ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY & ANOR v. EMMERSON & ANOR (D5/2013)

Court appealed from: Court of Appeal of the Northern Territory [2013] NTCA 04

Date of judgment: 28 March 2013

Date special leave granted: 11 October 2013

On 15 August 2011 Southwood J declared the first respondent ("Emmerson") to be a "drug trafficker" pursuant to s 36A(3) of the *Misuse of Drugs Act 1990* (NT) ("MDA") By virtue of that declaration the property of Emmerson, which had previously been made the subject of a restraining order, was forfeited to the Northern Territory pursuant to the provisions of the *Criminal Property Forfeiture Act 2002* (NT) ("CPF"). It was common ground that, apart from the $70,050 seized from Emmerson (which was crime-derived property), the balance of the property restrained was neither crime-derived nor crime-used property. Nor was it unexplained wealth. The property was valued in excess of $850,000 and had been acquired by Emmerson through legitimate means. It was acknowledged to have no connection with any criminal offences whatsoever. At the relevant time Emmerson was aged 55 years. He had for many years unlawfully used different drugs. He had been convicted of various drug-related offences in the Northern Territory and interstate.

Emmerson appealed against the decision on four grounds, two of which challenge the validity of the legislative scheme contained in the MDA and the CPF. The first of those grounds is that the forfeiture of property effected by the legislative scheme created by s 36A of the MDA and s 94(1) of the CPF is a law with respect to the acquisition of property otherwise than on just terms contrary to s 50(1) of the *Northern Territory (Self Government) Act 1978* (Cth). The second is that those provisions confer powers and functions on the Supreme Court of the Northern Territory which substantially impair and distort the institutional integrity of the Court and, further, are inconsistent with the defining characteristics of a court including the reality and appearance of independence and impartiality.

The Court of Appeal (Riley CJ, Kelly and Barr JJ) by majority, Riley CJ dissenting, held that s 36A of the MDA and s 94(1) of the CPF are invalid because they create a scheme which enlists the Supreme Court to give effect to executive decisions and/or legislative policy in a manner which undermines its institutional integrity in a degree incompatible with its role as a repository of federal jurisdiction.

The ground of appeal is:

- The Court of Appeal erred in holding that the statutory scheme comprised by the inter-operation of s 36A of the MDA and s 94 of the CPF is invalid because the scheme enlists the Supreme Court of the Northern Territory to give effect to executive decisions and/or legislative policy in a manner which undermines its institutional integrity in a degree incompatible with its role as a repository of federal jurisdiction.

The first respondent has filed a notice of contention contending that the decision of the Court of Appeal should be affirmed on the ground that the Court erroneously decided or failed to decide some matter of fact or law. The grounds include: "The Court of Appeal erred in holding that s 94(1) of the CPF together with s 36A of the MDA are not invalid as a law with respect to an acquisition of property otherwise

than on just terms within the meaning of s 50(1) of the *Northern Territory (Self Government) Act 19*78". The first respondent now seeks to rely on an amended notice of contention.

On 30 October 2013 a Notice of a Constitutional Matter was filed by the first appellant and on 26 November 2013 a Notice of a Constitutional Matter was filed by the first respondent. The Attorneys-General for the states of Western Australia, South Australia, New South Wales and the Attorney-General of the state Queensland have advised the Court that they will be intervening in this appeal. The Attorney-General for the Commonwealth of Australia is also intervening.