Burnett & Ors v Director of Public Prosecutions [2007] NTCA 7

PARTIES:	BURNETT, Martin John AND SPICECANE PTY LTD (ACN 009 652 733) v DIRECTOR OF PUBLIC PROSECUTIONS
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	APPELLATE JURISDICTION FROM THE SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA
FILE NO:	135 of 2006 (20628316)
DELIVERED:	1 NOVEMBER 2007
HEARING DATES:	28 – 31 MAY, 1 JUNE 2007
JUDGMENT OF:	MARTIN (BR) CJ, MILDREN & SOUTHWOOD JJ
APPEAL FROM:	JUSTICE RILEY 28 – 30 MARCH 2006 No 36 of 2006 (20609147) and No 37 of 2006 (20609172)
PARTIES:	BURNETT, Martin John AND BURNETT, Dianne Maria AND BURNETT, James Mick AND SPICECANE PTY LTD (ACN 009 652 733) AND

	EXECUTIVE BUSINESS STRATEGIES PTY LTD (ACN 107 862 000) AS TRUSTEE OF THE BURNETT FAMILY TRUST AND MONSOON HOMES PTY LTD (ACN 104 438 766) v THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE ATTORNEY-GENERAL OF THE NORTHERN TERRITORY OF AUSTRALIA (Intervener)
FILE NO:	153 of 2006 (20631967)
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 PURSUANT TO S 21 OF THE SUPREME COURT ACT
DELIVERED:	1 NOVEMBER 2007
HEARING DATES:	28 – 31 MAY, 1 JUNE 2007
JUDGMENT OF:	MARTIN (BR) CJ, MILDREN & SOUTHWOOD JJ
APPEAL FROM:	RESERVATION OF A QUESTION OF LAW

CATCHWORDS:

CRIMINAL LAW
Referral of question of law - appeal - jurisdiction, practice and procedure – operation of the *Criminal Property Forfeiture Act* 2002 (NT) – whether

conduct of proceedings and failure to provide reasons constituted a denial of procedural fairness – failure to provide reasons amounted to denial of procedural fairness – appeal allowed.

Referral of question of law -- Jurisdiction, practice and procedure -- operation of the *Criminal Property Forfeiture Act* 2002 (NT) – validity of legislation -- whether institutional integrity of the Court impaired – power to make allowance for legal expenses - legislation valid.

Criminal Property Forfeiture Act 2002 (NT), s 3, s 6, Pt 2, Pt 3, Pt 4 Div 1 and 2, Pt 5, Pt 6, s 92, s 121, s 135, s 136, and s 154; *Interpretation Act 1980 (NT)*, s 17; *Legal Aid Act 1990 (NT)*, s 5, s 7, s 12, s 26, Pt VI, s 43, s 44, s 45; *Misuse of Drugs Act 1990 (NT)*, s 36A; *Marriage Act 1961 (Cth)*, s 94(2); *Supreme Court Act 1979 (NT)*, s 21, s 51, s 53 and s 75; *Supreme Court Rules (NT)* r 23.01, r 92.06, r 92.08

Annetts v McCann (1990) 170 CLR 596; *ASIC v Edensor Nominees Pty Ltd and Ors* (2001) 204 CLR 559; *Baker v The Queen* (2005) 223 CLR 513; *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256; *Black v Taylor* [1993] 3 NZLR 403; *Cameron v Cole* (1944) 68 CLR 571; *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *Dietrich v The Queen* (1992) 177 CLR 292; *Electric Light and Power Supply Corporation Ltd v Electricity Commission (NSW) and Anor* (1956) 94 CLR 554; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Fleming v The Queen* (1998) 197 CLR 250; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2007) 33 WAR 245; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Leeth v The Commonwealth* (1992) 174 CLR 455; *McInnis v The Queen* (1979) 143 CLR 575; *Mansfield v Director of Public Prosecutions for Western Australia* (2006) 226 CLR 486; *Nichols v Queensland* [1983] 1 Qd R 580; *Nicholas v The Queen* (1998) 193 CLR 173; *Papps v Police* (2000) 77 SASR 210; *Plaintiff S157/ 2002 v The Commonwealth of Australia* (2003) 211 CLR 476; *R v Keyte* (2000) 78 SASR 68; *Sanders v Sanders* (1967) 116 CLR 366; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247; *Tran v Claydon* (2003) 40 MVR 506; *Tringali v Stewardson Stubbs & Collett Ltd* (1965) 66 SR (NSW) 335; *Walton v Gardiner* (1993) 177 CLR 378; *Wentworth v NSW Bar Association* (1992) 176 CLR 239; *Woolf v Trebilco* [1933] VLR 180, considered.

Alice Springs Town Council v Mpweteyerre Aboriginal Corporation and Others (1997) 115 NTR 25; *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corp* (1985) 1 NSWLR 561; *Apps v Pilet* (1987) 11 NSWLR 350; *Asiatic Petroleum Co Ltd v Anglo-Persian Oil Co Ltd* [1916] 1 KB 822; *Attorney-General (Hong Kong) v Lee Kwong-kut* [1993] AC 951; *Australian National Airlines Commission v The Commonwealth of Australia & Anor* (1975) 132 CLR 582; *Barton v Walker* [1979] 2 NSWLR 740; *Blatch v Archer*

(1774) 98 ER 969; *Chief Commissioner of Pay-Roll Tax v Group Four Industries Pty Ltd* [1984] 1 NSWLR 680; *De Iacovo v Lacanale* [1957] VR 553; *Director of Public Prosecutions (Cth) v Saxon* (1992) 28 NSWLR 263; *Director of Public Prosecutions (SA) v Vella* (1993) 61 SASR 379; *Equiticorp Holdings Ltd v Hawkins* [1993] 2 NZLR 737; *Giannarelli v Wraith* (1988) 165 CLR 543; *Hampton Court Ltd v Crooks* (1957) 97 CLR 367; *Harris v Caladine* (1991) 172 CLR 84; *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378; *In re Racal Communications Ltd* [1981] AC 374; *In the Estate of Leahy (Dec'd); Earl v Moses & Anor* [1975] 1 NSWLR 246; *Jago v District Court (NSW)* (1989) 168 CLR 23; *John Fairfax Publications Pty Ltd v Attorney – General (NSW)* (2000) 81 ALR 694; *Knight v FP Special Assets Ltd* (1992) 174 CLR 178; *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587; *Lipohar v the Queen* (1999) 200 CLR 485; *Main Electrical Pty Ltd v Civil & Civic Pty Ltd* (1978) 19 SASR 34; *Mansfield v Director of Public Prosecutions (WA)* (2005) 31 WAR 97; *Moevao v Department of Labour* [1980] 1 NZLR 464; *Mobasa Pty Ltd v Nikic* (1987) 47 NTR 48; *Nationwide News Pty Ltd & Ors v Bradshaw & Anor* (1986) 41 NTR 1; *North Australian Aboriginal Legal Aid Service Inc v Bradley & Anor* (2004) 218 CLR 146; *Pasha v Edmonds & Anor* (1998) 28 MVR 217; *Pettitt v Dunkley* [1971] 1 NSWLR 376; *R v Moffatt* [1998] 2 VR 229; *R v Parker* (1994) 75 A Crim R 437; *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40; *Re Harrod* [1978] 1 NSWLR 331; *The State of New South Wales v Canellis & Ors* (1994) 181 CLR 309; *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181; *Sypott v The Queen* [2003] VSC 41; *Western Australia v Ward* (1997) 76 FCR 492; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; *Young v Quin & Ors* (1985) 59 ALR 225, referred to.

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REPRESENTATION:

Counsel:

First & Fourth Appellants/Plaintiffs:	C McDonald QC with S Lee
Second Appellant/Plaintiff:	R Webb QC with T Prichard
Third, Fifth & Sixth Appellants/Plaintiffs:	D Greenwell
First Respondent/Defendant:	A Silvester
Intervener:	T Pauling QC with S Brownhill

Solicitors:

First, Second & Fourth Appellants/Plaintiffs:	Maleys
Third, Fifth & Sixth Appellants/Plaintiffs:	Grope Hamilton Lawyers
First Respondent/Defendant:	Solicitor for the Northern Territory
Intervener:	Attorney-General for the Northern Territory

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

Burnett & Ors v Director of Public Prosecutions [2007] NTCA 7
No. SC 135 of 2006 (20628316) & SC No 153 of 2006 (20631967)

No 135 of 2006

BETWEEN:

MARTIN JOHN BURNETT
First Appellant

SPICECANE PTY LTD
(ACN 009 652 733)
Second Appellant

AND

DIRECTOR OF PUBLIC PROSECUTIONS
Respondent

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

No 153 of 2006

BETWEEN:

MARTIN JOHN BURNETT
First Plaintiff

DIANNE MARIA BURNETT
Second Plaintiff

JAMES MICK BURNETT
Third Plaintiff

SPICECANE PTY LTD
(ACN 009 652 733)
Fourth Plaintiff

EXECUTIVE BUSINESS STRATEGIES PTY LTD (ACN 107 862 000) AS TRUSTEE OF THE BURNETT FAMILY TRUST
Fifth Plaintiff

MONSOON HOMES PTY LTD
(ACN 104 438 766)
Sixth Plaintiff

AND

DIRECTOR OF PUBLIC PROSECUTIONS
Defendant

THE ATTORNEY-GENERAL OF THE NORTHERN TERRITORY OF AUSTRALIA
Intervener

CORAM: MARTIN (BR) CJ, MILDREN & SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 1 November 2007)

Martin (BR) CJ:

Introduction

[1] Questions of law arising out of the operation of the Criminal Property Forfeiture Act ("the Act") have been referred to this Court.

[2] On 28 March 2006 the Director of Public Prosecutions ("the Director") filed in the Supreme Court two applications under the Act. In proceedings number 36 of 2006 the Director sought ex parte orders restraining identified real and personal property of a number of related persons and entities ("the plaintiffs"). The grounds advanced in support of the application were that all the property constituted unexplained wealth of the plaintiffs and that specified property was either crime-used or crime-derived property. Other incidental orders were sought including an order that six of the affidavits filed in support of the application not be provided to the plaintiffs on the

grounds of public interest immunity and that disclosure might prejudice an ongoing investigation.

[3] In proceedings number 37 of 2006 the Director sought a declaration that the plaintiff, Martin John Burnett, was at all times after 1 January 1999 taken to be involved in criminal activities. Declarations were sought that property identified in the application was crime-derived and crime-used property and constituted unexplained wealth for the purposes of the Act. Associated declarations were sought that none of the wealth was lawfully acquired. In substance a declaration was sought as to the amount of unexplained wealth together with either payment of the amount or forfeiture of the property.

[4] On 29 March 2006 the Director filed an ex parte application seeking consolidation of the two proceedings.

[5] All applications proceeded without notice to the plaintiffs. On 29 March 2006 a Judge of the Supreme Court ordered that the two sets of proceedings be consolidated. On 30 March 2006 his Honour made orders restraining all of the property identified in the application. The order specified that restraint was made on the grounds that some of the property was crime-derived property and all of the property constituted unexplained wealth of the plaintiffs.

[6] On 30 March 2006 the learned Judge also ordered that information contained in six affidavits filed in support of the application for restraining orders not be provided to the plaintiffs ("confidential affidavits"). The formal order

identifies that it was made on the grounds "of public interest immunity and that the Court is satisfied that the release of information contained in the … affidavits may materially prejudice an ongoing investigation …". No written reasons were delivered.

[7] A formal order was not made in respect of the applications for declarations. Consideration of those applications appears to have been adjourned.

[8] The Judge ordered that the court be closed during the hearings. No transcript has been made available to the plaintiffs. His Honour did not give reasons for his decisions. A subsequent application by some of the plaintiffs for access to the confidential affidavits was refused. Brief oral extempore reasons were given.

[9] In proceedings number 135 of 2006, the plaintiffs sought a declaration that the conduct of the proceedings before the judge constituted "a denial of procedural fairness" and were invalid. Further, and in the alternative, the plaintiffs sought a declaration that the failure of the Judge to give reasons constituted a denial of procedural fairness.

[10] In proceedings number 153 of 2006, the plaintiffs sought declarations that sections 46(2), 49(4) and 154(1)(a) of the Act are invalid. In essence, the plaintiffs submitted that these provisions substantially impair the institutional integrity of the Supreme Court of the Northern Territory and amount to an impermissible direction to the Court as to the manner and/or outcome of the exercise of the Court's jurisdiction under the Act.

[11] A different Judge reserved for the consideration of the Full Court a number of questions arising from both sets of proceedings. Those questions are set out in paragraphs [19] and [20] of these reasons.

[12] During submissions in this Court, no issue was taken as to the validity of either set of proceedings which have found their way to this Court through references of questions of law. In particular, in proceedings number 135 of 2006 the plaintiffs effectively sought a declaration from a Judge of the Supreme Court that proceedings before another Judge of the same Court constituted a denial of procedural fairness and were invalid. Neither party raised the question as to the power of a single Judge in the exercise of the Court's original jurisdiction to issue prerogative relief against another Judge.

[13] After this Court reserved its decision, the Court sought written submissions on this issue. In proceedings number 153 of 2006, both the Director and the Attorney-General who intervened in those proceedings submitted that as declarations were sought that various provisions of the Act were invalid and prerogative relief was not sought in respect of orders made by another Judge of the Court, the plaintiffs had standing and a Judge had jurisdiction to entertain the proceedings and power to make the orders sought.

[14] In respect of proceedings number 135 of 2006, however, the Director submitted that there is considerable doubt that a single Judge had jurisdiction to entertain the proceedings because a declaration was sought

that the conduct of another Judge of the Court constituted a denial of procedural fairness and, therefore, the orders of the Judge were invalid. The Director suggested that as the issues had been fully argued, rather than dismiss the proceedings, sitting as the Court of Appeal the Court should dispense with compliance with the Supreme Court Rules and treat the proceedings as an application for leave to appeal, grant leave to appeal and proceed on the basis that proceedings number 135 of 2006 constitute an appeal to the Court of Appeal. The plaintiffs did not object to that course.

[15] In my opinion, it is unnecessary to canvass the submissions or authorities with respect to these questions. Proceedings number 153 of 2006 were valid and it is unnecessary to determine the validity of proceedings number 135 of 2006. Rather, in proceedings number 135 of 2006, sitting as the Court of Appeal the Court should dispense with compliance with the Rules, grant leave to appeal and treat the matter as having been heard as an appeal.

[16] For ease of reference, these reasons proceed on the basis of the references of questions of law in both sets of proceedings. As will appear later in these reasons, however, in my view in proceedings number 135 of 2006 the appeal should be allowed.

Agreed Facts

[17] For the purposes of both sets of proceedings, the following facts were agreed between the parties:

"(1) The defendant [the Director of Public Prosecutions] proceeded ex parte before Riley J in the Supreme Court of the Northern Territory on 28, 29 and 30 March 2006 in proceedings numbered 36 and 37 of 2006 seeking restraint of the property set out in the application. The application was made pursuant to the provisions of the Criminal Property Forfeiture Act ("the Act").

(2) The defendant did not give notice to any of the plaintiffs or their servants or agents in respect of the ex parte applications made on 28 March 2006.

(3) The defendant relied upon some nine affidavits in the ex parte application. Six of the affidavits relied upon in the application were specified as confidential affidavits.

(4) The application in proceedings numbered 36 of 2006 stated in paragraph 9 thereof that the "facts, matters and circumstances supporting this application are as set out in the affidavits". This reference included the six confidential affidavits.

(5) The defendant, in his ex parte application, sought that all the property specified in the application be restrained under the provisions of the Criminal Property Forfeiture Act.

(6) The property sought to be restrained was:

(a) Real property

(i) Residential property known as 10 Stasinowsky Street, Alawa, Northern Territory being all that land comprised in Certificate of Title Vol 689 Fol 495 being Lot 1890 Town of Nightcliff from Plan A 000385, the registered proprietor of which is Executive Business Strategies Pty Ltd as trustee of the Burnett Family Trust;

(ii) Residential property known as Unit 17, 7 Brewery Place, Woolner, Northern Territory being all that land comprised in Certificate of Title Vol 672 Fol 033 being Lot 7105 Town of Darwin Units Plan U2003/603, the registered proprietor of which is James Mick Burnett;

(iii) Residential property known as 30 Orchard Road, Coconut Grove, Northern Territory being all that land comprised in Certificate of Title Vol 689 Fol 492 being Lot 9164 Town of Nightcliff from Plan

LTO 85/065 the registered proprietor of which is Executive Business Strategies Pty Ltd as trustee of the Burnett Family Trust;

(iv) Residential property known as 35 Flinders Drive, Stuart Park, Northern Territory being all that land comprised in Certificate of Title Vol 689 Fol 492 being Lot 4785 Town of Darwin from Plan OP 001415, the registered proprietor of which is Executive Business Strategies Pty Ltd as trustee of the Burnett Family Trust;

(v) Commercial property known as 110 Mitchell Street, Darwin, Northern Territory being all that land comprised in Certificate of Title Vol 689 Fol 492 being Lot 2443 Town of Darwin from Plan DIA 000388, the registered proprietor of which is Executive Business Strategies Pty Ltd as trustee of the Burnett Family Trust;

(vi) The net proceeds of the sale of the property known as 72 Archer Street, Woodford, Queensland 4514, the registered proprietor of which was Spicecane Pty Ltd.

(b) Personal property

(i) BMW 318i Sedan NT 662 589 owned by Spicecane Pty Ltd;

(ii) Holden Commodore SS VT Sedan NT 532 907 owned by Spicecane Pty Ltd;

(iii) Mazda B2600 4 x 2 Std Cab NT 429 603 owned by Spicecane Pty Ltd;

(iv) Ford Fairmont NT 647 197 owned by Martin John Burnett;

(v) Toyota Hilux NT 699 863 owned by James Mick Burnett.

(c) Accounts

(i) ANZ – Spicecane Pty Ltd – BSB 015 901 Acc No 1099-78264;

(ii) ANZ – Executive Business Strategies as Trustee of the Burnett Family Trust – BSB 015 901 Acc No 4967-14145;

(iii) CBA – Monsoon Homes Pty Ltd – Acc No 590310440725.

(d) Solicitors Trust Account – Priestleys Lawyers Pty Ltd Trust Account – monies held on behalf of Spicecane Pty Ltd or Martin John Burnett;

(e) Solicitors Trust Account – Smith & Stanton, Solicitors, 607 Robinson Road, Apsley, Queensland, 4034 – monies held on behalf of Spicecane Pty Ltd or Martin John Burnett.

The plaintiffs do not have any other real property, bank accounts or motor vehicles.

(7) The defendant did not direct Riley J's attention to restraining less property than that restrained so that the plaintiffs could meet legal expenses in defending proceedings number 36 and 37 of 2006.

(8) Riley J did not inquire whether he should restrain less property than that sought to be restrained.

(9) An application was made ex parte on 29 March 2006 to consolidate proceeding number 37 of 2006 with proceeding number 36 of 2006.

(10) No notice of the ex parte application for consolidation of proceeding number 37 of 2006 with proceeding number 36 of 2006 was given to any of the plaintiffs, their servants or agents.

(11) On 30 March 2006 the defendant made further submissions ex parte in respect of seeking the restraining orders sought in proceedings number 36 of 2006.

(12) Riley J made orders ex parte on 30 March 2006 restraining all the property sought in the application pursuant to the provisions of the Act.

(13) Other than the formal orders made on 30 March 2006 Riley J did not give any reasons for his decision and/or decisions and orders made on 28, 29 and 30 March 2006.

(14) Riley J did not publish any reasons for his decision and/or decisions and orders made on 28, 29 and 30 March 2006.

(15) No transcript of the ex parte proceedings on 28, 29 and 30 March 2006 has been made available to the plaintiffs, their servants or agents.

(16) Some of the plaintiffs sought access to the confidential affidavits in or around May 2006.

(17) Riley J denied the plaintiffs access to the confidential affidavits referred to in the application made ex parte on 28 March 2006. His Honour did not give formal reasons for his refusal but they can be gleaned from a transcript dated 26 May 2006 provided to the plaintiffs on 7 October 2006.

(18) The plaintiffs' interests in their property, livelihood and reputation were affected by the orders made on 28, 29 and 30 March 2006."

[18] Additional facts placed before the Court during the hearing are set out in the reasons of Mildren J in paras [196] and [198].

Questions Reserved

[19] In proceedings number 135 of 2006 ("procedural fairness proceedings"), the following questions were reserved for the consideration of this Court:

"1. Whether the cumulative factors referred to in 1 to 17 amount to a denial of procedural fairness in the conduct of the proceedings numbered 36 and 37 of 2006.

2. Further and alternatively whether the failure of Justice Riley to give and publish reasons for his decision or decisions and orders of 28, 29 and 30 March 2006 constituted a denial of procedural fairness in the circumstances of an ex parte application made by the defendant under the provisions of the Act.

3. Whether in the context of an ex parte application for the restraint of the plaintiffs' property the person is entitled to:

a) notice of the application;

b) reasons for making the restraining orders made on 28, 29 and 30 March 2006."

[20] In proceedings number 153 of 2006 ("validity proceedings"), the following questions were reserved;

"1. Whether s 46(2) of the Criminal Property Forfeiture Act ("the Act) is invalid on the basis that it imposes a limitation on the function of the Supreme Court which:

(a) comprises the institutional impartiality and appearance of impartiality of the Supreme Court;

(b) which is repugnant to the judicial process in a fundamental degree;

(c) inhibits the performance of the judicial function;

(d) imposes on the Supreme Court and the performance of the judicial function a rigid or inflexible rule;

(e) interferes with judicial discretion.

2. Whether ss 46(2), 49(4) and 154(1) of the Act are invalid on the basis that they direct the Supreme Court as to the manner and/or outcome of its exercise of jurisdiction under the Act.

3. Whether ss 46(2), 49(4) and 154(1) of the Act are invalid on the basis that they impose statutory procedures which:

(a) compromise the institutional impartiality and appearance of impartiality of the Supreme Court;

(b) are repugnant to the judicial process in a fundamental degree;

(c) inhibit the performance of the judicial function;

(d) impose on the Supreme Court and the performance of the judicial function a rigid or inflexible rule;

(e) interferes with a judicial discretion."

The Legislative Scheme

[21] The plaintiffs' complaints require consideration of the legislative scheme introduced in 2002 by the Act which replaced the conviction based forfeiture scheme that had been in operation since 1998 through the Crimes (Forfeiture of Proceeds) Act. In his Second Reading Speech on 16 May 2002 when introducing the new scheme, the Attorney-General described the conviction based scheme as "ineffective and outdated" and "largely useless". The Attorney-General described the new scheme as a "non-conviction based civil scheme" with three objectives:

> "1. To deter those who may be contemplating criminal activity by reducing the possibility of gaining a profit from that activity;
>
> 2. To prevent crime by diminishing the capacity of the offenders to finance future criminal activities; and
>
> 3. To remedy the unjust enrichment of criminals who profit at society's expense."

[22] The objectives identified by the Attorney-General in the Second Reading Speech are reflected in the preamble to the Act and in s 3:

> "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."

[23] Section 136 of the Act provides that proceedings on an application under the Act "are taken to be civil proceedings for all purposes" and questions of fact in such proceedings are to be decided on the balance of probabilities. Subsection (2) of s 136 directs that other than in proceedings relating to an

offence under the Act, rules of evidence applicable in civil proceedings apply and rules of evidence and construction applicable only in relation to the criminal law and criminal proceedings do not apply.

[24] Part 3 of the Act is concerned with investigations and grants extensive powers to investigators. Division 5 of Part 3 is headed "Secrecy requirements" and is plainly aimed at preventing disclosure of the fact of investigation with a view to preventing dissipation and removal of assets that might be seized and forfeited under the Act.

[25] As to property that is capable of being seized, restrained and forfeited, the Act is far reaching in its effect. Section 10 provides that the Act applies to property as follows:

> "(a) to property –
>
> (i) owned or effectively controlled; or
>
> (ii) previously owned,
>
> by persons who are involved in or taken to be involved in criminal activities;
>
> (b) to property that is crime-used; and
>
> (c) to property that is crime-derived.
>
> (2) The property (real or personal) of a person who is involved or taken to be involved in criminal activities is forfeit to the Territory to the extent provided in this Act to compensate the Territory community for the costs of deterring, detecting and dealing with the criminal activities.
>
> (3) Crime-used or crime-derived property (real or personal) is forfeit to the Territory to deter criminal activity and prevent the unjust enrichment of persons involved in criminal activities."

[26] Section 10(4) defines the circumstances in which a person is taken to be involved in criminal activities in wide terms. Similarly, broad definitions of crime-used and crime-derived property are found in s 11 and s 12.

[27] Although the Local Court is given limited jurisdiction in proceedings under the Act, the primary jurisdiction is conferred upon the Supreme Court by s 135(1) which provides that the Supreme Court "has jurisdiction in any proceedings under this Act".

[28] Various powers are conferred upon the Supreme Court, and in limited circumstances upon the Local Court, to make restraining orders with respect to identified property or property of specified persons. The plaintiffs do not challenge the overall validity of the provisions conferring power to make restraining orders, but attack the validity of ss 46(2), 49(4) and 154(1)(a) which they contend effectively prevent a court making restraining orders from taking into account legal expenses incurred in connection with proceedings under the Act. These and other provisions relating to the seizure of property and restraining orders are found in Part 4 of the Act which is headed "Ensuring Property Remains Available For Forfeiture". Sections 46(2) and 49(4) are in Division 2 of Part 4:

> *"Division 2 – Restraining orders in relation to property*
>
> **41. Applications for restraining orders**
>
> (1) A member of the Police Force or the DPP may apply to the Local Court for a restraining order under section 43(1).

(2) The DPP may apply to the Supreme Court for a restraining order under this Division.

(3) An application under subsection (1) or (2) may be made ex parte.

42. Proceedings for restraining orders

In proceedings for a restraining order, the court that is hearing the application under section 41 may do any or all of the following:

(a) order that the whole or any part of the proceedings is to be heard in closed court;

(b) order that only persons or classes of persons specified by the court may be present during the whole or any part of the proceedings;

(c) make an order prohibiting the publication of a report of the whole or any part of the proceedings or of any information derived from the proceedings.

43. Restraining order in relation to specified property

(1) Subject to section 135, the Local Court may, on application by a member of the Police Force or the DPP, make a restraining order in relation to property specified in the application if there are reasonable grounds for suspecting that the property is crime-used or crime-derived.

(2) The Supreme Court may, on application by the DPP, make a restraining order in relation to property specified in the application in any of the following cases:

(a) if there are reasonable grounds for suspecting that the property is crime-used or crime-derived;

(b) if the property is a subject of an examination order, whether or not the person to whom the examination order is directed owns or effectively controls the property;

(c) if the property is funds held in an account that is a subject of a monitoring order;

(d) if the property is funds held in an account to which a suspension order applies.

(3) Subsection (2) also applies to property where the court is advised that an application has been made, or it is intended that

within 21 days after the application for the restraining order an application will be made, for the examination order, monitoring order or suspension order (as the case may be).

44. Restraining orders in relation to property of named persons

(1) The Supreme Court may, on application by the DPP, make a restraining order in relation to the property of a person named in the application if –

(a) the person has been charged, or it is intended that within 21 days after the application the person will be charged, with an offence that, if the person is convicted of the offence, could lead to the person being declared to be a drug trafficker under section 36A of the *Misuse of Drugs Act*;

(b) an application has been made, or it is intended that within 21 days after the application for the restraining order an application will be made, for one or more of the following in relation to the person:

(i) a production order;

(ii) an unexplained wealth declaration;

(iii) a criminal benefit declaration;

(iv) a crime-used property substitution declaration; or

(c) an order or declaration mentioned in paragraph (b) has been made in relation to the person.

(2) A restraining order under this section can apply to –

(a) all or any property that is owned or effectively controlled by the person at the time of the application for the restraining order, whether or not any of the property is described or identified in the application; and

(b) all property acquired –

(i) by the person; or

(ii) by another person at the request or direction of the person named in the application for the restraining order,

after the restraining order is issued.

(3) The court must not refuse to make a restraining order under subsection (1)(b)(ii), (iii) or (iv) only because the value of the property subject to the restraining order exceeds, or could exceed, the amount that the person could be liable to pay to the Territory if the relevant declaration is made.

45. Restraining order to specify grounds

(1) If an application is made under section 41 for a restraining order, the court that is hearing the application must –

(a) consider each matter that is alleged by the applicant, either in the application or in the course of the proceedings, as a ground for making the order; and

(b) if the order is made – set out in the order each ground that the court finds is a ground on which the order may be made.

(2) If the court that is hearing an application under section 41 is satisfied that the release of information contained in an affidavit in support of the application may materially prejudice an ongoing investigation, the court may order that the information is not to be provided when a copy of the restraining order is served on any person.

46. Scope of restraining order

(1) In a restraining order, the court that makes the order may do any or all of the following:

(a) direct that any income or other property derived from the property while the order is in force is to be treated as part of the property;

(b) if the property is moveable – direct that the property is not to be moved except in accordance with the order;

(c) appoint the Public Trustee or another person to manage the property while the order is in force;

(d) give any other directions necessary to provide for the security and management of the property while the order is in force;

(e) provide for meeting the reasonable living and business expenses of the owner of the property.

(2) In subsection (1)(e), reasonable living and business expenses does not include legal expenses referred to in section 154.

47. Service of restraining order

(1) As soon as practicable after a restraining order is made, the applicant in relation to the order must arrange for a copy of the order and a notice that complies with subsection (5) to be served personally on each of the following persons:

(a) if property that is subject to the order was taken from a person or is in the custody of a person – that person;

(b) any person known to the applicant at the time the order was made who has, may have or claims to have an interest in the property subject to the order.

(2) If property subject to the order is registrable under an Act other than the *Land Title Act*, the applicant must notify the appropriate registrar of the issue of the notice.

(3) If, as a result of a statutory declaration made in accordance with section 48 by a person who was served under subsection (1) with a copy of the restraining order, the applicant becomes aware of another person who has, may have or claims to have an interest in the property subject to the order, the applicant must arrange for personal service of a copy of the order on the other person as soon as practicable.

(4) Subsections (1) and (3) do not prevent the applicant from serving a copy of the restraining order and a notice at any time on any other person of whom the applicant becomes aware who has, may have or claims to have an interest in the property.

(5) The notice referred to in subsection (1) is to –

(a) summarise the effect of the order, including the period for which it applies; and

(b) advise the person on whom the order and the notice are served –

(i) that the property described in the order may be forfeited under this Act;

(ii) that he or she can, within 28 days after being served with the copy of the order, file in the court that made the order an objection to the restraint of the property; and

(iii) of the person's obligation to make and lodge a statutory declaration in accordance with section 48.

(6) The applicant in relation to the restraining order must ensure that –

(a) an affidavit of service is endorsed on a copy of each copy of the restraining order that is served on a person; and

(b) each endorsed copy is filed in the court that made the order.

48. Statutory declaration required from person served with restraining order

(1) A person who is served under section 47(1) or (3) with a copy of a restraining order must make a statutory declaration as to the matters set out in subsection (2) and file the declaration in the court that made the restraining order within 7 days after being served with the order.

(2) In a statutory declaration under this section, the declarant must –

(a) state the name and, if known, the address of any other person of whom the declarant is aware who has, may have or claims to have an interest in property that is subject to the restraining order; or

(b) if the declarant is not aware of any other person who has, may have or claims to have an interest in property that is subject to the restraining notice – make a statement to that effect.

Penalty: 2 000 penalty units or imprisonment for 2 years.

49. Effect of restraining order

(1) While a restraining order is in effect in relation to property –

(a) subject to Division 3, the property cannot be dealt with; and

(b) the applicant in relation to the restraining order may apply under this Act to the court that made the restraining order for an order that all or some of the property is forfeit to the Territory.

(2) Income or other property that is derived from property subject to a restraining order is taken to be part of the property and is also subject to the restraining order.

(3) A person may apply to the court that made a restraining order for the release of property that is subject to the order to meet reasonable living and business expenses of the owner of the property.

(4) In subsection (3), reasonable living and business expenses does not include legal expenses referred to in section 154.

50. Setting aside of restraining order

(1) The applicant in relation to a restraining order under section 43(1) or (2)(a) must request the court that made the order to set the order aside if the grounds for suspecting that the property is crime-used or crime-derived no longer exist.

(2) The applicant in relation to a restraining order under section 44(1)(a) must request the court that made the order to set the order aside if the person could not be declared to be a drug trafficker.

(3) The applicant in relation to a restraining order may request the court that made the order to set the order aside for any other reason.

(4) If a restraining order relating to property is set aside, the applicant in relation to the restraining order must ensure that –

(a) notice of the setting aside is served personally, as soon as practicable, on each person on whom a copy of the restraining order was served under section 47;

(b) any property subject to the restraining order that is being retained under section 39(2) is returned to the person from whom it was seized unless it is to be otherwise dealt with under this Act or another Act;

(c) any property subject to the restraining order that is being guarded under section 39(2) is released from guard; and

(d) if the applicant is aware that the person to whom property is to be returned under paragraph (b) is not the owner of the property – the owner is notified, where practicable, of the setting aside of the restraining order and the return of the property.

51. Duration of restraining order

(1) A restraining order under section 43 or 44 has effect for the period, not exceeding 3 months, set by the court when the order is made.

(2) On application, the court that made a restraining order may extend the duration of the order for a further period not exceeding 3 months.

(3) The court that made a restraining order may extend the duration of the order on as many occasions as the court sees fit.

(4) If the period of a restraining order is extended under this section, the applicant in relation to the order must serve a notice of the extension on each person on whom a notice was served under section 47.

52. Restraining order ceases to have effect

(1) If a restraining order has been made under section 43(1) or (2)(a) in relation to suspected crime-used or crime-derived property, the order ceases to have effect if within the period set (or extended) by the court under section 51 an application has not been made –

(a) if the property is crime-derived – either under section 73 for a criminal benefits declaration or under Part 7 for forfeiture of the property; or

(b) if the property is crime-used – under Part 7 for forfeiture of the property.

(2) If a restraining order has been made under section 44(1)(a) in relation to property of a person who was to be charged with an offence, the order ceases to have effect if within 21 days after the date of the order the person has not been charged with the offence indicated in the application for the order or an alternative offence.

(3) If a restraining order has been issued under section 44(1)(a) in relation to property of a person who has been charged, or who was to be charged and a charge has been laid within 21 days after the date of the order, the order ceases to have effect –

(a) if the charge is finally determined but the person is not declared under section 36A of the *Misuse of Drugs Act* to be a drug trafficker; or

(b) if the charge is disposed of without being determined.

(4) If a restraining order has been made under section 43 on the basis that an application had been made or was to be made for another order, the restraining order ceases to have effect if –

(a) within 21 days after the making of the restraining order an application has not been made for the other order;

(b) the application for the other order is withdrawn; or

(c) the application for the other order is finally determined but the court that heard the application does not make the other order.

(5) If a restraining order has been made under section 44(1)(b) on the basis that an application was to be made for a production order or a declaration, the restraining order ceases to have effect if –

(a) within 21 days after the making of the restraining order an application has not been made for the production order or the declaration;

(b) the application for the production order or declaration is withdrawn;

(c) the application for the production order or declaration is finally determined but the court that heard the application does not make the production order or declaration; or

(d) if a declaration is made – the respondent's liability to pay to the Territory the amount ordered by the court that made the declaration (including any costs awarded against the respondent) is satisfied, whether or not all or any of the property subject to the restraining order was transferred to the Territory to satisfy the liability.

(6) A restraining order made under section 43 or 44 ceases to have effect if the order is set aside under section 50 or Part 5.

(7) Despite anything in this section, a restraining order that was issued under both sections 43 and 44 or on more than one ground under either section –

(a) only ceases to have effect if set aside on all grounds; and

(b) if set aside on only some of the grounds – continues in effect on each remaining ground.

(8) A restraining order ceases to have effect in relation to property if the property is forfeited to the Territory under Part 7, Division 3.

53. Real property

(1) If a restraining order is issued in relation to land –

(a) the applicant in relation to the restraining order must lodge an instrument, together with a copy of the restraining order, with the Registrar-General;

(b) the instrument has effect as a memorandum referred to in section 35 of the *Land Title Act* and is taken to be lodged by the appropriate Minister; and

(c) the restraining order takes effect in relation to the land when the instrument is registered under the *Land Title Act* and the Registrar-General enters a statutory restrictions notice in the land register.

(2) If, in accordance with section 52, a restraining order ceases to have effect and the order relates wholly or in part to land –

(a) the DPP must lodge an instrument with the Registrar-General advising that the order has ceased to have effect; and

(b) despite section 52, the restraining order only ceases to have effect in relation to the land when the instrument referred to in paragraph (a) is registered under the *Land Title Act* and the statutory restrictions notice is removed from the land register.

54. Property may be restrained under more than one order

(1) Property may be restrained under this Act under more than one order at the same time on the same or different grounds.

(2) If a restraining order ceases to have effect in relation to property, the property remains restrained under any other restraining order in relation to the property while the other order remains in effect."

[29] It is necessary to identify a number of significant features of Part 4, but first it is appropriate to set out Part 5 which concerns objections to the restraint of property:

> **"PART 5 – OBJECTIONS TO RESTRAINT OF PROPERTY**
>
> **59. Objections to restraining of property**
>
> (1) A person may file in the court that made the relevant restraining order an objection to the restraint of the property.
>
> (2) An objection is to identify –
>
> (a) the property to which the objection relates; and
>
> (b) the grounds for objection against the property being restrained.
>
> **60. Time for filing objection**
>
> (1) If a copy of the restraining order was served on the objector under section 47, the objection is to be filed –
>
> (a) within 28 days after the day on which the copy of the order was served on the objector; or
>
> (b) within any further time allowed by the court in which the objection is filed.
>
> (2) If a copy of the restraining order was not served on the objector under section 47, the objection is to be filed –
>
> (a) within 28 days after the day on which the objector becomes aware, or could reasonably be expected to have become aware, that the property has been restrained; or
>
> (b) within any further time allowed by the court in which the objection is filed.
>
> (3) The court may allow further time under subsection (2) or (3) despite that the time for filing the objection has expired.
>
> **61. Parties to objection proceedings**
>
> The Territory is a party to proceedings on an objection.

62. Setting aside restraining order

(1) The court that is hearing an objection to the restraint of property may set aside the relevant restraining order to the extent provided by section 63, 64 or 65.

(2) Despite subsection (1), if the property was restrained on 2 or more grounds but the court does not set aside the restraining order in relation to all the grounds, the restraining order continues in force on each remaining ground.

(3) If a court sets aside a restraining order under this Part, the court may make any necessary or convenient ancillary orders.

63. Setting aside restraining order – crime-used property

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

(a) the objector establishes that –

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

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

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

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

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

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

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

(b) the objector establishes that –

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

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

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

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

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

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

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

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

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

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

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

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

(5) For the purposes of this section, 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.

64. Setting aside restraining order – crime-derived property

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

(a) the objector establishes that –

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

(ii) the property is not effectively controlled by a person who wholly or partly derived or realised the property, directly or indirectly, from the commission of a forfeiture offence;

(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

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

(2) If the objector fails to establish for the purposes of subsection (1)(a) 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-derived may set the order aside if the court also orders the objector to pay to the Territory the value of the property.

(5) For the purposes of this section, 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.

65. Setting aside restraining order – other property

(1) The court that made a restraining order under section 44(1)(a) may set the order aside if the court finds that it is more likely than not that the person who is or will be charged with the offence does not own or effectively control the property, and has not at any time given it away.

(2) The court that made a restraining order under section 44(1)(b) or (c) may set the order aside if the court finds that it is more likely than not that the person who is or will be the respondent to the unexplained wealth declaration, criminal benefits declaration or crime-used property substitution declaration does not own or effectively control the property, and has not at any time given it away.

66. 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.

(2) 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;

(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;

(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.

(3) A person is an innocent party in relation to crime-derived property if –

(a) the person acquired the property, or the person's share of it (if it is owned by more than one person), for valuable consideration;

(b) the consideration was lawfully acquired;

(c) before acquiring the property or share, the person made reasonable inquiries, and took all other action reasonable in the circumstances, to ascertain whether or not the property was crime-derived;

(d) despite the inquiries made under paragraph (c), at the time of acquiring the property or share the person did not know and had no reasonable grounds for suspecting that the property was crime-derived; and

(e) the person did not acquire the property or share with the intention of avoiding the operation of this Act.

Restraint – Significant Features

[30] The plaintiffs submitted that when regard is had to the potential impact of restraining orders on persons adversely affected and to the consequences of such orders, the Act is draconian in its effects and it is particularly important that procedural fairness be afforded on an application for a restraining order. In the context of that proposition, it is appropriate to highlight a number of features of significance that emerge from the restraining and objection provisions. They may be summarised as follows:

- An application to the Supreme Court for a restraining order under Division 2 may be made ex parte. The Court retains a discretion whether to grant such an application: s 41.

- Power is conferred to close the Court and to make orders ensuring the confidentiality of the proceedings: s 42.

- A restraining order may be made in relation to specified property if the Court is of the view that there are reasonable grounds for suspecting that the property is "crime-used or crime-derived" or is the subject of an examination order or is funds held in an account that is the subject of a monitoring or suspension order: s 43.

- A restraining order may be made in relation to property of a named person in a number of circumstances set out in s 44(1). Those circumstances include the fact that an application has been made, or it is intended that an application will be made within 21 days, for an unexplained wealth or criminal benefit declaration in relation to the named person.

- As to the content of the restraining order, "in a restraining order" the Court may make a number of specified orders, including making provision "for meeting the reasonable living and business expenses of the owner of the property": s 46(1).

- Although there is no definition of "reasonable living and business expenses", s 46(2) provides that such expenses do not include "legal expenses referred to in s 154": s 46(2). Section 154 concerns legal expenses in relation to proceedings under the Act or criminal proceedings and is discussed in paragraphs [31] – [34] of these reasons.

- In contrast to the express power found s 14(3)(b) of the repealed Crimes (Forfeiture of Proceeds) Act, when making a restraining order there is no express power conferred to make provision for the legal expenses of the affected person.

- Unlike the Victorian Confiscation Act 1997, there is no express prohibition against the Court providing for legal expenses when making a restraining order: *Sypott v The Queen* [2003] VSC 41.

- While a restraining order is in place, the property cannot be dealt with. Income derived from the property is taken to be part of the property and is also subject to the restraining order.

- A restraining order has effect for a period, not exceeding three months, set by the Court when the order is made. On application the Court may extend the duration of the order for a further period not exceeding three months and orders of extension may be made on as many occasions as the Court sees fit.

- There is no provision for the making of an ex parte application to extend the duration of the order.

- Upon an application for a restraining order, the Court is directed by s 45 to consider each matter advanced by the applicant.

- If an order is made, the Court must set out in the order each ground that the Court finds is a ground on which the order may be made: s 45(1)(b).

- As soon as practicable after an order has been made, the applicant must arrange for service of the order on affected persons together with a notice summarising the effect of the order and the period for which it applies: s 47(1).

- As to confidentiality of information provided to the Court by the applicant, if the Court is "satisfied" that the release of information contained in an affidavit in support of the application "may materially

prejudice an ongoing investigation", the Court may order that the information is not to be provided when a copy of the restraining order is served on any person: s 45(2).

- Restrained property may be released from the restraining order "to meet reasonable living and business expenses" of the owner of the property: s 49(3). However, for those purposes, "reasonable living and business expenses" do not include "legal expenses referred to in s 154": s 49(4).

- The only other provisions that allow for setting aside a restraining order on an application by an affected person are those found in Part 5 relating to objections to restraint of property.

- An objection must be filed within 28 days after service of a copy of the order on the objector or, where service has not been effected, within 28 days after the day on which the objector becomes aware, or could reasonably be expected to have become aware, that the property has been restrained: s 60(1)(a) and (2)(a). The time for lodging an objection may be extended by the court.

- Upon objection to restraint of property, the burden of proof rests upon the objector to establish a ground of objection specified in relevant sections: ss 63 - 65.

- If property is restrained on the grounds that the property is "crime-used", the matters to be established are set out in s 63(1). If the restraint is on

the basis that the property is "crime-derived", the facts to be proven are set out in s 64(1).

- Other property is dealt with in s 65. In particular, if the order of restraint was made on the basis that an application had been made for an unexplained wealth declaration, the Court may set aside the order if it finds that it is "more likely than not" that the respondent to the unexplained wealth declaration does not own or effectively control the property and has not at any time given it away.

- Provision is made in s 66 for objection by an "innocent party" in relation to crime-used and crime-derived property.

- The Act is silent as to the use of confidential material in objection proceedings or in subsequent proceedings under the Act.

Legal Expenses – Section 154

[31] As I have said, in making a restraining order s 46(1)(e) empowers the Court to provide for the meeting of reasonable living and business expenses of the owner of the property, but such expenses do not include legal expenses referred to in s 154: s 46(2). In addition, while a restraining order is in effect, a person may apply to the Court for release of the property in order meet reasonable living and business expenses of the owner of the property, but such expenses do not include legal expenses referred to in ss 154: s 49(3) and (4). Section 154 is in the following terms:

"**154. Restrained property not available to meet legal costs**

(1) Property that is subject to a restraining order under this Act –

(a) is not to be released to meet the legal expenses of a person, whether the expenses are in relation to proceedings under this Act that relate to the forfeiture of the property or criminal proceedings; and

(b) is not to be taken into account for the purposes of an application by the person for Legal Aid.

(2) If –

(a) the Northern Territory Legal Aid Commission or another legal aid organisation provides a person with legal aid in respect of proceedings under this Act or criminal proceedings; and

(b) property of the person that was restrained under this Act is released –

(i) in whole; or

(ii) in part as surplus to an amount forfeited to the Territory (and any order for costs),

the person is liable to the Commission or other organisation for his or her legal costs and the property released is charged as security for those costs.

(3) A charge under subsection (2) –

(a) is subject to any prior encumbrances on the property that take priority; and

(b) if the property is land – takes effect when the charge is registered under the *Land Title Act*.

(4) If –

(a) legal aid is granted to a person whose property is restrained under this Act; and

(b) the restrained property is –

(i) released on grounds of hardship; or

(ii) forfeited,

the Commission or other organisation may apply to the Minister for reimbursement of the legal costs incurred in providing legal aid to the person.

(5) On application by the Commission or other organisation, the Minister may reimburse the Commission or organisation out of funds realised from the forfeited property, having regard to –

(a) the value of the property forfeited;

(b) the legal costs incurred by the Commission or organisation in the matter; and

(c) the state of the legal aid fund."

[32] Three features of s 154 should be noted. First, s 154 applies only to the release of property that is subject to a restraining order. It has no direct application at the earlier stage when a court is determining the content of a restraining order.

[33] Secondly, s 154(1)(a) is not limited to expenses incurred in relation to proceedings under the Act. The direction is not to release property subject to the restraining order "to meet the legal expenses of a person". On one view, the prohibition extends to all legal expenses, even if they are or will be incurred in connection with proceedings totally unrelated to the Act. In my view, however, bearing in mind the nature of the prohibition and the purposes of the legislation, the prohibition should be construed as relating to legal expenses only in relation either to proceedings under the Act or to criminal proceedings that are relevant to proceedings under the Act. The prohibition does not extend to legal expenses incurred in the ordinary course of running a business, personal affairs or criminal or other proceedings that are not relevant to proceedings under the Act.

[34] Thirdly, subs (2) – (5) of s 154 contemplate that the restraint of property might adversely affect the capacity of an affected person to privately fund legal representation in respect of proceedings under the Act or "criminal proceedings". As I have said, in my view the expression "criminal proceedings" in s 154(1)(a) should be read as limited to criminal proceedings that are relevant to proceedings under the Act. That expression should be construed in the same way for the purposes of s 154(2)(a). Regardless of that question, in providing that restrained property is not to be taken into account for the purposes of an application for legal aid, the Legislature has recognised the possible impact of restraint on the capacity to fund legal representation and has sought to ameliorate that particular impact.

Forfeiture

[35] As to the operation of the legislative scheme after property has been restrained, the substantive question of forfeiture is dealt with in Parts 6 and 7.

[36] Part 6 of the Act concerns proceedings for declarations. The Director may apply to the Supreme Court for an unexplained wealth declaration, a criminal benefit declaration and crime-used property substitution declaration. If the Court is of the view that it is more like than not that the respondent's total wealth as assessed in accordance with the Act is greater than the lawfully acquired wealth, the Court must declare that the respondent has unexplained wealth. In that situation, the Court must assess the unexplained wealth and specify the assessed value of that wealth. In

effect, the affected person must pay the amount assessed to the Territory or forfeit property to that value that is the subject of a restraining order.

[37] Similar procedures are provided in the case of applications for other forms of declarations which, if successful, result in forfeiture of property or a debt to the Territory which may be paid or satisfied through forfeiture of property that is the subject of a restraining order.

[38] Part 7 deals with satisfaction of liability to the Territory and contains provisions for applications by the Director for forfeiture of restrained property. The power to order forfeiture of restrained property is conferred in a number of circumstances, including determinations that the property is owned or controlled by a person declared under the Act to be a drug trafficker or that the property is crime-used or crime-derived.

[39] As mentioned, once an order of restraint is made the burden shifts to the affected person to establish the grounds upon which the order should be set aside. However, in subsequent substantive proceedings relating to declarations and forfeiture, the restraint orders and findings of the Judge who made the restraint orders have no impact upon the burden of proof and are irrelevant to the merits of the substantive applications. In the substantive proceedings for declarations and forfeiture and for release of forfeited property, independently of the existence of a restraining order, in a number of respects presumptions are made adverse to the affected person

and the burden of proof shifts to that person: ss 71(2), 75(2), 76(2), 83(1), 83(2), 92(2) and 121(1).

[40] This brief overview of the legislative scheme and its consequences is sufficient to demonstrate that the Act is complex and far-reaching in its impacts. In a number of circumstances, presumptions adverse to affected persons are made and the onus of proof is reversed. Similar legislation in Western Australia has been described as "draconian in its operation": *Mansfield v Director of Public Prosecutions for Western Australia* (2006) 226 CLR 486 at [24] and [50]. This is the context in which the issues raised by the plaintiffs are to be considered.

Validity

[41] The foundation of the plaintiffs' contention that ss 46(2), 49(4) and 154(1)(a) are invalid is the principle emanating from the decision of the High Court in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. In substance, the plaintiffs submitted that the provisions impermissibly direct the Court as to the manner and outcome of the exercise of the judicial function and work such oppression that "they impose impermissible limitations on the function of the Supreme Court of the Northern Territory and impose statutory procedures which:

(a) compromise the institutional impartiality and appearance of impartiality of the Supreme Court;

(b) are repugnant to the judicial process in a fundamental degree;

(c) inhibit the performance of the judicial function;

(d) impose on the Supreme Court and the performance of the judicial function a rigid and inflexible rule; and

(e) interfere with a judicial discretion."

[42] As to the proposition that the effect of the impugned provisions is to direct the Court as to the manner and outcome of the exercise of the judicial discretion, the written submissions of the plaintiff were as follows:

> "… Subparagraph 154(1)(a) of the Act clearly purports to direct the manner in which the Supreme Court's judicial power is to be exercised and an outcome. The combination of challenged subsections require and authorise the Court to proceed in a manner that does not ensure equality before the law, that predicates an outcome and the effect of the proscription is to deny a person affected of an important right, namely, the right to use his or her property as a fund to defend himself or herself and the ability to have a lawyer of their choice to represent them. Section 154 of the Act has a contextual prejudgment of guilt factored into it. The subsection makes a person affected a second class or third class citizen in the enjoyment of a right and relegates them, at best, as a potential client of Legal Aid and then, one whose property restrained is nevertheless liable for the Legal Aid Commission's costs. The combined prohibitions and directions in the challenged subsections, given the serious nature and effect of restraining orders, clearly compromises the impartiality and the reputation of the Court as a place where justice is administered."

Principles – Institutional Integrity

[43] It was common ground between the parties and the Attorney-General for the Northern Territory (intervening) that the Supreme Court of the Northern Territory "may exercise the judicial power of the Commonwealth pursuant to investment by laws made by the Parliament": *North Australian Aboriginal*

Legal Aid Service Inc v Bradley & Anor (2004) 218 CLR 146 at [28]. It was also common ground that in those circumstances the decision of the High Court in *Kable* applies in the Northern Territory.

[44] It has been said that a single principle does not emerge from *Kable*: *R v Moffatt* [1998] 2 VR 229 at 249 and 251; *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* (2000) 81 ALR 694 at [14] and *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2007) 33 WAR 245 at [77] (special leave to appeal to the High Court was granted on 15 June 2007). In *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 Kirby J provided the following general statement of the *Kable* principle:

> "**[25]** *Kable* holds that Ch III of the Constitution limits the power of State Parliaments to confer non-judicial functions or non-judicial characteristics on State Courts that are incompatible with, or repugnant to, the core requirements of such courts as potential recipients of federal jurisdiction, as provided for in the Constitution. The core requirements referred to include those of the manifest independence and impartiality of the judiciary in the discharge of their functions. This includes independence from legislative directions over individual judicial decisions and in the findings of fact and law that are necessary to them." (footnotes omitted)

[45] In *Baker v The Queen* (2005) 223 CLR 513 at [5], Gleeson CJ expressed the principle in the following terms:

> "… The principle for which [*Kable*] stands as authority is that, since the Constitution established an integrated Australian court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid."

[46] The concept of "institutional integrity" was discussed in the joint judgment of Gummow, Hayne and Crennan JJ in *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, when their Honours explained that federal jurisdiction may only be invested in a "'court' as that word is to be understood in the Constitution …" [61]. The judgment continued:

> **"[62]** Recognising that to be so reveals an important boundary to the power given to the Parliament by s 77(iii). The Parliament may not make a law investing federal jurisdiction in a body that is not a federal court created by the Parliament or that is not a 'court' of a State or Territory. But there is another and different proposition that is to be drawn from Ch III which has significance for State legislation concerning State Supreme Courts.
>
> **[63]** Because Ch III requires that there be a body fitting the description 'the Supreme Court of a State', it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description. One operation of that limitation on State legislative power was identified in *Kable*. The legislation under consideration in *Kable* was found to be repugnant to, or incompatible with, 'that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system' (*Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [101]) …".

[47] Although the concept of "institutional integrity" has not been defined in a single definition, the joint judgment described the principle as "one which hinges upon maintenance of the defining characteristics of a 'court', or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court". The judgment continued:

> "**[63]** … It is to those characteristics that the reference to 'institutional integrity' alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.

> **[64]** It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. The cases concerning identification of judicial power reveal why that is so. …".

[48] Later in the joint judgment, the following statement is made about the institutional integrity of the court:

> "**[66]** … Thus when reference is made to the institutional 'integrity' of a court, the allusion is to what *The Oxford English Dictionary* describes as 'the condition of not being marred or violated; unimpaired or uncorrupted condition; original perfect state; soundness'".

[49] As to the defining characteristics of a court, it is appropriate to note the observation in the joint judgment that the capacity of courts to administer the common law system of adversarial trial is an "important element" in the "institutional characteristics of courts in Australia" [64]. The judgment then emphasised the requirements of independence and impartiality:

> "**[64]** … Essential to that system is the conduct of trial by an independent and impartial tribunal.
>
> …
>
> **[66]** … Even the *appearance* of departure from the principle that the tribunal must be independent and impartial is prohibited lest the integrity of the judicial system be undermined. …".

[50] Many authorities have identified "institutional characteristics" of importance. In *Gypsy Jokers* Steytler P reviewed a number of relevant authorities. It is unnecessary, therefore, to undertake such a review. It is sufficient to refer to a number of uncontroversial "pointers" to essential characteristics and institutional integrity of courts identified by Steytler P.

[51] Steytler P identified the "pointers" after noting that the "critical notions of repugnancy and incompatibility have not been clearly defined in the context of the conferral of functions by State legislatures on State courts" [84] and that there is "no clearly accepted definition of 'institutional integrity'" [87]. These "pointers" may be summarised as follows:

- Although public confidence is not a separate consideration sufficient in itself for the operation of the *Kable* principle, it is a "basic quality" of courts, citing Gleeson CJ in *Baker*:

> "**[6]** The strength of the [*Kable*] principle lies in its constitutional legitimacy. It was not an invention of a method by which judges may wash their hands of the responsibility of applying laws of which they disapprove. In some of the judgments in *Kable*, references were made to public confidence in the courts. Confidence is not something that exists in the abstract. It is related to some quality or qualities which one person believes to exist in another. *The most basic quality of courts in which the public should have confidence is that they will administer justice according to law*. As Brennan CJ said in *Nicholas v The Queen* [(1998) 193 CLR 173 at 197 [37]]:
>
> > 'It is the faithful adherence of the courts to the laws enacted by the Parliament, however undesirable the courts may think them to be, which is the guarantee of public confidence in the integrity of the judicial process and the protection of the courts' repute as the administrator of criminal justice'". (my emphasis)

- "… [A] Supreme Court will lack institutional integrity if it is, or is perceived to be, not institutionally independent of the legislative and executive government in the exercise of its federal jurisdiction … . There are suggestions that a court will not have the required degree of

independence if it acts as a mere instrument of government policy …" [89].

- "… [I]nstitutional impartiality, and the appearance of it, must not be compromised … " [90].

- "… [T]he appearance of institutional independence and impartiality is no less important to the institutional integrity of the court than the fact of its institutional independence and impartiality. That, in turn, must be so because its absence will result in a loss of public confidence in the court as an institution, to the detriment of that institution and of the community generally" [94].

- It is at least a material consideration to determine whether the power conferred by the legislature is "antithetical to the judicial process" [92].

- There are a number of "relevant incidents" which are ordinarily part of the judicial process such as "the fact of a public hearing, application of rules of evidence, the existence of a discretion where appropriate; provisions with respect to the onus and standard of proof; an obligation to afford natural justice; an obligation to make proper disclosure; an obligation (and ability) to give reasons; and the existence of the right of appeal." [92]

[52] Counsel for the Attorney-General relied upon the following observations of McHugh J in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 75:

> "**[41]** The bare fact that particular State legislation invests a State court with powers that are or jurisdiction that is repugnant to the traditional judicial process will seldom, if ever, compromise the institutional integrity of that court to the extent that it affects that court's capacity to exercise federal jurisdiction impartially and according to federal law. State legislation may alter the burden of proof and the rules of evidence and procedure in civil and criminal courts in ways that are repugnant to the traditional judicial process without compromising the institutional integrity of the courts that must administer that legislation. State legislation may require State courts to exercise powers and take away substantive rights on grounds that judges think are foolish, unwise or even patently unjust. Nevertheless, it does not follow that because State legislation requires State courts to make orders that could not be countenanced in a society with a Bill of Rights, the institutional integrity of those courts is compromised.
>
> **[42]** The pejorative phrase – 'repugnant to the judicial process' – is not the constitutional criterion. In this area of constitutional discourse, it is best avoided, for it invites error. That which judges regard as repugnant to the judicial process may be no more than a reflection of their personal dislike of legislation that they think unjustifiably affects long recognised rights, freedoms and judicial procedures. State legislation that requires State courts to act in ways inconsistent with the traditional judicial process will be invalid only when it leads to the conclusion that reasonable persons might think that the legislation compromises the capacity of State courts to administer invested federal jurisdiction impartially according to federal law. That conclusion is likely to be reached only when other provisions of the legislation or the surrounding circumstances *as well as* the departure from the traditional judicial process indicate that the State court might not be an impartial tribunal that is independent of the legislative and the executive arms of government."

[53] The plaintiffs submitted that McHugh J stands alone in these views. It is unnecessary to resolve that question. At the least, it is plain that not every legislative direction or conferral of power that alters the traditional judicial processes compromises the institutional integrity of the court. For example, conferring a power to hear an application ex parte or reversing the onus of proof may be seen as altering the traditional judicial processes, but such

alterations do not in themselves compromise the institutional integrity of the court.

[54] In the context of the issues of public confidence and independence from the Legislature and Executive, it is appropriate to have regard to the joint judgment of Brennan CJ and Dawson, Toohey, McHugh and Gummow JJ in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1. The High Court was concerned with a provision in Commonwealth legislation nominating a Federal Court Judge as the person to report to the Minister. In determining that the provision was invalid, the joint judgment considered the incompatibility between performance of a non-judicial function and the office and function of a Ch III Judge. The joint judgment said (16):

> "In the present case, the category of incompatibility that arises for consideration is 'the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions with integrity is diminished.'" (footnote omitted)

[55] In that context, three questions were posed by the joint judgment in the following terms (17):

> "The statute or the measures taken pursuant to the statute must be examined in order to determine, first, whether the function is an integral part of, or is closely connected with, the functions of the Legislature or the Executive Government. If the function is not closely connected with the Legislature or the Executive Government, no constitutional incompatibility appears. Next, an answer must be given to the question whether the function is required to be performed independently of any instruction, advice or wish of the

> Legislature or the Executive Government, other than a law or an instrument made under a law (hereafter 'any non-judicial instruction, advice or wish'). If an affirmative answer does not appear, it is clear that the separation has been breached. The breach is not capable of repair by the Ch III judge on whom the function is purportedly conferred, for the breach invalidates the conferral of the function. If the function is one which must be performed independently of any non-judicial instruction, advice or wish, a further question arises: Is any discretion purportedly possessed by the Ch III judge to be exercised on political grounds – that is, on grounds that are not confined by factors expressly or impliedly prescribed by law? In considering these questions, it will often be relevant to note whether the function to be performed must be performed judicially, that is, without bias and by a procedure that gives each interested person an opportunity to be heard and to deal with any case presented by those with opposing interests. An obligation to observe the requirements of procedural fairness is not necessarily indicative of compatibility with the holding of judicial office under Ch III, for many persons at various levels in the executive branch of government are obliged to observe those requirements. But, conversely, if a judicial manner of performance is not required, it is unlikely that the performance of the function will be performed free of political influence or without the prospect of exercising a political discretion." (footnote omitted)

[56] In *Gypsy Jokers*, Steytler P noted that the majority in *Kable* did not apply the three question test postulated by the joint judgment in *Wilson* and observed that subsequent authorities reveal that "any suggestion arising from what was said in *Kable* that loss of public confidence might be a distinct and separately sufficient consideration for the operation of the *Kable* principle has since been eschewed" [82]. However, as will appear later in these reasons, even if those questions were applied to the challenged sections of the Act, in my opinion the challenge to validity fails.

[57] As part of their proposition that the institutional integrity of the court is compromised by the challenged sections, the plaintiffs contended that the combined effect of those sections is to "impose a rigid rule unconnected

with the merits of the particular case and direct the Court as to the manner in which a judicial discretion is to be exercised". In this context, the plaintiffs placed reliance upon the decisions of the High Court in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 and *Nicholas v The Queen* (1998) 193 CLR 173. It is appropriate, therefore, to consider those authorities and the relevant observations and principles emerging from them.

[58] In *Lim*, the Court was concerned with provisions of the Migration Act 1958 (Cth). Section 54L directed that a "designated" person "must be kept in custody" unless the person was removed from Australia under another section of the Act or was given an entry permit. Section 54R was also a direction. It provided that a "Court is not to order the release from custody of a designated person". The court held that s 54R was invalid.

[59] In a joint judgment, Brennan, Deane and Dawson JJ observed that circumstances could exist in which a "designated person" was unlawfully held in custody and, notwithstanding such unlawful custody, the courts, including the High Court, were directed by s 54R not to order release from custody. Discussing Ch III of the Constitution and the grants of legislative power contained in s 51 of the Constitution, their Honours said (27):

> "… Nor do those grants of legislative power extend to the making of a law which requires or authorises the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power". (footnote omitted)

[60] The joint judgment later observed that all the powers conferred upon the Parliament by s 51 of the Constitution are "subject to Ch. III's vesting of that judicial power in the courts which it designates, including this Court." (36) The judgment then identified the basis of invalidity (36 - 37):

> "… A law of the Parliament which purports to direct, in unqualified terms, that no court, including this Court, shall order the release from custody of a person whom the Executive of the Commonwealth has imprisoned purports to derogate from that direct vesting of judicial power and to remove ultra vires acts of the Executive from the control of this Court. Such a law manifestly exceeds the legislative powers of the Commonwealth and is invalid. Moreover, even to the extent that s 54R is concerned with the exercise of jurisdiction other than this Court's directly vested constitutional jurisdiction, it is inconsistent with Ch. III. In terms, s 54R is a direction by the Parliament to the courts as to the manner in which they are to exercise their jurisdiction. It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is quite a different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Ch. III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch. III vests exclusively in the courts which it designates."

[61] In *Lim* the Legislature purported to direct the court that it had no control over unlawful acts of the Executive. That direction exceeded the legislative powers of the Commonwealth. It was in that context that the joint judgment made the general observation concerning a direction to the courts as to the manner and outcome of the exercise of jurisdiction. That context is far removed from the context and effect of the provisions under consideration.

[62] In *Nicholas* the High Court was concerned with s 15X of the Crimes Act 1914 (Cth) which provided that on a prosecution for illegal importation of

narcotic goods, the fact that a law enforcement officer committed an offence in importing the goods or in being concerned in the importation of the goods was to be "disregarded" if certain conditions were met. The appellant argued that s 15X was an invalid direction to the court as to the manner or outcome of the exercise of the court's discretionary power.

[63] The appellant's argument was rejected. Brennan CJ noted the background to the legislation being the decision of the High Court in *Ridgeway v The Queen* (1995) 184 CLR 19 when the High Court held that evidence of an illegal importation of heroin organised by members of the Australian Police Force in a controlled operation for the purposes of proving an offence by an accused should be excluded in the exercise of the discretion. Section 15X was enacted in response to that decision and Brennan CJ explained the effect of s 15X in the following terms:

> "**[11]** … In exercising a court's discretion to decide whether evidence of the importation of narcotic goods in an authorised controlled operation should be admitted or rejected, the court is directed to disregard the fact that a law enforcement officer committed an offence in importing those narcotic goods. …"

[64] Brennan CJ made the following observation of relevance to the matter under consideration:

> "**[15]** … Subject to the Constitution, the Parliament can prescribe the jurisdiction to be conferred on a court but it cannot direct the court as to the judgment or order which it might make in exercise of a jurisdiction conferred upon it. …"

[65] As to the argument that s 15X was invalid because it "governs the determination by the trial judge of the challenge to the admission of evidence of an illegal importation" (at [22]), Brennan CJ observed that s 15X leaves the trial Judge with a discretion to reject the evidence "requiring only that in exercising the discretion, the illegal conduct of law enforcement officers should be disregarded" [26]. His Honour regarded the law as a "law governing the admission of evidence and therefore a law governing procedure" which had no effect upon the judicial function of fact finding or the judicial power to be exercised in determining guilt. As to the suggestion that the application of s 15X "would impair the integrity of the court's processes or bring the administration of criminal justice into disrepute", Brennan CJ said that such a suggestion was "to misconceive both the duty of a court and the factors which contribute to public confidence in the administration of criminal justice by the courts" [37]. His Honour continued:

> "… It is for the Parliament to prescribe the law to be applied by a court and, if the law is otherwise valid, the court's opinion as to the justice, proprietary or utility of the law is immaterial. Integrity is the fidelity to legal duty, not a refusal to accept as binding a law which the court takes to be contrary to its opinion as to the proper balance to be struck between competing interests. To hold that a court's opinion as to the effect of a law on the public perception of the court is a criterion of the constitutional validity of the law, would be to assert an uncontrolled and uncontrollable power of judicial veto over the exercise of legislative power. It would elevate the court's opinion about its own repute to the level of a constitutional imperative. *It is the faithful adherence of the courts to the laws enacted by the Parliament, however undesirable the courts may think them to be, which is the guarantee of public confidence in the*

integrity of the judicial process and the protection of the courts' repute as the administrator of criminal justice." (my emphasis)

[66] Gaudron J was of the view that, properly construed, s 15X did not prevent "independent determination" of the question whether the evidence should be excluded or independent determination of guilt or innocence. Her Honour continued:

> "**[80]** … And so construed, it is also clear that it neither authorises nor requires a court to proceed in circumstances which bring or tend to bring the administration of justice into disrepute. And although it is perhaps not quite so clear, it does not offend against the requirements of equal justice."

[67] The plaintiffs relied on the observations of Gaudron J concerning the judicial power and the essential character of a court:

> "**[73]** Judicial power is not adequately defined solely in terms of the nature and subject matter of determinations made in [the] exercise of that power. It must also be defined in terms that recognise it is a power exercised by courts and exercised by them in accordance with the judicial process. Thus, as was said in *Chu Kheng Lim v Minister for Immigration*, the Parliament cannot make 'a law which requires or authorises the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power'.
>
> **[74]** In my view, consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means, moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render

> its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute."

[68] The observations of Gaudron J identify, as do other authorities to which I have referred, characteristics which underpin the institutional integrity of a court exercising federal jurisdiction. Her Honour did not purport to set out an exhaustive list of those characteristics. Nor did her Honour suggest that a law which impinges upon any of those characteristics will necessarily compromise the institutional integrity of a court.

[69] In *Nicholas*, Gummow J identified the essential question as concerning "the limitation imposed by s 15X upon the discretion which the trial court otherwise would enjoy to exclude evidence that the heroin in question was imported into Australia in contravention of the *Customs Act*" [145]. His Honour then posed the following question:

> "**[145]** … Is this such an interference with the governance of the trial and a distortion of its predominant characteristics as to involve the trial court in the determination of the criminal guilt of the accused otherwise than by the exercise of the judicial power of the Commonwealth?"

Effect of Challenged Provisions

[70] The effect of the challenged sections is to be considered in the context of the legislative scheme in its entirety and, in particular, in the context of the provisions specifically dealing with the restraining orders and their consequences. The significant features of the restraining order provisions are summarised earlier in these reasons at [30]. Of note from the plaintiffs'

point of view is the fact that restraining orders may be made ex parte and may be based upon evidence or assertions that are not disclosed to the affected person. There is no requirement that the Director prove facts in the manner usually applicable to criminal trials. The exercise of the powers conferred by the Act could reach to all real and personal property owned by or effectively controlled by the affected person thereby seriously interfering with their right to enjoy their property and depriving them of the capacity to fund legal representation.

[71] On the other hand, even if it is assumed that in making a restraining order and after a restraining order is made the court is prohibited from making allowance for legal expenses, in my opinion such a restraint on the powers of the court in exercising the jurisdiction under the Act does not compromise the institutional integrity of the court. The following matters are of significance in reaching that view.

[72] First, the court is concerned with the restraint of property in anticipation of subsequent substantive proceedings concerning declarations and forfeiture of the property. While restraining orders interfere with important rights and they have significant consequences adverse to the affected person, in a practical sense they are in the nature of interlocutory proceedings and do not involve a determination of guilt or innocence of criminal charges or a determination of the ultimate issues in the substantive proceedings between the parties.

[73] Secondly, the legislation does not direct the court as to the manner or outcome of the exercise of the jurisdiction. The court is required to receive and assess evidence, make findings of fact and apply the law to the facts. If an application is made to proceed ex parte, the court is given an unfettered discretion in determining whether to accede to the application. Unlike the circumstances in *Gypsy Jokers*, the discretion with respect to confidentiality is unfettered. The powers contained in ss 42-46 concerning the making of restraining orders and their contents are also unfettered. As to whether restrained property should be released to meet reasonable living and business expenses, again the discretion is unfettered.

[74] The legislative prescription that living and business expenses do not include legal expenses as defined by s 154 does not direct the court as to the manner or outcome of an application for release of restrained property to provide for meeting living and business expenses. The effect of the challenged sections is to confer a jurisdiction that is confined or limited in a particular aspect by excluding identified legal expenses from the ambit of living and business expenses and by providing that the jurisdiction does not extend to releasing restrained property for the purpose of meeting legal expenses in relation to identified proceedings.

[75] Thirdly, in the context of the entire statutory scheme, the function which the court is required to perform is not alien to the judicial function and must be performed judicially. It is not a function that could reasonably be seen as confined in the way Wheeler JA in her dissenting judgment in *Gypsy Jokers*

described the role of the court under the Western Australian legislation, namely, as merely "a step in a process, initial and final stages of which involve the exercise of purely executive power" leaving the court's function "confined to the consideration of one very narrowly framed question" [147].

[76] Fourthly, turning to specific "defining characteristics" of a court, on any reasonable interpretation the challenged provisions do not undermine the independence and impartiality, or appearance of independence and impartiality, of the court. Nothing in the provisions is capable of undermining the confidence of the public that the court will "administer justice according to the law". The functions conferred on the court are not "an integral part of" or "closely connected with" the functions of the Legislature or the Executive Government. It cannot reasonably be said that the court is "a mere instrument of government policy". There is no basis for an inference that the function of the court is required to be performed other than "independently of any instruction, advice or wish of the Legislature or Executive Government" or that the court is to exercise the discretion on "political grounds". There is nothing in the challenged provisions requiring or authorising the court to ignore the rules of natural justice. Whether in the particular circumstances there was a breach of those rules is a separate issue discussed later in these reasons.

[77] Regardless of whether the obligation to give reasons is regarded as an aspect of procedural fairness or a separate requirement as an incident of the judicial process, the Act does not relieve the court of that obligation. The

nature and extent of that obligation within the statutory scheme is a different question also discussed later in these reasons.

Equality before the Law

[78] One of the significant effects which the plaintiffs asserted necessarily flows from the challenged provisions is the undermining of the ability of the court to ensure equality before the law. In their written submissions cited earlier in these reasons the plaintiffs asserted that "the combination of challenged subsections require and authorise the Court to proceed in a manner that does not ensure equality before the law …".

[79] As I understand the plaintiffs' contention, because a court is denied the opportunity of making allowance for legal expenses thereby potentially depriving the affected person of the capacity to fund legal representation, the ability of the court to ensure equality is undermined. The plaintiffs combine this effect with the prescription that living and business expenses do not include legal expenses, and that property the subject of a restraining order is not to be released to meet legal expenses, to support the proposition that the combination of challenged provisions "predicates an outcome and the effect of the proscription is to deny a person affected an important right, namely, the right to use his or her property as a fund to defend himself or herself and the ability to have a lawyer of their choice represent them." In this way the plaintiffs assert that given the serious nature and effect of restraining orders, the "combined prohibitions and directions in the

challenged subsections … clearly compromises the impartiality and the reputation of the Court as a place where justice is administered."

[80] It is readily apparent that an ex parte application for a restraining order, particularly when confidential material is relied upon by the Judge, places the affected person at a significant disadvantage in connection with restraint of property and objections to restraint. That disadvantage continues in subsequent objection proceedings by reason of the reversals of onus of proof. Similarly, there is an obvious disadvantage if an affected person is unable to fund their own legal representation. In my opinion, however, the possibility that these effects will ensue does not attract the reasoning that the court is required or authorised to sanction relevant inequality before the law.

[81] The plaintiffs relied upon the observations of Gaudron J in *Nicholas* cited earlier in these reasons in which her Honour identified that the essential character of a court "necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law … ." However, there is nothing in the challenged sections that authorises the Court to deny an affected person relevant equality before the law. Nor do those provisions cause relevant inequality.

[82] The following remarks in the joint judgment of McHugh, Gummow, Hayne and Heydon JJ in *Baker* are of relevance to the suggestion of a constitutional restriction in this regard upon State legislative power:

> "**[45]** Nor was an attempt made to imply a restriction upon State legislative power akin to the express provision proscribing denial of 'the equal protection of the laws' found in s 1 of the Fourteenth Amendment to the *United States Constitution*. Such an attempt, at a federal level, respecting the powers of the Parliament, would have to overcome the reasoning of the majority in *Leeth v The Commonwealth* [(1992) 174 CLR 455]. That reasoning gives no encouragement to the implication of a constitutional restriction upon State legislative power."

[83] In *Leeth* a challenge was mounted to s 4(1)(a) of the Commonwealth Prisoners Act 1967 (Cth) which was concerned with the application of State non-parole legislation to offenders convicted of federal offences. As State laws relating to the fixing of non-parole periods differed, the minimum term of imprisonment imposed on a federal offender could vary significantly according to the State in which sentence was imposed. The majority of the High Court upheld the challenged section. In their dissenting joint judgment, Deane and Toohey JJ spoke of the obligation of a court to extend "equal justice" (487):

> "… Thus, in Ch. III's exclusive vesting of the judicial power of the Commonwealth in the 'courts' which it designates, there is implicit a requirement that those 'courts' exhibit the essential attributes of a court and observe, in the exercise of that judicial power, the essential requirements of the curial process, including the obligation to act judicially. *At the heart of that obligation is the duty of a court to extend to the parties before it equal justice, that is to say, to treat them fairly and impartially as equals before the law and to refrain from discrimination on irrelevant or irrational grounds*." (my emphasis)

[84] In my opinion, leaving aside the reservations expressed in the joint judgment in *Baker*, and applying the observations of Deane and Toohey JJ, there is nothing in the challenged provisions or their effect which

undermines the capacity of the court to treat the affected person "fairly and impartially" as an "equal before the law" to the Director or another affected person. As I have said, the consequence of a restraining order might be to place the affected person at a disadvantage, but the existence of that disadvantage does not undermine the capacity of the court to comply with its duty "to extend to the parties before it equal justice" as that expression is properly understood. The court retains all its inherent powers necessary to ensure that the parties are treated "fairly and impartially as equals before the law".

[85] In these circumstances, and bearing in mind the features to which I have referred in paras [72] - [77], in my opinion the existence of the possibility that in a particular case the effect of a restraining order might be to restrain all the property of an affected person and deprive that person of the capacity to privately fund legal representation does not compromise the institutional integrity of the court. I have reached this view notwithstanding that the ultimate effect might be to deprive the affected person of legal representation in connection with proceedings under the Act or criminal charges relevant to proceedings under the Act. The fundamental defining characteristics of the court are present and what might be seen to be undesirable features of the procedures set out in the legislation or the consequences of a restraining order do not undermine the institutional integrity of the court. If the effect of an order is to deprive an affected person of legal counsel because of a lack of capacity and a refusal of

publicly funded legal assistance, and if the consequence of a lack of representation would be to deprive the affected person of a fair trial or to create injustice or oppression, the ultimate remedy lies in the hands of the court by way of a stay of proceedings.

[86] As mentioned, in arriving at this view I have assumed in favour of the plaintiffs' case that in determining whether to restrain property and, if so, how much property to restrain, the court is precluded from making allowance for legal expenses. If, however, the court possesses a power to decline to restrain property in order to make allowance for legal expenses, the entire foundation of the plaintiffs' case crumbles. I turn to that question.

Allowance for Legal Expenses – Other Powers

[87] As I have said, s 154 applies only to property that is subject to a restraining order. In other words, once property is restrained, s 154 directs that such property is not to be released to meet the legal expenses of an affected person. As there is no specific prohibition against the court providing for legal expenses when making a restraining order, the question to be determined for the purposes of the present discussion is whether, in making a restraining order, the court has an "incidental" power to decline to restrain some of the property for the purposes of enabling the affected person to use the property to fund their legal representation. Or, as the Director

contended, does the legislative scheme evince an intention to exclude such a power?

[88] In *Nicholas*, Brennan CJ spoke of the well recognised principle that in the absence of legislative prescription to the contrary, the conferral of jurisdiction carries with it those powers which are incidental and necessary to the exercise of the jurisdiction. His Honour said:

> "**[23]** The judicial power of a court is defined by the matters in which jurisdiction has been conferred upon it. The conferral of jurisdiction prima facie carries the power to do whatever is necessary or convenient to effect its exercise. The practice and procedure of a court may be prescribed by the court in exercise of its implied power to do what is necessary for the exercise of its jurisdiction but subject to overriding legislative provision governing that practice or procedure. …" (footnote omitted)

[89] As to incidental powers, in a joint judgment in *ASIC v Edensor Nominees Pty Ltd & Ors* (2001) 204 CLR 559 at [64], Gleeson CJ, Gaudron and Gummow JJ cited the following remarks of Toohey J in *Harris v Caladine* (1991) 172 CLR 84 at 136:

> "The distinction between jurisdiction and power is often blurred, particularly in the context of 'inherent jurisdiction'. But the distinction may at times be important. Jurisdiction is the authority which a court has to decide the range of matters that can be litigated before it; in the exercise of that jurisdiction a court has powers expressly or impliedly conferred by the legislation governing the court *and 'such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred*'." (footnote omitted) (my emphasis)

[90] Reference should also be made to the principle that when conferring jurisdiction upon the Supreme Court with respect to proceedings under the

Act, in the absence of a plain legislative direction or a clear inference to the contrary, it is to be assumed that the Legislature intended to take the court "as it finds it with all its incidents": *Electric Light and Power Supply Corporation Ltd v Electricity Commission (NSW) & Anor* (1956) 94 CLR 554 at 560. In *Electric Light* the Court said (560):

> "… When the legislature finds that a specific question of a judicial nature arises but that there is at hand an established court to the determination of which the question may be appropriately submitted, it may be supposed that if the legislature does not mean to take the court as it finds it with all its incidents including the liability to appeal, it will say so. In the absence of express words to the contrary or of reasonably plain intendment the inference may safely be made that it takes it as it finds it with all its incidents and the inference will accord with reality. …"

[91] The passage I have cited from *Electric Light* was applied by the High Court in *Mansfield* to the Criminal Property Confiscation Act 2000 (WA). The Western Australian legislation is a scheme similar to the Territory legislation under consideration and provides for confiscation of property acquired as a result of criminal activity or used for criminal activity. Jurisdiction is conferred upon the Western Australian Supreme Court and the legislation provides that the proceedings are to be "taken to be civil proceedings for all purposes". Provision is made for freezing orders in terms similar to restraint under the Territory Act, including a provision that an application for a freezing order can be made ex parte.

[92] Section 45 of the Western Australian legislation is similar to s 46 of the Territory Act. It states that "in a freezing order" the court may "provide for

meeting the reasonable living and business expenses of the owner of the property".

[93] The Western Australian legislation makes no mention of legal expenses. Reliance was placed on the absence of specific mention in view of previous legislation which had specifically provided that a freezing order "may provide for meeting the reasonable living and business expenses of the person whose property the order applies to, and the reasonable costs and expenses of the person defending any criminal charge." In addition, reference was made to the Second Reading Speech introducing the new scheme under consideration by the High Court. The Parliamentary Secretary had said that under the Bill no frozen property could be released for the payment of legal expenses, which statement accorded with explanatory notes accompanying the Bill asserting that there was "no power" in the Act for a court to release money for payment of legal expenses.

[94] In that context, the High Court in *Mansfield* was called upon to determine whether the Western Australian Supreme Court had the power to require the DPP to give an undertaking as to damages and whether it was permissible for the court to leave property aside from a restraining order for the purposes of use in meeting legal expenses. The reasoning of the court is instructive.

[95] In a joint judgment of five Justices, after applying the reasoning in *Electric Light*, consideration was given to "the scope of the power when making a

freezing order to attach conditions or require the provision of undertakings so as to diminish the possibility of oppression and injustice" [10]. The following remarks of Gaudron J in *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205 were held to apply:

> "It is contrary to long-established principle and wholly inappropriate that the grant of power to a court (including the conferral of jurisdiction) should be construed as subject to a limitation not appearing in the words of that grant. Save for a qualification which I shall later mention, a grant of power should be construed in accordance with ordinary principles and, thus, the words used should be given their full meaning unless there is something to indicate to the contrary. Powers conferred on a court are powers which must be exercised judicially and in accordance with legal principle. This consideration leads to the qualification to which I earlier referred. The necessity for the power to be exercised judicially tends in favour of the most liberal construction, for it denies the validity of considerations which might limit a grant of power to some different body, including, for example, that the power might be exercised arbitrarily or capriciously or to work oppression or abuse." (footnote omitted)

[96] As to the power of the Western Australian Court to require the DPP to give an undertaking as to damages, the joint judgment noted that the previous legislation provided for an undertaking as to damages. In rejecting the proposition of the DPP that the "past presence and present absence" of such a provision led to a "negative implication" as to the scope of the power conferred by the new scheme, the judgment stated:

> "**[28]** However, the legislative history is of insufficient weight, given the absence of express limitation upon the scope of the power to grant freezing orders found in the various subsections of s 43, to displace the considerations of justice and fairness which ordinarily attend the administration of a new remedy such as that involved here by a court such as the Supreme Court. These considerations point

against any negative implication to limit the scope of that power in the way urged by the DPP."

[97] After briefly discussing the development of the practice in equity with respect to undertakings as to damages and noting that attention to that development would "assist in appreciating the deep roots in the law of the considerations referred to by Gaudron J in *Knight* …", the judgment concluded:

> "**[34]** In contemporary circumstances, the traditional powers of a court of equity have devolved, in Australia, upon State Supreme Courts inter alios. In the exercise of its jurisdiction and powers, absent express provision to other effect by or under statute, the Supreme Court enjoyed a like power in the grant of an injunction or analogous remedy. Against this background, the traditional concern with avoidance of unfairness and injustice in the administration of powers such as those conferred by s 43 of the Act with respect to freezing orders, supports, in the absence of express statutory provision to other effect, not the negative implication urged by the DPP, but the contrary."

[98] In *Mansfield* the Court rejected the DPP's contention for a negative implication with respect to the power to require an undertaking from the DPP. Similarly, notwithstanding the background of previous legislation and the Second Reading Speech to which I have referred, the majority of the Court also rejected a negative implication as to the power of the Court to make provision for legal expenses. In doing so, the joint judgment emphasised the value of legal representation in the conduct of adversarial proceedings:

> "**[49]** The unique and essential function of the judicial branch of government is the quelling of controversies by the ascertainment of

> the facts and the application of the law. This is done by an adversarial system of litigation. It is plain that the operation of that system is assisted by the presence of legal representation, and may be severely impaired by its absence. In *Dietrich v The Queen* [(1992) 177 CLR 292 at 302], Mason CJ and McHugh J repeated the extrajudicial opinion of Lord Devlin that, save in the exceptional case of the skilled litigant, in practice the adversarial system breaks down where there is no legal representation.
>
> **[50]** The Act, as remarked earlier in these reasons, is draconian in its operation and complex in various of its provisions. There is not readily to be implied a denial of the powers of the Supreme Court when making or varying a freezing order to mould its relief to permit the use of funds to obtain legal assistance. Such assistance is for the benefit not only of the individual but for the more effective exercise of the jurisdiction conferred by s 101 of the Act with respect to proceedings under the Act. In that sense, it is also for the benefit of the State and the public.
>
> **...**
>
> **[52]** The general considerations discussed above as to the importance and public utility of legal representation in proceedings under the Act point away from any negative implication based upon s 45 which would restrict in this regard the scope of the power conferred upon the Supreme Court with respect to freezing orders." (footnote omitted)

[99] The joint judgment adopted the approach of Pullin JA in his dissenting judgment in the Court of Appeal. His Honour had assumed, without deciding, that legal expenses were not "living and business expenses" for the purposes of the Western Australian legislation. Having made that assumption, his Honour said [*Mansfield v Director of Public Prosecutions (WA)* (2005) 31 WAR 97]:

> "**[98]** However, the court in the exercise of its discretion may also refuse to make a freezing order over some property. The court could therefore make a freezing order with respect to certain property, and refuse to make one in relation to sufficient property to allow legal

> expenses to be paid. In other words the freezing order would not cover property to be used to pay legal expenses. If some property is exempted from the freezing order, then s 45 would not apply to it. In exempting some of the property from the freezing order, the court could provide that it be exempt on condition that it be spent in a particular way, ie, for legal expenses, and that there should be some machinery for ensuring that the money is spent only for that purpose."

[100] In approving the approach of Pullin JA, the joint judgment emphasised the importance of control over how the funds were used:

> "**[54]** The last sentence of the above passage is of great significance. It calls for great care by the parties and the Court in the framing of the condition to ensure, to the maximum practical extent, that exempted funds are not misused, whether by over servicing and overcharging or by other abuse."

[101] Although the Western Australian legislation did not expressly provide that "living and business expenses" did not include legal expenses, both Pullin JA and the joint judgment assumed that the expression did not include legal expenses and found that the legislation did not exclude the power to refrain from freezing certain property with legal expenses in mind. The joint judgment applied the "liberal construction" of which Gaudron J spoke in *Knight* being, as their Honours explained, a construction required for reasons of "justice and fairness which ordinarily attend the administration of a new remedy …" [28]. A critical question is whether the presence of the express statements in s 46(2) and s 49(4) rebuts that construction and leads to the negative implication that was rejected in *Mansfield*. In this regard, it is to be borne in mind that s 154(1)(a) specifically prohibits the release of restrained property for the purpose of meeting legal expenses.

[102] In my opinion, the negative implication should not be drawn. Given the nature of the scheme and the observations in the joint judgment in *Mansfield* concerning the "importance and public utility of legal representation" in proceedings under the Act or with relevance to the Act, and particularly having regard to the need to take all reasonable measures to avoid unfairness and oppression in circumstances where the legislative scheme places the affected person at a significant disadvantage, the "liberal construction" should be applied. As a consequence, when the court is considering an application to restrain property, in my view the court has the power to proceed in the manner described by Pullin JA as approved by the majority in *Mansfield*. As I have said, if this view is correct the foundation of the plaintiffs' contention that the institutional integrity of the court is compromised falls away.

Mareva Injunction

[103] The availability of equitable powers in the context of an application for restraint of property has an important practical effect. A court faced with an ex parte application for a restraining order may be minded to require service of the application upon an affected person, but may also be concerned that giving notice of the application could lead to disposal of the assets sought to be restrained before an order is made.

[104] Section 40 of the Act empowers the Local Court to make an interim restraining order if the Local Court is satisfied and an application "is to be made" under ss 43 or 44 "as soon as reasonably practicable" and if the court

is satisfied that the circumstances justify the making of an interim order. Such an order has effect for only 72 hours. The power of the Local Court does not assist once an application is made to the Supreme Court. Section 40 does not empower the Local Court to make an interim restraining order after an application has been made to the Supreme Court. Nor does s 40 empower the Local Court to extend the restraining order beyond 72 hours.

[105] The Act does not expressly confer on the Supreme Court a power to make an interim restraining order. If the court determines that notice of an application should be given to an affected person before a restraining order is made, the power to preserve the property that is the subject of the application must be found elsewhere. The obvious answer lies with a Mareva injunction. In this way the object of preservation is achieved while providing an affected person with an opportunity of responding to an application. The existence of the powers found in the equitable jurisdiction and their application to proceedings under the Act is further confirmation that the court retains its essential characteristics.

"Right" to Legal Representation

[106] As is apparent from these reasons, I am of the view that even if the court does not possess a power when making a restraining order to decline to make an order over property for the purpose of allowing for legal expenses, the plaintiffs' case as to invalidity is not made out. In order to reach that view I did not find it necessary to determine the nature of the "right" to

legal representation. More particularly, I did not need to determine whether the right asserted by the plaintiffs to use their property to secure the services of a lawyer of their choice to represent them exists. However, as this asserted "right" was the subject of submissions, I will indicate my view.

[107] The plaintiffs submitted that the "right" for which they contended is so important or fundamental that a conferral of power to restrain property and thereby to deprive the plaintiffs of their capacity to fund legal representation privately compromises the institutional integrity of the court. At the heart of this proposition is the existence and nature of the "right" for which the plaintiffs contended.

[108] In the context of a criminal trial, the question of a right to a fair trial and to legal representation was considered by the High Court in *McInnis v The Queen* (1979) 143 CLR 575 and *Dietrich v The Queen* (1992) 177 CLR 292. In my opinion, neither of those authorities establish the fundamental premise upon which the plaintiffs' case is based.

[109] In *McInnis* the appellant had been denied legal aid and sought an adjournment of his trial for the purpose of approaching the legal aid authority for reconsideration of his application. The adjournment was refused and the trial proceeded with the appellant representing himself. Following conviction the appellant's appeal to the Court of Criminal Appeal was dismissed. An application for special leave to appeal was refused.

[110] Barwick CJ observed that the question before the Court of Criminal Appeal was not whether an adjournment should have been granted, but whether, on the assumption that the adjournment should have been granted, the refusal resulted in a miscarriage of justice. His Honour continued (579):

> "It is proper to observe that an accused does not have a right to be provided with counsel at public expense. He has, of course, a right to be represented by counsel at his own or someone else's expense. He has no absolute right to legal aid. …"

[111] The plaintiffs sought to construe the remarks of Barwick CJ as asserting that an accused possesses a "fundamental right" to be represented by counsel at the accused's expense with the consequence that an order depriving a party of the capacity to fund their own legal representation amounts to a denial of a "fundamental right". This proposition must be rejected. There is no authority or principle which supports it. The so called "right" would be a right possessed only by wealthy parties. An indigent party does not possess such a "right". In the remarks of Barwick CJ upon which the plaintiffs rely, his Honour was not intending to enunciate the "right" for which the plaintiff contended. His Honour was referring to a right possessed by every party to participate through counsel should counsel be retained and available.

[112] The concept of a "right" to appear or be represented by counsel is common enough. In *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239, s 51(b) of the Legal Profession Act 1987 (NSW) provided that the Bar Council may "appear by counsel before, and be heard by, the Supreme Court in the exercise of the functions of the Supreme Court" under that legislation.

In a joint judgment, Deane, Dawson, Toohey and Gaudron JJ explained the meaning of that expression as follows (254):

> "Unless there is something to indicate to the contrary, the expression 'appear and be heard' and its variations, such as 'appear by counsel … and be heard' which is involved in the present case, when used in relation to court proceedings or, indeed, any proceedings directed to a hearing and determination of some disputed matter, signify a right to participate fully in those proceedings. The right may be expressly qualified, as, for example, where it is confined to a specific issue. On the other hand a qualification may arise, as a matter of implication, because of the issues involved, the nature of the interest affected or the like. But in the absence of an express or implied qualification, it is a right of full participation." (footnote omitted)

[113] These observations explain what Barwick CJ meant in *McInnis*. They apply to s 360 of the Criminal Code (NT) which provides that "Every accused person is entitled to give evidence, to call evidence and to be represented by counsel …". They also apply to s 75 of the Supreme Court Act which states that, "Subject to any other law in force in the Territory, a party in a proceeding may appear before the Court either personally or by a legal practitioner."

[114] In *Dietrich*, by a majority the High Court held that "… the common law of Australia does not recognise the right of an accused to be provided with counsel at public expense" (297 - 298). However, as Mason CJ and McHugh J explained in their joint judgment, the Court has the capacity to prevent an unfair trial occurring by reason of lack of representation by staying the proceedings (298):

> "… However, the courts possess undoubted power to stay criminal proceedings which will result in an unfair trial, the right to a fair trial being a central pillar of our criminal justice system. The power to grant a stay necessarily extends to a case in which representation of the accused by counsel is essential to a fair trial, as it is in most cases in which an accused is charged with a serious offence."

[115] Later in their judgment, their Honours approved of the observation of Deane J in *Jago v District Court (NSW)* (1989) 168 CLR 23 at 56 – 57 that the right of an accused to a fair trial is "more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial …" (299). Their Honours continued (299 - 300):

> "The right is manifested in rules of law and of practice designed to regulate the course of the trial. However, the inherent jurisdiction of courts extends to a power to stay proceedings in order 'to prevent an abuse of process for the prosecution of a criminal proceeding … which will result in a trial which is unfair'." (footnotes omitted)

[116] In rejecting the proposition that an accused person has a right to counsel at public expense, Mason CJ and McHugh J made the following important observation (310 - 311):

> "Thirdly, recognition of the right to counsel provided at public expense would necessarily entail, and indeed be founded upon, the principle that absence of representation necessarily means that a criminal trial is unfair. However, appellate courts in this country do not interfere with convictions entered at trial purely on the basis that there was unfairness to the accused in the conduct of the trial. The appellate jurisdiction in criminal matters depends upon a conclusion that there was a 'miscarriage of justice' such that the applicant 'has thereby lost 'a chance which was fairly open to him of being acquitted' … or 'a real chance of acquittal'', to repeat the expression used by Brennan, Dawson and Toohey JJ in *Wilde v The Queen*. Unless the recognition of the absolute right sought by the applicant

> entails the consequence that want of representation necessarily means that a trial has miscarried, the absolute right would lack an adequate sanction. The right would thus appear to be rather hollow." (footnotes omitted)

[117] As to the position in Australia, their Honours concluded (311):

> "For the foregoing reasons, it should be accepted that Australian law does not recognise that an indigent accused on trial for a serious criminal offence has a right to the provision of counsel at public expense. Instead, Australian law acknowledges that an accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that an accused is unable to receive, or did not receive, a fair trial. Such a finding is, however, inextricably linked to the facts of the case and the background of the accused."

[118] Deane J also rejected the existence of a "right" to be provided with legal representation at public expense. His Honour said (330):

> "It must be stressed that the applicant does not argue that he had a directly enforceable common law 'right' to be provided with legal representation at public expense. Clearly, he did not. The common law does not impose upon the government or any section or member of the community an enforceable duty to provide free legal advice or representation to anyone. What the common law requires is that, if the government sees fit to subject an accused person to a criminal trial, the trial must be a fair one. …"

[119] Deane J concluded (337):

> "It follows from the foregoing that, as a general proposition and in the absence of exceptional circumstances, a trial of an indigent person accused of serious crime will be unfair if, by reason of lack of means and the unavailability of other assistance, he is denied legal representation. …"

[120] Dawson J spoke of an "entitlement to appear by counsel". His Honour said (342 - 343):

> "Entitlement to appear by counsel is not the same thing as entitlement to have counsel provided at public expense. It is a right on the part of an accused person to avail himself of counsel if counsel is available to him or can be made available to him. A legal aid scheme is nowadays a means by which counsel may be made available to an accused person. *If, by the refusal of an adjournment, an accused is prevented from pursuing a course which could, with any reasonable prospect of success, enable him to avail himself of counsel, then it seems to me that it should be irrelevant to inquire further whether he has lost a chance of acquittal because he was unrepresented. The refusal of an adjournment which would deprive an accused of a reasonable opportunity to obtain representation would effectively deny him the form of trial to which he was entitled by statute – a trial at which he was represented by counsel. In such a case, the refusal of the adjournment would itself and without more cause the trial to miscarry.* It is not to the point that the accused would inevitably have been convicted because that is no answer when a trial is fundamentally flawed. Of course, not every refusal of an adjournment for the purpose of obtaining counsel will amount to a refusal to allow an accused to exercise his right. The accused may previously have had adequate opportunity to pursue his entitlement and have failed to do so. An adjournment may be sought for merely tactical reasons and not for the genuine purpose of obtaining representation. And no counsel may be available because the accused lacks the means to secure a representation and all avenues to obtain legal aid have been explored unsuccessfully.
>
> In the last set of circumstances, the accused has no right to be represented by counsel at public expense. …" (footnotes omitted) (my emphasis)

[121] Dawson J went on to consider s 397 of the Crimes Act 1958 (Vict.) which provided:

> "Every accused person shall be permitted after the close of the case for the prosecution to make full answer and defence thereto by counsel."

[122] As to the impact of that section, Dawson J said (344):

> "Having regard to the origins of s 397 and the view that I have expressed above, the applicant was correct in conceding that the

> section does no more than give a right to an accused to retain counsel if he has the means to do so or if counsel is otherwise available."

[123] Recognising the practical difficulties accompanying the provision of legal aid by reason of the limited funds available for such purposes, Dawson J observed (350):

> "… The function of the courts is to ensure that an accused person receives the fairest possible trial in all the circumstances and those circumstances may include the lack of representation of the accused in some cases. To be sure, the law lays down the requirements for a fair trial and departure from those requirements will result in a miscarriage of justice. But those requirements presently do not, and cannot in a practical world, include the availability of representation for an accused at public expense. …"

[124] Toohey J observed that "the existence of any right to counsel cannot be divorced from an historical context" (351). After examining that context, his Honour said (352 - 353):

> "These historical references demonstrate that the general appearance of counsel for an accused and the existence of any general appeal procedures are comparatively recent. In such a setting it would be surprising to find in the common law a right to counsel formulated in absolute terms. And none is to be found. It is more profitable to consider the present appeal by reference to the concept of a fair trial, in particular the extent to which that concept requires legal representation for an accused and the consequences if representation is not available."

[125] Gaudron J accepted that an accused person does not have a statutory or common law right to be provided with counsel at public expense. Her Honour noted, however, that there are Federal, State and Territory statutory provisions "conferring a right on an accused person to be represented on his trial" (368). However, her Honour did not express the right in unqualified

terms. She concluded that "legal representation should be seen as essential for the fair trial of serious offences unless the accused chooses to represent himself" (374). On that assumption, her Honour was of the view that the trial Judge was necessarily in error in allowing the trial of the appellant to proceed. Her Honour said (375):

> "… What makes a trial without representation unfair is the possibility that representation might affect the outcome of the case. That same matter reveals the nature of the error involved in this case and the consequence of that error. If an accused who is forced to represent himself is convicted, the prima facie position is that, had he been represented, he might have been acquitted. In other words, the prima facie position is that the accused has 'lost a chance which was fairly open to him of being acquitted' and that, in terms of the proviso to section 568(1) of the Crimes Act, there has been a 'substantial miscarriage of justice'." (footnote omitted)

[126] Finally, the following observation of her Honour at the conclusion of her judgment is of relevance to the matter under consideration (376 - 377):

> "This case is one in which the accused was unrepresented because he lacked means to provide for his defence and because he was refused legal aid. It is not a case where the decision of the trial judge denied the accused an opportunity to obtain legal representation or, for that matter, to apply for legal aid. *In a case involving the denial of an opportunity to obtain legal representation, whether through a legal aid scheme or privately, there would be a denial of the right to trial with representation. Like Dawson J, I am of the view that a denial of that kind would result in the trial being fundamentally flawed so that, without further enquiry, a conviction entered against the accused would have to be set aside. The present case is not a case of that kind. It is a case to be determined by the application of s 568(1) of the Crimes Act.*" (my emphasis)

[127] The passages I have highlighted from the judgments of Dawson and Gaudron JJ might be thought to provide support for the plaintiff's

contention. However, the reasoning is not applicable to the circumstances under consideration. The fundamental flaw of which both Dawson J and Gaudron J spoke was the denial of a reasonable opportunity to obtain representation. The challenged provisions do not authorise or direct the court to deny the affected person that opportunity. The powers of the court to provide an affected person with a reasonable opportunity to obtain legal representation are completely unfettered.

[128] The plaintiffs drew attention to three New Zealand decisions in support of their submission as to the importance of the right to be represented by counsel of choice. In my view, however, those decisions demonstrate that the "right" may be qualified or negated without detracting from the institutional integrity of the court.

[129] In *Equiticorp Holdings Ltd v Hawkins* [1993] 2 NZLR 737, Henry J spoke of "the general right of a party to be represented by a solicitor of choice" (739). His Honour did so in the context of a successful application that a solicitor who had previously acted for the defendants should be precluded from acting for the plaintiffs. In other words, the "general right" of which Henry J spoke was subject to the importance of maintaining solicitor – client confidentiality and of avoiding a conflict of interest.

[130] The same approach was taken by Thomas J in *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587. Similarly, in *Black v Taylor* [1993] 3 NZLR

403, the Court of Appeal recognised the qualified nature of the right.

Cooke P said (408 - 409):

> "… The right to a fair hearing in the Courts is an elementary but fundamental principle of British justice. It reflects the historical insistence of the common law that disputes be settled in a fair, open and even-handed way. …
>
> An associated consideration is the fundamental concern that justice should not only be done but should manifestly and undoubtedly be seen to be done.
>
> The integrity of our system of justice depends on its meeting those standards. The assessment of the appearance of justice turns on how the conduct in question – here Mr Gazley's wish to be able to act as a counsel for the defendants against M A Taylor – would appear to those reasonable members of the community knowing of that background.
>
> In making that assessment the Court will also give due weight to the public interest that a litigant should not be deprived of his or her choice of counsel without good cause. The right to the choice of one's counsel is an important value. But it is not an absolute. That is recognised in criminal legal aid where the assignment of counsel is made by the Registrar and is not a matter of client choice (Legal Services Act 1991, s 17). And as a matter of practice the Court limits client choice in various respects. …" (citations omitted)

[131] These authorities provide no comfort for the plaintiff's submission. The "general right", while important, is subservient to other public interests and, in my opinion, is not such a fundamental right that legislation having the potential effect of depriving a party of the capacity to fund legal representation is invalid because it offends the *Kable* principle.

[132] A number of authorities were cited in which it was held that the principle in *Dietrich* does not apply to civil matters. It is unnecessary to explore the

limits of the principle. For the reasons I have given, in my opinion there is no relevant "right" which is denied by the challenged provisions. The possibility that the effect of a restraining order might be to deprive an affected person of the capacity to fund legal representation privately does not impinge on a relevant right or compromise the institutional integrity of the court.

Inherent Power

[133] The final obstacle to the case for the plaintiffs as to validity is found in the inherent powers of the court which are sometimes described as the "inherent jurisdiction". As was explained in the joint judgment of Gaudron, Gummow and Hayne JJ in *Lipohar v The* Queen (1999) 200 CLR 485 at [78], the term "jurisdiction" is a "generic term" which is used in a variety of senses. The judgment continued:

> "… [T]he phrase 'inherent jurisdiction', used in relation to such things as the granting of permanent stays for abuse of process, identifies the power of a court to make orders of a particular description." (footnote omitted)

[134] In the passages cited earlier from the judgments in *Dietrich* and *Jago*, the power to stay criminal proceedings which will result in an unfair trial is plainly stated. However, the power to prevent injustice is not limited to criminal proceedings. In *Tringali v Stewardson Stubbs & Collett Ltd* (1965) 66 SR (NSW) 335 the New South Wales Court of Appeal was concerned with proceedings for damages which were stayed by the trial Judge until a

particular undertaking was given by the plaintiff. In the following passage from the joint judgment, the Court confirmed that the inherent power is not confined to closed categories of cases and extends to ensuring that injustice is not caused (344):

> "Whilst, however, the stay of proceedings granted by Else-Mitchell J cannot be justified upon the ground that the action itself is vexatious (see *Cox v Journeaux (No 2)* (1935) 52 CLR 713 at 720), nevertheless, we agree, with respect, with Else-Mitchell J when he said that the inherent power of the court to stay an action is not, to use his own words, 'confined to closed categories of cases of which vexatious suits is one illustration. It is a power which is exercisable in any situation where the requirement of justice demands it'. There are a number of grounds, both statutory and otherwise, upon which a stay of proceedings may be granted. Some of these are referred to in *Chitty's Archbold's QB Practice,* 12th ed, vol 2, pp 1374 et seq*; Halsbury's Laws of England*, 3rd ed, vol 30, pars 767, 768, and the notes to Order XIV, r 27, at pp 205-209 of Walker, *Supreme Court Practice (NSW)*, 4th ed (1958). Order XIV, r 27, applies to an application for a stay of proceedings if made before the commencement of the trial of an action and here the trial had commenced in the sense that appearances had been announced and the jury had been empanelled. *But, quite apart from the procedure prescribed by the rule, there can be no doubt that this Court has an inherent jurisdiction to endeavour to ensure that the pursuit of its ordinary procedures by litigants does not lead to injustice and for this purpose to grant in the exercise of its discretion a stay of proceedings, whether permanent or temporary, upon such conditions or terms (if any) as may seem appropriate in the particular circumstances and that this is a jurisdiction which may be exercised at any stage of the proceedings where it appears to be demanded by the justice of the case*. However, it must always be borne in mind that a stay of proceedings should not be lightly granted. The question always remains whether in any particular case the jurisdiction should be exercised and whether it should be exercised before the trial or during the conduct of the trial by the trial judge. …" (my emphasis)

[135] In a joint judgment in *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256, Gleeson CJ, Gummow, Hayne and Crennan JJ

spoke of the terms "inherent jurisdiction" and "inherent power" and of the application of the inherent power to civil proceedings:

> "**[5]** These appeals concern abuse of process as understood in the exercise of the 'inherent jurisdiction' of superior courts to stay proceedings. The phrase 'inherent jurisdiction' itself is a slippery one. In *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd*, Gleeson CJ, Gaudron and Gummow JJ remarked:
>
> > ''Jurisdiction' and 'power' are not discrete concepts. The term 'inherent jurisdiction' may be used, for example in relation to the granting of stays for abuse of process, to describe what in truth is the power of a court to make orders of a particular description. …'
> >
> > …
>
> **[6]** Accordingly, in *Hunter v Chief Constable of West Midlands Police* Lord Diplock used the term 'inherent power' rather than 'inherent jurisdiction'. In *Walton v Gardiner*, the majority, Mason CJ, Deane and Dawson JJ, accepted as correct the passage in *Hunter* in which Lord Diplock spoke of 'the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people'. His Lordship went on to describe as 'very varied' the circumstances where 'abuse of process' can arise. It will be necessary to return to that consideration later in these reasons.
>
> **[7]** In *Hunter*, Lord Diplock disavowed the use of the word 'discretion' in describing the exercise of the power to prevent abuse of process. Thereafter, in *R v Carroll*, Gaudron and Gummow JJ observed that the use of the term 'discretion' in this context indicates no more than that, although there are some clear categories, 'the circumstances in which proceedings will constitute an abuse of process cannot be exhaustively defined and, in some cases, minds may differ as to whether they do constitute an abuse'. They added:

> ‘It does not indicate that there is a discretion to refuse a stay if proceedings are an abuse of process or to grant one if they are not. However, as with discretionary decisions, properly so called, appellate review of its exercise looks to whether the primary judge acted upon a wrong principle, was guided or affected by extraneous or irrelevant matters, mistook the facts, or failed to take into account some material consideration.’

[8] A further distinction must now be drawn. It is accepted that the inherent power identified by Lord Diplock applies to both civil and criminal proceedings. However, the power does so with somewhat different emphases attending its exercise. In *Williams v Spautz*, Mason CJ, Dawson, Toohey and McHugh JJ identified two fundamental policy considerations affecting abuse of process in criminal proceedings. Their Honours said:

> ‘The first is that the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court’s processes may lend themselves to oppression and injustice.’

These considerations are not present with the same force in civil litigation where the moving party is not the State enforcing the criminal law. Earlier, in *Jago v District Court (NSW)*, Mason CJ had observed:

> ‘[T]he criteria for determining what amounts to injustice in a civil case will necessarily differ from those appropriate to answering the question in a criminal context’.” (footnotes omitted)

[136] In addition to the passages cited in *Batistatos*, two passages in the joint judgment in *Walton v Gardiner* (1993) 177 CLR 378 are of relevance. First, their Honours referred to remarks of Gaudron J in *Jago v District Court*

(NSW) at 74 concerning the application of the inherent power to civil proceedings (394):

> "In her judgment in *Jago*, Gaudron J stressed that the power of a court 'to control its own process and proceedings is such that its exercise is not restricted to defined and closed categories, but may be exercised as and when the administration of justice demands'. Her Honour added the comment 'that, at least in civil proceedings, the power to grant a permanent stay should be seen as a power which is exercisable if the administration of justice so demands, and not one the exercise of which depends on any nice distinction between notions of unfairness or injustice, on the one hand, and abuse of process, on the other hand'. …" (footnotes omitted)

[137] Secondly, the joint judgment in *Walton* also approved the following passage from the judgment of Richardson J of the New Zealand Court of Appeal in *Moevao v Department of Labour* [1980] 1 NZLR 464 at 481 which emphasised the maintenance of public confidence (394):

> "[P]ublic interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by the State and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice."

[138] The joint judgment in *Batistatos* observed that some of the considerations applicable in criminal matters do not exist with the same force in civil litigation "where the moving party is not the State enforcing the criminal law". In proceedings under the Act, however, while designated civil

proceedings, the State is the moving party and the proceedings are closely linked to matters of a criminal nature. In these circumstances, it might be said that many of the matters applicable in criminal proceedings are of significance to proceedings under the Act.

[139] The inherent power to prevent unfairness or injustice may be exercised at any stage of proceedings before the court. For example, on an application for a restraining order the court may determine that material relied upon by the court should not be disclosed to the affected person. However, I see no impediment to the court endeavouring to minimise the disadvantage necessarily flowing to the affected person in such circumstances by permitting disclosure of the confidential material either to counsel independent of the parties appointed to assist the court, or to counsel acting for the affected person, having received an undertaking from such counsel that the confidential information will not be disclosed to any person. In this way, subject to the obvious disadvantage flowing from the fact that the affected person is not given access to the confidential material, the unfairness that might otherwise be caused by the fact of confidentiality is ameliorated and legal counsel, with knowledge of the confidential material, is able to represent the interests of the affected person.

[140] As to the possible result that restraint of property deprives an affected person of the capacity to fund legal representation and legal aid is refused, if the court is of the view that proceedings under the Act or a criminal prosecution against the affected person will be unfair by reason of lack of

representation, the court will possess the discretion to stay the proceedings. The State, through the Director, having chosen to seek restraint of all property, or at least so much of an affected person's property as to deprive that person of the capacity to fund legal representation, and the court having stayed the proceedings, it will be in the hands of the State to ensure that the affected person is able to secure legal representation and, thereby, fairness in the proceedings. If appropriate, in conjunction with a stay of proceedings or subsequently, the court could revoke all or part of the restraining orders or refuse to extend all or part of the orders pursuant to s 51.

[141] In my opinion, the existence of the inherent power identified in the authorities to which I have referred provides a final answer to any contention that the institutional integrity of the court is compromised by the conferral of a power to restrain property to the extent that restraint might deprive the affected person of the capacity to fund representation. The underlying propositions that depriving the plaintiffs of the capacity to fund representation will necessarily result in both a failure to provide equal justice before the law and in proceedings that are unfair to the plaintiffs, cannot be sustained. The court possesses the independence, impartiality and power to prevent such consequences occurring. The institutional integrity of the court is not compromised.

Procedural Fairness

[142] The agreed facts are set out in para [17] of these reasons and additional facts are noted in paras [196] and [198] of the reasons of Mildren J. The essential facts upon which the plaintiffs' base their case that they were denied procedural fairness are as follows:

- The plaintiffs were not given any notice of the applications.
- The plaintiffs were not given any opportunity to be heard in respect of the application for restraint of property.
- The Judge relied upon information contained in six confidential affidavits that has not been made available to the plaintiffs.
- The Director did not direct the attention of the Judge to the possibility of restraining less property than that restrained for the purpose of enabling the plaintiffs to use unrestrained property to meet legal expenses in connection with proceedings under the Act.
- The Judge did not enquire whether he should restrain less property than that sought to be restrained in order to make allowance for legal expenses.
- Other than the formal orders identifying that the property was restrained on the grounds that it is crime-derived property and constitutes unexplained wealth, the Judge did not give any oral or written reasons for his decision to restrain the property.

- No transcript of the proceedings before the Judge has been made available to the plaintiffs.

- "The plaintiffs do not have any other real property, bank accounts or motor vehicles" and their "interests in their property, livelihood and reputation were affected by the orders" of the Judge.

[143] In their written submissions, although the plaintiffs accepted that s 41(3) expressly authorises the making of an ex parte application and "to that extent the *audi alteram partem* rule has been expressly or by necessary implication modified", nevertheless they submitted that the accumulation of the factors I have identified constituted a denial of procedural fairness. As a consequence, argued the plaintiffs, the orders are invalid by reason of jurisdictional error.

[144] The plaintiffs' written submissions identified two matters as at the "heart" of their case. First, that "the *ex parte* application made before his Honour and the defendant's use of confidential affidavits … precluded the plaintiffs from arguing why orders should not be made or, at least that orders should not be made in respect of all their property so that they could use some of that property to pay legal expenses" in connection with proceedings under the Act. Secondly, the failure of the Judge to give reasons which the plaintiffs contended were "essential in order to inform the plaintiffs as to the basis for the decision and the material facts his Honour relied upon".

[145] In *Annetts v McCann* (1990) 170 CLR 596, the coroner had declined to permit parents of a boy whose death the coroner was investigating to make a closing address concerning the evidence. The joint judgment of Mason CJ, Deane and McHugh JJ identified the critical question as being whether the Act under which the coroner was conducting the inquiry displayed "… a legislative intention to exclude the rules of natural justice and in particular the common law right of the appellants to be heard in opposition to any potential finding which would prejudice their interests." (598 - 599). The judgment identified the principle of construction in the following passage (598):

> "It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words or necessary intendment … ."

[146] Observations of relevance to the matters under consideration were also made by Gleeson CJ in *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476:

> "**[25]** In *Australian Broadcasting Tribunal v Bond* [(1990) 170 CLR 321 at 365 – 367], Deane J explained that, in the past, it was customary to refer to the duty to observe common law requirements of fairness as a duty 'to act judicially'. … Later, the duty came to be referred to as a duty to observe the requirements of 'natural justice'. Later again, it became common to speak of 'procedural fairness'. The precise content of the requirements so described may vary according to the statutory context; and may be governed by express statutory provision. Subject to any statutory regulation, and relevantly for present purposes, the essential elements involved include fairness and detachment. Fairness and detachment involve 'the absence of the actuality or appearance of disqualifying bias and

> the according of an appropriate opportunity of being heard'. A statute may regulate and govern what is required of a tribunal or other decision-maker in these respects, and prescribe the consequences, in terms of validity or invalidity, of any departure. Subject to any such statutory provision, denial of natural justice or procedural fairness will ordinarily involve failure to comply with a condition of the exercise of decision-making power, and jurisdictional error. …" (footnotes omitted)

[147] It is common ground that the Judge was required to act judicially and to afford procedural fairness to the parties. However, as Gleeson CJ noted in *Plaintiff S157*, it is necessary to have regard to the statutory context in order to determine the "precise content of the requirements" of procedural fairness and to consider whether those requirements are "governed" by any express statutory provision.

[148] As mentioned, s 3 of the Act sets out the objective of the legislative scheme as targeting "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". The preamble to the Act identifies the means by which the legislative scheme seeks to achieve this objective as forfeiture "of property acquired as a result of criminal activity and property used for criminal activity". The place of restraining orders in that overall context is obvious. It is to prevent dissipation or removal of property by preserving the property pending determination of proceedings whose ultimate purpose is forfeiture of the property. The heading to Part 4 of the Act reflects this purpose:

"**ENSURING PROPERTY REMAINS AVAILABLE FOR FORFEITURE**".

[149] In the particular statutory context to which I have referred, the requirements of procedural fairness at the time of an application for a restraining order are different from those requirements that apply at the time of a substantive proceeding for forfeiture of restrained property. In substance, the Judge was dealing with an interlocutory application and was not determining the final issue between the parties. While the consequences adverse to the plaintiffs brought about by a restraining order must be borne in mind, including the reversals of the onus of proof in objection proceedings, nevertheless at the interlocutory stage of restraint which has as its object the preservation of property and involves findings of no relevance to a determination of the ultimate issue between the parties relating to forfeiture, it is not surprising that the Legislature might specifically take measures which would ordinarily be frowned upon as constituting a denial of procedural fairness. At the interlocutory stage the Legislature has struck a balance in favour of preservation of property and confidentiality of information that might materially prejudice an ongoing investigation. By way of contrast, in the subsequent substantive proceedings relating to forfeiture, there is no specific provision authorising an ex parte application or conferring a discretion to rely upon material not disclosed to the plaintiffs.

[150] In connection with preservation of relevant property, the Act specifically provides that an application for a restraining order may be made ex parte. In

this way the statute has governed the content of the requirements of procedural fairness in the context of applications for restraining orders by expressly providing that the Court has a discretion to hear and determine such applications without notice being given to the affected person and without hearing from the affected person or from anyone on behalf of the affected person. While the Judge possessed a discretion to decline to hear the application unless notice was given to the plaintiffs, the course followed was expressly authorised by the Act. In these circumstances the absence of notice to the plaintiffs did not amount to a denial of procedural fairness.

[151] Similarly, the statute expressly confers a discretion to close the court and prohibit publication of any report of the proceedings. Further, if an ongoing investigation exists and the Judge is satisfied that release of information contained in an affidavit in support of the application for a restraining order might materially prejudice such an investigation, s 45(2) confers a discretion not to release the information to the affected person. The Act has expressly modified the feature of procedural fairness that ordinarily requires that a party to proceedings be informed of the material relied upon by a Judge in making an order adverse to the interests of the party.

[152] It is not necessary to determine the precise ambit of s 45(2) as the Judge also possessed and exercised the inherent power to direct that information remain confidential on the ground of public interest immunity. On one view, s 45(2) is worded oddly because it states that the court may order that information contained in an affidavit in support of an application for a

restraining order not be provided when a copy of the restraining order is served on any person. Service of a restraining order is required by s 47, but neither s 47 nor any other section in the Act requires that information contained in an affidavit in support of an application be provided to an affected person when serving a copy of the order. On the other hand, s 45(2) may have been enacted with a view to negating the usual requirement that when an order is made on an ex parte application, any affidavit or other material filed in support of the application should be served upon the affected person. The Legislature may also have enacted s 45(2) in anticipation of r 92.06(3) which specifically provides that except as provided by the Act, when notice of an application is served on a party the notice is to be accompanied by a copy of all affidavit evidence in relation to the application.

[153] Whatever view is taken of the wording of s 45(2), it reflects a legislative concern to maintain confidentiality of information that "may materially prejudice an ongoing investigation". It is plain that notwithstanding the usual requirement that a party have knowledge of the material relied upon by a court, the Legislature intended to modify this aspect of procedural fairness by conferring upon the court a discretion to deprive the affected person of knowledge of such material should the court be satisfied that disclosure might "materially prejudice an ongoing investigation".

[154] Returning to the procedures followed by the Judge in granting the restraining order, it follows from these reasons that in my opinion it is plain

from the statutory context and express statutory provisions to which I have referred that the procedures followed by the Judge in hearing and determining the application for a restraining order did not involve any breach of the requirements of procedural fairness applicable to the particular proceedings before the Judge. Other avenues such as requiring notice to be given to the plaintiffs and permitting the disclosure of confidential material to independent counsel or counsel retained by the plaintiffs following an undertaking that the material would not be disclosed to the plaintiffs were available to the Judge. However, the failure to adopt those alternative procedures did not involve any breach of the relevant requirements of procedural fairness. The course followed by his Honour was expressly authorised by the statute.

[155] As to the failure of the Director to bring to the attention of the Judge the possibility of restraining less property for the purpose of enabling the plaintiffs to use unrestrained property to meet legal expenses, in my view it cannot be said that such a failure, either in itself or in combination with the other matters relied upon by the plaintiffs, involved a lack of procedural fairness. Similarly, the failure of the Judge to enquire about such a course is not an aspect of procedural fairness. While these features of the proceedings before the Judge might be relevant to other forms of challenge to the orders for restraint of property, such failures cannot be elevated to a denial to afford the plaintiffs relevant procedural fairness.

Failure to Give Reasons

[156] The final issue raised in connection with procedural fairness concerns the failure of the Judge to give reasons for his decisions. The primary attack related to the absence of reasons for making the restraining orders. In substance the plaintiffs submitted that as a consequence of the absence of reasons for restraint they are denied meaningful participation in avenues of challenge to the orders. First, under the Act the plaintiffs are entitled to object to restraint, but they submitted that such a right is rendered nugatory in the absence of knowledge of the information relied upon by the Judge and of the reasoning of the Judge. In addition, while the Act does not make specific provision for appeals, the plaintiffs are entitled to seek leave to appeal or to apply to vary the orders, but in the absence of reasons the plaintiffs do not know whether there are any "jurisdictional, legal or factual matters such as material non disclosure" which would provide grounds for appeal. The plaintiffs contended that the unfairness caused by the absence of reasons for the restraining orders is compounded by the use of the confidential affidavits to which the plaintiffs have been denied access.

Principles

[157] The duty of courts to give reasons for decisions has been the subject of much judicial analysis. Whether the duty exists and, if it does, the content of that duty, depends upon a variety of factors including the nature and stage of proceedings, the nature of the decision, whether a right of appeal exists and, if applicable, the statutory context in which the decision was made. In

Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247, both Kirby P and McHugh JA spoke of the requirement that "justice must not only be done, but it must be seen to be done" (278). Mahoney JA described the requirement for reasons as being derived "from the nature of the judicial process itself and, consequently, as being an incident of it" (273). His Honour explained that he meant that "in general terms, the giving of reasons is seen as part of the process of deciding a matter judicially rather than in the course of other and different forms of decision" (273).

[158] McHugh JA also perceived the giving of reasons as a necessary incident of the judicial process "because it enables the basis of the decision to be seen and understood both for the instant case and for the future direction of the law" (279). His Honour identified the underlying basis for his view in the following passage (278-279):

> "When parties submit their dispute to a tribunal for adjudication, they do so on the assumption that the dispute will be decided in accordance with rules. They assume that the adjudicator will decide the dispute according to the rules or principles which governed their conduct and that he will ascertain, so far as he reasonably can, what are the facts of the dispute. To give effect to these assumptions a judicial decision must be a reasoned decision arrived at by finding the relevant facts and then applying the relevant rules or principles. A decision which is made arbitrarily can not be a judicial decision; for the hallmark of a judicial decision is the quality of rationality: cf Lord Denning, *Freedom Under the Law* (1949) at 91. However, without the articulation of reasons, a judicial decision cannot be distinguished from an arbitrary decision. In my opinion the giving of reasons is correctly perceived as 'a necessary incident of the judicial process' because it enables the basis of the decision to be seen and understood both for the instant case and for the future direction of the law."

[159] The qualification to the requirement that reasons be given was, in my respectful opinion, well expressed by McHugh JA in the following passage (279):

> "However, neither the need nor the appearance of justice requires that reasons be given for every decision made by a judicial tribunal. In the course of an action, a judge may make decisions concerning interlocutory matters which cannot reasonably be held to require reasons. Justice is a multi-faceted concept. In determining whether justice was done and seen to be done other interests and values, besides the giving of reasons, have to be considered. The limited nature of judicial resources and the cost to litigants and the general public in requiring reasons must also be weighed. For example, many questions concerning the admissibility of evidence may require nothing more than a ruling: in New South Wales common law judges have long held that they are not obliged to hear argument on the admissibility of every question of evidence let alone give reasons. It all depends on the importance of the point involved and its likely effect on the outcome of the case." (citations omitted)

[160] McHugh JA went on to discuss various factors which affect the content of the duty. His Honour expressly agreed with the statement of Mahoney JA in *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 at 386 that the extent of the duty to give reasons is related "to the function to be served by the giving of reasons". McHugh JA added that "more elaborate reasons are required where legislation gives a right of appeal against a decision than where no appeal lies" (280).

[161] The obligation to give reasons has also been related to procedural fairness. In *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372, the New South Wales Court of Appeal was concerned with a decision by an appeal panel under the Workplace Injury Management and Workers Compensation

Act 1998 (NSW). One of the issues concerned the duty of the panel to give reasons for its decision. Basten JA, with whom Handley and McColl JJA agreed, discussed the general law as to the duty to give reasons and observed that "[a]n implied statutory obligation [to give reasons] is no doubt informed by the requirements of procedural fairness, but more directly depends upon the judicial nature of the function and the specific statutory context …". His Honour added:

> "**[118] …** That is not, of course, to deny the significance of general principles of procedural fairness, as a basis underlying the obligation of a judicial officer to give reasons for decisions."

[162] In *Tran v Claydon* (2003) 40 MVR 506, McLure J, with whom Steytler and Johnson JJ agreed, said:

> "**[35]** Ordinarily, it is the duty of a Judge to state his or her reasons for decision and failure to do so may constitute an error of law. In determining whether in a particular case there is a duty and the extent of that duty, regard should be had to the function to be served by the giving of reasons.
>
> **[36]** Where there is a right of appeal, the function of reasons is to allow an appeal court to determine whether the decision was based on an appealable error. *In addition to securing a right of appeal, the obligation to give adequate reasons is an aspect of procedural fairness to a litigant who is entitled to know why it is that he or she has been successful or unsuccessful.* …" (citations omitted) (my emphasis)

Application of Principles

[163] The minimum requirements with respect to reasons are found in s 45(1)(b) which provides that if a restraining order is made the court must "set out in

the order each ground that the court finds is a ground on which the order may be made". The purpose is obvious. When the order is served as required by s 47 the affected person is given notice of each ground upon which the court found that an order could be made. It must be said, however, that merely identifying each "ground" upon which an order for restraint might be made provides very minimal information to the affected person. I do not construe s 45 as modifying the existence or content of a duty to give reasons that would otherwise exist.

[164] The content of the reasons required may be affected significantly by the course of proceedings before the court. An affected person who has been provided with all the material placed before the court and been given an opportunity to be heard in opposition to an application for restraint is in a significantly different position from the plaintiffs who have no knowledge of either the contents of the confidential affidavits or what was put to the Judge in submissions. The plaintiffs have no knowledge of how the Judge responded to those affidavits and submissions. To make those observations is not to criticise the way in which the proceedings were conducted before the Judge, but to emphasise that if justice is to be seen to be done, and if the plaintiffs against whom the orders were made are to be able to observe that a reasoned and impartial decision was made, the giving of reasons is essential.

[165] It must be acknowledged that as the Judge ordered that a significant amount of material provided to him not be made known to the plaintiffs, the ability of the Judge to identify the material upon which he relied and to explain his

reasoning was necessarily constrained. However, confidentiality did not prevent his Honour from stating whether he relied upon the confidential affidavits and, if he did, whether the information was of particular significance. Nor did it prevent his Honour from identifying the significance or otherwise of the material that was made available to the plaintiffs. In addition, his Honour could have identified the legal tests that he applied.

[166] Although the Judge was dealing with an application of an interlocutory nature, the Act provides the plaintiffs with a statutory right to object to the restraining orders. While many of the matters identified in s 63 as providing a basis for setting aside the restraining orders do not require knowledge of the material relied upon by the Judge or the reasons for the decision to restrain, nevertheless the absence of reasons places the objector at a significant disadvantage. In particular, if an objector seeks to establish that the objector is an innocent party for the purposes of s 63(1)(a)(ii), the objector is denied knowledge of material put against the objector and of the earlier reasoning of the Judge.

[167] The availability of the appeal process is also relevant. Although the Act does not specifically provide for a right of appeal, it is common ground that the plaintiffs are entitled to seek leave to appeal against the restraining orders. In the absence of reasons, the plaintiffs are unable to determine whether the Judge fell into error.

[168] There is no single formula for determining whether a duty to give reasons exists and, if it does, the content of the reasons required in order to discharge that duty. Notwithstanding that the Judge was dealing with an application of an interlocutory nature and that his Honour's decision is of no relevance to the merits of the substantive proceedings seeking declarations and forfeiture of property, bearing in mind the significant interference with rights to enjoy property and the principles to which I have referred in the context of rights to object and to seek leave to appeal, in my opinion it was incumbent upon the Judge to give reasons for making the restraining orders. Those reasons would necessarily have been of a restricted nature as a consequence of the orders concerning the confidential affidavits and the closing of the court, but in my view reasons were required. In reaching this view I am applying the principles to the particular circumstances that existed before the Judge. It does not follow that reasons will be required in every case where a Judge makes a restraining order. Each case must be determined according to its particular circumstances.

[169] The failure of the Judge to give reasons for making the restraining orders was an error of law. In addition, it amounted to a denial of procedural fairness.

[170] As to the consolidation of proceedings numbered 36 and 37 of 2006, the order was strictly procedural in nature and had no impact adverse to the plaintiffs. It was typical of an order that does not require the giving of reasons. Notwithstanding some question as to whether the order could be

made ex parte, in my view the absence of reasons does not amount to a denial of procedural fairness. As Mildren J has pointed out, if good reason exists for setting the order aside an application can be made to the Judge at any time.

[171] No reasons were given by the Judge for closing the court and making the order concerning the confidential affidavits. It is readily apparent that his Honour considered disclosure of the material contained in the confidential affidavits might materially prejudice an ongoing investigation. In these circumstances it is not surprising that his Honour closed the court and written reasons for that decision were not required. Similarly, in my view, reasons for ordering that the confidential affidavits not be provided to the plaintiffs were not required. The fundamental reason, namely, prejudice to an ongoing investigation, is obvious. The very fact of confidentiality made it impossible for his Honour to elaborate.

[172] On 12 April 2006 some of the plaintiffs filed an application for access to the confidential affidavits. That application was refused on 26 May 2006. No written reasons were given.

[173] The application for access to the confidential affidavits was supported by written submissions. In essence the plaintiffs submitted that they were unable to file an appeal against the restraining orders unless they were given access to the material upon which the decision to restrain was based. In oral submissions on 11 May 2006 counsel for the plaintiffs advised the Judge

that the plaintiffs were seeking access to the affidavits "so that we know the case against us and what we are going to be able to negotiate with the Public Trustee or the Director of Public Prosecutions for the management of these properties". Discussion between the Judge and counsel for the plaintiffs proceeded on the basis that access was required in order to pursue negotiations related to the management of the restrained property. In subsequent submissions counsel agreed with an observation by the Judge that the plaintiffs were not in a position to determine whether they had a ground of appeal because the plaintiffs did not know the basis on which the order was made. Counsel emphasised that the plaintiffs were entitled to know the case against them.

[174] The hearing was adjourned and the parties filed further written submissions. As to the merits of maintaining the order, the plaintiffs submitted that as parties to the proceedings whose rights had been detrimentally affected in a serious and material way they had a right to know the case against them. Other issues of no relevance for present purposes were also addressed.

[175] The hearing resumed on 26 May 2006. Discussion occurred as to whether the power in s 45(2) of the Act was spent and confidentiality could only be maintained through the application of r 92.06(4) which provides that a Judge may "limit the scope of the evidence that is provided to a party if the Judge is satisfied that the protection of an ongoing investigation requires it, or for other good reason." Counsel for the plaintiffs adopted the position that the

application was governed by the principles of public interest immunity and r 92.06(4).

[176] After hearing from counsel for the Director as to the operation of the legislative scheme in connection with the issue under consideration, his Honour indicated that he would hear from counsel for the plaintiffs as to why he should not continue the order under r 92.06(4). His Honour added that he would hear the submissions:

> "… [O]n the basis that I have already been satisfied that evidence should be – that the provision of evidence to a party should be limited in the manner that I have ordered because I'm satisfied that there is a need to protect an ongoing investigation and for other good reason, which is the other aspect of public interest immunity being – the methodology and the like."

[177] Labouring under the difficulty of not knowing what was in the confidential affidavits, counsel for the plaintiffs suggested there were reasons emerging from the material provided to the plaintiffs that justified the lifting of the order, particularly bearing in mind that two months had passed since the restraining order was made. The Judge's observations during submissions well demonstrate that his Honour was acutely aware of the adverse impact of the order upon the plaintiffs and of the natural concern of those trained in the law about the "secretiveness" of the procedures. Reference was again made to the plaintiffs' right of appeal.

[178] At the conclusion of submissions for the plaintiffs, his Honour gave brief oral extempore reasons for refusing the application:

> "I should say to you, to make it clear, Ms McMaster, that I do recollect the information that I have read and earlier ruled upon and I recollect the nature of it and of course I have it available to me but I don't need to reread it in order to make this order. In my view the situation should now be governed by Order 92.06(4) and pursuant to that provision, in relation to the material that I earlier – this is what I'm proposing to do – in relation to the material that I earlier declared, need not be provided when a copy of the restraining order was served upon various people and corporate entities.
>
> I now propose to direct that it – that same material need not be provided to the parties to the proceedings, being satisfied that the protection of an ongoing investigation requires such a course and that public interest immunity, in some respects – which I obviously can't identify at the moment – also requires such a course. So I would direct that that evidence not be provided to the parties to these proceedings and I make that across the board, not just to this particular party, in case it was not clear from the earlier order."

[179] In my view nothing more was required of the Judge. At issue was the availability of confidential affidavits used on an application of an interlocutory nature which had no bearing upon the substantive proceedings between the parties concerning declarations and forfeiture. The Judge was hearing an interlocutory application concerning that suppression in circumstances where, having decided that the material should not be made available to the plaintiffs, it was impossible for his Honour to explain why he had reached that view in any more detail than given in the brief reasons cited earlier. No error of law occurred and in this respect the plaintiffs were not denied procedural fairness on that application.

Answers to Questions

[180] In the procedural fairness proceedings, number 135 of 2006, I would answer the questions as follows:

1. Q. Whether the cumulative factors referred to in 1 to 17 amount to a denial of procedural fairness in the conduct of the proceedings numbered 36 and 37 of 2006.

   A. Absent the failure to give reasons for making the restraining orders; No.

2. Q. Further and alternatively whether the failure of Justice Riley to give and publish reasons for his decision or decisions and orders of 28, 29 and 30 March 2006 constituted a denial of procedural fairness in the circumstances of an ex parte application made by the defendant under the provisions of the Act.

   A. Yes, but only insofar as reasons were not given for making the restraining orders.

3. Q. Whether in the context of an ex parte application for the restraint of the plaintiff's property the person is entitled to:

   a) notice of the application;

   A. No.

Q. b) reasons for making the restraining orders made on 28, 29 and 30 March 2006

A. Yes, but only for making the restraining orders.

[181] In the validity proceedings, number 153 of 2006:

1. Q. Whether s 46(2) of the Criminal Property Forfeiture Act ("the Act) is invalid on the basis that it imposes a limitation on the function of the Supreme Court which:

(a) comprises the institutional impartiality and appearance of impartiality of the Supreme Court;

(b) which is repugnant to the judicial process in a fundamental degree;

(c) inhibits the performance of the judicial function;

(d) imposes on the Supreme Court and the performance of the judicial function a rigid or inflexible rule;

(e) interferes with judicial discretion.

A. No.

2. Q. Whether ss 46(2), 49(4) and 154(1) of the Act are invalid on the basis that they direct the Supreme Court as to the manner and/or outcome of its exercise of jurisdiction under the Act.

A. No.

3. Q. Whether ss 46(2), 49(4) and 154(1) of the Act are invalid on the basis that they impose statutory procedures which:

(a) compromise the institutional impartiality and appearance of impartiality of the Supreme Court;

(b) are repugnant to the judicial process in a fundamental degree;

(c) inhibit the performance of the judicial function;

(d) impose on the Supreme Court and the performance of the judicial function a rigid or inflexible rule;

(e) interferes with a judicial discretion.

A. No.

[182] As I have said, in my view proceedings number 135 of 2006 should be treated as an application for leave to appeal and leave should be granted. Further, on that basis, for the reasons I have given I would allow the appeal and set aside the orders of the Judge. Interim orders should be made by this Court to preserve the situation with respect to the restrained property until the matter is re-heard by a single Judge.

Mildren J:

[183] These two matters (No 135 of 2006 and No 153 of 2006) are references to the Full Court pursuant to s 21 of the Supreme Court Act.

[184] The reference in action No 153 of 2006 raises the constitutional validity of s 46(2), s 49(4) and s 154(1) of the Criminal Property Forfeiture Act (the Act). The reference in action No 135 of 2006 raises questions as to whether

the plaintiffs were denied procedural fairness in the conduct of proceedings Nos 36 and 37 of 2006 and whether in the context of an ex parte application for the restraint of the plaintiffs' property under the Act, the plaintiffs were entitled to notice of the application or reasons for making the restraining orders which were made in March 2006.

[185] In his reasons at paras [12] – [13], Martin CJ sets out the history of the proceedings after the Court, sitting as the Full Court in both proceedings, had heard submissions. I agree with his Honour that proceedings No 153 of 2006 are valid. Under s 21(2) of the Supreme Court Act, the Full Court has a discretion whether or not to accept the references. I entertain very considerable doubt whether the Full Court should accept the reference in matter No 153 of 2006 because even though the proceedings are valid, arguably they amount to a collateral attack upon orders made by a single Judge in actions No 36 of 2006 and No 37 of 2006 when the plaintiff had a right to seek leave to appeal against the orders so made. However, as I am of the view that the provisions of the Act are constitutionally valid, I think nothing is to be gained by refusing the reference in this matter.

[186] However, as to proceedings No 135 of 2006, I think it is clear that the Full Court should refuse the reference either on the ground that as a general rule a single Judge has no power to declare an order made by another single Judge of this Court is invalid and, therefore, neither has the Full Court, or alternatively on the basis that as a matter of discretion, such a declaration will be refused: see *Re Harrod* [1978] 1 NSWLR 331; *Main Electrical Pty*

Ltd v Civil & Civic Pty Ltd (1978) 19 SASR 34; *In the Estate of Leahy (Dec'd); Earl v Moses & Anor* [1975] 1 NSWLR 246 at 252; *Barton & Anor v Walker & Anor* [1979] 2 NSWLR 740 at 756; *In re Racal Communications Ltd* [1981] AC 374 at 384; *Chief Commissioner of Pay-Roll Tax v Group Four Industries Pty Ltd* [1984] 1 NSWLR 680 at 684; *Giannarelli & Ors v Wraith & Ors* (1988) 165 CLR 543 at 594-595. I agree with the Chief Justice that the Court, sitting as the Court of Appeal, has jurisdiction to dispense with compliance under the Rules, grant leave to appeal in actions No 36 of 2006 and No 37 of 2006, treat the appeal as having been heard by the Court of Appeal and that that is the preferable course to take.

[187] All matters were heard together upon the basis of agreed facts.

Agreed facts

[188] The agreed facts in each case are almost identical and are not relevantly distinguishable. The following is a summary of those facts.

[189] On 28 March 2006 the Director of Public Prosecutions commenced the two actions (No 36 of 2006 and No 37 of 2006) in the Supreme Court for restraining orders under the provisions of the Act in relation to certain property of the plaintiffs on the grounds that certain of the plaintiffs' property was crime used property; that certain of the plaintiffs' property was crime derived property; and that certain other property constituted unexplained wealth. Ex parte applications went before a Judge of this Court on 28, 29 and 30 March 2006. No notice of the applications was given to

any of the plaintiffs. The defendant relied upon some nine affidavits, six of which were specified as “confidential affidavits”.

[190] The application in proceedings No 36 of 2006 stated in paragraph nine that the “facts, matters and circumstances supporting this application are set out in the affidavits”. This reference included the six confidential affidavits.

[191] The property sought to be restrained included four residential properties, a commercial property, the net proceeds of the sale of a property in Queensland, five motor vehicles, the monies held in three bank accounts and certain monies held in two firms of solicitors’ trust accounts. It is an agreed fact that the plaintiffs do not have any other real property, bank accounts or motor vehicles.

[192] The application in action No 37 of 2006 also sought to restrain the whole of the issued capital of the plaintiffs’ Spicecane Pty Ltd, Executive Business Strategies Pty Ltd and Monsoon Homes Pty Ltd and was also brought against a further party Premier Amusements Pty Ltd which is not a party to the present proceedings.

[193] On 29 March 2006 the Judge on the ex parte application of the defendant consolidated proceeding No 37 of 2006 with proceeding No 36 of 2006. No notice of that application was given to any of the plaintiffs.

[194] The defendant did not direct the Judge’s attention to the possibility of restraining less property than that which was sought to be restrained so that

the plaintiffs could meet legal expenses in defending proceedings No 36 and 37 of 2006 and his Honour did not enquire whether he should restrain less property than was sought to be restrained.

[195] On 30 March 2006 the Judge made an order ex parte restraining all of the property sought in the applications except for the issued capital of the three companies abovementioned. Other than the formal orders which his Honour made on that date no reasons were published for his decisions. No transcript of the ex parte proceedings has been made available to the plaintiffs. Some of the plaintiffs have sought access to the confidential affidavits in or around May 2006. His Honour denied the plaintiffs access to that material. No formal reasons for his Honour's refusal were given except as may be gleaned from a transcript of the proceedings before his Honour on 26 May 2006. A perusal of the transcript reveals that the reason for refusing access to those affidavits was that his Honour was satisfied that such a course was required because it was necessary for the protection of an ongoing investigation by police and "that public interest immunity, in some respects – which I obviously can't identify at the moment – also requires such a course". It is agreed also that the plaintiffs' interests in their property, livelihood and reputation were affected by the orders which his Honour made.

[196] During the course of the hearings in this Court a further agreed fact was that his Honour closed the Court during the proceedings in actions Nos 36 and 37 of 2006 on 29 and 30 March 2006.

[197] Some further facts were placed before this Court during the course of the hearings. This related to an application for legal aid by Martin Burnett, Dianne Burnett and James Mick Burnett in relation to matters Nos 36 and 37 of 2006. The affidavit discloses that legal aid to these plaintiffs was refused, but it is not clear precisely what the reason for the refusal may have been. Secondly, the letter from the Northern Territory Legal Aid Commission which was attached to the affidavit indicates that legal aid would not be granted to companies. We were told that in any event none of the companies had made an application for legal aid. There was no agreement that the plaintiffs did not have other financial resources which are not the subject of the restraining order made by his Honour to enable them to meet legal costs.

[198] During the course of the hearings in this Court certain other facts were revealed to the Court by counsel without objection. First, it is to be noted that the restraining order was made on the grounds that all of the property was either crime derived property and/or constituted unexplained wealth of the plaintiffs. No order was made on the basis that the property or any of it was crime used property. The total gross value of the property restrained was in excess of $3m. The affidavit from which this information came was prepared by a Mr Wall, a financial investigator/forensic accountant employed by the Northern Territory police. That affidavit has been made available to the plaintiffs. Spicecane Pty Ltd conducts a business as a paving and tiling contractor. Executive Business Strategies Pty Ltd is the trustee of the Burnett Family Trust. The Trust is a discretionary trust, the eligible

beneficiaries of which are Dianne Maria Burnett, Martin John Burnett and their children. Until such time as the trustee seeks to vest in the beneficiaries any of the interest or corpus of the fund none of the eligible beneficiaries have any interest in the trust property. Monsoon Homes Pty Ltd is a building company, the sole director and shareholder of which is James Mick Burnett. So far as Monsoon is concerned its bank account has been restrained, but management control of the company has been left with James Mick Burnett. Arrangements have subsequently been put into place for Monsoon Homes Pty Ltd to provide monthly reporting to the Public Trustee. There are presently no criminal proceedings outstanding against any of the plaintiffs. One relatively minor charge under the Misuse of Drugs Act brought against Martin John Burnett has already been disposed of. Until this Court granted leave to appeal in actions No 36 of 2006 and No 37 of 2006 (see para [186] above) no application for leave to appeal had been lodged against any of the orders made and no application has been made to his Honour to provide reasons for any of the orders which he has made, nor for the supply of information on terms designed to protect the confidentiality of the material upon which his Honour has relied.

The Criminal Property Forfeiture Act 2002

[199] It is convenient at this point to consider the scheme of the Act. The preamble to the Act provides that it is an Act

> "to provide for the forfeiture in certain circumstances of property acquired as a result of criminal activity and property used for

> criminal activity, to provide for the reciprocal enforcement of certain Australian legislation relating to the forfeiture of proceeds of crime and forfeiture of other property, and for related purposes."

[200] Section 3 of the Act provides:

> "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."

[201] Section 6 of the Act defines a "forfeiture offence" to be an offence against the law in force anywhere in Australia that is punishable by imprisonment for two years or more or any other offence that is prescribed for the purposes of that section.

[202] Part 2 of the Act deals with the extent to which the Act applies. In summary the Act applies to property which is crime used, property which is crime derived and the property of persons who are involved in or taken to be involved in criminal activities if the person is declared under s 36A of the Misuse of Drugs Act to be a drug trafficker or if an unexplained wealth declaration or a criminal benefit declaration is made in relation to the person or the person is found guilty of a forfeiture offence.

[203] Part 3 of the Act deals with investigation and search powers. Part 4 is headed "Ensuring property remains available for forfeiture". Section 39 deals with the circumstances under which a member of the police force may seize any property. Division 2 of Part 4 deals with the obtaining of restraining orders in relation to property. The effect of a restraining order in relation to property is that subject to certain permitted dealings the property

cannot be dealt with, and empowers the applicant in relation to the restraining order to apply to the Court for an order that all or some of the restrained property be forfeited to the Territory. There is provision in s 49(3) for a person affected by a restraining order to apply to the Court for an order to meet the reasonable living and business expenses of the owner of the property. Section 49(4) provides that "reasonable living and business expenses do not include legal expenses referred to s 154".

[204] Part 5 of the Act deals with objections to restraint of property and enables a person whose property has been affected by a restraining order to apply to the Court to set aside the relevant restraining order. The evident purpose of Part 5 is to protect the innocent.

[205] Part 6 deals with proceedings for unexplained wealth declarations. Section 71(1) provides that the court which is hearing an application under s 67 must declare that the respondent has unexplained wealth if it is more likely than not that the respondent's total wealth is greater than his or her lawfully acquired wealth. Section 71(4) provides that when a court makes an unexplained wealth declaration the court must inter alia order the respondent to pay to the Territory the amount specified in the declaration as the value of his or her unexplained wealth. Part 12 of the Act deals with court jurisdiction and evidentiary matters. Section 135(1) provides that the Supreme Court has jurisdiction in any proceedings under the Act. Section 136(1) provides that proceedings on an application under the Act are taken to be civil proceedings for all purposes.

[206] Section 154(1) provides that property which is the subject of a restraining order under the Act is not to be released to meet the legal expenses of the person, whether the expenses are in relation to proceedings under the Act that relate to the forfeiture of the property, or criminal proceedings; and is not to be taken into account for the purposes of an application by the person for legal aid. The Act also contains a number of provisions which reverse the onus of proof or create presumptions which must be rebutted by the defendants in proceedings under the Act. These are set out in s 63, s 64, s 65, s 71(2), s 75(2), s 76(2), s 83(1), s 83(2), s 92(2) and s 121 of the Act.

The constitutional validity of s 46(2), s 49(4) and s 154(1) of the Act

[207] It was the plaintiffs' submissions that these subsections individually and collectively are invalid as they impose impermissible limitations on the functions of the Supreme Court and impose statutory procedures which:

1. compromise the institutional impartiality and appearance of impartiality of the Supreme Court;

2. are repugnant to the judicial process in a fundamental degree;

3. inhibit the performance of the judicial function;

4. impose on the Supreme Court and the performance of the judicial function a rigid or inflexible rule; and

5. interfere with a judicial discretion.

[208] The plaintiffs' argument is based on the principles to be derived from *Kable v Director of Public Prosecutions (NSW).* In substance, the plaintiffs' argument is that the subject provisions are invalid because the Legislative Assembly of the Northern Territory has invested this Court with a function which is incompatible with Chapter III of the Constitution and the exercise by this Court of the judicial power of the Commonwealth.

[209] It is not in contention that the *Kable* principle applies to this Court: see *North Australian Aboriginal Legal Aid Service Inc v Bradley* (supra) at 163 para [28]-[29].

[210] At the heart of the plaintiffs' submission is the contention that in all proceedings before this Court whether civil or criminal the plaintiff has the right to be represented by counsel. I accept this submission. Section 75 of the Supreme Court Act provides that "subject to any other law in force in the Territory, a party in a proceeding may appear before the Court either personally or by a legal practitioner". There is nothing, however, in the Criminal Property Forfeiture Act which specifically deprives the plaintiffs of their right to counsel. I accept also that generally speaking a party in civil or criminal proceedings has a right to counsel of his or her own choice. However, this is not an absolute right. There are many circumstances where counsel is either not obliged or not permitted to represent a particular party. It is well established that no person has the right to counsel at public expense whether in criminal or civil proceedings: *McInnis v The Queen*

(supra) at 579; *Dietrich v The Queen* (supra) at 297-298, 302-303, 311, 330, 342 and 364-365.

[211] Nevertheless the right to appear by counsel plays an important and vital role in the administration of justice in an adversary system: *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40 at 47 [9] per Williams JA and at 56-57 [62]-[63] per White J; *Mansfield v Director of Public Prosecutions for Western Australia* (supra) at 502-503 [49].

[212] It was submitted by counsel for the defendant that s 154 of the Act is designed to assist in the granting of legal aid to a defendant to a restraining order. Subsection 154(1)(b) provides that the restrained property is not to be taken into account for the purposes of an application for legal aid by a person whose property has been restrained. "Person" is not defined; in my opinion it includes a body corporate (s 17 of the Interpretation Act). Section 154(2) enables the Northern Territory Legal Aid Commission to take a charge over any property subsequently released from a restraining order as security for costs paid by the Commission in respect of proceedings under the Act or criminal proceedings. Even if the property is subsequently forfeited, the Commission may apply to the Minister to have the costs reimbursed: s 154(4).

[213] The Northern Territory Legal Aid Commission is established by s 5 of the Legal Aid Act. The function and powers of the Commission are set out in s 7. Subsection 7(1) provides that "the function of the Commission is to

provide legal assistance in accordance with this Act". The Act establishes two funds: the Legal Aid Fund (s 43) and the Contingency Legal Aid Fund (s 44). The Legal Aid Fund comprises, essentially, monies paid to or recovered by the Commission under the Legal Aid Act and monies paid to the Fund by the Northern Territory or the Commonwealth. The Contingency Legal Aid Fund consists of monies paid or lent to the Commission by any person, as well as monies paid out of the Legal Aid Fund.

[214] Section 26(1) of the Legal Aid Act provides for legal assistance from the Legal Aid Fund (other than legal assistance from the contingency fund) where the person is in need of assistance and it is reasonable to provide it. The question of need is means tested according to criteria set out in s 26(2). The question of reasonableness depends upon the view of the Commission as to the applicant's ultimate prospects of success in the litigation (s 26(3)(b)).

[215] Subsection 45(2)(a) of the Legal Aid Act provides that monies in the Contingency Legal Aid Fund shall be applied only to provide legal assistance to bring or defend civil proceedings. Subsection 45(1)(c) provides that monies in the Legal Aid Fund "shall be applied… as a loan or payment to the Contingency Legal Aid Fund". It is not clear to me whether or not legal aid to defend civil proceedings brought under the Criminal Property Forfeiture Act can be funded from the Legal Aid Fund or only from the Contingency Legal Aid Fund. The provisions of s 26 of the Legal Aid Act do not apply to legal assistance from the Contingency Legal Aid Fund. The Legal Aid Act does not spell out the criteria which need to be met for

determining an application for legal aid from the Contingency Legal Aid Fund. Subsection 12(e) provides that the Commission shall determine guidelines determining the conditions subject to which that fund will be made available for the provision of legal assistance to bring or defend legal proceedings.

[216] Under the Commission's guidelines (Guideline 4) "legal aid may be available for proceedings under the Criminal Property Forfeiture Act… where the value of the property which is the subject of the proceedings exceeds the likely costs of providing assistance". This is subject to the "NT Guidelines for Civil Law Matters". Civil Law guidelines are in Part 4 of the Guidelines. Those guidelines are designed to limit assistance to those cases where the applicant has reasonable prospects of success and is generally subject to means testing which may require the applicant to contribute towards the cost of the assistance and may require the applicant to give security.

[217] It would seem probable that the plaintiffs, if they are unable to raise the funds necessary to employ legal counsel themselves, should be eligible for legal aid. There may, however, be difficulties in satisfying the Legal Aid Commission of their prospects of success, particularly in the case of unexplained wealth declarations as these are likely to be very complex matters and may well require expert legal and accounting assistance. Nevertheless a limited initial grant of legal aid is available under the Civil

Law Guidelines, Guideline 1.1, to investigate and report on the merits of a case.

[218] I note also that the refusal of legal aid is subject to review by a review committee set up under Part VI of the Legal Aid Act.

[219] However, there remains the possibility that a case may arise where the Commission has refused legal aid to a person or persons who do have a meritorious defence and who are unable to pay for legal representation from their own resources.

[220] I note that the guidelines provide that legal assistance is not available for proceedings under the Proceeds of Crime Act 1987 (Cth). However that Act has now been superseded by the Proceeds of Crime Act 2002 (Cth).

[221] It would seem to me that in a case where legal aid was refused to a meritorious defendant this Court would have the power to discharge the restraining order or refuse to extend it if the Director of Public Prosecutions or the Northern Territory did not provide legal assistance to the defendant. These are not ordinary civil proceedings. They are proceedings brought by the Director of Public Prosecutions on behalf of the state. Any monies forfeited are forfeited to the Northern Territory. The reason why the *Dietrich* principle does not apply to civil proceedings is because the plaintiff in civil proceedings has a right to have his, her or its action heard and the plaintiff in such proceedings, by bringing those proceedings will not have prevented the defendant from obtaining legal representation.

[222] The legislature, by conferring jurisdiction on this court to make orders under the Act, must take the Court as it finds it, with all its incidents including the liability to appeal: *Electric Light and Power Supply Corp Ltd v Electricity Commission of New South Wales* (supra) at 560; *Mansfield* at 491 [7]. This Court has an inherent power to control and supervise its processes to prevent injustice. Rule 23.01(1)(c) specifically empowers the Court to stay a proceeding generally where the proceeding or a claim in a proceeding is an abuse of the process of the Court. In *Walton v Gardiner* (supra) at 393–395 Mason CJ and Deane and Dawson JJ approved of the following propositions: (1) a court whose function it is to dispense justice with impartiality and fairness both to the parties and the community possesses the necessary powers to prevent it processes being employed in a manner which gives rise to unfairness; (2) in the exercise of the inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it; (3) it is contrary to the public interest to allow confidence in the Court's ability to administer justice fairly to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice; (4) the power of the Court to control its processes is not confined to defined and closed categories but may be exercised as and when justice demands. In my opinion the power carries with it the power to adopt whatever remedies are appropriate to meet the circumstances of the case: *Wentworth v New South Wales Bar Association* (supra) at 252; *Jago v The District Court of New South Wales and Others* (supra) at 25, 56, 71 and 74. *Western Australia v*

Ward (1997) 76 FCR 492 is in itself an example of how the Court's powers were able to be used to prevent injustice by preventing a female barrister from appearing in a matter involving secret men's business in a native title claim.

[223] We were referred to *The State of New South Wales v Canellis & Ors* (1994) 181 CLR 309 at 328 where Mason CJ, Dawson, Toohey and McHugh JJ said that there is no suggestion in the majority judgments in *Dietrich v The Queen* that a court could exercise a similar jurisdiction in civil proceedings. However their Honours were not there referring to proceedings such as this where the proceedings are brought by the State for forfeiture of property, which are likely to be factually complex and as the High Court observed in *Mansfield* at 503 [50] "draconian in its operation and complex in various of its provisions".

[224] In *Mansfield v Director of Public Prosecutions (WA)* (supra) at 120 [100], Pullin JA indicated that the *Dietrich* principle could apply to confiscation proceedings. I note that s 154(1)(a) of the Act provides that property that is the subject of a restraining order is not be released to meet the legal expenses of the person whether those expenses are in relation to proceedings under the Act which relate to the forfeiture of the property or criminal proceedings.

[225] Alternatively, it was submitted that the Court could mould a restraining order in such a way as to leave some assets, not the subject of the

restraining order, so as to ensure that the plaintiffs were able to meet their proper legal expenses. In *Mansfield* at 504 [53] the majority judgment of the High Court expressly approved the following passage from the judgment of Pullin JA, where his Honour said:

> "… the Court in the exercise of its discretion may also refuse to make a freezing order over some property. The Court could therefore make a freezing order with respect to certain property, and refuse to make one in relation to sufficient property to allow legal expenses to be paid. In other words the freezing order would not cover property to be used to pay legal expenses. If some property is exempt from the freezing order, then s 45 would not apply to it. In exempting some of the property from the freezing order, the Court could provide that it be exempt on condition that it be spent in particular way, i.e., for legal expenses, and that there should be some machinery for ensuring the money is spent only for that purpose".

[226] The majority of the High Court went on to say at 504 [54]:

> "The last sentence of the above passage is of great significance. It calls for great care by the parties and the court in the framing of the condition to ensure, to the maximum practical extent, that exempted funds are not misused, whether by overservicing and overcharging or by other abuse".

[227] It was submitted that there was a considerable difference between the Western Australian legislation and the Northern Territory Act in that s 46(2) provides that "reasonable living and business expenses does not include legal expenses referred to in s 154". On the one hand that was the assumption which was made in relation to the Western Australian legislation although there was not specific provision to that effect. On the other hand it was submitted that here the legislature had clearly indicated a contrary intention. The matter is not free from difficulty. There is nothing in the Act

which specifically requires the court to make a restraining order if the grounds for the making of such an order are made out. The court has a discretion. The provisions of s 46(1) are identical to the provisions of s 45 of the Western Australian Act considered by the High Court in *Mansfield*, however, it was submitted that because of s 46(2) of the Act, a negative implication would restrict in this regard the scope of the power conferred upon the Supreme Court with respect to restraining orders.

[228] In my opinion, the submission of Mr Silvester for the Director is correct. The evident purpose of s 46(2) and s 154(1)(a) is to place a restriction on the power of the Court to make an order of the kind suggested by Pullin JA and approved by the High Court in *Mansfield*. The provisions as a whole persuade me that the legislature had in mind that in cases where the effect of a restraining order was to preclude the defendant to the order from being able to engage solicitors or counsel that a person in such a situation would be eligible for legal aid under the Legal Aid Act. The evident policy of these provisions is to prevent the dissipation of assets by fruitless, or over-expensive, litigation. In *Mansfield* the majority of the High Court observed at 504 [54] that in exempting some of the property from a freezing order great care was required "by the parties and by the Court in the framing of the condition to ensure, to the maximum possible extent, that exempted funds are not misused, whether by overservicing and overcharging or by other abuse". The effect of the provisions is to place effective control over expenditure on legal costs in the Legal Aid Commission. It may be inferred

that the legislature has decided that the Commission is better placed than individual Judges of this Court to ensure that funds are not wasted in this fashion, subject always to the Court's overriding duty to ensure that there is no injustice and that the proceedings are conducted fairly. Furthermore, s 44(3) provides that in certain cases, including applications for an unexplained wealth declaration, the Court must not refuse to make a restraining order "only because the value of the property subject to the restraining order exceeds, or could exceed, the amount that the person could be liable to pay to the Territory if the relevant declaration is made".

[229] The question then arises as to whether the effect of those provisions is unconstitutional because it offends the *Kable* principle. The relevant principles have been discussed in many cases, most recently reviewed by Steytler P in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (supra). They are dealt with very fully in the Chief Justice's reasons. It is not necessary for me to restate them.

[230] In my opinion, the institutional integrity of the Supreme Court is not compromised if the Court is not able to order or make provision for legal expenses to be met out of the restrained assets even if all of the assets of the defendant are to be restrained. In the making of an order the Court is required to act judicially; it is not the mere instrument of government policy. The Court must be satisfied on the material placed before it that it is proper to make a restraining order. In later proceedings where forfeiture is

sought, the Court is again required to act judicially. It must be satisfied that the criteria are met for the warranting of a forfeiture order.

[231] The fact that the Court has no power to make an order providing for legal expenses does not mean that the Court's institutional integrity is compromised. Nor does it mean that the proceedings are necessarily unfair. The Court retains its inherent powers to ensure that the proceedings are conducted fairly. The lack of legal representation may place an additional administrative burden upon the Court because, inter alia, it will have to explain to the unrepresented party matters of procedure relating to how it might go about presenting its case. The defendant in forfeiture proceedings will know in advance the nature of the case which it has to meet because the Rules require that the Director of Public Prosecutions provide affidavit material upon which it intends to rely. The Court also has power to order the Director of Public Prosecutions to give discovery of documents under Rule 92.08. Because the plaintiff in any such proceedings is the Crown represented by the Director of Public Prosecutions, the Court will expect the Director to act as a model litigant. The Court may call upon the Director, as a model litigant, to make enquiries into matters which the defendants are, for want of funds, unable to enquire into themselves.

[232] The fact that the burden of proof has been reversed or that there are presumptions of an evidentiary nature placed in the way of the defendants does not make the proceedings so unfair as to make the Court the instrument of government policy. It does not compel any particular result. The Court is

still able to exercise genuine evaluative findings of fact. There is in any event, as I have pointed out, provision for the defendants to seek and obtain legal aid, and, in my opinion, if legal aid is not forthcoming the Court may, inter alia, discharge the restraining order in whole or in part if the circumstances warrant it.

[233] In my opinion, the plaintiffs in these proceedings have not demonstrated that the impugned provisions are unconstitutional. As McHugh J said in *Fardon v Attorney-General (Qld)* (supra) at 600-601:

> "The bare fact that particular State legislation invests a State court with powers that are or jurisdiction that is repugnant to the traditional judicial process will seldom, if ever, compromise the institutional integrity of that court to the extent that it affects that court's capacity to exercise federal jurisdiction impartially and according to federal law. State legislation may alter the burden of proof and the rules of evidence and procedure in civil and criminal courts in ways that are repugnant to the traditional judicial process without compromising the institutional integrity of the courts that must administer that legislation. State legislation may require state courts to exercise powers and take away substantiative rights on grounds that judges think are foolish, unwise or even patently unjust. Nevertheless, it does not follow that, because State legislation requires State courts to make orders that could not be countenanced in a society with a Bill of Rights, the institutional integrity of those courts is compromised".

[234] His Honour also said at 601 [42]

> "State legislation that requires State courts to act in ways inconsistent with the traditional judicial process will be invalid only when it leads to the conclusion that reasonable persons might think that the legislation compromises the capacity of State courts to administer invested federal jurisdiction impartially according to federal law. That conclusion is likely to be reached only when other provisions of the legislation or the surrounding circumstances *as well as* the departure from the traditional judicial process indicate that the

> State court might not be an impartial tribunal that is independent of the legislative and executive arms of government."

[235] There is nothing necessarily antithetical in the processes which are adopted by the Act. So far as the alteration of the burden of proof and the presence of the presumptions to which I have earlier referred are concerned, it is not unexpected that a legislature would require the defendant in proceedings brought under the Act to explain the legitimacy of his assets. He is, after all, in the best position to know. Of course it may be more difficult for him or her to do so without legal and accountancy assistance. This may be particularly so if the defendant is already serving a term of imprisonment, but it does not inevitably follow that the proceedings must necessarily be unfair or that the Court cannot control the proceedings in such a way as to ensure that, so far as possible, the defendant receives a fair hearing.

[236] Reliance was placed by Mr McDonald QC for the plaintiffs upon the decision of the High Court in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (supra) at 36 per Brennan, Deane and Dawson JJ, who said:

> "It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Ch. III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch. III vests exclusively in the courts which it designates."

[237] However, there is no doctrine of separation of powers between the legislature, the executive and the judiciary in the Northern Territory. In the absence of such a doctrine, legislation which offends the principles set out in *Chu Kheng Lim* will not be invalid for that reason alone; it will only be invalid where the legislation directs the court as to the manner in which it is to exercise its jurisdiction in a way which infringes the *Kable* principle.

[238] There is nothing in s 46(2) which directs the court as to the manner and outcome of the exercise of its jurisdiction as to whether or not it should grant a restraining order. It simply grants a particular and confined power as contemplated by Brennan, Deane and Dawson JJ in *Chu Kheng Lim* with respect to what orders can be made in the event that the court decides that it is proper to make a restraining order.

[239] I would answer each of the questions raised by Olsson AJ in the reference in matter No 153 of 2006, no.

Were the defendants denied procedural fairness?

[240] The Act contemplates that an application for a restraining order under Division 2 of Part IV of the Act may be made ex parte (s 41(2)). The reason for such a provision is obvious. If notice were required to be given in all cases, the assets could be dispersed out of the court's jurisdiction.

[241] The fact that an application can be made ex parte does not by itself mean that the proceedings are necessarily unfair even though there are significant consequences once a restraining order is made.

[242] It is to be noted that a restraining order under the Act is different in important respects from an ex parte injunction obtained in the Court's ordinary equitable jurisdiction. Usually an ex parte injunction will only be granted on an interim basis. Upon the return date, the applicant for the injunction must establish his case all over again, after having given notice in the meantime to the defendant. A restraining order made ex parte can be set aside under s 63 and s 64 of the Act in so far as the orders were made on the basis that the property was crime used property or crime derived property. There is no specific provision for setting aside a restraining order made on the basis that an application has been made or is intended to be made for an unexplained wealth direction under s 44(1)(b)(ii). Notwithstanding that, it is my view that a restraining order could be set aside in any case where the application was made mala fides or where there was material non-disclosure or a failure to give an undertaking as to damages, for example.

[243] I do not think that there is anything unfair in the order consolidating the two proceedings. At the time that the order was made the proceedings had not been served. I think it was open to the learned Judge to have made that order and I can see no denial of natural justice to the plaintiffs in making it ex parte on this occasion. If there was some good reason for setting that order aside, an application to the Judge could be made at any time.

[244] Next it is complained that the proceedings were conducted in camera or at least a large part of the proceedings were conducted in camera and without a transcript.

[245] The Court has power under s 42(a) to order that the whole or any part of the proceedings relating to a restraining order is to be heard in closed court. It also has power to make an order prohibiting the publication of a report of the whole or any part of the proceedings or any information derived from the proceedings under s 42(c). It is understandable that the Court may need to use these powers where material is put before the Court in support of the restraining order where the information provided to the Court, if released, might materially prejudice an ongoing investigation. So much is recognised by s 45(2) of the Act.

[246] However in this case, the Court did not provide any reasons for the making of the order. It was submitted that no reasons are necessary because the order was only an interlocutory order, but in my opinion, interlocutory or not, a judge should give reasons when making such an ex parte order based upon material which is not fully disclosed to the parties affected by the order: see *Re Criminal Proceeds Confiscation Act 2002* (supra) at 47 [9] per Williams JA and at 56–57 [62]–[63] per White J. That is not to say that reasons are always required when all of the affidavits relied upon are to be served with the order. Much will depend upon the circumstances.

[247] Under the provisions of the Supreme Court Act s 51 and s 53 the plaintiffs in these proceedings have a right to seek leave to appeal to the Court of Appeal from the orders made by the Judge. If reasons are not given the defendants to the restraining order are not in a position to know whether they have a case to exercise their right to apply for leave to appeal. In order

to obtain leave, they must demonstrate that the correctness of the judgment of the Court is attended with sufficient doubt to warrant the granting of leave: see *Nationwide News Pty Ltd & Ors v Bradshaw & Anor* (1986) 41 NTR 1. Without reasons, the defendants will not know whether the Judge applied the correct test or tests in deciding whether to grant the order. For example, in relation to a restraining order on the basis that the property is crime used or crime derived, the Court has to be satisfied that there are reasonable grounds for suspecting that the property is crime used or crime derived. On the other hand an application for a restraining order under s 44(1)(b)(ii) on the basis that an application has been made or is intended to be made for an unexplained wealth declaration, the Judge would have to be satisfied that there is a prima facie case. If the basis upon which a non-disclosure order is made rests upon public interest immunity of a kind going beyond non-disclosure of information which might materially affect an ongoing investigation (assuming that the Court can make an order based on that kind of material which I doubt), the Court should indicate at the least the class of information being protected, what balancing considerations have been taken into account and why it is protected: see for example *Asiatic Petroleum Co Ltd v Anglo-Persian Oil Co Ltd* [1916] 1 KB 822; *Australian National Airlines Commission v The Commonwealth of Australia & Anor* (1975) 132 CLR 582; *Young v Quin & Ors* (1985) 59 ALR 225; as well as any other relevant factors: see generally S D Simpson, D L Bailey and E K Evans, *Discovery and Interrogations*, 2nd edition, Butterworths, Sydney,

1990, pp 210-221. In a case where the Court has received material which is based upon information which, if released, might materially prejudice an ongoing investigation, the reasons ought to disclose as much as possible consistent with the need to protect the confidential material. The Judge ought to address questions such as what balancing considerations have been taken into account, whether it is sufficient to suppress the names of any informants or the circumstances under which information has come to the attention of the Director of Public Prosecutions or the police, or whether it is necessary to go so far as to decide that the nature of the information is such that release of any of it could result in a significant risk that it would lead to the sources being discovered.

[248] In *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (supra) Martin CJ said at para [63] in reference to s 76(2) of the Corruption and Crime Commission Act 2003 (WA) which precluded information from being disclosed to the other party which the Commissioner of Police claimed to be confidential:

> "… s 76 should be construed as being consistent with the overriding and inherent obligation of a court to do justice as between the parties to proceedings before it. Thus, while the terms of s 76(2) will preclude disclosure of information which the Commissioner of Police claims to be confidential, this does not necessarily mean the court is precluded from imposing other procedures which might assist to inform the applicant of the case which has to be met. This is, of course, subject to due compliance with the prohibition upon disclosure of confidential information. On my view of the section, the court will be obliged to take whatever procedural steps are available to minimise the disadvantages suffered by an applicant if the Commissioner of Police claims confidentiality pursuant to s 76(2) (see *Osenkowski v Magistrates Court of South Australia*)."

[249] Similarly, in my view, the Court in exercising its powers under s 45(2) should consider whether, for example, a summary of the information contained in the confidential material can be released or alternatively if there is some other course which may be able to be adopted such as releasing the information to the defendant's lawyer upon receiving an appropriate undertaking to the Court not to reveal the information to the defendant. Perhaps in order to achieve this, the Court ought in the first place make only an interim order, and require the proceedings to be served before making a restraining order. I note that the Act provides, in s 40, for the applicant to apply to the Local Court for an interim order. However, I consider that the Supreme Court could also make an interim order, even though there are no specific legislative provisions relating to this Court. Where, by an Act of Parliament, a right or power is created, there must by implication carry with it the power to do everything which is indispensable for the purpose of exercising the right or power, or fairly incidental or consequential to the power itself: *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation and Others* (1997) 115 NTR 25 at 35.

[250] It is my view that the failure to give reasons in this case is not only an error of law, but it has deprived the defendants of procedural fairness: *Re Criminal Proceeds Confiscation Act 2002* (supra); *Pettitt v Dunkley* [1971] 1 NSWLR 376; *Mobasa Pty Ltd v Nikic* (1987) 47 NTR 48.

[251] Likewise, I consider that his Honour should have provided more expansive reasons for the refusal of the plaintiffs' application for access to the

confidential affidavits when that application was subsequently made to his Honour.

[252] It was submitted by Mr Silvester that the plaintiffs have not sought any reasons from his Honour and that had they done so his Honour may have provided them. Although an appeal court may remit a proceeding to a Judge to give reasons (*De Iacovo v Lacanale* [1957] VR 553; *Apps & Anor v Pilet* (1987) 11 NSWLR 350; *Pasha v Edmonds & Anor* (1998) 28 MVR 217), it is now too late to ask his Honour to provide reasons and the matter should be reheard before another judge.

[253] Mr Silvester submitted that although the Judge relied on confidential material to base the orders he made, that related only to the ground that the property was crime derived; that the order was supported in any event upon the basis of unexplained wealth and the affidavit material in respect of that subject matter has been fully disclosed. That may be so, but the order is nevertheless based also upon allegations that the property is crime derived and no reasons have been given for the order.

[254] In my opinion the appeal should be allowed and the restraining order made on 30 March 2006 should be set aside. I agree with the Chief Justice that an interim order should be made until the matter is reheard by a single Judge.

Southwood J:

[255] The Full Court is asked to consider questions of law which were reserved for the Court's consideration by Olsson AJ in proceeding number 135 of 2006

and proceeding number 153 of 2006. The Court is asked to do so under s 21 of the Supreme Court Act.

[256] In proceeding number 135 of 2006 the plaintiffs seek a declaration that the interlocutory orders of a single judge of the Supreme Court restraining the plaintiffs' property specified in the orders (the restraining orders) are invalid. The restraining orders were made ex parte under s 41(2), s 42(2)(a) and (b), s 43(2)(a), s 44(1)(a) and s 44(1)(b)(ii) of the Criminal Property Forfeiture Act (the Act) on the grounds that the property specified in the restraining orders was crime derived property and constitutes unexplained wealth. The plaintiffs argue that they were denied procedural fairness on the grounds that the plaintiffs were not given notice of the application for the restraining orders; the plaintiffs were not given an opportunity to be heard in circumstances where the making of the restraining orders substantively changed their positions; the plaintiffs were refused access to six affidavits on which the Director of Public Prosecutions relied in support of his application for the restraining orders; the court was closed during the hearing of the application for the restraining orders and no transcript of the hearing has been made available to the plaintiffs; and the presiding Judge failed to give reasons for granting the restraining orders and denying the plaintiffs access to six of the affidavits filed by the Director of Public Prosecutions. While the restraining orders remain in place the specified property and any income derived from that property cannot be dealt with by the plaintiffs.

[257] In proceeding number 153 of 2006, the plaintiffs seek a declaration that s 46(2), s 49(4) and s 154(1)(a) of the Act are invalid. The ground of invalidity is that the specified sections of the Act infringe Chapter III of the Constitution. The plaintiffs say that they do so because they confer a function upon the Supreme Court which substantially impairs the institutional integrity of the Supreme Court as a repository of federal jurisdiction: *Kable v Director of Public Prosecutions (NSW)* (supra); *North Australian Aboriginal Legal Aid Service v Bradley & Anor* (supra). The provisions of s 46(2), s 49(4) and s 154(1)(a) of the Act are repugnant to the judicial process and they inhibit the performance of the judicial function. The sections prevent a court that has made a restraining order from taking into account the legal expenses that a defendant may incur, thereby effectively denying a defendant the right to counsel and authorising the court to proceed in a manner that does not ensure equality before the law: *Nicholas v The Queen* (supra) per Gaudron J at 208 - 209. The sections also direct the Supreme Court as to the manner and outcome of the exercise of the court's jurisdiction under the Act.

[258] The questions of law reserved for the Full Court are set out in pars [19] and [20] of the Reasons for Judgment of Martin CJ. The facts which have been agreed by the parties are set out in par [17] of his Honour's Reasons for Judgment. Additional facts which were placed before the Full Court during the hearing are set out in pars [196] to [198] inclusive of the Reasons for Judgment of Mildren J.

The issues

[259] The following principal issues arise for consideration by the Full Court. First, there is the preliminary issue - should the Full Court accept the referral of the questions of law reserved for its consideration by Olsson AJ? Secondly, should the restraining orders be set aside on the ground that the presiding Judge failed to give reasons? Thirdly, do the provisions of s 46(2), s 49(4) and s 154(1)(a) of the Act substantially impair the institutional integrity of the Supreme Court in such a manner as to be incompatible with the Supreme Court's role as a repository of federal jurisdiction?

[260] For the reasons set out in pars [262] to [264] below, it is my opinion that the Full Court should not accept the referral of the questions of law. I agree with Martin CJ and Mildren J that rather than dismiss proceeding number 135 of 2006, sitting as the Court of Appeal, the Full Court should dispense with compliance with the Rules, grant leave to appeal and treat the matter as having been heard as an appeal against the restraining orders. I would dismiss proceeding number 153 of 2006 but I would allow the matters argued in that proceeding to be treated as part of the grounds of appeal against the restraining orders.

[261] I would allow the appeal against the restraining orders on the ground that the Judge who made the restraining orders failed to give reasons for his decision. The failure to give reasons amounted to an error of law which frustrated the plaintiffs' rights of appeal. The plaintiffs' argument that

s 46(2), s 49(4) and s 154(1) (a) of the Act are invalid cannot be sustained. The Act does not infringe Chapter III of the Constitution. The Court still retains the power to ensure that its procedures are not used in an oppressive manner and to ensure a fair hearing.

The Jurisdiction of the Full Court

[262] In proceeding number 135 of 2006 the plaintiffs ask a single Judge of the Supreme Court to grant a remedy in the nature of prerogative relief against the interlocutory orders of another Judge of the Supreme Court. The declaration sought is a declaration that the restraining orders are invalid.

[263] A single Judge of the Supreme Court does not have power to grant relief in the nature of prerogative relief against the orders of another Judge of the Supreme Court: *Woolf v Trebilco* [1933] VLR 180 per Mann J at 184. A Judge of the Supreme Court cannot make an order which is void. An order of the Supreme Court is valid until it is set aside: *Cameron v Cole* (1944) 68 CLR 571 per Rich J at 590; *Sanders v Sanders* (1967) 116 CLR 366 per Barwick CJ at 376. It is inappropriate to seek a declaration that an order of the Supreme Court is invalid. Provided that there is no irregularity, the only way in which the restraining orders can be set aside is on appeal against the restraining orders: *Re Harrod* (supra) per Hutley JA at 333. If there is an irregularity the appropriate course is to ask the Judge who made the restraining orders or the Judge who has the conduct of the substantive proceeding to set aside the orders.

[264] The Full Court should refuse the reference of the questions of law in proceeding number 153 of 2006 on discretionary grounds. The proceeding amounts to a collateral attack against the restraining orders, acceptance of the reference would maintain a multiplicity of proceedings, a multiplicity of proceedings creates a possibility of inconsistent judgments and the procedure adopted by the plaintiffs unreasonably interferes with normal trial and appellate procedure: *Giannarelli v Wraith* at 594 to 595; *Nichols v Queensland* [1983] 1 Qd R 580. The ordinary appeal provisions should be left to regulate the consolidated proceeding in which the restraining orders were made.

Failure to give reasons

[265] The presiding Judge, who made the restraining orders, erred in law when he failed to give reasons for making the restraining orders: *Fleming v The Queen* (1998) 197 CLR 250 at 260; *De Iacovo v Lacanale*; *Pettitt v Dunkley* (supra) per Asprey JA at 383; *Soulemezis v Dudley (Holdings) Pty Ltd* (supra); *Papps v Police* (2000) 77 SASR 210 at 218; *R v Keyte* (2000) 78 SASR 68.

[266] A court at first instance is required to give reasons for its decision where a losing party may be effectively deprived of his or her right of appeal if the basis of the decision is not properly articulated: *Pettitt v Dunkley* (supra) per Moffitt JA at 388; *Soulemezis v Dudley (Holdings) Pty Ltd* (supra) per McHugh JA at 280; *R v Keyte* (supra) per Doyle CJ at pp 75 to 79. The

obligation to give reasons arises because there is a remedy of appeal against the orders of the court that examines any errors in the reasoning process of the judge at first instance: *R v Keyte* (supra) per Doyle CJ at pp 75 to 79. Reasons must be adequate. Reasons need to be given only so far as is necessary to indicate to the parties why the decision was made and to allow them to exercise such rights as may be available to them: *Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd* (supra) per Mahoney JA at 386. What is adequate is to be determined by the circumstances of the case and the issues in the case: *R v Keyte* (supra) per Doyle CJ at p 81. These may include the following: the nature of the application before the presiding Judge; the fact that the proceeding was an ex parte application; the fact that the appellant will not have access to all of the information that was before the presiding Judge; and the obligations of the party making the application before the presiding Judge.

[267] The plaintiffs' rights of appeal in this case have been effectively frustrated by the failure of the presiding Judge to give reasons for making the restraining orders. As a result of the application for the restraining orders being made ex parte and in camera and the nondisclosure of the contents of the six affidavits on which the presiding Judge relied, the plaintiffs do not know the basis of the decision against them and they are unable to determine whether the presiding Judge fell into error. Without the presiding Judge's reasons for decision the plaintiffs in this case are unable to know what was found by the presiding Judge to be the reasonable grounds for suspecting

that the property specified in the restraining order was crime derived property; whether the Judge made all necessary findings of fact; and whether the Judge correctly identified and applied the relevant rules of law.

[268] In this case in order to explain the basis of the decision to grant the restraining orders, without divulging the details of the confidential information in such a way that may have prejudiced an ongoing investigation, the presiding Judge should have delivered reasons for decision that: stated the basis on which it was determined that there was a risk that the specified property would not be preserved if the application for the restraining orders did not proceed ex parte; stated the basis for finding that certain documents were confidential because they attracted public interest immunity; identified the class of documents that attracted public interest immunity; stated the factors which were taken into account in determining that the balance lay in favour of non-disclosure and not in favour of the open administration of justice; stated why the fair disposition of the case did not require disclosure of the confidential material; identified the principal issues that arose during the hearing of the ex parte application; stated whether there was any evidence which supported a finding in favour of the plaintiffs; identified the material findings of fact at an appropriate level of generality; stated the reasonable grounds for suspecting that the four residential properties, the commercial property, the net proceeds of the property in Queensland, the five motor vehicles, the monies held in three bank accounts and the monies held in two firms of solicitors' trust accounts

was all crime derived property; and identified the rules of law and the relevant tests which were applied in determining the application.

[269] I accept that in the circumstances of this case the obligation to give adequate reasons is an aspect of procedural fairness which is to be accorded to the plaintiffs who are entitled to know why the restraining orders were made: *Tran v Claydon* (supra) per McLure J at par [36]. However, I do not accept the plaintiffs' submissions that they were otherwise denied procedural fairness *which should have been accorded to them* (emphasis added). An entitlement to procedural fairness may be modified by statute and while the exercise of the Director of Public Prosecutions' right to make an ex parte application for a restraining order may deprive persons with an interest in specified property of a right to be heard at an interim stage of a proceeding, the provisions of the Act as a whole and the inherent jurisdiction of the court ensure that persons, who have an interest in the property which may be made the subject of a restraining order, have an opportunity to be heard.

[270] A restraining order is an interlocutory order which has effect for no longer than three months. An application for a restraining order should only proceed ex parte and in camera if the court considers such procedures are just in the circumstances of the case, necessary for the preservation of the specified property and necessary to preserve the confidentiality of information that might materially prejudice an ongoing investigation. If the court considers that it would be unjust to hear an ex parte application for restraining orders then under its incidental powers: *Harris v Caladine*

(supra) at 136, the court may grant an interim injunction restraining the specified property and give appropriate directions for the conduct of the hearing of an application under s 41 of the Act including directions as to the confidentiality of affidavits. Under the Act a person, who has an interest in the restrained property, has a right to file and to be heard upon the filing of an objection to a restraining order under s 59 of the Act, and a right to be heard at the substantive hearing of the criminal forfeiture proceeding before the Supreme Court. Under s 51 and s 53 of the Supreme Court Act, a person who has an interest in the property specified in the restraining order may also, with leave of the Court of Appeal, appeal against a restraining order and against any final orders made by the court.

The institutional integrity of the Supreme Court

[271] The basis of the plaintiffs' argument that s 46(2), s 49(4) and s 154(1)(a) of the Act infringe Chapter III of the Constitution was summed up by Ms Webb QC in reply. As I understand Ms Webb QC's submissions the plaintiffs' argument is that the combined effect of s 49 and s 154(1)(a) is to deprive the court of all of its necessary powers to ensure that the substantive proceeding before the court is equal and fair and that the court's processes are not used in an oppressive manner. The court is authorised to proceed in a manner that does not ensure equality before the law. A fundamental feature of the adversary system is that all parties to court proceedings are entitled to equality before the law and a key aspect of the principle of equality before the law is the right of each party to use the party's own

resources to retain the party's counsel of choice. If the effect of a restraining order is to prevent the party whose property is restrained from having access to sufficient resources to retain the counsel of the party's choice the continuation of the proceeding would mean that the party whose property is restrained is in an unequal position before the court. Furthermore, the proceeding would be unfairly oppressive because not only is the party, whose property is restrained, denied the right to counsel of the party's choice but the party bears the burden of proving that the restrained property was lawfully acquired property. A superior court which does not have all of the necessary powers to ensure that its processes are not used oppressively is not a suitable repository of Federal judicial power.

[272] Section 49 of the Act provides as follows:

> 49. Effect of restraining order
>
> (1) While a restraining order is in effect in relation to property –
>
> (a) subject to Division 3, the property cannot be dealt with;
>
> and
>
> (b) the applicant in relation to the restraining order may apply under this Act to the court that made the restraining order for an order that all or some of the property is forfeit to the Territory.
>
> (2) Income or other property that is derived from property subject to a restraining order is taken to be part of the property and is also subject to the restraining order.

(3) A person may apply to the court that made a restraining order for the release of property that is subject to the order to meet reasonable living and business expenses of the owner of the property.

(4) In subsection (3), reasonable living and business expenses does not include legal expenses referred to in section 154.

[273] Section 154(1)(a) of the Act provides as follows:

(1) Property that is subject to a restraining order under this Act –

(a) is not to be released to meet the legal expenses of a person, whether the expenses are in relation to proceedings under this Act that relate to the forfeiture of the property or criminal proceedings;

[274] The plaintiffs argue that the effect of s 49(4) and s 154(1)(a) of the Act is to direct the court not to release property that is the subject of a restraining order for the purposes of legal expenses and to thereby deprive the court of a necessary power to ensure that the parties are equal before the law.

[275] The plaintiffs' argument is unsustainable. The purposes of s 46(2), s 49(4) and s 154(1)(a) of the Act are to prevent the dissipation of property that may be crime used, crime derived or unexplained wealth and to enable the party whose property has been restrained and who may as a result have insufficient resources to pay for legal expenses to obtain legal aid if necessary. The Act does not abrogate the right to counsel in proceedings under the Act and in any event the right to counsel of a party's choice is not an absolute right. Even in this case it has not been established that the plaintiffs do not have resources other than the restrained property which

they may use to fund their legal expenses. Parties to legal proceedings, including civil proceedings, often have unequal resources.

[276] It is not unusual for there to be specific rules about the burden of proof for specific classes of case: see for example s 94(2) of the Marriage Act (Cth); *Attorney-General (Hong Kong) v Lee Kwong-kut* [1993] AC 951 at 969. Nor is it unusual for the burden of proof to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted: *Blatch v Archer* (1774) 98 ER 969 at 970; *Hampton Court Ltd v Crooks* (1957) 97 CLR 367 at 371; *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corp* (1985) 1 NSWLR 561. It would ordinarily be expected that the owner of property would be in the best position to explain how the property has been acquired and with what resources it has been acquired.

[277] Parliament has otherwise taken the Supreme Court as it finds it with all of the incidents of doing so: *Electric Light and Power Supply Corp Ltd v Electricity Commission of New South* (supra) at 560; *Mansfield v Director of Public Prosecutions (WA)* (supra) at 491. The Supreme Court of the Northern Territory has inherent power to ensure that its processes are not used oppressively and to ensure that the parties to a proceeding receive a fair hearing. The principle enunciated in *Dietrich v The Queen* (supra), that the courts have power to stay proceedings that will result in an unfair trial and the power extends to a case in which representation by counsel is essential to a fair trial, applies to proceedings under the Act: *Director of*

Public Prosecutions (Cth) v Saxon (1992) 28 NSWLR 263 per Kirby P at 275; *Director of Public Prosecutions (SA) v Vella* (1993) 61 SASR 379 per King CJ at 382; *R v Parker* (1994) 75 A Crim R 437 at 443 to 446; *Mansfield v Director of Public Prosecutions (WA)* (supra) per Pullin JA at pars [94] to [101].

[278] While a number of the cases to which I have referred above involved the Court making an order permitting a defendant to access restrained property for the purpose of funding legal proceedings and the Parliament of the Northern Territory has expressly precluded a defendant from accessing restrained property for that purpose, the principle enunciated in *Dietrich v The Queen* (supra) which is the principle on which the courts relied to grant defendants access to restrained funds has not been abrogated by Parliament. The Supreme Court of the Northern Territory still retains the inherent power to require an undertaking as to damages and to either stay a proceeding under the Act or to refuse to extend a restraining order if a defendant is unrepresented and representation by counsel is essential to a fair hearing of the proceeding. The power extends to staying a proceeding or to refusing to extend a restraining order on the grounds of oppression if the restraining order precluded the defendant from receiving a fair hearing in a criminal proceeding. Alternatively, the criminal proceeding itself could be stayed. That is, the court still retains the capacity to justly administer the proceedings before the court: *Forge v Australian Securities and Investment Commission* (supra) per Gummow, Hayne and Crennan JJ at 76 par [64].

The courts have recognised that because of the draconian nature of the provisions of criminal property forfeiture legislation there are cases where the proper administration of justice would break down if defendants were not represented by counsel. In such cases it is in the best interests not only of the defendant but also of the administration of justice that a defendant be legally represented.

[279] In my opinion the powers conferred by the Act on the Supreme Court are not antithetical to the judicial process. The court is required to act judicially and it is not a mere instrument of executive policy. The integrity of the court is not substantially impaired by the provisions of the Act. The court still retains those defining characteristics which mark a court apart from other decision making bodies. Not every conferral of power that alters traditional judicial processes compromises the institutional integrity of the Supreme Court: *Fardon v Attorney-General (Qld)* (supra) per McHugh J at pars [41] to [42].

The Court's power to refuse to make a restraining order over some property

[280] I have had the advantage of reading a draft of Martin CJ's Reasons for Decision. For the reasons given by his Honour I agree that at the time that the court is hearing an application for a restraining order the court may make a restraining order with respect to some property and refuse to make a restraining order in relation to sufficient property to allow legal expenses to be paid. His Honour's reasons are consistent with the principles I have

referred to above and the legislature has not clearly stated in the Act that the court does not have such a discretion: *Director of Public Prosecutions (Cth) v Saxon* (supra) per Kirby P at 275 E – F; *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205.

Orders

[281] I would make the following orders:

1. The reference of the questions of law reserved by Olsson AJ in proceeding number 135 of 2006 is declined.

2. The reference of the questions of law reserved by Olsson AJ in proceeding number 153 of 2006 is declined.

3. In proceeding number 135 of 2006:

   (a) The rules in relation to the bringing of an application for leave to appeal are dispensed with.

   (b) The plaintiffs are granted leave to appeal.

   (c) The plaintiffs are given leave to add as grounds of appeal the matters argued in proceeding number 153 of 2006.

   (d) The appeal is allowed on the ground that the learned judge at first instance failed to give reasons for decision for making the restraining orders.

   (e) The restraining orders are set aside.

(f) The matter is referred to the Registrar for fixing a hearing date of the application for restraining orders before another Judge.

(g) An interim injunction is granted until further order restraining the plaintiffs from dealing with all of the property that was previously subject to the restraining orders.

4. Proceeding number 153 of 2006 is dismissed.
