SUPREME COURT OF QUEENSLAND

CITATION:	*State of Queensland v Henderson* [2011] QSC 300
PARTIES:	**STATE OF QUEENSLAND** (applicant) **v** **JOHN WILLIAM HENDERSON** (respondent)
FILE NO:	SC No 1246 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	7 October 2011
DELIVERED AT:	Brisbane
HEARING DATES:	6, 7, 8, 9 & 10 June 2011
JUDGE:	Peter Lyons J
ORDERS:	**1. The application for a forfeiture order is granted.** **2. The application for an exclusion order is dismissed.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – CONFISCATION OF PROCEEDS OF CRIME AND RELATED MATTERS – FORFEITURE OR CONFISCATION – OTHER MATTERS – where money found in the boot of a car in a bag belonging to respondent – where applicant obtained restraining order under *Criminal Proceeds Confiscation Act* 2002 (Qld) in relation to the money – where respondent submitted money was proceeds of sale of jewellery given to him by his father – where applicant seeks forfeiture order under the Act – where respondent seeks exclusion order under the Act – where onus on respondent to prove jewellery and money not illegally acquired property – whether respondent is a 'prescribed respondent' who engaged in a serious crime related activity within the relevant limitation period – whether exclusion order should be made – whether forfeiture order should be made *Acts Interpretation Act* 1954 (Qld), s 4, s 20 *Criminal Proceeds Confiscation Act* 2002 (Qld), s 8, s 13, s 15, s 16, s 17, s 18, s 22, s 28, s 29, s 56, s 58, s 65, s 68, s 69
COUNSEL:	M D Hinson SC, with J S Brien, for the applicant J A McNab for the respondent
SOLICITORS:	Director of Public Prosecutions (Queensland) for the applicant Chan Lawyers for the respondent

[1] **PETER LYONS J:** On Saturday 20 April 2002, police officers found, in the boot of a car parked at the Reef Palm Motel in Cairns, a blue sports bag belonging to Mr Henderson. In the bag was a large sum of money. There has been some debate about the amount, but on any view it was of the order of $600,000. That resulted in the State obtaining, on 10 February 2003 a restraining order under the *Criminal Proceeds Confiscation Act* 2002 (Qld) (*Confiscation Act*) in relation to $598,325 in Australian currency. The State now seeks a forfeiture order under the *Confiscation Act*, and Mr Henderson seeks an exclusion order under the same Act.

Background

[2] Mr Henderson was born on 25 June 1955. The name he was given at birth was William Marijancevic. He gave evidence that he had changed his name to John William Henderson by deed poll.

[3] Mr Henderson has two brothers, Joseph Marijancevic (*Joseph*) and Frank Marijancevic (*Frank*). He also has a sister, Dianne Murphy. Brief reference was made in the evidence to another sister, Lynette, who was said to have been estranged from the rest of the family since she was a baby.

[4] Mr Henderson's father was Franjo Marijancevic (*Mr Marijancevic*). Mr Marijancevic was born on 25 October 1923 in Yugoslavia, and died on 29 April 2001 at Shepparton, in Victoria. He had been living at Picola, in the north of that State.

[5] Mr Henderson's account of the origin of the money found in his sports bag on 20 April 2002 is controversial. Nevertheless, it is convenient at this point to provide a brief summary of it. He gave evidence that, some years before his father's death, Mr Henderson was visiting his father in Picola. He thinks it is likely that this was in December 1996. His father gave him some jewellery, being a pair of gold earrings in which were set some diamonds; a gold bracelet with diamonds; a gold necklace with a diamond pendant; and a brooch encrusted with diamonds of varying sizes. At the time, Mr Marijancevic said to him words to the effect, "[l]ook after your family". Mr Henderson understood Mr Marijancevic to be referring to Joseph, Frank, and Ms Murphy, as well as himself. Mr Henderson took the jewellery to Melbourne, and it was kept for some years in a safety deposit box in the name of his then wife, Ms Warwick, at the Collins Street branch of the ANZ Bank.

[6] After the death of his father, Mr Henderson, Joseph, Frank, and Ms Murphy met at Mr Henderson's house, where he showed them the jewellery. They decided to have the jewellery valued and sold, and to invest the proceeds.

[7] In about December 2001 Mr Henderson took the jewellery to a jeweller, Mr Komianos. Mr Komianos told Mr Henderson that the jewellery had a wholesale value of between $600,000 and $700,000, and a retail value of $1 million. Mr Komianos produced drawings of the jewellery.

[8] Some time thereafter, a person whose first name was Daniel contacted Mr Henderson. He ultimately purchased the jewellery for $620,000 in cash. Mr Henderson kept the cash in a safety deposit box.

[9] Mr Henderson gave evidence that at about the beginning of 2002 he became interested in purchasing a property in Coondoo Street, Kuranda, owned by a company called Lynxhaven Pty Ltd, the company being associated with a Mr John Dredge. Mr Henderson gave evidence that in about January and February of 2002 he travelled to Cairns several times to meet with Mr Dredge, and as a result, they made a verbal agreement for Mr Henderson to purchase the Coondoo Street property, although they had not agreed upon the price.

[10] Mr Henderson gave evidence that he travelled to Cairns in April 2002. He brought with him the cash which was the proceeds of the sale of the jewellery, intending to use it to encourage Mr Dredge to accept a lower price. That cash was the money in his blue sports bag on 20 April 2002.

[11] The car in which the blue sports bag had been found had been hired to Mr Henderson. When the blue sports bag was found there, it was seized and taken back to the Cairns Criminal Investigation Branch office. A search of the bag revealed the presence of the money. The money was counted. Mr Henderson has claimed that the amount of money in the bag was greater than the recorded results of the count. After counting, the money was retained on police premises until the afternoon of Monday 22 April 2002. It was then left in a strong room at the Lake Street Branch of the Commonwealth Bank in Cairns, and the following day was deposited into the Queensland Police Service (*QPS*) Collections Account.

History of proceedings

[12] On 10 February 2003 an application was made for a restraining order, Mr Henderson being the respondent. The application referred to s 28(3)(a)(i) of the *Confiscation Act*, and was made in respect of all of the property of Mr Henderson. However, the supporting affidavit sought an order only in respect of property described as "cash to the value of $598,325 in Australian currency". No reference was made in the material to the fact that the money had been deposited into the QPS Collections Account. The restraining order, previously mentioned, identified the restrained property as "$598,325.00 in Australian Currency".

[13] On 5 March 2003 an application was made under the *Confiscation Act* for an order for the forfeiture of property of Mr Henderson described as "$598,325.00 in Australian Currency" (*forfeiture application*). On 30 May 2003, an application was filed on behalf of Mr Henderson for the exclusion from forfeiture of property similarly described (*exclusion application*). These two applications led to the present hearing.

[14] When the applications came on for hearing, Mr Henderson made an application for a stay of the proceedings. That application was refused. However, it drew attention to the fact that the money which had been seized had not been retained *in specie*. That resulted in an application on behalf of the State for a variation of the restraining order, and for leave to amend the forfeiture application. Despite opposition on behalf of Mr Henderson, those applications were granted. The restraining order was varied by substituting the words, "cash to the value of $598,325 in Australian currency deposited on 23 April 2002 in the Queensland Police Service collection account number 4804 0006 0429 held at the Commonwealth Bank of Australia", for the words, "$598,325 in Australian currency"; and leave was granted to amend the forfeiture application by substituting

the words, "the property restrained by the restraining order made on 10 February 2003 as varied by the order made on 8 June 2011", for the words, "$598,325 in Australian currency".

[15] Mr Henderson then applied for an adjournment to enable him to appeal against rulings made at the hearing. That was refused. Thereafter, an application was made on Mr Henderson's behalf for leave to amend the exclusion application consistent with the applications to vary the restraining order and the forfeiture application. That application was granted.

Statutory provisions

[16] The restraining order is itself a significant matter for both the forfeiture application and the exclusion application. It is convenient therefore to commence with a brief reference to statutory provisions relating to it.

[17] An application for a restraining order is made under s 28 of the *Confiscation Act*. That section identifies a "prescribed respondent" as a person suspected of having engaged in one or more serious crime related activities. In the case of a prescribed respondent, the application may relate to (amongst other things) stated property, or all property.

[18] Section 16 provides that anything done by a person that was, when it was done, a serious criminal offence, is a serious crime related activity. At all relevant times, s 17 has provided that a serious criminal offence includes an indictable offence for which the maximum penalty is at least five years imprisonment. Since 22 June 2009, s 17 also provides that an offence is a serious criminal offence if it is an offence under the law of the Commonwealth or a place outside Queensland, 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.

[19] An application under s 28 must be supported by an affidavit from a person identified in the section. Under s 29(1) the affidavit, for present purposes, must state both that the person identified as the prescribed respondent has engaged in one or more serious crime related activities, and the reason for the suspicion. Section 31 then requires the Court to make a restraining order if, after considering the application and the affidavit, the court is satisfied that there are reasonable grounds for the suspicion on which the application is based.

[20] Section 56 provides for the making of an application for a forfeiture order, by permitting an application for an order forfeiting to the State particular property restrained under a restraining order. Section 58 requires the court to make a forfeiture order if the court finds it more probable than not that (for present purposes) the prescribed respondent engaged, during the "limitation period", in a serious crime related activity. The limitation period is defined in s 58(9) to be "the period of 6 years before the day the application for the order is made", and "includes periods before and after the commencement of" s 58. Under s 58(4), the Court may refuse to make the order if the Court is satisfied that it is not in the public interest to make the order. Under s 59, on the making of the forfeiture order, the property which is the subject of the order is forfeited to the State, and vests absolutely in the State.

[21] Mr Henderson's exclusion application was made under s 65. In a case where an application for a forfeiture order has been made but not decided, that section permits a person who claims an interest in property to which the forfeiture application relates, to apply to the Court for an exclusion order. Under s 68, the court may make an exclusion order, but only if it is satisfied that the applicant has an interest in the property, and that it is more probable than not that the property to which the application relates is not "illegally acquired property". Section 69 defines an exclusion order, and s 70 states its effect. Essentially, for present purposes, an exclusion order excludes an interest in property from a forfeiture application, and has the consequence that a restraining order stops having effect in relation to the excluded interest.

[22] In the present case, the reference in s 68(2) to "illegally acquired property" is of some significance. That expression is defined in s 22, which is as follows:

> "**22 Meaning of *illegally acquired property***
> (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.
> (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.
> (5) Also, if the proceeds of dealing with illegally acquired property are credited to or placed in an account, the proceeds do not lose their identity as proceeds because they are credited to or placed in an account."

[23] There are other related definitions. The expression "illegal activity" is defined in s 15 to include a serious crime related activity, or an act or omission committed outside Queensland that is an offence against the law of the place in which it is committed, and would be an offence against the law of Queensland if committed in Queensland. Section 15 has not been amended.

[24] The term "proceeds" is defined in s 18, 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.

[25] Finally, brief reference should be made to the provision which regulate these proceedings. By virtue of s 8 of the *Confiscation Act*, these proceedings are not criminal proceedings; questions of fact must be decided on the balance of probabilities; the rules of evidence are those applying in civil proceedings; and, to

the extent that they are not inconsistent with the *Confiscation Act*, the *Uniform Civil Procedure Rules* 1999 (Qld) apply.

Contentions of the parties

[26] As the proceedings were conducted, the application of primary importance is the exclusion application. The structure of the *Confiscation Act* makes it appropriate to determine that application, before determining the forfeiture application.

[27] For Mr Henderson, it was submitted that the evidence called in his case showed that the money was the proceeds of the sale of jewellery given to him by his father; and accordingly it was the proceeds of the sale of "longstanding family heirlooms". It was submitted that it had been legally acquired, and that it was more probable than not that the jewellery from the sale of which the money was derived was itself not illegally acquired.

[28] The submissions on behalf of the State took issue with Mr Henderson's account of his possession of the money. In particular, reference was made to the explanation that Mr Henderson's great grandfather helped transport members of the Russian royal family across borders, and received the jewellery as a reward, said to have occurred "during the revolution". It was submitted that the evidence of Mr Penfold, a jeweller and a valuer called in the State's case, demonstrated that the jewellery was from a later period. If Mr Penfold's evidence were accepted, then the provenance of the jewellery was unexplained, and Mr Henderson had not discharged the onus of demonstrating that the jewellery and the proceeds of sale were not legally acquired.

[29] Additional submissions were made challenging the credit of Mr Henderson. They turned upon the fact that there were conflicts between his evidence and that of Mr Dredge; records indicated that Ms Warwick had a safe custody box at the Collins Street branch of the ANZ Bank only from 6 December 2002, which fact cast doubt on Mr Henderson's explanation for choosing Mr Komianos to value the jewellery; there was said to be an air of unreality about Mr Henderson's evidence of the circumstances of the sale of the jewellery, including the subsequent dealing with the cash received; that it was odd that a safe deposit box was taken on 13 March 2002 where the cash was retained, at a time when, on Mr Henderson's evidence, negotiations with Mr Dredge were well advanced, and shortly before the cash was taken to Cairns; Mr Henderson's failure to give an explanation for the money when his bag was seized in Cairns; and inconsistencies between his account of the money when interviewed by the police in April 2002 and his current evidence. It was also submitted that the evidence called in support of Mr Henderson's case was vague. It was submitted that it was unlikely that, if Mr Henderson had been given the jewellery for the benefit of his brothers and sister, he did not show the jewellery to them for some years. It was submitted that his account of his dealings with the jewellery, including its sale and the keeping of the proceeds of the sale, suggested a desire to hide unlawful conduct. Reference was made to his criminal history in that context. It was also submitted that Mr Henderson had lied to police about his mode of arrival at the Reef Palm Hotel. The evidence of his brothers and sister was challenged on the basis of their interest in the outcome of the proceedings, and the fact that they have been convicted of offences of dishonesty.

[30] It was submitted that Mr Henderson's criminal history demonstrated he was a prescribed respondent. Reliance was also placed on his possession of cannabis on 20 April 2002.

[31] Although more directly relevant to the forfeiture application, it is convenient to commence with a consideration of Mr Henderson's criminal history, and to consider whether he is a prescribed respondent.

Was Mr Henderson a prescribed respondent?

[32] Mr Henderson has a criminal history in both Queensland and Victoria. In Queensland, it extends back to 1980. In Victoria, excluding convictions as a minor, it extends back to 1974. Some offences are drug related. Some involve violence. A number are property related, including theft, burglary, and receiving stolen property. The list of offences is lengthy.

[33] It should be noted that there has been no suggestion that Mr Henderson's criminal record is not probative of the conduct constituting the offences recorded in it. As will become apparent, it is particularly relevant to note the offences committed after 4 March 1997.

[34] Mr Henderson's Victorian criminal history shows that, on 5 March 1999, he was convicted on a charge of recklessly causing injury to a person without lawful excuse. He was sentenced to 21 days imprisonment. The offence was committed on 4 June 1997. On 18 June 2001, Mr Henderson was convicted of an offence described as "THEFT – FROM SHOP (SHOPSTEAL)", an offence committed on 22 October 1999. For this he was fined $200. On 4 April 2002, Mr Henderson was convicted of a charge of possession of cannabis, resulting in a fine of $600. The offence was committed on 20 February 2001. On 6 September 2002, Mr Henderson was convicted of the offence of going equipped to steal or cheat, resulting in a sentence of four months imprisonment, wholly suspended. The offence was committed on 3 November 2001. On 6 September 2002, Mr Henderson was also convicted of a charge of intentionally damaging property, and was ordered to pay $650 compensation. A sentence of two months imprisonment was imposed, suspended for 18 months. That offence was also committed on 3 November 2001.

[35] It should be mentioned that property related offences of which Mr Henderson was convicted in 1997 and 1998 resulted in the imposition of prison sentences, the longest being two years and nine months. It is not clear when any of these offences was committed, and in particular, whether any was committed after 4 March 1997.

[36] Section 58(1)(a) of the *Confiscation Act*, read with s 58(9), refers to the engagement by a prescribed respondent in a serious crime related activity in "the period of 6 years before the day the application for the order is made". The natural reading of these provisions would mean that the six year period is determined by reference to the date of the making of the application for the forfeiture order. No submission was made to suggest otherwise. Nor was there any submission to suggest that the identification of the limitation period is affected by the amendment to the restraining order, made on 8 June 2011. It follows that the relevant limitation period commenced on 5 March 1997.

[37] On 5 March 2003, s 17 of the *Confiscation Act* was as follows:

> "**17 Meaning of serious criminal offence**
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> **(1)** An offence is a **'serious criminal offence'** if it is any of the following—
>
> (a) an indictable offence for which the maximum penalty is at least 5 years imprisonment."

[38] As from 22 June 2009, s 17(1) was amended by the insertion of paragraph (c), which is as follows:

> "(c) an offence under the law of the Commonwealth or a place outside Queensland, including outside Australia, that, if the offence had been committed in Queensland, would be an offence mentioned in paragraph (a) or (b)."

[39] It may be thought that prior to 22 June 2009, it is debatable whether an indictable offence committed in another State, was an indictable offence for the purposes of s 17(1)(a). However, the term "indictable offence" was defined in s 36 of the *Acts Interpretation Act* 1954 (Qld) (*Acts Interpretation Act*) as follows:

> **"*indictable offence*** includes an act or omission committed outside Queensland that would be an indictable offence if it were committed in Queensland."

[40] The provisions of the *Acts Interpretation Act* apply to another Act, subject to a contrary intention appearing in that Act.[1] There has been no submission that prior to 22 June 2009, such an intention appeared in the *Confiscation Act*. The position seems to be that, until that date, the definition of indictable offence found in the *Acts Interpretation Act* applied. It seems unnecessary to consider the position thereafter.[2]

[41] Accordingly, it seems to me that an act or omission committed in Victoria that would be an indictable offence if committed in Queensland is a serious criminal offence for the purposes of s 17 of the *Confiscation Act*, as it stood on 5 March 2003, if the maximum penalty for the offence is at least five years imprisonment. It follows that such an act is a serious crime related activity, for the purposes of s 58(1)(a) of the *Confiscation Act*.

[42] The maximum penalty in Queensland for the possession of cannabis as at 20 February 2001 was 15 years imprisonment. Accordingly, the offence relating to the possession of cannabis committed in Victoria on that date was, for the purposes of the *Confiscation Act*, a serious criminal offence, and a serious crime related activity; with the result that Mr Henderson's conviction for this offence would appear to be sufficient to establish that he is a prescribed respondent who engaged in a serious crime related activity within the relevant limitation period.

[43] The offences which have been mentioned so far were all committed in Victoria. However, on 20 April 2002, 23.3 grams of cannabis was found in Mr Henderson's blue sports bag, which, as has been previously stated, was found in the car he had rented. For the State, reliance was also placed on what was said to be Mr Henderson's possession of this marijuana on 20 April 2002. There is no suggestion that Mr Henderson has been convicted of this offence. Indeed, a copy of Mr

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1 See s 4 of the *Acts Interpretation Act*.

2 See s 20 of the *Acts Interpretation Act*.

Henderson's record dated 1 June 2010 indicates that a complaint relating to this offence was dismissed. However there has been no submission that, for that reason, a finding that Mr Henderson engaged in a serious crime related activity in the relevant limitation period could not be made. Nor was there any submission made that the evidence did not establish that Mr Henderson was in possession of this marijuana. The evidence of his possession of marijuana on 20 April 2002 is also sufficient to establish that Mr Henderson is a prescribed respondent as defined in the *Confiscation Act*.

[44] In view of these findings, it is unnecessary to consider further the offences relied upon by the State to establish the fact identified in s 58(1)(a) of the *Confiscation Act*.

The provenance of the jewellery

[45] Joseph, Frank, and Ms Murphy all gave evidence generally supportive of the evidence of Mr Henderson on this issue. Joseph gave evidence that Mr Henderson had told him in about 1996 or 1997 that Mr Marijancevic had given jewellery to Mr Henderson for Frank, Ms Murphy, Mr Henderson and himself. He associated the jewellery with his mother and father having told him that jewellery had been given to his great grandfather as a reward for providing transportation services for Russian royalty. He also gave evidence of a meeting of the four of them at Mr Henderson's house in Maribyrnong, subsequent to the death of Mr Marijancevic, where he saw the jewellery (which he described); and where it was decided to have the jewellery valued and sold. He also gave evidence of a later family meeting at which it was decided to invest the proceeds of the sale of the jewellery in the Queensland property market. Broadly similar evidence was given by Frank and Ms Murphy.

[46] Joseph, when asked in cross-examination, said that the gift of the jewellery to his great grandfather (or possibly his great grandfather's father) occurred around the 1900s or late 1800s. He claimed a quarter share in the money seized on 20 April 2002.

[47] Frank gave evidence, that when Mr Henderson first showed him the jewellery, he thought it was junk. Ms Murphy, on the other hand, gave evidence that when she first saw it she thought it was valuable. Joseph, Frank and Ms Murphy all gave evidence that they did not see the jewellery during their father's lifetime, and first saw it when Mr Henderson later showed it to them. Joseph also gave evidence that there had been tension within the family as a result of the seizure of the money in April 2002.

[48] An affidavit of Theodosis Komianos was read in Mr Henderson's case. In December 2001, Mr Komianos was the sole director and company secretary of a company that carried on business as a jewellery wholesaler and retail merchant. The business was carried on at Level 1, 330 Little Collins Street, Melbourne. Mr Komianos gave evidence that in about December 2001, a man whom he later came to know as Mr Henderson, came to his office and produced jewellery, being a pair of large diamond earrings, a large diamond pendant, a broach circled with a large number of diamonds, and a bracelet with diamonds in a circle. Mr Komianos gave a verbal valuation of the jewellery at approximately $600,000 wholesale, and over a $1 million retail. Mr Komianos produced a drawing of the jewellery. Mr Komianos also recalled telling a few people that Mr Henderson had items for sale, but could

not recall the names of those people. Mr Komianos gave evidence that apart from the occasion when he valued the jewellery, he has not had contact with Mr Henderson, or with anyone associated with him, save for the purpose of making his affidavit and earlier affidavits, and for the purpose of giving evidence before the Administrative Appeals Tribunal, Victorian District Registry. That apparently occurred in 2005.

[49] Mr Komianos' affidavit was sworn in April 2010. He was not required for cross-examination. Three documents from Dr David Lee, of Westmeadows, in Victoria were tendered. One was dated 1 June 2011; another 3 June 2011; and the third, though itself undated, has a facsimile stamp showing the date as 6 June 2011. Dr Lee said that Mr Komianos is an alcoholic who has chronic brain damage and resulting memory loss, and that he is on "antidepressant (*sic*) and Valium". Dr Lee reported that Mr Komianos consumes two litres of alcohol a day. Dr Lee stated that Mr Komianos "became mentally unfit a few years ago", and that he was unfit to travel.

[50] Mr Penfold gave evidence that he had examined the sketches exhibited to the affidavit of Mr Komianos. He considered each of the items of jewellery to be "of a relatively modern period post 1950's". He referred to some of the notations on the drawings, suggesting they might be a hallmark typical of European, Asian or American manufacture, but not specific to any of them. Older European jewellery and Russian jewellery would have a different hallmark, the number 750. Mr Penfold considered the designs of the jewellery shown in the sketch were not consistent with Russian styles of the early 20th or late 19th century. Mr Penfold also gave evidence that over the years, he had made an intensive study of the age of jewellery "just as a hobby".

[51] Notwithstanding the limited nature of the information available to Mr Penfold, I am satisfied that his opinion as to the probable age of the jewellery depicted in Mr Komianos' sketches should be accepted. He relied principally on the design of the jewellery. He made particular reference to the bail for the pendant, which he said would be more embellished if it was 100 years old. He considered that reference to the number of carats for each piece, by use of the letter "K", was also inconsistent with the jewellery being of older European origin. There is no evidence to suggest that jewellery similar in design was produced prior to 1950.

[52] No objection was taken to the account of the provenance of the jewellery given by Mr Henderson, his brothers and sister, on the grounds of hearsay. As the case was conducted, the issue was whether that account could be true. On Joseph's evidence, the jewellery had to be manufactured prior to 1920. This would be consistent with the making of the gift to the great grandfather of Mr Henderson, his brothers and sister. There was no evidence as to the date of the birth or death of this person; but since Mr Marijancevic was born in 1923, their great grandfather is likely to have been an adult at least by 1900.

[53] Assuming the truth of the evidence of Mr Henderson, his brothers and his sister that they were given an account by their parents of the provenance of the jewellery, that account cannot be true.

[54] However, the evidence called in Mr Henderson's case was generally challenged. The nature of the challenge has been set out earlier in these reasons. However it is

appropriate to mention that Joseph, Frank and Ms Murphy all have some criminal convictions, including convictions for property related offences. Moreover, the State relies upon the certificates from Dr Lee, for the purpose of challenging the evidence of Mr Komianos.

[55] The material includes, without objection, a statutory declaration by Mr Komianos of 30 October 2002, referring to an occasion when Mr Henderson came to his office at 330 Little Collins Street, Melbourne, identifying the jewellery, and confirming that he gave a valuation of it. There is therefore no reason to think that Mr Komianos' evidence as to the making of the valuation should be rejected by reason of his current state of health. Moreover, the sketch of the jewellery bears the stamp of Mr Komianos' company, providing some support for the evidence both from him and Mr Henderson that Mr Komianos produced the sketch. There is no evidence to suggest that there was any occasion other than December 2001 when Mr Komianos valued the jewellery and drew the sketch.

[56] I therefore accept the evidence of Mr Komianos that in December 2001 Mr Henderson produced to him the jewellery depicted in the sketch, which at that time he valued.

[57] There is an issue about whether the money resulted from the sale of the jewellery. The only evidence on this question comes from Mr Henderson. I am conscious that there are a number of significant reasons to treat his evidence with suspicion. However, I note that the amount of cash seized in April 2002 is broadly consistent with the valuation provided by Mr Komianos, and Mr Henderson's evidence about the sale. The evidence does not identify any other potential source of the funds. In particular, Mr Henderson's criminal activity, at least in the years leading up to 2002, seems to have been relatively easy to detect, and not the kind of activity likely to enable him to aggregate some $600,000 in cash. On balance, therefore, I accept that the money seized in April 2002 was the product of the sale of the jewellery valued by Mr Komianos.

[58] Similarly, I am 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. There is corroboration of Mr Henderson's evidence to this effect, from the evidence of his brothers and his sister. There was a submission that the evidence of Joseph, Frank and Ms Murphy should be rejected because they have an interest in the proceedings; but the only identified interest is that shown by the evidence which is challenged, namely, that the jewellery was given by Mr Marijancevic to Mr Henderson for the benefit of the four of them. The other criticisms of their evidence, and the concerns about its reliability because of their criminal convictions, obviously cast some doubt on this explanation for the source of the jewellery; but again, there was no better explanation.

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

Outcome of exclusion application

[60] The effect of s 68(2) of the *Confiscation Act* is that an exclusion order be may be made only if it is more probable than not that the property to which that application relates is not illegally acquired property. The application relates to the property

restrained by the restraining order, made on 10 February 2003 and varied on 8 June 2011. In effect, that is the amount of $598,325 in Australian currency, standing to the credit of the QPS Collection Account mentioned earlier. Under s 22(5) of the *Confiscation Act*, if the money were the proceeds of dealing with illegally acquired property, then it does not lose its character because it was placed into the QPS Collection Account. If the jewellery were illegally acquired property, then under s 22(2) of the *Confiscation Act*, money acquired from its sale is also illegally acquired property.

[61] 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.

[62] I note that on the evidence, Joseph, Frank, and Ms Murphy may also have an interest in this property. On that basis, they would be entitled to be given notice of the applications, and to participate in the hearing. They were given notice of the applications, at least informally, and were content for them to be conducted by Mr Henderson. The State was also content for the proceedings to be conducted in that way. While therefore there may be some scope for debate about whether Mr Henderson could have sought an exclusion order in respect of all of the property,[3] it is unnecessary to deal with this matter.

Outcome of forfeiture application

[63] Under s 58 of the *Confiscation Act*, a forfeiture order must be made in respect of property that continues to be restrained under a restraining order, if, in the present case, Mr Henderson engaged during the limitation period in a serious crime related activity. I have already made a finding to that effect.

[64] There has been no suggestion that the operation of s 58 of the *Confiscation Act* might be affected by claims by Joseph, Frank and Ms Murphy of an interest in the money.

[65] No submissions were made on Mr Henderson's behalf that it would not be in the public interest to make the forfeiture order. It is accordingly unnecessary to consider this question. However, 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 s 13(4) of the *Confiscation Act*.

Conclusion

[66] Mr Henderson's application for an exclusion order should be dismissed. The State's application for a forfeiture order should be granted.

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[3] See in particular s 69(1)(a) and (b) of the *Confiscation Act*.