**WHITE v. DIRECTOR OF PUBLIC PROSECUTIONS FOR WESTERN AUSTRALIA (P44/2010)**

Court appealed from: Court of Appeal of the Supreme Court of Western Australia [2010] WASCA 47

Date of judgment: 12 March 2010

Date special leave granted: 21October 2010

This matter concerns an application by the respondent for a crime-used property substitution declaration pursuant to s 22(1) of the *Criminal Property Confiscation Act* 2000 (WA) ("the Act"), that certain property owned by the appellant was available for confiscation in the place of "crime-used property". Section 22 provides that the Court must declare property owned by the respondent to the application under the Act to be available for confiscation instead of crime-used property if crime-used property was not available for confiscation, and it is more likely than not that the respondent (to the s 22 application) made criminal use of the crime-used property. The police had obtained a freezing order in relation property owned by the appellant which included some $135,000 in a bank account. The respondent's application under the Act sought confiscation of those monies.

Section 147 of the Act provides:

> A person makes criminal use of property if the person … uses or intends to use the property in a way that brings the property within the definition of crime-used property.

Section 146(1) of the Act defines property as being 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 confiscation offence, or in or in connection with facilitating the commission of a confiscation offence;
>
> …
>
> (c) any act or omission was done, omitted to be done or facilitated in or on the property in connection with the commission of a confiscation offence.

In this case, the appellant was convicted of wilful murder, which took place on a property leased by the appellant. The property was enclosed by cyclone fencing with barbed wire atop it and gates, also topped with barbed wire, which were secured by padlocks. During a dispute about money, the appellant shot the deceased several times within the property then, the deceased having managed to climb over the gates, opened those gates and shot the deceased, killing him. The primary judge (Jenkins J) declined to make the declaration sought. Her Honour concluded that the property was crime-used as defined by s 146(1)(c) of the Act because although the fatal shot was fired outside the property, the earlier shots fired on the property had a clear nexus with the fatal shot. However, in relation to s 147 of the Act, her Honour held that whilst the appellant "used" the fence and gates to assist him to commit the murder, he did not use the property in a manner bringing it within that section.

The Court of Appeal allowed the respondent's appeal. McLure P gave the judgment of the Court, with which Owen and Buss JJA agreed. McLure P held

that deliberate access over or presence on the land in order to commit a confiscation offence was not of itself sufficient to bring the conduct within either subs 146(1) of the Act, there must be a link between the relevant use of the property and the commission of the offence and that relationship had to be more than tenuous or remote. However, her Honour held that there would be a sufficient relationship if the acts constituting the use of the property had the consequence or effect of facilitating the offence. In this case, it was the intentional locking of the gates, and the storage of the deceased's body on the land.

The grounds of appeal include:

- Whether the Court of Appeal erred in finding that the property concerned was "crime-used" property within the meaning of s 146(1)(a) of the *Criminal Property Confiscation Act* 2000 (WA);

- Whether the Court of Appeal erred in finding that for a crime-used property substitution declaration it was not a requirement that the act or acts constituting the relevant use of the property be done with the intention or purpose or committing the specific offence of which the appellant was convicted;

- Whether the Court of Appeal erred in finding that the terms "uses" and "use" in s 147 of the Act encompass all activities that bring property within the definition of "crime-used" under s 146 of the Act.