DPP v Dickfoss (No 2) [2011] NTSC 29

PARTIES:	DIRECTOR OF PUBLIC PROSECUTIONS v MARK WESLEY DICKFOSS (Respondent/Objector) THE NORTHERN TERRITORY OF AUSTRALIA (Respondent to the Objector) ATTORNEY GENERAL OF THE NORTHERN TERRITORY OF AUSTRALIA (Intervenor)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	105 of 2009 (20922571)
DELIVERED:	13 APRIL 2011
HEARING DATES:	8 MARCH 2011
JUDGMENT OF:	MILDREN J

CATCHWORDS:

FORFEITURE OF PROPERTY – Application to set aside – whether order would cause undue hardship to objector or others with interests in the property – whether house not secure relevant to the making of the order

PRACTICE AND PROCEDURE – Costs – whether public interest litigation relevant to the usual order as to costs – whether departure from usual order justified

Criminal Property Forfeiture Act, s 11(1)(a), s 11(1)(c), s 51, s 63(2), s 63(3)(a), s 63(3)(b), s 96(1), s 103, s 103(a), s 103(b), s 103(c), s 103(d), s 156

Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3) [2010] NSWLEC 59; *DPP v Dickfoss* [2011] NTSC 04; *Mansfield v Director of Public Prosecutions for Western Australia* (2006) 226 CLR 486; *Oshlack v Richmond River Council* (1988) 193 CLR 72; *Save the Ridge Inc v The Commonwealth* (2006) 230 ALR 411; referred to

REPRESENTATION:

Counsel:

Applicant/Respondent to the Objection:	R Jobson
Respondent/Objector:	A Wyvill SC
Intervenor:	No Appearance

Solicitors:

Applicant/Respondent to the Objection:	Solicitor for the Northern Territory
Respondent/Objector:	Ward Keller
Intervenor:	No Appearance

Judgment category classification:	A
Judgment ID number:	Mil11486
Number of pages:	15

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

DPP v Dickfoss (No 2) [2011] NTSC 29
No 105 of 2009 (20922571)

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS
Appellant

AND:

MARK WESLEY DICKFOSS
Respondent/Objector

THE NORTHERN TERRITORY OF AUSTRALIA
Respondent to the Objector

ATTORNEY GENERAL OF THE NORTHERN TERRITORY OF AUSTRALIA
Intervenor

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 13 April 2011)

[1] On 14 January 2011, I delivered reasons for my judgment in this matter. At the conclusion, I said that I would hear the parties as to the form of the orders to be made in accordance with these reasons and as to costs.

[2] In my reasons, I found that the objector had failed to show that the forfeiture offence of possession fell outside of s 11(1)(c) of the *Criminal Property*

Forfeiture Act (the Act). I dismissed the constitutional challenge and said that the objection must be dismissed. In relation to the application for forfeiture, I said that I was satisfied that the applicant has proved that the land was crime used within the meaning of s 11(1)(c) of the Act and that, as the land was still the subject of a restraining order, there must be an order for forfeiture.

[3] Before any orders were taken out, the objector took out a summons seeking certain relief. After hearing submissions, I reserved my decision.

Application to set aside the restraining order

[4] Mr Wyvill SC, on behalf of the objector, submitted that the Court had a broad statutory power to set aside a restraining order.

[5] Section 156 of the Act provides as follows:

> **156 Later applications, orders or findings**
>
> The fact that an application, order or finding has been made under this Act in relation to any property, person or forfeiture offence does not prevent another application, order or finding, or a different application, order or finding, from being made under this Act in relation to the property, the person or the offence.

[6] It was submitted that at the time Olsson AJ made the restraining order on 27 July 2009, his Honour did not have the advantage of hearing any submissions on behalf of the objector or the advantage of receiving any evidence such as was placed before me on the hearing of the objection application and the application for an order for forfeiture.

[7] On the hearing of the summons, Mr Wyvill SC was granted leave to file in court a further affidavit sworn by the objector concerning the state of the house on the land. This affidavit was read without objection from Mr Jobson who did not seek to cross-examine upon it.

[8] The affidavit deposes to the following further facts relating to the house. The house is a simple building consisting of a concrete floor, a frame of rough sawn Australian native timber and cladding of corrugated iron for both the walls and roof. There are no internal doors and the only entry doors do not have normal door furniture or a lock. There is also a screen door which has no lock. There is nothing other than flyscreen on the louvered windows by way of security. The only way to lock the door is with a chain and padlock. Before the late Mr Alfred Dickfoss died, he lived a hermit-like existence and rarely left the property. The last time he left the property overnight was about five or six years prior to his death to have a medical operation in Brisbane, Queensland. At that time, the objector stayed at home.

[9] The objector did not usually lock the house and has no recollection of ever locking it until after his father's death. Since then he has locked his home using the chain and padlock on occasions when he is away overnight. He swore that he did not keep the cannabis in the house to keep it secure.

[10] It would appear from the objector's affidavit that the occupants of the house rarely both left it at the same time at or around the time when the offences were committed.

[11] It was not suggested that Olsson AJ made any error in making the restraining order. It was put that this new material would entitle this Court as a court of equity to reconsider the order and that the power to do so was reinforced by the express provisions of s 156 of the Act.

[12] Attention was drawn to paragraph [91] of my earlier judgment[1] when I said that bearing in mind that the Act is particularly draconian and complex in its various provisions, it would be open to the Court to refuse an application where the forfeiture offence was minor, technical or trivial, and the value of crime-used property was substantial so that there was significant disproportionality between the remedy sought and the purposes which the remedy sought to achieve, particularly if there would be significant hardship to the defendant or others with an interest in the property.

[13] Mr Jobson submitted that I had no power to set aside Olsson AJ's order absent any evidence to suggest that the order was invalid for reasons such as absence of jurisdiction or material non-disclosure or changed circumstances. The only remedy, so it was put, was to appeal the order.

[14] Although s 156 of the Act is very broadly drafted, I do not consider that it is wide enough to cover this kind of situation. In terms of orders, s 156 merely

[1] *DPP v Dickfoss* [2011] NTSC 04.

states that the fact that an order has been made does not prevent another order or a different order from being made under the Act in relation to the property, the person or the offence. The difficulty now is that the restraining order made by Olsson AJ on 27 July 2009 has been extended until further order by an order which I made on 17 September 2010, whereas the original order was in the nature of an interim order that was made only until the close of business on 27 January 2010. That is not in itself fatal to the objector's present application, but it demonstrates that the burden of showing that the order should be set aside now rests upon the objector.

[15] As I understand the objector's submission, it is put that the offence is a minor or trivial one and that there was significant disproportionality between the remedy sought and the purposes which the remedy sought to achieve, particularly as there would be significant hardship to the objector. So far as disproportionality is concerned, by itself this is a common feature of forfeiture proceedings or forfeiture legislation generally. Nevertheless, it is a factor to be considered in relation to the other relevant circumstances to the extent that they exist.

[16] I do not accept that the offence can be described as trivial or minor as submitted by Mr Wyvill SC. The offence carries a maximum penalty of imprisonment for 14 years. The amount of the cannabis plant material found is more than the double the minimum required to amount to a commercial quantity.

[17] It may be accepted that the objector was using the cannabis for pain relief and intended to use the material solely for his own use, but there is always a potential, even in such circumstances, for the cannabis to find its way into the hands of others. It could be stolen; it could be given away to friends; or the objector may be tempted in hard times to sell some of it. Clearly, the purpose of imposing significant penalties for the possession of cannabis is because the Legislature has taken the view that cannabis is a dangerous drug. Not only are there potentially health problems to a user which may require treatment at public expense, but it can lead to anti-social, if not criminal, behaviour particularly when the consumer is under the influence of it; all the more so when mixed with excessive alcohol consumption.

[18] So far as hardship is concerned, I accept that an order which leads to forfeiture will cause significant hardship to the objector. He will lose the property and his home. He is now unable to be employed and is receipt of a disability pension. On the other hand, the outcome of these proceedings will not leave him penniless, as he will inherit through the estate of his late father 50 per cent of the net proceeds of sale. There is nothing to show that the objector would be unable to obtain alternative accommodation on a rental basis or be unable to survive on his pension supplemented by his inheritance.

[19] I do not consider that the combination of the circumstances is sufficient to exercise any discretion which I may have to set aside the restraining order.

[20] The second application, which Mr Wyvill SC made, was to ask me to reopen my findings in paragraphs [85] and [96] of my previous decision. In paragraph [85], I said that because the objector had control of the land and the house on it, which in the ordinary course would be locked up to prevent intruders at night and at times when the occupants were absent, there was a direct and immediate connection with the land bearing in mind that the connection does not have to be substantial. The new evidence from the objector shows, as I have said before, that the house was rarely locked and that it was not his intention to use the house for the purpose of providing security for the cannabis. I do not think that the objector's actual intention is an irrelevant consideration because if that were his intention, there would clearly be the necessary connection with the land, but even without that intention there can be the relevant connection. Whether the house can be locked or not does not alter the fact that the objector and his father were both in physical occupation of the house, they were the owners of the land and therefore the house and they were not only in a position legally to prevent unauthorised access to the house, but they were also physically in a position to do so. Furthermore, they could have locked the house up if they had chosen to do so. In my opinion, there was sufficient connection with the land. I decline to change my opinion that the objector failed to show that the forfeiture offence of possession fell outside s 11(1)(c) of the Act.

[21] In paragraph [96] of my judgment, I said that there was no evidence that the land, as opposed to the house, was fenced or had locked gates so as to

prevent intruders, so I would not infer that the objector used the land by exercising control over it in any meaningful way. This was said in respect of the cannabis plants which were grown in pots. I went on to say that the findings that I had made in relation to the plant material and the connection with it to the land for the purposes of possessing it remain unaltered regardless of where the burden of proof lies. I decline to change my conclusion in relation to that as well. The circumstances in relation to the pots upon the land and the cannabis found inside the house are quite different. There are always questions of degree involved.

Costs

[22] The remaining issue is in relation to costs. Mr Jobson on behalf of the Director sought an order for costs. Mr Wyvill SC submitted that there should be no order as to costs.

[23] The Court has a discretion whether or not to order a successful party to pay costs. However, the discretion must be exercised judicially and, in general, a successful party is entitled to an order for costs unless there are sufficient reasons established to deprive that party of its costs.

[24] Mr Wyvill SC submitted that the litigation concerned a new and unique scheme in relation to which there were no relevant authorities in the Northern Territory except in relation to the interlocutory stages. In the absence of settled law, the defendant was not in a position where it was possible to give him confident advice about the merits of the claim against

him. In fact he succeeded on one of the major issues, particularly whether the facts fell within s 11(1)(a) of the Act. I was told that there were other cases awaiting the outcome of the decision in this matter, although according to Mr Jobson most of those other matters depended upon the outcome of the constitutional challenge rather than the construction issues that were dealt with in this case.

[25] I was referred by Mr Wyvill SC to a number of decisions where Superior Courts have declined to order costs where the proceedings have been characterised as "public interest litigation" with "the prime motivation" being the upholding of "the public interest in the rule of law". The first of those decisions was *Oshlack v Richmond River Council*.[2] It is difficult to see how this was a case which could be so categorised. The objector had a direct interest in the outcome of the proceedings. The only thing that can be said about the public interest is that the legislation "is draconian in its operation and complex in various of its provisions".[3] I accept that the resolution of the questions of construction in this case are likely to be of benefit both to the Director of Public Prosecutions as well as to other litigants. However, that in itself is not an unusual feature of this kind of litigation.

[26] The other authority to which I was referred was the decision of the NSW Land and Environment Court in *Caroona Coal Action Group Inc v Coal*

---

2 (1988) 193 CLR 72.

3 See *Mansfield v Director of Public Prosecutions for Western Australia* (2006) 226 CLR 486 at 503 para [50].

Mines Australia Pty Ltd (No 3).[4] That was also a case involving public interest litigation. As was said by Preston CJ in that case:[5]

> A review of the decisions on costs reveals that courts have used, in effect, a three step approach in determining whether to depart from the usual costs rule: first, can the litigation be characterised as having been brought in the public interest?; secondly, if so, is there "something more" than the mere characterisation of the litigation as being brought in the public interest?; and thirdly, are there any countervailing circumstances, including relating to the conduct of the applicant, which speak against departure from the usual costs rule?

[27] The difficulty I have is characterising the litigation as public interest litigation. I agree with Preston CJ that the notion of public interest is a "nebulous concept". Preston CJ summarised five considerations which bear upon this question. They include:

- the public interest served by litigation;
- whether that interest is confined to a relatively small number of members concerned with private interests or whether the interest is wider involving a significant number of members of the public;
- whether the application is sought to enforce public law obligations;
- whether the prime motivation for the litigation is to uphold the public interest in the rule of law; and
- whether the applicant has no pecuniary interest in the outcome of the proceedings.[6]

---

4 [2010] NSWLEC 59.
5 at para [13].
6 See para [38].

[28] Looking at these considerations as a group, I am unable to see how this could be truly said to be public interest litigation. The objector's objection was brought in order to protect his interest in property and that of the interest of his late father. The forfeiture application it may be said was brought by the Director of Public Prosecutions to enforce a statutory right and it may be said that to that extent the action was brought in the interest of the public rather than in the interest of the Director of Public Prosecutions itself. Plainly, the objector does have a pecuniary interest in the outcome of the proceedings. So far as the interests of other members of the public are concerned, only a small number of people are likely to be unfortunate enough to have proceedings brought against them under the provisions of this Act.

[29] Furthermore, insofar as it might be said that the proceedings brought by the Director of Public Prosecutions were brought in the public interest, it is to be observed that the Director has succeeded. This is not a case where the proceedings were commenced by the objector who could lay claim to bringing the proceedings in the public interest.

[30] Nevertheless, there is force in this submission of Mr Wyvill SC that an order for costs in this case against the objector would be a harsh result. The objector did not in fact succeed on some important issues in the case. So far as the objection relating to the late father's interest is concerned, that was not an issue, but some costs were no doubt incurred in relation to the preparation of the Notice of Objection and the service upon the Director of

Public Prosecutions and briefing counsel. The issue was not resolved in favour of the objector until later in the proceedings. Additionally, some costs were incurred in relation to having the property valued which was a necessary step in the late Mr Dickfoss' case. Mr Wyvill SC submitted that the impact of an order for costs will compound the objector's personal financial position and also that the questions of construction raised significant issues which will be of benefit to other litigants. However, that is not enough to displace the general rule that costs should follow the event.[7]

[31] Because the Director did not succeed on all of the issues that were argued, I would not order that the objector pay the whole of the Director's costs. Bearing in mind the other matters to which I have referred, I think this is an appropriate case for the Director to only recover a proportion of its costs. The time and effort taken to deal with the issues on which the Director failed in the claims involving the objector personally, added about a third to the whole of the costs. Taking into account the costs relating to the late father's objection, I consider that should order that the objector pay 55 per cent of the Director's costs to be taxed or agreed. As no costs have been sought in relation to the constitutional issues, there will be an order that each party bear their own costs on those issues.

Orders

[32] I make the following orders:

---

[7] *Save the Ridge Inc v The Commonwealth* (2006) 230 ALR 411 at 414-415 [12]-[14].

1. That Mark Wesley Dickfoss, the first objector, and Alfred Otto Dickfoss (deceased), the second objector, have leave to amend their respective objections in terms of paragraph 6 of the reasons for judgment delivered on 14 January 2011.

2. The objection of Mark Wesley Dickfoss is dismissed.

3. The objection of Alfred Otto Dickfoss (deceased) is upheld.

4. Pursuant to s 96(1) of the *Criminal Property Forfeiture Act* (the Act), all that land described in the certificate of title volume 684 folio 523, namely, Lot 4 Hundred of Cavenagh from Plan (S) LTO 076/001, the registered joint owners of which are Mark Wesley Dickfoss and Alfred Otto Dickfoss (deceased), (the property) as specified in paragraph 1 of the restraining order of Olsson AJ of 27 July 2009 as extended from time to time, is forfeit to the Territory on the grounds that it is crime used property pursuant to s 11(1)(c) of the Act.

5. For the purpose of s 63(3)(a) and s 63(3)(b) of the Act, the Court determines that the respondent's share of the property is 50 per cent and Alfred Otto Dickfoss' (deceased) share of the property is 50 per cent.

6. Pursuant to s 63(2) and s 103 of the Act, upon sale of the property, the proceeds of the sale are to be applied as follows and in the order specified below:

6.1 The costs charged and the expenses arising from the sale (s 103(a));

6.2 Expenses incurred by the Territory in managing the property while the restraining order was in place (s 103(b));

6.3 Expenses incurred by the Territory in managing the property after forfeiture (s 103(c));

6.4 The Australia and New Zealand Banking Group Limited mortgage account in respect of the secured mortgage on the property (s 103(d)); and

6.5 The remainder of the proceeds of sale to be divided between the Territory and the deceased estate of Alfred Otto Dickfoss in the following proportions:

(i) 50 per cent to the Territory; and

(ii) 50 per cent to the deceased estate of Alfred Otto Dickfoss.

7. Subject to paragraph 8, the first respondent and first objector, Mark Wesley Dickfoss, is to pay 55 per cent of the costs of the Director of Public Prosecutions to be taxed or agreed.

8. Each party is to bear their own costs in relation to the constitutional issues raised.

9. On the undertaking of the respondent by his counsel to prosecute expeditiously an appeal from the order in paragraph [4] above, that order and orders 5-7 inclusive are stayed until further order and the property is to continue to be restrained until further order pursuant to s 51 of the Act.
