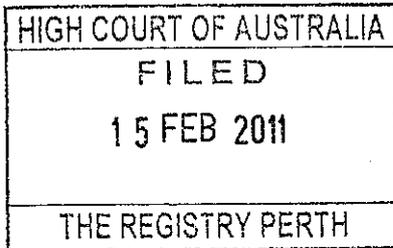


BETWEEN:

GARY ERNEST WHITE
Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS (WA)
Respondent



RESPONDENT'S SUBMISSIONS

Part I:

20 This submission is in a form suitable for publication on the internet.

Part II:

- 30
1. The issue under grounds 2(a) and (c) of the Notice of Appeal is whether it was open to the Court of Appeal to make the relevant findings of fact, having regard to a consideration of all of the evidence at trial.
 2. Was the finding by the Court of Appeal that the land was crime-used under s 146(1)(a) of the *Criminal Property Confiscation Act 2000 (WA)* (**Act**) correct?
 3. Do the terms 'uses' and 'use' in section 147 of the Act encompass all activities that bring the property within the meaning of 'crime-used' under section 146 of the Act?

Part III:

40 The Respondent does not consider any notice should be given in compliance with section 78B of the Judiciary Act 1903.

Part IV:

4. The summary of facts set out by the appellant at paragraphs 7 and 8 are accepted.

Part V:

- 50
5. The appellant's statement of applicable statutes at Part VII of his submissions is accepted, with the exception of adding the *Interpretation Act 1984 (WA)*.

Part VI:

Findings of fact by the Court of Appeal

Number of times gates closed

- 10 6. It is accepted that the evidence at trial allows for the conclusion that the gates to the Property were locked on three occasions. This is not inconsistent with the finding of the Court of Appeal that the gates were locked on at least two occasions¹.
7. It is also accepted that the third occasion on which the gates were locked was when Dennis Walter Jardin (know as **Rainbow**) unlocked the gates to allow the females on the Property to leave, and then relocked the gates after their departure².
- 20 8. Although Rainbow did not give evidence at trial, it was nevertheless open on the evidence to conclude that Rainbow's actions in locking the gate were at the behest of the appellant:
- (a) The appellant telephoned Sidney John Reid (**Reid**) and asked him to go to the Property and lock the gates [**AB 42.37**];
- (b) When Reid arrived and drove in to the Property, Rainbow was at the Property and came out to see who was there [**AB 42.62, 43.67**]; and
- (c) Reid asked Rainbow if Rainbow could go and lock the front gate [**AB 43.65**].
- 30 9. It is unclear from the evidence of Reid whether he told Rainbow that the appellant had asked for the gates to be locked³. However, Rainbow must have been aware that the appellant wanted the gates locked by the time he locked them on the third occasion as:
- (a) Rainbow had been directed by Reid to lock the gates [**AB 43.65**]; and
- (b) By that time, Rainbow was aware that the appellant was on the Property and had relocked the gates after his entry. This was apparent as Rainbow had to unlock the gates to allow the women to leave. [**AB 48.24**]
- 40 10. In any event, Rainbow's act in locking the gates on the third occasion simply maintained the status of the property as locked, as intended by the appellant.

¹ [**AB 298.30**].

² [**AB 48.24, 49.40**].

³ [**AB 43.67**].

11. It was therefore open for the Court of Appeal to find that the gates were locked for the purpose of detaining Tapley on the Property so he would be physically available to the appellant⁴.

Purpose for which gates closed

12. The appellant contends at paragraphs 10 and 19 of the Appellant's Submissions that there was no evidence to permit Scott J (**the Trial Judge**) to reach the conclusion that the appellant knew that Anthony David Tapley (**Tapley**) was present at the Property at the time Reid went to the Property and closed the gates. While it is accepted that there was no direct evidence of this, the Trial Judge's conclusion was the only reasonable inference available based on the following evidence at trial:
- 10
- (a) The appellant telephoned Reid and asked him to go to the Property and lock the gates, and not let anyone come or go from the Property **[AB 42.37]**;
- 20
- (b) The gates were open when Reid arrived at the Property. Reid drove inside and asked Rainbow to lock the gates **[AB 42.60]**;
- (c) The appellant and Richard Samuels arrived at the Property about 10 to 15 minutes after Reid arrived **[AB 45.62]**. The appellant unlocked the gates, drove inside the Property and re-locked the gates behind him **[AB 46.16]**;
- (d) The appellant walked over to the house and immediately told the girls to leave **[AB 46.67]**;
- 30
- (e) The appellant seemed agitated at this time **[AB 47.20]**;
- (f) The appellant said angrily to Susan Kay Miller, in an obvious reference to Tapley, "what the fuck are you doing bringing him over here?" **[AB 130.66]**;
- (g) After Miller and the other women had left and Rainbow had relocked the gates, the appellant left the house and headed straight down to where Tapley was on the Property and confronted him **[AB 48.55, 49.72]**; and
- 40
- (h) When the appellant got within range of Tapley, he pulled a gun out from the back of his jeans and shot him in the shoulder **[AB 51.17]**.
13. Accordingly, it was open to the Trial Judge to find that the reason the appellant asked Reid to lock the gates was because he knew that Tapley was inside his yard and the appellant wished to speak to him **[AB 239.13]**.

⁴ **[AB 298.30]**

14. There was no evidence at trial to suggest an alternative reason for the appellant asking Reid to lock the gates.
15. It was open to the Court of Appeal to conclude that the appellant "intended to confront Tapley, with a gun if necessary". The Court of Appeal's finding with respect to the gun was an inference properly drawn from what occurred:
- 10 (a) The appellant had a gun on him at the time which was stored in the back of his jeans **[AB 51.17]**;
- (b) Shortly after his arrival, the appellant did in fact confront Tapley:
- (i) The appellant demanded money from Tapley **[AB 48.63]**;
- (ii) When there was no reply from Tapley, the appellant said that he was going to make an example of Tapley **[AB 48.65]**; and
- (iii) The appellant pulled out a gun whilst still walking towards Tapley **[AB 49.16]**.
- 20 (c) The appellant then shot Tapley with the gun in the left shoulder **[AB 51.18]** and chased him around the property, firing three more shots **[AB 51.55-52.10]**.

Use of property relating to specific confiscation offence

16. It is unnecessary for the purposes of this case to determine the application of s 106 of the Act in circumstances where s 22 applies. The application before Jenkins J ultimately proceeded on the basis that the only relevant confiscation offence was the wilful murder of Tapley.
- 30

What is the 'use' or 'intended use' of property?

The approach to statutory construction

17. The decision of the Court of Appeal is an application of well-established principles of construction to the provisions of the Act.
18. It is accepted that generally, a statute will not be construed as abrogating or curtailing a fundamental right or freedom unless that intention is clearly manifested in the legislation⁵. That presumption is now read in the context that modern legislatures regularly enact laws that take away or modify common law rights⁶.
- 40
19. While necessary, this common law principle of interpretation does not deny any role for the recognition of the social or public policy lying behind the Act

⁵ *Coco v The Queen* (1994) 179 CLR 427 at 437; *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252 at 529; *Jeffery v Director of Public Prosecutions (Cth)* (1995) 79 A Crim R 514 at 517; *Lee v Director of Public Prosecutions (Cth)* (2009) 75 NSWLR 581 at [18].

⁶ *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 328; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 284.

in the process of construction and interpretation. The ascertainment of the requisite clarity and the resolution of any ambiguity takes place within the ordinary process of statutory construction and interpretation⁷.

20. In considering and applying the relevant principles of statutory construction therefore, it is necessary to begin with an examination of the scheme of the Act⁸. A court construing the Act must ascertain the intention manifested by the legislation, and give meaning and effect to the language of the Act. This requires careful consideration of the text and structure of the relevant parts of the legislation⁹.
21. In particular, the primary object of statutory construction is to construe the relevant provisions so that they are consistent with the language and purpose of all the provisions of the statute. Accordingly, it is necessary to begin by considering the context of the provision that is being construed. The statute is to be construed on the basis that its provisions are intended to give effect to harmonious goals¹⁰.
22. It is relevant to have regard to the declared intention of the Act and the obvious evil that it is designed to remedy¹¹.
23. It is submitted that the position in respect of a penal statute was aptly described in *Saffron v Director of Public Prosecutions*¹², by Kirby P:

A court will give effect to the will of Parliament. It will do so, if that will is clear, even in a penal statute and despite drastic consequences for those affected.

The legislative intent behind the Act

24. The broad purposes of the Act can be derived from at least three sources: the long title of the Act, the synopsis of confiscable property in s 4, and the Second Reading Speech.
25. The long title is as follows:

An Act to provide for the confiscation in certain circumstances of property acquired as a result of criminal activity and property used for criminal activity, to provide for the reciprocal enforcement of

⁷ *NSW Crime Commission v Kelaita* (2008) 75 NSWLR 564 at [15]-[17]; *Director of Public Prosecutions v Xian Xuan Xu & Anor* [2010] NSWSC 842 at [27].

⁸ *Plaintiff s157/2002 v The Commonwealth of Australia* [2003] HCA 2; (2003) 211 CLR 476 at 491.

⁹ *Saeed v Minister for Immigration and Citizenship* [31]; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at [30]; *Australian Competition and Consumer Commission v Baxter Healthcare Pty Limited* (2007) 232 CLR 1 at [2].

¹⁰ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 to 382; *Wilson v State Rail Authority of New South Wales* [2010] NSWCA 198 at [14].

¹¹ *Re Bidie* [1949] Ch 121 at 130, cited by Mason J in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* [1985] HCA 48; 157 CLR 309 at 315 and referred to in *Wilson v State Rail Authority of New South Wales* [2010] NSWCA 198 at [14].

¹² (1989) 96 FLR 196 at 200.

certain Australian legislation relating to the confiscation of profits of crime and the confiscation of other property, and for connected purposes.

26. Section 4 is in the following terms:

Property of the following kinds is confiscable to the extent provided by this Act –

...

10

(c) *Property used in or in connection with the commission of a confiscation offence, or property of equal value (**crime-used property** – see section 146).*

27. The Second Reading Speech in respect of the Criminal Property Confiscation Bill 2000 (**Bill**) and the debates following it included the following statements:

20

(a) The new era of organised crime requires a more effective and better targeted approach, underpinned by a strong statutory framework, to confiscation of proceeds of criminal activity and property used in criminal activity¹³.

(b) Members may be aware that the operation of the current confiscation legislation has been defeated in relation to crime-used property in a number of respects. This has included cases in which, for example, a person used property he or she did not own and when property he or she did own at the time was not available for confiscation. The Bill seeks to overcome these difficulties...¹⁴

30

28. The purpose of the equivalent Commonwealth confiscation legislation has been considered by the Courts¹⁵. These cases confirm that the purpose of that legislation is the confiscation of property in prescribed circumstances.

29. In *Lee v Director of Public Prosecutions (Cth)*, the New South Wales Court of Appeal stated:

40

The Proceeds of Crime Act 2002 (Cth) manifests a plain and clear intention to effect the confiscation of property in the circumstances which it prescribes, regardless of the interests of any person in the property... Thus, the confiscation of property is not achieved by words of general implication, nor is it an intrusion on general law protections which has come about incidentally to the main purpose of the

¹³ Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 June 2000, 8611 (Barron-Sullivan).

¹⁴ Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 June 2000, 8611-12 (Barron-Sullivan).

¹⁵ *Lee v Director of Public Prosecutions (Cth)* (2009) 75 NSWLR 581; *Director of Public Prosecutions v Xiao Xuan Xu & Anor* [2010] NSWSC 842; *Director of Public Prosecutions v Logan Park Investments Pty Ltd* (1995) 37 NSWLR 118.

*legislation...The taking of the property in the prescribed circumstances is the primary purpose of the legislation*¹⁶.

30. Similarly, in *Director of Public Prosecutions v Logan Park Investments Pty Ltd*¹⁷, Kirby A-CJ said that the *Proceeds of Crime Act 1987* establishes a "scheme for depriving persons of property rights which they otherwise enjoy by law"¹⁸.
- 10 31. Given the underlying purpose of the legislation, it cannot be said that Parliament has not directed its attention to the "rights or freedoms in question" and has not "consciously decided upon abrogation or curtailment"¹⁹. The purpose of the Act is the confiscation of property in circumstances which it prescribes and it is in this context that the provisions should be construed. The issue is whether the particular facts in the present case fall within the ambit of those circumstances.

Meaning of "use" of "intended use" within s 146(1)(a)

- 20 32. For property to be crime-used under s 146(1)(a) it must be:
- (a) used or intended for use; and
 - (b) that use must be directly or indirectly in or in connection with the commission of a confiscation offence, or
 - (c) that use must be directly or indirectly in or in connection with facilitating the commission of a confiscation offence.
- 30 33. The question of how property was used is essentially a question of fact. It is not disputed that for the purposes of s 146(1)(a), the ordinary meaning of the word 'use' is applicable²⁰. That is, 'to employ for some purpose, put into service, and turn to account'²¹.
34. It follows that, as found by Jenkins J and the Court of Appeal, 'use' does not incorporate unintended or accidental use²². The use of property requires a deliberate act.²³
35. However, contrary to the Appellant's Submissions at paragraph 45, it is not necessary that the act or acts constituting the relevant use be done with the

¹⁶ *Lee v Director of Public Prosecutions (Cth)* (2009) 75 NSWLR 581 at [20]; affirmed in *Director of Public Prosecutions v Xiao Xuan Xu & Anor* [2010] NSWSC 842 at [25].

¹⁷ (1995) 37 NSWLR 118.

¹⁸ *Director of Public Prosecutions v Logan Park Investments Pty Ltd* (1995) 37 NSWLR 118 at 125-126.

¹⁹ See paragraph 18 above; *Coco v The Queen* (1994) 179 CLR 427 at 437; *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252 at 529.

²⁰ As concluded by Jenkins J at [AB 268.59] and the Court of Appeal at [AB 295.50].

²¹ [AB 268.60, 295.52].

²² [AB 268.64, 299.11].

²³ [AB 268.66, 299.11].

intention of committing the specific confiscation offence²⁴. This is apparent from the language of s 146(1)(a) which does not refer to the intention of the person who uses the property.

36. The relationship identified in s 146(1)(a) between the use of the land and a confiscation offence is that the relevant use be directly or indirectly "in connection with" the commission of, or facilitating the commission of, a confiscation offence²⁵.
- 10 37. The words "in connection with" are of wide import and capable of describing a spectrum of relationships. The question of what relationship will suffice to establish the connection contemplated by the particular statute requires "a value judgment about the range of the Act"²⁶.
38. The Court of Appeal made such a value judgment in determining that the relevant relationship needs to be more than 'tenuous or remote', but less than 'direct and immediate'²⁷. The Court of Appeal stated that the requisite relationship would fall between these two extremes and involve matters of degree and judgment.
- 20 39. Despite the contention of the appellant in paragraph 48 of the Appellant's Submissions, the Court of Appeal's approach as set out above did not vest the court with a 'discretion'. The process of finding facts and applying to those facts a degree of judgment to determine whether certain legal consequences follow is a common approach taken by the courts in various spheres and does not involve the exercise of discretion.
40. At its widest, s 146(1)(a) will be satisfied by a use indirectly in connection with the facilitation of a confiscation offence. It follows, as found by the Court of Appeal, that there is a sufficient relationship between the act constituting the use and the specific confiscation offence if the act has the consequence or effect of facilitating that offence.
- 30 41. This approach is consistent with the intention of Parliament as evidenced by the Explanatory Notes²⁸ in relation to clause 146 (now s 146), which states that:

For the effective operation of the Act it is essential that property used in the commission of crime is defined very broadly.

40

Findings of Court of Appeal as to whether the Property was "crime-used"

42. In relation to the present case, the appellant submits that there was no deliberate act by the appellant which resulted in the property being 'used'²⁹.

²⁴ As found by the Court of Appeal at [AB 299.13].

²⁵ [AC 297.17].

²⁶ *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 288 – 289, cited by the Court of Appeal at [AB 297.24].

²⁷ [AB 297.50]

²⁸ Explanatory Notes, Criminal Property Confiscation Bill 2000 (WA), 69.

43. The Court of Appeal found that there were two relevant ways in which the Property was used within the definition of s 146(1)(a)³⁰:
- (a) The intentional locking of the gates and prevention of Tapley from being able to leave the Property to enable the appellant to confront and deal with Tapley; and
 - (b) The storing of Tapley's body away from public view pending its disposal.
- 10
44. The Court of Appeal was entitled to find that these two uses were "in connection" with the facilitation of the willful murder of Tapley:
- (a) In respect of the first use, the Court was entitled to find that the gates were closed for the purpose of confronting Tapley, as set out in paragraphs 9 – 13 above; and
 - (b) In respect of the second use, the Court was entitled to find that matters after the confiscation offence were in connection with the commission of the willful murder, in accordance with *Re Nanaimo Community Hotel Ltd*³¹. The fact that the appellant was able to use the Property to hide the body provided the appellant with confidence that he could kill Tapley and conceal his crime.
- 20
45. The first use identified by the Court of Appeal can be further elaborated in the following terms: the appellant made use of the Property as an enclosure or trap. He put it to that use when he walked out to confront Tapley inside the Property when the appellant knew that the gates were locked and that Tapley could not escape.
- 30
46. This was a finding open on the evidence:
- (a) The appellant had asked Reid to lock the gates **[AB 42.37]**;
 - (b) The appellant would have been aware that his request was carried out as the gates were locked when he arrived. The appellant had to unlock the gates to enter the Property **[AB 46.66, 158.54]**;
 - (c) After entering the Property, the appellant relocked the gates behind him **[AB 46.67]**; and
 - (d) When Tapley fell from the gates on to the other side of the fence, the appellant was aware that the gates were locked as he obtained his key to unlock the gates before walking out **[AB 53.29]**.
- 40

²⁹ Appellant's Submissions at paragraph 56.

³⁰ **[AB 299.27 – 299.30]**.

³¹ [1944] 4 DLR 638, cited by the Court of Appeal at **[AB 297.30]**.

47. The connection between these uses of the Property and the facilitation of the willful murder of Tapley was sufficient to bring them within the definition of "crime-used" in s 146(1)(a). The uses involved more than mere presence on the land and were more than a tenuous or remote relationship; they had the consequence of facilitating the relevant confiscation offence.

"Use and "uses" within the definition of s 147

10 48. It is submitted that "use" and "uses" in s 147 are intended to be grammatical forms of "used" in the composite expression "crime-used".

49. If this were thought to be a strained construction, it is justified to give effect to the overall statutory intention. As was pointed out by McHugh J in *Newcastle City Council v GIO General Limited*³²:

20 *...When the purpose of a legislative provision is clear, a court may be justified in giving the provision "a strained construction" to achieve that purpose provided that the construction is neither unreasonable nor unnatural. If the target of a legislative provision is clear, the court's duty is to ensure that it is hit rather than to record that it has been missed.*

50. The construction contended for by the respondent, and adopted by the Court of Appeal, is neither unreasonable nor unnatural.

51. If that construction is correct, the finding of Jenkins J that the Property was crime-used within the meaning of s 146(1)(c)³³ provides a sufficient basis to find that the appellant made criminal use of the property.

30 52. Contrary to this, the appellant contends that the term "uses" in s 147 must be intended to refer only to acts or activities that would come within s 146(1)(a) and (b); and not include the other ways (under s 146(1)(c) and (3)) in which property may become crime-used property.

53. There are several reasons for rejecting that construction, considering the scheme of the Act as a whole:

40 (a) It would result in the arbitrary application of crime-used substitution declarations under s 22;

(b) It would create an inconsistency in the application of ss 82 and 87 of the Act to crime-used property effectively controlled by persons whose acts have rendered the property crime-used, depending on which provision of s 146 applies; and

(c) The purpose of s147 within the scheme of the Act to identify "tainted" persons in relation to crime-used property.

³² (1997) 191 CLR 85 at 113.

³³ [AB 273.47].

Crime-used property substitution declaration

54. The primary object of statutory construction is to construe the relevant provisions of an Act so that they are consistent with the language and purpose of all the provisions of the statute. The statute is to be construed on the basis that its provisions are intended to give effect to harmonious goals³⁴.
- 10 55. Section 142(c) of the Act provides that property is confiscable if it is crime-used property. Where the crime-used property is not available for confiscation, s 22 of the Act provides for a crime-used property substitution declaration to be made if 'it is more likely than not that the respondent made criminal use of the crime-used property'³⁵.
56. The scheme of the Act as a whole manifests an intention that a crime-used property substitution declaration is available against all persons whose conduct brings property within the definition of crime-used property.
- 20 57. The Explanatory Notes to the Bill state:
- (a) *A crime-used property substitution declaration is essentially equivalent to the confiscation of crime-used property and is made against the person who made criminal use of the property in the crime. Therefore clause 147 provides that the definition of 'criminal use of property' is linked to the definition of 'crime-used property'*³⁶; and
- (b) *A crime-used property substitution declaration is relevant where the property used in a crime isn't available for confiscation. There can be a number of reasons for this...For example, where a person who committed the crime used property which belonged to someone else. If he had used his own property it would be liable to confiscation*³⁷.
- 30 58. This intention is consistent with the broad purpose of the Act, evidenced by the synopsis of confiscable property in s 4 of the Act which includes, at s 4(c):
- Property used in or in connection with the commission of a confiscation offence, or property of equal value (crime-used property – see section 146).*
- 40 59. It is clear from the fact that s 146 is more expansive in its description of property, that is, "crime-used property", that the description 'property used in or in connection with the commission of a confiscation offence' in s 4(c) was intended to be a compendious way of describing all "crime-used property". The reference to "property of equal value" in s 4(c) must have been

³⁴ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 to 382.

³⁵ *Criminal Property Confiscation Act 2000* (WA), s 22(1)(b).

³⁶ Explanatory Notes, *Criminal Property Confiscation Bill 2000* (WA), 69.

³⁷ Explanatory Notes, *Criminal Property Confiscation Bill 2000* (WA), 12.

intended to refer to property confiscable pursuant to a crime-used property substitution declaration. Section 4(c), therefore, manifests an intention that a crime-used property substitution declaration should be available to confiscate property of equal value to all forms of crime-used property.

60. The Second Reading Speech also evidences this intention:

10 ...The current confiscation legislation³⁸ has been defeated in relation to crime-used property in a number of respects. This has included cases in which, for example, a person used property he or she did not own and when property he or she did own at the time was not available for confiscation. The Bill seeks to overcome these difficulties by providing in part 3, division 3, that the person who uses property which is not available for confiscation is liable to pay to the Crown the value of that property³⁹.

20 61. Further, the use of the term "crime-used property substitution declaration" itself indicates Parliament's intention that the declaration apply to all crime-used property within the definition of s 146. There is no provision in Part 3 Division 3, dealing with crime-used property substitution declarations, which distinguishes between s 146(1)(a) on the one hand and s 146(c) and s 146(3) on the other.

62. If all crime-used property is liable to confiscation, there is no reason why only property which is used in a way that would bring it under s 146(1)(a) and (b) should be liable to a crime-used property substitution declaration.

30 63. The construction advanced by the appellant would deny the availability of a crime-used property substitution declaration in circumstances where the property was crime-used within the meaning of s 146(1)(c) or s 146(3), and would otherwise be liable to confiscation if owned by the appellant.

64. There is no justification in the text, the purpose of the Act, or principle for differentiating between acts or activities which bring property under the different grounds in s 146 in determining whether property of equal value can be confiscated in substitution of crime-used property. Such differentiation is contrary to the legislative intention manifest in the Act, and confirmed by the Explanatory Notes to the Bill⁴⁰.

40 **Inconsistency concerning s 82 and 87**

65. A limited meaning of criminal use, that is, one confined to acts which come under s 146(1)(a) and (b), is not consistent with the apparent intention of sections 82(4) and 87.

³⁸ Referring to the previous *Crimes (Confiscation of Profits) Act 1988* (WA).

³⁹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 June 2000, 8611-8612 (Barron-Sullivan).

⁴⁰ Cited above at paragraph 57; also cited by the Court of Appeal at [AB 303.17].

66. Sections 82 and 87 allow the court to set aside a freezing order, and to release crime-used property from confiscation where all of the relevant criteria are met. One of relevant criteria is that “the property is not effectively controlled by a person who made criminal use of the property”⁴¹.

67. On the appellant’s construction of s 147, a person who is not the owner but who effectively controls property and whose acts rendered the property crime-used under s 146(1)(c) or s 146(3), would be entitled to have a freezing order set aside or to have the crime-used property returned after confiscation, whereas a person in the same position whose acts rendered the property crime-used under s 146(1)(a) or s 146(1)(b) would not be so entitled.

68. Such a result could not have been intended by the legislature.

Meaning of s 147

69. The Explanatory Notes, cited above at paragraph 57, makes it clear that Parliament’s intention was for the two definitions in s 146 and 147 to be linked.

70. When the Act is considered as a whole, it is clear that the primary term is crime-used. “Crime-used” is intended to encompass all the activities in s 146(1) and (3). The word “uses” in s 147 takes its meaning from that intention. This approach gives effect to the need to determine the hierarchy of provisions and give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme⁴².

71. S 147 is not a limiting provision on s 146 in the context of s 22 of the Act. It is submitted that sections 146 and 147 have different purposes and are directed towards establishing different issues. The purpose of s 146 is to identify the relevant property which is crime-used; while the purpose of s 147 is to identify the person who brings the property within s 146⁴³.

72. This interpretation of the provisions is supported by the Glossary at the end of the Act, which applies by virtue of s 3 to define or affect the meaning of some terms in the Act. It states:

(a) Crime-used in relation to property, has the meaning given in section 146; and

(b) Criminal use, in relation to *a person and property*, has the meaning given in s 147 (emphasis added).

⁴¹ *Criminal Property Confiscation Act 2000* (WA), s 82(4)(b) and s 87(1)(b).

⁴² *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70].

⁴³ As identified by McLure P at [AB 299.53]

73. When considered in the context of s 22, it is clear that s 147 has this purpose. An action for crime-used property is against the property itself; while an action for a crime-used property substitution declaration is against particular persons, as the property is not available. Section 147 is therefore required in this situation to identify the persons against whom an action can be taken in respect of a crime-used property substitution declaration.
- 10 74. When that approach is taken to the provisions, it is clear that 'use' in s 147 must encompass all of the ways under s 146 in which property can become crime-used. Section 147 makes no distinction between any of the four circumstances under s 146⁴⁴ in which property is crime-used.
75. Section 9 of the *Interpretation Act 1984* (WA) provides that where a word or phrase is defined in a written law, other parts of speech and grammatical forms of the word or phrase have corresponding meanings. This principle is applicable in considering the terms "crime-used" and "criminal use".
- 20 76. There is no scope for construing s 147 in a way which limits the property which can be subject to a crime-used property substitution declaration under s 22 of the Act. The principles of statutory interpretation are clear that the Act must be viewed as a whole as Parliament would have intended for the provisions of the Act to interact in a harmonious way. The constructions submitted by the respondent would result in a consistent approach to the Act which gives effect to the purpose of the Act, being the confiscation of property which is involved in criminal activity in some way

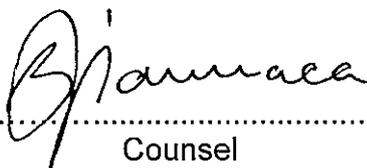
Part VII:

- 30 77. Not applicable.

Part VIII

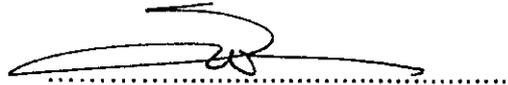
78. The appeal be dismissed.
79. The judgment and orders of the Court of Appeal be affirmed.
80. No other orders are required by the Respondent.

40 Dated 15 February 2011


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⁴⁴ *Criminal Property Confiscation Act 2000* (WA), ss 146(1)(a), (1)(b), (1)(c) and (3).



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