

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CRENNAN JJ

DIRECTOR OF PUBLIC PROSECUTIONS
FOR VICTORIA

APPELLANT

AND

PHAN THI LE

RESPONDENT

Director of Public Prosecutions for Victoria v Le [2007] HCA 52
14 November 2007
M65/2007

ORDER

1. *Appeal allowed in respect of grounds (1)-(3) and dismissed in relation to grounds (4)-(7).*
2. *Set aside Order 1 of the orders made by the Court of Appeal of the Supreme Court of Victoria on 15 February 2007 and, in its place, order that:*
 - (a) *the appeal be allowed;*
 - (b) *Order 1 of the orders made by Judge Campbell on 31 March 2006 be varied as follows:*
 - (i) *Order that the interest as joint proprietor of Phan Thi Le in the property situated at 10/28-30 Ridley Street, Sunshine and more particularly described in Certificate of Title Volume 9604 Folio 908 be excluded from the automatic forfeiture pursuant to s 52(1)(a) of the Confiscation Act 1997; and*
 - (ii) *Declare that the nature of the interest of Phan Thi Le in the property is that of tenant in common as to a one-half share.*
3. *The appellant to pay the respondent's costs of the appeal to this Court.*

On appeal from the Supreme Court of Victoria

Representation

D F Jackson QC with N J O'Bryan SC for the appellant (instructed by Solicitor for Public Prosecutions)

D Grace QC with D C Hallows and M K Moshinsky for the respondent (instructed by Melinda Walker & Co)

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

CATCHWORDS

Director of Public Prosecutions for Victoria v Le

Criminal Law – Confiscation of Property – Exclusion order – Husband was sole registered proprietor of an apartment ("the property") which was the matrimonial home – Husband charged with trafficking in drug of dependence – Husband subsequently transferred the property to himself and his wife ("the respondent") as joint registered proprietors for consideration of "natural love and affection" – Director of Public Prosecutions for Victoria obtained a restraining order over the property pursuant to the *Confiscation Act* 1997 (Vic) ("the Act") for the purpose of automatic forfeiture upon conviction – Husband convicted – Respondent applied, pursuant to s 51 of the Act, for exclusion of the property from automatic forfeiture – Whether whole of the property, or only the respondent's joint interest in the property, could be excluded from forfeiture on the satisfaction of certain conditions – Whether respondent satisfied the condition in s 52(1)(a)(iii) of the Act that the circumstances in which she acquired her interest in the property were "such as not to arouse a reasonable suspicion that the property was tainted property" – Whether "reasonable suspicion" to be tested wholly objectively – Whether "natural love and affection" constituted "sufficient consideration" within the meaning of s 52(1)(a)(v) of the Act.

Words and phrases – "good consideration", "interest", "natural love and affection", "property", "property in which the applicant claims an interest", "reasonable suspicion", "sufficient consideration", "valuable consideration".

Confiscation Act 1997 (Vic), ss 51, 52(1), 52(2).

1 GLEESON CJ. I have had the advantage of reading in draft form the joint reasons for judgment of Kirby and Crennan JJ. I agree with the orders proposed in those reasons. As to the first and third issues with which they deal (the scope of orders excluding property from forfeiture, and the matter of reasonable suspicion), I agree with what their Honours have said and have nothing to add. As to the second issue (sufficient consideration), I would add the following, and make particular reference to the factual basis on which the primary judge and all three members of the Court of Appeal decided the question.

2 The relevant part of the evidence as to the motivation for the transfer, to the respondent, of an interest (as joint tenant) in the matrimonial home was laconic, and barely tested in cross-examination. The respondent was entirely dependent upon her husband. She said that she asked to be made a part owner of the matrimonial home because, if anything happened to her husband, she would have had nowhere to live and believed the property would pass to his children by a former marriage. The primary judge concluded:

"Whilst natural love and affection may not be sufficient to justify a commercial contract between people at arm[']s length, it is a common 'consideration' in respect to the alteration of property interests between husband and wife, as is the case here. In any event, it would seem to me to be arguable that what Le was doing in transferring a moiety of his interest in the property was no more than fulfilling a matrimonial obligation. The implication that Mr Le did effect the transfer to avoid the consequences of his wrongdoing rests upon supposition, which supposition might have been more attractive had he sought to transfer the whole of his interest in the property to the Applicant.

I am satisfied, in the circumstances, that the Applicant, as his wife, acquired her interests in the property for a sufficient consideration."

3 All three members of the Court of Appeal upheld that conclusion. Maxwell P and Chernov JA, with whom Neave JA agreed on this point, said that "sufficient consideration" included both valuable consideration and good consideration, but added, in a footnote, that it did not encompass nominal consideration. They concluded that "[i]n the circumstances of this case as found by his Honour, 'natural love and affection' ... constituted 'sufficient consideration'".

4 Both the primary judge and the Court of Appeal were careful to relate their conclusion that natural love and affection constituted sufficient consideration to the circumstances of this case. Maxwell P and Chernov JA quoted the passage in the reasoning of the primary judge set out above. The "matrimonial obligation" of Mr Le to the respondent was an important part of the circumstances. There was no detailed investigation of the extent of Mr Le's matrimonial obligations to the respondent. The primary judge, however,

recorded a general impression that, in making the respondent a joint tenant, Mr Le was doing no more than fulfilling his obligations. The judge did not go beyond that, presumably because the issue was not the subject of more precise evidence or argument.

5 I do not take the primary judge or the Court of Appeal to have accepted that a transfer of an interest in property in consideration of natural love and affection would always satisfy the requirements of s 52(1)(a)(v) of the *Confiscation Act* 1997 (Vic); and I would not accept that. There are circumstances in which a transfer in consideration of natural love and affection might reflect no legal or equitable obligation, matrimonial or otherwise. Such a consideration might move a transfer from one wealthy spouse to another who was even wealthier; or from a parent to a financially independent child. A transfer of property in consideration of natural love and affection may be "founded in motives of generosity, prudence, and natural duty"¹. Goodwill or generosity towards persons in a certain class may form the basis of what the law regards as good consideration; obligation does not necessarily come into it.

6 In the context of the *Confiscation Act* and, in particular, s 52, relating the meaning of "sufficient consideration", without further statutory definition, to concepts of "valuable" and "good" consideration as they apply to conveyancing or contract law is not easy. It is common ground that it does not include nominal consideration; yet to restrict it to commercial transactions supported by payment in money or money's worth goes beyond what is required by the legislative text and purpose. On the other hand, it is easy to imagine examples of transfers to near relatives² which are motivated purely by goodwill or generosity, and reflect no form of obligation.

7 A transfer in consideration of natural love and affection may be for sufficient consideration within the meaning of the Act where it reflects a legal or equitable obligation of the transferor to the transferee. Such an obligation may arise out of a matrimonial relationship, and commonly does so. It is not necessary that it be capable of precise measurement, or that there be a search for exact equivalence between the obligation and the value of the interest transferred. A substantial parity will suffice. It is unnecessary to decide the issue that would arise in a case of a transfer for money or money's worth, but at a substantial undervalue. In the circumstances of the present case, the consideration was sufficient.

1 Blackstone, *Commentaries on the Laws of England*, 18th ed (1829), vol 2 at 297.

2 The expression "near relatives" is sometimes used to describe the class of persons covered by "good consideration", eg *Vaizey on Settlements*, (1887), vol 1 at 66; *Gibson's Conveyancing*, 20th ed (1970) at 198.

3.

- 8 GUMMOW AND HAYNE JJ. This appeal concerns the transfer to the respondent, Phan Thi Le ("Mrs Le"), by her husband, Roy Le ("Mr Le"), of a half share of his interest in an apartment in the Melbourne suburb of Sunshine, and the consequences for that transfer of the *Confiscation Act 1997* (Vic) ("the Act"). While this appeal concerns the meaning of several familiar terms of property and conveyancing law, its resolution does not depend on any abstract consideration of the meaning of "property" or "interests" therein. The resolution of the appeal turns instead on the proper interpretation of s 52 of the Act and the extent of the exclusion from automatic forfeiture effected by that section. However, an understanding of that section must be found in an understanding of an operation of the Act as a whole.

The transfer to Mrs Le

- 9 On 23 June 2003, Mr Le was charged with several offences, including trafficking in not less than a commercial quantity of a drug of dependence. He pleaded guilty and was convicted on 1 February 2005, and was sentenced on 18 February to a term of imprisonment for four years with a two year non-parole period.

- 10 Until 29 August 2003 and pursuant to the *Transfer of Land Act 1958* (Vic), Mr Le was the sole registered proprietor of the apartment in the suburb of Sunshine³, which was the matrimonial home. On that date, Mrs Le was registered as joint proprietor of the apartment. The property was subject to a registered mortgage, and the mortgagee consented to the transfer. Mr Le had conveyed the fee simple to Mrs Le and himself as joint tenants, for a consideration stated in the transfer to be "natural love and affection". Mrs Le explained that she "did not pay any money to my husband for the transfer because I am his wife".

- 11 Something should be said at the outset respecting the significance of that matrimonial relationship for the issues of construction of the Act upon which the appeal turns. The position at general law, as it stood after the enactment of the *Married Women's Property Act 1882* (UK) and cognate legislation elsewhere,

3 The Land Description in Certificate of Title Vol 09604 Folio 908 was "[u]nit 10 on Strata Plan 021815G and an undivided share in the common property for the time being described on the plan".

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was explained by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth*⁴. His Lordship concluded⁵:

"The wife has no specific right against her husband to be provided with any particular house, nor to remain in any particular house. She has a right to cohabitation and support ... [But] the wife's rights, as regards the occupation of her husband's property, are essentially of a personal kind ... Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability. The wife's right has none of these qualities, it is characterised by the reverse of them."

(It was not suggested that any other statute was the source of any relevant obligation on Mr Le to create the joint tenancy.)

- 12 Accordingly, the change in the title to the Sunshine property whereby Mr and Mrs Le became joint tenants was not made in discharge of any matrimonial obligation imposed by law upon Mr Le to create a proprietary interest in favour of his wife.

The restraining order

- 13 After the transfer to Mrs Le and before Mr Le's conviction, the appellant Director of Public Prosecutions ("the DPP") applied pursuant to s 16(2) of the Act to the County Court for a restraining order. That sub-section provides:

"The DPP or a prescribed person, or a person belonging to a prescribed class of persons, may apply, without notice, to the Supreme Court or the County Court for a restraining order in respect of property if—

...

- (c) a person has been charged with a Schedule 2 offence and that person has an interest in the property or the property is tainted property in relation to that offence."

- 14 The apartment was "tainted property" within the meaning of s 3 of the Act as it was property that "was used ... in, or in connection with, the commission of

4 [1965] AC 1175.

5 [1965] AC 1175 at 1247-1248. See also the reasons of Mason J in *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342.

the offence", namely Mr Le's use of it for the storage and preparation of heroin for sale. The property was also "property in which the defendant has an interest" within the meaning of s 10.

15 The effect of a restraining order is explained in s 14(1):

"A restraining order is an order that no property or interest in property, that is property or an interest to which the order applies, is to be disposed of, or otherwise dealt with by any person except in the manner and circumstances (if any) specified in the order."

16 What, then, was the property or an interest to which the order applied? So much must be determined from the order itself. The restraining order made by Judge Fagan on 18 September 2003 relevantly specified the property by its street address in Sunshine, and by reference to the identified Certificate of Title. The description of the relevant property in those terms made it clear that the restraint was sought with respect to the property as a whole, and not with respect to any particular interest therein. It may be added that the forfeiture of the property as "tainted property" served to emphasise that the property was being spoken of in the physical sense, as it would be rather artificial to speak of the "use" of an "interest" in property in the commission of an offence.

17 The order could have been, but was not, made with respect to Mr Le's interest alone, and the reason for not doing so is plain. As Philippides J noted in *Commonwealth Director of Public Prosecutions v Hart*⁶:

"If a restraining order were not to extend to all interests in the property specified in the order, it could be rendered nugatory by the simple expedient of disposing of or otherwise dealing with the equitable interests in the property."

For like reasons, the offence in s 29 of the Act of knowingly contravening a restraining order is committed by "disposing of, or otherwise dealing with, an interest in property to which the order applies"; not merely by disposing of the property itself.

18 Section 16(2) makes it clear that "property" can be restrained – and eventually forfeited – on the basis of the defendant's "interest" therein, or on the basis of the property's status as "tainted property". There is therefore no requirement that the defendant's "interest" equate to the entirety of ownership of that property. Plainly, others may have an interest in the restrained property in

6 [2007] QCA 184 at [45].

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addition to the defendant whose crime rendered the property "tainted property", or whose interest in the property enlivened the jurisdiction of the court to make the restraining order. So much is recognised by s 19A(1) of the Act which provides that:

"a member of the police force must give a notice to each person who the applicant for the restraining order believes has an interest in that property requiring the person to give to the member of the police force a written declaration of property interests".

The required content of such a declaration of property interests is set out in s 19B.

19 The order made by Judge Fagan specified that the purpose for which the order was made included automatic forfeiture pursuant to Div 2 of Pt 3 of the Act. That statement of purpose was required by s 15(3), which specifies that:

"If a court makes a restraining order in respect of property or an interest in property—

- (a) the court must state in the order the purpose for which the property or interest is restrained; and
- (b) if the court excludes property or an interest in property from the order in respect of a purpose, the court must state in the order whether the property or interest remains restrained for any other purpose and, if so, state that other purpose."

In the present case, the purpose was automatic forfeiture, and no property or interest was excluded.

The forfeiture of the property

20 The property being thus restrained, the effect of s 35 of the Act was that the "restrained property", and not merely the defendant's interest therein, was forfeited to the Minister on the expiry of 60 days after Mr Le's conviction. The effect of that forfeiture is set out in s 41(2) of the Act:

"the property vests in the Minister subject to every mortgage, charge or encumbrance to which it was subject immediately before the order was made or the automatic forfeiture occurred (as the case may be) and to—

- (c) in the case of land, every interest registered, notified or saved under the **Transfer of Land Act 1958** or the **Property Law Act 1958**".

After the transfer to her, Mrs Le was joint registered proprietor of the land, and s 41(2)(c) might be thought to preserve her registered interest. However, sub-s (3) goes on to state that:

"If registrable property is forfeited to the Minister under a forfeiture order or a civil forfeiture order or by automatic forfeiture under section 35—

- (a) the property vests in equity in the Minister but does not vest in the Minister at law until the applicable registration requirements have been complied with; and
- (b) the Minister is entitled to be registered as owner of the property; and
- (c) the Minister or a prescribed person authorised by the Minister for the purposes of this sub-section has power to do, or to authorise the doing of, anything necessary or convenient to obtain the registration of the Minister as owner, including but not limited to, the execution of any instrument required to be executed by a person transferring an interest in property of that kind."

21 It may be that the registration of the Minister "as owner" in s 41(3)(b) – that is, as registered proprietor of the fee simple – is apt to exclude Mrs Le's "ownership" as joint registered proprietor. By contrast, the preservation of registered interests not amounting to "ownership", such as the registered mortgage in the present case, might not be inconsistent with the status of the Minister as "owner". However, in light of the preferable construction of s 52, discussed below, it is unnecessary to reach a concluded view on these matters. The significant point for present purposes is that s 41 prescribes the vesting of the property itself and not merely the defendant's interest therein, subject to the automatic preservation of certain specified interests which in the present case would include the registered mortgage. Those interests which are not preserved are also forfeited, subject to the ability of such an interest-holder to apply to "buy back" their interest from the Minister pursuant to s 56 of the Act.

The application for exclusion from forfeiture

22 Because of an apparent miscalculation of time by her solicitor, Mrs Le was unable to make an application pursuant to s 20 of the Act for an order pursuant to s 22(b) that the property be excluded from the restraining order before any forfeiture was effected. The property having been forfeited, Mrs Le made an application to the County Court pursuant to s 51(1) for an order under s 52 "excluding property in which the applicant claims an interest from the operation of section 35". Because of the miscalculation, she also required, and was granted pursuant to s 51(3), an extension of time in which to make that application.

23 The primary judge (Judge Campbell) and the majority of the Court of Appeal (Maxwell P and Chernov JA; Neave JA dissenting)⁷ held that an order under s 52 had the effect of excluding from forfeiture all of the property in which the applicant claimed an interest, and not merely the interest itself. Judge Campbell made an exclusion order to that effect on 31 March 2006, and that determination was affirmed on appeal on 15 February 2007.

24 In grounds 1, 2 and 3 in its Notice of Appeal to this Court, the DPP contends that the majority of the Court of Appeal erred, and that the exclusion from forfeiture operated with respect to the applicant's interest in property, not the property as a whole. Mrs Le submits the converse. For the reasons that follow, her submissions are to be preferred on this point.

What was to be excluded from forfeiture?

25 One must return to the statutory text. The relevant terms of s 51(1) of the Act are:

"If property is forfeited to the Minister under section 35, a person (other than the defendant) who claims to have had *an interest in the property* immediately before it was forfeited may ... apply to the court that made the relevant restraining order for an order under section 52." (emphasis added)

26 Section 52 should next be set out.

"52 Determination of exclusion application—automatic forfeiture

(1) On an application made under section 51, the court may make an order excluding *property in which the applicant claims an interest* from the operation of section 35—

(a) if the court is not satisfied that the *property in which the applicant claims an interest* is not tainted property but is satisfied that—

(i) the applicant was not, in any way, involved in the commission of the Schedule 2 offence; and

(ii) where the applicant *acquired the interest* before the commission of the Schedule 2 offence, the applicant

7 (2007) 15 VR 352.

10.

did not know that the defendant would use, or intended to use, *the property* in, or in connection with, the commission of the Schedule 2 offence; and

- (iii) where the applicant *acquired the interest* at the time of or after the commission of the Schedule 2 offence, the applicant acquired the interest without knowing, and in circumstances such as not to arouse a reasonable suspicion, that *the property* was tainted property; and
 - (iv) the applicant's *interest in the property* is not subject to the effective control of the defendant; and
 - (v) where the applicant *acquired the interest* from the defendant, directly or indirectly, that it was acquired for sufficient consideration; or
- (b) if the court is satisfied that *the property* is not tainted property and that—
- (i) the applicant's *interest in the property* is not subject to the effective control of the defendant; and
 - (ii) where the applicant *acquired the interest* from the defendant, directly or indirectly, that it was acquired for sufficient consideration.

- (2) If the court makes an order under sub-section (1), the court may also make an order declaring the nature, extent and value of the applicant's *interest in the property*." (emphasis added)

Both ss 51 and 52 therefore explicitly direct attention to the property which has been forfeited to the Minister pursuant to s 35, as it is *that* property which is retrospectively excluded from forfeiture.

27

In the present case, the property to be forfeited pursuant to s 35 was that specified in the order of Judge Fagan, namely the apartment itself. Mrs Le's interest, which gave her standing to make the s 51 application, was her interest as joint registered proprietor of that property. However, it is the property, not the interest, that is excluded from forfeiture. Maxwell P and Chernov JA correctly observed⁸:

8 (2007) 15 VR 352 at 365.

"the property which is automatically forfeited to the minister is the same property as has been made the subject of the relevant restraining order, and it is equally apparent that it is *that* property which is to be the subject of any exclusion order, whether made before the property is automatically forfeited or after forfeiture. When ss 22 and 52 of the Act speak respectively of excluding 'the property', or 'property', from the operation of the restraining order or the operation of s 35, they are referring to the property the subject of the restraining order or the automatic forfeiture, as the case may be. In either situation, it is *that* property which is to be 'saved' from automatic forfeiture.

A restraining order can, of course, be made in respect of an interest in property. That follows from the definition of 'property' in s 3. But once the restraining order has been made, that interest is 'the property' to which the later provisions of the Act apply."

28 The difficulty with the construction adopted by Neave JA is that it does not recognise that the property excluded by s 52 from the operation of s 35 is that property previously specified in the restraining order. Where, as here, that order specifies particular property, it is not to the point that the definitional provisions in s 3 might have permitted the restraint of some lesser interest. Conversely, if the order restrains only an interest in property, then only that interest will be excluded by s 52. Either way, the extent of the exclusion is determined not by the definitions of "property" or "interest" in the abstract, but rather by the content of the particular restraining order. Section 55 deals with the return of property by the Minister. When that section speaks of a court making an exclusion order "in respect of an interest in property", this must be understood in light of what was the power of the court to have made a restraining order in respect of such an interest, rather than in respect of the property as a whole. Contrary to the DPP's submissions, there is thus no inconsistency between s 55 and the construction of s 52 favoured by the majority of the Court of Appeal.

29 The legislature could have framed s 52 so as to enable a court to make an order excluding the applicant's *interest in property* from the operation of s 35. It did not do so⁹, despite the apparent tenor of the explanatory memorandum, and the plain and unambiguous words of the statute must prevail¹⁰. As has been set out above, the Act repeatedly recognises that people other than the defendant

9 Section 52 has since been amended by the *Confiscation Amendment Act* 2007 (Vic) to enable the court to make an "order excluding the applicant's *interest in property* from the operation of section 35". (emphasis added)

10 cf *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518.

may have "interests" in the property that is subject to the restraining order and eventual forfeiture. It is thus hardly surprising that s 52 draws a consistent distinction between the forfeited property and the applicant's interest therein. So much can be seen in the nine occasions in which the distinction is drawn in the section itself, namely in the first clause of sub-s (1), in par (a), in sub-pars (ii)-(v), in par (b) sub-pars (i) and (ii), and in sub-s (2), which have been emphasised in the setting out of s 52 earlier in these reasons.

30 In addition, the power conferred in sub-s (2) to declare the "nature, extent and value of the applicant's interest in the property" would be meaningless and redundant if the exclusion brought about by sub-s (1) only operated with respect to that interest; such an order made under that sub-section would in itself require a statement of the nature of the interest claimed, leaving sub-s (2) as mere surplusage. Rather, the utility of sub-s (2) arises because the exclusion brought about by sub-s (1) is not necessarily commensurate with the extent of the applicant's interest in the property. Sub-section (2) therefore provides the opportunity to declare the nature of that interest which enlivens the court's jurisdiction to make the exclusion order.

31 For these reasons, the majority of the Court of Appeal were correct in their construction of s 52(1) of the Act as it relates to the scope of the relevant exclusion order and the meaning of "property" as it appears in that sub-section. Grounds 1, 2 and 3 in the Notice of Appeal fail.

The criteria for exclusion

32 On one view, the exclusion of the restrained property, rather than merely the applicant's interest, from the operation of the automatic forfeiture might be thought to be too generous towards the applicant, whose interest in the property may be comparatively minor. Neave JA gave the examples of an applicant having only a restrictive covenant or easement over the land¹¹. Those particular examples may have been inapposite, as interests or encumbrances of that kind (if registered) are preserved by s 41 from the effect of forfeiture, thus making an exclusion order unnecessary. The operation of s 41 in the case of a joint tenant or tenant in common of the fee simple might be different, as mentioned above.

33 In any event, the apparent generosity of the Act towards applicants of that kind is counterbalanced in the statutory scheme by the relatively strict criteria in s 52(1) which an applicant must meet before an exclusion order can be made. In the case of Mrs Le, those criteria were that she "was not, in any way, involved in the commission of the Schedule 2 offence", that she acquired her interest in the

11 (2007) 15 VR 352 at 369.

property "without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was tainted property"; that her interest "is not subject to the effective control of the defendant"; and that her interest "was acquired for sufficient consideration". Given the effect of an exclusion order – namely, the exclusion of the whole of the property from forfeiture – it is not to be assumed that those criteria will be as easily satisfied as appears to have been assumed in argument in this Court.

34 Of those criteria, the requirement that there be "sufficient consideration" was most open to doubt on the facts of the present case. It is to that criterion which is the subject of grounds 4 and 5 in the Notice of Appeal, and to these we now turn.

"Sufficient consideration"

35 Until the transfer in question, Mr Le was the sole registered proprietor of the property the continued ownership or enjoyment of which is at stake in these proceedings. On 29 August 2003 he transferred the property to himself and his wife as joint tenants. The consideration was expressed to be "natural love and affection". The critical question is whether, within the meaning of the Act, the transfer was made for "sufficient consideration". It is convenient to approach that question first by looking to the character given by the general law to a conveyance expressed to be made for a consideration being "natural love and affection".

36 The various senses in which the term "consideration" is used and the adjectives attached to it have been detailed and discussed in this Court in *Roxborough v Rothmans of Pall Mall Australia Ltd*¹² and *Commissioner of State Revenue (NSW) v Dick Smith Electronics Holdings Pty Ltd*¹³. The following may be added in elaboration of what was said in those cases and with particular reference to conveyancing law and practice.

37 Equity will not (subject to what appears below) assist what it regards as a volunteer to perfect an otherwise imperfect gift of property. In that regard, it would be insufficient to show "good consideration", being natural affection for family members or moral obligation¹⁴. However, "valuable consideration" will

12 (2001) 208 CLR 516 at 556-557 [103].

13 (2005) 221 CLR 496 at 504-506 [22]-[24].

14 Underhill and Hayton, *Law Relating to Trusts and Trustees*, 17th ed (2007) at §9.75.

attract the intervention of equity. Equity regards this as not including a bare covenant under seal but as including not only money or money's worth but a settlement made before and in consideration of marriage or agreed before and executed after the marriage¹⁵. There was no marriage consideration in the present case and no "valuable consideration". Nor, given what has been said earlier in these reasons respecting *National Provincial Bank*¹⁶, was the creation of the joint tenancy the discharge of any obligation imposed by law upon the husband to create a proprietary interest in the apartment in favour of his wife.

38 It should be added to what has been said respecting "good consideration" that it may play a part in the operation of limited and specific conveyancing principles, albeit with no reference to the situation in the present case.

39 Of the expression "good consideration" it was said in Elphinstone's work, one of the classic conveyancing treatises¹⁷:

"By 'good consideration' is meant merely the motive of natural affection towards relations. It has no validity against creditors or purchasers. The only effect of it is to raise the use in covenants to stand seised."

Further, Leake wrote that¹⁸:

"The *motive* then stood in place of a consideration, and it was said to be made upon a *good* consideration, as distinguished from a consideration of money or value, which formed the characteristic of a bargain and sale."

40 By way of qualification to the general principle that equity does not lend the assistance of its doctrines and remedies to voluntary undertakings, the presence of motive as "good consideration" has been treated as sufficient to deny the implication of what otherwise would be a resulting trust in favour of the disponor. As was said in the American case of *Groff v Rohrer*¹⁹:

15 Underhill and Hayton, *Law Relating to Trusts and Trustees*, 17th ed (2007) at §9.76.

16 [1965] AC 1175 at 1247-1248.

17 *Elphinstone's Introduction to Conveyancing*, 7th ed (1918) at 81. (footnote omitted)

18 *An Elementary Digest of the Law of Property in Land* (1874) at 110.

19 35 Md 327 at 336 (1872). See also *House v Caffyn* [1922] VLR 67 at 79; *Wirth v Wirth* (1956) 98 CLR 228 at 235-236; *Scott on Trusts*, 4th ed (1989), vol 5 at §405.

"The relation of ... husband and wife, if there were no proof of a valuable consideration in the deeds, furnished ground of meritorious consideration, to prevent the implication that the husband merely intended that [the wife] should be a trustee of the property conveyed, for his benefit".

41 But what is particularly significant for present purposes is the proposition stated by Elphinstone that the presence of a "good consideration" for a conveyance has no validity against creditors or purchasers. Thus, it would not, for example, found a defence of bona fide purchase of a legal estate for value and without notice of an equitable estate.

42 That understanding of the general law is significant for the question of statutory construction in this case. Here a third party is involved, asserting rights and remedies conferred by the Act. In that setting, and with the limited role of a consideration of natural love and affection even at general law, it is unlikely that the statutory term "sufficient consideration" includes that species of consideration.

43 When used elsewhere in the general law, the term "sufficient consideration" imports a notion of tangible benefit or advantage conferred by the promisor upon the promisee, as in the case of a forbearance to sue²⁰, a bona fide compromise of a disputed claim²¹, or the conferral of some other form of practical benefit²². In these cases, the "threshold of legal recognition" regarding the consideration turns on the existence of such a real benefit²³. However, natural love and affection imports no such benefit.

44 At the relevant time, the term "sufficient consideration" was not defined in the Act, but the statutory context in which the phrase appears has been set out

20 *Crears v Hunter* (1887) 19 QBD 341; *Combe v Combe* [1951] 2 KB 215.

21 *Wigan v Edwards* (1973) 47 ALJR 586.

22 *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723.

23 cf Carter and Harland, *Contract Law in Australia*, 4th ed (2002) at 112 [323].

above²⁴. Of course, unlike s 121(6)(d) of the *Bankruptcy Act* 1966 (Cth)²⁵, s 52(1)(a)(v) of the Act did not explicitly exclude "natural love and affection" from the ambit of "sufficient consideration". Conversely, however, the section did not explicitly include that matter, unlike s 172 of the *Property Law Act* 1958 (Vic)²⁶. In a forfeiture statute in which the effect of an exclusion order is to exclude the entirety of the relevant property from forfeiture, it may very much be doubted that a voluntary transfer for "natural love and affection" would be one made for "sufficient consideration", especially given the limited efficacy of "natural love and affection" as a form of consideration at general law.

45 In light of the operation of s 52, the DPP rightly submits that it would be incongruous if a criminal were able by a voluntary conveyance to a spouse or other relative to put such property beyond the reach of the Act. In the present case, there was no suggestion that the conveyance in question was in any way fraudulent or designed to defeat the operation of the Act. To the contrary, Mrs Le's explanation of the transfer was accepted by the primary judge and Court of Appeal as being reasonable, namely that she was anxious about her future lest anything happen to her husband, and that her husband in turn was doing "no more than fulfilling a matrimonial obligation" by transferring a moiety of his interest in the property to her.

46 The requirement that there be "sufficient consideration" is a criterion distinct from, and in addition to, the requirements that the applicant not be involved in the commission of the relevant offence, and that she acquire her interest "without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was tainted property". That the applicant has a plausible explanation for the acquisition of her joint interest does not demonstrate the presence of "sufficient consideration" in the sense required by sub-par (v) of s 52(1)(a) of the Act. In particular, even if the existence of a

24 A definition of "sufficient consideration" has since been inserted into s 3 of the Act by the *Confiscation Amendment Act* 2007 (Vic). That definition provides that the term means "consideration that reflects the market value of the property". Among other things, "consideration arising from the fact of a family relationship between the transferor and transferee" and "love and affection" are specifically excluded.

25 This provides that "the transferee's love or affection for the transferor" has "no value as consideration".

26 This provides that "[t]his section shall not extend to any estate or interest in property alienated for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the alienation, notice of the intent to defraud creditors."

"matrimonial obligation" on the part of Mr Le were conceded (contrary to what is said earlier in these reasons) that would say nothing about any consideration flowing from Mrs Le for the acquisition of her interest. Yet that is what the statute requires.

47 Further, in the context of a forfeiture statute of general application, it would be surprising if the efficacy against the DPP of a transfer turned upon the particular matrimonial status or other domestic situation of the applicant. Such an interpretation of the term "sufficient consideration" would not assist the fair and equal operation of the Act, but would rather create exceptions based on the happenstance of the particular legal status given to the relationship between the transferor and transferee.

48 In addition to these general matters, there are two other textual indications in the Act that "natural love and affection" does not amount to "sufficient consideration". First, the definition of "gift" in s 3 of the Act, as it relates to the meaning of "property in which the defendant has an interest" in s 10, includes within that definition a transfer for a consideration significantly less than market value. In order to expand the range of property available for forfeiture, the definition of "gift" (quintessentially a voluntary transfer) is sufficiently wide to include a transfer for what amounted to valuable consideration. Given that the effect of s 52 is to exclude that property from forfeiture, it would be strange if the definition of "sufficient consideration" included voluntary transfers for "natural love and affection". Secondly, the existence of a family or domestic relationship is a factor that can lead to the conclusion that property is property over which a defendant exercises "effective control" within the meaning of s 9 of the Act. Again, the purpose of that expansive definition is to render the property available for forfeiture, and it would be very surprising that the "natural love and affection" generated by those same family or domestic relationships would be a reason for excluding that property from forfeiture under s 52.

49 For each of these further reasons "natural love and affection" did not amount to "sufficient consideration" within the meaning of s 52(1)(a)(v) of the Act. The exclusion order should not have been made as Mrs Le failed to satisfy one of the prerequisite criteria. The appeal should therefore be allowed on grounds 4 and 5.

Remaining matters

50 The remaining grounds of appeal that are pressed concern the correctness of the conclusion reached by the primary judge and the Court of Appeal that Mrs Le had satisfied the criterion in s 52(1)(a)(iii) of the Act that her interest was acquired "without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was tainted property". In light of the appellant's success on grounds 4 and 5, it is unnecessary to decide the point.

However, given that Mrs Le's evidence was uncontradicted and was accepted by both the primary judge and the Court of Appeal, it would be difficult for the DPP now to persuade this Court to overturn the findings made below.

Orders

- 51 The appeal should be allowed, and the orders of the Court of Appeal made on 15 February 2007 should be set aside save as to costs. In their place, it should be ordered that the appeal to the Court of Appeal be allowed and the orders of Judge Campbell made on 31 March 2006 be set aside save as to costs; in their place it should be ordered that the application be dismissed. Pursuant to the undertaking made by the appellant as a condition of the grant of special leave on 25 May 2007, the appellant must pay the respondent's costs in this Court.

52 KIRBY AND CRENNAN JJ. This matter concerns the operation of the *Confiscation Act* 1997 (Vic) ("the Act") as it stood at 11 April 2005²⁷. The question is whether the respondent ("the wife") was entitled to an order to exclude from automatic forfeiture under the Act property which she held as a joint tenant with her husband.

53 On an application by the wife, the County Court of Victoria (Judge Campbell) ("the primary judge") made an order excluding the whole of the property from automatic forfeiture under the Act on 31 March 2006. The Court of Appeal (Maxwell P and Chernov JA; Neave JA dissenting) dismissed an appeal by the Director of Public Prosecutions for Victoria ("the DPP") on 15 February 2007²⁸. The DPP seeks to have the orders made below set aside and to have the wife's application for an exclusion order dismissed. Upon the grant of special leave to appeal, an undertaking was given by the DPP that he will not seek to disturb the orders as to costs made by the Court of Appeal and he will pay the costs of the wife of the appeal to this Court in any event.

The facts

54 The subject of this dispute is a two-bedroom apartment located in Sunshine, Victoria ("the apartment"). It is the matrimonial home of the wife and her husband, Roy Le, whom she married in Vietnam in September 1997. Mr Le purchased the apartment in his own name in December 1998. The wife has lived in the apartment since she came to Australia in July 1999.

55 On 23 June 2003, Mr Le was charged with a number of offences, including trafficking in not less than a commercial quantity of heroin for which he was convicted on 1 February 2005. He was sentenced to a term of imprisonment.

56 On 29 August 2003, the apartment was conveyed into the joint names of the wife and her husband. The consideration for the transfer was expressed to be "natural love and affection". Before the primary judge, the wife gave evidence that she had asked her husband to put her name on the title because she was concerned that if anything happened to him, the apartment would pass to her husband's children from his former marriage and she would have nowhere to live. The wife is not able to speak or write English. She has no driver's licence, no savings and no next of kin in Australia. Since her husband commenced his term of imprisonment, the wife has made mortgage payments from her pension in

27 The application for an exclusion order was initiated on that date.

28 *Director of Public Prosecutions v Le* (2007) 15 VR 352.

respect of a mortgage over the property, which at the date of the application for an exclusion order was of the order of \$20,000.

The relevant legislation

57 Part 2 of the Act deals with restraining orders preventing disposition of, or dealing with, "property" or an "interest in property"²⁹. Section 16 allows the DPP to seek a restraining order in respect of property which is reasonably suspected of being "tainted property". The expression "tainted property" in relation to an offence includes property that "was used, or was intended by the defendant to be used in, or in connection with, the commission of the offence"³⁰. Relevantly, offences in respect of which a restraining order may be sought include those offences specified in Sched 2³¹. Mr Le was convicted of a Sched 2 offence.

58 Part 3 of the Act deals with forfeiture of property, and Div 2 of Pt 3 deals with automatic forfeiture after conviction of a Sched 2 offence. Section 35 relevantly provides:

"(1) If—

- (a) a person is convicted of a Schedule 2 offence; and
- (b) a restraining order is or was made under Part 2 in respect of property for the purposes of automatic forfeiture in reliance on—
 - (i) the defendant's conviction of that offence; or
 - (ii) ...; and
- (c) the restrained property is not the subject of an exclusion order under section 22—

29 Section 14 (1); cf *Proceeds of Crime Act* 2002 (Cth), s 17 considered in *Director of Public Prosecutions (Cth) v Hart* [2007] QCA 184.

30 Section 3(1).

31 The Act distinguishes between Sched 1 offences and the more serious offences specified in Sched 2. If a person is convicted of a Sched 1 offence, the DPP may apply for a forfeiture order in respect of tainted property, whether or not the property has previously been subject to a restraining order (see s 32). The Act provides for the automatic forfeiture of restrained property upon conviction for a Sched 2 offence (see s 35).

21.

the restrained property is forfeited to the Minister on the expiry of 60 days after—

- (d) the making of the restraining order; or
- (e) the defendant's conviction—

whichever is later." (footnote omitted)

59 Part 5 deals with the effect of forfeiture and Pt 6 deals with exclusion orders which operate to exclude property the subject of a restraining order from the operation of the automatic forfeiture provisions.

60 If property is forfeited under s 35, s 51 permits a person (other than the defendant) who claims an interest in such property to make an application for an exclusion order within 60 days or otherwise with the leave of the court³². The application is for "an order under section 52" which provides for "an order excluding property in which the applicant claims an interest from the operation of section 35". Section 52 contains the conditions for the grant of such an order:

"52 Determination of exclusion application—automatic forfeiture

- (1) On an application made under section 51, the court may make an order *excluding property in which the applicant claims an interest* from the operation of section 35—
 - (a) if the court is not satisfied that the property in which the applicant claims an interest is not tainted property but is satisfied that—
 - (i) the applicant was not, in any way, involved in the commission of the Schedule 2 offence; and
 - (ii) where the applicant acquired the interest before the commission of the Schedule 2 offence, the applicant did not know that the defendant would use, or intended to use, the property in, or in connection with, the commission of the Schedule 2 offence; and
 - (iii) where the applicant acquired the interest at the time of or after the commission of the

32 Section 51(2) and (3).

Schedule 2 offence, the applicant acquired the interest without knowing, and in circumstances such as not to arouse *a reasonable suspicion*, that the property was tainted property; and

(iv) ...

(v) where the applicant acquired the interest from the defendant, directly or indirectly, that it was acquired for *sufficient consideration*; or

...

(2) If the court makes an order under sub-section (1), the court may also make an order declaring the nature, extent and value of the applicant's interest in the property."

(emphasis added)

The proceedings below

61 After Mr Le was charged, the DPP made an application under s 16(2)(c) of the Act for a restraining order³³. Pursuant to s 18³⁴, on 18 September 2003, a restraining order was made with respect to the apartment in the County Court (Judge Fagan). As required by s 15(3)(a), the Court declared that the property had been restrained for the purpose, amongst others, of satisfying "automatic forfeiture of property that may occur under Division 2 of Part 3".

62 On 1 February 2005, Mr Le pleaded guilty and was convicted of trafficking a drug of dependence in not less than a commercial quantity. As explained above, by virtue of s 35, a consequence of Mr Le's conviction was the automatic forfeiture of the property the subject of the restraining order on the expiry of 60 days after conviction.

33 Section 16(2)(c) provides that a restraining order could be sought if "a person has been charged with a Schedule 2 offence and that person has an interest in the property or the property is tainted property in relation to that offence".

34 The restraining order also applied to a black 1992 Mercedes-Benz sedan, which was not the subject of dispute in these proceedings.

63 The application made by the wife under s 51 of the Act was based on her interest as "joint proprietor" of the property³⁵.

64 The primary judge noted that there was no dispute that the property was "tainted property" within the meaning of par (a) of that definition in s 3(1). There was also no dispute that the wife was not in any way involved in the commission of the offence in question³⁶.

65 The primary judge considered that there were two substantive issues: whether the wife had acquired her interest in the property without knowing, and in circumstances such as not to arouse "a reasonable suspicion", that the property was "tainted property"³⁷; and whether her acquisition of her interest in the property was for "sufficient consideration"³⁸.

66 The primary judge found in favour of the wife on both issues. In the course of so doing, his Honour observed that it seemed to him to be arguable that "what [Mr Le] was doing in transferring a moiety of his interest in the property was no more than fulfilling a matrimonial obligation".

67 The DPP sought to have the exclusion order apply only to the wife's "interest in the property" as a joint tenant. However, the primary judge rejected this submission and instead ordered that the exclusion from forfeiture apply to the whole of the property "situate at 10/20-30 Ridley Street, Sunshine"³⁹.

The issues

68 Three live issues were pursued on the appeal. The principal issue was the construction of the phrase "property in which the applicant claims an interest" as it occurs in s 52(1). There were two other issues of statutory interpretation. One was whether the expression "sufficient consideration", as it occurs in

35 Although the application was made out of time, the primary judge granted leave for the wife to bring her application on the basis that the delay was not due to neglect on her part: see s 51(3).

36 Section 52(1)(a)(i).

37 Section 52(1)(a)(iii).

38 Section 52(1)(a)(v).

39 It can be noted that the description of the property in this order differs from the description in the restraining order, which refers to the property at "10/28-30 Ridley Street, Sunshine".

s 52(1)(a)(v), includes the consideration of "natural love and affection". The other was whether the "reasonable suspicion" that property is "tainted property", referred to in s 52(1)(a)(iii), is to be tested subjectively or partly or wholly objectively.

The Court of Appeal

69 A submission by the DPP that the power to exclude property should be read down to apply to "so much of the property as relates to the [wife's] interest" was rejected by the majority in the Court of Appeal (Maxwell P and Chernov JA)⁴⁰. The majority considered that while it was the wife's interest in the property which gave the wife standing to seek an exclusion order⁴¹, it was nevertheless the whole property which was restrained by the restraining order and therefore any successful application for an exclusion of the restrained property from forfeiture would result in an exclusion of the whole property.

70 In dissent, Neave JA considered that the power conferred on the court by s 52(1) of the Act could "only be exercised so as to exclude the [wife's] interest in the property which is automatically forfeited and not to exclude the whole of the property from forfeiture"⁴². For the reasons which follow, Neave JA's conclusions on the proper construction of s 52(1) are to be preferred.

71 The Court of Appeal unanimously found that the term "sufficient consideration" in s 52(1)(a)(v) of the Act included both "valuable consideration" and "good consideration" as those terms were understood at common law, and that "natural love and affection" constituted "sufficient consideration" for the purposes of that section⁴³.

72 The Court of Appeal was also united in finding that the wife did not have a reasonable suspicion "that the property was tainted property"⁴⁴. It was noted that the wife gave evidence about "her state of knowledge and, by necessary implication, her lack of suspicion" and "[t]hat evidence was not challenged in

40 *Director of Public Prosecutions v Le* (2007) 15 VR 352 at 364-365 [49]-[50].

41 *Director of Public Prosecutions v Le* (2007) 15 VR 352 at 365 [50].

42 *Director of Public Prosecutions v Le* (2007) 15 VR 352 at 367-368 [64].

43 *Director of Public Prosecutions v Le* (2007) 15 VR 352 at 364 [45] per Maxwell P and Chernov JA.

44 Section 52(1)(a)(iii).

cross examination, or otherwise"⁴⁵. In adopting that position, the Court of Appeal proceeded on the basis that the appropriate statutory test was objective⁴⁶.

73 Both of those unanimous findings should be upheld for the reasons which follow. Orders should be made varying the orders for excluding the property from automatic forfeiture, so as to exclude the wife's interest in the property and to declare the nature of her interest as a tenant in common as to a half share⁴⁷.

Scope of orders excluding property from automatic forfeiture – s 52(1)

74 Each party relied on the scheme of the legislation and the text of the Act as supporting the different constructions of s 52(1) set out above. It must be conceded that the detailed provisions of the Act give rise to some awkwardness when the subject matter of a restraining order or a forfeiture order is real property owned jointly by a person convicted of a relevant offence and another.

75 In supporting the construction of s 52(1) preferred by Neave JA, the DPP contended that the power to exclude property from forfeiture was limited to excluding "the applicant's interest" in the property which was "partial". The wife submitted that both the scheme and terms of the Act supported the contrary conclusion. It was submitted that the exclusion order that can be made under s 52(1) can relate only to the "whole" of the property in which the applicant has an interest, rather than to the applicant's interest in the property.

76 In seeking to uphold the decision of the majority in the Court of Appeal that the whole of the property could be excluded⁴⁸, the wife relied particularly on the opening words of s 52(1), emphasised above, as indicating that the Court's power to exclude was directed to the "property in which the applicant claims an interest" rather than to "the applicant's interest in the property". It was chiefly grammatical emphases, such as those, on subject and object and on definite articles, which were relied on to support the wife's contention that the power to make an exclusion order was expressly directed to things or objects and did not encompass any partial interest in things or objects.

45 *Director of Public Prosecutions v Le* (2007) 15 VR 352 at 362 [37] per Maxwell P and Chernov JA.

46 *Director of Public Prosecutions v Le* (2007) 15 VR 352 at 359-360 [24] per Maxwell P and Chernov JA.

47 Section 52(2).

48 *Director of Public Prosecutions v Le* (2007) 15 VR 352 at 364-367 [49]-[62] per Maxwell P and Chernov JA.

77 The purposes of the Act set out in s 1 which were relevant to the restraining and forfeiture orders in this case include providing for "automatic forfeiture of restrained property of persons convicted of certain offences in certain circumstances"⁴⁹ and "forfeiture by the Supreme Court or the County Court of property restrained on suspicion that it is tainted property in relation to a Schedule 2 offence"⁵⁰. It was also a purpose of the Act "to provide for the forfeiture of the proceeds of certain offences, whatever the form into which they have been converted"⁵¹.

78 Section 51(1) refers to an applicant for an exclusion order as a person "who claims to have had an interest in the property". Section 52(1), set out above, provides that the court "may make an order excluding property in which the applicant claims an interest". Subparagraphs 52(1)(a)(ii), (iii), (iv) and (v) all contain references to the applicant's "interest" in the property.

79 Section 3(1), the definition section of the Act, provides:

"**property**' means real or personal property of every description, whether situated within or outside Victoria and whether tangible or intangible, and includes any interest in any such real or personal property".

80 Section 3(1) also defines interest in property:

"**interest**', in relation to property, means—

- (a) a legal or equitable estate or interest in the property; or
- (b) a right, power or privilege over, or in connection with, the property".

81 Far from distinguishing "property" as signifying only a thing or an object (eg Blackacre) from "property" as signifying a "legal relationship with a thing"⁵² (eg a joint tenancy), the definitions in s 3(1) indicate that the statutory meaning of property comprehends "property" in both manifestations.

49 Section 1(b).

50 Section 1(c).

51 Section 1(a).

52 *Yanner v Eaton* (1999) 201 CLR 351 at 365-366 [17] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

82 The majority in the Court of Appeal recognised that the definition of "property" in s 3(1) included interests in property⁵³, but took the view that the restraining order in this case was confined to "property which is tainted property", which means the *whole* of the property used in connection with an offence⁵⁴. It was this reasoning which led the Court of Appeal to reject the argument that s 52(1) empowered a court to exclude an interest in the property, following a restraining order directed to what the Court of Appeal called "the whole property".

83 If a restraining order directed to the property did not apply to all the interests in the property to which it referred, a question would arise as to whether or not a disposition by the husband of his joint interest in the apartment would contravene the restraining order. As observed by Philippides J in *Commonwealth Director of Public Prosecutions v Hart*, which concerned cognate federal legislation, if restraining orders do not extend to all the interests in the property specified in an order, the order "could be rendered nugatory by the simple expedient of disposing of or otherwise dealing with the equitable interests in the property"⁵⁵.

84 Read in the light of the definitions of both "property" and "interest" in s 3(1), and having regard to the Act as whole, s 52(1) empowers a court to make orders in respect of any "real or personal property" and in respect of any interest in such real or personal property in which the applicant claims an interest. Sometimes the two will coincide, such as where a person is the sole owner of Blackacre. Where they do not coincide, the court's powers are to exclude the applicant's "interest" in the object of the restraining order with the result that any interest, other than the applicant's interest, can remain subject to the restraining order. Such a construction is unremarkable given that real property is frequently owned jointly.

53 Cf *Director of Public Prosecutions (Cth) v Hart (No 2)* [2005] 2 Qd R 246 at 257 [20]; McPherson JA construed similar, but not identical, definitions in the *Proceeds of Crime Act 2002* (Cth) as comprehending both meanings of "property" but considered that "the primary meaning of 'property'" in the equivalent section is the thing itself.

54 *Director of Public Prosecutions v Le* (2007) 15 VR 352 at 365 [51]-[53] per Maxwell P and Chernov JA.

55 *Commonwealth Director of Public Prosecutions v Hart* [2007] QCA 184 at [45].

85 Support for this construction is to be found in the Explanatory Memorandum⁵⁶ which can be taken into account⁵⁷, although words in extrinsic materials cannot be substituted for the words of the legislation⁵⁸.

86 This construction is also supported by s 41(2) of the Act, which describes the effect of forfeiture:

"If—

...

(b) property is forfeited to the Minister by automatic forfeiture under section 35—

the property vests in the Minister subject to every mortgage, charge or encumbrance to which it was subject immediately before the order was made or the automatic forfeiture occurred (as the case may be) and to—

(c) in the case of land, every interest registered, notified or saved under the Transfer of Land Act 1958 or the Property Law Act 1958 ..."

87 Further support for the construction can be found in s 33(2) which applies to forfeiture orders (as distinguished from automatic forfeiture orders) which states that "[a] forfeiture order must specify the interests in property to which it applies" and in s 29(1) which provides that a person who "knowingly contravenes a restraining order by disposing of, or otherwise dealing with, an interest in property to which the order applies is guilty of an indictable offence".

88 It would be difficult to achieve the purposes of the Act and to implement its sanctions if restraining orders and forfeiture orders did not specify the interests in property to which they were directed. Furthermore, the relevant provisions for exclusion orders assume the possibility that a person, other than a person convicted of a Sched 2 offence, has an interest in the property which is restrained or liable to forfeiture.

56 Explanatory Memorandum for the *Confiscation Bill* 1997 of 14 November 1997, cl 52: "If the applicant is able to prove the matters referred to in paragraphs (d) and (e) [matters going to 'effective control' and 'sufficient consideration'] this will prove that the defendant does not have *an interest in the property*." (emphasis added)

57 *Interpretation of Legislation Act* 1984 (Vic), s 35(b)(iii).

58 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 per Mason CJ, Wilson and Dawson JJ.

89 Here, the restraining order restrained the husband "whether by himself or by his servants, agents or otherwise" from disposing of or dealing with "property at 10/28-30 Ridley Street, Sunshine and more particularly described in Certificate of Title Volume 9604 Folio 908". The relevant folio report recorded "Roy Le" and "Phan Thi Le both of 10/30 Ridley Street Sunshine" as the "Joint Proprietors". It also recorded details of a mortgage in favour of Westpac Banking Corporation.

90 In terms of s 3(1) of the Act, the restraining order is directed to real property, 10/28-30 Ridley Street, Sunshine, the particular description of which in the folio report indicates that the legal and equitable interest⁵⁹ in the real property is held by joint proprietors, the husband and the wife. If one adopted the language of s 41(2)(c)⁶⁰, the particular description of the real property reveals the wife's "interest registered ... under the Transfer of Land Act 1958". It is well established that a joint tenant can dispose of his or her interest in real property (other than by will), as discussed later in these reasons.

91 It should also be noted that, in the context of certain applications for exclusion from restraining orders, the court may declare that the restraining order "shall be disregarded for the purposes of section 35"⁶¹, or may make "such orders in relation to the property to which the restraining order relates as it considers just"⁶², which can include "an order varying the property to which the restraining order relates"⁶³.

92 Had the wife's initial application under s 20⁶⁴, for an exclusion from the restraining order, not been made out of time, there is no doubt the court had the power to confine the restraining order to the husband's joint interest in the real property, if it took the view that the restraining order was not already so confined. Such an order would have resulted in a severance of the joint tenancy, a topic to which we will return.

59 See s 3(1): definition of "interest" set out above at [80].

60 Set out above at [86].

61 Section 23.

62 Section 26(1).

63 Section 26(5)(a).

64 The wife's application under s 20 for exclusion from the restraining order was subsequently amended to include also the application under s 51(1) for exclusion from automatic forfeiture.

93 There are numerous other provisions in the Act which also support construing s 52(1) so as not to confine the word "property" where they occur to "real property", in circumstances where a restraining order restrains disposition of real property owned jointly.

94 Section 33(5)(c) provides that a court considering whether to make an order for forfeiture⁶⁵ in favour of the Minister may take into account the claim of any person to an interest in the property having regard to matters set out in s 50(1)⁶⁶. Section 51(4) includes a reference to "[a]n application for an order under section 52 in relation to an interest in property" and s 52(2) provides that a court may declare an applicant's interest in property. That is consistent with the legislature's concern to identify the interest which is the subject of a forfeiture order⁶⁷.

95 When the definition of the word "property" in s 3(1) is read into the introductory words of s 52(1) as it was by Neave JA⁶⁸, and s 52(1) so construed is applied to the facts of this case, the property in question is the apartment, and the joint proprietorship in the apartment, in which the wife claims an interest.

96 That the construction of s 52(1) set out above avoids incongruous results⁶⁹ confirms its correctness.

97 The interpretation favoured by Neave JA is also more consonant with the apparent purpose of the Act⁷⁰. It achieves a more proportionate outcome and one that is harmonious with the apparent objectives of the Act. In the context of the findings that the property was "tainted" (but that the wife was not in any way involved in the husband's criminal conduct and that the circumstances did not arouse a reasonable suspicion on her part) to exempt the entire property

65 As distinguished from automatic forfeiture.

66 Section 50(1) matters include the same matters relevant to s 52(1) set out above.

67 Section 33(2).

68 *Director of Public Prosecutions v Le* (2007) 15 VR 352 at 368 [67] per Neave JA.

69 Examples of which were given by Neave JA: *Director of Public Prosecutions v Le* (2007) 15 VR 352 at 369-370 [73]-[77].

70 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71] per McHugh, Gummow, Kirby and Hayne JJ.

(including the husband's interest) because she too had an interest, would appear to provide her with a windfall in respect of his interest. Had that been the purpose of the Act, it may be inferred that Parliament would have made that purpose clear.

98 The interest of the wife in the real property was described by the primary judge as "a moiety" of the husband's interest in the real property, the transfer of which "was no more than fulfilling a matrimonial obligation". At a subsequent hearing for the purpose of pronouncing his orders, the primary judge was asked to declare (under s 52(2)) that the wife's interest was "a joint tenant's interest", so as to facilitate a subsequent "partition action", a course his Honour declined to take.

99 A joint tenancy in land has two distinguishing features: the right of survivorship and the unities of title, interest, possession and time⁷¹. In *Land Law*⁷², Professor Butt describes the possible methods of termination of joint tenancy of land as follows⁷³:

"A joint tenancy terminates in one of three ways. The first is by operation of the right of survivorship, when the land vests entirely in the last surviving joint tenant. The second is by sale or partition ... The third is by severance ..." (footnote omitted)

100 Professor Butt goes on to recognise that, for the purposes of severance, "a joint tenant is regarded as having a *potential* share in the land commensurate with that of the other joint tenants"⁷⁴. Alienation of a joint tenant's interest in land is one method of severance. This can occur as a result of a legal process. For example, taking a joint tenant's interest in land in execution of a judgment will sever a joint tenancy⁷⁵. With Torrens title land, severance of a joint tenancy occurs once property vests in a trustee in bankruptcy in equity⁷⁶. To employ a

71 Butt, *Land Law*, 5th ed (2006) at 214 [1405], 216 [1410].

72 Butt, *Land Law*, 5th ed (2006).

73 Butt, *Land Law*, 5th ed (2006) at 237 [1456].

74 Butt, *Land Law*, 5th ed (2006) at 237 [1458]. (original emphasis)

75 *Guthrie v Australia and New Zealand Banking Group Ltd* (1991) 23 NSWLR 672 at 680 per Meagher JA. See also *Mitrovic v Koren* [1971] VR 479 at 481 per Gowans J.

76 *Bankruptcy Act* 1996 (Cth), s 58(2). See also *Re Holland; Ex parte Official Trustee in Bankruptcy* (1985) 5 FCR 165 at 167 per Fisher J.

word used of different facts⁷⁷, but equally applicable here, the joint tenancy "transmogrifies" to a tenancy in common, once a trustee in bankruptcy is registered as proprietor of the bankrupt's interest⁷⁸. Professor Butt gives other examples of severance of joint tenancy as a result of legal processes⁷⁹. What the examples have in common is that certain court orders are inconsistent with the continuation of a joint tenancy.

101 It can hardly be doubted that a court is empowered under the Act to make orders which are expressly or impliedly inconsistent with the continuation of the joint tenancy of the husband and the wife. Such powers have some similarity with powers under the *Family Law Act 1975* (Cth)⁸⁰ to make orders in respect of jointly owned property, the effect of which is that the property is to be sold, divided or transferred in a manner inconsistent with the continuation of a joint tenancy.

102 Applying s 52(1) (as construed above) and other relevant sections, the primary judge was empowered to dispose of the wife's application by specifying the interest to which the forfeiture order would thereafter apply, and excluding the wife's joint interest in the apartment from the forfeiture order. At least the unities of interest and time⁸¹ would be destroyed, thereby severing the joint tenancy.

Sufficient consideration – s 52(1)(v)

103 Because the wife obtained her joint interest in the apartment from her husband, she had to satisfy the court that her interest was acquired for "sufficient consideration". This expression, which occurs in s 52(1)(a)(v) (and also in s 52(1)(b)(ii) and in ss 21, 22, 24, 50 and 54), is not defined in the Act.

104 The DPP submitted that the policy of the Act is to ensure that criminals, their associates and dependants forfeit the proceeds of crime. It was contended that the policy supported the submission that "sufficient consideration" means

77 *Peldan v Anderson* (2006) 227 CLR 471 at 483 [29] per Gummow ACJ, Kirby, Hayne, Callinan and Crennan JJ.

78 *Sistrom v Urh* (1992) 40 FCR 550 at 556.

79 See for example Butt, *Land Law*, 5th ed (2006) at 249-250 [1487].

80 Section 79.

81 Exceptions to the "unity of time" requirement for wills and conveyances to uses have no application here.

"adequate consideration", which in turn means money or money's worth. Otherwise, it was contended, criminals could subvert the Act by transferring property to a spouse, partner, child or other relative in order to put the property beyond the reach of the Act. Analogies with bankruptcy legislation and cognate confiscation legislation in other jurisdictions were also relied upon.

105 The wife sought to sustain the conclusion of all members of the Court of Appeal that "sufficient consideration" includes "valuable consideration" and "good consideration" but not "nominal consideration".

106 The general obligations or duties of support owed by married couples to each other⁸², reaffirmed recently in the United Kingdom⁸³, often entail legal and equitable joint ownership of marital property such as the matrimonial home. This gives rise to a separate point. In finding that the husband's transfer to the wife of a "moiety" of his interest in the real property "was no more than fulfilling a matrimonial obligation", the primary judge treated "natural love and affection" as adequate consideration in all the circumstances of this case.

107 This Court has recognised that consideration may have different meanings in different contexts⁸⁴, and that it has a wider meaning or operation in conveyancing than it does in simple contracts⁸⁵. The "wider" meaning is that in conveyancing consideration is not treated as requiring consideration sufficient to support a contract.

108 Speaking generally, and without reference to exceptions, a promise will not be legally binding unless made in a deed or supported by consideration. As Professor Treitel states⁸⁶:

82 Cf the discussion of legal duties arising in marriage in Joske, *Matrimonial Causes and Marriage Law and Practice of Australia and New Zealand*, 5th ed (1969) at 134.

83 *Miller v Miller* [2006] 2 AC 618 at 632 [11] and 632-633 [16] per Lord Nicholls of Birkenhead, 655 [123] and 660-661[141] per Baroness Hale of Richmond.

84 *Roxborough v Rothmans of Pall Mall Australia Limited* (2001) 208 CLR 516 at 556 [103] per Gummow J.

85 *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)* (1948) 77 CLR 143 at 152 per Dixon J.

86 Treitel, *The Law of Contract*, 11th ed (2003) at 67; see also *Chitty on Contracts*, 29th ed (2004), vol 1 at 216 [3-002].

"This doctrine [of consideration] is based on the idea of reciprocity: 'something of value in the eye of the law' must be given for a promise in order to make it enforceable as contract." (footnote omitted)

109 Because consideration of "natural love and affection" is commonly referred to in deeds of gift or voluntary settlements, a reference to the phrase "strongly suggests a gift"⁸⁷. There are older cases in which it was recognised that "natural love and affection" was not "sufficient consideration" to ground an assumpsit, although it was sufficient to raise a use⁸⁸.

110 While natural love and affection may not be sufficient consideration to support a contract, it is settled that, at common law, "[a]n antenuptial agreement to settle property in consideration of marriage is backed by good consideration, and may be specifically enforced by the husband, wife and issue of the marriage"⁸⁹.

111 The situation is more complicated in relation to post-nuptial settlements of property, although some post-nuptial promises have been considered to constitute "valuable consideration"⁹⁰ or "good consideration"⁹¹.

112 Marriage has long been considered "valuable consideration" in the specific context of conveyancing⁹². The principle has been given statutory

87 *Mansukhani v Sharkey* [1992] 2 EGLR 105 at 106 per Fox LJ; see also *Cattanach v Melchior* (2003) 215 CLR 1 at 104 [292] per Callinan J.

88 See, for example, *Bret v JS* (1600) Cro Eliz 756 [78 ER 987]. See also *Tweddle v Atkinson* (1861) 1 B & S 393 at 398 per Crompton J, 399 per Blackburn J [121 ER 762 at 764] (which is somewhat differently reported at (1861) 30 LJQB (NS) 265).

89 Meagher, Heydon and Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 4th ed (2002) at 654 [20-025] citing *Re Cook's Settlement Trusts* [1965] Ch 902 at 915-916. See also *Attorney-General v Jacobs Smith* [1895] 2 QB 341 at 353 per Kay LJ.

90 *Green v Paterson* (1886) 32 Ch D 95 at 106-108 per Fry LJ.

91 *Popiw v Popiw* [1959] VR 197 at 199 per Hudson J.

92 Blackstone, *Commentaries on the Laws of England* (1766), vol 2 at 297.

force⁹³ and has been reconfirmed on many occasions⁹⁴. In the factual circumstances of the present case, where Mr Le and the wife were married, it is unnecessary to explore the extent to which, in contemporary social circumstances, that learning applies to other marriage-like relationships⁹⁵.

113 The phrase "sufficient consideration" generally means legally sufficient to enforce a promise⁹⁶; it is specifically defined in a number of cognate acts⁹⁷ to exclude certain forms of consideration which, otherwise, might have been thought sufficient.

114 In the Court of Appeal, Maxwell P and Chernov JA (with whom Neave JA agreed on this point) noted⁹⁸:

"The term 'sufficient consideration' is not defined in the Act, although courts have sometimes used it as a synonym for adequate or 'valuable' consideration. Thus, for example, in describing as 'sufficient' the valuable consideration given by the promisee in *Wigan*, Mason J meant no

93 *Property Law Act* 1958 (Vic), s 18(1); Robinson, *The Property Law Act Victoria* (1992) at 408-409; *Conveyancing Act* 1919 (NSW), s 7(1); *Law of Property Act* 1936 (SA), s 7; *Property Law Act* 1974 (Q), Sched 6; *Property Law Act* 1969 (WA), s 7; *Law of Property Act* (NT), s 4.

94 See *Chief Commissioner of State Revenue (New South Wales) v Dick Smith Electronics Holdings Pty Ltd* (2005) 221 CLR 496 at 505 [24] per Gleeson CJ and Callinan J (in dissent but not on this point) and the references referred to there. See also *House v Caffyn* [1922] VLR 67 at 75 per Cussen J.

95 cf *Garcia v National Australia Bank Limited* (1998) 194 CLR 395 at 403 [19]-[20] per Gaudron, McHugh, Gummow and Hayne JJ; cf at 427 [66.5] per Kirby J.

96 *Black's Law Dictionary*, 8th ed (2004) at 326; *Oxford Dictionary of Law* (2006) at 117: "sufficient means sufficient in law".

97 *Proceeds of Crime Act* 2002 (Cth), s 338; *Criminal Assets Recovery Act* 1990 (NSW), s 4(2); *Criminal Assets Confiscation Act* 2005 (SA), s 3; *Criminal Proceeds Confiscation Act* 2002 (Q), Sched 6; *Crime (Confiscation of Profits) Act* 1993 (Tas), s 4(4); *Confiscation of Criminal Assets Act* 2003 (ACT), Dictionary; cf *Criminal Property Confiscation Act* 2000 (WA), Glossary.

98 *Director of Public Prosecutions v Le* (2007) 15 VR 352 at 362-363 [41] per Maxwell P and Chernov JA citing *Wigan v Edwards* (1973) 47 ALJR 586; 1 ALR 497.

more than that the consideration was adequate to impose on the promisor an enforceable obligation." (footnote omitted)

115 While the courts have at times used the terms "valuable consideration" and "sufficient consideration" interchangeably⁹⁹, it seems well recognised in the context of contract law that the term "sufficient consideration" can be contradistinguished from the term "adequate consideration", as noted by Professors Carter and Harland¹⁰⁰:

"The rule that consideration must be sufficient requires that what is put forward as consideration reach a threshold of legal recognition. But once this threshold is reached no inquiry is required into how valuable the consideration is. Thus, the rule is frequently expressed in the form 'consideration must be sufficient but need not be adequate'."

116 Similarly, Dr Robinson notes that "valuable consideration" has a particular meaning when used in contradistinction to "good consideration"¹⁰¹:

"Formerly no distinction was drawn between 'valuable consideration' and 'good consideration' ... However when contrasted with 'valuable consideration', the expression 'good consideration' generally means natural affection towards a member of the settlor's family." (footnote omitted)

117 In support of the submission that "sufficient consideration" in this Act should be construed as "adequate" which would mean money's worth, the DPP submitted that the policy considerations underpinning the Act were more closely aligned with policy considerations relevant to the *Bankruptcy Act* 1966 (Cth) than they were with policy considerations informing stamp duties and similar legislation. Particular reliance was placed on s 121 of the *Bankruptcy Act* as it

99 See *Wigan v Edwards* (1973) 47 ALJR 586 at 594-595 per Mason J; 1 ALR 497 at 512; *Barba v Gas & Fuel Corporation (Vict)* (1976) 136 CLR 120 at 132 per Gibbs J; *McKay v National Australia Bank Ltd* [1998] 1 VR 173 at 177 per Winneke P.

100 Carter and Harland, *Contract Law in Australia*, 4th ed (2002) at 112 [323]. See also *Australian Contract Law Reporter*, vol 1 at ¶8-080: "Consideration need not be adequate, but must be sufficient ... Although the words 'sufficient' and 'adequate' are normally synonymous, a distinct and well recognised meaning is attributed to each word when the above statement is made."

101 Robinson, *The Property Law Act Victoria* (1992) at 408.

stood prior to its amendment in 1996¹⁰². That provided that a disposition which was not "for valuable consideration" was void against the trustee in bankruptcy. Section 121(1) was construed in *Cannane v J Cannane Pty Ltd (in liquidation)*¹⁰³ in the light of the principle that fraudulent dispositions made for the purpose of delaying creditors should be set aside. The principle derived from the Statute of Elizabeth (13 Eliz I c 5), which was enacted in 1570. Bankruptcy provided a special context in which "valuable consideration" was construed as consisting of "real and substantial value, and not [consideration] which is merely nominal or trivial or colourable"¹⁰⁴. By way of contrast, the legislation under consideration in this appeal is relatively new. An applicant for an exclusion order must satisfy a court of his or her non-involvement with criminal conduct before an exclusion order will even be considered. Further, like cognate confiscation provisions, s 121(6)(d) of the *Bankruptcy Act* as it currently stands expressly provides that "love or affection" has no value as consideration¹⁰⁵.

118 The DPP also urged that "sufficient consideration" should be construed in conformity with cognate statutes in other jurisdictions, which reflect similar policy considerations¹⁰⁶.

119 In *New South Wales Crime Commission v Mahoney*, Grove J construed the term "sufficient consideration" as it appears in s 9(5) of the *Criminal Assets Recovery Act 1990 (NSW)*¹⁰⁷ as requiring "adequacy ..., that is to say, something

102 This section was replaced by the *Bankruptcy Legislation Amendment Act 1996 (Cth)*.

103 (1998) 192 CLR 557 at 573 [37] per Gummow J; see also 567 [13] per Brennan CJ and McHugh J.

104 *Re Abbott* [1983] Ch 45 at 57 per Sir Robert Megarry VC; see also *Barton v Official Receiver* (1986) 161 CLR 75 at 84-85, 86 per Gibbs CJ, Mason, Wilson and Dawson JJ; *Official Trustee in Bankruptcy v Mitchell* (1992) 38 FCR 364 at 368-369.

105 This section was inserted into the *Bankruptcy Act 1996 (Cth)* by the *Bankruptcy Legislation Amendment Act 1996 (Cth)*.

106 See Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, (1999) par 2.61.

107 Section 9(5) provides that:

"An interest in property ceases to be serious crime derived property or illegally acquired property:

(Footnote continues on next page)

more than nominal"¹⁰⁸. However, it should be noted that that Act expressly provides that¹⁰⁹:

"A reference in this Act to acquiring an interest in property for sufficient consideration is a reference to acquiring the interest for a consideration that, having regard solely to commercial considerations, reflects the value of the interest."

120 Legislation of the Commonwealth dealing with the proceeds of crime specifically provides that whether or not there has been "sufficient consideration" is to be assessed "having regard solely to commercial considerations"¹¹⁰.

121 The provisions of s 52(1)(a)(i)-(v) inclusive, operating together, support the policy considerations identified by the DPP. They ensure that in circumstances such as those here, an exclusion order will only be made in favour of an applicant found innocent of any involvement in the commission of a Sched 2 offence and found to have no knowledge of circumstances leading to a property being "tainted property".

122 Given that "natural love and affection" is "sufficient consideration" for conveyancing purposes, and given the mutual obligations of support of spouses, if a purpose of the legislation is to provide for the forfeiture of a joint interest in real property of an innocent spouse (who acquired the interest as the wife did here), that would need to be expressly provided. As mentioned above, there are express provisions in cognate legislation, and in s 4(3) of the *Confiscation*

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- (a) when it is acquired by a person for sufficient consideration without knowing, and in circumstances that would not arouse a reasonable suspicion, that the interest was, at the time of acquisition, serious crime derived property or illegally acquired property ..."

108 (2003) 142 A Crim R 409 at 419 [52].

109 Section 4(2).

110 *Proceeds of Crime Act* 2002 (Cth), s 338.

*Amendment Act 2007 (Vic)*¹¹¹, which define "sufficient consideration" to exclude "love and affection"¹¹².

123 In the absence of an express limitation on the meaning of sufficient consideration, the legislative history of the Act "is of insufficient weight ... to displace the considerations of justice and fairness which ordinarily attend the administration of a new remedy"¹¹³.

124 The Court of Appeal did not err in construing "sufficient consideration", as it occurred in s 52(1)(a)(v), as encompassing "natural love and affection" in the circumstances of this case¹¹⁴.

"Reasonable suspicion" – s 52(1)(a)(iii)

125 Under s 52(1)(a)(iii), a court must be satisfied that "where the applicant acquired the interest at the time of or after the commission of the Schedule 2 offence, the applicant acquired the interest without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was tainted property".

126 There were concurrent findings of fact by the primary judge and the Court of Appeal that the wife acquired her interest in circumstances such as not to arouse a reasonable suspicion that the property was tainted property¹¹⁵. As the

111 Section 4(3) provides:

"**sufficient consideration**, in relation to property, means consideration that reflects the market value of the property and does not include—

...

(d) consideration arising from love and affection".

112 This new definition of "sufficient consideration" will not affect "the rights of the parties" in the present appeal. See s 17 of the *Confiscation Amendment Act 2007 (Vic)* which inserts s 178(2) into the Act.

113 *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at 497 [28] per Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ.

114 *Director of Public Prosecutions v Le* (2007) 15 VR 352 at 364 [45] per Maxwell P and Chernov JA.

115 *Director of Public Prosecutions v Le* (2007) 15 VR 352 at 360-362 [28]-[37] per Maxwell P and Chernov JA, 367-368 [64] per Neave JA.

concurrent findings were not affected by clear error or injustice, in accordance with principle, this Court should not disturb them¹¹⁶.

127 By reference to, and comparison with, verbal formulae considered in *Queensland Bacon Pty Ltd v Rees*¹¹⁷ and *Australian Securities and Investments Commission v Edwards*¹¹⁸, the DPP contended that the Court of Appeal applied the requisite test subjectively by looking only to whether the wife had the requisite state of mind, rather than approaching the matter objectively. The DPP relied on various matters of fact said to support findings contrary to the Court of Appeal's finding, if the test were applied objectively. However, the wife had not been challenged in her evidence on her denial of knowledge of the relevant circumstances. In any event, the majority in the Court of Appeal (with whom Neave JA agreed on this point) stated¹¹⁹:

"Plainly, the word 'reasonable' imports an objective test. This means that it will not avail an applicant to say 'I had no suspicion' if a reasonable person in her circumstances, and knowing what she knew, would have formed a suspicion ... In the present case, the question is: would a reasonable person in [the wife's] position have had a suspicion?"

128 There was no error in the Court of Appeal's description of the test or in its application.

Conclusions

129 The DPP has succeeded on this appeal in relation to the grounds of appeal concerning the proper construction of s 52(1) but the wife has succeeded on the grounds relating to the construction of both s 52(1)(a)(iii) and (v). The result is that the appeal should be allowed in part. The orders of the Court of Appeal should be set aside and the orders made by the primary judge should be varied in accordance with these reasons.

¹¹⁶ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 567-569 [48]-[54] per Gleeson CJ.

¹¹⁷ (1966) 115 CLR 266.

¹¹⁸ (2005) 220 ALR 148 at 205 [249].

¹¹⁹ *Director of Public Prosecutions v Le* (2007) 15 VR 352 at 359-360 [24], [27] per Maxwell P and Chernov JA.

Orders

130

We would order:

- (1) Appeal allowed in respect of grounds (1)-(3) and dismissed in relation to grounds (4)-(7).
- (2) Order 1 of the Court of Appeal of 15 February 2007 be set aside, appeal to the Court of Appeal be allowed and order 1 of the orders made by the primary judge on 31 March 2006 be varied as follows:
 - (i) Order that the interest as joint proprietor of Phan Thi Le in the property situated at 10/28-30 Ridley Street, Sunshine and more particularly described in Certificate of Title Volume 9604 Folio 908 be excluded from the automatic forfeiture pursuant to s 52(1)(a) of the *Confiscation Act* 1997 (Vic).
 - (ii) Declare that the nature of the interest of Phan Thi Le in the property is that of tenant in common as to a one-half share.
- (3) Order that the DPP pay the costs of Phan Thi Le of the appeal to this Court.