SUPREME COURT OF QUEENSLAND

CITATION:	*CDPP v Mare & Ors* [2008] QCA 373
PARTIES:	**COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS** (applicant/appellant) v **JOHN DALZELL MARE** (first respondent) **GARAH HILLS PTY LTD** ACN 101 383 751 (second respondent) **WDPT INVESTMENTS LIMITED** (third respondent) **VANUATU POOLED INVESTMENT MANAGERS LIMITED** (fourth respondent) **STAR GATE INVESTMENTS LIMITED** (fifth respondent) **SILK ROAD TRADERS PTY LTD** ACN 103 778 525 (sixth respondent)
FILE NO/S:	Appeal No 5573 of 2008 DC No 2446 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	28 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	26 September 2008
JUDGES:	Fraser JA, Mackenzie AJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal and set aside the orders of the primary judge dated 6 June 2008.** **2. Instead of those orders:** **(a) Grant the application for amendment filed by the Commonwealth Director of Public Prosecutions on 3 March 2008.** **(b) Dismiss the application filed by the second**

respondent and sixth respondent on 28 April 2008.

(c) The respondents pay the Commonwealth Director of Public Prosecutions' costs of and incidental to both applications, to be assessed on the standard basis.

3. The respondents pay the appellant's costs of the appeal to be assessed on the standard basis.

CATCHWORDS: CRIMINAL LAW – PROCEDURE – CONFISCATION OF PROCEEDS OF CRIME AND RELATED MATTERS – FORFEITURE OR CONFISCATION – *Proceeds of Crime Act* 2002 (Cth) – where restraining orders made pursuant to s 18 of the Act – where s 45(2) provided that unless a confiscation order had been sought within 28 days after the making of the restraining order the restraining order would expire – where appellant brought an application for the forfeiture of property pursuant to s 49(1) of the Act, a section which applied only when a restraining order had been made under s 19 of the Act – where the second and sixth respondents sought to have the appellant's application struck out on the basis that the appellant should have brought a confiscation order under s 47(1) of the Act – where the appellant sought leave to amend the appellant's application under s 62 of the Act by substituting s 47(1) instead of s 49(1) – where the primary judge found that the appellant had not brought an application for a confiscation order within the terms of s 45(2) of the Act – where the primary judge refused the appellant's application under s 62 – whether the primary judge erred by striking out the appellant's application for a forfeiture order – whether the primary judge erred in rejecting the appellant's application to amend under s 62

Crimes Act 1914 (Cth), s 29D
Judiciary Act 1903 (Cth), s 79
Proceeds of Crime Act 2002 (Cth), s 18, s 19, s 20, s 33, s 34, s 36, s 45, s 47, s 49, s 59, s 62, s 66, s 388
Supreme Court Act 1995 (Qld), s 53
Uniform Civil Procedure Rules 1999 (Qld), r 26, r 375, r 387, r 658

Agtrack (NT) Pty Limited v Hatfield (2005) 223 CLR 251; [2005] HCA 38, followed
Berowra Holdings Pty Ltd v Gordon (2006) 225 CLR 364; [2006] HCA 32, cited
Commonwealth Director of Public Prosecutions v Mare & Ors, unreported, Queensland District Court, DC No 349 of 2006, 6 June 2008, reversed
Cropper v Smith (1884) 26 Ch D 700, cited
Leotta v Public Transport Commission (NSW) (1976) 9 ALR 437, cited
Murphy v Farmer (1988) 165 CLR 19; [1988] HCA 31, cited

Project Blue Sky Inc & Ors v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
Trustee of the Property of Geoffrey Mahony and Deborah Mahony & Ors v McElroy & Ors [2004] 1 Qd R 667; [2003] QCA 208, cited.

COUNSEL: P J Flanagan SC, with J M Horton, for the appellant
J Dearn for the first, third, fourth and fifth respondents
P J Davis SC, with A E Cappellano, for the second and sixth respondents

SOLICITORS: Director of Public Prosecutions (Commonwealth) for the appellant
Eaton Lawyers for the first, third, fourth and fifth respondents
Russo Lawyers for the second and sixth respondents

[1] **FRASER JA:** On 6 June 2008 a District Court judge declared that restraining orders made on 7 July 2005, 20 July 2005 and 30 November 2005 pursuant to s 18 of the *Proceeds of Crime Act* 2002 (Cth) ceased to have effect on 4 August 2005, 17 August 2005 and 28 December 2005 respectively, each such date being 28 days after the date of the corresponding restraining order.[1] The primary judge made those orders on the footing that they gave effect to s 45(2) of that Act, which provides:

> "(2) A restraining order ceases to be in force if, within 28 days after the order was made:
>
> (a) the suspect has not been convicted of, or charged with, the offence, or at least one offence, to which the restraining order relates; and
>
> (b) there is no confiscation order or application for a confiscation order that relates to the offence ."

[2] The appellant contended that the restraining orders remained in force because it had made a timely application in terms of s 45(2)(b). The primary judge concluded that although the appellant had within the 28 day time limit filed an application for a "confiscation order" within the literal meaning of that defined term, the application was nevertheless not one that fell within s 45(2)(b). The defect identified by the primary judge was that the appellant's application sought the forfeiture of property to the Commonwealth "pursuant to s 49(1)" of the Act, a section which applied only when a restraining order had been made under s 19 of the Act: because the restraining orders had been made under s 18 of the Act the forfeiture application should have invoked s 47(1) rather than s 49(1).

[3] The primary judge also rejected the appellant's attempt to cure that defect. His Honour dismissed the appellant's application under s 62 of the Act to amend the application by substituting reference to "s 47(1)" instead of "s 49(1)" and ordered that the appellant's application for forfeiture be struck out.

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[1] *Commonwealth Director of Public Prosecutions v Mare & Ors*, unreported, Queensland District Court, DC No 349 of 2006, 6 June 2008.

[4] The appellant contends that the primary judge erred in concluding that the restraining orders ceased to be in force, in refusing the appellant's application to amend the application for a forfeiture order, and in granting the second and sixth respondents' application to strike out the appellant's application for a forfeiture order.

[5] In my respectful opinion the appellant's contentions must be accepted. I will explain my reasons for that conclusion after I have outlined so much of the scheme of the Act as is relevant to the issues in this appeal, the factual background, and the competing arguments advanced for the parties.

***Proceeds of Crime Act* 2002 (Cth)**

[6] Part 2-1 of the Act provides, in relation to certain offences, for the making of the restraining orders against property which prohibit the disposal of or dealing with that property. Section 25 empowers the appellant to apply for a restraining order and ss 17 – 20 provide that a court with the relevant jurisdiction must make a restraining order in the four different sets of circumstances set out in those provisions.

[7] Section 17 provides for restraining orders when a person has been convicted of or charged with, or it is proposed that a person be charged with, an indictable offence, and s 20 concerns circumstances in which there are reasonable grounds to suspect that a person has committed an indictable offence (or a foreign indictable offence) and has derived literary proceeds in relation to that offence. Section 19 provides for restraining orders where there are reasonable grounds to suspect that property is the proceeds of an indictable offence, foreign indictable offence or an indictable offence of a Commonwealth concern, whether or not the identity of the person who committed the offence is known.

[8] The restraining orders in this case were made under the fourth of the provisions I have mentioned, s 18, which provides for such orders where there are reasonable grounds to suspect that a person has committed a "serious offence" in the six years preceding the date upon which the application was made.[2]

[9] Effect is given to restraining orders by Div 4 of Pt 2-1 of the Act. Provisions are made for notice of the order to be given to the owner of property covered by a restraining order[3] and for the recording of particulars of a restraining order in property registers (with the result that persons who subsequently deal with the property are taken not to be acting in good faith and are taken to have notice of the restraining order in subsequent dealings with the property).[4] Courts are empowered to set aside a disposition or dealing with property that contravenes a restraining order if it was not made for sufficient consideration or not in favour of a person who acted in good faith.[5] Offences, punishable by imprisonment for five years or 300 penalty units or both, are created for persons who dispose of or deal with property covered by a restraining order in contravention of that order in defined circumstances, including where the person knows that the property is covered by a restraining order.

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2 There is an exception to that time limit for terrorist offences, which is not relevant here.
3 Section 33.
4 Section 34.
5 Section 36.

[10] Restraining orders cease to be in force in a variety of different circumstances.[6] Such orders are in the nature of interlocutory injunctions in the sense that they maintain the status quo for a period pending any final order. The "confiscation order" referred to in s 45(2) may be regarded as the final order. The term is defined in
s 338:

> "338 In this Act, unless the contrary intention appears:
>
> …
>
> ***confiscation order*** means a *forfeiture order, a *pecuniary penalty order or a *literary proceeds order."
>
> (The asterisks appear in the statutory text: they indicate defined terms.)

[11] The form of "confiscation order" relevant in this appeal is the "forfeiture order". Part 2-2 of the Act provides for forfeiture orders, under which property is forfeited to the Commonwealth if certain offences have been committed: it is not in all cases a requirement that any person has been convicted of such an offence.[7]

[12] The scheme established by Pt 2-2 includes Div 1 (which is concerned with the making of forfeiture orders) and Div 3 (which concerns how forfeiture orders are obtained: for example, s 59 authorises applications by the appellant for such orders). In Div 1, ss 47 – 49 specify circumstances in which a court with relevant jurisdiction must make an order that property specified in the order is forfeited to the Commonwealth if the Commonwealth Director of Public Prosecutions applies for the order. (Division 1 of Pt 2-2 in that respect mirrors the scheme of Div 1 of Pt 2-1.)

[13] Importantly for the arguments in this appeal, under s 47 one of the circumstances which must exist before the court is obliged to make an order is that the relevant property is covered by a restraining order made under s 18; similarly, under s 49 one of the circumstances that must exist before the court is obliged to make the forfeiture order is that the relevant property is covered by a restraining order under s 19. (In each case the relevant restraining order must have been in force for at least six months.)

[14] Part 2-1 of the Act includes, in Div 3, provisions which empower the court to exclude specified property from the reach of a restraining order.[8] Part 2-2 includes, in Div 5, provisions for reducing the effect of forfeiture orders, including provisions that empower courts to exclude specified property from forfeiture orders.[9]

[15] It is convenient now to set out those sections of the Act upon which the respondents principally rely to support the construction of s 45(2) accepted by the primary judge:

> "**18. Restraining orders--people suspected of committing serious offences**
>
> *When a restraining order must be made*
>
> (1) A court with *proceeds jurisdiction must order that:

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6 Section 45.
7 Section 66.
8 Sections 29-32.
9 Sections 73-76.

(a) property must not be disposed of or otherwise dealt with by any person; or

(b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;

if:

(c) the *DPP applies for the order; and

(d) there are reasonable grounds to suspect that:

(i) a person has committed a *serious offence; and

(ii) if the offence is not a *terrorism offence—the offence was committed within the 6 years preceding the application, or since the application was made; and

(e) any affidavit requirements in subsection (3) for the application have been met; and

(f) the court is satisfied that the *authorised officer who made the affidavit holds the suspicion or suspicions stated in the affidavit on reasonable grounds.

Note: A court can refuse to make a restraining order if the Commonwealth refuses to give an undertaking: see section 21.

Property that a restraining order may cover

(2) The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is any one or more of the following:

(a) all or specified property of the *suspect;

(aa) all or specified *bankruptcy property of the suspect;

(b) all property of the suspect other than specified property;

(ba) all bankruptcy property of the suspect other than specified bankruptcy property;

(c) specified property of another person (whether or not that other person's identity is known) that is subject to the *effective control of the suspect;

(d) specified property of another person (whether or not that other person's identity is known) that is:

(i) in any case—*proceeds of the offence; or

(ii) if the offence to which the order relates is a*terrorism offence—an *instrument of the offence.

Affidavit requirements

(3) The application for the order must be supported by an affidavit of an *authorised officer stating:

(a) that:

(i) the authorised officer suspects that the *suspect committed the offence within the 6 years preceding the application, or since the application was made; or

(ii) the offence is a *terrorism offence; and

(b) if the application is to restrain property of a person other than the suspect but not to restrain *bankruptcy property of the suspect—that the authorised officer suspects that:

(i) the property is subject to the *effective control of the suspect; or

(ii) in any case—the property is *proceeds of the offence; or

(iii) if the offence to which the order relates is a terrorism offence—the property is an *instrument of the offence.

The affidavit must include the grounds on which the *authorised officer holds those suspicions.

Restraining order need not be based on commission of a particular offence

(4) The reasonable grounds referred to in paragraph (1)(d) need not be based on a finding as to the commission of a particular *serious offence.

Risk of property being disposed of etc.

(5) The court must make a *restraining order even if there is no risk of the property being disposed of or otherwise dealt with.

Later acquisitions of property

(6) The court may specify that a *restraining order covers property that is acquired by the *suspect after the court makes the order. Otherwise, no property that is acquired after a court makes a restraining order is covered by the order.

19 Restraining orders—people suspected of committing indictable offences etc.

When a restraining order must be made

(1) A court with *proceeds jurisdiction must order that:

(a) property must not be disposed of or otherwise dealt with by any person; or

(b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;

if:

(c) the *DPP applies for the order; and

(d) there are reasonable grounds to suspect that the property is:

(i) the *proceeds of a *terrorism offence or any other *indictable offence, a *foreign indictable offence or an *indictable offence of Commonwealth concern (whether or not the identity of the person who committed the offence is known); or

(ii) an *instrument of a terrorism offence;

and, if the offence is not a terrorism offence, that the offence was committed within the 6 years preceding the application, or since the application was made; and

(e) the application for the order is supported by an affidavit of an *authorised officer stating that the authorised officer suspects that:

(i) in any case—the property is proceeds of the offence; or

(ii) if the offence to which the order relates is a terrorism offence—the property is an *instrument of the offence;

and including the grounds on which the authorised officer holds the suspicion; and

(f) the court is satisfied that the *authorised officer who made the affidavit holds the suspicion stated in the affidavit on reasonable grounds.

Property that a restraining order may cover

(2) The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is:

(a) in any case—*proceeds of the offence; or

(b) if the offence to which the order relates is a *terrorism offence—an *instrument of the offence.

Refusal to make a restraining order

(3) Despite subsection (1), the court may refuse to make a *restraining order in relation to an *indictable offence that is not a *serious offence if the court is satisfied that it is not in the public interest to make the order.

Note: A court can also refuse to make a restraining order if the Commonwealth refuses to give an undertaking: see section 21.

Restraining order need not be based on commission of a particular offence

(4) The reasonable grounds referred to in paragraph (1)(d) need not be based on a finding as to the commission of a particular *indictable offence.

Risk of property being disposed of etc.

(5) The court must make a *restraining order even if there is no risk of the property being disposed of or otherwise dealt with.

…

45 Cessation of restraining orders

Effect on restraining orders of withdrawal of charges, acquittals etc.

(1) A *restraining order that relates to one or more offences ceases to be in force 28 days after one of the following occurs:

(a) the charge, or all of the charges, that relate to the restraining order are withdrawn;

(b) the *suspect is acquitted of the offence, or all of the offences, with which he or she was charged;

(c) the suspect's conviction for the offence, or all of the offences, of which he or she was convicted are *quashed;

unless:

(d) there is a *confiscation order that relates to the offence; or

(e) there is an application for such a confiscation order before the court; or

(f) there is an application under:

(i) Division 6 of Part 2-2; or

(ii) Division 4 of Part 2-3; or

(iii) Division 5 of Part 2-4 or 2-5;

for confirmation of a forfeiture, or a confiscation order, that relates to the offence; or

(g) the suspect is charged with a *related offence.

Restraining orders if there is no conviction etc.

(2) A *restraining order ceases to be in force if, within 28 days after the order was made:

(a) the *suspect has not been convicted of, or charged with, the offence, or at least one offence, to which the restraining order relates; and

(b) there is no *confiscation order or application for a confiscation order that relates to the offence.

Restraining orders and forfeiture orders etc.

(3) A *restraining order ceases to be in force in respect of property covered by the restraining order if:

(a) either:

(i) the court refuses an application for a *forfeiture order that would have covered the property; or

(ii) the court excludes the property from a forfeiture order; or

(iii) a forfeiture order that covers the property is discharged or ceases to have effect; or

(iv) the court excludes the property under section 94 from forfeiture under Part 2-3; and

(b) in the case of a refusal of an application for a *forfeiture order:

(i) the time for an appeal against the refusal has expired without an appeal being lodged; or

(ii) an appeal against the refusal has lapsed; or

(iii) an appeal against the refusal has been dismissed and finally disposed of; and

(c) no application for another *confiscation order relating to:

(i) an offence to which the restraining order relates; or

(ii) a *related offence;

is yet to be determined; and

(d) no other confiscation order relating to such an offence is in force.

…

47 Forfeiture orders—conduct constituting serious offences

(1) A court with *proceeds jurisdiction must make an order that property specified in the order is forfeited to the Commonwealth if:

(a) the *DPP applies for the order; and

(b) the property to be specified in the order is covered by a *restraining order under section 18 that has been in force for at least 6 months; and

(c) the court is satisfied that:

(i) a person whose conduct or suspected conduct formed the basis of the restraining order engaged in conduct constituting one or more *serious offences; and

(ii) for each such suspected offence that is not a *terrorism offence—the offence was committed within the 6 years preceding the application for the restraining order, or since that application was made.

Note: The order can be made before the end of the period of 6 months referred to in paragraph (1)(b) if it is made as a consent order: see section 316.

(2) A finding of the court for the purposes of paragraph (1)(c) need not be based on a finding as to the commission of a particular offence, and can be based on a finding that some *serious offence or other was committed.

(3) The raising of a doubt as to whether a person engaged in conduct constituting a *serious offence is not of itself sufficient to avoid a finding by the court under paragraph (1)(c).

…

49 Forfeiture orders—conduct constituting indictable offences etc.

(1) A court with *proceeds jurisdiction must make an order that property specified in the order is forfeited to the Commonwealth if:

(a) the *DPP applies for the order; and

(b) the property to be specified in the order is covered by a *restraining order under section 19 that has been in force for at least 6 months; and

(c) the court is satisfied that one or more of the following applies:

(i) the property is *proceeds of one or more *indictable offences;

(ii) the property is proceeds of one or more *foreign indictable offences;

(iii) the property is proceeds of one or more *indictable offences of Commonwealth concern;

(iv) the property is an instrument of one or more *terrorism offences; and

(d) the court is satisfied that each such offence that is not a terrorism offence was committed within the 6 years preceding the application for the restraining order, or since that application was made; and

(e) the court is satisfied that the DPP has taken reasonable steps to identify and notify persons with an *interest in the property.

(2) A finding of the court for the purposes of paragraph (1)(c):

(a) need not be based on a finding that a particular person committed any offence; and

(b) need not be based on a finding as to the commission of a particular offence, and can be based on a finding that some offence or other of a kind referred to in paragraph (1)(c) was committed.

(3) Paragraph (1)(c) does not apply if the court is satisfied that:

(a) no application has been made under Division 3 of Part 2-1 for the property to be excluded from the *restraining order; or

(b) any such application that has been made has been withdrawn.

* To find definitions of asterisked terms, see the Dictionary, at section 338."

[16] In addition the following provisions in Div 3 of Pt 2-2 of Ch 2 are relevant:

59 DPP may apply for a forfeiture order

(1) The *DPP may apply for a *forfeiture order.

(2) If the application relates to a person's conviction of an *indictable offence, the application must be made before the end of the period of 6 months after the *conviction day.

62 Amending an application

(1) The court hearing an application for a *forfeiture order may amend the application:

(a) on application by the *DPP; or

(b) with the consent of the DPP.

(2) However, the court must not amend the application to include additional property in the application unless:

(a) the court is satisfied that:

(i) the property was not reasonably capable of identification when the application was originally made; or

(ii) necessary evidence became available only after the application was originally made; or

(b) the *forfeiture order applied for is an order under section 47 or 49 and the court is satisfied that:

(i) including the additional property in the application for the order might have prejudiced the investigation of, or the prosecution of a person for, an offence; or

(ii) it is for any other reason appropriate to grant the application to amend.

(3) On applying for an amendment to include additional property in the application, the *DPP must give written notice of the application to amend to any person whom the DPP reasonably believes may have an *interest in that additional property.

(4) If the *forfeiture order applied for is an order under section 48, any person who claims an *interest in that additional property may appear and adduce evidence at the hearing of the application to amend.

* To find definition of asterisked terms, see the Dictionary, at section 338."

Factual background

[17] The appellant's originating application filed on 7 July 2005 sought orders that dealings with specified property be restrained. Subsequent applications sought variations to the initial orders. The basis for the restraining orders expressed in the affidavits filed by the appellant was that the specified property was suspected of being property of the first respondent, Mr Mare, or under his effective control; he, as the "suspect" in terms of s 18, was alleged to have committed a "serious offence", a contravention of s 29D of the *Crimes Act* 1914 (Cth), which involved defrauding the Commonwealth by failing to pay substantial amounts of excise duty payable in connection with dealings in petroleum products, contrary to the *Excise Act* 1901 (Cth).

[18] Restraining orders were duly made on 7 July 2005, 20 July 2005 and 30 November 2005. They prohibited dispositions of and dealings with identified property except as authorised by the terms of those orders.

[19] Those restraining orders were made under s 18 of the Act. The first two orders recited that they were made under s 18: no reference was made to s 19. The supporting affidavits, sworn by Mr Norris of the Australian Federal Police on 7 and 20 July 2005, referred to the charges under s 29D of the *Crimes Act* 1914 (Cth) as constituting charges of a "serious offence". The term "serious offence" is used in s 18: it is not used in s 19. It is common ground that the suspected offences are "serious offences", each being "an indictable offence punishable by imprisonment for 3 or more years involving . . . unlawful conduct by a person that causes, or is intended to cause, a benefit to the value of at least $10,000".[10] Furthermore, the affidavits did not seek to establish that any of the specified property was the proceeds of an offence, as would have been required for a restraining order under s 19: that was not required for s 18.

[20] On 29 July 2005, within the 28 days limited by s 45(2), the appellant filed an application to have "forfeited to the Commonwealth" the property covered by the restraining orders made on 17 and 20 July 2005. The application identified as the affidavits upon which the appellant intended to rely the affidavits of Mr Norris sworn on 7 and 20 July 2005 with reference to which the restraining orders had been made. For the reasons I gave in the preceding paragraph it is clear that those affidavits were intended to satisfy the conditions specified in s 47(1)(c) of the Act and they were not intended to satisfy the conditions specified in s 49(1)(c). That it was s 47 rather than s 49 that was intended to be invoked by the forfeiture application appears also from the fact that this application was filed in the matter commenced by the first application for a restraining order (D 2447 of 2005) in which the restraining orders had been made under s 18: see ss 47(1)(b) and 49(1)(b).

[21] Despite that, and although by the specified return date of the application (6 February 2006) the condition specified in s 47(1)(b) (that the property to be specified in the forfeiture order is covered by a restraining order under s 18 that has been in force for at least six months) might be satisfied and the corresponding condition in s 49(1)(b) could not be satisfied, para [1] of the application stated that the forfeiture orders were sought "pursuant to s 49(1)" of the Act.

[22] On 23 September 2005 (outside the 28 day period specified in s 45(2)) an order was made by consent of all the parties under r 375 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") that para [1] of the appellant's application for a forfeiture order made on 29 July 2005 be amended by deleting "49(1)" and inserting "47(1)" in its place; but that amendment was not made. Various other applications concerning the restraining orders were also made on the footing that those orders remained in force.

[23] On 3 March 2008 the appellant applied pursuant to s 62(1) of the Act to amend its application for forfeiture by substituting in para [1] the expression "47(1)" for the expression "49(1)". On 28 April 2008 the second respondent and the sixth respondent applied for the appellant's application for forfeiture to be struck out and for declarations that the restraining orders ceased to have effect on specified dates each of which were 28 days after the date of the relevant restraining order. The

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[10] Section 338 definition of "serious offence", (a)(iii).

other respondents supported the application made by the second and the sixth respondents.

Reasons of the primary judge

[24] The primary judge acceded to the second and sixth respondents' applications and dismissed the appellant's application. The primary judge accepted that upon a literal interpretation of s 45(2)(b) the appellant had made an "application for a confiscation order" within the specified 28 day period but considered that the literal interpretation of s 45(2)(b) should be rejected.[11]

[25] His Honour cited *Project Blue Sky Inc & Ors v Australian Broadcasting Authority*[12] for the uncontentious propositions that the primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all of the statutory provisions; that the meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole"; and that "the context of the words, the consequences of the literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning".[13] The primary judge considered that two matters required acceptance of the construction of s 45(2)(b) propounded for the second and sixth respondents.

[26] First, the primary judge concluded that the appellant's application was not one that "*relates to the offence*" within the meaning of s 45(2)(b): [14]

> "[12] It is pellucidly clear by reference to the mechanism and operation of the Act that s 47 and s 49 have different spheres of operation and relate to forfeiture being based upon, in the case of 47, persons suspected of committing serious offences. Section 49 concerns forfeiture orders where the allegation is of conduct constituting an indictable offence. Under s 47 or s 49, property will continue to be restrained after 28 days from the making of a restrained order only if that property is property "covered by" the co-relative restraining order under s 18 or s 19 [see s 47(1)(b); s 49(1)Co)].
>
> Section 45(2)(b) extends the operation of a restraining order beyond 28 days after it is made only where the "confiscation order" or an application for such order is made that *relates to the offence*. This is a shorthand form of expression which contemplates that the particular category of restraining order must be the foundation of the co-relative forfeiture order or application for such order. The offence to which s 45(2)(b) is by virtue of s 18 and s 19 of the Act described by

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11 *Commonwealth Director of Public Prosecutions v Mare & Ors*, unreported, Queensland District Court, DC No 349 of 2006, 6 June 2008 at [24].

12 *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 and 384 per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28.

13 *Commonwealth Director of Public Prosecutions v Mare & Ors*, unreported, Queensland District Court, DC No 349 of 2006, 6 June 2008 at [21].

14 *Commonwealth Director of Public Prosecutions v Mare & Ors*, unreported, Queensland District Court, DC No 349 of 2006, 6 June 2008 at [12].

reference to two separate categories - serious offences and indictable offences respectively. Section 45(2)(b) refers not to any offence but to *the* offence."

[27] The second strand of the primary judge's reasoning also emphasised the relationship between ss 18 and 47 on the one hand and ss 19 and 49 on the other hand: [15]

> "[14] It is common ground amongst the parties that a s 18 restraining order may successfully found only a s 47 forfeiture order, and a s 19 restraining order may only found a s 49 forfeiture order. Furthermore, the CDPP concedes that the present application under s 49, founded as it is on a restraining order made by this Court under s 18, can never lead to a successful forfeiture order under s 49 being made. This concession is clearly correct. The legislation comprehensively and, to my mind, very clearly makes a distinction between each type of restraining order and each forfeiture order upon which it is based.
>
> [15] In this case, the property which has been restrained pursuant to the requirements of s 18 it is argued, continues beyond the 28 day limit, to be restrained by virtue of the application made under s 49 which application is clearly on a basis different from the foundational s 18 restraining order. This leads to what is superficially an absurd result in that the property, after the 28 day limit, is preserved and restrained beyond that limit on the basis on a wholly untenable application. This much is also conceded by the CDPP who relies upon the broad definition of "confiscation order" as it applies to s 45.
>
> [16] In my view, the definition "confiscation order" is no more than a broad generic definition. Resort must be had to the more detailed concepts and distinctions provided for in the notion of "forfeiture order" and the distinctions as they appear in the Act to ss 47 and 49 orders. Those sections and the relationship of each with ss 18 and 19 restraining orders expose quite different spheres of operation and foundation in terms of the making of a forfeiture order based either on ss 18 or 19 restraining orders.
>
> [17] I note that no judicial decision has been given on this matter to date.
>
> [18] In the face of potential and patent absurdity it is, I think, appropriate to consider the operation of the Act as a whole rather than to take the limited view proposed by the CDPP, particularly in circumstances where legislation of this kind makes considerable inroads into the traditional proprietary rights of persons.

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[15] *Commonwealth Director of Public Prosecutions v Mare & Ors*, unreported, Queensland District Court, DC No 349 of 2006, 6 June 2008 at [14] – [20].

> [19] In my view the literal interpretation contended for by the CDPP that is, that merely making *any kind* of "confiscation order" will be sufficient to prolong the life of a restraining order beyond 28 days is entirely inconsistent with the operation and intention of the Act.
>
> [20] The legislation contemplates the continued restraint of property by inter alia the mere application for a confiscation order. Such continued restraint is at the whim of the CDPP prosecuting such application. Significantly, no time limit is imposed upon that application being heard or determined. Should the CDPP argument be accepted, not only is the continued restraint of property at the whim of the CDPP, but that restraint may properly be based upon an application for confiscation, the foundation of which is fundamentally flawed and which is never able to succeed. This is productive of the absurdity to which I have already referred."

[28] After referring to *Project Blue Sky Inc & Ors v Australian Broadcasting Authority*, the primary judge continued: [16]

> "[22] It cannot be supposed that the legislation contemplates allowing property to be restrained on one basis, for example, restraint under s 18 but the continuation of restraint of that property beyond the 28 day time limit on the basis of an application under s 49 which does not relate to, and is incompatible and inconsistent with the foundational restraining order under s 18.
>
> [23] The result contended for by the CDPP produces an unattractive outcome and cannot I think be regarded as being warranted by the legislative scheme viewed as a whole.
>
> [24] The prerequisites for making such restraining orders under ss 18 and 19 and for forfeiture orders under ss 47 and 49 disclose different bases for such forfeiture orders. Such orders must only be made in circumstances where stringent preconditions are fulfilled. The literal interpretation of s 45(2)(5) should be rejected.
>
> [25] In my view, all property the subject of s 18 restraining orders has not continued to be restrained because the application made to the Court was pursuant to quite different provisions, that is, an application for forfeiture under s 49."

[29] In rejecting the appellant's application to cure the defect identified by the primary judge by amending its forfeiture application, his Honour observed:

> "[27] . . .Although s 62 of the Act empowers amendments of various kinds, what in reality is sought by the CDPP in this

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16 *Commonwealth Director of Public Prosecutions v Mare & Ors*, unreported, Queensland District Court, DC No 349 of 2006, 6 June 2008 at [22] – [25].

> case cannot truly be regarded as an amendment. In reality the CDPP seeks to substitute a s 47 application for the application already made pursuant to s 49. This in my view is not authorised by s 62 of the Act."[17]

The competing arguments

[30] The appellant contends that the fact that its application for forfeiture incorrectly invoked s 49 rather than s 47 does not disqualify it as an "application for a confiscation order that relates to the offence" for the purposes of s 45(2)(b). In opposition to the non-literal construction propounded for the respondents and accepted by the primary judge the appellant also points to the court's general power to amend a forfeiture application under s 62. It contends that the effect of the judgment below is to permit a technicality to subvert the object of the Act expressed in s 5 of depriving "persons of the proceeds of offences … and benefits derived from offences against the laws of the Commonwealth". The appellant contends that the primary judge's construction is therefore contrary to the injunction in *Project Blue Sky Inc v Australian Broadcasting Authority*[18] that effect should be given to the purposes of the statute so far as possible.

[31] In a supplementary submission filed after the hearing of the appeal by the court's leave, the appellant contends that the effect of r 658 of the UCPR, which is submitted to apply by operation of s 79 of the *Judiciary Act* 1903 (Cth), is that the wrong specification in the forfeiture application of s 49 did not preclude the court from granting relief under s 47 of the Act. Rule 658 of the UCPR provides:

> "(1) The court may, at any stage of a proceeding, on the application of a party, make any order, including a judgment, that the nature of the case requires.
>
> (2) The court may make the order even if there is no claim for relief extending to the order in the originating process, statement of claim, counterclaim or similar document."

[32] The second and sixth respondents, whose submissions the other respondents adopt, contend that the expression in s 45(2)(b) "application for a confiscation" order means an application for a pecuniary penalty order or a forfeiture order of a type which corresponds to the restraining order obtained. It is submitted on behalf of the respondents that such a construction is consistent with the obviously intended function of restraining orders as being interlocutory in nature; that it is consistent with the scheme of the Act which relates particular restraining orders to particular forfeiture orders; and that it is consistent with the structure of s 45, under which a restraining order should cease unless the appellant within 28 days seeks final relief by making an application for a forfeiture order based upon the particular restraining order earlier obtained. For the respondents it is argued that departure from the literal meaning is required to reflect that intention of Parliament. The respondents contend that the context at least creates an ambiguity in the term "application for a confiscation order" and they invoke authority [19] for the proposition that the

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17 *Commonwealth Director of Public Prosecutions v Mare & Ors*, unreported, Queensland District Court, DC No 349 of 2006, 6 June 2008 at [27].

18 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78].

19 *Murphy v Farmer* (1988) 165 CLR 19 at 28; [1988] HCA 31; *DPP v Logan Park Investments Pty Ltd & Anor* (1995) 125 FLR 359 at 366-369; *Director of Public Prosecutions (Cth) v Hart* [2004] 2 Qd R 1 at 5 [12]; [2003] QCA 495.

ambiguity should be resolved in the respondents' favour because the Act severely and radically affects property rights.

[33] For the respondents it is argued that r 26(6) of the UCPR applied here to attribute significance to the reference in the appellant's forfeiture application to s 49 of the Act. Rule 26(6) provides:

> "If an application is made under an Act, the application must state the name and section number of the Act under which the application is made."[20]

[34] The respondents also contend that it is significant that, as they argue, the appellant intended to invoke s 49 rather than s 47. In that respect the respondents rely upon an affidavit in which a lawyer employed by the appellant, Mr Dalton, deposed:

> "(c) On 29 July 2005 CDPP filed an application for forfeiture order pursuant to section 49(1) of the Act in respect of the property covered by the First Restraining Order and the Second Restraining Order ("the Forfeiture Application"). The Forfeiture Application should have been made pursuant to section 47(1) rather than section 49(1) of the Act as the proceedings were commenced on the basis that MARE had committed serious offences rather than on the basis that the property was the proceeds of the offences."

[35] The submission on behalf of the respondents is that this evidence made inevitable the finding of the trial judge that the appellant's application for a forfeiture order filed on 29 July was made "pursuant to s 49(1) of the Act".[21]

[36] In response to the submission made on behalf of the appellant concerning the operation of r 658 of the UCPR, it is argued for the respondents that r 658 does not apply because it is inconsistent with the extinguishment of the restraining orders which occurred 28 days after the restraining orders were made when there was no "application for a confiscation order". In an alternative submission, the respondents contend that even if r 658 has the operation for which the appellant contends, s 45(2)(b) remained unfulfilled because the appellant's forfeiture application was nevertheless not one that fitted the description in s 45(2).

Discussion

[37] The second and sixth respondents' senior counsel (whose submissions the other respondents adopt) did not present argument in support of the primary judge's view (in para [12] of his Honour's reasons) that the application for forfeiture is not one that, in terms of s 45(2)(b), "*relates to the offence*" to which the restraining orders relate. The forfeiture application undoubtedly relates to the offences to which the restraining orders related: the affidavits identified in the forfeiture application which describe the suspected offences are the same affidavits that had been relied upon in the earlier applications for the restraining orders. This first strand of the primary judge's reasoning must be rejected.

[38] In my respectful opinion the primary judge also erred in reaching the conclusion, upon which the respondents particularly rely, that the forfeiture application was made pursuant to s 49. Neither of ss 47 and 49 authorise the bringing of

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20 A cognate provision for pleadings is contained in UCPR r 149(1)(e).

21 *Commonwealth Director of Public Prosecutions v Mare & Ors*, unreported, Queensland District Court, DC No 349 of 2006, 6 June 2008 at [4].

applications. The statement in the application that the order was sought "pursuant to s 49" identified only the provision which the appellant mistakenly claimed would empower the court to make a forfeiture order. The provision of the Act which empowered the appellant to apply for a forfeiture order was s 59. The respondents do not contend that the bringing of the forfeiture application was not authorised by that section.

[39] That being so it is not easy to see any basis for the view that the application was not an "application for a confiscation order". The appellant's application for forfeiture fits the description in s 47(1)(a) of the Act. That paragraph (like the corresponding paragraph in s 49) does not require that the application specify the section of the Act under which the application is made (s 59) or the section which empowers the court to make the forfeiture order upon satisfaction of the specified conditions (in this case s 47). No provision in the Act attributes any significance to a wrong description in the application of the section which authorises the making of the "confiscation order". The incorrect specification of s 49 in the application thus seems to be of no moment.

[40] The District Court was exercising federal jurisdiction in this matter.[22] The ascertainment of the factual basis of a federal controversy is not necessarily limited by allegations in the originating process: reference to the evidence may be required.[23] Here the breadth of the controversy is indicated by the original restraining orders and the affidavits referred to in the application. In light of that material, which was plainly directed to the potential operation of s 47 rather than s 49, the reference in the application to s 49 could not be regarded as confining the District Court's jurisdiction.

[41] Nor can I accept the respondents' contention that the literal meaning of the provision in issue should be rejected. That the definition of "confiscation order" is intended to be applied in s 45(2) is indicated by the asterisk before the term "confiscation order" in that provision. The significance of that asterisk is identified by s 3 which relevantly provides:

> "(2) Most of the terms that are defined in the Dictionary in Chapter 6 are identified by an asterisk appearing at the start of the term: as in "*proceeds". The footnote with the asterisk contains a signpost to the Dictionary."

[42] In light of that provision and the asterisk in s 45(2)(b) next to the expression "confiscation order", the respondents face a difficult task in seeking to establish that a "contrary intention" appears which would justify not applying the definition of "confiscation order". The Act does not evince any such contrary intention. The scheme of the Act relied upon by the primary judge concerns the circumstances in which forfeiture orders may be made but it does not touch upon the question whether a particular document is to be characterised as "an application for a confiscation order."

[43] Contrary to the primary judge's conclusion in para [20] of his Honour's reasons for judgment, the literal construction of s 45(2)(b) does not give rise to absurdity. The legislation does not contemplate the continued restraint of property merely by the

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22 The operative provisions refer to courts having "proceeds jurisdiction". That jurisdiction is conferred upon the District Court by s 335 of the Act.

23 *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 262-263 [32]; [2005] HCA 38.

making of an application for a confiscation order. The restraint is justified by the original restraining order, which must be based upon compliance with the statutory conditions for the making of such orders. The application which prevents that order from ceasing to have effect must seek a confiscation order that relates to the same (suspected) offence with reference to which the restraining order was made. It also cannot be said that the continued restraint is "at the whim" of the appellant; neither is it significant that the Act itself imposes no time limit within which an application for a confiscation order must be heard or determined. Once a confiscation application is filed it is under the control of the court; it is subject to application of the procedural provisions governing the progress and disposition of all other applications in the court (subject of course to any contrary provisions in the Act).

[44] It is in my respectful opinion also not correct to say that the foundation of the appellant's application for a forfeiture order was "fundamentally flawed" or "never able to succeed".

[45] In that respect the respondents contend that the mistaken reference to s 49 was significant because r 26(6) of the UCPR (which I set out in para [33] of these reasons) required the forfeiture application to identify the provision under which it was made. For the purposes of this argument I will assume, contrary to the view I have expressed, that in terms of r 26(6) the application was "made under" s 47 rather than s 59. I will also assume, without deciding, that r 26(6) applied in its own terms.[24] If so, it was "picked up" by s 79 of the *Judiciary Act* 1903 (Cth), which provides:

> "The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."

[46] But assuming that r 26, applying as surrogate federal law, obliged the appellant to advert to s 47 in the application, the fact that the application omitted to do so nevertheless does not mean that the application is not appropriately characterised as an "application for a confiscation order" in terms of s 45(2)(b) of the Commonwealth Act.

[47] A similar issue arose in *Agtrack (NT) Pty Ltd v Hatfield*.[25] In that case the respondent's pleaded claim for damages for the wrongful death of her husband in a plane crash omitted reference to her right to claim damages under Pt IV of the *Civil Aviation (Carriers Liability) Act* 1959 (Cth) (the "Carriers' Act"). The appellant contended that such a reference was essential for the attraction of federal jurisdiction, so that the respondent's claim was extinguished by s 34 of the Carriers' Act. That section extinguished a claimant's right to damages if an action had not been brought within two years of the date on which the aircraft arrived or the carriage stopped. In support of the appellant's contention it relied upon a procedural rule which is indistinguishable from r 26(6) of the UCPR. Gleeson CJ,

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24 Rule 26 applies only to originating applications: UCPR r 25. The application for forfeiture was not made in the form of an originating application but it is perhaps arguable that it should have been in that form.

25 *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251; [2005] HCA 38.

McHugh, Gummow, Hayne and Heydon JJ rejected the appellant's contention in the following passage:[26]

> "Rule 13.02(1)(b) of Ch 1 of the Rules of the Victorian Supreme Court applies to a claim which "arises by or under any Act" and requires the "pleading" to identify the specific provision relied upon. When "picked up" by s 79 of the *Judiciary Act*, it may be taken that "Act" is to be understood as including a federal statute. However, there is no requirement in Pt IV that a plaintiff expressly invoke the Carriers' Act in any legal process.
>
> The Attorney-General correctly submitted that a separate and subsequent question may arise as to whether an action brought under Pt IV has been properly pleaded in accordance with any rules of pleading picked up by s 79 of the *Judiciary Act*. For example, if the relevant rules of court required that any particular statutory provision be referred to, it might be necessary for a plaintiff to amend. However, such amendments would not be disallowed on the basis that there had been a failure to comply with Pt IV of the Carriers' Act. As it happens in the present case Ormiston JA had said [(2003) 7 VR 63 at 75.]:
>
> > "[I]f all the facts were otherwise properly contained in the statement of claim, there would ordinarily be little reason why an amendment should not be permitted to satisfy the rule. It would thus merely characterise a liability which the facts would otherwise establish." [27]

[48] In this case, as in *Agtrack (NT) Pty Ltd v Hatfield*, the Commonwealth legislation does not impose a requirement that the court process aver reliance upon that legislation. The result then of the appellant's incorrect reference to s 49 is simply that an amendment may be required.

[49] Such an amendment may be made under s 62 of the Act. That provision is certainly of sufficient breadth to encompass an amendment to substitute a reference to s 47 for the reference in the application to s 49. An error in the contrary conclusion of the primary judge (that by such an amendment the appellant sought to substitute a "s 47 application" for the application already made "pursuant to s 49") appears from what I have already said: the application was not made under either section, but rather under s 59. The omission of any reference to that provision could not conceivably bear upon the question whether the application was of a character described in s 45(2)(b).

[50] The efficacy of the application was unaffected by the obviously incorrect reference to s 49 rather than s 47. That wrong reference could not have misled the respondents and an amendment to correct it would not be productive of any injustice. And contrary to an argument advanced for the second and sixth respondents, the subjective intention of the parties does not bear on the breadth of the federal jurisdiction engaged by the appellant's proceedings.[28] In any case, I do not construe Mr Dalton's affidavit as supporting the view that the reference to s 49 was anything other than an unintended mistake: it clearly appears from the

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26 *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 265 [39]-[40] ; [2005] HCA 38.

27 See also per Callinan J at 281 [104], 282 [107].

28 *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 262-263 [32]; [2005] HCA 38.

affidavits referred to in the application and the bases of the earlier restraining orders that the real issue between the parties comprehended the potential application of s 47 rather than s 49.

[51] In these circumstances, the presence of the power in s 62 to amend applications supports the appellant's propounded construction of s 45(2)(b). Similarly, that construction is supported by the existence when the Act was enacted of procedural provisions in courts throughout the Commonwealth that contemplated that amendments of this character should be made where that was necessary for resolution of the real issues between the parties.

[52] To adapt a passage in the High Court's judgment in *Berowra Holdings Pty Ltd v Gordon*: [29]

> "Once a plaintiff has commenced proceedings, [s 45(2)(b)] must be understood in connection with the procedural structure for the conduct of litigation in [the District Court], not in isolation from it. This is not to subjugate the statute to the Rules, but to recognise that the subject matter with which the statute deals is "rights" in the context of actual or apprehended litigation, and to understand the function of the Rules of Court and procedural law in facilitating adjudication of disputed claims."

[53] Part of the relevant procedural milieu is, as Stephen, Mason and Jacobs JJ observed in *Leotta v Public Transport Commission (NSW)*, [30] the fact that now "and for many years past, a plaintiff does not fail by being refused leave to amend or through failure formally to apply for amendment, where the evidence has disclosed a case in the cause of action fit to be determined by the tribunal of fact." The reference to "many years past" was not an overstatement. In Queensland, for example, the requirement now expressed in s 53 of the *Supreme Court Act* 1995 (Qld) (of which there are counterparts in other States[31]) that "such amendments as may be necessary for the purposes of determining in the existing suit the real question in controversy between the parties shall be made", was formerly contained in s 80 of the *Common Law Practice Act* 1867 (Qld); and that provision was itself copied from an Imperial statute enacted in 1852. [32]

[54] An English rule of court in indistinguishable terms informed what is perhaps one of the best known judgments in this area of the law, that of Bowen LJ in *Cropper v Smith*.[33] In a passage which has been quoted with approval on countless occasions[34] in the intervening 125 years Bowen LJ said:

> "Now, I think it is a well established principle that the object of Courts is to decide the rights of parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard

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29 *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364 at 376 [36] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; [2006] HCA 32.

30 *Leotta v Public Transport Commission (NSW)* (1976) 9 ALR 437 at 446.

31 *Court Procedure Rules* 2006 (ACT), r 501; *Civil Procedure Act* 2005 (NSW), s 64; *Supreme Court Act* (NT), s 80; *Supreme Court Rules* 2000 (Tas), r 427; *Supreme Court (General Civil Procedure) Rules* 2005 (Vic), o 36.01; *Rules of the Supreme Court* (WA), r 501.

32 15 & 16 Vic c 76, s 222. Similar provision was contained in an earlier Imperial statute, 3 & 4 Wm IV c 42, s 23, which was enacted in 1833.

33 *Cropper v Smith* (1884) 26 Ch D 700 at 710.

34 Including in *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 152-153 per Dawson, Gaudron, and McHugh JJ; [1997] HCA 1.

> laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace."

[55] Although the exercise of a discretion referable to the facts of each case is involved, even where a rule of court requires reference to a statutory provision upon which a claim is based, a mistaken reference to the applicable provision would not ordinarily be permitted to deny relief to a plaintiff where the facts that justify that relief are proved.[35]

[56] It is arguable that no amendment is even necessary to produce that result in a case of this kind. Rule 658 of the UCPR (which is set out in para [31] of these reasons) is "picked up" in this matter by s 79 of the *Judiciary Act* 1903 (Cth). The effect of r 658 here appears to be that no amendment is strictly necessary; that the court is empowered to apply the provisions of s 47 notwithstanding that it is not mentioned in the application; and that this is so even if r 26(6) required such a reference. [36]

[57] But regardless whether the amendment was strictly necessary, the procedural milieu in place when the Act commenced and under which it operates confirms the view that s 45(2)(b) is not to be construed as denying the status of an "application for a confiscation order" merely because of an incorrect reference in the application to the section claimed to authorise the order.

[58] The respondents could not and did not oppose the amendment to correct that mistake otherwise than on the basis of their contentions concerning the construction of s 45(2)(b). For the reasons I have given those contentions should be rejected. The amendment should be allowed.

[59] It is therefore unnecessary to consider a further question, agitated in the parties' submissions whether the defect in the application could be cured by ordering an amendment under the UCPR which, under r 387(1) of UCPR, would be antedated to the date of filing of the forfeiture application.[37]

Disposition

[60] I would make the following orders:

1. Allow the appeal and set aside the orders of the primary judge dated 6 June 2008.

2. Instead of those orders:

(a) Grant the application for amendment filed by the Commonwealth Director of Public Prosecutions on 3 March 2008.

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35 *Agtrack (NT) Pty Ltd v Hatfield* (2003) 7 VR 63 at 75 per Ormiston JA, cited with approval in *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 265 [40]; [2005] HCA 38; *Downs Investments Pty Ltd (in liq) v Perwaja Steel Sdn Bhd* [2002] 2 Qd R 462 at 474, per Williams JA, Davies JA and Byrne J agreeing; [2001] QCA 433. See also *Coppo & Ors v Banalasta Oil Plantation Ltd & Ors*; *Borg v Pawski & Ors* [2005] QCA 96 at [30], [83], in which the Court relied upon UCPR r 658.

36 Arguably the terms of s 47 itself would oblige the court to make the order if the expressed conditions are fulfilled, but that issue is not raised in this case.

37 Cf *Ramsay v McElroy* [2004] 1 Qd R 667; [2003] QCA 208.

(b) Dismiss the application filed by the second respondent and sixth respondent on 28 April 2008.

(c) The respondents pay the Commonwealth Director of Public Prosecutions' costs of and incidental to both applications, to be assessed on the standard basis.

3. The respondents pay the appellant's costs of the appeal to be assessed on the standard basis.

[61] **MACKENZIE AJA:** I agree with the reasons of Fraser JA and with the orders he proposes.

[62] **DAUBNEY J:** I respectfully agree with the reasons for judgment of Fraser JA, and with the orders he proposes.