

# SUPREME COURT OF QUEENSLAND

CITATION: *State of Queensland v Cooper and Anor* [2005] QSC 055

PARTIES: **STATE OF QUEENSLAND**  
(applicant)  
v  
**NICHOLAS PAUL COOPER**  
(respondent)

**STATE OF QUEENSLAND**  
(applicant)  
v  
**PETA CHEREE HOLLIS**  
(respondent)

FILE NO/S: BS No 7957 of 2004  
BS No 7958 of 2004

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 24 March 2005

DELIVERED AT: Brisbane

HEARING DATE: 22 February 2005

JUDGE: Holmes J

ORDER:

1. Pursuant to s 151 of the *Criminal Proceeds Confiscation Act 2002*, that cash in the sum of eleven thousand, eight hundred and twenty-five dollars (\$11,825), the property of Peta Cheree Hollis, be forfeited to the State.
2. Pursuant to s 34 of the *Drugs Misuse Act 1986*, that the property of Peta Cheree Hollis listed in schedule A to the originating application herein, the value of which I consider to be nil, be forfeited to the Crown.
3. Pursuant to s 184 of the *Criminal Proceeds Confiscation Act 2002*, that Peta Cheree Hollis pay to the State a pecuniary penalty in the amount of four hundred and twenty-five dollars (\$425).
4. Pursuant to s 184 of the *Criminal Proceeds Confiscation Act 2002* that Nicholas Paul Cooper pay to the State a pecuniary penalty in the amount of two thousand dollars

**(\$2,000).**

**CATCHWORDS:** CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGEMENT AND PUNISHMENT – ORDERS FOR COMPENSATION, REPARATION, RESTITUTION, FORFEITURE AND OTHER MATTERS RELATING TO DISPOSAL OF PROPERTY – FORFEITURE OR CONFISCATION – PECUNIARY PENALTY ORDER - Where applicant seeks pecuniary penalty orders under *Criminal Proceeds Confiscation Act 2002 (Qld)*, s 178 and a forfeiture order under *Criminal Proceeds Confiscation Act 2002 (Qld)*, s 151; *Drugs Misuse Act 1986 (Qld)*, s 34 – where, in determining amount of pecuniary penalty order, court must assess value of benefits derived– whether entire proceeds of drug sales constituted benefits derived by respondents– alternatively, whether only so much of proceeds as retained by respondents after passing balance to drugs’ supplier constituted benefits derived

*Crimes (Confiscation of Profits) Act 1989 (Qld)*  
*Criminal Proceeds Confiscation Act 2002 (Qld)*, s 151, s 178, s 182(1), s 184, s 187, s 193, Schedule 1  
*Drugs Misuse Act 1986 (Qld)*, s 34

*Director of Public Prosecutions v Delaney* (1998) 7 TasR 383

*Re Tunney* [1994] 2 QdR 113

*R v Fagher* (1989) 16 NSWLR 67

*R v Pepin* (1996) 86 ACrimR 327

**COUNSEL:** JA Kapeleris for the applicant  
 S Reidy, solicitor, for the respondent Cooper  
 D Kent for the respondent Hollis

**SOLICITORS:** Office of the Director of Public Prosecutions, Queensland for the applicant  
 Carne Reidy Herd for the respondent Cooper  
 Legal Aid Queensland for the respondent Hollis

### *The application*

- [1] The applicant seeks the making of pecuniary penalty orders against the respondents, in the amount of \$11,200 against Nicholas Paul Cooper, and in the amount of \$69,175 against Peta Cheree Hollis. Orders are also sought against Ms Hollis for forfeiture of the sum of \$11,825 and certain items of property related to drug use. Ms Hollis consents to the making of the forfeiture orders, but both she and Mr Cooper argue that the Crown has overstated the benefits which it says they derived from the commission of confiscation offences. Mr Cooper was convicted of one count of trafficking in methylamphetamine and 3,4 methylenedioxymethamphetamine between 16 June and 16 August 2002. Ms Hollis was convicted of trafficking in methylamphetamine and 3,4 methylenedioxymethamphetamine between 22 April and 16 August 2002; three

counts of possessing a dangerous drug (respectively 3,4 methylenedioxymethamphetamine, methylamphetamine and lysergide) on 16 August 2002; possession of things used in connection with a crime (three smoking pipes); and possessing property (money) obtained from trafficking.

- [2] Primarily at issue on these applications is whether the respondents should be regarded as deriving as a benefit all of the proceeds they had in their hands from the sale of drugs or only so much of the proceeds as they retained after passing the balance onto the drugs' supplier. There are associated arguments as to the actual calculation of the amounts derived by each.

*The legislation*

- [3] Section 178 of the *Criminal Proceeds Confiscation Act* 2002 enables the State, where a person is convicted of a confiscation offence, to apply to the Supreme Court for a pecuniary penalty order "requiring the person to pay to the State the amount of the benefits derived from the commission of the confiscation offence". Section 182(1) requires the court, in deciding such an application, to have regard to the evidence given in any proceeding against the respondent for the relevant confiscation offence. Where the offence is a serious drug offence (as the offences committed by Mr Cooper and Ms Hollis were) the court must assess the value of the benefits derived and order the person to pay a pecuniary penalty in that amount, less certain deductions. The only such deduction relevant here applies to Ms Hollis, in the form of the amount of any forfeiture order made against her. Although those limited deductions are specified, s 193 dictates that any expenses or outgoings, which is to say "all costs and expenses incurred by the person in, or in connection with, committing the offence or offences", are to be disregarded in assessing the value of benefits derived.
- [4] Section 187(1) of the Act sets out what must be taken into account in assessing the value of benefits; relevantly for present purposes those matters include
- (a) the value of cash and other property that came into the possession or under the control of the relevant person or someone else at the request, or by the direction, of the relevant person, because of the commission of the offence;
  - (b) the value of any benefit provided for the relevant person or someone else at the request, or by the direction, of the relevant person because of the commission of the offence;
  - (c) if the offence consisted of the doing of an act or thing in relation to a dangerous drug or controlled substance (the *illegal drug*)—
    - (i) the market value, when the offence was committed, of a dangerous drug or controlled substance similar, or substantially similar, to the illegal drug involved in the offence; and
    - (ii) the amount that was, or the range of amounts that were, ordinarily paid for the doing of a similar, or substantially similar, act or thing ...."

- [5] Schedule 1 to the Act contains “Assessment of benefits examples”, which are said to be examples of the “practical operation” of the relevant sections<sup>1</sup>. Example 1 is as follows

“(1) A and B are separately convicted of confiscation offences of carrying on the business of unlawfully trafficking in a dangerous drug.

(2) C bought the dangerous drug from B on 5 occasions for \$2 000—a total of \$10 000.

(3) B gave the money to A.

(4) A paid B a total of \$1 000.

(5) B acted solely as an agent or courier of A.

(6) A is—

(a) the supplier of the dangerous drug; and

(b) the principal with whom C, through B, dealt.

(7) Under section 187(1)(a) and (b) and 193, the benefit derived by A is \$10 000.

(8) Under section 187(1)(a), the benefit derived by B is \$1 000.”

*The background to the confiscation offences*

- [6] At the time of her arrest, Ms Hollis was 25, had one minor previous conviction for an offence of dishonesty committed when she was a teenager, and was unemployed, although she had previously worked as a disability support worker. Mr Cooper was 23, had no previous convictions and worked in a grocery store. In August, 2002, they moved together into a unit in Fortitude Valley. Previously they had shared accommodation with a man I shall refer to as X. (He has absconded and charges against him remain to be dealt with.) On 16 August 2002, police officers, having searched X’s premises, moved on to conduct a search of the unit where Ms Hollis and Mr Cooper now lived. In Ms Hollis’ bedroom they found a number of clip-seal plastic bags containing cannabis; 24.43g of 3,4 methylenedioxymethamphetamine (ecstasy) which produced a pure concentration of 4.943g; 8.183g of methamphetamine which amounted to 2.123g pure; 0.001g of amphetamine; and a miniscule amount of lysergide.
- [7] In the course of the search, Ms Hollis told the officers that X was the source of the drugs. She said “I don’t pay for – like I don’t buy it ... He just gives it to me to sell ...”. Later, when asked what the “exact arrangement” with X was, she answered “He gives me the drugs and I sell them and then I take a small cut and give him the rest of the money back. And then whatever I don’t use [or] sell I give the stuff back”.
- [8] The searching police also found, in two different locations in Ms Hollis’ bedroom, amounts of money totalling \$11,785. In an interview later that day, Ms Hollis said that \$3,700 (which had been in a separate envelope) was for X. She described it as “money that I’d sold drugs from and I’d taken my part out of it and that was [X]’s money to give back to him.” Her share of the total sum from which the \$3,700 came would, she said, probably have been \$400 or \$500. The balance of the money seized consisted in the main, Ms Hollis claimed, of her savings from a payout in respect of injuries she had received in a car accident, although she conceded there was also a component of drug money. Previously, she explained, her keycard had

---

<sup>1</sup> Section 7.

been stolen and funds withdrawn from her bank account by the thief; since that experience she had kept all her money about her. If, after meeting living expenses, she had any money left over from drug dealing she added it to her store.

- [9] Two note books were also found in the course of the search. One recorded the details of amounts and dates of payments to X, totalling \$73,000 over a four month period. The other contained names of individuals and amounts. The notes, Ms Hollis said, referred to “money that people owed me” from supplies of drugs.
- [10] In the interview, Ms Hollis expanded on her arrangement with X. He would give her a certain amount of drugs which she would sell and then take her cut. All the drugs located in her bedroom were given to her by X to sell; she agreed it was, as the interviewing officer described it, the “standard agreement where you sell them, you get a certain cut and you give the remainder to him”. She would sell a bag of cannabis, she said, for \$25 from which she would receive \$5; “Special K” (ketamine) would be sold a gram at a time for \$200, of which she would keep \$20; ecstasy tablets for \$40-\$50 each, of which she would keep about \$10; and small bags containing methylamphetamine for \$40-\$50, of which \$10 would be hers.
- [11] The arrangement with X began, Ms Hollis said, when they were sharing premises. He told her that he was selling drugs and asked her if she “wanted to make a bit of extra cash”. Subsequently, when friends asked her to get drugs for them, she would contact X by telephone, he would provide the drugs for her to sell and he would tell her how much money to return to him. The arrangement seems to have become more regular over time. He would tell her how much there was in the way of drugs to sell and she would take them to nightclubs. At the end of the evening she would work out with X how much she had sold; then she would take her part and give the rest of the funds to him. She would sell what she was given, but if she needed more she would ask X for more, although not in large amounts. Ms Hollis estimated that she made between \$300 and \$500 per week selling drugs at clubs. She swore two affidavits, relied on in this application, which essentially confirmed her account to the police, including the details of her earnings.
- [12] Mr Cooper was also interviewed on the day of the search. He said that he sold drugs when he went out clubbing. He did not buy drugs from anybody; he got them from Ms Hollis, who in turn obtained them from X. As far as he knew, Ms Hollis bought them. He would take with him to nightclubs a bag of 10 or 20 ecstasy tablets, each of which he would sell for \$40, keeping \$5 for himself. He sold within his circle of acquaintances and friends, a group of about 10 or 15 people. When he and Ms Hollis came home from their nightclub excursions he gave his takings (less his share) to her. He was asked how much he would make selling drugs on a weekly basis. Initially he volunteered the figure of \$100, but said that in the last week he had earned nothing. Later, in answer to that question he said, “between \$200 and \$500”. His answer is somewhat equivocal; it is not clear whether that figure refers to the total proceeds of his sales or his take, but at sentence it was put by the Crown, and not disputed, that the figure did in fact reflect Mr Cooper’s actual earnings.

*The pecuniary penalties sought*

- [13] In respect of Ms Hollis, the applicant relied on the amounts recorded in the notebook, totalling \$73,000. At sentence, the learned sentencing judge arrived at a range of \$15,000 to \$20,000 as the actual profit to Ms Hollis. Assuming that his

Honour applied the 20 per cent to 25 per cent profit range which seems generally to have been applicable to Ms Hollis' dealings, he must have based his calculation on a figure of \$60,000 as representing the money handed over by Ms Hollis from sales made by her, leaving a balance of \$13,000 as representing Mr Cooper's sales. The applicant, however, made a slightly different allowance, of \$12,000, for Mr Cooper's sales, and, using the figure of \$20,000 as retained by Ms Hollis, added it to \$61,000 to calculate a turnover of \$81,000. After deducting the forfeiture amount, it arrived at the figure of \$69,175 sought by way of pecuniary penalty order.

- [14] The applicant did not seek to argue that the contents of Ms Hollis' notebook were in any way admissible against Mr Cooper, relying instead on his admissions as to his earnings. On the basis of Mr Cooper's estimate of profits of between \$200 and \$500, Mr Kapeleris, for the applicant, made a calculation of the total proceeds he had received of between \$6,400 (20 pills sold at \$40 per pill over eight weekends) and \$16,000 (50 pills sold at \$40 over eight weekends). The amount sought by way of pecuniary penalty, \$11,200, was mid-way in that range.

*The respondents' submissions*

- [15] On the strength of Example 1 of the "Assessment of benefits examples", both Mr Kent, for Ms Hollis, and Mr Reidy, for Mr Cooper, argued that their clients were to be regarded in the same category as B in the example; that is to say, as acting in Ms Hollis' case, as an agent of X, the supplier and the principal with whom the customers were in truth dealing, and in the case of Mr Cooper, as an agent of either X or Ms Hollis. Consequently the benefits derived by their clients were only the monies retained by them: their commissions.
- [16] For Ms Hollis, Mr Kent pointed out that she had been brought into the business by X; she had not purchased the drugs from him, it was only after they were sold that he received the proceeds less the amount she retained; she was effectively a commission agent recruited by X. Mr Cooper and Ms Hollis had been treated, in terms of culpability, on an equal footing at the sentence; they ought now to be regarded as playing the same role, which in each case was that of an agent.
- [17] Mr Reidy, for Mr Cooper, adopted the submission that his client was an agent of the kind illustrated in example 1 of the "Assessment of benefits examples". He invited attention to examples 2 and 4 as well, to argue that s 187 was underpinned by a concept of determining benefit according to where the proprietary interest in the criminal venture lay. Mr Cooper could not assert any interest in the drugs or money; his only expectation was to receive a small amount from each transaction. He had said specifically in his interview, "I don't buy drugs from anybody".
- [18] Both Mr Kent and Mr Reidy suggested, albeit somewhat faintly, that hardship or the lack of prospect of their clients' being able to meet any orders might be relevant considerations. Mr Reidy adverted in his written submissions to *Director of Public Prosecutions v Delaney*<sup>2</sup>, a decision of the Tasmanian Court of Criminal Appeal to the effect that the absence of any prospect of the respondent's meeting an order was a relevant consideration, and *R v Pepin*<sup>3</sup> and *R v Fagher*<sup>4</sup>, both decisions of the New

<sup>2</sup> (1998) 7 TasR 383.

<sup>3</sup> (1996) 86 ACrimR 327.

<sup>4</sup> (1989) 16 NSWLR 67.

South Wales Court of Criminal Appeal, in which the possibility that hardship was a factor was left open. But the legislative provisions under consideration in all of those cases contained this important difference: the making of a pecuniary penalty order was discretionary, not mandatory as it is under s 184 in this case, where serious drug offences are involved.

- [19] And one of the members of the court in *Fagher*, Hunt J, took the view that hardship was not in any case relevant under the New South Wales Act:

"...I am quite unable to see how hardship could be a relevant consideration to the decision whether the pecuniary penalty should be imposed. If a person retains ill gotten gains from the commission of a crime, the fact that he will suffer hardship by having to disgorge those gains (because, for example, he cannot use them for some lawful purpose) and therefore need not disgorge them appears to me to defeat the whole purpose of this Act. The legislature has very carefully identified hardship as being relevant to the decision whether a forfeiture order should be made, but not as being relevant to the decision whether a pecuniary penalty should be imposed. That, it seems to me, should be the end of any relevance of hardship when such penalties are imposed. This is particularly so as the pecuniary penalty is in no sense intended to be a punishment..."<sup>5</sup>

That reasoning was applied by Shepherdson J in *Re Tunney*<sup>6</sup> to conclude that hardship was not a consideration in the making of a pecuniary penalty order under the *Crimes (Confiscation of Profits) Act 1989*. It applies, in my view, with equal force to the *Criminal Proceeds Confiscation Act*. I do not think that there is any room for incapacity to pay, whether one regards it as a compassionate or a pragmatic consideration, to enter into the assessment process under s 184.

#### *The applicant's submissions*

- [20] Mr Kapeleris argued that both Ms Hollis and Mr Cooper ought to be regarded as traffickers in their own right. They were not subject to any control by X; they found their own customers and could sell to whomever they chose; they seem to have been at liberty to decide the amounts for which they would sell. In Ms Hollis' case, she had said that she would get further supplies from X if she ran out of drugs, and she spoke of customers owing her, rather than X, money. The money returned to X was simply to be regarded as payment for the drugs: a cost or expense incurred by Ms Hollis and Mr Cooper in connection with trafficking.

#### *The benefits derived by the respondents*

- [21] There is, I think, a risk of focussing so much on the "Assessment of benefits examples" that one loses sight of what it is that the Act requires. It is not essential to decide whether either Ms Hollis or Mr Cooper is correctly described as an agent as that term is used in commercial law, and the notion of proprietary interest does not sit comfortably with illicit drugs or the proceeds of their sale. What s 184 requires is assessment of the value of the benefits each derived. One of the matters to be taken into account in that process is the value of the cash that came into the offender's

<sup>5</sup> (1989) 16 N.S.W.L.R. 67 at 78.

<sup>6</sup> [1994] 2 QdR 113.

possession as the result of his offending, but it is not conclusive; clearly one must look at the entire context in order to decide what benefit was derived. Ordinarily the receipt of funds to be passed to another would not be regarded as derivation of a benefit. But, of course, s 193 requires that any expenses or outgoings are to be disregarded, so it is clear that “benefit” is to be equated with gross, not net, profit. Example 1 assists in illustrating what is implicit in ss 184, 187 and 193: that the fact that an amount of money passes through an individual’s hands does not itself mean that that sum constitutes the relevant benefit.

- [22] There is no doubt here that most of the money went back to X. The question is whether what was handed to him was payment for the drugs, in which case those amounts would constitute expenses incurred by the respondents in connection with their sale; or whether what was given to him was a return of his proceeds from the sale of drugs less the benefit that each became entitled to for their part in selling them.
- [23] The context of the offending and the statements of the two respondents tend to indicate the latter. There is nothing in the background of either Ms Hollis or Mr Cooper to suggest any experience in drug sales apart from those carried out at the instigation of X. They seem to have been introduced to the process by X, and there is no suggestion that either ever sold drugs at the behest of anyone else. There was nothing very entrepreneurial about their arrangements; they sold within their own social circles. Although X did not control whom they sold to, it is a reasonable assumption that he knew the limited context in which they would make their sales. There is no evidence as to how the prices were set. It seems clear that there was a standard, generally acknowledged price range but whether it was in the first instance set by X or Ms Hollis was not the subject of any evidence. What was returned to X seems always to have been the actual proceeds of sale, less the percentages retained by the respondents. Significantly, there is nothing to indicate that he would receive the price of the drugs from Ms Hollis whether or not they were sold; to the contrary, it seems that any unsold drugs were returned to him.
- [24] Most importantly, one cannot ignore how both Mr Cooper and Ms Hollis described the arrangement in the accounts they gave to the police, which were unchallenged. Mr Cooper said that he did not buy drugs. He did say that as far as he knew Ms Hollis bought them; but apart from the uncertainty as to his source of information, it is not admissible against Ms Hollis herself. In any event, what is of importance is that on his account he did not pay for the drugs he sold; he derived a limited benefit in the form of commission.
- [25] Ms Hollis consistently described her arrangement with X as one in which she received the drugs and returned the proceeds. She did not deviate at all from that position, apart from the reference to individuals owing her money. That is capable of suggesting a perception that she was entitled to the money herself, but I do not think it is conclusive. I am inclined to think that the reference to “money that people owed me” meant no more than that these were outstanding amounts which people were to pay to her.
- [26] What occurred here was, I am satisfied, the return of proceeds as opposed to payment of a purchase price. The former is not properly characterised as the incurring of expenses or outgoings. I conclude, therefore, that the benefits derived

by Mr Cooper and Ms Hollis were those amounts retained by them from the proceeds of their sale of drugs supplied by X.

*The value of the benefits derived*

- [27] As to the amounts retained, on Ms Hollis' estimate of earning between \$300 and \$500 per week over the 16 weeks of her engagement in the business, the amount paid to her would have been between \$4,800 and \$8,000. In her affidavits, she alights on the figure of \$400 per week, and deposes to a belief that she received \$6,800. But I regard the contemporary record of \$73,000 paid on to X as a more reliable starting point than Ms Hollis' estimates after the event. However, it is difficult to know what proportion of those funds came from Mr Cooper's sales. One cannot use Mr Cooper's own statements as to his level of earning in the case against Ms Hollis. The learned sentencing judge appears to have assumed it was about \$13,000, but it seems to have been a relatively arbitrary allowance; indeed his Honour emphasised that his calculations were not to be given any great weight.
- [28] For the purposes of this exercise, I am prepared to make what I suspect may be the over-generous assumption suggested by Mr Kent: that one-third of the \$73,000 emanated from Mr Cooper's sales, on the basis that he was dealing for two months and Ms Hollis for four. Taking \$49,000 as the proceeds from her sales transmitted to X, and adopting 25 per cent as an average profit, one arrives at a figure of \$12,250 as representing the value of the benefit she derived.
- [29] Given the concession implicit in Ms Hollis' consent to the forfeiture orders, I am satisfied that the moneys seized from her are tainted property and that it is appropriate that they be forfeited. Subtracting the forfeited amount of \$11,825, Ms Hollis should pay, by way of a pecuniary penalty order, the balance of \$425. I should for the sake of completeness say at this point that I am also satisfied that the property of which the Crown seeks forfeiture under s 34 of the *Drugs Misuse Act* 1986 is liable to forfeiture, in consequence of Ms Hollis' having committed and having been convicted of, the offence of trafficking .
- [30] Mr Cooper said that he earned between \$200 and \$500 on a weekly basis, although he also said at one stage that he had received nothing for one week and at another point suggested that his earnings were \$100 per week. The maximum received, on his account, was \$4,000; that is, \$500 per week for eight weeks. Mr Reidy's suggestion was that half the maximum amount would be properly representative of the profit made by Mr Cooper. I accept that submission.

*Orders*

- [31] I order:
1. Pursuant to s 151 of the *Criminal Proceeds Confiscation Act* 2002, that cash in the sum of eleven thousand, eight hundred and twenty-five dollars (\$11,825), the property of Peta Cheree Hollis, be forfeited to the State.
  2. Pursuant to s 34 of the *Drugs Misuse Act* 1986, that the property of Peta Cheree Hollis listed in schedule A to the originating application herein, the value of which I consider to be nil, be forfeited to the Crown.
  3. Pursuant to s 184 of the *Criminal Proceeds Confiscation Act* 2002, that Peta Cheree Hollis pay to the State a pecuniary penalty in the amount of four hundred and twenty-five dollars (\$425).

4. Pursuant to s 184 of the *Criminal Proceeds Confiscation Act 2002* that Nicholas Paul Cooper pay to the State a pecuniary penalty in the amount of two thousand dollars (\$2,000).