

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, HEYDON AND CRENNAN JJ

NIGEL CUNNINGHAM MANSFIELD

APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS
FOR WESTERN AUSTRALIA

RESPONDENT

Mansfield v Director of Public Prosecutions for Western Australia
[2006] HCA 38
20 July 2006
P53/2005

ORDER

1. *Appeal allowed with costs.*
2. *Set aside orders 3 and 4 of the Court of Appeal of the Supreme Court of Western Australia dated 29 April 2005 and, in their place, order that:*
 - (a) *leave be granted to appeal to the Court of Appeal in respect of grounds 1 and 2 of the draft notice of appeal dated 21 December 2004;*
 - (b) *the appeal be treated as instituted and heard instanter and be allowed;*
 - (c) *orders 1 and 2 of the orders of Roberts-Smith J made on 30 November 2004 be set aside;*
 - (d) *the respondent pay the costs of the appellant in respect of the whole of the leave application and of the appeal to the Court of Appeal;*
 - (e) *paragraphs 2, 3 and 4 of the appellant's Chamber Summons dated 16 September 2004 and the appellant's application for leave to*

amend the Chamber Summons to seek provision for legal expenses be referred to a single judge for determination; and

- (f) *the costs of previous proceedings on the Chamber Summons dated 16 September 2004 be costs of the further proceedings before that single judge.*

On appeal from the Supreme Court of Western Australia

Representation

M L Bennett with S K Shepherd for the appellant (instructed by Lavan Legal)

D R Williams QC with T A Staples for the respondent (instructed by Director of Public Prosecutions for Western Australia)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Mansfield v Director of Public Prosecutions for Western Australia

Criminal Law – Confiscation of property – Freezing order – Where Director of Public Prosecutions ("DPP") may apply ex parte for a freezing order pursuant to s 41 of the *Criminal Property Confiscation Act 2000* (WA) ("the Act") – Where Court "may" make freezing orders pursuant to s 43 of the Act – Where no express statutory restrictions imposed upon the permissive power to grant freezing orders under s 43 of the Act – Whether relevant that proceedings under the Act are "civil proceedings" by reason of s 102 of the Act – Whether DPP is able to give an undertaking as to damages – Whether the limitation of liability provision in s 137 of the Act would render futile the provision of an undertaking as to damages by the DPP – Whether Court has power to require the DPP to provide an undertaking as to damages when exercising the statutory power under s 43 of the Act to make a freezing order.

Criminal Law – Confiscation of property – Freezing order – Variation of freezing order – Where power to vary freezing orders derived by implication from s 45 of the Act and s 48 of the *Interpretation Act 1984* (WA) – Where legal expenses not referred to in s 45 of the Act which provides that the Court may provide for meeting "reasonable living and business expenses" in a freezing order – Whether Court has power to vary a freezing order to allow for the payment of reasonable legal costs.

Courts – Jurisdiction of courts – Relationship between general law powers of court and jurisdiction conferred by the statute – Where s 43 of the Act expressed in permissive terms without express statutory restrictions – Whether equitable principles applicable to granting discretionary remedies at general law may be imported into exercise of jurisdiction under s 43 of the Act.

Statute – Statutory construction – Whether appropriate in legislation to draw negative implications from prior legislation on the same subject matter – Whether appropriate in construing statutory provisions to draw negative implications from other provisions in the Act – Whether s 137 of the Act limits the power conferred by s 43 of the Act to make freezing orders – Whether the express words of s 45 of the Act limit the power to vary freezing orders.

Words and phrases – "freezing order", "undertaking as to damages".

Crimes (Confiscation of Profits) Act 1988 (WA) (repealed), s 20(11).
Criminal Property Confiscation Act 2000 (WA), Pt 2, Pt 3 Div 2, Pt 4 Div 3,
ss 4, 5, 41, 42, 43, 45, 101, 102, 137, 141, 142.
Crown Suits Act 1947 (WA), s 5.
Director of Public Prosecutions Act 1991 (WA), s 10, s 16, s 20.
Interpretation Act 1984 (WA), s 48.
Supreme Court Act 1935 (WA).
Rules of the Supreme Court (WA), O 52 r 9.

1 GLEESON CJ, GUMMOW, KIRBY, HAYNE AND CRENNAN JJ. This appeal is brought from the Court of Appeal of Western Australia (Steytler P, Wheeler and Pullin JJA)¹. That Court granted leave to appeal in respect of two of the grounds contained in the appellant's draft notice of appeal to that Court and upheld the appeal on those grounds. They involved what was described as "the Citibank issue" and in this Court nothing turns upon them.

2 The occasion for this appeal is the refusal of the majority of the Court of Appeal (Pullin JA dissenting) to grant leave to appeal upon the two remaining grounds². These concerned the powers of the Supreme Court of Western Australia in the exercise of jurisdiction conferred by s 101(1) of the *Criminal Property Confiscation Act 2000* (WA) ("the Act")³. In particular, the appellant complains that the primary judge (Roberts-Smith J) in his judgment delivered on 30 November 2004⁴ erred in law in two respects.

3 The first ground taken by the primary judge is that, in the exercise of its jurisdiction under the Act, which is expressed in terms that the Supreme Court "may make a freezing order" (s 43(1)), the Supreme Court cannot, in the exercise of its discretion, require the provision by the respondent ("the DPP") of an undertaking as to damages to protect the interests of a party such as the appellant whose property is bound by the freezing order. The reference to an undertaking as to damages evokes, by analogy, the practice of courts of equity when granting

1 *Mansfield v Director of Public Prosecutions* (WA) (2005) 153 A Crim R 41.

2 A fifth proposed ground was abandoned during the course of hearing. Each side having had partial success, the Court of Appeal made no order as to costs. In this Court, the appellant seeks costs in respect of the whole of the appellate processes in the Court of Appeal.

3 Section 101(1) states:

"The Supreme Court has jurisdiction in any proceedings under this Act."

Such proceedings are to be "taken to be civil proceedings for all purposes" (s 102(1)).

4 *Director of Public Prosecutions* (WA) v *Mansfield* (2004) 150 A Crim R 348.

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interlocutory remedies such as those by way of injunction⁵, assets preservation order⁶ and appointment of a receiver⁷.

4 The second ground taken by the primary judge and disputed by the appellant is that his Honour erred in denying the power of the Supreme Court in a freezing order to allow (whether initially or by later variation) for the payment of reasonable legal costs for the defence of related civil or criminal proceedings.

5 The Act is described in its long title as a statute:

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

The jurisdiction exercised in this case by the Supreme Court thus was conferred as part of a new statutory scheme having a significant impact upon personal and property rights.

6 The Supreme Court is the highest court of general jurisdiction in the State and is protected by s 73 of the Constitution⁸. The Court of Appeal is established as a division of the Supreme Court by the *Supreme Court Act* 1935 (WA) ("the Supreme Court Act")⁹. Before looking more closely at the particular provisions engaged in this dispute and at the course of the litigation, there should be stated several general and significant considerations that are presented by legislation

5 See *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1979) 146 CLR 249 at 260-262; *affd* (1981) 146 CLR 306.

6 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 403-404 [51]-[52].

7 See *National Australia Bank Ltd v Bond Brewing Holdings Ltd* (1990) 169 CLR 271 at 277; *National Australia Bank Ltd v Bond Brewing Holdings Ltd* [1991] 1 VR 386 at 559-561 (Full Court).

8 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 111, 141-142; *Fish v Solution 6 Holdings Ltd* [2006] HCA 22 at [33].

9 s 7(1)(b).

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such as the Act and by the conferral thereunder of jurisdiction upon the Supreme Court¹⁰.

The *Electric Light Case*

7 The first significant consideration is that identified in the joint reasons of the whole Court in *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW*¹¹. Their Honours said¹²:

"When the legislature finds that a specific question of a judicial nature arises but that there is at hand an established court to the determination of which the question may be appropriately submitted, it may be supposed that if the legislature does not mean to take the court as it finds it with all its incidents including the liability to appeal, it will say so. In the absence of express words to the contrary or of reasonably plain intendment the inference may safely be made that it takes it as it finds it with all its incidents and the inference will accord with reality."

That reasoning is applicable to the operation of the Act. The DPP accepts that there is power in the Supreme Court to vary the scope of freezing orders¹³. The debate concerned the scope of that power so as to allow for legal costs. The power to vary these orders is derived by implication from s 45 of the Act¹⁴ and from the provision in s 48 of the *Interpretation Act* 1984 (WA) respecting the exercise from time to time of powers conferred by statute.

8 The DPP also, correctly, accepted that a person whose property was affected by an ex parte freezing order might apply to have it set aside for such

10 Jurisdiction, qualified by subject-matter and amounts in issue, is conferred by s 101 of the Act also upon the District Court and the Magistrates Court.

11 (1956) 94 CLR 554.

12 (1956) 94 CLR 554 at 560; cf *Byrnes v The Queen* (1999) 199 CLR 1 at 20-21 [32]-[33].

13 In the present litigation, some variations of the freezing order had been made on application by the DPP: *Director of Public Prosecutions (WA) v Mansfield* (2004) 150 A Crim R 348 at 349.

14 Section 45 lists in pars (a)-(e) what the court "may do" in a freezing order.

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reasons as the absence of jurisdiction, material non-disclosure, and changed circumstances¹⁵.

- 9 The Act itself makes no provision for appeals, by leave or otherwise, to the Court of Appeal from the exercise of first instance jurisdiction by the Supreme Court. However, the DPP has accepted that, by leave, an appeal may be brought from the imposition of a freezing order¹⁶ and, as in this case, from applications to vary such orders. There was no challenge by the DPP to the competency of the appeal taken in this case to the Court of Appeal and thence to this Court.

Knight's Case

- 10 The second significant consideration affects the scope of the power when making a freezing order to attach conditions or require the provision of undertakings so as to diminish the possibility of oppression and injustice. The following remarks by Gaudron J in *Knight v FP Special Assets Ltd*¹⁷ express the point:

"It is contrary to long-established principle and wholly inappropriate that the grant of power to a court (including the conferral of jurisdiction) should be construed as subject to a limitation not appearing in the words of that grant¹⁸. Save for a qualification which I shall later mention, a grant of power should be construed in accordance with ordinary principles and, thus, the words used should be given their full

15 *Bennett & Co v Director of Public Prosecutions (WA)* (2005) 154 A Crim R 279 at 292-293.

16 *Director of Public Prosecutions (WA) v Gypsy Jokers Motorcycle Club Inc* (2005) 153 A Crim R 8 at 15.

17 (1992) 174 CLR 178 at 205. See also *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313; *Conway v The Queen* (2002) 209 CLR 203 at 219 [36]; *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 486 [14], 506 [75]-[76]; *Fish v Solution 6 Holdings Ltd* [2006] HCA 22 at [33].

18 See *Hyman v Rose* [1912] AC 623 at 631; *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 290.

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meaning unless there is something to indicate to the contrary. Powers conferred on a court are powers which must be exercised judicially and in accordance with legal principle. This consideration leads to the qualification to which I earlier referred. The necessity for the power to be exercised judicially tends in favour of the most liberal construction, for it denies the validity of considerations which might limit a grant of power to some different body, including, for example, that the power might be exercised arbitrarily or capriciously or to work oppression or abuse."

- 11 Something more now should be said of the litigation in the Supreme Court and the context of the Act in which it took place.

The scheme of the Act

- 12 The term "confiscable property" is of central importance. Section 4 states that each species of property described in pars (a)-(e) is confiscable to the extent provided by the Act. Paragraph (b) deals with "criminal benefits" and refers to s 145. That section spells out the circumstances in which a person has acquired a "criminal benefit", and classifies as "criminal benefits" certain property, services, advantages and benefits obtained as a result of a person's involvement in the commission of a "confiscation offence".

- 13 The Act applies to "criminal benefits" whether the relevant "confiscation offence" was committed in Western Australia or elsewhere and, significantly, whether or not anyone has been charged or convicted of that offence (s 5(2)). The "property" may, but need not be, situated in Western Australia (s 5(3)), and includes both real and personal property of any description, and a legal or equitable interest in such property (Glossary). The "property", as so defined, which is confiscable pursuant to s 142(b) includes that which is:

"owned or effectively controlled, or [which] has at any time been given away, by a person who has acquired a criminal benefit".

- 14 The critical term "confiscation offence" is given a broad meaning by s 141. It includes an offence which is punishable by imprisonment for two years or more and which is "against a law in force anywhere in Australia". That would include the laws of the Commonwealth. To the significance of this it will be necessary to return.

- 15 Part 2 (ss 6-10) provides, among other things, for the automatic confiscation of "frozen property" where an objection is not taken to the relevant freezing order within a stipulated time after service of a copy of that order (ss 7,

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46(4), 150). Such an objection was taken within time by the appellant and as a result Pt 2 did not work any automatic confiscation.

16 However, Pt 3, Div 2 (ss 15-20) has been engaged in this case. It provides for applications by the DPP for a "criminal benefits declaration". Such an application may be made in conjunction with an application for a freezing order, in proceedings for the hearing of an objection as referred to earlier, or at any other time (s 15(2)). Upon the making of a criminal benefits declaration by the Court, s 20 imposes a liability to pay to the State the amount of the assessed criminal benefit acquired by the party in question. Such moneys are to be paid into the "Confiscation Proceeds Account" established by s 130 (s 131(1)(a)) and money may be paid out of that account at the direction of the Attorney-General for the public purposes listed in s 131(2).

17 The "freezing order" spoken of above is the creature of Pt 4, Div 3 (ss 41-49). The Division is headed "Freezing orders for confiscable property". Sections 41 and 42 state:

- "41. (1) The DPP may apply to the court for a freezing order for property.
- (2) An application may be made ex parte.
42. In proceedings for a freezing order, the court may do any or all of the following –
- (a) order that the whole or any part of the proceedings is to be heard in closed court;
- (b) order that only persons or classes of persons specified by the court may be present during the whole or any part of the proceedings;
- (c) make an order prohibiting the publication of a report of the whole or any part of the proceedings or of any information derived from the proceedings."

Section 43 provides that the Court "may make a freezing order" in the four situations stipulated in sub-ss (1), (3), (5) and (8). An order may be made if, as was the case here, an "examination order ... is in force in relation to the property" (s 43(1)(a)). Examination orders, requiring a person to submit to an examination about, among other things, suspected confiscable property, may be ordered by the Court pursuant to s 58(1)(b).

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18 A freezing order also may be made under s 43(3) if the DPP advises the Court that within 21 days after the making of the order it "is likely" that an application will be made for a criminal benefits declaration (under Pt 3, Div 2) against the person in respect of whose property the freezing order is sought. The phrase "whose property" abbreviates the broader language of s 43(3) – "for *all or any* property that is owned or effectively controlled by the person or that the person has at any time given away" (emphasis added). A freezing order under s 43(3) is not to be refused only because the value of the property "could exceed" the amount payable under s 20 if a criminal benefits declaration is made (s 43(4)). A freezing order may be made, for all property, whether or not any of the property is described in the application (s 43(6)). It is an offence, subject to certain exceptions, for any person to deal with frozen property (s 50).

19 The freezing order made under s 43(3) stops being in force if set aside on all grounds in proceedings on an objection (s 48(5)(d), s 49(3)(e)). Additionally, the Court may set aside the order if it finds it to be "more likely than not" that the respondent to the criminal benefits declaration does not own or effectively control the property and has not at any time given it away (s 84(1)). The duration of the freezing order granted against the appellant otherwise is linked to the outcome of the application for the criminal benefits declaration (s 48(5), s 49(3)). However, it appeared from argument in this Court that the duration of the freezing order is not linked by the Act to the outcome of related criminal proceedings; the pendency of such criminal proceedings is not a ground for a stay of proceedings under the Act (s 104).

The steps in the litigation

20 The relevant first steps in the present litigation were described by Steytler P as follows¹⁹:

"On 12 July 2002 a freezing order was made [by McKechnie J, ex parte and on the application of the DPP] under s 43 of the Act in respect of all property owned or effectively controlled by the [appellant]. It was made upon two grounds. The first was that the DPP had advised the Court that an application for an examination order had been made in relation to the property proposed to be frozen (s 43(1)(a)). The second was that an application against the [appellant] for a criminal benefits declaration was likely to be made within 21 days in relation to his property (s 43(3)(c)).

19 (2005) 153 A Crim R 41 at 44-45.

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The application for a criminal benefits declaration, when brought against the [appellant], was supported by a statement of claim. That document, as it has since been amended, pleads that between 9 June and about 3 August 2000 the [appellant] engaged in a series of insider trading offences contrary to the then provisions of ss 1002G and 1311 of the *Corporations Act 2001* (Cth).

By a consent order made by the Supreme Court [Roberts-Smith J] on 18 February 2004 the freezing order was varied to authorise the release of \$2500 per fortnight in order to meet the reasonable living expenses of the [appellant] and his wife. An amount of \$102,500 was released in order to meet their reasonable living expenses between 12 July 2002 and 13 February 2004."

21 To that narration of events several additions should be made. First, the appellant filed on 7 August 2002 a notice of objection to the freezing order and pleadings were ordered in the objection proceedings. The application for the criminal benefits declaration is not yet ready for trial. Nor are the criminal proceedings. The appellant was first charged on 14 August 2002 with offences, including offences against the *Crimes Act 1914* (Cth). As Steytler P pointed out, these charges were reformulated. Then, on 23 September 2005, new indictments were signed by the Commonwealth Director of Public Prosecutions. The upshot is that, for whatever reason, the freezing order has been in force for over four years.

22 By Chamber Summons dated 16 September 2004, the appellant sought, among other relief, an order requiring the DPP to provide an undertaking as to damages as a condition for the continuation of the freezing order (as varied) pending the final disposition of the application for a criminal benefits declaration. On the return date, the appellant also sought leave to add to the Chamber Summons an application for an order authorising the release of funds to enable him to retain an expert and to fund his defence proceedings generally. Roberts-Smith J refused that leave because, in any event, there was no power under the legislation to allow release of funds for that purpose²⁰. His Honour also rejected the argument for the appellant that, with respect to the undertaking, the freezing order was a form of statutory injunction, analogous to an asset preservation order²¹, so that the ordinary rules and practices respecting injunctive

20 (2004) 150 A Crim R 348 at 353-354.

21 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380.

relief were applicable²². By majority, the Court of Appeal upheld the conclusions of the primary judge.

The construction of s 43 of the Act

23 Section 43 states that the Court "may" on application by the DPP make the freezing orders spoken of in sub-ss (1), (3), (5) and (8). Two critical questions are whether this exercise of power is permissive or mandatory and, if the latter, the range of matters which may properly be taken into account by the Court in deciding to grant or refuse a freezing order.

24 As to the first question, the DPP accepted in this Court, and correctly, that the exercise of the power is permissive not mandatory. In doing so, the DPP accepted the correctness of the decision of the Supreme Court of Western Australia (Malcolm CJ, Wheeler and McLure JJ) in *Bennett & Co v Director of Public Prosecutions (WA)*²³. Their Honours noted that they reached their conclusions partly from the structure of the Act, notably the use of "must" in the declaration of confiscation provision in s 30, and partly from reasons of principle. As to the latter, their Honours said²⁴:

"The freezing order is draconian in its scope. It may prohibit a person from dealing with all of that person's property. Once properly made, it comes to an end only under the relatively limited circumstances described in [s 48 and] s 49, or if set aside pursuant to a successful objection (with the objection provisions being limited in scope and casting the onus onto the objector). It seems unlikely therefore that it was intended, for example, that the Court would be required to make such an order merely because the DPP had advised the Court that an application for an examination order was likely to be made, even if there was no material before the Court which suggested the grounds upon which such an examination order might be sought, so as to enable the Court to consider whether any such application would be bona fide or would be made on reasonable grounds having any arguable prospect of success."

22 (2004) 150 A Crim R 348 at 352-353.

23 (2005) 154 A Crim R 279.

24 (2005) 154 A Crim R 279 at 289.

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25 That reasoning is consistent with, and an illustration of the importance of, the remarks by Gaudron J in *Knight*²⁵ set out earlier in these reasons.

26 The majority in the Court of Appeal based their rejection of the submissions respecting the existence of a power to require provision of an undertaking as to damages on three grounds. These were repeated in this Court by the DPP. On examination, none is decisive of the extent of the power conferred in this case upon the Supreme Court by s 43(3).

The submissions by the DPP – negative implication

27 As to the first ground, it is true that s 20(11) of the *Crimes (Confiscation of Profits) Act* 1988 (WA), which was replaced by the Act, expressly provided for an undertaking as to damages in relation to what then were identified as "restraining orders"²⁶. The DPP relies upon this past presence and present absence for a negative implication as to the scope of the power conferred by the Act upon the Supreme Court.

28 However, the legislative history is of insufficient weight, given the absence of an express limitation upon the scope of the power to grant freezing orders found in the various sub-sections of s 43, to displace the considerations of justice and fairness which ordinarily attend the administration of a new remedy such as that involved here by a court such as the Supreme Court. These considerations point against any negative implication to limit the scope of that power in the way urged by the DPP.

29 A brief consideration of the development of the equity practice respecting undertakings as to damages will assist in appreciating the deep roots in the law of the considerations referred to by Gaudron J in *Knight* and by the Supreme Court in *Bennett & Co.*

25 (1992) 174 CLR 178 at 205.

26 Section 21 of later federal legislation, the *Proceeds of Crime Act* 2002 (Cth), expressly authorises the court to refuse to make a restraining order if the Commonwealth refuses or fails to give to the court an appropriate undertaking, and empowers the DPP to give such an undertaking on its behalf.

30 In *Smith v Day*²⁷, Sir George Jessel MR introduced his (characteristically) unreserved judgment by saying that the undertaking as to damages had been "invented" by Knight Bruce LJ, when Vice-Chancellor. (He was appointed Vice-Chancellor in 1841.) That statement often, and in this Court²⁸, has been accepted at its face value, and has been taken to refer to the terms on which the interlocutory injunction was granted ex parte in 1851 by Knight Bruce V-C in the copyright litigation of *Novello v James*²⁹.

31 However, the Master of the Rolls in *Smith v Day* misstated the position. As Kriewaldt J explained in *Chisholm v Rieff*³⁰, the matter has a longer history. Kriewaldt J referred to the decisions of the Lord Chancellor in *Sanxter v Foster*³¹ and of Leach V-C in *Irving v Harrison*³². To these may be added the remarks of Lord Eldon LC in *The Marquis of Downshire v Lady Sandys*³³ and *Wombwell v Belasyse*³⁴. In the judgment of the Supreme Court of the United States in *Russell v Farley*³⁵, which was delivered shortly before that in *Smith v Day*³⁶, Bradley J suggested that the practice went back even further.

27 (1882) 21 Ch D 421 at 424.

28 *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1979) 146 CLR 249 at 260; affd (1981) 146 CLR 306.

29 (1854) 5 De G M & G 876 [43 ER 1111].

30 (1953) 2 FLR 211 at 214. See also the judgment of Young J in *Southern Tableland Insurance Brokers Pty Ltd (in liq) v Schomberg* (1986) 11 ACLR 337.

31 (1841) Cr & Ph 302 [41 ER 506], shown in *The Digest*, (1989 2nd reissue), vol 18 at §5421 as a decision of Lord Cottenham LC, not of Lord Lyndhurst LC, as Kriewaldt J recorded it in *Chisholm v Rieff*.

32 (1824) 3 LJ Ch (OS) 48.

33 (1801) 6 Ves Jun 107 at 113 [31 ER 962 at 965].

34 (1825) 6 Ves Jun 116 (n) [31 ER 966 at 968].

35 105 US 433 (1881).

36 (1882) 21 Ch D 421.

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32 There may be a question as to when the practice became settled, but what is important for present purposes is an understanding of the considerations which favoured the adoption of a requirement for the provision to the equity court of the undertaking.

33 In *Russell v Farley*, Bradley J, referring to the treatment of the subject in the first edition of *Kerr on Injunctions*³⁷, said³⁸:

"It is a settled rule of the Court of Chancery, in acting on applications for injunctions, to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused³⁹. And if the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party; for the damage arising from the act of the court itself is *damnum absque injuria*, for which there is no redress except a decree for the costs of the suit, or, in a proper case, an action for malicious prosecution. To remedy this difficulty, the court, in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. *The power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for.* It is a power inherent in the court, as a court of equity, and has been exercised from time immemorial." (emphasis added)

34 In contemporary circumstances, the traditional powers of a court of equity have devolved, in Australia, upon State Supreme Courts *inter alios*. In the exercise of its jurisdiction and powers, absent express provision to other effect by or under statute, the Supreme Court enjoyed a like power in the grant of an injunction or analogous remedy. Against this background, the traditional concern with avoidance of unfairness and injustice in the administration of powers such as those conferred by s 43 of the Act with respect to freezing orders,

37 *A Treatise on the Law and Practice of Injunctions in Equity*, (1867). See also "Notes – Interlocutory Injunctions and the Injunction Bond", (1959) 73 *Harvard Law Review* 333, where reference is made to 18th century statutory requirements in Maryland and Virginia for injunction bonds.

38 105 US 433 at 438 (1881).

39 *Kerr on Injunctions*, (1867) at 209, 210.

supports, in the absence of express statutory provision to other effect, not the negative implication urged by the DPP, but the contrary.

Section 137 of the Act

35 The second ground urged by the DPP is based upon what is said to follow from s 137 of the Act. This states:

"A person on whom this Act confers a function is not personally liable in civil proceedings, and the State is not liable, for anything done or default made by the person in good faith for the purpose of carrying this Act into effect."

The presence of s 137 is said to render an undertaking as to damages nugatory or futile.

36 Section 137 is directed to a different field of discourse. It is an example of provisions of the type considered in *Puntoriero v Water Administration Ministerial Corporation*⁴⁰ and *Bankstown City Council v Alamo Holdings Pty Ltd*⁴¹. The section, for example, may give protection against actions in trespass and detainee for steps taken in the management of seized, frozen and confiscated property⁴², but is not directed to the consequences attendant upon the voluntary tendering and acceptance by the Court of an undertaking.

37 The point was accurately developed by Pullin JA in his dissenting reasons as follows⁴³:

"It is argued that if the DPP cannot be made liable for anything done or default made in good faith for the purpose of carrying the Act into effect, then it would have no liability under an undertaking as to damages and therefore there is no point in requiring it. In my opinion, the existence of s 137 is of no assistance to the DPP. If the DPP gives an undertaking as to damages and the freezing order is discharged after the objection

40 (1999) 199 CLR 575.

41 (2005) 79 ALJR 1511; 221 ALR 1.

42 Provided for in Pt 7 (ss 88-100) of the Act.

43 (2005) 153 A Crim R 41 at 59.

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proceedings, then provided that the appellant was able to prove that he suffered loss, and compensation was assessed by the Court, the DPP could not refuse to pay that compensation. Such a default would not be a default 'in good faith' for the purpose of carrying the Act into effect."

Civil proceedings

38 The third ground advanced by the DPP repeats the rebuttal by the majority in the Court of Appeal of an argument by the appellant which is inessential to his success in this Court. In the Court of Appeal, the appellant had submitted that the statement in s 102(1) of the Act that "for all purposes" proceedings on an application under the Act "are taken to be civil proceedings" imported the Rules of the Supreme Court (WA) ("the Rules"), including O 52 r 9. This requires the provision in a specified form of an undertaking as to damages "upon the grant of an interlocutory injunction".

39 However, a freezing order is not identified by the Act as an "injunction". Further, if the Act did so, this term would take its content from the statute itself, with such supplementation by the Rules as then was appropriate⁴⁴. But the issue upon which this appeal turns has already been explained and lies elsewhere. It concerns the scope of the power conferred by the use of the phrase "may make" in s 43 of the Act.

40 The DPP relied strongly upon *Thomson Australian Holdings Pty Ltd v Trade Practices Commission*⁴⁵. With respect to the specific regime of injunctive relief provided by s 80 of the *Trade Practices Act* 1974 (Cth) and the conferral by ss 22 and 23 of the *Federal Court of Australia Act* 1976 (Cth) of general "Judicature Act" powers, Gibbs CJ, Stephen, Mason and Wilson JJ concluded⁴⁶:

"It is scarcely to be supposed that the Parliament intended to draw a distinction in these respects between two classes of injunctions, one class of injunctions granted under s 80 and another class granted under ss 22 or 23 of the *Federal Court of Australia Act*. The inference is irresistible that Parliament looked upon s 80 as a complete and comprehensive statement

44 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 394 [28]-[29], 412 [80].

45 (1981) 148 CLR 150.

46 (1981) 148 CLR 150 at 162.

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of the circumstances in which injunctions might be granted in respect of relief sought under the *Trade Practices Act*."

41 *Thomson Holdings* is an example of legislation which has the "reasonably plain" contrary intendment spoken of earlier in the *Electric Light Case*⁴⁷ and discussed earlier in these reasons. The present case does not involve an issue of that kind. Rather, it turns upon the construction of the particular provisions for freezing orders which are made by s 43 of the Act.

The giving of an undertaking

42 In the Court of Appeal Steytler P raised another issue respecting the giving of an undertaking. His Honour said⁴⁸ that it would have to be required of the State, not the DPP. However, there is no difficulty in that respect. The *Director of Public Prosecutions Act* 1991 (WA) provides that the functions of the DPP "are performed on behalf of the State" (s 10(1)(a)), that those functions include the taking of proceedings under the Act (s 16(3)) and that the DPP has power to do all things necessary or convenient to perform those functions (s 20(1)). The provision of an undertaking as to damages as a step required by the Court for it to make a freezing order would be supported by the combination of these sections. It should be added that s 5 of the *Crown Suits Act* 1947 (WA) provides for the Crown, under the title "the State of Western Australia", to sue and be sued in any court or otherwise competent jurisdiction.

43 The ascription to an application for a freezing order of the character of civil proceedings by s 102(1) of the Act is significant here. The DPP does not in such proceedings prosecute any breach of the criminal law and, as remarked above, the outcome of one species of proceeding does not determine that of the other. Further, an objective of a freezing order is to secure the prospective liability of the appellant to pay to the State, pursuant to s 20, an amount equal to the assessed value of the criminal benefit allegedly acquired by the appellant. Hence the statement in submissions by the DPP to this Court that the DPP stands in the position of a contingent creditor.

47 (1956) 94 CLR 554 at 560.

48 (2005) 153 A Crim R 41 at 49.

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44 In *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd*⁴⁹, Lord Goff of Chieveley (with whom the other Law Lords agreed) considered the law with respect to undertakings as it stood in England after *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry*⁵⁰. His Lordship said of *Hoffmann*⁵¹:

"It was decided, first, that in actions brought by the Crown to enforce or protect its proprietary or contractual rights, it should be in no different position from the ordinary citizen and so should be required to give an undertaking in the usual way. But, second, it was held that different principles applied in cases where the Crown brought a law enforcement action, in which an injunction was sought to restrain a subject from breaking a law where the breach would be harmful to the public or a section of it."

In the latter circumstances, the propriety of requiring an undertaking was to be considered in the light of the particular circumstances of the case⁵².

45 In *Optus Networks Pty Ltd v City of Boroondara*⁵³, Charles JA and Callaway JA expressed general agreement with the speech of Lord Goff in *Kirklees*⁵⁴ as expressing the law of Victoria. That speech, of course, accepted the majority view expressed in *Hoffmann* by Lord Diplock. Lord Wilberforce was of a different view, one less favourable to the enjoyment of any special position by the Crown⁵⁵. In the present litigation, Pullin JA said he was persuaded by what

49 [1993] AC 227.

50 [1975] AC 295.

51 [1993] AC 227 at 272.

52 [1993] AC 227 at 273.

53 [1997] 2 VR 318 at 332, 340.

54 See also *McCleary v Director of Public Prosecutions (Cth)* (1998) 20 WAR 288 at 309-310.

55 [1975] AC 295 at 357-360.

had been said by Lord Wilberforce⁵⁶. This Court has not ruled on the point and it is unnecessary to do so now.

46 The present litigation does not concern the general jurisdiction of the Supreme Court under the Supreme Court Act to award injunctive relief. However, the jurisdiction under the Act to make freezing orders does involve the protection of the prospective or contingent (it is unnecessary to choose between these terms) property rights of the State. It is more difficult to categorise the freezing order procedure purely as "a law enforcement action" in the sense used in the House of Lords. The statutory regime is *sui generis*. The situation is sufficiently dealt with by holding that, within the authority conferred by s 43 of the Act, the Supreme Court had the power (albeit not the duty) to require the provision of an undertaking and, if this was not offered or was offered in unsatisfactory terms, the Supreme Court was at liberty to refuse the freezing order sought by the DPP.

Federal jurisdiction

47 This conclusion makes it unnecessary to determine whether, by dint of s 64 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") and the reasoning in *Maguire v Simpson*⁵⁷, the same result might be reached by another route. Such a result would be dictated by the circumstance that, in dealing with the applications before him, Roberts-Smith J was exercising federal jurisdiction where the rights of the State and the appellant "shall as nearly as possible be the same"⁵⁸. This would depend upon the presence, at all times since the appellant was first charged on 14 August 2002, of charges against federal law. These provide "confiscation offences" upon which the definition of "criminal benefits" depends. A question then would be whether the right or duty in question in the application by the appellant to Roberts-Smith J respecting variation of the freezing order

56 (2005) 153 A Crim R 41 at 60.

57 (1977) 139 CLR 362. See also *The Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 59.

58 Judiciary Act, s 64; see also *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 48 [24]-[25], 60-66 [68]-[87], 88 [160]-[161], 90 [169].

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owed its existence to federal law⁵⁹. It is unnecessary, particularly in the absence of full argument, to essay an answer here to that question.

Legal expenses

48 On this, the second and remaining aspect of the appeal, fundamental considerations also are engaged by the submission for the DPP that the primary judge and the majority of the Court of Appeal correctly construed the freezing order provisions as denying implicitly the power of the Court to make provision for legal expenses. No constitutional question was raised by the parties to this appeal. It will be assumed that the appeal can be decided without regard to any constitutional implications.

49 The unique and essential function of the judicial branch of government is the quelling of controversies by the ascertainment of the facts and the application of the law⁶⁰. This is done by an adversarial system of litigation. It is plain that the operation of that system is assisted by the presence of legal representation, and may be severely impaired by its absence. In *Dietrich v The Queen*⁶¹, Mason CJ and McHugh J repeated the extrajudicial opinion of Lord Devlin that, save in the exceptional case of the skilled litigant, in practice the adversarial system breaks down where there is no legal representation.

50 The Act, as remarked earlier in these reasons, is draconian in its operation and complex in various of its provisions. There is not readily to be implied a denial of the powers of the Supreme Court when making or varying a freezing order to mould its relief to permit the use of funds to obtain legal assistance. Such assistance is for the benefit not only of the individual but for the more effective exercise of the jurisdiction conferred by s 101 of the Act with respect to proceedings under the Act. In that sense, it is also for the benefit of the State and the public.

51 The DPP asserts a negative implication drawn from the express terms of s 45 of the Act. This states:

59 *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581.

60 *Fencott v Muller* (1983) 152 CLR 570 at 608; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 79 ALJR 755 at 763 [43]; 214 ALR 92 at 102-103.

61 (1992) 177 CLR 292 at 302.

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"In a freezing order, the court may do any or all of the following –

- (a) direct that any income or other property derived from the property while the order is in force is to be treated as part of the property;
- (b) if the property is moveable – direct that the property is not to be moved except in accordance with the order;
- (c) appoint the DPP, the Public Trustee or the Commissioner of Police to manage the property while the order is in force;
- (d) give any other directions necessary to provide for the security and management of the property while the order is in force;
- (e) provide for meeting the reasonable living and business expenses of the owner of the property."

The primary judge also referred⁶² to a statement in the Second Reading Speech on the Bill for the Act⁶³ that property could be released from a freezing order only for the payment of living expenses and none could be released for payment of legal expenses. But the Bill did not so state; nor does s 45 of the Act. His Honour erred in concluding that what was said in the Legislative Assembly had put the matter in no doubt⁶⁴.

52 The general considerations discussed above as to the importance and public utility of legal representation in proceedings under the Act point away from any negative implication based upon s 45 which would restrict in this regard the scope of the power conferred upon the Supreme Court with respect to freezing orders.

62 (2004) 150 A Crim R 348 at 354.

63 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 29 June 2000 at 8613.

64 (2004) 150 A Crim R 348 at 354.

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20.

53 The treatment of the matter by Pullin JA in his dissenting judgment was correct and we would adopt the following passage⁶⁵:

"In my opinion it is not necessary to force the issue into a question about whether or not legal expenses can be categorised as 'reasonable living and business expenses' in a freezing order. Indeed I will assume without deciding that legal expenses are not 'living' or 'business' expenses.

Section 43(3) states that the Court may make a freezing order for 'all or any' property that is owned or effectively controlled by the person. The Court may make a freezing order over all property owned by a person and in that freezing order make provision for 'meeting the reasonable living and business expenses of the owner of the property'. As I have said I will assume this will not allow the Court to make provision for legal expenses.

However, the Court in the exercise of its discretion may also refuse to make a freezing order over some property. The Court could therefore make a freezing order with respect to certain property, and refuse to make one in relation to sufficient property to allow legal expenses to be paid. In other words the freezing order would not cover property to be used to pay legal expenses. If some property is exempted from the freezing order, then s 45 would not apply to it. In exempting some of the property from the freezing order, the Court could provide that it be exempt on condition that it be spent in a particular way, ie, for legal expenses, and that there should be some machinery for ensuring that the money is spent only for that purpose."

54 The last sentence of the above passage is of great significance. It calls for great care by the parties and the Court in the framing of the condition to ensure, to the maximum practical extent, that exempted funds are not misused, whether by overservicing and overcharging or by other abuse.

Orders

55 The following orders should be made:

- (1) Appeal allowed with costs.

⁶⁵ (2005) 153 A Crim R 41 at 61-62.

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- (2) Set aside orders 3 and 4 of the orders of the Court of Appeal of 29 April 2005 and in lieu thereof order that:
- (a) leave be granted to appeal to the Court of Appeal in respect of grounds 1 and 2 of the draft notice of appeal dated 21 December 2004;
 - (b) the appeal be treated as instituted and heard *instanter* and be allowed;
 - (c) orders 1 and 2 of the orders made by Roberts-Smith J on 30 November 2004 be set aside;
 - (d) the appellant have his costs in respect of the whole of the leave application and of the appeal to the Court of Appeal;
 - (e) paragraphs 2, 3 and 4 of the appellant's Chamber Summons dated 16 September 2004 ("the Chamber Summons") and his application for leave to amend to seek provision for legal expenses be referred to a single judge for determination;
 - (f) costs of previous proceedings on the Chamber Summons be costs of the further proceedings before that single judge.

56 HEYDON J. I would dismiss the appeal.

Undertaking as to damages

57 There are no words in the legislation importing any principles by analogy to those relating to undertakings as to damages given as the price of equitable relief. The language of the legislation, considered in the light of its history, is sufficiently clear to exclude those principles. Different views are open about whether the legislation is excessively harsh, either in general or in the circumstances of this particular case, and about whether it is an unjust overreaction to the problems with which it seeks to deal. Unfortunately, to my mind the language is quite clear, and creates an insuperable obstacle to the applicant's arguments. I would not, however, accept the respondent's arguments based on s 137.

Legal expenses

58 I agree with Steytler P that this part of the appellant's arguments must fail for the reasons given by the President⁶⁶.

66 *Mansfield v Director of Public Prosecutions (WA)* (2005) 153 A Crim R 41 at 50-51 [38]-[43].