note that there is no evidence such an agreement is possible.<sup>79</sup> It is clear neither Ms Cappa nor Mr Burrell are in a financial position to pay rent in addition to living expenses. They are both in receipt of government assistance and are unemployed, save for occasional casual work performed by Ms Cappa. There is no income being generated from the Affleck property and they have limited savings to support a family. The Affleck property cannot be readily liquidated given the share ownership arrangement of joint tenancy and the property cannot be subdivided.<sup>80</sup> There was the belated evidence at the hearing that Mr Burrell will need to sell his share to Nathan Cappa to cover legal expenses, but even so, selling the respondent's share and realising any proceeds would be unlikely to adequately provide accommodation for the objectors. Given Nathan Cappa and his partner now reside at the Affleck property, it is not, in my view, a practical or feasible solution for the respondent to make provision for the objectors by attempting to sell his share.

[56] If the forfeiture application was directed only to the respondent, there could be no complaint given his criminal activities on the Osbeck property. The *CPFA* does however contemplate circumstances where innocent persons

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<sup>78</sup> Applicant's written submissions at 10.

<sup>79</sup> Objectors' written submissions at 10.

<sup>80</sup> Objectors' written submissions at 10.

such as family members, provided they satisfy the strict criteria under s 63, will not suffer unduly due to a final order.

[57] In my view the objectors have established what is required in s 63. The restraining order will be set aside.

### **Alternative ground for objection**

[58] In the alternative, Ms Cappa seeks to have the forfeiture order set aside pursuant to s 63(1)(b) of the *CPFA*. The applicant accepts that Ms Cappa was an innocent party but rejects that Ms Cappa is an owner of the Osbeck property and that the property was not effectively controlled by a person who made criminal use of the property. The objectors accept that the respondent is not an innocent party. In the circumstances, Ms Cappa submitted that the Court's power under s 63(2) of the *CPFA* is enlivened.

### **The objector is the owner of the property or is one of 2 or more owners of the property**

[59] Section 5 of the *CPFA* defines an "owner" as "a person who has a legal or equitable interest in the property". On behalf of Ms Cappa it was submitted she has an equitable interest in the property as a consequence of the existence of a joint endeavour between the respondent and herself to increase the equity in the property or to improve or maintain the property, such that it would be contrary to equitable principles not to recognise a

constructive trust in favour of Ms Cappa.<sup>81</sup> On behalf of the applicant it was submitted the Court should be slow to recognise an interest of this kind.

[60] Mr Burrell states he purchased the Osbeck property in 1987 for \$43,500. His father assisted him with the deposit. The property was bought subject to vendor finance for a ten-year period and he commenced making repayments to the vendors at a rate of \$430.50 per month.<sup>82</sup> At the time, the residence had only concrete floors, no internal walls and a small kitchenette. There was no laundry. There was a shower and a toilet.<sup>83</sup>

[61] Mr Burrell and Ms Cappa commenced their relationship in 1989 or 1990. Ms Cappa and Nathan Cappa moved permanently into the Osbeck property in or about 1999. Between 1990 and 1999, Mr Burrell stayed with Ms Cappa at her flat in Nylander Street during the week. The flat was owned by Ms Cappa's parents and they did not pay rent.<sup>84</sup> As Mr Burrell was living at the Nylander Street flat during the week, he was able to rent out the second bedroom of the Osbeck property for \$100 per week to friends requiring accommodation. This was for short term intermittent periods. He used this income to contribute toward the mortgage repayments.<sup>85</sup>

[62] According to Ms Cappa, between 1990 and 28 August 1997 (when the mortgage on the Osbeck property was fully paid), she occasionally contributed to the monthly mortgage payments. She estimates that she

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<sup>81</sup> Objectors' written submissions at 11.

<sup>82</sup> Affidavit of Michael Burrell, sworn 20 March 2017 at [4].

<sup>83</sup> Affidavit of Michael Burrell, sworn 20 March 2017 at [5].

<sup>84</sup> Affidavit of Camilla Cappa, sworn 20 March 2017 at [23].

<sup>85</sup> Affidavit of Camilla Cappa, sworn 20 March 2017 at [24].

contributed approximately \$5,000 between 1992 and 1997. She does not have a record of the payments, and their frequency and value was varied.<sup>86</sup> Further, during that period, any additional funds that she saved were spent on property improvements at the Osbeck property, including the gardens and landscaping.<sup>87</sup>

[63] In 2000, Ms Cappa's parents sold a property in Goyder Road, Darwin. She says that they gifted her \$25,000 from that sale, which she used to assist Mr Burrell to pay for renovations made to the Osbeck property between 2000 and 2002. The renovations included the building of an extension to the dwelling in order to create a separate living space for Nathan Cappa, as well as a patio extension and a roof extension to cover the concrete. Annexed to Ms Cappa's affidavit are before-and-after photos of the renovations.<sup>88</sup>

[64] In 2006, her parents sold their Nylander Street properties and, according to Ms Cappa, gifted her a further \$70,000. She says that all of that money went into paying for improvements made to the Osbeck property, including general property improvement and maintenance, and building an extension of the existing structure or shed.<sup>89</sup>

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<sup>86</sup> Affidavit of Camilla Cappa, sworn 20 March 2017 at [26].

<sup>87</sup> Affidavit of Camilla Cappa, sworn 20 March 2017 at [27].

<sup>88</sup> Affidavit of Camilla Cappa, sworn 20 March 2017 at [29].

<sup>89</sup> Affidavit of Camilla Cappa, sworn 20 March 2017 at [31].

[65] Ms Cappa states that over time she has gradually developed the property, creating established gardens and lawns. Photos were provided to support this.<sup>90</sup>

[66] Ms Cappa was not able to provide supporting documentary evidence of the gifts from her parents. When asked about this in cross-examination, she stated that she had tried to obtain bank records to attach to her affidavit, but the bank could not obtain records from more than seven years ago.<sup>91</sup> When asked whether there were builder's invoices or quotes for work done in 2006, she said there were but they were not in her name.<sup>92</sup> She was asked whether she received the money in 2006 before or after her arrest on 8 February 2006 but she could not recall. She recalled receiving the money sometime in early 2006.<sup>93</sup>

[67] Ms Cappa and Mr Burrell were convicted on 18 July 2006 in relation to cannabis offences. A shed on the Osbeck property had been converted into a grow room for cannabis. That shed was the one that Ms Cappa testified was constructed using the \$25,000 gift from her parents in 2000. Ms Cappa agreed that there were no records of the gift or the money being spent. She stated that they hired their next door neighbour to build the shed.<sup>94</sup>

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<sup>90</sup> Affidavit of Camilla Cappa, sworn 20 March 2017 at [30].

<sup>91</sup> T8.

<sup>92</sup> T8.

<sup>93</sup> T9.

<sup>94</sup> T10.

[68] It was suggested to Ms Cappa that the money did not come from her parents. She repeated that it had.<sup>95</sup>

[69] In 2009, Ms Cappa says that her parents gifted her a further \$10,000 towards constructing a dwelling at the Osbeck property for her brother, Nicholas Cappa, to live in. They purchased a detached dwelling and installed it on the property. They used additional savings to improve the living conditions of the structure.<sup>96</sup> Nicholas Cappa stayed on the property from time to time to give respite to her parents.

[70] Notwithstanding a lack of supporting documentation, I broadly accept Ms Cappa's evidence concerning her substantial financial contribution to the improvements on Osbeck property. It is the type of contribution that is not out of the ordinary, given the length of the relationship and the length of time both Ms Cappa and the respondent resided at the Osbeck property. Their children were raised principally at the Osbeck property. Earlier bank records were not available to Ms Cappa, but her affidavit and oral evidence provided some level of detail in respect of the expenditure of relatively large sums of money on improvements. Her evidence was challenged in cross examination but her answers appeared credible and clear with reasonable concessions being made by her concerning errors with dates and some of the particulars. Broadly, however, I accept her evidence of relatively substantial contributions to improvements to the property.

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<sup>95</sup> T10.

<sup>96</sup> Affidavit of Camilla Cappa, sworn 20 March 2017 at [32].

Although there is no presumption by virtue of a personal relationship of joint endeavour, the length and nature of the relationship and the financial contributions to improvements on the property mean it is reasonable to conclude Ms Cappa was engaged in a joint endeavour with the respondent to improve and maintain the property. It is the case that precise details cannot be ascertained but absent other evidence, it is reasonable to conclude Ms Cappa made financial contributions as disclosed in her affidavit. It is for the objector, Ms Cappa, to establish she has an equitable interest.

[71] In some cases the acquisition of property by one party prior to the commencement of a relationship has been held to defeat the inference of a common intention constructive trust arising after the acquisition of the relevant property.<sup>97</sup> That view has however been rejected.<sup>98</sup> That the respondent purchased the property prior to the commencement of the de facto relationship is not determinative. The question principally is whether the financial contributions to the Osbeck property created an equitable interest in accordance with the principles of constructive trusts as set out in *Muschinski v Dodds*<sup>99</sup> and *Baumgartner v Baumgartner*.<sup>100</sup>

[72] If the relationship between Ms Cappa and the respondent was at an end and if the respondent attempted to dispose of the proceeds of any sale without an appropriate award being made to Ms Cappa in recognition of her contribution, in my view it is likely a Court would grant equitable relief in

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<sup>97</sup> Discussed in *Director of Public Prosecutions v Ali (No 2)* [2010] VSC 50 at [69]-[75].

<sup>98</sup> *Director of Public Prosecutions v Ali (No 2)* [2010] VSC 50.

<sup>99</sup> (1985) 160 CLR 583.

<sup>100</sup> [1987] HCA 59; 164 CLR 187.

the form of constructive trust relief against the respondent and treat Ms Cappa as having a beneficial interest in the Osbeck property held by the respondent as the legal owner. It would be unconscionable for the respondent to assert that he was the sole beneficial owner.<sup>101</sup> In circumstances such as these, constructive trust relief can be imposed even where no intention to form a trust can be established.<sup>102</sup>

[73] Counsel for the applicant drew attention to the reasoning in *Director of Public Prosecutions v Ali (No 2)*<sup>103</sup> where Hargrave J, in the context of the Victorian legislation considered the position of a party whose contributions were not made directly to the acquisition or improvement of the relevant property. His Honour said “where the relationship fails, and the property is owned by only one party, it may be unconscionable for the owner to deny the interest of the other party”.<sup>104</sup> Although the contributions made in *Ali* were of a non-financial kind, it was held the principles of constructive trust did not have application to the proceedings, as the marriage continued and there was therefore no reason for the operation of the principles of constructive trust.<sup>105</sup> As noted in that matter, the making of a civil forfeiture order under the relevant legislation will not bring the marriage to an end.

[74] Similar reasoning applies here, although it may be noted there is a stronger case for the acknowledgment of an equitable interest on the part of Ms

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<sup>101</sup> *Willis v The State of Western Australia (No 3)* [2010] WASCA 56 at [78].

<sup>102</sup> *Muschinski v Dodds* (1985) 160 CLR 583 at 615, per Deane J.

<sup>103</sup> [2010] VSC 503.

<sup>104</sup> *Director of Public Prosecutions v Ali (No 2)* [2010] VSC 50 at [83], citing *Baumgartner v Baumgartner* (1987) 164 CLR 137.

<sup>105</sup> *Director of Public Prosecutions v Ali (No 2)* [2010] VSC 50 at [85].

Cappa than in *Ali*. Ms Cappa’s financial contributions clearly contributed to a joint endeavour such that her equitable interest should be acknowledged. There were certain contingencies that operated on the facts in *Ali* that are not present here. Given the *CPFA* clearly recognises equitable ownership, on balance I find Ms Cappa has established she is one of the two owners in terms of s 63(1)(b)(i).

**The property is not effectively controlled by a person who made criminal use of the property**

[75] In my view Ms Cappa cannot establish the property is “not effectively controlled” by the respondent. I agree with Mildren J’s approach to this issue outlined in *Harrison v Commissioner of Police & Anor.*<sup>106</sup> His Honour explained s 63 specifically contemplates the possibility there may be joint owners where one of the joint owners is an innocent party, and the joint owner who committed the forfeiture offence and used the property for that purpose did not have “effective control” of the crime-used property. His Honour said the legislature contemplated that the question of who had effective control of the property focuses on the fact of control, and whether the owner who committed the forfeiture offence had sole effective control of the property to the exclusion of the other owner. The question of who had the full legal and beneficial ownership of an asset may be a relevant, but not necessarily a determinative, consideration.

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<sup>106</sup> [2012] NTSC 45; 32 NTLR 84.

[76] His Honour relied on the following passage from *Connell v Lavender*:<sup>107</sup>

[i]n my opinion, the ordinary meaning of “control” is de facto control or control in fact. The question then is: what effect does the adjective “effective” have upon the meaning? Mr Hughes submitted that it necessarily connoted legal control, that is to say control which is exercised by virtue of some legal right or power. This would be de jure control. In my opinion, “effective control” in the context of the statute means de facto control. The expression contemplates control that is practically effective, in the sense that the person concerned has in fact the capacity to control the possession, use, or disposition of the property. This is, in my opinion, the meaning of “effective control” unadorned or unencumbered by the definition in s 3(1) in terms of s 52A of the Act.

[77] In my view the respondent had “effective control” of the Osbeck property as contemplated by the *CPFA*. He was in continuous possession of the Osbeck property aside from when he was in custody. He resided there during his offending and during the separation with Ms Cappa, save for when he was in custody. As the legal owner he had the right to sell the property, even though he may have been required to deal with the proceeds in an equitable manner with respect to Ms Cappa. The fact that Ms Cappa has an equitable interest does not prevent and has not prevented the respondent from exercising effective control. In my view, Ms Cappa cannot succeed under s 63(b)(ii).

[78] Although Ms Cappa is an innocent party in relation to the property (s 63(b)(iii)), the respondent is not an innocent party (s 63(b)(iv)). If I am wrong concluding that s 63(b) has not been established, then pursuant to s 63(2)(a) I would order that Ms Cappa be paid fifty percent of the proceeds

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<sup>107</sup> (1991) 7 WAR 9 at 22, per Malcolm CJ, Pidgeon and Rowland JJ agreeing.

of the sale of the Osbeck property, representing her half share in the property.

### **Orders**

1. The Court upholds the objections of the objectors Camilla Cappa, Leroy Burrell and Bill Burrell.
2. The restraining order over the property at 70 Osbeck Road, Virginia made on 29 November 2016 pursuant to s 11 of the *Criminal Property Forfeiture Act 2000* is set aside.
3. I will hear the parties on costs.

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