PARTIES:	DIRECTOR OF PUBLIC PROSECUTIONS
	v
	HELPS, Robert John;
	OTTENS, Dean Lynton
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	CRIMINAL
FILE NOS:	No 122 of 1993 No 159 of 1993
DELIVERED:	18 April 1994
HEARING DATES:	28, 30 March 1994
JUDGMENT OF:	Martin CJ.

CATCHWORDS:

Criminal Law - Jurisdiction, practice and procedure - Forfeiture -

Crimes Forfeiture Act (NT), s3 "tainted property" - Director of Public Prosecutions Act (NT), s4 and s11(1) - Aboriginal Land Rights (Northern Territory) Act (Cth) -

Criminal Law - Jurisdiction, practice and procedure - Forfeiture - Nature of property -

motor vehicle
pastoral lease
shares in company
tractor
front end loader
fertiliser
cash received from sale of prohibited drug -

Criminal Law - Jurisdiction, practice and procedure - Forfeiture - Nature of property - Interest of shareholders in company's assets -

Criminal Law - Jurisdiction, practice and procedure - Forfeiture - Nature of exercise of discretion -

Criminal Law - Jurisdiction, practice and procedure - Forfeiture - Nature of proceedings - Penal in character -

Criminal Law - Jurisdiction, practice and procedure - Plea of guilty - Effect on subsequent forfeiture order -

Criminal Law - Jurisdiction, practice and procedure - Witnesses - Cross-examination - Disallowance of question - Question as to culpability - Application for forfeiture on a plea of guilty on agreed facts -

Criminal Law - Jurisdiction, practice and procedure - Forfeiture - Relationship between sentencing and forfeiture -

Crimes Forfeiture Act (NT), s5(1)(b)(ii) "hardship" - s6(1)(b) effect of forfeiture order on registered mortgagee - s7 effect of forfeiture on third parties -

Tarzia (1991) 52 A Crim R 102 at 107, 109, followed.
Taylor v Attorney-General (1991) 55 SASR 462 at 474, applied.
Anderson (1992) 61 A Crim R 382 at 384, applied.
Lake (1989) 44 A Crim R 63 at 68-69, applied.

REPRESENTATION:

Counsel:

Applicant:	John Adams
1st Respondent:	Stuart Brown
2nd Respondent:	John Waters

Solicitors:

Applicant:	DPP
1st Respondent:	Legal Aid
2nd Respondent:	Waters James McCormack

Judgment category classification: A
Judgment ID Number: mar94002
Number of pages: 29
DISTRIBUTION: GENERAL

mar94002

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 122 of 1993

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS

AND:

ROBERT JOHN HELPS

No. 159 of 1993

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS

AND:

DEAN LYNTON OTTENS

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 18 April 1994)

These are applications by the Director of Public Prosecutions, pursuant to the *Crimes (Forfeiture of Proceeds) Act*, for forfeiture orders in respect of certain property which he claims is "tainted property", being property used in

connection with the commission of an offence against a law of the Territory that may be prosecuted on indictment (s3 definitions). The offence was that of cultivation of a commercial quantity of a dangerous drug, namely 10,553 cannabis plants at Hidden Valley Station contrary to the *Misuse of Drugs Act*. The maximum penalty for the offence is 25 years imprisonment.

Each of the above named offenders, along with others, pleaded guilty to the charge and were formally convicted. (Formal conviction by the Court is not, however, a precondition to the exercise of jurisdiction to make a forfeiture order; s3(2)(b)).

Where a person has been convicted of such an offence the Director may, within prescribed time limits, apply to the Court for an order pursuant to s5 in relation to specified property and if the Court -

(a) is satisfied that the property is tainted property in relation to the offence, that is, used in or in connection with or derived or realised, directly or indirectly, by a person as a result of the commission of the offence, and

(b) has taken into consideration (having regard to the information before it) -

(i) the use that is ordinarily or had been intended to be made of the property; and

(ii) any hardship that may reasonably be likely to arise (whether on the part of that person or any other person) following the making of the order

it may order that the property is forfeited to the Territory (s5 and definition).

Helps - application and facts

As to Helps, the application is made in respect of a Ford motor vehicle, registered in his name in South Australia number UHS 026, valued by agreement at, $11,000. It was admittedly driven by him from Adelaide to Hidden Valley with two co-offenders as passengers, namely Bruno Musitano and Vincenzo Rocca. Those three people were largely responsible for setting up the plantation, Helps primarily being engaged in seeing to the reticulation of water from a nearby bore, and the others planting the cannabis seeds and watering and otherwise tending to the growing plants. They were present when some of the plants were harvested and sold and others harvested and prepared for sale. Helps' vehicle was also used for transporting the co-offenders from Hidden Valley Station to Dunmarra Roadhouse, but it is not clear that the purpose for those trips had much to do with the illegal conduct. He worked

at the site from early June 1993, until the police raid during which he was arrested, on 22 August of that year. A sum of $7,000 in cash was handed to him by a co-offender which was to be delivered to Ottens. It was placed in the boot of the car.

Helps' sworn evidence was that the vehicle had been purchased by him from the joint savings of himself and his mentally incapacitated adult daughter, she being in receipt of a social security benefit arising from her disability. It was not suggested upon the hearing that the arrangements between Mr Helps and his daughter in relation to the purchase of the car was such that there was reason to believe she had an interest in it, and the Director was not required to give notice to her (s5(2)(a)). Given those facts, s7 would appear to provide her with the opportunity to claim and seek to protect any such interests if a forfeiture order is made in respect of the vehicle. Mr Helps also said that he and his wife had separated some time ago, that his daughter and his wife did not get along well together, and that he had cared for his daughter in a house in Adelaide. The vehicle was acquired and used by him in Adelaide for normal purposes, including the provision of transport of his daughter on outings, including for her rehabilitation. He is presently in prison and she is cared for by her mother and her grandparents who also live in Adelaide. According to Mr Helps, the mother is unable to provide transport for the daughter as often as needed, and the grandparents have no motor vehicle. If the subject vehicle was not forfeited it

could go to the grandparents who could then use it for the benefit of his daughter. Her mental condition is such that she is unable to use public transport. The use of the car in connection with the commission of the offence was remote. It simply provided transport for labourers to travel from Adelaide to the site, and as a piece of property had nothing more to do with the cultivation of cannabis.

I am satisfied that the motor vehicle was purchased and ordinarily used for innocent domestic purposes in Adelaide. Apart from any hardships that Mr Helps may suffer as a result of the forfeiture of the vehicle itself, hardship may reasonably be likely to arise on the part of his daughter following the making of any forfeiture order in respect of the motor vehicle, because arrangements could not be made for it to be made available in Adelaide to provide for her transport, for which there is no reasonably available alternative for her. There is nothing to suggest that the daughter had any knowledge of the purpose for which her father took the car from Adelaide.

Helps was sentenced to four years imprisonment for his part in the crime and it was ordered that he not be eligible for release on parole for 18 months, both periods to commence on 22 August 1993.

Ottens - application

In respect of Ottens, the application for forfeiture,

as originally framed, was for the following:

"(a) pastoral lease No 936, in respect of which **Scobie & Son Pty Limited** is the lessee and the Northern Territory of Australia is the lessor in respect of the property known as Hidden Valley Station, Daly Waters in the Northern Territory being all that piece of parcel of land containing an area two thousand eight hundred and eleven square kilometres or thereabouts and being Northern Territory Portion 2724 and being the land more particularly described in Registry Book Volume 197 Folio 90

(b) all of the right title and interest of **Dean Lynton Ottens** in shares, stock or scrip in the said company **Scobie & Son Pty Limited**

(c) A John Deere Tractor Model No. 8430 Serial No. 6466 AR 12032354 RG.

(d) A Clark Front End Loader Model No. 75A Serial No. 58028.

(e) A quantity of fertiliser as described:

(i) 65 x 20 kg bags of "Nurseryman's Choice" brand potting mix;
(ii) 31 x 50 kg bags of "Pivot" brand Ammonium Nitrate;
(iii) 7 x 50 kg bags of "Top" brand Superphosphate; and
(iv) 16 x 50 kg bags of "Pivot" brand complete D.N.P.K.

(f) $7,000.00."

During the course of the proceedings, the application was withdrawn in respect of the shares, stock or scrip in Scobie & Son Pty Ltd, when it was recognised that no such property could be shown to fall within either part of the definition of "tainted property" in the *Act*.

Facts re the pastoral lease and interests in it

The pastoral lease was held by Scobie & Son Pty Ltd from the Crown in right of the Northern Territory. Mr Ottens occupied the land the subject of it. It was upon part of that land (measuring approximately one hundred metres by sixty metres out of the total area of the land the subject of the lease of two thousand eight hundred and eleven square kilometres) that the illicit crop was cultivated, and it was from it that water was drawn to nourish the plants. But what is sought to be forfeited is not the land but the leasehold interest in it (see definition of property s3). For jurisdiction to be founded for a forfeiture application it must be shown that the property sought to be forfeited is tainted property, that is, in this case, that the lessee's interest in the pastoral lease was so tainted. In these circumstances it could only be so found if that interest was used in or in connection with the commission of the offence. It was not an issue in the proceedings, but I have paused to consider how it is that that interest could be so used. The land in respect of which it is granted can be easily seen to be used in that way, but the land can not be forfeited to the Crown as it already owns it. All that can be forfeited is the interest in it granted by the Crown. A connection between the interest and its use in or in connection with the commission of the offence must lie in the circumstance that it is the interest which gives the lessee, and those permitted by it to enter upon the land, the opportunity to be upon the land and thus to commit the offence. The use of the

land is dependent upon the existence of the lease and some of the rights granted to the lessee thereunder. It was the opportunity given to Mr Ottens as occupier of the land with the consent of the lessee that enabled the commission of the offence. In that way, and there may be others, the connection is made.

The lease was held by Scobie & Son Pty Ltd in which Mr Ottens and his former wife have been the sole and equal shareholders and directors since 1985. The only other interest in the lease known to the Court comprises that of the ANZ Bank as mortgagee. The Bank had notice of the application and appeared simply to request that its interest be noted. Its position, if a forfeiture order is made, would appear to be protected under s6(1)(b), but the Court would hear further from the Bank before making the order.

As to the Territory, it is bound by the *Act* (s4), and the functions of the Director are performed on its behalf, though in the name of his Office, *Director of Public Prosecutions Act* s11(1). It might be reasonably expected, therefore, that such interests as the Territory may have in the proceedings as owner of the land, and lessor of the lease sought to be forfeited, would be taken into account by the Director. As lessor the Territory has rights, powers and privileges over, or in connection with the lease (see definition of "interest"). The question whether hardship may reasonably be likely to arise on the part of the Territory, if the forfeiture order is made,

s5(1)(b)(ii) also arises. For example, the Court can but assume, since the Director acts on behalf of the Territory, that consideration was given to the effect, if any, which forfeiture may have upon the status of the land with reference to the provisions of the *Aboriginal Land Rights (Northern Territory) Act* (Commonwealth). Since it was represented it was not required that notice of the application be given to the Territory in its capacity as owner of the land and landlord.

As lessee, Scobie & Son Pty Ltd has an obvious legal interest in the lease. It appeared upon the hearing by the same counsel as was instructed by Mr Ottens. As shareholders and directors of that company, Mr and Mrs Ottens have no legal or equitable interests in relation to the company's property and I doubt that they have any right, power or privilege over, or in connection with it within the meaning of the *Act*. They have, however, every right to represent the company to protect its interests, and, if desired, to give evidence of personal hardship (s5(1)(b)(ii)). Mr Ottens did so, but Mrs Ottens did not. There is no other person who the Court has reason to believe has an interest in the property or part of it.

The infinitesimal proportion of land used in or in connection with the commission of the offence has already been noted, as has the size of the crop. The latter consideration bears more heavily in favour of the application than does the former against it. It is not suggested that the company was involved in the offence in any other way.

A search of the title to the pastoral lease shows that it was granted by the Minister to the Company on 2 September 1985, but there is evidence to strongly suggest that the company was in fact the holder of a former pastoral lease in respect of the same land prior to that time. According to Mr Ottens, he and another person purchased the shares in Scobie & Son Pty Ltd in August 1983 and the company was at that time the lessee of the land. In 1985, Mrs Ottens purchased that other person's shares in the company, and Mr Ottens and his wife have remained as the equal shareholders and directors since that time, notwithstanding that a decree nisi for the dissolution of their marriage was pronounced on 4 December 1992. The Articles of Association of the company are not before the Court and I will therefore proceed upon the basis that both Mr and Mrs Ottens are entitled by reason of their respective shareholdings, to have their paid up capital returned upon a liquidation, so far as the assets of the company are available for that purpose, and that their respective shareholdings entitle each of them to a one half share upon a distribution of excess assets, if any. Although there is no clear evidence as to what the net asset value of the company is (for example, there is no up to date balance sheet showing all assets and all liabilities) the parties appear to have proceeded upon the basis that its only asset is its interest in the pastoral lease and that it has no liabilities. It has, however, granted the mortgage to the ANZ Bank which is to secure loans to it or on account of Nectar Pty Ltd. No effort has been made to provide details of the assets and liabilities of Nectar Pty Ltd so that the position as between

the two companies can be examined. In the estimate of Mr Bremner, not a licensed valuer, but nevertheless a real estate agent with long experience in a rural area, the fair value of the pastoral lease and improvements is between $400,000 and $500,000, all depending upon a number of factors. It was assumed that there were of the order of a thousand head of mixed cattle on the property, not owned by the company, but by Nectar Pty Ltd, which Mr Bremner would estimate to be worth somewhere between $250 and $300 a head, depending on their Brahman content, a matter about which there was no evidence. Mr Ottens gave evidence after Mr Bremner and did not seek to put any other number upon the cattle on the property, or advance any views as to their value. There is some other evidence that in late 1993, steers and other cattle were sold from Hidden Valley for a price of approximately $300 each.

There was no separate valuation of plant and equipment, nor was there any evidence on which I could rely as to the value the interests of the companies in the land and improvements, plant, equipment and stock upon a sale of the enterprise on a walk-in walk-out basis. The only liabilities of which there is any evidence are those of Nectar Pty Ltd to the Bank, amounting to approximately $557,000, and to Elders Limited, secured livestock mortgage, $196,000.

The forfeiture of the pastoral lease would result in a reduction in the net asset value of the company of the order of, say, $450,000 and the bank, exercising its power of sale

as mortgagee, would still be owed a considerable sum. The likely outcome of the disposal of the stock and plant, whether sold with the pastoral lease or not, and the ultimate disposition of the net proceeds of the sale of those items, is entirely conjectural. Mr Ottens deposes that he and his former wife are guarantors of the loan to the ANZ Bank and thus would be personally liable for any shortfall. All in all I am satisfied that it is more than likely that if the pastoral lease is ordered to be forfeited, and thus proceeds to sale under mortgagee's powers, (whether or not Elders Limited joins in with a view to a sale of the property and associated assets on a walk-in walk-out basis) the price to be realised will be less than that which might be realised if the assets were sold in a more orderly fashion. It goes without saying, and there is evidence to suggest, that a forced sale, which in my opinion would necessarily flow from a forfeiture order in respect of the pastoral lease, would produce a sum substantially less than fair market value. That is a loss which Scobie & Son Pty Ltd would bear initially. Mr Ottens does not disclose how much was paid for the transfer of the shares in Scobie & Son Pty Ltd nor what capital has been invested on further improvement to the land. He provides details of the improvements which have been made, and they are undoubtedly substantial.

I find that the lessee's interest in the pastoral lease is ordinarily used for the conduct of a cattle station and that that has been the case since at least the time when Mr and Mrs Ottens took transfer of the shares in the company.

Income to assist in the running of the property has come, not only from the proceeds of the sale of cattle, but through Mr Ottens' personal labour in various contracting jobs undertaken by him in the district. There have been a number of factors which have contributed to what appears to be the present parlous financial position. I need not go into them in detail since I have not heard from those whom it is suggested by Mr Ottens contributed to the losses. Until 1990 the property provided the place of residence for Mr Ottens and his family. At that time his wife left and until early 1993 Mr Ottens was assisted by his eldest son, then aged 11, in the running of the station. According to Mr Ottens, there is an expectation that that son would be able to return to assist in the running of the property and eventually take over its management. Mr Ottens' parents, who were farmers themselves, have assisted financially in the management of the station and have contributed over $40,000 to the ongoing costs. Acknowledging the financial difficulty, Mr Ottens nevertheless remains optimistic that the debts can be reduced so that the business may be conducted as a viable concern or, upon sale of all of the property involved in the business, there would be sufficient funds left after payment of debts for him to be able to take up an interest in another property.

Throughout the proceedings Mr Ottens spoke as if he were the proprietor of the pastoral lease and the owner of all of the other assets and the debtor to the bank, stock agent and other creditors. No doubt he feels that way because of the many years of hard work he has put into the business. The Court knows

nothing of any arrangements between Mr and Mrs Ottens nor as to whether she is likely to make any application under the *Family Law Act* for a property settlement, although noting the time for doing so has expired. It must be remembered that they each have an interest in the outcome of these proceedings, and for the reasons already indicated, hardship may reasonably be likely to arise on their part following the making of a forfeiture order in respect of the pastoral lease. It would appear that they are likely to suffer financial hardship through the diminution in the value of the net asset backing of their shares in the companies. Of a less tangible nature, but nevertheless real, it is also reasonably likely that Mr and Mrs Ottens and Bradley will suffer hardship in having their son's expectations of returning to the property to assist his father in the running of it, lost. As to Mr Ottens, it is reasonably likely that he will suffer further hardship if an order is made forfeiting the pastoral lease, not only arising from the factors already mentioned, but also through loss, in such circumstances, of the business and assets which he has worked to acquire and build up over many years. In addition, and importantly if the forfeiture order is made, he would certainly be unable to return to the property upon his discharge from prison, losing what has been his place of residence and his vocation as a pastoralist. The hardship of imprisonment will be increased if the order sought is made.

I do not think it is appropriate to take into account the possibility that even if a forfeiture order is not made,

the hopes and expectations of Mr Ottens and other members of his family will be dashed because of the actions of secured creditors. That will be something arising from contractual commitments made in the ordinary course of business.

The evidence is that Mr Ottens engaged in the cultivation of the cannabis for the sole purpose of raising funds, one eighth of undefined proceeds of sale, which he thought would amount to between $100,000 and $200,000, to be applied for the purpose of saving the business and the business assets. Although it is an agreed fact that the proceeds of sale of the cannabis, if all harvested and sold illegally in small lots, would approximate $20m, there was no evidence to suggest that Mr Ottens expected to receive or would have received one eighth of that sum.

There is nothing to suggest that Mrs Ottens or Bradley had any knowledge or involvement of Mr Ottens criminal conduct.

Other property - interests

The position as to the ownership or the holding of any other interest in the tractor, front end loader and fertiliser is unclear. As to the plant, Mr Ottens' evidence does not touch upon title, but I am safe in assuming, from the general tenor of the evidence, that it is owned either by Nectar Pty Ltd or himself and his former wife. There was no reason to believe that any other person had an interest in any of that

property or any part of it. Mr and Mrs Ottens were the sole shareholders and directors of Nectar Pty Ltd, which it seems was the management or operating company for the pastoral business conducted on the land contained in the pastoral lease.

John Deere Tractor

As to the John Deere tractor, the evidence of Mr Ottens is that it was never used in relation to the cultivation of the cannabis, but was used to cultivate a substantially larger area of ground than that upon which the cannabis was later grown, and for the purpose of growing watermelons, rockmelons and other varieties of melons. The area cultivated with the tractor had previously been sown to millet and other stock fodder which can be useful as a ground cover for mulch in relation to the cultivation of melons. The agreed facts in relation to Mr Ottens culpability in the offence simply state that the tractor was used to cultivate the area, and not that it was used to cultivate the area for the purposes of growing cannabis. The evidence does not show that it is tainted property. The statement by Mr Helps to the police as to his observation regarding the use of that tractor is not admissible.

Front end loader

As to the front-end loader, it was an agreed fact that it was used by Mr Ottens for the purpose of carrying fertiliser

to the area upon which the cannabis was cultivated and leaving it at different points around that area. In addition, Mr Ottens' evidence was that it was used by him to lift heavy materials when he constructed a stock trough some 250 metres from the area upon which the cannabis was planted in about October or November 1992, and that it was left at that site after that work was finished. It was left at that site with a view to its being used to build a tank stand annexed to the stock trough and that work was in fact carried out in February 1994. It was used in connection with the commission of the offence in a minor way. It was ordinarily used for other innocent purposes. There is no evidence directed to hardship in relation to this particular item.

Fertiliser

As to the fertiliser, it was claimed on behalf of Mr Ottens that he was the owner of the 7 x 50 kilogram bags of "Top" brand superphosphate, it having been purchased for an innocent purpose, being the provision of feed supplements to the stock depastured on the land comprised in the pastoral lease. It was worth about $245. It seems from other material before the Court on an earlier application made to restrain the disposal of the property the subject of the application, that the remaining fertiliser was part of a larger quantity taken to the property by co-offenders and some of which was used to fertilise the cannabis crop. There are 3.65 tons of fertiliser remaining valued at approximately $4,420. There is nothing to

cause me to have reason to believe that any particular person has any interest in that fertiliser. If a forfeiture order is made, any person who claims an interest in it has the opportunity to apply for an order under s7. The difficulty in the way of the making of a forfeiture, however, is that it does not seem that it falls within the definition of "tainted property". It may have been brought to the site with a view to being used in or in connection with the cultivation of the cannabis, but it was not. It was not put into service or turned to account or expended or consumed in use (see definition of "use" in Concise Macquarie Dictionary). There is no evidence to show that it was derived or realised directly or indirectly by a person as a result of the commission of the offence. The application for forfeiture of it is refused.

The same considerations apply to the fertiliser claimed by Mr Ottens to be his. But if I am wrong about the question of use, I am not satisfied that that fertiliser is tainted property in any event. There was clear evidence from Mr Ottens, which I accept, that it was purchased by him and that it was not tainted property within the meaning of the definition.

$7,000 - cash

As to the sum of $7,000 in cash, it was found in Mr Helps' vehicle when the police searched it at the site of the cannabis plantation. Mr Helps claims no interest in it.

The agreed facts as between the Crown and Mr Ottens are that a co-offender gave the $7,000 to Mr Helps to pass on to Mr Ottens, it being a one eight share of the proceeds of sale of some cannabis which had been previously harvested. Mr Ottens entered into the enterprise with a view to obtaining a one eight share of the proceeds of sale of the cannabis harvested from the site. The application for the forfeiture of that sum of money is not opposed by anyone appearing before the Court on this application. Although the information about it is brief, it nevertheless satisfies me that that property was derived or realised, directly or indirectly, by Mr Helps as a result of the cultivation of cannabis, the subject of the indictment in this case. There is no reason to believe that any particular person not represented before the Court has an interest in that cash, but, if it is forfeited, anyone who claims such an interest may make an application under s7.

Legal Issues

I now turn to consider other matters of law particularly in relation to discretion. The *Act* confers upon the Court, and any other exercising jurisdiction under it, a discretion as to whether an order for forfeiture is be made in respect of the property, the subject of the application (s5). Before proceeding to consider forfeiture, the Court must first be satisfied that the property, the subject of the application, is "tainted property" within the meaning of the *Act* and that it is tainted in relation to the serious offence for which a

person has been convicted (or deemed to have been convicted). The Director bears the onus of satisfying the Court in respect of those matters. It is unclear as to whether the proceedings for forfeiture are criminal or civil in nature. The *Act* is silent on the point. In some cases the answer to that question may be important, for example, in relation to the standard of proof. It was not an issue in this case, presumably because the facts which had to be ultimately found were not much in dispute on the material before the Court reduced to that which is normally admissible as evidence in a Court of law. There is no suggestion that those rules are in any way abrogated by the *Act* in relation to forfeiture except, perhaps, by s64 (as to other remedies see s11(6) in Part III and numerous provisions in Part IV - "Restraining Orders"). Whatever may be the case, I have no reasonable doubt as to the findings in respect of which the Director bears the onus, but that may not be the standard which needs to be applied.

Whatever may be the nature of proceedings seeking a forfeiture order, and the consequences flowing therefrom, there is no doubt that such an order is penal in character (per Lord Diplock in *Cuthbertson* (1981) AC 470 at 484; and, for example in *Ward, Miles and Graham* (1987) 33 A Crim R 60 at p66 and *Cheatley v R* (1972-1973) ALR 907), and thus the *Act* is to be strictly construed.

In the case of Helps, he was sentenced at the same time as a number of co-offenders. It was mooted during the

proceedings on sentence that the forfeiture application would be made, but his counsel applied for an adjournment of that application so as to seek further instructions. There was no application for adjournment of the sentencing proceedings until the application had been heard.

As to Ottens, the plea on sentence and application for forfeiture were heard together and both adjourned for consideration. It is not part of the scheme of the *Act* that an application be heard by the sentencing Judge (s55(2)). The deferral of the hearing of the application until after sentencing is clearly envisaged and sanctioned by s5(1), in that the relevant period is 6 months after conviction or the like.

During the course of the hearing of the application concerning Ottens, he placed in evidence an affidavit going to the ordinary use to which the various items of property were put, hardship and other matters considered to be relevant to those proceedings. Counsel for the Director obtained leave to cross-examine on the affidavit, during the course of which he unsuccessfully sought to have Ottens answer questions directed to his culpability for the offence. It was put on behalf of the Director that the Court could weigh in the balance, in the exercise of its discretion in the forfeiture application, not just hardship, but also the degree of culpability of the offender. That is correct, but it did not seem right to me that in circumstances where the offender and the Director had agreed on the facts as to culpability for the purpose of sentence, and

such facts had been put to the Court, that the Director should be permitted to endeavour to adduce admissions from the offender going beyond those agreed to on sentence, in proceedings having to do with forfeiture. I can see no warrant for that course of conduct. It is unfair. Apart from anything else, privilege against self-incrimination may arise. Offenders resisting a forfeiture application, potentially exposed to cross-examination with that objective, may be deterred from giving evidence relevant to forfeiture, and thus are effectively denied the opportunity, given by the statute, of endeavouring to protect their property interests and putting forward hardship. No relevant authority was cited on behalf of the Director and I have been unable to find any. Once my tentative views were made known, in the course of argument, counsel for the Director desisted from pursuing the matter, quite properly in my view. The Court may well be embarrassed by proceeding to sentence on one view of culpability, but being presented with another in relation to forfeiture. That can not be right.

The relationship between sentence and forfeiture, if any, which may be taken into account by the Court is not an easy matter. One thing is abundantly clear, and that is that a sentence must not be increased so as to allow room for the refusal or mitigation of a forfeiture order, nor do I think that the sentence should be mitigated because it is intended that a forfeiture order be made. But the Court may have regard to any hardship that may reasonably be likely to be caused to any

person, including the offender, by the proposed order (s5(1)(b)(ii)). In *Tarzia* (1991) 52 A Crim R 102 at 107, the Court of Criminal Appeal of Western Australia held that the length of sentence and severity of the penalty imposed for the offence to which the application for forfeiture relates is relevant to the hardship which the offender will suffer if a forfeiture order is made. With respect to the Court, it appears to have gone a little too far, since the matter to be taken into consideration is only the hardship that may reasonably be likely to arise. Otherwise I agree. I bear in mind the sentence of imprisonment just passed upon Mr Ottens. The Court also pointed out that an order for forfeiture is an additional punishment, and that it was appropriate to assess the effect of a forfeiture order in the light of the punishment already imposed. It went on to adopt the view expressed in earlier cases (see at p109) that the "hardship" to the offender must be something other than the hardship which inevitably flows from the loss of the property itself.

In *Taylor v Attorney-General* (1991) 55 SASR 462 at 474 Debelle J. reviewing the cases on this question, suggested the following considerations may be relevant:

" . the value of the property;
. the nature of the offender's interest in the property;
. the value of the drugs involved or the size of the crop;
. whether the property was acquired with the proceeds of the sale of drugs;
. the utility of the property to the offender;
. the length of ownership of the property;

. the extent to which the property is connected with the commission of the offence;
. the fact that forfeiture is intended as a deterrent; and
. the interests of innocent third parties."

His Honour proceeded:

"Although the legislation provides some safeguard for the interests of third parties, the exercise of the discretion is a further safeguard and may be of great importance when hardship would be caused to persons who are not offenders or innocent third parties with interests in the property. As Allen J observed in *R v Bolger* (supra) (at 128):

> "If, for example, the forfeiture order would be in respect of a family home, the hardship which would follow to innocent persons who lived in the home, albeit that they had no interest in the property in law or in equity, would be material. Likewise it would be material if the tainted property were a car which the wife of the offender could not do without if she weren't able to get her children to and from school. A hardship might not be decisive. But clearly it would be relevant to the exercise of the discretion."

The infinite variety of circumstances which might arise leads to a natural disinclination to suggest what other factors might affect the exercise of discretion. But, broadly speaking, in the exercise of its discretion, the court will have regard to the circumstances of the offence, the extent to which the property was connected with the commission of the offence, the seriousness of the offending, the value of the property in relation to the offence and the likely consequences of an order for forfeiture upon the offender and others who might be affected by the order.

Where land is being used for growing cannabis, regard might not necessarily be had to the value of the land on which it was grown, but regard might be had to the consequential hardship on the offender or his family,

> for example, if they were to be left homeless or in penury. The exercise of discretion might be affected by the size of the crop grown on the land or the frequency of offending. If partnership assets are used, regard might be had to the interests of innocent partners. If a motor car is involved, and that is the family motor car, it might be material if the wife of the offender could not do without it: see also Olsson J in *Attorney-General v Meyer* (supra).
>
> At the end of the day it is necessary to have regard to whether the order of forfeiture would be severely disproportionate to the circumstances of the offence and the nature and degree of the offending. The fact that there is some disproportion is not necessarily a reason for refusing to order forfeiture: that would fail to recognise Parliament's intention to create an additional deterrent. However, if forfeiture were to result in unnecessary hardship, having regard to the circumstances of the offence, a court might be justified in refusing the order."

I respectfully agree with those views.

In some earlier cases it was suggested that the Court was restricted to taking into account the matters referred to in s5(1) before proceeding to exercise its discretion, but the preferred view, with respect, is as expressed by Williams J. in *Anderson* (1992) 61 A Crim R 382 at 384 and the cases there referred to. The discretion is very wide, but of course it must be exercised judicially, including after bearing in mind the objects of the legislation. Confining myself to forfeiture (other considerations apply to pecuniary penalty orders) those objects include incapacitating the offender by depriving him of the physical and financial ability, power or opportunity to continue to engage in the proscribed conduct; eliminating

unjust enrichment; deterring the offender and others from crime by undermining the ultimate profitability of the venture, and, with all those considerations in mind, to protect the community by curtailing the circulation of prohibited items. Rehabilitation of the offender seems to be a matter of little weight. (Fisse, Fraser and Coss (eds) - *The Money Trail* - Law Book Company 1992 Chapter 6 "Forfeiture, Confiscation and Sentencing" by Professors Freiburgh and Fox; and Professor's Freiburgh's article "Criminal Confiscation, Profit and Liberty" (1992) 25 ANZJ Crim 44).

But that is not the end of it. In *Lake* (1989) 44 A Crim R 63 Kirby P., with whom Lee CJ and McInerney J agreed at pp68 and 69, said:

> "The inevitable and intended consequence of the operation of the Act is that it will have a punitive consequence. However, the Act must operate and have its deterrent effect, according to its terms. Those terms give relief if the sentencing Judge considers that, in all the circumstances, hardship would be occasioned by an order under the Act. Therefore the fact that allowing hardship will, to that extent, reduce the deterrent impact of the Act, is simply part and parcel of the ordinary operation of the Act, according to the language which Parliament has used. It is not a frustration of that operation but a fulfilment, as Parliament intended".

SUMMARY

Orders

Helps' motor vehicle

For the reasons given I am satisfied that the vehicle is tainted property; its use in connection with the offence was minor; it was acquired and ordinarily used for innocent purposes; Mr Helps' daughter may reasonably be likely to suffer hardship following the making of the order. In the exercise of discretion the application for forfeiture is refused.

Scobie & Son Pty Ltd - interest as lessee - the Pastoral Lease

For the reasons given I am satisfied that the land comprised in the lease is tainted property; its connection with the offence was significant; it was acquired and developed and ordinarily used over many years for innocent purposes.

Hardship may reasonably be likely to arise on the part of the company, beyond that caused by the forfeiture of the lease itself, arising from reduced price upon sale by the mortgagee and thus not reducing the debt of the company to the level which might be expected if the sale was at fair market value.

Hardship may reasonably be likely to arise on the part of Mr and Mrs Ottens by reason of the reduction in the value of their shares, both in Scobie Pty Ltd and Nectar Pty Ltd, and increased liability on personal guarantees for loans.

It is not suggested that Mrs Ottens is other than an innocent party. Indeed, counsel for the Director said that he did not wish to cause her any hardship if it could be avoided. Bradley Ottens' expectations may reasonably be likely to be dashed. Mr Ottens' place of residence and vocation will be lost to him and the burden of the sentence will be increased.

This was a very serious offence of its type, but in all the circumstances Mr Ottens should not be obliged to suffer such draconian consequences.

In the exercise of discretion, the application for forfeiture of the pastoral lease is refused.

John Deere Tractor

The evidence does not show that it is tainted property. The application for forfeiture is refused.

Front End Loader

It is shown to be tainted property, but its ordinary use was innocent and its use in connection with the offence minimal. In the exercise of discretion the application is refused.

Fertiliser

None of it is shown to be tainted property. The application is refused.

$7,000 - cash

That property was derived from the cultivation of the cannabis. No other considerations arise. It is forfeited to the Territory.