

Form 27D Respondent's Submissions
(rule 44.03.3)

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B22 of 2014

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND

BETWEEN:

JOHN WILLIAM HENDERSON
Appellant

and

THE STATE OF QUEENSLAND
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification as to Form

1. This submission is in a form suitable for publication on the Internet.

Part II: The Issues

2. The principal question raised by the appeal is whether it is sufficient to satisfy s.68(2)(b) of the *Criminal Proceeds Confiscation Act* (2002) (Qld) (the CPC Act) for an applicant for an exclusion order to prove that the applicant acquired possession of the property to which the application relates in circumstances which do not involve any illegal activity by the applicant.

Part III: Certification as to s.78B of *Judiciary Act* 1903

3. The respondent considers that notice need not be given pursuant to s.78B of the *Judiciary Act* 1903.

Part IV: Material Facts

4. The respondent does not contest any material facts set out in the appellant's narrative of facts or chronology.

Part V: Statement about Applicable Statutes



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5. The appellant's references to the CPC Act are incomplete because they do not include reference to ss.24-26 of that Act.

Part VI: Statement of Argument

6. Section 68 of the CPC Act¹ provides as follows:-

"68 Making of exclusion order

- (1) *The Supreme Court, on an application under section 65 or 66, may make an exclusion order.*
- (2) *The Supreme Court must, and may only, make an exclusion order if it is satisfied-*
- 10 (a) *the applicant has or, apart from the forfeiture, would have, an interest in the property; and*
- (b) *it is more probable than not that the property to which the application relates is not illegally acquired property."*

7. It is common ground that:-

- (a) the property to which the application relates is \$598,325 in Australian currency;
- (b) that property was the proceeds of sale of the jewellery;
- 20 (c) if the jewellery was illegally acquired property, the proceeds of its sale was also illegally acquired property under s.22(2).

8. Sections 22(1) to (4) of the CPC Act provide as follows:-

"22 Meaning of "illegally acquired property"

- (1) *Property is "illegally acquired property" if it is all or part of the proceeds of an illegal activity.*
- (2) *Property is also "illegally acquired property" if-*
- (a) *it is all or part of the proceeds of dealing with illegally acquired property; or*
- (b) *all or part of it was acquired using illegally acquired property.*
- 30 (3) *For subsection(2), it does not matter whether the property dealt with or used in the acquisition became illegally acquired property because of subsection(1) or subsection (2).*
- (4) *Subsections (1) and (2) apply whether or not the activity, dealing or acquisition because of which the property became illegally acquired property happened before the commencement of this section."*²

¹ References to the CPC Act in these submissions are to Reprint 3D of the Act, in force from 1 January 2011 and at the date of the trial in June 2011. The version of s.68 in the appellant's outline is the version in force before its amendment on 8 December 2003.

² Section 22 commenced on 1 January 2003.

9. Schedule 1 Part 1 of the Act contains examples of the practical operation of the definition “illegally acquired property”.³

10. “Illegal activity” is defined by s.15 as follows:-

“15 Meaning of “illegal activity”

An “illegal activity” is an activity that is-

- (a) *a serious crime related activity; or*
- (b) *an act or omission that is an offence against the law of Queensland or the Commonwealth; or*
- (c) *an act or omission committed outside Queensland that-*
 - (i) *is an offence against the law of the place in which it is committed; and*
 - (ii) *would be an offence mentioned in paragraph (b) if it were committed in Queensland.”*

11. Section 18 defines “proceeds” as follows:-

“18 Meaning of “proceeds”

“Proceeds”, in relation to an activity, includes property and another benefit derived because of the activity-

- (a) *by the person who engaged in the activity; or*
- (b) *by another person at the direction or request, directly or indirectly, of the person who engaged in the activity.”*

12. Property characterised as “illegally acquired property” under s.22 retains that character until it stops being property of that character. Sections 24 to 26 of the CPC Act provide as follows:-

“24 Definitions for subdiv 2

In this subdivision-

“character” of property means its character as either illegally acquired property or serious crime derived property.

“property” means property that is either of the following because of subdivision 1-

- (a) *illegally acquired property;*
- (b) *serious crime derived property.*

25 Property retains its character despite disposal

Illegally acquired property or serious crime derived property retains its character-even if it is disposed of, including by using it to acquire other property-until it stops being property of that character under section 26.

³ See s.7(1) and see also s.27.

26 *When property stops being illegally acquired property or serious crime derived property*

Property stops being illegally acquired property or serious crime derived property-

- 10
- (a) *when it is acquired by a person for sufficient consideration,⁴ without knowing, and in circumstances not likely to arouse a reasonable suspicion, that the property was illegally acquired property or serious crime derived property; or*
- (b) *when it vests in a person on the distribution of the estate of a deceased; or*
- (c) *when it is disposed of under this Act, including when discharging a pecuniary penalty order or a proceeds assessment order; or*
- (d) *when it is the proceeds of the disposal of property under this Act other than by sale under a condition of a restraining order or by order of the Supreme court under section 46 or 138; or*
- (e) *when it is acquired by Legal Aid as payment of reasonable legal expenses payable because of an application under this Act or in defending a charge of an offence; or*
- 20 (f) *in circumstances prescribed under a regulation.⁵*

13. None of the circumstances described in s.26 occurred in this case. Consequently, if the jewellery was illegally acquired property, it retained that character and did not stop being unlawfully acquired property upon the appellant's father making a gift of the jewellery to the appellant. The gift was not a s.26 dealing which affected the character of the property the subject of the gift.
14. Proof of that gift amounted to no more than proof that possession of the jewellery had been transferred from the appellant's father to the appellant. It was proof that the appellant had an interest in the jewellery under s.68(2)(a). It did not amount to proof that the jewellery was illegally acquired property under s.68(2)(b). Section 30 68(2) contains two separate and cumulative requirements. The first under paragraph (a) is concerned with title to property. The second, under paragraph (b), is concerned with the character of property according to a statutory definition of that character. The Act recognises, in s.27, that a person may own property which has the character of illegally acquired property.
15. The appellant bore the onus of proving that the jewellery was not the proceeds of illegal activity. The evidence led by the appellant was directed to showing a lawful acquisition of the jewellery by an ancestor by way of a reward for providing transportation services for Russian royalty around the 1900s or late 1800s. Implicit in that account was that possession of the jewellery was lawfully acquired

⁴ Defined by Schedule 6 as meaning a consideration that, having regard solely to commercial considerations, reflects the value of the interest.

⁵ No circumstances are prescribed under a regulation.

by the ancestor from the owner of the jewellery.⁶ The jewellery had been passed down in the family to the appellant's father.

16. That account was rejected as a truthful account. The trial judge accepted the evidence of Mr Penfold, a jeweller, that each of the items of jewellery was "of a relatively modern period post 1950s".⁷ Consequently, it was unknown how the appellant's father came to be in possession of the jewellery, and the appellant failed to establish that the jewellery was not illegally acquired property.
17. The appellant's argument on grounds 1, 5 and 6 advances three propositions:-
- (a) the jewellery was not the proceeds of an illegal activity because there was no evidence of illegal activity by the appellant and no evidence of the appellant's involvement in his father's acquisition of the jewellery;⁸
 - (b) it was sufficient for the purposes of s.68(2)(b) for the appellant to show that he acquired title to the jewellery by way of gift from his father;⁹
 - (c) it was unnecessary for the purposes of s.68(2)(b) for the appellant to show that his father had not unlawfully acquired the jewellery.¹⁰
18. Those propositions should not be accepted. They disregard the statutory concept of "illegally acquired property" and the continuing character of illegally acquired property until it stops having that character according to statutorily prescribed criteria. They rely on the common law concept of title to property which is not part of the CPC Act's legislative scheme for characterising property as "illegally acquired property" and providing for property which is not illegally acquired property to be excluded from restraint or forfeiture.
19. Illegally acquired property is simply property which is the proceeds of an illegal activity. Such proceeds are characterised as illegally acquired property without regard to whether the acquirer has a title to the property. Such proceeds continue to have the character of illegally acquired property despite subsequent dealings (including disposal or gift), other than those dealings which, under s.26, result in loss of that character.
20. It can be accepted that the jewellery is not illegally acquired property derived from illegal activity engaged in by, or involving, the appellant. That was not the case advanced by the State. To say that the jewellery was not the proceeds of illegal activity engaged in by the appellant is not a complete answer to the question whether the jewellery is illegally acquired property. That is because, if the jewellery is the proceeds of illegal activity engaged in by another person, it retains that character notwithstanding a transfer of possession to the appellant.

⁶ As White JA observed, the evidence was led to support an inference that the jewellery derived from an era when the jewellery had allegedly come into the family: see [2014] 1 Qd R 1 at 19 [91]; [2013] QCA 82 at [91].

⁷ Trial judgment [51], reported at (2011) 218 A Crim R 111.

⁸ Appellant's outline paragraphs 22, 23 and 27

⁹ Appellant's outline paragraphs 27 and 28.

¹⁰ Appellant's outline paragraph 29.

21. Accordingly, it was insufficient for the appellant to discharge his onus of proof under s.68(2)(b) to show that he acquired the jewellery by way of gift from his father. That showed merely a transfer of possession, and showed nothing about the character of the jewellery as being illegally acquired property or not.
22. Sections 25 and 26 negate the proposition that it was sufficient for the appellant to show that the jewellery was not illegally acquired property because he had received it from his father as a gift. The appellant had also to show that the jewellery was not illegally acquired property before the transfer to him by way of gift. The evidence of the circumstances of the acquisition of the jewellery by the appellant's father was not accepted. There was no evidence that the jewellery was lawfully acquired by the appellant's father.
23. The appellant's argument on grounds 2, 3 and 4 advances three propositions:-
- (a) the CPC Act operates by recognising and giving effect to common law possessory titles;¹¹
 - (b) the accounts of the origin of the jewellery did not detract from that recognition and effect and those accounts were not relevant to the possessory title of the appellant and his father;¹²
 - (c) the CPC Act does not require proof of a chain of title overriding possessory title.¹³
24. Those propositions should not be accepted. They also disregard the statutory concept of "illegally acquired property" and the continuing character of illegally acquired property until it stops having that character, and draw on common law concepts of title which are not part of the legislative scheme.
25. Section 68(2)(b) takes as its relevant point of reference the defined concept of illegally acquired property. It is irrelevant to the characterisation of property as illegally acquired property to identify whether the acquirer has title to the property, in the sense explained in *Russell v Wilson*¹⁴ i.e. a "title" to property just as lawful and just as powerful as if it were the absolute title except as against the absolute owner and any person claiming to hold by virtue of the absolute owner's authority. If the acquirer has title to property which is illegally acquired property, that property is nevertheless illegally acquired property and cannot be excluded from forfeiture under s.68(2)(b). Exclusion from forfeiture depends on the property not being illegally acquired property, not on title. Possessory title may be transferred upon the transfer of possession of the property, but that is not a criterion of relevance under the CPC Act. What is relevant is the character of property as illegally acquired property. The concept of illegally acquired property, its defining features and its enduring character are all creations of the CPC Act.

¹¹ Appellant's outline paragraph 30.

¹² Appellant's outline paragraphs 31-33.

¹³ Appellant's outline paragraph 35.

¹⁴ (1923) 33 CLR 538 at 546.

26. There is no error in failing to take into account the existence (or non-existence) of a possessory title in considering the s.68(2)(b) issue. The CPC Act does not make a possessory title a relevant criterion of the operation of s.68(2)(b).
27. It can be accepted that the account of the origin of the jewellery was not relevant to the question whether the appellant or his father had a possessory title of the kind described in *Russell v Wilson*. But whether the appellant or his father had such a possessory title was an irrelevant question to the operation of s.68(2)(b). The relevant question was whether the jewellery was illegally acquired property.
- 10 28. The case at trial was conducted on the basis that the issue was whether the account of the provenance of the jewellery given by the appellant and his siblings could be true.¹⁵ That account was found not to be true on the basis of expert evidence accepted by the trial judge as to the age of the jewellery. Consequently, it was unknown how the appellant's father came into possession of the jewellery, and the appellant failed to establish that the jewellery was not illegally acquired property.
- 20 29. The appellant's argument that the appellant's father had a possessory title which was not excluded by the Act misses the point. The possessory title of the father is not evidence that the jewellery was not illegally acquired property. Property which is illegally acquired property as defined by the Act does not cease to be illegally acquired property because it is in the possession of a person who has a possessory title to the property (unless the possessory title was acquired by a s.26 dealing).
- 30 30. The CPC Act does not require proof of a chain of title overriding possessory title. What s.68(2)(b) requires, as a necessary condition of excluding property from forfeiture, is proof that the property is not illegally acquired property. What constitutes illegally acquired property is not dependent on the existence or non-existence of a possessory title, or the transfer of a possessory title.¹⁶
- 30 31. Once it is understood, as ss.25 and 26 require it to be understood, that dealings in illegally acquired property (other than dealings described in s.26) do not change the character of property as illegally acquired property, it follows that proof that the appellant's father transferred possession of the jewellery to the appellant affords no proof that the jewellery was not illegally acquired property.
32. The evidence of the provenance of the jewellery was tendered to show that the jewellery was not illegally acquired property. That evidence was not accepted as truthful. Had the appellant not tendered that evidence his application for an exclusion order must necessarily have failed.
33. The appellant refers to the objects of the Act.¹⁷ Section 4 expresses objects of the Act. Section 13 explains Chapter 2 of the Act which contains the confiscation without

¹⁵ Trial judgment [52].

¹⁶ Other than a transfer in a circumstance described in s.26, none of which circumstances was present in this case.

¹⁷ Appellant's outline paragraphs 25 and 26.

conviction scheme.¹⁸ The objects are carried into effect by the substantive provisions of the Act including s.68(2)(b). There is nothing in s.4 or s.13 which is of particular assistance in this case.

34. The appellant's reliance¹⁹ on ss.4(2)(a) and (b) and ss.13(1), (4) and (7) of the Act as reinforcing a distinction between the activities of the appellant and the activities of his father, and the centrality of a causal link between illegal activity and the proceeds of that activity to the interpretation of the exclusion provisions is misplaced.
35. The essential features of the CPC Act regime for excluding property from forfeiture if the property is not illegally acquired property are found in the corresponding legislation of the Commonwealth, other States and Territories.²⁰ Those features are:-
- (a) the characterisation of property as illegally acquired property²¹ or a cognate expression such as proceeds,²² derived property²³ or tainted property;²⁴
 - (b) providing for property which is not of the relevant character to be the subject of an exclusion order;²⁵
 - (c) defining illegally acquired property or a cognate expression as meaning:
 - (i) property wholly or partly derived or realised (directly or indirectly) from the commission of an offence or unlawful activity;²⁶
 - (ii) property wholly or partly derived or realised from the disposal or other dealing with proceeds of an offence or unlawful activity, and property wholly or partly acquired using proceeds of an offence or unlawful activity;²⁷
 - (d) property retaining its character as illegally acquired property etc even if it is disposed of or otherwise dealt with;²⁸

¹⁸ See ss.4(3) and (5). The other scheme, in Chapter 3 is the confiscation after conviction scheme.

¹⁹ Appellant's outline paragraph 25.

²⁰ Commonwealth – Proceeds of Crime Act 2002
New South Wales – Criminal Assets Recovery Act 1990
Victoria – Confiscation Act 1997.
South Australia – Criminal Assets Confiscation Act 2005
Western Australia – Criminal Property Confiscation Act 2000.
Tasmania – Crime (Confiscation of Profits) Act 1993.
ACT – Confiscation of Criminal Assets Act 2003.
Northern Territory – Criminal Property Confiscation Act 2000.

²¹ Qld s.22; NSW ss.9(1) and (4).

²² Cth s.329(1), Vic s.3, SA s.7

²³ Vic s.3. The expression "crime derived" property is used in WA and NT: see WA s.148 and NT s.12.

²⁴ Vic s.3, Tas s.4(1), ACT s.10.

²⁵ Qld s.68; Cth ss.29(2), 73(1)(c)(i) and 94(1)(e); NSW s.25(2); Vic ss.36V(1)(a), 40B(1)(a), 50(1)(a) and 52(1)(a); SA ss.34(1)(b)(i), 58(1)(c)(ii) and (d), 59(1)(c)(ii) and (d) and 76(1)(c)(i); WA s.83(1); Tas s.18(5)(b) and (c); ACT ss.76(2)(a) and 77(2)(b); NT s.64(1)(b).

²⁶ Qld ss.22(1) and 18; Cth s.329(1); NSW ss.9(1)(a) and (4); Vic ss.7A(b), 7B(b) and s.3 definition of "tainted property" paragraphs (a)(iii) and (b)(iii); SA s.7(1)(a); WA s.148(1); Tas s.4(1) definition of "proceeds"; ACT s.10(1)(b); NT s.12(1).

²⁷ Qld s.22(2) and 18; Cth s.330(1); NSW ss.9(1)(b) and (c) and (4); Vic ss.7A(c), 7B(c); SA s.7(1)(c); WA ss.148(2) and (3); ACT s.10(1)(c); NT s.12(3).

²⁸ Qld s.25; Cth s.330(3); NSW s.9(3); SA s.7(1)(d); WA s.148(4); NT s.12(4).

(e) property only losing its character as illegally acquired property etc in specified circumstances.²⁹

36. The appellant's argument³⁰ that it is a step too far to disregard the possessory title should not be accepted. Possessory title is relevant under s.68(2)(a) in determining whether the applicant for an exclusion order has an interest in the property. It is irrelevant to the separate question under s.68(2)(b) whether the property is or is not illegally acquired property.

10 37. The appellant's argument³¹ that it is no part of the purpose of the CPC Act to take chattels from people whose accounts have been accepted should be rejected. The only account of the appellant which was accepted was his account that the jewellery was a gift from his father. Acceptance of that account satisfied s.68(2)(a). It did not, and could not having regard to ss.25 and 26, satisfy s.68(2)(b). The account of the provenance of the jewellery, which was relevant only to s.68(2)(b) was not accepted.

38. As to the object expressed in s.4(2)(b) of the Act, s.68 contains criteria by which effect is given to that object. It clearly distinguishes between title to property, the subject of s.68(2)(a), and the character of the property, the subject of s.68(2)(b). Those concepts are separate and distinct, save where title is acquired by a dealing mentioned in s.26 which results in property losing its character as illegally acquired property.

39. The appeal should be dismissed with costs.

20 **Part VIII: Time Estimate**

40. The respondent estimates between 1 hour and 1.5 hours will be required for the presentation of the respondent's oral argument.

DATED: 11 July 2014



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²⁹ Qld s.26; Cth s.330(4); NSW s.9(5); SA s.7(2); WA s.148(8); NT s.12(8).

³⁰ Appellant's outline paragraph 35.

³¹ Appellant's outline paragraph 36.