

IN THE MATTER OF THE *CRIMINAL
PROPERTY FORFEITURE ACT*

AND

IN THE MATTER OF LLOYD GREEN

BETWEEN:

PARTIES:

DIRECTOR OF PUBLIC
PROSECUTIONS

v

LLOYD GREEN

TITLE OF COURT:

FULL COURT OF THE
SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION:

FULL COURT OF THE SUPREME
COURT OF THE NORTHERN
TERRITORY EXERCISING
TERRITORY JURISDICTION UPON
REFERENCE PURSUANT TO S 21 OF
THE *SUPREME COURT ACT*

FILE NO:

No 82 of 2008 (20817720)

DELIVERED:

4 MAY 2010

HEARING DATES:

30 and 31 March 2010

JUDGMENT OF:

MARTIN CJ, MILDREN & REEVES JJ

CATCHWORDS:

CRIMINAL LAW AND PROCEDURE – reference to Full Court of questions of law – powers of court limited to facts stated in the reference – court refused reference on academic questions but accepted reference to questions whether a crime-used property substitution declaration could be made – whether court may declare property of equivalent value owned or effectively controlled by the respondent to be substituted for the crime-used property – defendant held leasehold interest in crime-used property – whether crime-used property not available – question 1 in the reference answered in the negative – *Criminal Property Forfeiture Act* s 81.

STATUTORY INTERPRETATION – *Criminal Property Forfeiture Act* s 81 – defendant occupied property under a lease – defendant convicted of unlawfully cultivating cannabis, supplying cannabis and possessing cannabis on the leased property – definition of “property” could refer to the physical land or to an interest in the land – application for crime-used property substitution declaration under s 81 – not available if property not amendable to a restraining order or forfeiture for reason referred to in s 82 – not available if defendant does not own the property – definition of “owner” includes “a person having a legal or equitable interest in the property” – whether “own” has a corresponding meaning – whether property not available for forfeiture if defendant has leasehold interest – *Criminal Property Forfeiture Act*, s 5, s 81, s 82; *Interpretation Act*, s 23 – text clear that only interests in land and not the land itself can be forfeited.

Criminal Property Forfeiture Act, s 3, s 5, s 6, s 7, s 10(1), s 10(2), s 10(3), s 10(4)(c), s 10(5), s 11, s 11(1)(b), s 11(1)(c), s 11(2)(a), s 81, s 81(2), s 81(4)(c), s 82, s 86(1), s 86(3), s 101, s 121(1)(c), s 121(1) (d); *Interpretation Act*, s 23; *Supreme Court Act*, s 21(1), 21(2)

Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334; *Duke Group Ltd (in Liq) v Arthur Young (Reg) (No 2)* (1990) 54 SASR 511; *Thomas v The King* (1937) 59 CLR 279; followed

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27, referred to

REPRESENTATION:

Counsel:

Applicant: R Jobson
Respondent: A Wyvill SC & S Lee

Solicitors:

Applicant: Solicitor for the Northern Territory
Respondent: Northern Territory Legal Aid
Commission

Judgment category classification: A
Judgment ID Number: mil10460
Number of pages: 17

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

Director of Public Prosecutions v Green [2010] NTSC 16
No. 82 of 2008

IN THE MATTER OF
THE *CRIMINAL PROPERTY*
FORFEITURE ACT

AND

IN THE MATTER OF
LLOYD GREEN

BETWEEN:

DIRECTOR OF PUBLIC
PROSECUTIONS
Applicant

AND:

LLOYD GREEN
Respondent

CORAM: MARTIN CJ, MILDREN & REEVES JJ

REASONS FOR JUDGMENT

(Delivered 4 May 2010)

Martin CJ:

- [1] For the reasons given by Mildren J, I agree that only the first question should be answered and the answer should be in the negative.

[2] I also agree with his Honour’s observations as to the reach of the definition of “forfeiture offence”.

Mildren J:

[3] This is a reference to the Full Court by Riley J, pursuant to s 21(1) of the *Supreme Court Act*. After hearing the submissions of the parties, the Court decided to accept only the first question in the reference. In our view, the remaining questions are academic and should not be answered.¹

[4] An attempt was made by the parties to put before the Court facts additional to the facts which are set out in the reference.

[5] Section 21 of the *Supreme Court Act* provides as follows:

21. Full Court

- (1) The Judge hearing a proceeding, not being a proceeding in the Court of Appeal in which the jurisdiction of the Court is exercisable by one Judge, or, if the hearing of such a proceeding has not commenced, any Judge, may refer that proceeding or part of that proceeding to the Full Court.
- (2) The Full Court may –
 - (a) accept;
 - (b) decline to accept; or
 - (c) accept in part only,

¹ See *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355-360; [44]-[59] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ.

a reference made under subsection (1) and, in any event, may make such orders and give such directions as it thinks proper in relation to, and to the procedure to be followed in, the further conduct of the proceedings or part, as the case may be, including, in a case where evidence was received before the reference, orders and directions in relation to the use, if any, to be made of that evidence.

[6] As was noted by Perry J in *Duke Group Ltd (in Liq) v Arthur Young (Reg) (No 2)*,² the reservation of a part of the proceeding in the case, or for that matter the whole of the proceedings, to the Full Court, is a different procedure from the stating of a question of law by the form of a stated case. It is well understood that the powers of a court to which a case has been stated are limited to answering the specific questions referred to it and that the court is not able to refer to any material not set forth in the case itself. Thus, the court is not entitled to go outside of the case stated and refer to the transcript of evidence.³ But, where there has been a reference under s 21, the Full Court is not necessarily so restricted because the Judge has the power to refer the whole of the case to the Full Court. However, in this case, the Judge has not referred the whole case to the Full Court but only questions of law which have arisen. In those circumstances the Court has a judicial discretion whether to accept the reference either in whole or in part and, if it accepts the reference, whether in whole or in part, it should confine itself to the facts as stated in the reference as found by the trial Judge. To do otherwise would be to invite the Full Court to decide questions for which there is no factual basis and which may yet have to be determined by the

² (1990) 54 SASR 511 at 514.

³ See *Thomas v The King* (1937) 59 CLR 279.

trial Judge and, moreover, which were not part of the reference. Further, such a process would invite the Court to make rulings upon legal issues which may be academic particularly in cases where there have been no findings of fact to support the question or questions.

The facts as found by the trial Judge

- [7] On 10 July 2008, the respondent was dealt with in the Supreme Court in relation to a number of offences under the *Misuse of Drugs Act*. He was convicted of unlawfully cultivating 18 cannabis plants, possessing 4.161 kilograms of cannabis plant material and of supplying cannabis plant material to an unknown person. In addition to being convicted on each count, he was sentenced to a total effective period of imprisonment of two years commencing on 10 July 2008. The sentence was suspended upon him entering into a Home Detention Order for a period of nine months.
- [8] The offences occurred in a shed on a rural block situated at Block 375 Stuart Highway (Block 375). At all relevant times the respondent was the owner of a leasehold interest in Block 375 and it was pursuant to this interest that he was in occupation of the shed that was used in committing the subject offences.
- [9] The owner of the freehold interest in Block 375 was not involved in the offending and the applicant accepted that the offending occurred without the knowledge of the owner. By operation of s 82 of the *Criminal Property Forfeiture Act*, crime-used property is not available for forfeiture if the

respondent does not own or have effective control of the property. The applicant concluded that no grounds existed upon which it could seek the restraint and ultimate forfeiture of the owner's interest in Block 375 on the ground that the land is crime-used property. The applicant, therefore, sought a crime-used property substitution declaration against the respondent pursuant to the provisions of s 81(2) of the *Criminal Property Forfeiture Act*. The property sought to be substituted consists of two residential properties associated with the respondent being Unit 3, 75 Driver Avenue, Palmerston (the Palmerston unit) which is owned by the respondent and 212 McGorrie Road, Marrakai (the Marrakai land) which is owned by the respondent jointly with his de facto wife.

[10] On 30 June 2008, I granted a restraining order pursuant to s 81(2) of the Act over the Palmerston unit and the Marrakai land.

[11] According to the unchallenged expert evidence led on behalf of the applicant, at the relevant time the freehold value of Block 375 was \$1.5 million; the Palmerston unit had a value of \$205,000; and the Marrakai land had a value of \$105,000. Those valuations have been accepted by the trial Judge.

[12] The learned trial Judge ruled as follows:

- (a) The property situated at Block 375 Stuart Highway was crime used property within the meaning of s 11 of the Act;

- (b) The crime used property was, for the purposes of the Act, the land itself not some legal interest in the land;
- (c) The respondent did not own or have effective control of the property situated at Block 375 and that property was not available for forfeiture by operation of s 82 of the Act; and
- (d) The Court may therefore declare property of equivalent value owned or effectively controlled by the respondent be substituted for the crime used property pursuant to s 81 of the Act.

[13] The learned trial Judge referred a number of questions to the Court. The only one which the Court has decided to answer is whether, in the circumstances, he was correct in the rulings that he made.

[14] The answer to that question depends upon the construction to be given to various provisions of the Act.

The relevant provisions of the Act

[15] Section 10(1) of the Act provides that the Act applies to property that is crime-used. Section 10(2) provides:

- (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.

[16] Section 10(3) provides:

- (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.

[17] Section 10(4)(c) provides, that for the purposes of the Act, a person is taken to be involved in criminal activities if the person is found guilty of a forfeiture offence. Section 10(5) provides that property is liable to forfeiture under the Act if it is, inter alia, crime-used property, whether the relevant forfeiture offence was committed in the Territory or elsewhere, whether or not any person has been charged with or found guilty of the relevant forfeiture offence, and whether the property is in the Territory or outside of the Territory.

[18] Crime-used property is defined by s 11 in the following manner:

- (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.

[19] Section 6 of the Act defines what is meant by a “forfeiture offence”. It provides:

For the purposes of this Act, a forfeiture offence is –

- (a) an offence against a law in force anywhere in Australia that is punishable by imprisonment for 2 years or more; or

- (b) any other offence that is prescribed for the purposes of this section.

[20] There is no question that the offences which the respondent committed were “forfeiture offences”.

[21] The sheer breadth of the definition of “forfeiture offence” is breathtaking. A list of the Northern Territory offences punishable by a term of imprisonment for two years or more was provided by counsel for the respondent. The list ran to 27 pages covering as it did a very wide range of offending against numerous Acts, a good many of which were triable only summarily. The list contained only Northern Territory Acts and was not in fact complete as it did not deal with, for example, the *Corporations Act*; nor did it deal with Commonwealth offences or offences made under the laws of other states or territories. The extremely wide definition of a forfeiture offence gives rise to the real possibility that even relatively trivial offences may give rise to forfeiture of very valuable property. The wide definition of crime-used property, particularly in s 11(1)(c), gives rise to the possibility that what may be forfeited, for a relatively trivial offence, may be the offender’s own home if an act or omission was done in connection with the commission of a forfeiture offence on the offender’s own property. If the offence was committed on someone else’s property in which the offender had no interest, the offender may be liable for a crime-used substitution declaration under s 81 of the Act. The consequences of such a declaration are that the Court must value the crime-used property at its full market

unencumbered value, and order the offender to pay that sum to the Territory under s 81(4)(c). The amount ordered to be paid may be satisfied by forfeiture under Part 7 of the substituted property: see ss 86(1) and (3); s 101. In this case, the results could well be a judgment for \$1.5 million and possibly forfeiture of the respondent's land worth about \$310,000.00. Allowing for any mortgagees to be paid out, the resultant debt would be well in excess of \$1 million.

[22] The Act has been described by both counsel as draconian in its reach.

I doubt whether even Dracos himself would have conceived of a law so wide reaching. The questions of construction which we are asked to consider are therefore matters of extreme importance.

[23] Reference should also be made to s 3 of the Act which provides as follows:

3. Objective

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.

[24] It is clear from s 10(2) and s 10(3) that the objective of the Act goes well beyond that stated in s 3.

[25] Section 5 of the Act defines "property" in the following term:

property means –

- (a) real or personal property of any description, wherever situated and whether tangible or intangible; or

- (b) a legal or equitable interest in any property referred to in paragraph (a).

[26] Section 5 also defines “owner” to mean, in relation to property “a person who has a legal or equitable interest in the property”.

[27] Section 7 defines “effective control of property” in the following terms:

- (1) For the purposes of this Act, a person has effective control of property if, although the person does not have the legal estate in the property, the property is directly or indirectly subject to the control of the person or is held for the ultimate benefit of the person.
- (2) Without limiting subsection (1), when determining whether a person has effective control of any property, the following matters may be taken into account:
 - (a) any shareholdings in, debentures over or directorships of any corporation that has a direct or indirect interest in the property;
 - (b) any trust that has a relationship to the property;
 - (c) family, domestic and business relationships between persons having an interest –
 - (i) in the property;
 - (ii) in a corporation that has a direct or indirect interest in the property; or
 - (iii) in a trust that has a relationship to the property;
 - (d) any other relevant matters.

[28] The expression “legal estate” in s 7(1) is not defined.

[29] The Act also includes a definition of “premises” which is defined to include “a vessel, aircraft, vehicle, structure, building and any land or place whether built on or not”.

[30] Section 5 defines “land” to include an interest in land.

[31] The argument for the applicant was that the expression “crime-used property” refers equally to the physical land or personal property as well as the legal or equitable interest in any property whether real or personal. It was submitted that the definition of crime-used property in s 11(1)(b) supported this contention because of the reference to the “use” of property for storage and upon which the commission of acts or omissions “in or on the property” occurs: see s 11(1)(c). It was submitted that an interest cannot be used in this sense. It was submitted that the interest is the means by which a person or persons become entitled to utilise property for a relevant purpose, but it was only the physical entity which was used pursuant to the rights conferred by the interest. It was further submitted that s 11(2)(a) suggested that the physical property was intended by reference to the property being capable of also being used for another purpose.

[32] The structure of the definition of “property” suggests that the first part of the definition under sub-paragraph (a) is intended to refer to the physical property that is to say the physical land or the physical personal property being used such as a motor vehicle, an aeroplane or a boat, whereas the second part of the definition refers to legal or equitable interests in any such

property. It is curious that the definition uses the word “or” rather than “and”. Pearce and Geddes suggest in their text *Statutory Interpretation in Australia*⁴ “in ordinary speech the word ‘and’ is used conjunctively and the word ‘or’ is used disjunctively”. However, as the learned authors point out, “or” has sometimes been interpreted to mean “and” if the Court concludes that there are compelling reasons for finding that there is a printing or drafting error, or, if by reference to the context in which the word appears, that the cumulative effect of the provision should not be dictated to by the presence of the word in question. There is nothing in the context of the definition itself to suggest any drafting error, nor is there anything in the context of the definition to suggest “or” means “and”. The argument of the applicant depended upon the underlying purpose and the objects of the Act, but in my opinion that is not a helpful exercise in this case. I think that the true answer to this question depends upon the context in which the word “property” is to be found in a provision of the Act. In some cases, it may appear to be clear that the word was intended to refer to the physical property; in other cases, it may be clear that it was intended to refer only to a legal or equitable interest in the property; and in yet other cases, it may appear to refer to both.

Crime-used property substitution declaration

[33] The relevant provisions of the Act which deal with crime used property substitution declarations begin with s 81 which provides as follows:

⁴ 6th ed, para 2.25.

81. Application for Crime-Used Property Substitution Declaration

- (1) The DPP may apply to the Supreme Court for a crime-used property substitution declaration against a person.
- (2) On hearing an application under subsection (1), the court may declare that property of equivalent value owned or effectively controlled by the respondent is to be substituted for crime-used property if –
 - (a) it is more likely than not that the respondent has made criminal use of property so that the property is crime-used property within the meaning of s 11; and
 - (b) the crime-used property is not amenable to a restraining order or forfeiture under this Act for a reason or reasons referred to in s 82.
- (3) An application under subsection 1 may be made in conjunction with an application under Part 4, Division 2 for a restraining order, in proceedings under Part 5 for the hearing of an objection to the restraining of property, or at any other time.
- (4) If the court makes a declaration under this section, the court must –
 - (a) assess the value of the crime-used property in accordance with s 85;
 - (b) specify the assessed value of the crime-used property in the declaration; and
 - (c) order the respondent to pay to the Territory the amount specified in the declaration as the value of the crime-used property.
- (5) Crime-used property substitution declarations can be made against 2 or more respondents in respect of the same crime-used

property, whether or not the applications for the respective declarations are heard in the same proceedings.

- (6) If a court makes a declaration under this section, the court may make any necessary or convenient ancillary orders, including awarding costs as the court sees fit.

[34] Section 82 provides:

Crime-Used Property Not Available

For the purposes of s 81, crime-used property is not available for forfeiture if –

- (a) the respondent does not own or have effective control of the property;
- (b) the property was or is owned or effectively controlled by the respondent, and was or is restrained, but the restraining order has been or is to be set aside under s 63(1)(a) in favour of a spouse, de facto partner or dependant of the respondent; or
- (c) the property has been sold or otherwise disposed of, or cannot for any other reason be found for the purposes of this Act.

[35] The argument of Mr Wyvill SC for the respondent was that on the facts as found by Riley J, the finding that crime-used property was not available in terms of s 82 was not correct because the respondent did own the property. It was not contended that s 82(b) or (c) applied to the circumstances of this case.

[36] Mr Wyvill's argument focused on s 82(a). It was submitted that the respondent could not own the physical land; all he or anyone else could own was an interest in the land. On the facts of this case, Mr Wyvill's

submission is supported by the definition of “owner” to which I have previously referred. Although the word “own” is not defined, s 23 of the *Interpretation Act* provides:

In an act, where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings.

[37] There is nothing in the context of s 82 to suggest that the word “own” ought not to be given the meaning contended for by Mr Wyvill. In my opinion, it is clear from the text that crime-used property is not available for forfeiture if the respondent does not have an interest in the land whether it be legal or equitable. As Mr Wyvill pointed out, forfeiture of property can only mean in that context forfeiture of whatever interest in the property the respondent may have.

[38] Further support for Mr Wyvill’s argument is to be found in s 81(4) which requires the Court when making a declaration under s 81 to “assess the value of the crime-used property in accordance with s 85”. Once again, the physical land cannot be valued; all that can be valued is an interest in the land.

[39] In determining these questions, close attention must be paid to the text of the Act. As was said in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*:⁵

⁵ (2009) 239 CLR 27 at 47-48 para [47].

This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been deployed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.

[40] Counsel for the applicant pointed out in his submission that notwithstanding the textural difficulties to which I have referred, this Court should find that it was the physical land which was crime-used rather than the interest and that the word “owned” in s 82(a) should be given a narrow meaning limited only to the person who holds a freehold interest in the property. It was submitted that the respondent’s interpretation would leave open a significant gap in the scheme because people who deal in drugs, whether by cultivating them, manufacturing them or selling them could avoid a crime-used property substitution declaration by the simple expedient of letting some premises. However there are answers to this contention. First, the text is not ambiguous, but bears a plain meaning. Secondly, the owner of the legal estate may find that the property is liable to forfeiture if the legal owner is not an innocent party or if the legal owner was not aware or could not reasonably be expected to become aware until after the property was forfeited that the property was liable to forfeiture under Part 7 Division 3 of the Act (see s 121(1)(c) and (d)). Thirdly, it cannot be said that an order forfeiting an interest such as a lease does not always have consequences to the lessee. A lease may in fact be valuable, but even if it is not, forfeiture

of a lease is likely to disrupt the lessee's activities whether they be limited to criminal activities or not.

[41] Riley J found that the Court may declare property of equivalent value owned or effectively controlled by the respondent to be substituted for the crime-used property in this case. In my opinion, His Honour came to the wrong conclusion. I would answer question 1 in the reference in the negative and order that the applicant pay the respondent's costs of the reference.

Reeves J:

[42] I also agree with Mildren J that only the first question should be answered and that the answer should be in the negative, for the reasons his Honour has given.
