HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER AND KEANE JJ

JOHN WILLIAM HENDERSON APPELLANT

AND

STATE OF QUEENSLAND RESPONDENT

Henderson v Queensland
[2014] HCA 52
16 December 2014
B22/2014

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Queensland

Representation

S Gillespie-Jones with E McKinnon for the appellant (instructed by Gary Prince)

M D Hinson QC for the respondent (Director of Public Prosecutions (Qld))

CATCHWORDS

Henderson v Queensland

Criminal law – Confiscation of property – Exclusion order – Where State sought forfeiture of proceeds of sale of jewellery given to appellant by deceased father – Where appellant sought exclusion from forfeiture under s 68(2) of *Criminal Proceeds Confiscation Act* 2002 (Q) ("Act") on ground money not "illegally acquired property" – Where "illegally acquired property" defined by s 22(2)(a) of Act to include "proceeds of dealing with illegally acquired property" – Whether sufficient for appellant to prove money was not proceeds of illegal activity on his part – Whether appellant discharged onus placed upon him by s 68(2)(b) to prove jewellery not illegally acquired by father.

Words and phrases – "burden of proof", "civil standard of proof", "exclusion order", "forfeiture order", "illegally acquired property".

Criminal Proceeds Confiscation Act 2002 (Q), ss 4, 22, 25, 26, 58(1), 68(2).

FRENCH CJ.

Introduction

1 On 22 November 2011, the Supreme Court of Queensland made an order under the *Criminal Proceeds Confiscation Act* 2002 (Q) ("the CPCA") forfeiting cash to the value of $598,325 which had been found in the possession of the appellant, who was a person who had engaged in a serious crime related activity within the meaning of the CPCA. An application by the appellant for exclusion of the cash from forfeiture was dismissed[1]. It was dismissed on the basis that although the cash was not itself the proceeds of any illegal activity, it was the proceeds of the sale of jewellery, given to the appellant to hold for himself and three of his siblings by their father, which itself was not shown not to have been illegally acquired property[2]. An appeal to the Court of Appeal of the Supreme Court of Queensland was dismissed on 16 April 2013[3]. The appellant appeals to this Court against that decision by special leave granted on 16 May 2014[4]. The appeal turns critically upon the construction of s 68(2) of the CPCA, which provides:

> "The Supreme Court must, and may only, make an exclusion order if it is satisfied—
>
> (a) the applicant has or, apart from the forfeiture, would have, an interest in the property; and
>
> (b) it is more probable than not that the property to which the application relates is not illegally acquired property."

2 The appellant challenges the decision of the Court of Appeal primarily by reference to what he had to prove in order to satisfy the criterion in s 68(2)(b). For the reasons that follow, the appeal should be dismissed.

Factual background

3 The factual circumstances are set out in detail in the reasons for judgment of Gageler and Keane JJ respectively. The essential facts as found by the primary judge were:

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1 *Queensland v Henderson* (2011) 218 A Crim R 111 at 122 [66].

2 (2011) 218 A Crim R 111 at 121 [60]–[61].

3 *Henderson v State of Queensland* [2014] 1 Qd R 1.

4 [2014] HCATrans 102 (Crennan and Kiefel JJ).

- The appellant had engaged in a serious crime related activity within the meaning of the CPCA within a period of six years before the application for a forfeiture order[5].

- The money the subject of the order was found in the appellant's possession[6].

- The money was the proceeds of the sale of jewellery given to the appellant for the benefit of the appellant and his siblings by their now deceased father[7].

- The jewellery had been said by the appellant's father to have been a gift to the appellant's great grandfather from Russian royalty in the late 19th or early 20th century[8].

- The account given to the appellant and his siblings of the provenance of the jewellery was untrue. The jewellery had in fact been made some time after 1950[9].

- It was not known how the appellant's father had come into possession of the jewellery[10].

4 On the basis of the preceding findings, the primary judge held that the Court could not be satisfied, on the balance of probabilities, that the jewellery itself was not illegally acquired property[11]. The term "illegally acquired property" includes all or part of the proceeds of dealing with illegally acquired property[12]. It followed that the money the subject of the exclusion application had not been shown on the balance of probabilities not to be illegally acquired property[13]. The exclusion order sought by the appellant was therefore refused.

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5 (2011) 218 A Crim R 111 at 118 [42].

6 (2011) 218 A Crim R 111 at 111 [1].

7 (2011) 218 A Crim R 111 at 118 [45], 120–121 [57]–[58].

8 (2011) 218 A Crim R 111 at 118 [45]–[46].

9 (2011) 218 A Crim R 111 at 119 [50]–[51].

10 (2011) 218 A Crim R 111 at 121 [59].

11 (2011) 218 A Crim R 111 at 121 [60]–[61].

12 CPCA, s 22(2)(a).

13 (2011) 218 A Crim R 111 at 121 [60]–[61].

The Court of Appeal came to the same conclusion. It found no error in the primary judge's approach to the standard of proof[14]. It found that on the evidence the primary judge was entitled to conclude that the appellant had not discharged the onus on him[15].

Legislative framework

5 A comprehensive overview of the CPCA and the text of relevant provisions are set out in the judgment of Keane J. What follows is an outline of salient features relevant to this appeal.

6 The "main object" of the CPCA is to remove the financial gain and increase the financial loss connected with illegal activity, whether or not a particular person is convicted of an offence because of the activity[16]. Other "important" objects are protective of property rights. One of those is to protect property honestly acquired by persons innocent of illegal activity from forfeiture and other orders affecting property[17]. Nevertheless, the text of s 68(2)(b) of the Act, as construed by the primary judge and the Court of Appeal, does not, as in the circumstances of this case, protect from characterisation as "illegally acquired" property received as a gift from another unless it is also shown not to have been illegally acquired by that other.

7 At the commencement of Ch 2 of the CPCA, which contains the substantive provisions directly relevant to this appeal, s 13 explains its operation. Chapter 2 enables proceedings to be started to confiscate property derived from illegal activity whether or not a person who engaged in the relevant activity has been convicted of any offence[18]. It requires the Supreme Court to make a forfeiture order confiscating property if it finds it more probable than not that the property is serious crime derived property because of a serious crime related activity of a person, even though a particular person suspected of having engaged

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14 [2014] 1 Qd R 1 at 18 [86] per White JA, Holmes JA agreeing at 3 [1], Daubney JA agreeing at 20 [100].

15 [2014] 1 Qd R 1 at 19 [92].

16 CPCA, s 4(1).

17 CPCA, s 4(2)(b).

18 CPCA, s 13(1).

in the serious crime related activity can not be identified[19]. The Chapter is also described as containing ancillary provisions[20]:

> "including provisions giving persons opportunities to have lawfully acquired property excluded from the effect of restraining orders and forfeiture orders."

8 The substantive provisions of Ch 2 of the CPCA provide for the State to apply for a restraining order in respect of property of a person suspected of having engaged in one or more serious crime related activities (a "prescribed respondent")[21]. Property the subject of a restraining order may then be the subject of a forfeiture application by the State[22]. The Supreme Court must make a forfeiture order if it finds it more probable than not that the prescribed respondent engaged in a serious crime related activity during a six year period prior to the application[23]. There is a discretion to refuse, on public interest grounds, to make the order[24]. A doubt as to whether a person engaged in a serious crime related activity does not suffice to avoid a finding on which a forfeiture order may be made[25]. On the making of the order the property the subject of the order is forfeited to the State and vests absolutely in the State[26].

9 An application for an exclusion order in relation to property the subject of a forfeiture application may be made by the prescribed respondent[27]. Pursuant to s 68(2)(b), the order cannot be made unless the Court is satisfied that "it is more probable than not that the property to which the application relates is not illegally acquired property". The effect of an exclusion order is to exclude the applicant's

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19 CPCA, s 13(4)(b).

20 CPCA, s 13(7).

21 CPCA, s 28(3)(a).

22 CPCA, s 56(1).

23 CPCA, s 58(1)(a) read with s 58(9).

24 CPCA, s 58(4).

25 CPCA, s 58(6).

26 CPCA, s 59(1).

27 CPCA, s 65(2).

property from the forfeiture application[28]. The property is also freed from the effect of the restraining order otherwise applicable to it[29].

10 The term "illegally acquired property" is central to s 68(2)(b). The money the subject of this appeal is property[30]. Pursuant to s 22(1), property is "illegally acquired property" if it is all or part of the proceeds of an "illegal activity". An "illegal activity" is defined by reference to the commission of various classes of criminal offence[31]. Section 22(2) provides that property is also "illegally acquired property" if:

> "(a) it is all or part of the proceeds of dealing with illegally acquired property; or
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> (b) all or part of it was acquired using illegally acquired property."

11 By virtue of s 25, illegally acquired property retains its character as such even if it is disposed of, including by using it to acquire other property, until it stops being property of that character by virtue of one or more of the circumstances set out in s 26. They include acquisition of the property by a person for sufficient consideration, without knowing, and in circumstances not likely to arouse a reasonable suspicion, that the property was illegally acquired property[32]. The jewellery was a gift to the appellant for the benefit of the appellant and his siblings and was not acquired for any consideration. None of the circumstances set out in s 26 was applicable to it or the money the subject of these proceedings.

Contentions and conclusions

12 On the facts as found by the primary judge and not in dispute before the Court of Appeal, the money the subject of the exclusion application was not "all or part of the proceeds of an illegal activity" within the meaning of s 22(1) of the

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28 CPCA, s 69(1)(b).

29 CPCA, s 70.

30 *Acts Interpretation Act* 1954 (Q), s 36, meaning of "property". An argument in the Court of Appeal that the deposit of the money the subject of this appeal into a bank account following its seizure required a fresh forfeiture application, which would have been out of time, was rejected in the Court of Appeal and is not pursued in this Court: [2014] 1 Qd R 1 at 14–16 [68]–[79].

31 CPCA, ss 15, 16 and 17.

32 CPCA, s 26(a).

CPCA. The question is whether it was nevertheless "illegally acquired property" within the meaning of s 22(2)(a) as "all or part of the proceeds of dealing with illegally acquired property".

13 The appellant's principal contention was that in order to satisfy the requirements of s 68(2)(b), he needed to prove no more than that the jewellery, sold for the money the subject of his application, was not the proceeds of any illegal activity on his part. That submission could find no footing in the text of s 68(2)(b) read with that of s 22(2). Pursuant to s 22(2), property is characterised as illegally acquired if it is all or part of the proceeds of dealing with illegally acquired property or was acquired using such property. Given that none of the circumstances set out in s 26 was applicable to the jewellery, if it had been illegally acquired by the appellant's father it would still have been illegally acquired property after being given to the appellant. On its face, s 68(2)(b) read with s 22(2) required the appellant to negative that proposition. The appellant would read s 68(2)(b) as requiring an applicant for an exclusion order to satisfy the Supreme Court that it was "more probable than not that the property to which the application relates was not acquired by illegal activity on the part of the applicant". That construction involves a judicial interpolation in the text of the statute. It is not a construction which the text permits.

14 It may be argued that the construction adopted by the primary judge and the Court of Appeal is in tension with the protective objectives of the Act because the applicant for an exclusion order may have to prove not only that the property was honestly acquired by him or her, when s 26 is not applicable, but also that it is not tainted by its ancestry. The primary judge observed[33]:

> "it would appear to be anomalous that property may be confiscated, because the ultimate origin of the property is beyond the knowledge of, and means of proof available to, a prescribed respondent. Such a case would appear to be well outside the intended scope of the legislation, as identified in s 13(1) and (4) of the Confiscation Act."

The tension thus indicated cannot be resolved by widening the scope of the protection effected by exclusion orders beyond the limits imposed by the text of the Act.

15 The appellant fails in his primary argument in this Court. In order to discharge the burden imposed by s 68(2)(b) it was necessary for the appellant to satisfy the Supreme Court that it was more probable than not that the jewellery was not illegally acquired in his father's hands at the time that the appellant received it. The placement of the burden of proof is uncompromising and unable

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33 (2011) 218 A Crim R 111 at 121 [65].

to be ameliorated by any "conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct"[34]. On the facts found by the primary judge, there was no available hypothesis to explain how the appellant's father acquired the jewellery. The appellant failed to discharge the onus placed upon him.

16 The appellant further complained of the way in which the Court of Appeal referred to the hearsay testimony of the account given by the appellant's father of how he came by the jewellery. In this respect I agree with the reasoning of Bell J. In the end what was left after the rejection of that evidence as a true account of the provenance of the jewellery was a want of evidence about it.

Conclusion

17 For the preceding reasons, the appeal should be dismissed with costs.

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34 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171; 110 ALR 449 at 450; [1992] HCA 66.

18 KIEFEL J. All relevant provisions of the *Criminal Proceeds Confiscation Act* 2002 (Q) are set out, and the scheme of the Act is explained, in the reasons of Gageler J and Keane J.

19 The property which was the subject of an application for forfeiture, and which the appellant sought to have excluded from an order for forfeiture, was $598,325 in Australian currency. Section 68(2) of the Act required the appellant to prove a negative: that the cash was not "illegally acquired property". Section 22 in relevant part provides:

> "(1) Property is ***illegally acquired property*** if it is all or part of the proceeds of an illegal activity.
>
> (2) Property is also ***illegally acquired property*** if—
>
> (a) it is all or part of the proceeds of dealing with illegally acquired property; or
>
> (b) all or part of it was acquired using illegally acquired property."

20 The appellant was able to satisfy the primary judge that the cash was not the proceeds of an illegal activity, because it represented the proceeds of sale of a gift of jewellery which had been made to him by his father in his father's lifetime. Section 22(2) directed attention to the jewellery itself. It required the appellant to prove that the conversion of the jewellery into cash was not a dealing with illegally acquired property. The appellant could not discharge his burden of proof because he could not establish that the jewellery was lawfully acquired by his father.

21 There is no basis for disturbing the findings of the primary judge, and the conclusion his Honour reached, for the reasons given by Bell J.

22 The appeal should be dismissed with costs.

23 BELL J. The facts and relevant provisions of the *Criminal Proceeds Confiscation Act* 2002 (Q) ("the Act") are set out in the reasons of Gageler J and Keane J and need not be repeated, save to the extent that it is necessary to do so in order to explain my reasons.

24 Mr Henderson appeals by special leave from the judgment of the Court of Appeal of the Supreme Court of Queensland on six grounds. Each ground[35], save ground four, is premised upon the assumption that it was sufficient for Mr Henderson to prove "that he acquired the jewellery otherwise than by an illegal activity" in order to discharge the onus imposed on him under s 68(2) of the Act. I agree with Keane J's analysis of the Act and with his Honour's reasons for rejecting the premise for each of these grounds.

25 Ground four contends that the Court of Appeal erred by "[a]ttributing evidential value to hearsay by the appellant's now deceased father and using the inadequacy of such hearsay against the appellant". On the hearing of the appeal in this Court, Mr Henderson explained the purport of ground four, submitting that "[w]here there is no evidence … you cannot just assume that the jewellery has been illegally acquired"[36] and "just because the account given by the father was not true you cannot draw an inference that the jewellery was illegally

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35 Ground one contends that the Court of Appeal erred by ruling that for Mr Henderson to succeed in his application he had to persuade the trial court that his deceased father prior to gifting him the jewellery had come by the jewellery lawfully.

Ground two contends that the Court of Appeal erred by failing to find that possession of the jewellery by Mr Henderson's deceased father was prima facie evidence of ownership by Mr Henderson's father.

Ground three contends that the Court of Appeal erred by failing to find that Mr Henderson's deceased father's declaration that he was gifting the jewellery to his children was a declaration against proprietary interest and as such was an exception to the rule against hearsay, in the absence of any superior title.

Ground five contends that the Court of Appeal erred by failing to perceive that it was Mr Henderson's possession of the property that was the subject of the *Criminal Proceeds Confiscation Act* 2002 (Q), not the possession by Mr Henderson's deceased father.

Ground six contends that the Court of Appeal erred by failing to distinguish between Mr Henderson's title to the jewellery and Mr Henderson's deceased father's title to the jewellery.

36 *Henderson v State of Queensland* [2014] HCATrans 229 at lines 340-341.

acquired"[37]. The second proposition requires qualification to which it will be necessary to return; however, more fundamentally, each proposition misconceives the primary judge's finding. His Honour did not find that the jewellery was illegally acquired property: rather, he was not persuaded of the probability that the jewellery was *not* illegally acquired property[38]. The finding may reflect a conclusion that it is probable that the jewellery was illegally acquired or it may reflect a conclusion that there are hypotheses that are consistent with illegality and hypotheses that are consistent with the absence of illegality and that Mr Henderson simply failed to discharge the onus of proof[39].

26 To the extent that ground four is relied upon for the contention that, given the findings of primary fact, the only inference that was open was that the jewellery was not illegally acquired property, I would reject it. It is a radical reformulation of the case that was run at trial and before the Court of Appeal. At trial, Mr Henderson led evidence to establish that the jewels given to him by his father were "longstanding family heirlooms"[40]. The respondent sought to meet this case by demonstrating that all of the jewellery was of "a relatively modern period post 1950's"[41]. As conducted, the issue in the case was whether the account of the provenance of the jewellery could be true[42]. Contrary to Mr Henderson's submission – that the Act imposes an almost insuperable obstacle to proof that an inter vivos gift is not illegally acquired property – it was accepted that, if the primary judge was satisfied that the hearsay account of the provenance of the jewels was probably true, Mr Henderson had discharged the onus and was entitled to the exclusion order that he sought. The primary judge was not so satisfied[43].

27 Mr Henderson did not contend at trial that it was sufficient to point to the evidence of his father's possession of the jewellery and to invite the court to

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37 *Henderson v State of Queensland* [2014] HCATrans 229 at lines 393-395.

38 *Queensland v Henderson* (2011) 218 A Crim R 111 at 121 [61].

39 *Holloway v McFeeters* (1956) 94 CLR 470 at 476-477 per Dixon CJ; [1956] HCA 25. See also *Cross on Evidence*, 9th Aust ed (2013) at 315 [9015].

40 *Queensland v Henderson* (2011) 218 A Crim R 111 at 115 [27].

41 *Queensland v Henderson* (2011) 218 A Crim R 111 at 115-116 [28], 119 [50].

42 *Queensland v Henderson* (2011) 218 A Crim R 111 at 120 [52].

43 *Queensland v Henderson* (2011) 218 A Crim R 111 at 121 [61].

apply a provisional presumption[44] that individuals ordinarily do not engage in criminal activity. Putting to one side the correctness of the analysis, such a case may have led the respondent to explore other issues in cross-examination and to adduce other evidence in its case[45]. It might have sought, for example, to explore Mr Henderson's father's financial capacity to invest in jewellery having a retail value of $1,000,000.

28 It may be accepted that the fact that a witness is disbelieved does not prove the opposite of that which is asserted[46]. However, this is not to say that the primary judge was precluded from drawing any inference from the fact that the father's account of the provenance of the jewellery was false. In some circumstances, a court may infer from the telling of a false story that the truth would harm the witness' interests[47]. It was not a question of making a finding that Mr Henderson's father came into possession of the jewellery as the result of criminal activity. Mr Henderson bore the onus and it would have been open to the primary judge to consider the fact that the father gave a false account of the provenance of the jewellery as a circumstance telling against satisfaction that it was discharged.

29 Mr Henderson appealed to the Court of Appeal on four grounds[48]. The Court of Appeal was required to decide the appeal on the issues raised by these grounds. It is uncontroversial that the Court of Appeal was authorised, after giving respect and weight to the conclusion drawn by the primary judge, to decide for itself the proper inference to be drawn from the facts as found[49]. The

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44 Denning, "Presumptions and Burdens", (1945) 61 *Law Quarterly Review* 379 at 379-380.

45 *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at 1608 [51] per Gleeson CJ, McHugh and Gummow JJ; 200 ALR 447 at 461; [2003] HCA 48, citing, inter alia, *Coulton v Holcombe* (1986) 162 CLR 1 at 8-9 per Gibbs CJ, Wilson, Brennan and Dawson JJ; [1986] HCA 33.

46 *Steinberg v Federal Commissioner of Taxation* (1975) 134 CLR 640 at 684 per Barwick CJ, 694 per Gibbs J; [1975] HCA 63.

47 *Edwards v The Queen* (1993) 178 CLR 193 at 208 per Deane, Dawson and Gaudron JJ; [1993] HCA 63, approving Gibbs J's statement in *Steinberg v Federal Commissioner of Taxation* (1975) 134 CLR 640 at 694.

48 Mr Henderson's amended notice of appeal contained five grounds; however, proposed ground four was abandoned at the hearing.

49 *Warren v Coombes* (1979) 142 CLR 531 at 551 per Gibbs ACJ, Jacobs and Murphy JJ; [1979] HCA 9.

only ground that challenged the primary judge's ultimate conclusion was ground three. This ground contended that in circumstances which included acceptance of the evidence of Mr Henderson and his siblings, the absence of evidence that the father had unlawfully acquired the jewellery, and the inherent limitations in the evidence of Mr Penfold, it was not open to fail to be satisfied that it was more probable than not that the jewellery was not illegally acquired. The second of the three circumstances, as White JA observed[50], reversed the onus of proof. Her Honour identified the focus of the challenge as the primary judge's acceptance of the opinion evidence of Mr Penfold[51]. Mr Penfold, a jeweller and valuer, considered that the jewellery had not come into existence before 1950[52]. The principal criticism of Mr Penfold's evidence was that his opinion was not based on examining the jewels (Mr Henderson had sold the jewels to a man named Daniel and their whereabouts were unknown) but only upon sketches made by Mr Komianos[53]. White JA correctly rejected the criticisms of the primary judge's acceptance of Mr Penfold's opinion[54]. Her Honour concluded that it had been open to the primary judge to find that Mr Henderson had not discharged the onus imposed by s 68(2) of the Act[55].

30 Mr Henderson did not argue in the Court of Appeal that, notwithstanding the primary judge's acceptance of Mr Penfold's opinion, the only inference open to his Honour was that the jewels were not illegally acquired property. Accordingly, the Court of Appeal was not required to consider the relationship between the statutory allocation of the burden of proof and a presumption of the kind now suggested. Nor was the Court of Appeal required to review the evidence to determine whether, in the event that a presumption that persons do not ordinarily engage in criminal activity was to be applied, that presumption had been displaced.

31 It is a large step for this Court to hold that it was not open to the primary judge to fail to be satisfied that the jewellery was not illegally acquired property, particularly when the evidence given at the trial is not before the Court on the appeal. Moreover, it is wrong to approach the determination of an exclusion application under the Act upon a presumption that individuals ordinarily do not

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50 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 18 [88].

51 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 18 [89].

52 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 10-11 [48]-[49].

53 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 18 [89].

54 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 18-19 [89]-[92].

55 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 19 [92].

engage in criminal activity. Such a presumption is inconsistent with the allocation of the burden of proof in s 68(2) of the Act.

32 The Act subjects a person who is suspected of engaging in one or more serious crime related activities ("a prescribed respondent") to the risk that some or all of the person's property may be restrained and thereafter forfeited to the State. The Act does not confine its reach to such of the prescribed respondent's property as is directly or indirectly derived from his or her serious crime related activity. The Act casts the onus on the prescribed respondent to prove that property that he or she seeks to have excluded from forfeiture is not "illegally acquired property". In determining whether the applicant for an exclusion order has discharged that onus, the court does not commence with an assumption that individuals either ordinarily do, or do not, engage in criminal activity.

33 Mr Henderson was required to prove a negative. It was necessary for Mr Henderson to point to evidence of facts and circumstances supporting the conclusion that, according to the course of common experience, it was probable that the jewellery was not illegally acquired property[56]. Discharge of the onus was not a mechanical exercise; it required that the primary judge be actually persuaded as a matter of probability that the jewellery was not illegally acquired property[57]. The primary judge found that the father's account of the provenance of the jewellery could not be true[58]. His Honour went on to record that Mr Henderson had been unable to establish how his father came into possession of the jewellery and consequently unable to establish that the jewellery was not illegally acquired property[59]. His Honour's reasons were responsive to the single factual issue on which the case was fought. It was not an error to conclude that, in the absence of some evidence as to how the father came to be in possession of jewellery worth a very substantial sum[60], Mr Henderson had failed to discharge the onus that s 68(2) imposed on him.

34 The appeal should be dismissed with costs.

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56 *Holloway v McFeeters* (1956) 94 CLR 470 at 476-477 per Dixon CJ, 480-481 per Williams, Webb and Taylor JJ citing *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5-6; *Jones v Dunkel* (1959) 101 CLR 298 at 304-305 per Dixon CJ, 305 per Kitto J, 309-310 per Menzies J; [1959] HCA 8.

57 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361 per Dixon J; [1938] HCA 34.

58 *Queensland v Henderson* (2011) 218 A Crim R 111 at 120 [53].

59 *Queensland v Henderson* (2011) 218 A Crim R 111 at 121 [61].

60 *Queensland v Henderson* (2011) 218 A Crim R 111 at 121 [59].

GAGELER J.

Introduction

35 On 20 April 2002 police found a bag in the boot of a hire car parked outside a motel in Cairns. The bag contained $598,325 in cash and 23.3 grams of cannabis. Three days later, police deposited the money in a bank account operated by the Queensland Police Service.

36 The bag belonged to John William Henderson, formerly named William Marijancevic, whom police suspected of having engaged in serious crime related activity.

37 On 1 January 2003, operative provisions of the *Criminal Proceeds Confiscation Act* 2002 (Q) ("the Act") entered into force. On 10 February 2003, on the application of the State of Queensland made that day under s 28(3)(a) of the Act, the Supreme Court of Queensland made a restraining order under s 31(1) of the Act restraining any person from dealing with identified property of Mr Henderson. The order, as subsequently varied, identified the restrained property as the money held on deposit in the bank account.

38 On 22 November 2011, on the further application of the State made on 5 March 2003 under s 56(1) of the Act, the Supreme Court made an order under s 58(1)(a) of the Act forfeiting to the State the money then held on deposit in the bank account, being the principal sum of $598,325 deposited on 23 April 2002 together with accrued interest. The forfeiture order was based on the Supreme Court finding it more probable than not that Mr Henderson had engaged in a serious crime related activity, constituted by his conviction, early in 2002 in Victoria, of a charge of possessing cannabis and alternatively his possession of the 23.3 grams of cannabis found in his bag on 20 April 2002.

39 Before making the forfeiture order, the Supreme Court dismissed an application by Mr Henderson made on 30 May 2003 under s 65 of the Act for an order excluding the whole of the money from the application for the forfeiture order. The Supreme Court was permitted and obliged by s 68 of the Act to make the exclusion order which Mr Henderson sought if, but only if, the Supreme Court was satisfied that Mr Henderson had an interest in the money and that it was more probable than not that the money was not "illegally acquired property". It will be necessary in due course to refer to the text of s 68, to the definition of illegally acquired property in s 22, and to related provisions of the Act.

40 The primary judge (Peter Lyons J) found that the evidence adduced by Mr Henderson established that the $598,325 contained in the bag constituted the proceeds of the sale sometime in or about December 2001 of jewellery which had been given to Mr Henderson in or about December 1996 for the benefit of Mr Henderson and three of his siblings by their father, Franjo Marijancevic, who

was born in Yugoslavia in 1923 and who died in Victoria on 29 April 2001. His Honour nevertheless held that he was unable to reach the satisfaction required to make the exclusion order because Mr Henderson was unable to establish how his father came into possession of the jewellery. His Honour characterised that result, to which he considered himself driven by reason of the lack of evidence about how Mr Henderson's father came into possession of the jewellery, as "anomalous"[61]. The Court of Appeal (Holmes and White JJA and Daubney J) dismissed an appeal by Mr Henderson[62].

41 The ultimate question in Mr Henderson's further appeal, by special leave, to this Court is whether the evidence adduced by Mr Henderson and accepted by the primary judge ought to have been sufficient for Mr Henderson to have discharged his burden of satisfying the Supreme Court that it was more probable than not that the money was not illegally acquired property.

42 Before turning in more detail to the circumstances which give rise to that question and to the issues which arise in its resolution, it is convenient to set out the relevant statutory provisions and to locate them within the scheme of the Act in its applicable form[63].

The Act

43 The Act identifies as its main object to remove the financial gain and increase the financial loss associated with "illegal activity", whether or not a particular person is convicted of an offence because of that activity[64]. The expression illegal activity encompasses a "serious crime related activity"[65]. A serious crime related activity is anything done by a person that was, when it was done, a "serious criminal offence"[66]. That includes any indictable offence for which the maximum penalty is at least five years' imprisonment[67]. The expression illegal activity also encompasses an act or omission that is an offence

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61 *Queensland v Henderson* (2011) 218 A Crim R 111 at 121 [65].

62 *Henderson v State of Queensland* [2014] 1 Qd R 1.

63 Reprint No 3D, as in force on 1 January 2011.

64 Section 4(1).

65 Section 15(a).

66 Section 16(1).

67 Section 17(1)(a).

against the law of Queensland or the Commonwealth[68], as well as an act or omission committed outside Queensland that is an offence against the law of the place in which it is committed and that would be an offence against the law of Queensland or the Commonwealth if it were committed in Queensland[69].

44 The Act goes on to identify what it describes as another important object. That other identified object includes ensuring that property rights are affected by orders made under the Act only through procedures which ensure that persons who may be affected by those orders are given a reasonable opportunity to establish the lawfulness of the activity through which they acquired the relevant property rights[70]. It also includes protecting from forfeiture property honestly acquired by persons innocent of illegal activity[71].

45 Subject to immaterial inclusions and exclusions[72], a reference in the Act to "property" is to "any legal or equitable estate or interest ... in real or personal property of any description (including money)", whether situated in Queensland or elsewhere (including outside Australia)[73]. The term "money" in this context refers to money in any form, whether corporeal (such as when held in notes) or incorporeal (such as when held on deposit in a bank account)[74].

46 Other than a prosecution for an offence against the Act, a proceeding under the Act is not a criminal proceeding[75]. The rules of evidence applicable in proceedings under the Act are those applicable in civil proceedings[76]. Importantly, questions of fact must be decided on the balance of probabilities[77].

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68 Section 15(b).

69 Section 15(c).

70 Section 4(2)(a).

71 Section 4(2)(b).

72 Section 19.

73 Schedule 6 "property" and s 36 of the *Acts Interpretation Act* 1954 (Q).

74 Fox, *Property Rights in Money*, (2008), Ch 1.

75 Section 8(1) and (2).

76 Section 8(4).

77 Section 8(3).

47 Chapter 2 of the Act makes provision for the procedures which were invoked by the State and by Mr Henderson in the present case. That chapter authorises the State to bring proceedings in the Supreme Court which are capable of resulting in the Supreme Court making orders forfeiting to the State all or any property of a person who the Supreme Court is satisfied on the balance of probabilities engaged in a serious crime related activity. The proceedings are in two stages.

48 The first stage is initiated by the State applying to the Supreme Court under s 28 for an order restraining any person from dealing with property stated in the order. The application must be supported by an affidavit of an officer authorised under the *Crime and Misconduct Act* 2001 (Q) or a police officer. Section 28(3)(a) permits such an application to relate to all or any of the property of a person suspected of having engaged in one or more serious crime related activities. Such a person is referred to as a "prescribed respondent". Section 29(1)(a) provides that the relevant officer's affidavit must state, for property mentioned in s 28(3)(a) if the serious crime related activity involves an offence of a kind stated in Pt 1 of Sched 2 to the Act, that the officer suspects that the prescribed respondent has engaged in one or more serious crime related activities and the reason for the suspicion. Offences stated in Pt 1 of Sched 2 include any offence, punishable by imprisonment for five years or more, involving a dangerous drug as defined under the *Drugs Misuse Act* 1986 (Q). Under s 31(1), subject to s 31(2), the Supreme Court must make a restraining order in relation to property if, after considering the application and affidavit, the Supreme Court is satisfied that there are reasonable grounds for the suspicion on which the application is based.

49 The second stage is initiated by the State applying to the Supreme Court under s 56(1) for a forfeiture order, forfeiting to the State particular property restrained under the prior restraining order. Under s 58(1)(a), subject to s 58(4), the Supreme Court must make a forfeiture order in respect of property that has been restrained on an application relating to property mentioned in s 28(3)(a) if the Supreme Court finds it more probable than not that the prescribed respondent mentioned in that application engaged in a serious crime related activity during the period of six years before the day the application for the forfeiture order was made. Subject only to that limitation period, Ch 2 is expressed to apply in relation to illegal activity or serious crime related activity whether happening before or after 1 January 2003[78].

50 An application for a restraining order may be made without notice to the person to whom it relates[79]. In contrast, notice of an application for a forfeiture

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78 Section 14.

79 Section 28(2)(b).

order must be given to a person whose property is restrained under the restraining order and to anyone else considered by the Crime and Misconduct Commission or the Commissioner of the Police Service to have an interest in the property[80].

51 Where an application for a forfeiture order has been made, but the application has not been decided, s 65 allows a person who claims an interest in property to which the application relates to apply to the Supreme Court for an exclusion order. The applicant can be a prescribed respondent. An exclusion order is an order which states the nature and extent of the applicant's interest in the property[81] and which, if made before the application for the forfeiture order has been decided, excludes the applicant's property from the application for the forfeiture order[82]. The making of an exclusion order also stops the restraining order continuing to have effect in relation to the excluded interest[83].

52 Section 68(1) authorises the Supreme Court to make an exclusion order on an application under s 65. Section 68(2), the construction and operation of which lies at the heart of the present case, provides:

> "The Supreme Court must, and may only, make an exclusion order if it is satisfied—
>
> (a) the applicant has or, apart from the forfeiture, would have, an interest in the property; and
>
> (b) it is more probable than not that the property to which the application relates is not illegally acquired property."

53 The reference in s 68(2)(b) to illegally acquired property must be read with the definition of that expression in s 22. Section 22 provides in part:

> "(1) Property is ***illegally acquired property*** if it is all or part of the proceeds of an illegal activity.
>
> (2) Property is also ***illegally acquired property*** if—
>
> (a) it is all or part of the proceeds of dealing with illegally acquired property; or

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80 Section 57(1).

81 Section 69(1)(a).

82 Section 69(1)(b).

83 Section 70.

(b) all or part of it was acquired using illegally acquired property.

(3) For subsection (2), it does not matter whether the property dealt with or used in the acquisition became illegally acquired property because of subsection (1) or subsection (2).

(4) Subsections (1) and (2) apply whether or not the activity, dealing or acquisition because of which the property became illegally acquired property happened before the commencement of this section."

54 The definition in s 22 must itself be read with related definitions in ss 18 and 21, and with ss 25 and 26.

55 Section 18 defines "[p]roceeds, in relation to an activity" to include "property and another benefit derived because of the activity ... by the person who engaged in the activity ... or ... by another person at the direction or request, directly or indirectly, of the person who engaged in the activity". Section 21 provides that "benefit" includes "service and advantage" and that a "benefit derived" by a person includes "a benefit derived by someone else at the person's request or direction". Schedule 6 defines "derived" to include "directly or indirectly derived" and "realised".

56 Section 25, read with the definition of "character" in s 24, provides in part:

"Illegally acquired property ... retains its character [as illegally acquired property]—even if it is disposed of, including by using it to acquire other property—until it stops being property of that character under section 26."

57 Section 26 provides in part:

"Property stops being illegally acquired property ...

(a) when it is acquired by a person for sufficient consideration, without knowing, and in circumstances not likely to arouse a reasonable suspicion, that the property was illegally acquired property ...; or

(b) when it vests in a person on the distribution of the estate of a deceased; or

(c) when it is disposed of under this Act ...; or

(d) when it is the proceeds of the disposal of property under this Act ...; or

(e) when it is acquired by Legal Aid as payment of reasonable legal expenses payable because of an application under this Act or in defending a charge of an offence; or

(f) in circumstances prescribed under a regulation."

58 The definition in s 22 must also be read in light of what s 7(1) describes as examples of the practical operation of its application set out in Pt 1 of Sched 1. The first of those examples usefully illustrates the interaction of ss 22 and 25. Of the elaborate sequence of events referred to in the example, it is sufficient to consider the first three. The first event is that A acquires money as the proceeds of an illegal activity: the money is illegally acquired property by operation of s 22(1). The next event is that A uses the money to buy land from B in circumstances which do not attract the operation of s 26(a): the money paid by A to B remains illegally acquired property by operation of s 25, and the land becomes illegally acquired property by operation of s 22(2)(b). The next event is that A sells the land to C for a larger sum of money in circumstances which again do not attract the operation of s 26(a): the land remains illegally acquired property by operation of s 25, and the larger sum of money paid by C to A becomes illegally acquired property by operation of s 22(2)(a).

Mr Henderson's application

59 The restraining order in respect of the money held on deposit in the bank account was made by the Supreme Court under s 31(1) on an application of the State under s 28(3)(a) of the Act. Mr Henderson was necessarily mentioned in that application as the prescribed respondent. The subsequent making by the State of the application for the forfeiture order on 5 March 2003 triggered the ability of Mr Henderson to apply under s 65 of the Act for the whole of that amount to be the subject of an exclusion order.

60 To obtain the exclusion order for which he applied, it was incumbent on Mr Henderson to establish to the civil standard of proof that the conditions set out in s 68(2)(a) and (b) of the Act were met in respect of the money which police found in his bag on 20 April 2002 and which they subsequently deposited in the bank account.

61 There was and could be no dispute between the State and Mr Henderson that Mr Henderson, having possession of the money, also had title to the money in the absence of a superior claim by someone else[84]: that was the basis on which the State had sought and obtained the restraining order. There could therefore be

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84 *Russell v Wilson* (1923) 33 CLR 538 at 546; [1923] HCA 60; *Field v Sullivan* [1923] VLR 70 at 86.

no dispute that the Supreme Court ought to be satisfied that Mr Henderson had an interest in the money which met the condition in s 68(2)(a) of the Act.

62 The substantial contest between Mr Henderson and the State concerned the condition in s 68(2)(b) of the Act: whether or not the Supreme Court ought to be satisfied that it was more probable than not that the money was not illegally acquired property.

Evidence

63 Mr Henderson gave evidence in support of his application in which he gave the following account of how he came into possession of the money. In or about December 1996, Mr Henderson was visiting his father in his father's house in Picola in Victoria. His father then gave him some jewellery, comprising a pair of earrings, a bracelet, a necklace and a brooch, which his father had kept in a box under a bed, saying to him "[l]ook after your family". Mr Henderson understood his father to be referring to his brothers, Joseph and Frank Marijancevic, and to his sister Dianne Murphy. Mr Henderson regarded himself from then on as holding the jewellery on behalf of those siblings and himself in equal shares. Mr Henderson took the jewellery home to Melbourne where it was initially kept in a safety deposit box in a bank.

64 The account continued that, after the death of their father in April 2001, Mr Henderson and his siblings together decided to have the jewellery valued and sold, and to invest the proceeds. In or about December 2001, Mr Henderson took the jewellery to a jeweller in Melbourne, Mr Theodosis Komianos, who sketched the jewellery and told Mr Henderson that it had a wholesale value of between $600,000 and $700,000 and a retail value of $1,000,000. Sometime later, a person whose first name was Daniel contacted Mr Henderson and ultimately purchased the jewellery for $620,000, which he paid Mr Henderson in $50 notes. Mr Henderson and his wife went to different banks and a casino, where they exchanged the $50 notes for $100 notes. Mr Henderson then kept that cash in a safety deposit box in a bank. Mr Henderson and his siblings held a family meeting in which they decided that the cash should be invested in the Queensland property market. In or about January and February 2002, Mr Henderson travelled to Cairns several times, where he met with a Mr John Dredge to negotiate the possible purchase of an investment property. Mr Henderson then reached a verbal agreement with Mr Dredge to purchase a property in Kuranda, but he and Mr Dredge were continuing to negotiate on the price. They agreed to meet in a coffee shop in a shopping plaza in April 2002. Mr Henderson travelled to Cairns for that meeting, bringing with him the cash which was the proceeds of the sale of the jewellery. He thought he could use the cash as a bargaining tool to encourage Mr Dredge to accept the lowest possible price. That cash (which he maintained should have been $620,000 and from which an amount was therefore missing) was the cash which on 20 April 2002 police found in his bag in the boot of a car which Mr Henderson had hired.

65 Joseph and Frank Marijancevic and Dianne Murphy each gave evidence generally supportive of Mr Henderson. None had seen the jewellery during their father's lifetime. Each first saw it when Mr Henderson showed it to them after their father's death. They explained that they associated the jewellery with their mother and father having told them that jewellery had been given to their great grandfather as a reward for providing transportation services for Russian royalty. No objection was taken to the hearsay nature of that evidence.

66 An affidavit of Mr Komianos was also read in Mr Henderson's case. Mr Komianos deposed to having carried on business as a jeweller in Melbourne in December 2001, when a man he later came to know as Mr Henderson came into his office with jewellery in respect of which Mr Komianos gave a verbal valuation at approximately $600,000 wholesale and over $1,000,000 retail. Mr Komianos described the jewellery and also produced a sketch of the jewellery which he deposed to having made at the time. He explained in his affidavit that he recalled telling a few people that Mr Henderson had items for sale but that he could not recall the names of those people. Mr Komianos was not required for cross-examination. Medical certificates concerning him, tendered in evidence by Mr Henderson, explained that Mr Komianos was an alcoholic who had chronic brain damage and resulting memory loss, that he "became mentally unfit a few years ago", and that he was unfit to travel.

67 The State called Mr Kenneth Penfold, a registered valuer and jeweller operating his business in Brisbane, to give an opinion as to the age of the jewellery based on Mr Komianos' sketch. Mr Penfold's opinion was that all of the items of jewellery were relatively modern, indeed that they were all manufactured after 1950.

Findings

68 The primary judge accepted the evidence of Mr Komianos that in December 2001 Mr Henderson produced jewellery to him, as depicted in his sketch, which at the time he had valued. His Honour also accepted the opinion of Mr Penfold that the jewellery had been manufactured after 1950. It followed that the account of the jewellery having been given to Mr Henderson's great grandfather as a reward for providing transportation services for Russian royalty could not be true. The jewellery, on that account, would have had to have been manufactured before 1920[85].

69 The primary judge accepted, on balance, the evidence of Mr Henderson that the cash found by police in his bag in the boot of the hire car in Cairns was the product of the sale of the jewellery that had been valued by Mr Komianos.

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85 (2011) 218 A Crim R 111 at 119-120 [51]-[56].

His Honour also accepted that the jewellery was given to Mr Henderson by his father and shown by him to his brothers and sister shortly after his father's death. His Honour treated it as significant that the evidence of Mr Henderson to that effect had been corroborated by his siblings. Notwithstanding criticisms made by the State as to the reliability of their evidence, there was, his Honour said, no better explanation[86].

70 His Honour continued[87]:

> "The consequence of these findings, however, is that it is unknown how Mr Marijancevic came into possession of the jewellery."

71 His Honour concluded[88]:

> "Since Mr Henderson has been unable to establish how Mr Marijancevic came into possession of the jewellery, and consequently that the jewellery was not illegally acquired property, it follows that the property the subject of the exclusion application has not been shown on the balance of probabilities not to be illegally acquired property, and the exclusion order sought by Mr Henderson cannot be made."

72 In the Court of Appeal, to which Mr Henderson had a right of appeal under s 263 of the Act, Mr Henderson framed one of his grounds of appeal as follows:

> "In all the circumstances – including the learned judge's acceptance of the evidence of the appellant and his siblings, the absence of any evidence that the appellant's father had unlawfully acquired the jewellery and the inherent limitations in the evidence of Kenneth Penfold – it was not open to fail to be satisfied on the balance of probabilities that it was more probable than not that the jewellery was not illegally acquired."

73 White JA, with whom Holmes JA and Daubney J agreed, responded that[89]:

> "it was for Mr Henderson to persuade his Honour that his father had not unlawfully acquired the jewellery. The primary judge was quite entitled to conclude that Mr Henderson had not discharged that onus."

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86 (2011) 218 A Crim R 111 at 120-121 [57]-[58].

87 (2011) 218 A Crim R 111 at 121 [59].

88 (2011) 218 A Crim R 111 at 121 [61].

89 [2014] 1 Qd R 1 at 19 [92].

Mr Henderson's arguments in this Court

74 Mr Henderson argues in this Court that s 68(2)(b) of the Act, on its proper construction, required only that he prove that it was more probable than not that the jewellery was not derived by him because of an illegal activity in which he had engaged or in which someone else had engaged at his direction or request. Having proved that he had acquired the jewellery lawfully from his father, it was unnecessary for him to go further and to prove that his father had not unlawfully acquired the jewellery.

75 Mr Henderson's construction argument is that, as applied to that expression in s 68(2)(b), the primary definition of illegally acquired property in s 22(1) is confined to property that is all or part of the proceeds of an illegal activity which was engaged in by the applicant for the exclusion order or by another person at the direction or request of the applicant for the exclusion order.

76 Mr Henderson invokes the objects of the Act in support of that construction. He also raises the spectre of any other construction leading to the absurdity of infinite regression. If the family story of the jewellery having been given to his great grandfather as a reward for providing transportation services for Russian royalty had been accepted as true, Mr Henderson asks rhetorically, would he also have needed to have proved that the unknown and now long dead giver of the jewellery had not acquired the jewellery unlawfully?

77 As an alternative to his construction argument, Mr Henderson advances in this Court a version of the argument he put unsuccessfully to the Court of Appeal challenging the ultimate finding of the primary judge. The argument as refined in the course of oral submissions is that, given the findings of primary fact which he made and notwithstanding the primary judge's rejection of the family story, the primary judge ought to have been satisfied on the balance of probabilities that the jewellery was not illegally acquired by Mr Henderson's father.

78 Mr Henderson's construction argument cannot be sustained. His alternative argument is sound, and I accept it.

Construction

79 There is no textual or contextual warrant for construing the reference to illegally acquired property in s 68(2)(b) in the restrictive manner for which Mr Henderson argues. To do so would run counter to the plain words of s 22. It would also effectively negate the operation of ss 25 and 26.

80 When s 22(1) is read with s 18, it is plain that property has the character of illegally acquired property if it is all or part of property derived because of any illegal activity either by any person who engaged in that illegal activity or by any other person at the direction or request of the person who engaged in that illegal activity. When s 22(2) is then read with s 22(1), it is equally plain that once

property attains the character of illegally acquired property under s 22(1), any further property that is all or part of the proceeds of dealing with that property, or that was acquired using that property, also attains the same character. Section 22(3) then makes clear that s 22(2) operates to produce the same effect in relation to subsequent dealings and acquisitions.

81 Section 25 operates in addition to produce the result that property that has once attained the character of illegally acquired property by operation of s 22 retains that character until the happening of one of the events referred to in s 26(a) to (f). If there could be any doubt about that operation of s 25, that doubt could only be dispelled by the examples set out in Pt 1 of Sched 1, to the first of which reference has already been made.

82 Interpreted in light of those elaborate and interlocking definitional and illustrative provisions, the reference in s 68(2)(b) to illegally acquired property is, clearly enough, to any property that has at any time in the past attained the character of illegally acquired property by operation of s 22(1) or (2), provided only that it has not stopped retaining the character of illegally acquired property by reason of the happening of an event referred to in s 26(a) to (f).

83 The objects of the Act do not suggest to the contrary. The main object, expressed in terms of removing the financial gain and increasing the financial loss associated with illegal activity, contains nothing to confine the illegal activity to which it refers to activities of persons within a particular class. Nor is any such confinement suggested by inclusion within the other identified object of the Act of reference to procedures which ensure that persons who may be affected by orders made under the Act are given a reasonable opportunity to establish the lawfulness of the activity through which they acquired relevant property. The further reference within that object to protecting from forfeiture property honestly acquired by persons innocent of illegal activity is best read as a shorthand reference to the operation of s 26(a).

84 The consequence for the present case is as follows. If the jewellery had attained the character of illegally acquired property by operation of s 22(1) or (2) or s 25 at or before the time it came into the possession of Mr Henderson's father, the jewellery retained that character in Mr Henderson's possession by operation of s 25: his father's gift of the jewellery to Mr Henderson was not an event referred to in s 26(a) to (f). If the jewellery had so attained and retained the character of illegally acquired property, the money Mr Henderson received from the sale of the jewellery also became illegally acquired property by operation of s 22(2)(b). To discharge his legal burden of satisfying the Supreme Court that it was more probable than not that the money was not illegally acquired property, Mr Henderson therefore needed to satisfy the Supreme Court that the jewellery did not have the character of illegally acquired property when the jewellery was in the possession of his father.

85 The spectre which Mr Henderson raises of him, or another applicant for an exclusion order, facing the potentially impossible task of needing to lead specific evidence to establish that no predecessor in title anywhere in the world ever derived title as a result of an illegal activity does not arise on the proper construction of s 68(2)(b). The spectre, however, is not avoided by any implicit limitation in the section's reference to illegally acquired property on the expression as defined in s 22 and explained in s 25: there is none.

86 The spectre is avoided by the emphasis which the section gives, through its express reference to satisfaction of what is more probable than not, to proof that property is not illegally acquired property needing only to be proof to the ordinary civil standard. Neither the existence of the restraining order nor of the application for the forfeiture order gives rise to any presumption that property is illegally acquired property which the applicant for the exclusion order is required to overcome.

Proof: inference and probability

87 Two explanations of the ordinary civil standard of proof, although lengthy, are usefully recalled in this context. One is that of Dixon CJ in *Murray v Murray*[90], with reference to *Briginshaw v Briginshaw*[91]:

> "What the civil standard of proof requires is that the tribunal of fact, in this case the judge, shall be 'satisfied' or 'reasonably satisfied'. The two expressions do not mean different things but as in other parts of the law the word 'reasonably', which in origin was concerned with the use of reason, makes its appearance without contributing much in meaning. However, its use as a qualifying adjective seems to relieve lawyers of a fear that too much unyielding logic may be employed. But the point is that the tribunal must be satisfied of the affirmative of the issue. The law goes on to say that he is at liberty to be satisfied upon a balance of probabilities. It does not say that he is to balance probabilities and say which way they incline. If in the end he has no opinion as to what happened, well it is unfortunate but he is not 'satisfied' and his speculative reactions to the imaginary behaviour of the metaphorical scales will not enable him to find the issue mechanically. The passages cited in *Briginshaw's Case* ... show that in English law there never were more than two standards of persuasion ... But they show that from the beginning of the nineteenth century courts did not impose on the parties, or one may perhaps say claim from the parties, the same strictness or exactness of proof about all questions arising in a civil trial without regard to their

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90 (1960) 33 ALJR 521 at 524.

91 (1938) 60 CLR 336 at 360-363; [1938] HCA 34.

> triviality or importance, the unlikelihood or the probability of their occurring. In other words the tribunal might reason upon the evidence to a conclusion as a responsible and sensible man would in all the circumstances."

88 The other is the often repeated explanation of Dixon, Williams, Webb, Fullagar and Kitto JJ in *Bradshaw v McEwans Pty Ltd*[92]:

> "The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence while [in] the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort where direct proof is not available it is enough [if] the circumstances appearing in the evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture ... But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then though the conclusion may fall short of certainty it is not to be regarded as a mere conjecture or surmise".

Applying those principles to the civil case before them, in which the plaintiff bore the legal burden of proving harm to have arisen from the defendant's negligence, their Honours went on to explain[93]:

> "Once the plaintiff offers evidence which standing by itself raises a higher degree of probability that the harm arose from negligence for which the defendant is responsible that will support a verdict unless the defendant goes into evidence. ... All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendant's negligence. By more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood."

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92 (1951) 217 ALR 1 at 5. See also *Luxton v Vines* (1952) 85 CLR 352 at 358; [1952] HCA 19; *Holloway v McFeeters* (1956) 94 CLR 470 at 480-481; [1956] HCA 25; *TNT Management Pty Ltd v Brooks* (1979) 53 ALJR 267 at 269; 23 ALR 345 at 349-350.

93 (1951) 217 ALR 1 at 5-6.

89 Generally speaking, and subject always to statutory modification, a party who bears the legal burden of proving the happening of an event or the existence of a state of affairs on the balance of probabilities can discharge that burden by adducing evidence of some fact the existence of which, in the absence of further evidence, is sufficient to justify the drawing of an inference that it is more likely than not that the event occurred or that the state of affairs exists. The threshold requirement for the party bearing the burden of proof to adduce evidence at least to establish some fact which provides the basis for such a further inference was explained by Kitto J in *Jones v Dunkel*[94]:

> "One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that actual case a specific event happened or a specific state of affairs existed."

90 That description of the ordinary operation of the civil standard of proof applies equally to a case in which the legal burden of a party is to prove the non-happening of an event or the non-existence of a particular state of affairs as to a case in which a party's legal burden is to prove the happening of an event or the existence of a particular state of affairs. As Davidson J earlier explained in the Supreme Court of New South Wales in *Ex parte Ferguson; Re Alexander*[95]:

> "In all legal proceedings the basic principle at common law is that in civil cases a plaintiff must prove the essential elements of his case even if that course involves establishing the assertion of a negative ... He must establish what is really the affirmative in substance, not what is merely affirmative in form ... But if the party bearing the onus furnishes some evidence which gives rise to a presumption or inference of fact in his favor or that presumption already exists, the onus shifts to the other party".

His Honour's reference to evidence adduced by the party bearing the legal burden of proof giving rise to a "presumption or inference of fact" was to nothing more than an inference of fact drawn, in accordance with ordinary processes of inferential reasoning, in the absence of further evidence[96]. His Honour's

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94 (1959) 101 CLR 298 at 305; [1959] HCA 8. See also *Carr v Baker* (1936) 36 SR (NSW) 301 at 306; *TNT Management Pty Ltd v Brooks* (1979) 53 ALJR 267 at 269; 23 ALR 345 at 350. See generally Hodgson, "The Scales of Justice: Probability and Proof in Legal Fact-finding", (1995) 69 *Australian Law Journal* 731 at 732-733.

95 (1944) 45 SR (NSW) 64 at 70.

96 *Cross on Evidence*, 9th Aust ed (2013) at 297 [7240], 299 [7255].

reference to an "onus" then shifting to the other party was to nothing more than the practical need (sometimes referred to as a "tactical burden") for an opposing party to adduce further evidence if that party wants to prevent such an inference of fact actually being drawn in the circumstances of the case[97].

91 The process of inferential reasoning involved in drawing inferences from facts proved by evidence adduced in a civil proceeding cannot be reduced to a formula. The process when undertaken judicially is nevertheless informed by principles of long standing which reflect systemic values and experience. One such principle, forming "a fundamental precept of the adversarial system of justice"[98], is that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted"[99]. Another such principle, "reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct", is that "a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct"[100]. The reluctance of a court to infer fraudulent or criminal conduct is ordinarily somewhat stronger in respect of a person who is not a party to litigation and who is for that reason denied an opportunity to explain and justify his or her conduct as consistent with the conventional perception[101].

92 To discharge his legal burden of proving that the jewellery was not illegally acquired property, Mr Henderson did not need to lead specific evidence affirmatively to establish that each owner in the chain of title to the jewellery had derived that title otherwise than as a result of some illegal activity. It was enough that he adduced evidence within his capacity to produce to establish facts

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97 *Cross on Evidence*, 9th Aust ed (2013) at 293 [7215].

98 *Russo v Aiello* (2003) 215 CLR 643 at 647 [11]; [2003] HCA 53.

99 *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970]. See also *Houston v Wittner's Pty Ltd* (1928) 41 CLR 107 at 122; [1928] HCA 34; *Hampton Court Ltd v Crooks* (1957) 97 CLR 367 at 371-372; [1957] HCA 28; *G v H* (1994) 181 CLR 387 at 391-392; [1994] HCA 48; *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 454 [36]; [2001] HCA 12.

100 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171; 110 ALR 449 at 450; [1992] HCA 66, referring to *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362, *Helton v Allen* (1940) 63 CLR 691 at 701; [1940] HCA 20 and *Rejfek v McElroy* (1965) 112 CLR 517 at 520-522; [1965] HCA 46. See also *G v H* (1994) 181 CLR 387 at 399.

101 Eg *Bale v Mills* (2011) 81 NSWLR 498 at 516-518 [70]-[79].

sufficient to allow the opinion to be formed that the more probable inference was that the title to the jewellery was not so derived.

93 Mr Henderson adduced evidence by which he succeeded in proving to the satisfaction of the primary judge that the money was the proceeds of his own sale of jewellery given to him by his father. Those findings were not inevitable. But they were made. The State did not argue in the Court of Appeal, and does not argue in this Court, that they should be revisited.

94 On his Honour's findings, Mr Henderson therefore succeeded in giving the innocent explanation that he came into possession of the jewellery as a gift from his father. He and his siblings went on to give an account, which they said they had been given by their mother and father, as to how their father came into possession of the jewellery. Having rejected that account as untrue, the primary judge might well have been justified in inferring that the account had been concocted, by Mr Henderson's parents or more latterly by Mr Henderson and his siblings, as a cover for an inconvenient truth of the jewellery having come into Mr Henderson's father's possession as the proceeds of some undisclosed illegal activity by Mr Henderson's father or someone else[102]. But his Honour did not draw any such adverse inference. His Honour rather treated the evidence as a whole as providing no indication, one way or the other, as to how Mr Henderson's father came into possession of the jewellery. There is no suggestion that Mr Henderson failed to call any other witness who might have provided another account.

95 Mr Henderson's appeal to the Court of Appeal was an appeal by way of rehearing[103]. His further appeal to this Court is an appeal in the strict sense. To discharge its appellate function, the Court of Appeal was, and this Court is, obliged to reach its own conclusion as to the inference to be drawn from the primary facts found by the primary judge if and to the extent that the correct inference to be drawn is put in issue in the appeal[104].

96 Mr Henderson's grounds of appeal to the Court of Appeal were not framed in terms which unambiguously invoked that obligation. Understandably in that circumstance, the conclusion reached in the Court of Appeal, that the primary

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102 Cf *Steinberg v Federal Commissioner of Taxation* (1975) 134 CLR 640 at 694; [1975] HCA 63.

103 Rule 765 of the Uniform Civil Procedure Rules 1999 (Q), as applied by s 8(6) of the Act.

104 *Warren v Coombes* (1979) 142 CLR 531 at 551, 553; [1979] HCA 9; *Fox v Percy* (2003) 214 CLR 118 at 126-127 [25]; [2003] HCA 22; *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330 at 403 [266], 415 [294]; [2007] HCA 42.

judge was "entitled" to conclude that Mr Henderson had not discharged the "onus" of persuading the primary judge that his father had not unlawfully acquired the jewellery, was not expressed in terms which unambiguously reflected that obligation.

97 Mr Henderson's appeal to this Court does sufficiently put in issue the proper inference to be drawn from the primary facts found by the primary judge to permit and require this Court to reach its own conclusion.

98 When due weight is given to the conventional perception that persons do not ordinarily engage in criminal conduct, the primary judge's findings of fact do not lead to the anomalous outcome to which his Honour considered himself driven. Absent some basis in the evidence for considering that conventional perception to be inapplicable to Mr Henderson's father, or to any earlier owner of the jewellery, the absence of evidence as to how any of them acquired title to the jewellery leaves as the more probable inference that it was not as a result of some illegal activity. That is the inference appropriate to be drawn, to which this Court should now give effect.

Conclusion

99 The evidence adduced by Mr Henderson and accepted by the primary judge was sufficient for Mr Henderson to discharge the burden placed on him by s 68(2)(b) of the Act of satisfying the Supreme Court that it was more probable than not that the money the subject of the restraining order was not illegally acquired property. The exclusion order for which he applied should have been made, from which it follows that the forfeiture order for which the State applied should not have been made.

100 I would allow the appeal.

101 KEANE J. The *Criminal Proceeds Confiscation Act* 2002 (Q) ("the Act") makes provision for the forfeiture to the State of Queensland ("the State") of property in which persons who have been engaged in serious crime related activity have an interest.

102 The appellant, Mr Henderson, is a person who has engaged in serious crime related activity[105]. He was the respondent to an application by the State for forfeiture of his property, being the cash proceeds of sale of jewellery found to have been given to him by his now deceased father. In response to the State's application for forfeiture, Mr Henderson applied to have the cash proceeds of the jewellery excluded from the scope of any forfeiture order on the basis that the jewellery was not "illegally acquired property".

103 The primary judge (Peter Lyons J) and the Court of Appeal of the Supreme Court of Queensland (White JA, Holmes JA and Daubney J agreeing) held that the Act required Mr Henderson to prove that the jewellery had not been illegally acquired by his father, and that Mr Henderson had failed to discharge that onus.

104 On appeal to this Court, Mr Henderson contended that the courts below erred in proceeding on the footing that the Act required him to prove that his father had not acquired the jewellery illegally. He contended that it was sufficient for him to prove that he had not himself acquired the jewellery illegally on his part; and that he had satisfied this burden. It was also said that the courts below should have found that the jewellery was not illegally acquired property in the hands of his father.

105 For the reasons which follow, Mr Henderson's contentions should be rejected.

Factual background

106 Towards the end of 1996, Mr Henderson visited his father at his house in Picola, Victoria[106]. During the visit, Mr Henderson's father handed him various items of jewellery and said words to the effect, "take this and look after your brothers and sisters"[107], which Mr Henderson understood to be a reference to his

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105 *Queensland v Henderson* (2011) 218 A Crim R 111 at 116-117 [34], 118 [42]-[44].

106 *Queensland v Henderson* (2011) 218 A Crim R 111 at 112 [5]; *Henderson v State of Queensland* [2014] 1 Qd R 1 at 4 [9].

107 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 4 [9].

brothers, Mr Joseph Marijancevic ("Joseph") and Mr Frank Marijancevic ("Frank"), and his sister Ms Dianne Murphy[108].

107 After leaving his father's house, Mr Henderson took the jewellery to Melbourne where, he said, he deposited it in a safety deposit box at the Collins Street branch of the ANZ Bank[109]. According to Mr Henderson, there it remained[110].

108 Following the death of Mr Henderson's father on 29 April 2001, Mr Henderson invited Joseph, Frank and Ms Murphy to his house for a family meeting[111]. At that meeting, he showed them the jewellery for the first time. A collective decision was then made to have the jewellery valued and sold, and to have the proceeds invested[112].

109 In about December 2001, Mr Henderson took the jewellery to Mr Theodosis Komianos, a self-employed jeweller, for valuation[113]. Mr Komianos sketched the jewellery and told Mr Henderson that it had a retail value of $1 million, and a wholesale value of between $600,000 and $700,000[114].

110 At some point thereafter, a person known only as Daniel[115] purchased the jewellery from Mr Henderson for $620,000 in cash[116]. Mr Henderson, Joseph, Frank and Ms Murphy subsequently decided to invest that cash in the Queensland real property market[117]. In that regard, Mr Henderson began

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108 *Queensland v Henderson* (2011) 218 A Crim R 111 at 112 [5]. The primary judge noted that Mr Henderson had another sister, but that she had been "estranged from the rest of the family since she was a baby": *Queensland v Henderson* (2011) 218 A Crim R 111 at 112 [3].

109 *Queensland v Henderson* (2011) 218 A Crim R 111 at 112 [5].

110 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 4 [10].

111 *Queensland v Henderson* (2011) 218 A Crim R 111 at 112 [6].

112 *Queensland v Henderson* (2011) 218 A Crim R 111 at 112 [6].

113 *Queensland v Henderson* (2011) 218 A Crim R 111 at 112 [7], 120 [56].

114 *Queensland v Henderson* (2011) 218 A Crim R 111 at 112 [7].

115 Mr Henderson gave evidence that he could not remember Daniel's full name.

116 *Queensland v Henderson* (2011) 218 A Crim R 111 at 112 [8].

117 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 5 [17].

negotiating with a Mr John Dredge in relation to the purchase of a retail shop property located in Coondoo Street, Cairns[118].

111 Mr Henderson and Mr Dredge arranged to meet in Cairns in April 2002 to negotiate a potential sale of that property[119]. Mr Henderson arrived in Cairns at some point in April 2002[120]. He brought with him most of the cash he had received from the sale of the jewellery, believing that he could use it to encourage Mr Dredge to accept a reduced price for the sale of the Coondoo Street property[121]. After arriving, Mr Henderson hired a car and placed the cash he had brought with him in a blue sports bag in the boot[122].

112 On 20 April 2002, Mr Henderson and an acquaintance visited some people who were staying in Cairns in a unit at the Reef Palms Motel[123]. During their visit, police attended the unit to investigate some matters related to the occupants[124]. A search of the unit uncovered a quantity of illegal drugs[125]. That discovery resulted in a police search of each person present, as well as the car Mr Henderson had hired, which was parked nearby[126]. In the boot of the car police discovered the blue sports bag and a small quantity of cannabis[127].

113 The police took the blue sports bag back to the Cairns Criminal Investigation Branch office[128]. There they discovered the cash[129]. Mr Henderson

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118 *Queensland v Henderson* (2011) 218 A Crim R 111 at 112 [9]; *Henderson v State of Queensland* [2014] 1 Qd R 1 at 6 [17].

119 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 6 [18].

120 *Queensland v Henderson* (2011) 218 A Crim R 111 at 112 [10].

121 *Queensland v Henderson* (2011) 218 A Crim R 111 at 112-113 [10].

122 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 6 [18].

123 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 6 [19].

124 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 6 [19].

125 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 6 [19].

126 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 6 [19].

127 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 6 [20].

128 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 6 [20].

129 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 6 [20].

claimed ownership of the cash but declined to explain its origins, except to say that "it was not unlawfully obtained and was not related to police enquiries."[130]

114 Mr Henderson was arrested for possession of tainted property in respect of the cash and possession of cannabis[131]. Afterwards, police counted the cash and issued him with a receipt for the total amount[132].

115 On 22 April 2002, police delivered the cash to the Lake Street branch of the Commonwealth Bank in Cairns, where it was subsequently deposited into the Queensland Police Service Collections Account[133].

116 Mr Henderson eventually purchased the Coondoo Street property with finance provided by a bank loan[134].

The Act

117 The objects of the Act are set out in s 4(1) and (2):

> "(1) The main object of this Act is to remove the financial gain and increase the financial loss associated with illegal activity, whether or not a particular person is convicted of an offence because of the activity.
>
> (2) It is also an important object of this Act—
>
> (a) to ensure that property rights are affected by orders under this Act, including orders limiting a person's ability to deal with the property, only through procedures ensuring persons who may be affected by the orders are given a reasonable opportunity to establish the lawfulness of the activity through which they acquired the relevant property rights; and

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130 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 6 [20].

131 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 6 [20].

132 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 6-7 [23].

133 *Queensland v Henderson* (2011) 218 A Crim R 111 at 113 [11].

134 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 6 [22].

(b) to protect property honestly acquired by persons innocent of illegal activity from forfeiture and other orders affecting property; and

(c) to ensure that orders of other States restraining or forfeiting property under corresponding laws may be enforced in Queensland."

118 The term "illegally acquired property" is defined by s 22 of the Act, which relevantly provides:

"(1) Property is ***illegally acquired property*** if it is all or part of the proceeds of an illegal activity.

(2) Property is also ***illegally acquired property*** if—

(a) it is all or part of the proceeds of dealing with illegally acquired property; or

(b) all or part of it was acquired using illegally acquired property."

119 It can be seen that the concern of this definition is to describe a characteristic feature of property rather than to describe its acquirer.

120 Section 15 of the Act defines the expression "illegal activity" to include "a serious crime related activity", which is, in turn, defined by s 16 as a "serious criminal offence", which is, in turn, defined relevantly for present purposes by s 17(1)(c) as "an offence under the law of … a place outside Queensland, including outside Australia, that, if the offence had been committed in Queensland", would be an indictable offence for which the maximum penalty is at least five years' imprisonment.

121 Section 25 of the Act provides that "illegally acquired property" retains that character "even if it is disposed of, including by using it to acquire other property ... until it stops being [illegally acquired property] under section 26."

122 Section 26 of the Act provides:

"Property stops being illegally acquired property ...

(a) when it is acquired by a person for sufficient consideration, without knowing, and in circumstances not likely to arouse a reasonable suspicion, that the property was illegally acquired property ...; or

(b) when it vests in a person on the distribution of the estate of a deceased; or

(c) when it is disposed of under this Act, including when discharging a pecuniary penalty order or a proceeds assessment order; or

(d) when it is the proceeds of the disposal of property under this Act other than by sale under a condition of a restraining order or by order of the Supreme Court under section 46 or 138; or

(e) when it is acquired by Legal Aid as payment of reasonable legal expenses payable because of an application under this Act or in defending a charge of an offence; or

(f) in circumstances prescribed under a regulation."

123 One may now refer to the provisions of the Act which establish the scheme of the Act in respect of the forfeiture of property associated with persons who have engaged in serious crime related activity.

124 Section 56(1) of the Act provides that the State may apply to the Supreme Court of Queensland for an order, described as a "forfeiture order", forfeiting to the State "particular property restrained under a restraining order."

125 Section 58 of the Act provides for the making of a forfeiture order if the Supreme Court finds it more probable than not that, for property restrained under s 28(3)(a), the prescribed respondent engaged in a serious crime related activity.

126 Sections 56 and 58 provide for the culmination of the process of forfeiture. It is necessary to understand the steps which lead to that culmination.

127 Section 56(1) directs one to s 31(1) of the Act, which provides for the making of a restraining order. Section 31(1) requires, subject to presently immaterial exceptions[135], the Supreme Court to make a restraining order "in relation to property if … it is satisfied there are reasonable grounds for the suspicion on which the application is based." The reference in s 31(1) to "the application" directs one, in turn, to s 28 of the Act, which provides for the first step in the process of forfeiture.

128 Section 28(1) provides that the State may apply to the Supreme Court for:

"an order (***restraining order***) restraining any person from dealing with property stated in the order (the ***restrained property***) other than in a stated way or in stated circumstances."

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135 See s 31(2).

129 Section 28(3) provides that the application for a restraining order may relate to all or any of the following property:

> "(a) for property of a person suspected of having engaged in 1 or more serious crime related activities (a ***prescribed respondent***)—
>
> (i) stated property; or
>
> …
>
> (iii) all property; or
>
> …
>
> (b) stated property, or a stated class of property, of a stated person, other than a prescribed respondent;
>
> (c) stated property suspected of being serious crime derived property because of a serious crime related activity of a person, even though a particular person suspected of having engaged in the serious crime related activity can not be identified."

130 By virtue of s 28(2), the application for a restraining order must be supported by an affidavit in which, in accordance with s 29(1), the deponent must state his or her suspicion as to the provenance of the property depending on whether it is property described in par (a), (b) or (c) of s 28(3).

131 Bearing in mind that ss 56 and 58 contemplate a forfeiture order in respect of the property restrained under a restraining order, it is important to note that the reach of s 28(3)(a)(iii) is not confined to those items of property of a prescribed respondent derived from the serious crime related activity of that prescribed respondent, but may extend to all the property of a prescribed respondent. Although s 28(3)(a)(iii) was not invoked by the State in this case, the broad scope of s 28(3)(a)(iii) is instructive in relation to the operation of the Act.

132 Property may be restrained under s 28(3)(a)(iii) and, hence, forfeited under s 58, without proof of a connection between the criminal activity of a prescribed respondent and that person's acquisition of property the object of the application for forfeiture.

133 Section 65 of the Act applies if an application for a forfeiture order has been made but has not been decided. Under s 65(2):

> "A person, including a prescribed respondent, who claims an interest in property to which the application relates may apply to the Supreme Court for an exclusion order."

134 Section 68(2) of the Act provides:

> "The Supreme Court must, and may only, make an exclusion order if it is satisfied—
>
> (a) the applicant has or, apart from the forfeiture, would have, an interest in the property; and
>
> (b) it is more probable than not that the property to which the application relates is not illegally acquired property."

135 Under s 70 of the Act, where an exclusion order is made:

> "excluding an interest in property from an application for a forfeiture order, the restraining order applying to the restrained property stops having effect in relation to the excluded interest."

136 The Act thus authorises the forfeiture of all of the property of a person shown to have been engaged in serious crime related activity, but allows property, shown on the balance of probabilities not to be illegally acquired property, to be excluded from forfeiture.

137 By s 8, a proceeding for forfeiture of property under the Act is not a criminal proceeding; the rules of evidence are those applicable in civil proceedings, and questions of fact are to be decided on the balance of probabilities.

138 It is instructive to contrast the scheme relating to forfeiture with s 77(1) of the Act, which provides for an application by the State for an order requiring:

> "a person to pay to the State the value of the proceeds derived from the person's illegal activity that took place within 6 years before the day the application for the order is made."

139 Section 77(1) is expressly concerned with the proceeds of the person's own illegal activity; the scheme of ss 22, 26, 28, 31, 56 and 58 is not concerned with illegal acquisition by the person. Rather, the scheme of the Act in relation to forfeiture is concerned with the character of the property as "all or part of the proceeds of an illegal activity."

The proceedings

140 On 10 February 2003, the State successfully sought a restraining order in respect of property of Mr Henderson[136] described as "cash to the value of $598,325 in Australian currency" ("the restrained property")[137]. As both the primary judge and the Court of Appeal noted[138], the application for a restraining order was made in respect of all Mr Henderson's property, but the supporting affidavit sought an order only in respect of property described as "cash to the value of $598,325 in Australian currency". It is common ground that the restrained property is the cash that was seized by police on 20 April 2002.

141 On 5 March 2003, the State filed an application for a forfeiture order in respect of the restrained property, and on 30 May 2003, Mr Henderson filed an application for an exclusion order in respect of the same ("the exclusion application").

142 Mr Henderson made the exclusion application on the ground that the money was not "illegally acquired property" within the meaning of s 68(2)(b) of the Act; rather, it was money that he had lawfully acquired in exchange for selling various items of antique jewellery he had been given by his father.

143 A hearing to determine the outcome of both applications was conducted in the Supreme Court over the course of five days in June 2011.

The proceedings before the primary judge

144 The application which assumed primary importance in the proceedings was the exclusion application[139]. The decisive issue with respect to that application was whether it was more probable than not that the restrained property was "illegally acquired property" within the meaning of s 68(2)(b) of the Act.

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136 The primary judge noted that, based on the evidence, Joseph, Frank and Ms Murphy may have an interest in the property. They were content for the proceedings to be conducted on the basis that the restrained property was the property of Mr Henderson: *Queensland v Henderson* (2011) 218 A Crim R 111 at 121 [62].

137 *Queensland v Henderson* (2011) 218 A Crim R 111 at 113 [12]; *Henderson v State of Queensland* [2014] 1 Qd R 1 at 7 [25].

138 *Queensland v Henderson* (2011) 218 A Crim R 111 at 113 [12]; *Henderson v State of Queensland* [2014] 1 Qd R 1 at 7 [25].

139 *Queensland v Henderson* (2011) 218 A Crim R 111 at 115 [26].

145 The parties[140] and the primary judge[141] proceeded on the basis that s 22(2) of the Act meant that the restrained property would be "illegally acquired property" if the jewellery which was sold to acquire it was also "illegally acquired property". That assumption was not challenged in this Court.

146 In determining whether the jewellery was "illegally acquired property", attention was directed to whether the jewellery had been illegally acquired by Mr Henderson's father, rather than by Mr Henderson himself. The proceedings were conducted on the footing that it was for Mr Henderson to prove that his father had not illegally acquired the jewellery.

147 Mr Henderson, Joseph, Frank and Ms Murphy all gave evidence that they had been told that the jewellery had been passed down to their father, having been given initially to their great-grandfather by the Russian royal family in exchange for transportation services he provided for them at the beginning of the twentieth century. This evidence was received as proof of the provenance of the jewellery without objection to its admissibility as hearsay. As the primary judge said[142]: "As the case was conducted, the issue was whether that account could be true."

148 The State contended that that account as to the provenance of the jewellery was untrue. The State called Mr Kenneth Penfold, a self-employed jeweller and registered valuer, to give his opinion as to the likely age of the jewellery[143]. Based on the sketches of the jewellery taken by Mr Komianos, Mr Penfold gave his opinion that the jewellery was "of a relatively modern period post 1950's" and was inconsistent with Russian styles of the early twentieth or late nineteenth century[144].

149 The primary judge was "prepared to accept" that "the jewellery was given to Mr Henderson by his father, and shown by him to his brothers and his sister shortly after his father's death."[145] Nevertheless, the primary judge found that

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140 *Queensland v Henderson* (2011) 218 A Crim R 111 at 115 [27], [28].

141 *Queensland v Henderson* (2011) 218 A Crim R 111 at 121 [60].

142 *Queensland v Henderson* (2011) 218 A Crim R 111 at 120 [52].

143 *Queensland v Henderson* (2011) 218 A Crim R 111 at 119 [50]; *Henderson v State of Queensland* [2014] 1 Qd R 1 at 10-11 [48]-[49].

144 *Queensland v Henderson* (2011) 218 A Crim R 111 at 119 [50]; *Henderson v State of Queensland* [2014] 1 Qd R 1 at 10-11 [48]-[49].

145 *Queensland v Henderson* (2011) 218 A Crim R 111 at 120 [58].

"[n]otwithstanding the limited nature of the information available to Mr Penfold ... his opinion as to the probable age of the jewellery depicted in Mr Komianos' sketches should be accepted."[146]

150 As a result, his Honour found that the account by Mr Henderson and his brothers and sister as to the provenance of the jewellery "cannot be true"[147].

151 His Honour went on to conclude[148]:

> "Since Mr Henderson has been unable to establish how [his father] came into possession of the jewellery, and consequently that the jewellery was not illegally acquired property, it follows that the property the subject of the exclusion application has not been shown on the balance of probabilities not to be illegally acquired property, and the exclusion order sought by Mr Henderson cannot be made."

152 On that footing, the exclusion application was dismissed, and the State's application for a forfeiture order was granted[149].

The decision of the Court of Appeal

153 Mr Henderson appealed to the Court of Appeal of the Supreme Court of Queensland. In his amended notice of appeal, Mr Henderson contended, among other things, that in all the circumstances – including the absence of any evidence that Mr Henderson's father had unlawfully acquired the jewellery and the inherent limitations in the evidence of Mr Penfold – it was not open to the primary judge to fail to be satisfied on the balance of probabilities that the jewellery was not illegally acquired.

154 The Court of Appeal rejected that contention. White JA[150] held that "it was for Mr Henderson to persuade [the primary judge] that his father had not unlawfully acquired the jewellery", and that "[t]he primary judge was quite entitled to conclude that Mr Henderson had not discharged that onus."

155 The Court of Appeal dismissed the appeal.

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146 *Queensland v Henderson* (2011) 218 A Crim R 111 at 119 [51].

147 *Queensland v Henderson* (2011) 218 A Crim R 111 at 120 [53].

148 *Queensland v Henderson* (2011) 218 A Crim R 111 at 121 [61].

149 *Queensland v Henderson* (2011) 218 A Crim R 111 at 122 [66].

150 *Henderson v State of Queensland* [2014] 1 Qd R 1 at 19 [92].

The issues in this Court

156 The appeal to this Court proceeds pursuant to a grant of special leave made by Crennan and Kiefel JJ on 16 May 2014.

157 The principal issue in this Court is whether the Act permits forfeiture only of property acquired illegally by the respondent to the State's application for forfeiture. If that issue is resolved against Mr Henderson, it is necessary to consider whether Mr Henderson discharged his burden of proving that it was more probable than not that the jewellery was not illegally acquired property in his father's hands.

The onus of proof

158 Mr Henderson contended that it was sufficient for the purposes of s 68(2)(b) of the Act for him to show that the jewellery had not been illegally acquired by him, regardless of whether it was illegally acquired property in his father's hands. In support of that contention, Mr Henderson referred to s 4(1) and s 4(2)(b) of the Act.

159 The State accepted that if the Court accepted Mr Henderson's submission that s 68(2)(b) of the Act only required him to prove that the jewellery had not been illegally acquired by him, then the findings of the primary judge were sufficient for him to succeed in the appeal[151]. The State contended, however, that the circumstance that the jewellery was not illegally acquired by Mr Henderson was not an answer to the question whether the jewellery was "illegally acquired property" within the meaning of s 68(2)(b) of the Act. The State's contention should be accepted.

160 The forfeiture for which the Act provides is civil forfeiture, that is to say, forfeiture in the absence of any need for a criminal conviction[152]. The "utility of civil assets forfeiture laws as a means of deterring serious criminal activity" is now widely recognised in Australia and internationally[153].

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151 See special leave application: [2014] HCATrans 102 at line 186.

152 cf *Burton v Honan* (1952) 86 CLR 169 at 178-179; [1952] HCA 30.

153 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 345 [29]; [2009] HCA 49.

161 It may be noted that the primary judge made the observation[154] that:

> "it would appear to be anomalous that property may be confiscated, because the ultimate origin of the property is beyond the knowledge of, and means of proof available to, [the person whose property is liable to forfeiture]. Such a case would appear to be well outside the intended scope of the legislation".

162 But, in a legislative scheme which expressly contemplates the forfeiture of all the property of a person found to have engaged in serious crime related activity, however that person may have come by that property, it is hardly anomalous that the person should be required to prove that a particular piece of property does not bear the character of illegally acquired property in order to gain an exemption from liability to forfeiture. The operation of the Act in this way is in accord with the objective of the Act of "remov[ing] the financial gain … associated with illegal activity"[155]. The Act prevents the accumulation of significant assets by those involved in serious criminal activity[156], and, in particular, ensures that a person engaged in criminal activity is not allowed to benefit from the illegal activities of others.

163 The Act has some resemblance to the *Criminal Property Forfeiture Act* (NT) ("the NT Act"), considered by this Court in *Attorney-General (NT) v Emmerson*[157], which provided for forfeiture of all or any of the property owned by a person irrespective of any connection between any criminal activity of that person and his or her acquisition of the property in question. Both the Act and the NT Act operate to authorise the forfeiture of property which is not derived from criminal activity by the current owner of the property. But the Act operates less drastically than the NT Act, in that it affords a respondent to an application for forfeiture the opportunity to show that property is not illegally acquired property and so should be excluded from forfeiture.

164 It is significant in this regard that s 26 of the Act makes comprehensive provision for the circumstances in which illegally acquired property loses its character as such. In particular, the terms of s 26(a) and (b) of the Act confirm

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154 *Queensland v Henderson* (2011) 218 A Crim R 111 at 121 [65].

155 Section 4(1).

156 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 344-345 [25]-[29], 361-362 [81]-[82]; *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 at 528 [15]; 307 ALR 174 at 178-179; [2014] HCA 13.

157 (2014) 88 ALJR 522; 307 ALR 174.

that receipt of property without knowledge that it was illegally acquired property does not suffice to deny the property the character of illegally acquired property. The provisions of s 26(a) and (b) of the Act confirm that property illegally acquired, for example, by one family member should not lose its character as illegally acquired property by reason of a gift inter vivos to another family member.

Discharging the onus of proof

165 It was said that the Court of Appeal should have concluded that Mr Henderson had satisfied the onus of proof in relation to whether the jewellery was illegally acquired property. Mr Henderson stressed the difficulty confronting a person required to prove that property in his possession had not, at some indeterminate point in the chain of title of his predecessors, been illegally acquired. This invites both a general and a specific response.

166 Speaking generally, the extent of the difficulty should not be exaggerated. The terms of s 26(a) and (b) of the Act suggest that it is likely to arise only in the case of gifts inter vivos of personal property. That said, it may well be that in some cases it will be difficult for a person who honestly acquires property by informal gift to prove that the property does not have the character of "illegally acquired property". The Act may, in some cases, operate harshly. But the wisdom of such a measure is a matter for the legislature[158]. As Lord Rodger of Earlsferry said in *R v Smith*[159]:

> "If in some circumstances [a confiscation scheme] can operate in a penal or even a draconian manner, then that may not be out of place in a scheme for stripping criminals of the benefits of their crimes. That is a matter for the judgment of the legislature".

167 In any event, as noted above, the operation of the Act is less harsh than if the possibility of exclusion from forfeiture were denied altogether, as it was by the NT Act.

168 Turning to the specifics of this case, it is important to appreciate that this is not a case where the passage of time denied Mr Henderson the possibility of giving an account of how the jewellery had come into his possession. The evidence of Mr Henderson and his siblings of their father's account of how he had come into possession of the jewellery was tendered and received as part of

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158 *Burton v Honan* (1952) 86 CLR 169 at 179; *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 at 540-541 [79]-[82]; 307 ALR 174 at 194-195.

159 [2002] 1 WLR 54 at 61 [23]; [2002] 1 All ER 366 at 373; *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 at 541 [82]; 307 ALR 174 at 195.

Mr Henderson's case at trial notwithstanding its hearsay character. It is important to appreciate that the issue tendered by the parties to the primary judge was whether "that account could be true". The primary judge resolved that issue emphatically in the negative.

169 Mr Henderson's father's account was admitted into evidence and found, on the balance of probabilities, to be untrue. The primary judge and the Court of Appeal both rejected the only explanation consistent with the jewellery not being illegally acquired property in Mr Henderson's father's hands. In these circumstances, the primary judge and the Court of Appeal were right to conclude that they could not find that the jewellery was not illegally acquired property. As a result, the proceeds of the jewellery were rightly not excluded from the property liable to be forfeited to the State.

170 The rejection of the only account of the provenance of the jewellery in the hands of Mr Henderson's father meant that there was, at best for Mr Henderson, no evidence as to how the jewellery had been acquired[160]; and so Mr Henderson did not begin to meet the burden of proving that the jewellery did not bear the character of illegally acquired property.

171 The burden of proof that the jewellery was not illegally acquired property was squarely upon Mr Henderson: it was not discharged. The burden cast upon Mr Henderson by s 68(2)(b) cannot be reduced or overcome by some general presumption of lawful behaviour. That would be inconsistent with the statutory allocation of the burden of proof; indeed, a presumption of lawful behaviour has little place in the context of a statute which operates upon proof that the respondent has been found to have been a person who has engaged in serious criminal activity, and without the need for proof that the respondent acquired property by his or her own illegal activities.

172 In any event, the case presented by Mr Henderson to the primary judge and the Court of Appeal did not seek to invoke any such presumption. The case was fought squarely on the basis that the account given by Mr Henderson's father was true. As the primary judge said: "As the case was conducted, the issue was whether that account [that is, the father's account] could be true." It cannot now be said that the courts below failed to heed the claims of a presumption of lawful behaviour. They were simply not invited to consider such a presumption as part of the case advanced on behalf of Mr Henderson.

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160 *Scott Fell v Lloyd* (1911) 13 CLR 230 at 241; [1911] HCA 34; *Hobbs v Tinling* [1929] 2 KB 1 at 21; *Steinberg v Federal Commissioner of Taxation* (1975) 134 CLR 640 at 684, 694; [1975] HCA 63.

Conclusion and orders

173 The appeal should be dismissed with costs.