

# SUPREME COURT OF QUEENSLAND

CITATION: *Isherwood v Commonwealth Director of Public Prosecutions*  
[2003] QSC 109

PARTIES: **RONALD KEITH ISHERWOOD**  
(applicant)  
v  
**COMMONWEALTH DIRECTOR OF PUBLIC  
PROSECUTIONS**  
(respondent)

FILE NO/S: SC 2828/03

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 7 May 2003

DELIVERED AT: Brisbane

HEARING DATE: 30 April and 1 May 2003

JUDGE: McMurdo J

ORDER: **That the application made by Mr Isherwood under s 48(4)(e) of the *Proceeds of Crime Act 1987* in relation to 23 Oak Court, Minyama, and the Markham marine vessel, be dismissed, and that he pay to the respondent his costs of and incidental to the application be assessed.**

CATCHWORDS: PROCEEDS OF CRIME - where restraining order against certain property pursuant to *Proceeds of Crime Act* - where applicant seeks declaration pursuant to section 48(4)(e) Act - where onus on applicant to establish matters set out in section 48(4)(e) - whether applicant satisfies court property was not derived directly or indirectly from unlawful activity

*Criminal Code (Qld)*, s 408C  
*Drugs Misuse Act 1986 (Qld)*  
*Proceeds of Crime Act 1987 (Cth)*, s 30, s 30(1)s, 48(4), s 48(4)(e)  
*Customs Act 1901 (Cth)*, s 113  
*Taxation Administration Act 1953 (Cth)*, s 8K, s 8P  
*DPP v Brauer* [1991] 2 Qd R 261, considered

COUNSEL: P Callaghan for the applicant  
M Freer for the respondent

SOLICITORS: Robertson O’Gorman for the applicant  
Commonwealth Director of Public Prosecutions for the respondent

- [1] **McMURDO J:** On 18 April 2002 the applicant was charged with the offence of conspiracy to import cocaine. He has been committed for trial. On 10 May 2002, this court, in reliance upon that charging, made a restraining order against certain property, including real property at 23 Oak Court, Minyama in the State of Queensland, and a Markham Marine vessel. The duration of the restraint has been extended by subsequent orders, and most recently by my order of 30 April 2003 which is to expire at 5 p.m. today. The respondent Director has an application to further extend the restraint upon this and other property until 5 p.m. on 28 March 2004. The applicant is a co-owner with his wife, Sheila Renee Isherwood, of the Oak Court property. The restraining orders have referred to the vessel as property in which the applicant has an interest, and that appears to be common ground for present purposes.
- [2] The offence with which the applicant is charged is a “serious offence” for the purposes of the *Proceeds of Crime Act 1987* (Cth) (“the Act”).<sup>1</sup> Should the applicant be convicted of the offence, and the restraining orders remain in force in relation to Oak Court and the vessel, that property would be forfeited to the Commonwealth pursuant to s 30(1) of the Act. To avoid that contingency, the applicant seeks a declaration that the restraining order, to the extent to which it relates to these two items of property, shall be disregarded for the purposes of s 30. This application is made according to s 48(4) which provides:
- “Where:
- (a) a person (in this subsection called the “defendant”) has been convicted of, or has been charged or is about to be charged with, a serious offence;
  - (b) a court, in reliance on the conviction, charging or proposed charging, makes a restraining order against property;
  - (c) the defendant has an interest in the property;
  - (d) the defendant applies to the court for a declaration under this subsection in relation to the interest; and
  - (e) the court is satisfied that:
    - (i) the property was not used in, or in connection with, any unlawful activity and was not derived, directly or indirectly, by any person from any unlawful activity; and
    - (ii) the defendant’s interest in the property was lawfully acquired;

---

<sup>1</sup> Section 7

the court may, by order, declare that the restraining order, to the extent to which it relates to the property, shall be disregarded for the purposes of section 30.”

- [3] The applicant has sworn to the matters in subsection 48(4)(e) so that there is evidence which, if accepted, could satisfy the court of those matters. The respondent opposes the application upon the basis that I should not be satisfied that either item of property was not derived, directly or indirectly, from any unlawful activity. The respondent suggests that the unlawful activity was of one or more of four kinds. The first is that the applicant failed to enter goods for export as required by s 113 of the *Customs Act* 1901 (Cth) (“*Customs Act*”). Second, it is said that he made false and misleading statements contrary to s 8K and s 8P of the *Taxation Administration Act* 1953 (Cth) (“*Taxation Administration Act*”) in that he misstated his income for at least three tax years. Next it is suggested that he obtained credit from financial institutions by making false statements contrary to s 408C of the *Queensland Criminal Code*. Lastly it is suggested that he has dealt with prohibited substances contrary to the *Drugs Misuse Act* 1986 (Qld), although in circumstances quite distinct from the matter with which he is charged.

### **Oak Court**

- [4] This is a house and land purchased by the applicant and Mrs Isherwood under a contract dated 19 February 2001. The price was \$475,000 with a deposit of \$15,000. The part of the contract which is in evidence does not show an agreed completion date, but other evidence indicates, and I find that it was settled sometime in March 2001. Most of the purchase price was lent to the purchasers by a financier called Liberty Funding Pty Ltd (“Liberty”). The amount lent was \$400,000, which after deduction of fees and charges left \$391,259 available. The adjusted purchase price paid on settlement was \$475,169.18 resulting in a total of \$83,910.18 (including the deposit) to be found by the purchasers. The Liberty loan was refinanced in July 2001, by the provision by the ANZ Bank of a line of credit facility, with a limit of \$450,000. Approximately \$400,000 was advanced to pay out the Liberty loan upon Oak Court. The Isherwoods had made three monthly payments of \$3,500 to Liberty. The interest rate charged by Liberty was 10%.
- [5] The Isherwoods made a written application for that loan which they signed and dated 28 February 2001, in which Mr Isherwood described himself as a “self-employed sole trader” with an annual gross income of \$116,000. Mrs Isherwood was described as a self employed “actor/actress” having an annual gross income of \$50,000.<sup>2</sup> The application made to the ANZ Bank records that the Bank was informed that each of the Isherwoods was an “investor/importer” having an income of \$97,500, that is that their combined income was \$195,000. Mr Isherwood was shown as having been in that “employment” for a period of 20 months but no corresponding period was shown for Mrs Isherwood.<sup>3</sup>
- [6] The applicant lodged a tax return for the year ended 30 June 2001 which showed his income as but \$2.00, which was said to have been derived as interest. His tax return for the previous year declared a total business income of \$11,316, and claimed no deductions. His return for the 1999 year declared an income of \$14,250. There is

<sup>2</sup> Exhibit “D” to the affidavit of Paul Marshall Gabb sworn 30 April 2003.

<sup>3</sup> Exhibit “J” to the affidavit of P M Gabb filed 28 April 2003.

nothing in the evidence to indicate that his income as declared in the years 1999-2001 is reconcilable with either of the amounts he represented respectively to Liberty and the ANZ Bank.

- [7] At about the same time that Oak Court was purchased, the Isherwoods purchased a residential property at 30 Jessica Boulevard, Minyama Waters. That contract was for a purchase price of \$445,000 including the deposit of \$25,000. It settled on 9 February 2001. Liberty lent the Isherwoods \$300,000 which was applied in part payment. The applicant swears he borrowed amounts from various friends and associates, totalling \$110,000, to make up most of the balance of the purchase price. One of those loans was an amount of \$40,000, advanced by a Mr Spero. I am prepared to find that Mr Spero did make that loan, there being documentary evidence to support it.<sup>4</sup> The other loans, totalling \$70,000, are not the subject of any documentary evidence and I am unable to find that they were or were not made, having regard to the general difficulty I have in accepting the applicant's evidence. This loan of \$300,000 from Liberty was also refinanced by the ANZ Bank in mid 2001. The property at Jessica Boulevard has been sold at a substantial profit. That sale was for a price of \$710,00 and was completed in April 2002. Approximately \$689,000 from the sale price was paid to the ANZ Bank. This has had some consequence for the applicant's interest in Oak Court, for it would appear to have increased the value of his interest after allowance for the existing encumbrance to the ANZ Bank. The Isherwoods continue to live at Oak Court but they are in default in their obligations to the Bank, which are not limited to the Oak Court finance.
- [8] On the applicant's version, he and Mrs Isherwood had to find about \$42,000 to complete their purchase of Jessica Boulevard, after borrowing amounts totalling \$110,000 from associates. As I have said, I am unable to find whether they required only an amount of that order, or whether they used funds of their own rather than some of the loans which Mr Isherwood says were made. Mr Isherwood says that the source of this \$42,000 were funds, totalling \$145,000, received on the sale of other real property and two motor vehicles at about June 1999. Those monies are also said to be a substantial source of the \$84,000 needed to complete the purchase of Oak Court, after allowing for the Liberty funding. Mr Isherwood swears that some of the \$84,000 was also found from his "ongoing jewellery business, although the jewellery business had diminished in volume as my renovation business increased in its level of activity". In his oral evidence, he said that the \$145,000 was banked in mid 1999 but very quickly withdrawn and kept in cash at his residence. He said that this was used to transact business from time to time on things such as the purchase of jewellery. But he also said that some of it was used for living expenses, "I used it to live off" he said.<sup>5</sup> I am unable to accept that these funds of \$145,000, if received by him in mid 1999, were still held and used in the purchase of the two properties as he has said. His National Australia Bank statements do show the receipt of \$90,000 in May 1999 and its withdrawal<sup>6</sup> within a couple of months. It seems to me to be unlikely that he and his family were able to live off those monies for 18 months and yet have perhaps most of those funds remaining to meet the 2001 purchases. The applicant said he withdrew the funds in 1999 so that he could use them in carrying on his businesses. I think more likely that the funds used for Oak Court came from

---

<sup>4</sup> Exhibit "H" to the applicant's affidavit.

<sup>5</sup> Transcript 53

<sup>6</sup> For all but about \$5,000

those activities than from the remainder of cash he had withdrawn some 18 months or so earlier.

- [9] The respondent suggests that at least some of the monies used to purchase Oak Court were the product of unlawful activity. The applicant conceded that he did not enter goods for export when he took opals overseas with the intention of selling them. He said that he sold them over a five year period from 1996 at what he described as a significant “retail mark-up” figure, and that he sold opals to a number of buyers in the United States, including a jewellery store in Beverly Hills through which he would sell opals on consignment. At least one of those opals sold for an amount of the order of US\$35,000. The proceeds of sale of these opals were kept in an American Bank account or cash at either the home of his parents-in-law or at a friend’s house in Los Angeles. It seems to me likely that his opal trading was assisted by his failure to declare the opals for export but the respondent is unable to suggest that there was some particular identifiable financial benefit which he enjoyed from the suggested breaches of the *Customs Act*.
- [10] His evidence of opal trading, considered with other evidence, strongly indicates that his income in the years 1991-2001 was very much greater than he declared in his tax returns. He does not claim to have kept reliable records of his receipts, and if he did, he did not provide them to the accountant who prepared his tax returns. Affidavits sworn by Mrs Isherwood were exhibited to an affidavit of Mr Gabb, relied upon by the respondent.<sup>7</sup> According to those affidavits, Mrs Isherwood and her children were wholly dependent upon her husband and the family had substantial expenses. The Isherwoods travelled overseas on many occasions, mainly to the United States, but also Mr Isherwood made trips to Fiji, Thailand and Brazil. Some stays in the United States were extensive; for example there was a four month stay in 1998. The applicant said that they were accommodated by his parents-in-law and that, in effect, it cost them nothing to live whilst they were in the United States but I cannot accept that. In summary, the evidence fairly demonstrates that the Isherwoods had a lifestyle involving substantial household expenditure and extensive travel, in the three years prior to the acquisition of Oak Court. I do not accept that they were living simply on accumulated capital from such business transactions as are subject to the applicant’s affidavit. Then there is a statement made by Mr Barraclough, an accountant who prepared the applicant’s three tax returns I have mentioned. His statement hardly enhances confidence in the accuracy of those tax returns. He says that in order to prepare the returns he was dependent on the applicant to furnish documents to meet substantiation requirements, but the documentation supplied was incomplete, most Bank statements were missing and cheque books, receipts and any other relevant documentation “had been lost or could not be located”, so that he was unable to form an opinion concerning the applicant’s “true financial affairs”. The taxation returns were therefore completed on the basis of the applicant’s “verbal instructions”. Now the applicant did swear that he was involved in a serious motorbike accident in 2000 which he said explained why he had no income in the year to 30 June 2001. Nevertheless it seems to me to be highly unlikely that he had *no* income. For the 1999 and 2000 years, there is at least a real likelihood that his income was substantially more than the amounts of approximately \$14,000 and \$11,000 as declared. For example, the unreliability of the return for the 2000 year is further indicated by the absence of any deductions, and the assertion that the income was from but two transactions.

---

<sup>7</sup> Affidavit filed 28 April 2003.

Moreover, the tax returns do not correspond with the situation of a man who was quite prepared to borrow substantial sums, including \$700,000 from Liberty in February/March 2001. The servicing of the interest upon the Liberty loans would have involved something of the order of \$6,000 per month, and there is nothing in the evidence suggesting that one of the properties was expected to produce rental income to support those payments.

- [11] The onus is upon the applicant to satisfy me that his interest in these properties was not derived from unlawful activity. The respondent does not have to prove, for example, the unlawful activity which it suggests. It is impossible to form a reliable view as to what was his income, however, the evidence raises a substantial prospect that he evaded payment of tax for at least three years in sums which would total over those years at least some tens of thousands of dollars and perhaps more than \$100,000. I conclude that the applicant may well have been dishonest in these tax returns and that he has not satisfied me that the funds used to acquire Oak Court were not derived from the commission by him of offences against s 8K and s 8P of the *Taxation Administration Act*.
- [12] For the purposes of the Oak Court property, it is then unnecessary for me to consider that the further suggestions made by the respondent, including that he fraudulently misrepresented his income in obtaining finance from Liberty and the ANZ Bank. However, it is convenient that I now discuss at least those applications for finance, for there are issues here relevant also for the finance obtained from the ANZ Bank to purchase the vessel.
- [13] The applicant's income which was represented to Liberty is inconsistent with the applicant's tax returns, but that might indicate no more than the falsity of the returns. It does not seem to me to be at all unlikely that the applicant's income was of the order of \$116,000 per annum, as he represented to Liberty. On his version, the applicant's evidence as to the \$116,000 was a piece of fiction, authored by his finance broker, who advised that an amount of that order had to be represented to Liberty to persuade it to make these loans. On his own evidence he appears to have obtained credit<sup>8</sup> by representing what he believed to be untrue, thereby committing an offence under s 408C of the *Criminal Code*. Although there is at least a strong prospect that his income was greater than that declared in his tax returns, I am unable to find that it was or was not of the order of \$116,000. In addition, the application for finance represented that Mrs Isherwood had an income of \$50,000, which is contradicted by her sworn evidence<sup>9</sup> that she had no income during any of these relevant years and was wholly dependent upon her husband. I am mindful of the applicant's difficulty in having to prove a negative, and of comments, such as those of Thomas J in *DPP v Brauer* [1991] 2 Qd R 261 at 268, that slender evidence may suffice to satisfy an evidential burden in relation to a negative state of affairs. I also keep in mind the fact that the respondent has gathered extensive information as to the applicant's financial affairs and that the applicant has had to rely heavily upon memory if he is to give truthful evidence here. However, the evidence as to the Liberty finance, is sufficient to warrant a finding that the applicant obtained that finance by unlawful activity contrary s 408C of the *Criminal Code*, and I am not satisfied the applicant did not engage in such activity. If he did so, the immediate result was to obtain the credit with which Oak Court was purchased.

<sup>8</sup> Which is 'property' as defined in s 408C(3)(a).

<sup>9</sup> Exhibited to the affidavit of Mr Gabb of 28 April 2003

- [14] I have reached a like conclusion in relation to the applications for finance to the ANZ Bank, being the application made in June 2001 to refinance the Oak Court debt. The Oak Court refinance application appears to have seriously misrepresented the position by reference to an income, and of the order of \$97,500, derived by Mrs Isherwood. Again, it could be found from Mr Isherwood's own evidence that he dishonestly obtained the ANZ credit by misstating his own income. The refinance of the Liberty funding seems to have been intended to achieve a lower interest rate and accordingly it has had some contribution to the derivation of the present interest of Mr Isherwood in Oak Court.
- [15] Even putting on one side any unlawful activity involved in the ANZ refinancing of the Liberty loan, I am not satisfied that the interest of Mr Isherwood in Oak Court was not derived from unlawful activity contrary to the *Taxation Administration Act* or s 408C of the *Criminal Code*. It follows that the applicant has failed to discharge the required onus under that s 48(4)(e) in relation to Oak Court, and his application in that respect must be dismissed.

### **The Vessel**

- [16] This was purchased in November 2001, I find, by a borrowing of \$100,000 from the ANZ Bank. The application for this loan was made by Mrs Isherwood and is dated 7 November 2001. Oak Court was given as security, as was a guarantee by the applicant. A statement of financial position dated 26 October 2001 is exhibited to Mr Gabb's affidavit filed 28 April 2003. It represents, in effect, that each of the Isherwoods had a gross income of \$97,500 per annum and a net income in excess of \$60,000 per annum. Although this document is exhibited to the affidavit of Mr Gabb, read by the respondent at the commencement of the hearing, it was not the subject of any specific cross examination. Nevertheless, the suggested misrepresentations of the incomes of the applicant and Mrs Isherwood are effectively the same as those alleged to have been made in the application to the ANZ for refinance, which was made only some four months earlier. It therefore seems to me that the applicant was sufficiently on notice that the respondent would rely on the same misstatements when made in the context of this transaction. The statement of 26 October 2001 appears to be signed both by the applicant and Mrs Isherwood. The respondent has thereby adduced evidence which would support a finding that the loan for the acquisition of the vessel was obtained by a contravention of s 408C. I conclude that the applicant has not satisfied me that his interest in the vessel was not derived from unlawful activity, and in particular, from the commission of an offence under s 408C of the *Criminal Code*. Accordingly, the application in relation to it must also be dismissed.
- [17] I order that the application made by Mr Isherwood under s 48(4)(e) in relation to 23 Oak Court, Minyama, and the Markham marine vessel, be dismissed, and that he pay to the respondent his costs of and incidental to the application be assessed.