

PARTIES: DIRECTOR OF PUBLIC PROSECUTIONS

v

LLOYD GREEN

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION

FILE NO: 82 of 2008 (20817720)

DELIVERED: 21 May 2009

HEARING DATES: 24 and 27 March 2009 and 27 April 2009

JUDGMENT OF: RILEY J

**CATCHWORDS:**

CRIMINAL PROPERTY FORFEITURE – REAL PROPERTY – SUBSTITUTION – Interpretation of the *Criminal Property Forfeiture Act* (NT) – drug offences – crime used property unavailable for forfeiture – crime used property substitution declaration sought – property is the physical aspect of the land not the legal interest in the land – definition of “effective control” of property – Court may declare property be substituted for crime used property

*Criminal Property Forfeiture Act* (NT) s 3, s 5, s 7, s 10, s 11, s 12, s 39, s 43, s 44, s 63, s 64, s 81, s, 82, s 85, s 95, s 96, s 97, s 98, s 101; *Misuse of Drugs Act* (NT)

*Solicitor General v Bartlett* [2008] 1 NZLR 87; *Director of Public Prosecutions v Walsh* [1990] WAR 25; *Connell v Lavender* (1991) 7 WAR 9, applied

**REPRESENTATION:**

*Counsel:*

Applicant:	R Jobson
Respondent:	Self represented
Contradictor:	A Wyvill

*Solicitors:*

Applicant:	Solicitor for the Northern Territory
Respondent:	N/A

Judgment category classification:	B
Judgment ID Number:	Ri10905
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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*DPP v Green* [2009] NTSC 21  
No 82 of 2008 (20817720)

BETWEEN:

**DIRECTOR OF PUBLIC  
PROSECUTIONS**  
Applicant

AND:

**LLOYD GREEN**  
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 21 May 2009)

- [1] The issues in this case relate to the interpretation and application of certain provisions of the *Criminal Property Forfeiture Act* (NT).

**The scheme of the Act**

- [2] In the preamble the Act is expressed to be an Act to provide for the forfeiture of property acquired as a result of criminal activity and property used for criminal activity. Section 3 of the Act identifies a further objective of the legislation to be 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”.

- [3] The Act applies to property owned or effectively controlled or previously owned by persons who are involved in or are taken to be involved in criminal activities (s 10(1)). The property, whether it be real or personal, will be liable to forfeiture where it is property that is "crime used" or property that is "crime derived" as defined in the Act.
- [4] The forfeiture of the property is to be for the purpose of compensating the Territory community for the cost of deterring, detecting and dealing with criminal activities (s 10(2)). It is clear that the purpose of the legislation is not to impose a further punishment upon offenders but, rather, to act as a compensatory measure to the community. However, it is to be noted that the power to order forfeiture is also designed to deter criminal activity and prevent the unjust enrichment of persons involved in criminal activities (s 10(3)). The legislation permits a very serious invasion upon the rights of a citizen to the exclusive enjoyment of his or her property.
- [5] In the present case the Court is not concerned with the issue of crime derived property. Crime derived property focuses upon property that is wholly or partly derived or realised from the commission of a forfeiture offence under the Act (s 12). The Court is here concerned with property which is liable to forfeiture under the Act as "crime used property". For present purposes, property is crime used if the property was used, directly or indirectly, in or in connection with the commission of a forfeiture offence. Section 11 of the Act is in the following terms:

## 11 Crime-used property

- (1) For the purposes of this Act, property is crime-used if –
  - (a) the property is or was used, or intended for use, directly or indirectly, in or in connection with the commission of a forfeiture offence or in or in connection with facilitating the commission of a forfeiture offence;
  - (b) the property is or was used for storing property that was acquired unlawfully in the course of the commission of a forfeiture offence; or
  - (c) an act or omission was done, omitted to be done or facilitated in or on the property in connection with the commission of a forfeiture offence.
- (2) Without limiting subsection (1), property described in that subsection is crime-used whether or not –
  - (a) the property is also used, or intended or able to be used, for another purpose;
  - (b) any person who used or intended to use the property as mentioned in subsection (1) has been identified;
  - (c) any person who did or omitted to do anything that constitutes all or part of the relevant forfeiture offence has been identified; or
  - (d) any person has been charged with or convicted of the relevant forfeiture offence.

[6] The provisions of the Act allow for the identification of crime used or crime derived property, the preservation of that property and, ultimately, the forfeiture of the property in identified circumstances.

[7] Section 39 of the Act permits a member of the Police Force to seize property if there are reasonable grounds for suspecting that the property is crime used

property or crime derived property. Division 2 of Pt 4 of the Act provides for the granting of restraining orders in relation to specified property if there are reasonable grounds for suspecting that the property is crime used or crime derived (s 43). Restraining orders can also be made in relation to all or any property that is owned or effectively controlled by a named person where the person has been charged or will be charged with an offence that could lead to the person being declared a drug trafficker under the *Misuse of Drugs Act*. A restraining order may also be granted against a named person where an application has, or is to be made, for an unexplained wealth declaration, a criminal benefit declaration or a crime used property substitution declaration in relation to the person (s 44).

- [8] Part 5 of the Act allows for objections to orders restraining property. Section 63 deals with the setting aside of a restraining order in relation to crime used property and s 64 deals with the setting aside of a restraining order in relation to crime derived property. It is not necessary to address the nature and scope of objections in these proceedings.
- [9] In the event that identified crime used property is not available for forfeiture the Director of Public Prosecutions may apply to the Supreme Court for a crime used property substitution declaration against a person. The circumstances in which crime used property will not be available for forfeiture are specified in s 82 of the Act in the following terms:

## 82 Crime-used property not available

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

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

[10] In circumstances where crime used property is not available for forfeiture the application for a crime used property substitution declaration is able to be made pursuant to the terms of s 81 of the Act which are as follows:

## 81 Application for crime-used property substitution declaration

- (1) The DPP may apply to the Supreme Court for a crime-used property substitution declaration against a person.
- (2) On hearing an application under subsection (1), the court may declare that property of equivalent value owned or effectively controlled by the respondent is to be substituted for crime-used property if –
  - (a) it is more likely than not that the respondent has made criminal use of property so that the property is crime-used property within the meaning of section 11; and
  - (b) the crime-used property is not amenable to a restraining order or forfeiture under this Act for a reason or reasons referred to in section 82.

- (3) An application under subsection (1) may be made in conjunction with an application under Part 4, Division 2 for a restraining order, in proceedings under Part 5 for the hearing of an objection to the restraining of property, or at any other time.
- (4) If the court makes a declaration under this section, the court must –
  - (a) assess the value of the crime-used property in accordance with section 85;
  - (b) specify the assessed value of the crime-used property in the declaration; and
  - (c) order the respondent to pay to the Territory the amount specified in the declaration as the value of the crime-used property.
- (5) Crime-used property substitution declarations can be made against 2 or more respondents in respect of the same crime-used property, whether or not the applications for the respective declarations are heard in the same proceedings.
- (6) If a court makes a declaration under this section, the court may make any necessary or convenient ancillary orders, including awarding costs as the court sees fit.

[11] The value of the crime used property is to be assessed in accordance with the terms of s 85 of the Act. That section provides that the value is taken to be its full value even if the respondent did not outlay any amount for the purpose of obtaining or making criminal use of the property or did not outlay an amount equal to its full value for that purpose.

[12] Section 95 of the Act then provides for applications for forfeiture orders. Section 96 deals with applications for forfeiture in relation to crime used

property and s 97 with applications in relation to crime derived property.

Those sections are in the following terms:

96 Crime-used property

- (1) A court that is hearing an application under section 95 in relation to property restrained on suspicion the property was crime-used must order that the property is forfeit to the Territory if the court is satisfied that it is more likely than not that the property is crime-used.
- (2) A court must order forfeiture of property under subsection (1) despite that no person has been identified as the owner or controller of the property.

97 Crime-derived property

A court that is hearing an application under section 95 in relation to property restrained on suspicion the property was crime-derived must order that the property is forfeit to the Territory if the court is satisfied that it is more likely than not that the property is crime-derived.

[13] Where, as here, the court is being invited to make a forfeiture order in respect of substituted property the application is made by the Director of Public Prosecutions under s 98 of the Act. Section 101 of the Act then provides:

101 Substituted property

A court that is hearing an application under section 98 may order that property subject to a restraining order is forfeit to the Territory if a crime-used property substitution declaration has been made under section 81 against the person who owned or effectively controlled the restrained property at the time the restraining order was made.

### **The present application**

- [14] On 10 July 2008 the respondent was dealt with in the Supreme Court in relation to a number of offences under the *Misuse of Drugs Act*. He was convicted of unlawfully cultivating 18 cannabis plants, possessing 4.161 kg of cannabis plant material and of supplying cannabis plant material to an unknown person. In addition to being convicted on each count, he was sentenced to a total effective period of imprisonment of two years commencing on 10 July 2008. The sentence was suspended upon him entering into a home detention order for a period of nine months.
- [15] The offences occurred in a shed on a rural property situated at Block 375 Stuart Highway (Block 375). At all relevant times the respondent was the owner of a leasehold interest in Block 375 and it was pursuant to this interest that he was in occupation of the shed which was used in committing the subject offences.
- [16] The owner of the freehold interest in Block 375 was not involved in the offending and the applicant has accepted that the offending occurred without the knowledge of the owner. As has been noted above, s 82 of the Act provides, inter alia, that crime used property is not available for forfeiture if the respondent does not own or have effective control of the property. In those circumstances the applicant concluded that no grounds existed upon which it could seek the restraint and ultimate forfeiture of the land at Block 375 on the ground that the land is crime used property. The applicant therefore sought a crime used property substitution declaration against the

respondent pursuant to the provisions of s 81(2) of the *Criminal Property Forfeiture Act*. The property sought to be substituted consisted of two residential properties associated with the respondent being Unit 3, 75 Driver Ave, Palmerston, (the Palmerston unit) which is owned by the Respondent and 212 McGorrie Rd, Marrakai, (the Marrakai land) which is also owned by the respondent along with his de facto wife

[17] On 30 June 2008 Mildren J granted a restraining order pursuant to s 81(2) of the Act over the Palmerston unit and the Marrakai land. According to the unchallenged expert evidence led on behalf of the applicant, at the relevant time the freehold value of Block 375 was \$1.5 million, the Palmerston unit had a value of \$205,000 and the Marrakai land a value of \$105,000. I accept those valuations for the purposes of these proceedings. There was no valuation of the leasehold interest held by the respondent in Block 375.

### **The contradictor**

[18] When the matter came before the Court the respondent and his wife, who had each submitted objections, were self represented. As this was the first application of its kind in the Northern Territory I requested the applicant to engage independent legal counsel to appear as a contradictor. Mr Wyvill of counsel undertook that role. The respondent and his wife continued to be self represented. They adopted and relied upon the submissions of the contradictor.

[19] The contradictor submitted that in order to succeed in its application the applicant must, inter alia, establish the following matters:

- (a) the existence of "crime used" property;
- (b) that the crime used property is not amenable to restraint and forfeiture under the Act for a reason given in s 82 of the Act;  
and
- (c) that the respondent owns or effectively controls property "of an equivalent value".

[20] In its submissions the applicant accepted it must establish the matters in items (a) and (b) in the preceding paragraph but said, correctly, in relation to item (c) that the court is only required to assess the value of the crime used property to make an order pursuant to s 81(4)(c) of the Act.

### **The existence of "crime used" property**

[21] It is readily apparent that the respondent made criminal use of the rented premises in the course of cultivating the cannabis plants. There is a relevant certificate of conviction of the respondent and the transcript of the evidence given in the proceedings and the sentencing transcript have been received into evidence pursuant to s 141 of the Act. The rented property was used directly in the commission of the offences notwithstanding that it was also used for residential purposes. The respondent, who by virtue of s 83(1) of the Act bears the onus, has not endeavoured to establish the contrary. In the

phraseology of s 81(2)(a) of the Act it is more likely than not that the respondent made criminal use of the property so that the property is crime used property within the meaning of s 11 of the Act.

**Is the property amenable to restraint?**

[22] As the argument developed it became clear that there were two issues to be resolved in these proceedings:

- (a) whether the reference to "property" in the expression "crime used property" is a reference to the land as a physical entity or a reference to the legal interest held in the land by the relevant respondent; and
- (b) whether the respondent did have effective control of the property.

[23] The contradictor argued that, in the circumstances of this case, the relevant crime used property was not the freehold interest in Block 375, which was not available for forfeiture, but rather the leasehold interest held by the respondent in that land, which was available for forfeiture. It was submitted that the relevant crime used property, being the leasehold interest of the respondent, was amenable to restraint and forfeiture under the Act and, accordingly, there was no power to make an order under s 81(2) because the requirements of s 81(2)(b) were not satisfied.

- [24] The applicant did not dispute that the respondent was in occupation of the land pursuant to a leasehold interest and that he used the land in committing the subject offences whilst in occupation pursuant to that interest.
- [25] In relation to real property there are different kinds of tenures and interests available including freehold, leasehold, licences and licences for particular purposes. The contradictor submitted that such interests are not easily taken and exercised by third parties without the consent of the owner. They are distinct interests with distinct entitlements.
- [26] In the present case it was pointed out that the "legal estate", which the respondent owned and over which he had effective control, was the leasehold estate. It was submitted that it is the interest of the respondent that is targeted in the legislation rather than a legal estate or interest held by a person, other than the respondent, who was not involved in the offences. In this case it was the leasehold interest held by the respondent that was the property used in the commission of the offence.

### **The submissions of the Applicant**

- [27] In response, the applicant made it plain that it did not contend that a particular legal interest in the land, being a freehold interest or, indeed, any other legal interest had been crime used. Rather, the applicant maintained that the corporeal aspect of the property was so used and it was that use which made the land crime used property for the purposes of the Act. Having established that the land itself had been so used, it was submitted

that the crime used property in this case was not amenable to forfeiture because ownership of the freehold interest in the subject land was held by an innocent party.

[28] The applicant submitted that the crime used property for the purposes of s 11 of the Act is the physical entity, the crime used land, and not some legal interest in that land. It points out that "property" as defined in s 5 of the Act refers to both the corporeal aspect of the land and rights in the nature of ownership of the land. The applicant submitted that "property" in the context of "crime used property" is that which is referred to in par (a) of the definition rather than a legal or equitable interest in the property as referred to in par (b) of the definition. Crime used property refers to the physical entity rather than the legal interest.

[29] The correctness of this view of s 11 of the Act is, in my opinion, made plain by reference to the words of the section. For example, the section refers to the "use" of the property in conjunction with a forfeiture offence. It refers to the use of the property for storage and makes reference to an act or omission being done or facilitated "in or on the property in connection with the commission of a forfeiture offence". An "interest" in land, such as a leasehold interest, cannot be "used" in the sense contemplated by that section. The legal interest is a means by which a person may become entitled to utilise property for a relevant purpose but it is the physical entity which is used for the purpose of crime.

- [30] Similarly s 11(2) of the Act talks of the property being "used" for "another purpose". What is intended by reference to the property being capable of other uses is the physical property. The "other use" must, for present purposes, mean uses of the land itself by the person who is in occupation.
- [31] The applicant submitted that the intention of the legislation is to provide a regimen whereby a person who uses the property of an innocent party in a physical manner in the commission of a forfeiture offence may be subject to a substitution declaration and the subsequent forfeiture of property owned or effectively controlled by the offender to the "equivalent value" of the property which was crime used. The Act refers to the physical entity of property and not any legal interest in property which has been crime used.
- [32] In my opinion, the submissions of the applicant are to be accepted. The terminology adopted within the relevant sections makes the intention clear. It would place an unacceptable strain upon the language to seek to interpret it in the manner submitted by the contradictor.
- [33] In my opinion, for the purposes of the present substitution proceedings which are confined to real property, crime used property relates to the physical aspect of the land itself and not some legal interest in the land.
- [34] The valuation of the crime used property for substitution purposes refers to the actual value of the land, however that may be assessed, and is not confined to any particular legal interest a respondent may have in relation to the property. In this case it was submitted that the reference to "equivalent

value" in s 81(2) "must mean unencumbered freehold value as land can have no greater value than that". I do not agree that is necessarily the case. In my view, the assessment of equivalent value may not be so restricted but in any event it is sufficient to conclude that for the present case the unencumbered freehold value is the appropriate measure.

### **Effective control**

[35] The term "property" is defined in s 5 of the Act to mean:

- (a) real or personal property of any description, wherever situated and whether tangible or intangible; or
- (b) a legal or equitable interest in any property referred to in paragraph (a).

[36] In the present case the applicant identified the crime used property as the land at Block 375. The applicant submitted that Block 375 was not available for forfeiture by virtue of s 81 of the Act because the respondent did not own or have effective control of it. There was no suggestion that the respondent owned the property and the issue, therefore, was whether he had effective control over the property by virtue of the leasehold interest he held over the relevant part of the block.

[37] The meaning of the expression "effective control" is addressed in s 7 of the Act. It includes within the scope of the expression a person who has effective control of property even though he does not have the legal estate in the property. It will be sufficient if the property is directly or indirectly subject to his control or is held for his ultimate benefit.

[38] It was the submission of the applicant that a leasehold interest in property in the present circumstances does not provide the respondent with "effective control" for the purposes of the Act. It was said that a person with the leasehold interest held by the respondent has a limited interest in the property. It was argued that the expression "effective control" cannot be taken to apply to mere usage of property or a recognized right to occupy, use or possess property. The expression refers to a level of control beyond that which a tenant such as the respondent possesses. Effective control must include a capacity sufficiently wide to encompass a right of sale, an ability to renovate or develop or a capacity to charge the property.

[39] The applicant argued that if a mere tenant was held to have effective control of the property for the purposes of the Act, the objects of the Act would be significantly frustrated. It was submitted that such an interpretation would place respondents beyond the reach of s 82(a) of the Act and allow persons to rent premises in order to commit offences leaving their own property beyond risk of forfeiture by way of substitution.

[40] The expression "effective control" has been considered in both New Zealand and Western Australia in relation to legislation of a similar kind to that under consideration here. In *Solicitor General v Bartlett*<sup>1</sup> Stevens J observed that in determining whether a person had "effective control" of property the Court was entitled to consider the real, de facto position of the respondent in relation to the property. He went on to say [27]:

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<sup>1</sup> [2008] 1 NZLR 87

The intent is that the respondent should not profit from his crime purely because of the legal structure by which he chooses to organise his assets. In order to determine whether the respondent had effective control of the property, the court must ask whether in fact the respondent had the capacity to control, use, dispose of or otherwise treat the property as his own.

[41] The decisions in Western Australia were to similar effect. In *Director of Public Prosecutions v Walsh*<sup>2</sup> Seaman J regarded effective control as meaning a degree of control where the respondent was able to treat the property "as his own" at the relevant date. In *Connell v Lavender*<sup>3</sup> Rowland J said:

The expression contemplates control that is practically effective, in the sense that the person concerned has in fact the capacity to control the possession, use, or disposition of the property.

[42] In the present case the rights of the respondent were limited to rights of occupation and use. He was not able to dispose of the property, charge it, develop it or otherwise use it in such a manner as to treat it as his own. His limited rights did not give him "effective control" of the property in the sense contemplated by s 82 of the Act. His leasehold interest was not available for forfeiture because it did not provide him with effective control of the property. It follows that the Court may declare property of equivalent value owned or effectively controlled by the respondent be substituted for the crime used property, being Block 375.

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<sup>2</sup> [1990] WAR 25

<sup>3</sup> (1991) 7 WAR 9 at 22

[43] It was not the role of the contradictor to make submissions as to the personal circumstances of the respondent nor as to whether there is any material to be placed before me by way of amelioration of the primary impact of the legislation. There have been no submissions regarding the status of the Marrakai land which is jointly owned by the respondent and another. I will hear further from the applicant and from the respondent as to the consequences of the conclusions I have reached and as to the orders or declarations I should make.

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