

Form 27E -- Appellant's Reply

(rule 44.05.5)

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B22/2014

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND

BETWEEN

JOHN WILLIAM HENDERSON
Appellant

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and

THE STATE OF QUEENSLAND
Respondent

APPELLANT'S REPLY

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Part I: Certification as to form

1. This reply is in a form suitable for publication on the internet.

Part II: The reply to the Respondent's argument

2. The State contends that the appellant fails because he cannot prove that either his grandfather (the appellant's account) or alternatively, (his great-grandfather (his brother Joseph's alternative account) was not in possession of illegally acquired property (s.22). To prove this the appellant must prove that either of the nominated parties, including himself, did not engage in illegal activity (s.15), or that those people did not derive property by engaging in that activity or by directing another person to engage in that activity (s.18).

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FILED ON BEHALF OF: the Appellant
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3. This is a tricky problem of proof in the absence of a Grand Duchess, Sydney Riley, Felix Dzerzhinsky or the Cheka chauffeur of his Silver Ghost Roll-Royce who might or might not have witnessed the event. There is, on the State's construction, no need to stop at the Appellant's father depending on the family hearsay. It could extend to the Russian Royalty from whence the baubles are said to have come. By inference the diamonds came from a mine somewhere, perhaps unlawfully?
- 10 4. The power the prosecution asserts to nominate what a prescribed respondent must prove in order to succeed in an application to exclude is a very wide one. In combination with s.26 it can make in these circumstances an application extremely onerous.
5. These consequences were not intended by the legislature, and as such are not the context in which sections 68, 22, 18 and 15 are to be applied.¹ For that one must look at the context of these provisions in the legislation.

The structure of the Statute.

Objects of the Act

- 20 6. The State's position is inconsistent with the objects of the Act in s.4(2)(a) and (b). That section provides that it is the lawful activity of the appellant in his acquisition of the property rights that is pivotal. Further, people in the appellant's position were to be protected from forfeiture. S. 13(7) gives to persons in the appellant's position opportunities to have lawfully acquired property excluded from restraining and forfeiture orders.

Restraining orders

- 30 7. S.28(3)(a) gives the State power to restrain the property of a prescribed respondent and s.28(3)(b) the property of a stated person and s.28(3)(c) the property of an unidentified person. The application must be supported by affidavit where an officer must swear that he suspects the prescribed respondent has engaged in serious crime related activity (s.29(a)), or the prescribed respondent has derived proceeds from a serious crime related activity of a prescribed respondent (s.29(1)(b) & (c)). The Court must make a restraining order if there are reasonable grounds for the foregoing suspicion (s.31(1)). The court may refuse to make an order if there is no undertaking as to damages (s.31(2)(b)). A restraining order does not apply to property acquired after the order is made unless expressly stated (s.31(4)).

¹ *Project Blue Sky v ABA* (1998) 194 CLR 355 per McHugh, Gummow, Kirby & Hayne JJ. at [69-71] and [78].

8. The owner of the property must preserve the restrained property (s.32). The property may be sold to satisfy the owner's pecuniary penalty or assessment order (ss.32 and 33). If the person cannot meet the expenses out of property that is unrestrained, the Court can order living expenses, business expenses, dependants' expenses and debts incurred in good faith provided the property from which the expenses or debt are to be paid is not illegally acquired property (s.34). It is plain that illegally acquired property constraint applies to the person whose property is restrained and no one else.
- 10 9. A prescribed respondent may exclude property from a restraining order if it can be shown that the property is not illegally acquired property and the property is unlikely to be required to satisfy a proceeds assessment order (s.48(1)). It is submitted that it is the prescribed respondent who must prove that the restrained property was not illegally acquired property, when he or she acquired it.

Forfeiture order

10. The State may apply to forfeit restrained property (s.56(1)). Notice must be given to each person whose property is restrained, anyone else that claims an interest in the property may appear (s.57). The Court must make a forfeiture order if property restrained under s.28(3)(a) or (b) *"if the prescribed respondent....engaged in serious crime related activity"*.
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11. Under s.13(4) a forfeiture order must be made if the court finds it more probable than not that the persons whose suspected serious crime related activity was the basis of the relevant restraining order, engaged in serious crime related activity.
12. It is fundamental that the power to forfeit depends on the power to restrain. It would be odd if Parliament intended the State to restrain property on account of the prescribed respondent's activity, and forfeit the property on account of the prescribed respondent's activity, yet require the respondent to prove in an exclusion application on account of the activity of someone who died years ago.
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Exclusion order

13. An exclusion order may be applied for where there is an application for a forfeiture order but there has been no decision on the application (s.65). It follows that the property sought to be excluded must be the subject of a restraining order and must in these circumstances be restrained under s.28(3)(a) and (b), a prescribed person or a stated person, other than a prescribed person. S.28(3)(c) applies to an unidentified suspect.
14. It is in the above context that the applicant must show it is more probable that not that the property is not illegally acquired property (s.68(b))
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The issue

15. The State contends that the applicant has failed to establish that the property was not illegally acquired property. This begs the question, what is it that the applicant has to prove? The answer is found in the statutory definitions.
16. Relevantly the property is illegally acquired “if it is all or part of the proceeds of illegal activity” (s. 22). It is “illegal activity” if it complies with s.15. It is “proceeds in relation to an activity, includes property... derived because of that activity (a) by the person who engaged in that activity or (b) by another person at the direction or request, directly or indirectly of the person who engaged in that activity”.
17. The State contends that this “person” can be anyone with the consequences in paragraphs 2-4 above; the appellant contends that the person must be a prescribed person or a stated person under s.28(3)(a) and (b), the only persons to which the restraining order applies. This produces a sensible and harmonious interpretation of the statute. The “derived proceeds” and “derived property” in s.29(1)(b) and (c) required to be sworn in obtaining the restraining order are the same derived proceeds that are required to be explained in the exclusion application by s.18. The person who acquired the property in s.68 who would have had an interest in the property, is the same person whose acquisition of that property is called into question in the exclusion proceedings, the same person who if he or she acquires property after the restraining order is not subject to restraint unless specifically mentioned (s.31).
18. This is in accordance with the objects of the Act.
19. The statutory context suggests that the person doing the activity in s.18 and deriving property are the same one against whom the restraining order was made, and the same one against whom a forfeiture order could be made. It would therefore be strange if the effect of “proceeds” in s.18 required disproof of an activity not of the person subject to the restraining order or liable to a forfeiture order.
20. It is submitted that the prescribed respondent must prove what the Statute says he or she must prove, no more or no less. The State submits that the test that was required to be proved by the appellant was that established by the hearsay at trial; “the evidence led by the appellant was directed at showing...,”² “That was not the case advanced by the State”,³ “the case at trial was conducted on the basis that...⁴. These glosses cannot be substituted for the test that the legislature intended.

² Respondent’s submissions page 4 line 16- page 5 line 2.

³ Respondent’s submissions page 5 line 21-2.

⁴ Respondent’s submissions page 7 line 9.

21. The respondent notes the appellant's account of his acquisition of the property was accepted but contends that as he has not proved the jewellery was not illegally obtained property he must fail. It is submitted that in having this account accepted it follows that he has proved that he has not acquired illegally acquired property and is entitled to the relief sought.

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