# SUPREME COURT OF QUEENSLAND

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| CITATION: | *State of Qld v Brooks & McCabe* [2006] QCA 431 |
| PARTIES: | **STATE OF QUEENSLAND**<br>(applicant/cross-respondent/appellant/cross-respondent)<br>**v**<br>**DALE RICHARD BROOKS**<br>(respondent/cross-applicant/respondent/cross-appellant)<br>**LEE PATRICIA McCABE**<br>(cross-applicant) |
| FILE NO/S: | Appeal No 446 of 2006<br>SC No 1763 of 2005 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 3 November 2006 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 12 September 2006; 18 September 2006 |
| JUDGES: | Jerrard and Keane JJA and Jones J<br>Separate reasons for each member of the Court, Keane JA and Jones J concurring as to the orders made, Jerrard JA dissenting in part |
| ORDER: | **1. Appeal by the State allowed**<br>**2. The sum of $84,999 is added to the proceeds assessment order made by the learned primary judge**<br>**3. Mr Brooks to pay the State's costs of the appeal to be assessed**<br>**4. Cross-appeal dismissed with costs** |
| CATCHWORDS: | CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - ORDERS FOR COMPENSATION, REPARATION, RESTITUTION, FORFEITURE AND OTHER MATTERS RELATING TO DISPOSAL OF PROPERTY - FORFEITURE OR CONFISCATION - *Criminal Proceeds Confiscation Act 2002* (Qld) - State applied for proceeds assessment order and forfeiture of property pursuant to the Act - respondent applied to exclude property from forfeiture on basis it was not illegally acquired - respondent argued assets were mostly derived from successful legitimate real estate investments - State argued respondent's apartment was illegally acquired property - meaning of "illegally acquired property" - meaning of "expenses |

or outgoings incurred…in relation to the illegal activity" - whether the apartment was illegally acquired property

*Criminal Proceeds Confiscation Act 2002* (Qld), s 18, s 22, s 26, s 38, s 48, s 68, s 69, s 77, s 82, s 84
*Criminal Code 1899* (Qld), s 408C

*A-G (NSW) v Peters* (1924) 34 CLR 146, cited
*Allders International Pty Ltd v Commissioner of State Revenue (Vic)* (1996) 186 CLR 630, cited
*Coulton v Holcombe* (1986) 162 CLR 1, cited
*DPP (Cth) v Jeffery* (1992) 58 A Crim R 310, applied
*Gould v Vaggelas* (1985) 157 CLR 215, cited
*Joye v Beach Petroleum NL* (1996) 67 FCR 275, cited
*Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd & Ors* (1992) 110 ALR 449, cited
*R v Easton* [1994] 1 Qd R 531, considered

COUNSEL: R J Douglas SC, with J B Rolls, for the appellant/cross-respondent
N M Cooke QC, with S Di Carlo, for the respondent/cross-appellant

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant/cross-respondent
Paul Carter and Associates for the respondent/cross-appellant

[1] **JERRARD JA:** In this appeal I have read the reasons for judgment of Keane JA, and, subject to one matter, I agree with those and the orders proposed by His Honour. I agree that s 22 of the *Criminal Proceeds Confiscation Act 2002* (Qld) had little relevance to the proper construction of s 18 of that Act or the expression "proceeds of an illegal activity", where that expression appears in division 2 of part 5 of chapter 2 of the Act. Senior counsel for the respondents suggested that s 22 of the Act distinguished between illegally acquired property which was directly derived from an illegal activity, described in s 22(1), and illegally acquired property which was indirectly derived from illegal activity, described in s 22(2). If that section does, that is simply a coincidence which really has no relevance to the construction of s 18.

[2] The State of Queensland asked for a proceeds assessment order for the capital gain made by Mr Brooks on the resale of the Toowong apartment. It claims that gain as the indirectly derived benefit enjoyed by Mr Brooks because of the fraud on the bank. I agree with Keane JA that that capital gain satisfies the description of a benefit indirectly derived because of the fraud, that being the sole reason for the fraud.

[3] Where I respectfully disagree with Keane JA is on the application of s 84. It instructs that when assessing the value of the proceeds of an illegal activity, a court must disregard any expenses or outgoings incurred in relation to the illegal activity. The Act distinguishes between illegal activities and the proceeds of illegal activities, and s 84 is not an instruction to disregard expenses and outgoings in relation to the proceeds derived because of an illegal activity. In this matter Mr Brooks borrowed $631,000 from the bank, lent to him because he had fraudulently misrepresented his

income. That fraudulent misrepresentation was the illegal activity. The direct benefit he derived because of the fraud (the "proceeds" of his illegal activity, as defined in s 18 of the Act) was the loan of that $631,000, and his having the use of that money. The indirect benefits he derived included the capacity to repay that loan, represented by the increasing capital value of the Toowong apartment.

[4] But I do not see how the obligation to repay that $631,000, or any part of it – and Mr Brooks did repay all of it – was an expense or outgoing incurred in relation to the fraud or illegal activity. It was an obligation he undertook, incurred in relation to the proceeds derived because of the illegal activity, namely the loan of the $631,000. He was obliged to repay all of that money, not just $600,000. It is only after repayment of the larger sum happened that Mr Brooks would get any potential benefit from the capital gain in the price of the unit. The $31,000 borrowed, above and beyond the $600,000 cost of the Toowong apartment was apparently spent on legal expenses and other costs incurred when buying and selling that unit. I add that I also regard those as expenses and outgoings incurred in relation to the proceeds derived because of the illegal activity, not as expenses incurred in relation to that illegal activity.

[5] Likewise, I regard the $32,000 which he paid in interest payments in the relatively short history of the loan as not being expenses or outgoings in relation to the illegal activity. Those interest payments were an expense or outgoing in relation to the loan or benefit derived because of the fraud or illegal activity, the "proceeds" defined in s 18, but not an expense or outgoing in relation to the fraud. They are different in character from the example provided in the footnote to s 84 in the Act, namely the expenses of acquiring dangerous drugs later resold. Accordingly, I would reduce the amount of a nominal proceeds assessment order by the further amount of $63,000 ($31,000 + $32,000) and would add to the proceeds assessment order made by the learned primary judge only the sum of $21,999.

[6] **KEANE JA:** At the trial of this action, the State of Queensland ("the State") was partially successful in claims it made under the *Criminal Proceeds Confiscation Act 2002* (Qld) ("the Act") against Mr Brooks and his wife, Ms McCabe. In this Court, the State urges that its case warranted a greater measure of success than it achieved at trial. The State's argument in this regard turns largely on the proper construction of a number of provisions of the Act.

[7] Mr Brooks cross-appeals. He seeks to have the proceeds assessment order adverse to him set aside or the quantum reduced. Mr Brooks also seeks to have an order for the forfeiture of a motor vehicle set aside. It is, therefore, appropriate that Mr Brooks' cross-appeal be addressed first.

[8] Before discussing the arguments which arise on the cross-appeal and the appeal, I will briefly summarise the provisions of the Act which govern the proceedings, the claims made below, and the reasons of the trial judge.

**The Act and the proceedings**

[9] Chapter 2 of the Act makes provision for the confiscation of property derived from illegal activity whether or not the person alleged to have been engaged in illegal activity has been convicted of that illegal activity.[1] The State may apply to the

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[1] Chapter 2 consists of s 13 to s 93.

Supreme Court for an order restraining a person from dealing with property where that person is suspected of having engaged in serious crime related activities.[2] Under s 48 of the Act, the Supreme Court may exclude property from a restraining order if the court is satisfied that it is more probable than not that the property to which the application relates is not illegally acquired property, and that the property is unlikely to be required to satisfy a proceeds assessment order.

[10] The State may apply to the Supreme Court for a forfeiture order whereby particular property restrained under a restraining order may be forfeited to the State on the basis that the person whose property is restrained engaged in "serious crime related activity" or the property is "serious crime derived property".[3] The State bears the onus of proof in this regard on the balance of probabilities.[4]

[11] Where an application for forfeiture has been made but not decided, a person may apply for an exclusion order, the effect of which is to exclude an interest in property from a restraining order and from a forfeiture order.[5] Under s 68(2)(b) of the Act, such an order may be made if the court is satisfied that "it is more probable than not that the property to which the application relates is not illegally acquired property". Section 69(2) of the Act provides, however, that the property which is not illegally acquired property may be released from the restraining order and the application for forfeiture "only if the court is satisfied the property is unlikely to be required to satisfy any proceeds assessment order the court may make against the person".

[12] Under s 77 of the Act, a person may be ordered "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".[6] Such an application may be made in relation to, inter alia, "proceeds of an illegal activity, whether acquired in Queensland or elsewhere".[7]

[13] Pursuant to s 82 of the Act, the calculation of the amount of a proceeds assessment order is to be made by reference to the value of property that came into the possession or under the control of the relevant person because of the illegal activity.[8] The court must also have regard to "the value of any benefit provided for the relevant person … at the request, or by the direction, of the relevant person because of the illegal activity".[9]

[14] By virtue of s 84 of the Act, the expenses incurred by a relevant person in relation to the illegal activity in question must be disregarded in making a proceeds assessment order.

[15] Under the Act, "[t]he amount a person is ordered to pay to the State under a proceeds assessment order is a debt payable by the person to the State",[10] and is a

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2 Section 28 of the Act.
3 Section 56 and s 58 of the Act.
4 Section 58(1) of the Act.
5 Section 65 and s 70 of the Act.
6 See also s 78 and s 15 to s 17 of the Act.
7 Section 81(1)(b) of the Act.
8 Section 82(1)(a).
9 Section 82(1)(b) of the Act.
10 Section 86 of the Act.

charge upon "all the interests of the person in property" in favour of the State "to the extent necessary to secure payment of the amount".[11]

[16] Each of the proceedings to which I have referred above is declared by s 8(2) of the Act to be "not a criminal proceeding". An order under the Act requiring the payment of an amount or restraining or forfeiting property "is not a punishment or sentence for any offence".[12]

[17] Section 18 of the Act defines the term "proceeds" as follows:

> "***Proceeds***, in relation to an activity, includes property and another benefit derived because of the activity -
>
> (a) by the person who engaged in the activity; or
>
> (b) by another person at the direction or request, directly or indirectly, of the person who engaged in the activity."

[18] By virtue of Sch 6 to the Act, the term "derived" is defined to include:

> "(a) directly or indirectly derived; and
>
> (b) realised."

[19] Section 21 of the Act defines the expressions "benefit" and "benefit derived" as follows:

> "(1) ***Benefit*** includes service and advantage.
>
> (2) A ***benefit derived*** by a person includes a benefit derived by someone else at the person's request or direction."

[20] The term "illegal activity" is defined in s 15 of the Act to include an offence against the law of Queensland. The term "serious crime related activity" is defined in s 16 of the Act to mean an act which was, when it was done, a "serious criminal offence" which was, in turn, defined in s 17 of the Act to include an indictable offence for which the maximum penalty is at least five years imprisonment.

[21] The term "illegally acquired property" is defined by s 22 of the Act as follows:

> "(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).
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> (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.
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> (5) Also, if the proceeds of dealing with illegally acquired property are credited to or placed in an account, the proceeds do not

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11 Section 88(1) of the Act.

12 Section 9 of the Act. As to the approach to construction of confiscatory legislation of this kind, see *New South Wales Crime Commission v Murchie & Anor* (2000) 49 NSWLR 465 at 472 - 475 [31] - [41].

> lose their identity as proceeds because they are credited to or placed in an account."

**The claims made by the parties**

[22] The State alleged that Mr Brooks had engaged in "serious crime related activity" within the meaning of s 16 of the Act by way of trafficking in illegal drugs and selling firearms. The State applied for the forfeiture of certain property which had earlier been made the subject of a restraining order.

[23] The State also sought a proceeds assessment order in the sum of $1,039,400 in relation to what it alleged were the proceeds of trafficking in cannabis and methylamphetamine between 5 January 2004 and 13 August 2004.

[24] Mr Brooks applied, pursuant to s 68 of the Act, for an exclusion order so as to exclude certain items of property from the restraining order. The effect of such an application being successful would have been to prevent the making of a forfeiture order in respect of the items of property the subject of an exclusion order, subject, of course, to the qualification relating to proceeds assessment orders that is imposed by s 69(2) of the Act.

[25] The State's case in relation to the drug trafficking was that, in the period of January to August 2004, Mr Brooks sold quantities of methylamphetamine and cannabis to, inter alia, an undercover police officer known to Mr Brooks as Fenton. The officer tape-recorded his conversations with Mr Brooks. The State also alleged that Mr Brooks was a party to the production of cannabis during this period at a house owned by him and Ms McCabe at Chambers Flat. A police raid at these premises revealed a hydroponic cannabis growing operation. The State relied upon evidence from Fenton that Mr Brooks told him that he was selling 10 pounds of cannabis a week. It was on the assumption that this assertion was correct that the State quantified its claim for a proceeds assessment order.

[26] The State also relied upon the evidence of Mr West. Mr West had worked for Mr Brooks at Mr Brooks' panel beating business and had also rented a house from Mr Brooks. A transcript of evidence given by Mr West before a Deputy Registrar pursuant to s 38(1)(c) of the Act was tendered at trial. Mr West said that he made lampshades for use in the cannabis growing operation on instructions from Mr Brooks. Mr West's transcript also contained assertions that he saw Mr Brooks selling quantities of cannabis in one pound parcels once or twice over five to six years. He said that Mr Brooks made sales of smaller parcels of cannabis to between two to six people per week and, towards the later part of Mr Brooks' operation, 10 people per week. These customers, according to Mr West, came to Mr Brooks' panel beating shop and left the shop with sandwich bags full of marijuana.

[27] The State's case also included, by late addition, the contention that Mr Brooks had, in contravention of s 408C of the *Criminal Code*, fraudulently procured a loan from a bank to finance the acquisition by him and his wife of an apartment at Toowong. In September 2003, Mr Brooks and Ms McCabe purchased the apartment at Toowong for $600,000. They lived there until they sold it in January 2005. They borrowed the whole amount of the purchase price from a bank, and the loan also served to meet the costs of the transaction. The State alleged that this loan was procured as a result of Mr Brooks misrepresenting his income to the bank, and the State claimed the gross profit realised on the sale as proceeds of that fraud. It is to

be noted that Mr Brooks said at his examination under s 38(1)(c) of the Act, a record of which was tendered at the trial, that the purpose of the acquisition was profit on resale. He said: "Well, the intention was to make money on it … Was to buy it and sell it." The property was resold for $699,999. The total borrowing was $631,000 of which $456,000 was secured on the Toowong apartment and $175,000 was secured on premises at Archer Court. This latter loan was repaid before the resale. The actual cost of the apartment was $600,000. The balance of the loan of $631,000 was used to defray legal costs and other expenses incurred in the acquisition of the unit.

[28] Mr Brooks sought to have the apartment and its proceeds excluded from his "illegally acquired property". The apartment was sold by Mr Brooks and Ms McCabe, and the proceeds were used to acquire a boat which was the subject of the restraining order. The State sought forfeiture of the boat, and a proceeds assessment order in the sum of $99,999 being the net proceeds of the sale of the Toowong apartment. Mr Brooks resisted the State's application for a proceeds assessment order, and sought an exclusion order in respect of the boat to preclude its forfeiture.

**The decision below**

[29] The learned trial judge did not accept that Mr Brooks' drug trafficking operation was likely to have produced proceeds of the order of $1 million as the State asserted. His Honour found that, as at mid-August 2004, the assets owned by Mr Brooks and Ms McCabe were largely derived from successful and legitimate investments in real estate.[13]

[30] His Honour did conclude, however, that a Toyota HiLux utility acquired by Mr Brooks in September 2004 for $4,000 was purchased with cash which his Honour was not satisfied was not the proceeds of criminal activity. Accordingly, Mr Brooks failed to discharge the onus which was upon him of showing that the HiLux was not acquired using illegally acquired property, namely the proceeds of drug sales.[14] His Honour ordered that the HiLux be forfeited to the State.[15]

[31] On the basis that, as Mr West had said, in the latter part of Mr Brooks' trafficking operation, there were, apart from Fenton, about 10 customers per week buying an ounce of cannabis at a price of $250, the trial judge held that an average turnover of about $2,500 per week was likely, giving a sum of $65,000 over six months. The total proceeds, including the sum of $36,700 being proceeds of the sale of drugs and a firearm to Fenton, were assessed at $101,700.[16] Accordingly, his Honour made a proceeds assessment order in this sum.

[32] As to the Toowong apartment, the trial judge found that, more probably than not, Mr Brooks obtained the loan by dishonestly misrepresenting his income to the bank. As a result, Mr Brooks was found to have contravened s 408C of the *Criminal Code*.[17]

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13 *State of Qld v Brooks*, unreported, No 1763 of 2005, 21 December 2005 at [30].
14 *State of Qld v Brooks*, unreported, No 1763 of 2005, 21 December 2005 at [31].
15 *State of Qld v Brooks*, unreported, No 1763 of 2005, 21 December 2005 at [82].
16 *State of Qld v Brooks*, unreported, No 1763 of 2005, 21 December 2005 at [48].
17 *State of Qld v Brooks*, unreported, No 1763 of 2005, 21 December 2005 at [7].

[33] The learned trial judge held that the Toowong apartment was not acquired illegally. His Honour held that it was neither illegally acquired property nor the proceeds of illegal activity. Consequently, the proceeds of sale of that apartment and the boat purchased with those proceeds were also not illegally acquired property.[18] His Honour, therefore, made an exclusion order in respect of the boat, and declined to make a proceeds assessment order in respect of the profit on resale of the apartment.

[34] His Honour reached this conclusion on the basis that the loan which Mr Brooks fraudulently obtained from the bank was not "property" within the meaning of the Act but "credit". As a result, the apartment purchased with that "credit" was not "illegally acquired property". His Honour took the view that s 22 of the Act drew a crucial distinction "between on the one hand, the proceeds of an illegal activity and, on the other, that which is acquired with the use of such proceeds".[19] This conclusion was regarded by his Honour as determinative against each of the State's applications for forfeiture of the boat and a proceeds assessment order.

[35] It is necessary to set out in full the reasons for the trial judge's conclusion on this point. In relation to the State's application for the forfeiture of the boat, his Honour said:[20]

> "As I have found, this was purchased in February 2005 by funds drawn from the (larger) Suncorp account. The State accepts that the source of the funds was the proceeds of sale of the Toowong apartment. But it argues that the apartment was paid for by loans procured from what I have found was the fraud of Mr Brooks in contravention of s 408C of the *Code*. Its case is that the apartment was illegally acquired property in terms of s 22(1) in that the apartment was itself all or part of the proceeds of an illegal activity. It is not argued that Mr Brooks was in some way in receipt of illegally acquired property in the form of the monies advanced, which would make the apartment purchased with those monies illegally acquired property by s 22(2)(b). There was no point at which Mr Brooks had the money advanced standing to his credit in a bank account, such that there was at that point a fund of money owned by him and thereby constituting property acquired by him. Instead the State's case is in reliance upon s 22(1).
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> As Mr Brooks said in his examination, he was able to obtain the finance from Adelaide Bank Limited only by misrepresenting his income. The evidence from the Bank's witness is to the effect that it would not have lent this money if his income had been truly declared. And the whole of the purchase price was financed by Adelaide Bank. In this way there is a logical factual connection between his fraud and the acquisition of the apartment. In terms of s 18, the State argues that the apartment was the *proceeds* of the fraud, because it was property 'derived because of' the fraud. The Act defines the term 'derived' to include that which is 'directly or indirectly derived'. (Schedule 6) The application of that definition of 'proceeds', within s 18, to a particular case is an issue of causation involving questions of degree. And so for Mr Brooks it is argued

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18 See *State of Qld v Brooks*, unreported, No 1763 of 2005, 21 December 2005 at [66] - [67].

19 *State of Qld v Brooks*, unreported, No 1763 of 2005, 21 December 2005 at [62].

20 *State of Qld v Brooks*, unreported, No 1763 of 2005, 21 December 2005 at [60] - [67].

that the derivation, i.e. the acquisition, of the apartment was too remote from any fraud against the Bank. But at what point should the line be drawn, so that property whose acquisition is causally related to a crime cannot be described as the proceeds of that crime?

The answer is indicated by the structure of s 22. Within that section there is an acknowledged distinction between on the one hand, the proceeds of an illegal activity and, on the other, that which is acquired with the use of such proceeds. There is a recognition that not all property whose acquisition is causally related to criminal activity itself constitutes the proceeds of that activity. It is for that reason that s 22(2) extends the ambit of what would otherwise constitute illegally acquired property. But for s 22(2), illegally acquired property would encompass only that property whose acquisition itself was illegal. An obvious example would be stolen property. Another would be property obtained from the illegal supply of … dangerous drugs; the money received for that supply would be property acquired in the course of the performance of a criminal act. By contrast here, no law proscribed the *acquisition* of the apartment.

Had Mr Brooks stolen money which he then used in payment for the apartment, it would be illegally acquired property, not because it was all or part of the proceeds of his theft (s 22(1)), but because the apartment was acquired using the proceeds of the theft (s 22(2)(b)). Similarly, had he used the proceeds of drug sales in payment for the apartment, the apartment would be illegally acquired property by s 22(2)(b). The apartment was not illegally acquired in the sense which would engage s 22(1).

The State does not argue that [the apartment] was illegally acquired property by the operation of s 22(2). That is because the apartment was not the proceeds of dealing with illegally acquired property and nor was it acquired using illegally acquired property. What the Bank provided was not property but credit. That was the benefit derived by Mr Brooks from his contravention of s 408C. In that way it would be within the definition of 'proceeds' in s 18. But according to s 22(2) there must be some dealing with or use of illegally acquired *property*; and to be illegally acquired property within s 22(1), the subject matter must first be *property*. Subsection 22(1) does not deem a benefit, not of itself property, to be property for the purposes of 22(1). 'Property' is defined by s 19 of this Act and by s 36 of the *Acts Interpretation Act* 1954 (Qld). Whilst the provision of credit does constitute property for the purposes of s 408C of the *Criminal Code*, it is not deemed to be property for the purposes of the *Criminal Proceeds Confiscation Act*. So the credit provided by Adelaide Bank does not constitute 'illegally acquired property' for the purposes of s 22(2) and the State is right not to rely upon that subsection.

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It follows that Mr Brooks has proved that the Toowong apartment was not illegally acquired property. In turn it is proved that its proceeds of sale were not illegally acquired property. Given the State's concession that the boat was purchased from those proceeds,

> it follows that he has proved that the boat was not illegally acquired property and that it should be excluded, subject to the operation of s 69(2).
>
> It also follows that there is no case for a proceeds assessment order in relation to the fraud offence. Because the apartment itself was not the proceeds of the fraud, neither was the profit upon its resale the proceeds of that offence." (emphasis in original; some citations footnoted in original)

[36] I shall return to a discussion of these reasons after dealing with Mr Brooks' cross-appeal. Before turning to the cross-appeal, I note that the learned primary judge ordered Mr Brooks to pay the costs of the State save for its costs of three days of the trial, as to which his Honour made no order as to costs. This order reflected his Honour's view as to the relative success of the parties.[21]

**Mr Brooks' cross-appeal**

[37] The transcript of Mr West's examination under s 38(1)(c) of the Act was admitted under s 92(4)(a) of the *Evidence Act 1977* (Qld). Mr West was called as a witness at trial, and was available for cross-examination concerning the contents of his transcript. Mr Brooks contends that the use made by the learned trial judge of the transcript of Mr West's evidence was unfair to Mr Brooks, and that Mr West's evidence was not sufficient to sustain the trial judge's conclusions as to the level of Mr Brooks' trafficking in drugs.[22]

[38] On Mr Brooks' behalf, it was said that a number of the questions put at the examination before the Deputy Registrar were leading questions which might not have been allowed had they been asked of Mr West at trial. Attention was drawn to that part of Mr West's evidence which was to the effect that up to 10 people per week had purchased drugs from Mr Brooks. Reference to the transcript, however, shows that Mr West's statement that 10 people per week came to Mr Brooks' panel beating shop for purposes not associated with the panel beating business was not elicited by leading questions.

[39] It was also submitted on behalf of Mr Brooks that the learned judge was not entitled to fill gaps in the State's case by supposition, and that is no doubt correct; but it is clear that his Honour acted upon the evidence of Mr West without any need to resort to supposition as a gap-filling measure.

[40] It was submitted that the evidence of Mr West was unreliable, especially so far as the level of sales of drugs achieved by Mr Brooks. This unreliability, it was said, was supported by Mr West's admission in cross-examination that his recollection of the relevant time was poor. On the other hand, Mr West's evidence that he saw 10 customers per week leaving Mr Brooks' panel beating shop with sandwich bags of marijuana was not challenged in cross-examination, and he did not disavow this recollection. That Mr West's evidence was not more detailed and forthcoming may be readily explicable on the basis that Mr West was an accomplice unwilling to give evidence against Mr Brooks.

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21 *State of Queensland v Brooks & Anor* [2006] QSC 8 at [19]. The orders as to costs were delivered on 2 February 2006; the original judgment was delivered on 21 December 2005.

22 Cf *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 450.

[41] Mr West's evidence was uncontradicted. Mr Brooks did not give evidence at the trial, but the transcript of his examination under s 38(1)(c) of the Act was tendered. While Mr Brooks' transcript contained statements which are relevant to the State's appeal, it did not contradict Mr West's evidence on the point presently under discussion.

[42] Furthermore, Mr West's evidence did not stand alone. There was evidence of admissions made by Mr Brooks to Fenton that he was engaged in a level of trading which involved the sale of 10 pounds of marijuana per week. His Honour was not prepared to act upon this boastful confession to make the proceeds assessment order in excess of $1,000,000 sought by the State; but it may well be that this evidence gave his Honour sufficient confidence to act upon Mr West's evidence.

[43] Next, it was argued that the trial judge's conclusion in relation to the status of the HiLux as illegally acquired property was contrary to the weight of the evidence. This submission proceeds on a misunderstanding of the operation of the Act. The trial judge found that Mr Brooks had engaged in serious crime related activity which generated cash from which the HiLux may have been purchased. Section 68 of the Act obliged Mr Brooks to prove that "it is more probable than not that the property to which the application relates is not illegally acquired property". Mr Brooks gave no evidence by which he might have discharged the burden of proof which s 68 of the Act cast upon him.

[44] Mr Brooks' cross-appeal in relation to the issues discussed above should be dismissed.

**The costs order**

[45] Mr Brooks also seeks to challenge the costs order made by the trial judge on the ground that the discretion as to costs was wrongly exercised because Mr Brooks had been successful in the major issues raised in the proceedings. In truth, of course, the State was successful in the proceeding. It obtained a proceeds assessment order and an order for forfeiture from the court. The State's claims could not have been brought in a lower court with jurisdiction over the amount of the judgment obtained by the State. The question is really whether there was good reason why the costs should not have followed the event of the State's success.[23]

[46] Until the ninth day of the nine day hearing, the trial was conducted on the footing that Mr Brooks contested the State's case that he had engaged in "serious crime related activity". A large body of evidence was led by the State directed to this issue. A considerable amount of time was taken up in the cross-examination of witnesses called by the State on this issue.

[47] On Mr Brooks' behalf, it is said that a number of the State's witnesses who gave evidence of Mr Brooks' criminal activity were either not cross-examined or were not extensively cross-examined. Nevertheless, it was only on the ninth day of the trial that an explicit concession was made on Mr Brooks' behalf that he had, indeed, engaged in serious crime related activity; and at no time did Mr Brooks admit his liability to a proceeds assessment order.

[48] On behalf of Mr Brooks, it was said that the State's claim was exorbitant and was bolstered by late amendments. It was also said that the expert evidence relating to

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[23] Rule 689 of the *Uniform Civil Procedure Rules 1999* (Qld).

Mr Brooks' financial affairs was not gainsaid by evidence from the State. But all this fails to recognise that the State's applications were, in the end, successful. Mr Brooks resisted throughout the trial to the State's case in relation to the extent of his drug trafficking. In that regard, the State succeeded to a greater extent than that which Mr Brooks was ever willing formally to concede. Moreover, and importantly, the State's proceeds assessment application resulted in a greater measure of success than was reflected in offers made by Mr Brooks under Ch 9 Pt 5 of the *Uniform Civil Procedure Rules 1999* (Qld). Mr Brooks' offer was to pay $45,000 in full settlement. He made no offer in relation to forfeiture of property or as to the costs of the proceedings.

[49] It is perhaps not entirely irrelevant here that the State's failure to achieve a greater measure of success in its proceeds assessment application resulted from the trial judge's refusal to regard as reliable admissions made by Mr Brooks to Fenton as to the level of trafficking in which Mr Brooks was engaged. Thus, a considerable period of the trial was devoted to the attempts by Mr Brooks, which were successful in the end, to prove the unreliability of statements actually made by Mr Brooks himself. It is not entirely unfair that a person who sets the hares loose should pay for running them down.

[50] In my opinion, it was not demonstrated on Mr Brooks' behalf that the trial judge's discretion as to costs was exercised upon an erroneous appreciation of the relative success of each side or by reference to irrelevant considerations. The cross-appeal as to costs should be dismissed.

**The State's appeal**

[51] The State submitted that the learned trial judge erred in failing to conclude that the Toowong apartment, which had been acquired with the loan fraudulently procured by Mr Brooks, was illegally acquired property. The State argued that Mr Brooks' fraud upon the bank provided him with a benefit, namely the provision of the funds to complete the acquisition of the Toowong apartment.

[52] The State's argument in this regard was that the funds provided by the bank to enable the acquisition of the Toowong apartment to be completed were a benefit, in that they were a service or advantage. That service or advantage was derived because of Mr Brooks' contravention of s 408C of the *Criminal Code*. That service or advantage was, therefore, proceeds of that illegal activity within s 18 of the Act, and "illegally acquired property" within the meaning of s 22(1) of the Act.

[53] The false step in this argument is that it fails to recognise that s 22 of the Act does not read: "'Illegally acquired property' is all or part of the proceeds of an illegal activity." As the learned trial judge observed, s 22 defines "illegally acquired property" as "property" which can be said to be "all or part of the proceeds of an illegal activity". The State's argument does not accommodate the need to identify, as the first step in the application of s 22, an item of "property" which is said to be part of the proceeds of illegal activity. While the "proceeds of illegal activity" may include a benefit other than property, "illegally acquired property" must be "property" rather than "another benefit".

[54] The second argument advanced by the State in this Court was that the learned primary judge erred in failing to appreciate that a proceeds assessment order may be made in respect of the value of the proceeds derived from the person's illegal

activity even if those proceeds are not themselves "illegally acquired property". The State argued that his Honour erred in limiting the availability of a proceeds assessment order to cases where those proceeds also meet the definition of "illegally acquired property". The State pointed out that s 18 of the Act defines the term "proceeds" so as to include both "property" and "another benefit", and that the provisions of the Act relating to proceeds assessment orders do not assume or require that the proceeds must be "illegally acquired property" within the meaning of s 22 of the Act.

[55] An argument in these terms was not specifically adverted to by his Honour, and it seems that it may not have been put to him in these terms. It seems that the State's case, as put to his Honour, was that the apartment was, indeed, "illegally acquired property".[24] To the extent that the issue is one of law, the circumstance that it was not agitated at first instance is not, as a matter of procedural fairness, an obstacle in the way of this Court giving effect to the construction of the Act for which the State now contends.[25] To the extent that matters of fact are involved in the argument, they do not depend on disputed evidence. Mr Brooks, in his statement given pursuant to s 38(1)(c) of the Act, stated clearly that his intention in acquiring the Toowong apartment was to make a profit by reselling it. In any event, it was not suggested on behalf of Mr Brooks that this argument was not open to the State on appeal. It is, therefore, an argument which this Court should address.

[56] In my respectful opinion, the State's second argument should be accepted. My reasons for this conclusion may be summarised briefly. As a matter of fact, the funds provided by the bank were used by Mr Brooks to acquire the Toowong apartment. In a legal sense, this is also true. In the eye of the law, the funds advanced by the bank to Mr Brooks were paid to the vendor of the unit, no doubt at Mr Brooks' direction, to discharge Mr Brooks' obligation to pay the purchase price so as to entitle him to a transfer of the apartment as purchaser. Mr Brooks' illegal activity was informed by an intention to profit from it. Mr Brooks stated at his examination that the apartment was purchased to make a capital gain on resale. As the trial judge found, the loan was necessary to fund the purchase. The loan thus provided the occasion for the making of the profit on resale which Mr Brooks intended to make. Any profit on the sale of the apartment purchased with that purpose by funds fraudulently obtained for that purpose is, as a matter of ordinary language, the proceeds of the fraud, in that it is a benefit derived from the fraud. I now proceed to explain more fully the bases for this summary statement of my conclusions.

[57] It may be accepted that confiscatory legislation such as the Act will be "enforced only where the intention of the legislature is clear",[26] but where the intention is clear it must be given effect.

[58] There is, in my view, no stretching of language involved in reaching the conclusion that the profit realised on the resale of the apartment represents the value of the proceeds of Mr Brooks' fraud. This conclusion is fully in accord with the statement in s 4(1) of the Act where the "main object of the Act" is stated to be "to remove the financial gain … associated with illegal activity …". There can be no doubt that

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24 *State of Qld v Brooks*, unreported, No 1763 of 2005, 21 December 2005 at [60].

25 *Coulton v Holcombe* (1986) 162 CLR 1 at 7 - 9; *Allders International Pty Ltd v Commissioner of State Revenue (Vic)* (1996) 186 CLR 630 at 666.

26 *DPP (Cth) v Jeffery* (1992) 58 A Crim R 310 at 320.

this gain was associated with the fraud on the bank. More importantly, the concern of the Act is to capture the proceeds of "illegal activity". This concern to capture the proceeds of illegal activity should not be defeated by a narrow focus on what is obtained directly in the commission of a crime. The expansion of the definition of the expression "derived" to include "indirectly derived" is quite inconsistent with such a narrow focus. It is sufficiently broad to encompass a combination of legal and illegal activity as the cause of a benefit within the meaning of s 18 of the Act. A thief who deposits stolen money with a bank could not be heard to say that the interest on the deposit is not the proceeds of his theft merely because it was also, and more directly, derived from a lawful deposit. So Mr Brooks cannot claim that the profit he intended to make was not the proceeds of his fraud merely because part of his scheme involved the lawful purchase and sale of the apartment.

[59] I am, therefore, of the opinion that while it is true to say, as the learned trial judge did, that "the apartment was not illegally acquired in the sense which would engage s 22(1)",[27] the profit on resale was a benefit in respect of which a proceeds assessment order might be made.

[60] The Act does not insist upon a conclusion that proceeds of illegal activity must be illegally acquired property if a proceeds assessment order is to be made. It is apparent from the second and third paragraphs of the reasons of the learned trial judge which I have set out above that his Honour regarded the definition of "proceeds" in s 18 of the Act as raising an "issue of causation involving questions of degree", and that s 22 of the Act provided the answer to the question whether "property whose acquisition is causally related to a crime cannot be described as the proceeds of that crime".[28] But s 22 is concerned to identify illegally acquired property for the purposes of those provisions of ch 2 of the Act which operate in respect of such property; it is not concerned to provide instruction as to the meaning of s 18. The definition in s 22 of "illegally acquired property" is not linked by text or context to the provisions of the Act which fix the scope of proceeds assessment orders.[29] As has been seen, s 18 of the Act defines the term "proceeds" so as to include "property and **another benefit**". (emphasis added)

[61] In my respectful opinion, to approach the question whether property whose acquisition is causally related to illegal activity is accurately described as the proceeds of that illegal activity by reference to the narrower concept of "illegally acquired property" in s 22 of the Act is to be distracted from applying the language of the relevant statutory provisions. The relevant provisions concern the proceeds of illegal activity and their assessment. In this respect, s 18 is crucial. It encompasses benefits other than property, so that it is no answer to a proceeds assessment application in the present case to say that the loan obtained by fraud was not property but a credit.

[62] The relevant question, so far as the making of a proceeds assessment order is concerned, is that indicated by s 18 and s 77 of the Act. That question is whether the profit realised upon the sale of the Toowong apartment is a benefit, ie a "service" or an "advantage" derived by Mr Brooks because of Mr Brooks' fraud on the bank. That question should, in my view, be answered in the affirmative having regard to the undisputed facts of this case.

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27 *State of Qld v Brooks*, unreported, No 1763 of 2005, 21 December 2005 at [63].

28 *State of Qld v Brooks*, unreported, No 1763 of 2005, 21 December 2005 at [61] - [62].

29 Section 77 to s 84 of the Act.

[63] For the purposes of s 18 and s 77 of the Act, the fraud on the bank was not an activity which can sensibly be regarded independently of the purpose which informed it and its consequences. The acquisition of the apartment occurred because Mr Brooks' fraud on the bank enabled him to pay the price of the apartment. By his own evidence, Mr Brooks intended to realise, on resale of the apartment, an amount greater than the price he had paid for the apartment. That objective was achieved. The gain on resale was an advantage which he sought to derive, and did derive, because of his fraud on the bank: without his fraud, he would not have had the unit to sell. The purpose which informed his fraud was to make a gain on resale, and he achieved that purpose. That the achievement of that purpose was more expensive than he may have intended is a matter to which s 84 of the Act is relevant, and I will discuss that point directly.

[64] There may be cases where s 18 does not facilitate an expanded operation of s 77 because the causal connection between the benefit or advantage which is derived is too tenuous to satisfy s 18, for example, where the illegal activity is not an integral part of the plan which produces the benefit. There may be cases where an unlooked for, or accidental, gain from fraudulent activity is so remote from the fraud that it cannot sensibly be said that the advantage was derived from the fraud. Questions of fact and degree may need to be addressed. The point to be emphasised for present purposes is that the crucial question is as to the application of s 18 of the Act to the particular facts of the case. Section 18 must be understood and applied in its own terms, not through the prism of s 22.

[65] The next question to be addressed is the value of the benefit which Mr Brooks derived because of his fraud. Section 84 of the Act requires that the expenses or outgoings incurred by Mr Brooks in relation to his fraud be disregarded in determining the value of the benefit derived by Mr Brooks.

[66] On Mr Brooks' behalf, it is submitted that the profit realised on the sale of the Toowong apartment must be established by taking into account the expenses involved in servicing the fraudulently obtained loan and in buying and selling the apartment. That submission depends on whether it is correct to say, as the State says, that these expenses are required by s 84 of the Act to be disregarded on the basis that they are "expenses incurred" by Mr Brooks "in relation to the illegal activity".

[67] It may be accepted that, although the phrase "in relation to" is an expression of wide ambit, it should be taken, in the context of the Act, to require a direct or substantial connection between the expenses and the illegal activity which has produced the benefit in question.[30] In this case, the expenses in question were an integral part of the plan which was effected by Mr Brooks' illegal activity. By virtue of Mr Brooks' fraudulent representations, he obtained credit from the bank. That "credit" was a loan under which he assumed obligations to service the loan. The expenses involved in discharging these obligations, such as interest payable under the loan, were expenses which he was necessarily obliged to incur to obtain the loan in order to purchase the apartment. Acceptance by Mr Brooks of the obligation to meet these expenses was necessary to bring his fraud to completion: if he had not agreed to the obligation to pay interest, he could not have persuaded the bank to lend him the money, however persuasive his false inducements might otherwise have been.

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30 *Joye v Beach Petroleum NL & Cortaus Ltd (in liq)* (1996) 67 FCR 275 at 285.

Similarly, the transaction costs of buying and selling were related as necessary elements of the profit making intention to the fraud. I would, therefore, reject Mr Brooks' submission that these expenses must be taken into account in valuing the proceeds of the fraud.

[68] It might be argued that, because Mr Brooks was obliged to repay a loan of $631,000 and to pay interest on that loan, the value of the benefit derived by Mr Brooks from his illegal activity cannot be ascertained until the $31,000 (which did not represent part of the purchase price of the Toowong unit) and the interest paid on the loan are taken into account in Mr Brooks' favour. In this regard, it might be argued that these expenses are expenses incurred in relation to the proceeds derived because of an illegal activity rather than expenses incurred "in relation to the illegal activity". In my respectful opinion, these arguments should not be accepted.

[69] The illegal activity was not the making of the fraudulent misrepresentation; it was the procuring of the loan by means of the dishonest representation. The object of that illegal activity was the realisation of a gain on the purchase and sale of the Toowong apartment. Expenses incurred in relation to the procuring of such a loan will, as a matter of business, inevitably be expenses which also relate to the proceeds of the plan effected by procuring the loan. It is illogical to say that, because an expense may, with perfect accuracy, be described as an expense incurred in relation to the proceeds derived because of an illegal activity, that expense may not also be described, with perfect accuracy, as an expense incurred "in relation to the illegal activity". It is hardly surprising that neither s 84, nor any other part of the Act, operates by reference to an express dichotomy between expenses of one description and expenses of the other. Such a distinction would be impossible to maintain in practice.

[70] Once it is accepted, as I think it must be, that the obligations incurred by Mr Brooks in relation to the loan were integral to the illegal activity involved in procuring the loan, it follows that interest payable on the loan was an expense incurred in relation to that illegal activity. The transaction costs which Mr Brooks incurred in acquiring the Toowong apartment were also a necessary element of the plan effected by the procuring of the loan. Section 84 of the Act would clearly have required those transaction costs to be ignored in ascertaining the value of Mr Brooks' gain on resale if those costs had not been funded by the loan. *A fortiori*, they should be ignored where they were funded by the loan because their connection with the dishonestly procured loan is even closer.

[71] The actual amount of the loan was irrelevant to the benefit derived by Mr Brooks from his fraud on the bank. He fraudulently borrowed a principal sum of $631,000, and he repaid a principal sum of $631,000. The principal of the loan can, therefore, be ignored in determining the value of the benefit Mr Brooks derived from the fraudulently obtained loan. Because of that fraudulent borrowing, Mr Brooks was able to derive a gain by realising the increase in the value of the apartment. Section 84 of the Act requires that expenses incurred by him which were necessarily associated with the fraudulent borrowing should be ignored in ascertaining the value of the benefit he derived from it. That means that the interest incurred in relation to the loan should be ignored in determining the value of the benefit obtained by the fraudulent borrowing.

[72] On Mr Brooks' behalf, it was next submitted that the cost incurred in furnishing the Toowong apartment should also be taken into account in determining the value of the advantage derived by Mr Brooks' fraud. Having regard to the only evidence on this point, which is Mr Brooks' evidence at his examination, this submission should be accepted.

[73] Mr Brooks was adamant that he told the purchaser that he would not sell the furniture in question for under $15,000. This evidence may not be compelling, but it is the only evidence on the point. It appears that the furniture was installed to enable Mr Brooks and Ms McCabe to live in the unit. The installation of the furniture was, therefore, neither a necessary nor even incidental aspect of the profit making intention. The amount of $15,000 should be taken into account in fixing the quantum of the proceeds assessment order.

[74] It was further submitted on Mr Brooks' behalf that Ms McCabe's interest in the Toowong apartment must also be brought into account. Section 18(b) and s 82(1)(a) or (b) of the Act provides the answer to this submission: her interest should not be taken into account so as to reduce the value of the benefit derived because of the illegal activity. It is to be borne in mind that the loan and acquisition of the Toowong unit were arranged by Mr Brooks.

**Mr Brooks' notice of contention**

[75] Mr Brooks also advanced three arguments pursuant to a notice of contention by which he sought to maintain the decision of the trial judge on this issue. First, he sought to argue that the apartment ceased to be "illegally acquired property" by virtue of s 26(a) of the Act because neither the bank nor the vendor was aware of any criminal activity by Mr Brooks. This argument must fail because it fails to focus upon the property the subject of the State's application which is, of course, the property acquired by Mr Brooks and Ms McCabe. In any event, for the reasons set out above, this argument is entirely irrelevant to the making of a proceeds assessment order.

[76] Secondly, Mr Brooks sought to argue that the "illegally acquired property" should be limited to the profit made by the respondent. The submission also fails for the reasons set out above.

[77] Thirdly, Mr Brooks asserted that this Court should refuse to make an order in relation to the Toowong apartment and its proceeds because it is not in the public interest to do so. This submission is based on the contention that:

> "the Act is not intended to catch a one-off false statement in a loan application, where the lender is protected by a mortgage security, and even more so, in cases where the mortgage has been repaid."

[78] There is no support for this third submission in the text of the Act. It is contrary to the main object of the Act expressed in s 4(1) of the Act.

**Conclusion and orders**

[79] In my view, the appeal by the State should be allowed by adding to the proceeds assessment order made by the learned primary judge the sum of $84,999 (being the $99,999 profit made by Mr Brooks on the sale of the Toowong apartment minus the $15,000 cost of furnishing the apartment). Mr Brooks should pay the State's costs of the appeal to be assessed.

[80] The cross-appeal should be dismissed with costs.

[81] **JONES J:** I have read the reasons prepared by Jerrard JA and Keane JA. As I agree generally with the reasons of Keane JA and the orders he proposes, I will make some comment on the only point of divergence between their separate reasons.

[82] In the scheme of the *Criminal Proceeds Confiscation Act 2002* (Qld), Chapter 2 Part 5 dealing with proceeds assessment orders is quite distinct from the other forms of relief which relate specifically to property.

[83] A proceeds assessment order requires the person against whom it is made "to pay to the State the value of proceeds derived from illegal activity" (emphasis added). By definition (s 18) "proceeds" in relation to an activity includes property and other benefit.

[84] The focus of this part of the appeal is on the two questions – firstly, what is the illegal activity and secondly, what is the value of the benefit derived from it? In assessing that value, "any expenses or outgoings incurred in relation to the illegal activity must be disregarded" (s 84).

[85] The illegal activity in my view is the obtaining of the loan by fraud. However morally reprehensible it might be to make a misrepresentation, it only amounts to illegal activity if it causes another person, in reliance upon it, to act adversely to some interest. Section 408C of the *Criminal Code* is illustrative of this point. The offence of fraud requires, in addition to dishonesty, the application of property to one's own use, the obtaining of another's property, causing detriment or inducing others to deliver property, doing or abstaining from doing any act by which a benefit will be gained. This requirement of there being action to accompany the dishonest intent was discussed by the Court of Appeal in *R v Easton*[31]. Macrossan CJ said (at p 533):-

> "Under s 408C of the Code an intention of a certain kind, namely, a dishonest one is a necessary element of the offence. An impression is created that the offence which is constituted by the section will depend on circumstances that would, at least in some ways, be akin to those involved in the tort of conversion. In the Code section the action will, in addition, be accompanied by a dishonest intent.
>
> …
>
> The mere formation of a dishonest intention or plan will not be enough under s 408C – something amounting to an application to use must occur."

Pincus JA and Demack J said (at p 538):

> "In our view, a claim or assertion of ownership of property will not ordinarily be able to be described as an application of that property to one's own use…The point may, in our view, be illustrated by considering the application of the section to a physical chattel. If a person occupying the driver's seat of a motor car says dishonestly, "This car is mine", that will not, at least in general, amount to an

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[31] [1994] 1 QdR 531

> application of the car to the use of the person making the false statement."

To similar effect in civil law are the requirements of reliance upon the representation (*Attorney-General (NSW) v Peters*)[32] and foreseeable damage (*Gould v Vaggelas*)[33].

[86] Thus, I take the view that the illegal activity relied upon in this case was complete only when benefit was gained. In this instance this was when the loan funds were made available.

[87] The benefit derived by the respondent as a result was the difference between the principal which was required to be repaid to the lender and the sale price received. The costs of borrowing – interest, stamp duty, legal fees etc – fall within the ambit of "expenses or outgoings". They were necessarily incurred in order for the loan funds to be made available and thus clearly expended "in relation to the illegal activity of receiving the loan". I take the view, therefore, that they are expenses of the kind which by virtue of s 84 of the Act must be disregarded. I accept that the cost of the furniture was a separate matter to the fraudulent obtaining of the loan funds and that the inclusion of $15,000 in this connection in the sale price of the unit should be taken into account.

[88] I agree with the orders proposed by Keane JA.

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32 (1924) 34 CLR 146

33 (1984) 157 CLR 215