SUPREME COURT OF QUEENSLAND

CITATION:	*State of Qld v Brooks* [2005] QSC 390
PARTIES:	**STATE OF QUEENSLAND** (applicant/cross respondent) v **DALE RICHARD BROOKS** (respondent/cross applicant) **LEE PATRICIA McCABE** (cross applicant)
FILE NO/S:	BS 1763 of 2005
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	21 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	29, 30, 1, 2, 5, 6, 7, 8, 9 December 2005
JUDGE:	McMurdo J
ORDER:	**1. The Toyota Hilux utility Queensland registration number 622 CDL registered in the name of Dale Richard Brooks will be forfeited to the State of Queensland** **2. The interests of Mr Brooks in Suncorp Metway account No 024425782 to the extent of $62,377.05, and in Suncorp Metway account No 046214703 to the extent of $1,195.30, will be forfeited to the State** **3. Mr Brooks' interest in the real property located at 14-16 Lower Cross Street, Goodna, (Real Property Description Lots 7 and 8, Registered Plan 110911, County of Stanley, Parish of Goodna); the real property located at Lot 393 Iron Pot Creek Road, Kyogle, New South Wales, (Real Property Description Lot 393 in Deposited Plan 815696 at Toonumbar, Parish of Langwell, County of Rous – Title Folio No 393/815696); and the Porsche motor vehicle Queensland registration number 911 DAT is in each case excluded from the application for forfeiture** **4. Pursuant to s 79 of the *Criminal Proceeds Confiscation Act* 2002, Mr Brooks will be ordered to pay, as a proceeds assessment order, the sum of $35,127.65.**

5. The application and the cross application in relation to the vessel described in paragraph 2 (d) of the restraining order made on 28 February 2005 are adjourned to 30 January 2006

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 – CONFISCATION – where the State applied for a proceeds assessment order and the forfeiture of property pursuant to the *Criminal Proceeds Confiscation Act* 2002 (Qld) – where the respondent engaged in activity constituting offences of drug trafficking and production, the unlawful supply of a firearm and fraud under s 408C of the *Criminal Code* 1899 (Qld) – whether the respondent's property may be excluded from the forfeiture application because it is more probable than not the property was not illegally acquired property

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 – PECUNIARY PENALTY ORDER – where the State applied for a proceeds assessment order of $1,039,400 – where there was evidence that the respondent's expenditure was able to be funded from legitimate income – where there was evidence of a conversation in which the respondent claimed to an undercover police officer to be selling 10 to 12 pounds of cannabis per week – where there was limited evidence of sales to anyone other than the undercover police officer – whether the proceeds of the respondent's drug trafficking were $1,039,400 or some other amount

Acts Interpretation Act 1954 (Qld), s 19, s 36
Criminal Code 1899 (Qld), s 408C
Criminal Proceeds Confiscation Act 2002 (Qld), Chapter 2, s 19, s 20(4)(b), s 22, s 22(5), s 38(1)(c), s 49, s 58(1), s 58(4), s 50(1), s 65, s 66, s 68(2), s 69(2), s 79(3), s 2(1)(c)(i), s 83(34), s 83(1)(a), s 88

R v Maher [1987] 1 Qd R 171, cited
R v Fagher (1989) 16 NSWLR 67, discussed
R v Pepin (1996) 86 A Crim R 327, referred to

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

SOLICITORS: Queensland Director of Public Prosecutions for the applicant/cross respondent
Paul Carter and Associates for the respondent/cross applicants

[1] **McMURDO J:** The State of Queensland applies for a proceeds assessment order and the forfeiture of property pursuant to the *Criminal Proceeds Confiscation Act* 2002 (Qld) ("the Act"). The respondent, Mr D R Brooks, cross applies to exclude property from forfeiture on the basis that it was not illegally acquired. Substantially the same cross application is made by his wife, Ms McCabe, who claims to be the owner of some of the property.

The criminal activity

[2] The applications are made under Chapter 2 of the Act because Mr Brooks has not been convicted of any relevant offence. In the way in which these proceedings were conducted, there was no dispute of the State's case that in 2004 Mr Brooks engaged in activity constituting offences of drug trafficking and production and, in one instance, the unlawful supply of a firearm. The State's allegation that Mr Brooks committed an offence under s 408C of the *Criminal Code* 1889 (Qld), by defrauding a bank from which he and Ms McCabe borrowed to buy an apartment in 2003, was disputed.

[3] The State's case in relation to the drugs and firearm matters is principally based upon the evidence of an undercover police officer, who was known to Mr Brooks and who gave his evidence under the name of Fenton. He contacted Mr Brooks at the beginning of 2004. Mr Fenton was engaged in an operation being conducted by the Australian Crime Commission. The operation was investigating the unlawful supply of firearms, and for that purpose warrants were issued permitting the interception of calls involving Mr Brook's mobile telephone. Mr Fenton however was not limited to investigating that activity but was also concerned with investigating offences involving drugs.

[4] Mr Fenton tape recorded his conversations with Mr Brooks, whether they were in person or by phone. He had dealings with him from January to August 2004, although there was no contact within a three month period from the beginning of March. The tapes of those conversations are in evidence, save for one or two exceptions where the recording of the conversation failed, but where there is the recording of Mr Fenton's summary of the conversation which he made soon after it occurred and which I accept as reliable. Mr Fenton was extensively cross examined but ultimately there was no challenge to his evidence that he had these certain dealings with Mr Brooks, and in particular that Mr Brooks supplied him with certain quantities of drugs for certain prices. The drugs in each case were analysed and the certificates are in evidence. I find that Mr Brooks supplied the following to Mr Fenton:

- 5 January 2004, one pound of cannabis for $3,800;
- 14 January 2004, half a pound of cannabis for $1,900;
- 16 January 2004, half an ounce of methylamphetamine for $2,400;
- 29 January 2004, one ounce of methylamphetamine for $4,500;

- 20 February 2004, one pound of cannabis for $3,500;
- 27 February 2004, one ounce of methylamphetamine for $4,500 and 20 ecstasy tablets for $500;
- 10 June 2004, one pound of cannabis for $3,300;
- 16 June 2004, one pound of cannabis for $3,300;
- 30 June 2004, two grams of methylamphetamine for $300;
- 6 July 2004, one ounce of methylamphetamine for $4,200;
- 13 August 2004, one pound of cannabis for $3,300.

From the same evidence I also find that on 16 July 2004, Mr Brooks sold to Mr Fenton a .38 calibre revolver for $1,200.

[5] The State further alleges that Mr Brooks was a party to the production of cannabis by a hydroponic operation within a house owned by him and Ms McCabe at Archer Court, Chambers Flat. On 4 March 2004 police executed a search warrant at that house where they discovered a reasonably sophisticated hydroponic operation. A number of plants were seized. I accept the evidence of Sergeant Feeney that the plants were, for the most part, over three months old. I find that the operation pre-dated Mr Fenton's first contact with Mr Brooks, which may be relevant because it was at one point suggested that the hydroponic operation was a response to the Fenton demand for pounds of cannabis. Mr Brooks told police that this house was let to a Mr Wayne Carey. But for the purposes of these proceedings, I am satisfied that Mr Brooks was a party to this production and indeed that he was effectively the producer. His fingerprints were found on lampshades which were there only for the production of cannabis. And relevantly unchallenged evidence was given by a former employee of Mr Brooks' panel beating shop, Mr West, that he made these lampshades on Mr Brooks' instructions. Mr West was examined before a deputy registrar[1] and the transcript of that examination was tendered in these proceedings. Although objection was taken to the tender of the transcript, the subsequent cross examination of Mr West by counsel for Mr Brooks in this hearing was upon the premise that it was Mr Brooks who was growing the cannabis at Archer Court, as Mr West had said in his evidence at the examination. In this hearing, Mr West said that as far as he was aware, there was not any crop that came from Archer Court. It is possible that there was some cannabis supplied by Mr Brooks, to Mr Fenton or others, which came from this hydroponic operation. But I am not satisfied that Mr Brooks had harvested a sizeable crop from Archer Court, and in particular something which would have provided Mr Brooks with stock from which he could have supplied several pounds a week, by the time this facility was closed on 4 March.

[6] In September 2003 Mr Brooks and Ms McCabe purchased an apartment at Toowong for $600,000. It was their residence until they sold it in January 2005. They borrowed the whole of the purchase price from Adelaide Bank Limited. There was a loan of $456,000 which was secured on the apartment and a further loan of $175,000 secured on their Archer Court premises. In applying for these loans, Mr Brooks represented that his income was $100,000 from his panel beating business together with rental income of $13,524 and what he said was the proposed rental from the apartment of $28,600. According to a witness from the Bank, the application was granted on the basis that his income was $120,000 plus rental

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1 Under an examination order made pursuant to s 38(1)(c)

income of $20,280. Mr Brooks has also been examined before the deputy registrar and the transcript of that examination was tendered. He there admitted that his representations as to his income and his intention to let the apartment were false. But he maintained that he was told by his finance broker to make these representations because he had to do so to obtain the loans. He did not give evidence in this hearing.

[7] The State submits that he thereby committed an offence against s 408C of the *Criminal Code*, in that he dishonestly obtained credit, which is within the definition of "property" for the purposes of that section. He argues that he did not act dishonestly and, in effect, that it is not proved that he realised that what he did was dishonest by the standards of ordinary honest people.[2] In these proceedings, it is for the State to prove the "serious crime related activity" for which it seeks a proceeds assessment order, but the standard of proof is upon the balance of probabilities. According to what Mr Brooks said at his examination, he simply followed the recommendations of his broker who effectively dictated what he should represent as his income. The broker told him that if he inserted his true income, which he says was about $20,000, the Bank would not lend the money. I conclude that more probably than not Mr Brooks realised that what he was doing was dishonest by the standards of ordinary honest people and that he did commit an offence against s 408C.

Proceeds assessment order

[8] As filed, the State's application is for an assessment of $1,039,400 "or such lesser sum as the court assesses". That amount comprises $16,400 for the supplies of methylamphetamine and ecstasy to Mr Fenton together with $1,023,000 said to be the proceeds of trafficking in cannabis (including the supplies to Mr Fenton). That last figure is calculated upon the premise of a supply, on average, of 10 pounds of cannabis per week for the 31 weeks from 5 January to 13 August 2004, which is the period during which he supplied to Mr Fenton. A price of $3,300 per pound has been assumed. That was the price of two of the Fenton supplies and is less than the prices of the other supplies to him. There is no issue as to what price should be used in the assessment. The amount of $3,300 is supported by other evidence in the State's case.[3] The contest is as to the extent to which Mr Brooks was trafficking in cannabis and in particular whether he was selling anything like 10 pounds per week.

[9] The State tendered evidence of various real estate transactions in which Mr Brooks and Ms McCabe have been involved since about 1992. This demonstrates substantial success in real estate investment and provides a good explanation for their present financial position. Between them they now own two real properties, a boat (costing $72,000) and two motor vehicles, and their bank accounts have credit balances totalling in excess of $125,000. Mr Brooks' interest (if any) in all of that property is the subject of a restraining order made under s 31 of the Act, and is the subject of the State's application for forfeiture.

[10] In the respondents' case, evidence was given by an accountant, Ms Bundesen, who has undertaken an extensive examination of the affairs of Mr Brooks and Ms McCabe. This provides a reasonably clear picture of the sources, or at least the principal sources, of their present assets. To some extent the evidence permits an

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2 *R v Maher* [1987] 1 Qd R 171

3 Section 82(1)(c)(i)

assessment to be made of Mr Brooks' wealth at the beginning and the end of the period of criminal activity which is relied upon (January through August 2004). And as I will now discuss it does not indicate that he was in receipt of any significant but unexplained income.

[11] According to his tax return for the year ending 30 June 2003, he had a taxable income of $20,506. The State says that he misstated that income because he included purported rental from their property at Lower Cross Street, Goodna ("the Goodna property") as a means of disguising his illegal income. Mr Brooks says this house was let to Mr West, who as already mentioned, was an employee of Mr Brooks. Mr West said in his examination (the content of which was tendered by the State) that he was indeed Mr Brooks' tenant, paying $150 per week. Mr West left Mr Brooks' employ on acrimonious terms and in some respects has given evidence which is damaging to him. I do not see why Mr West would wish to falsely swear that he was Mr Brooks' tenant. In addition, the payment of $150 per week is supported by the evidence of deposits to Suncorp towards its loan for this property. For the most part those deposits are in the amount of $150 or a multiple of it, and broadly speaking, their timing corresponds with $150 per week. I am satisfied that this rent was paid for the Goodna property. I also accept that Mr Brooks' legitimate income for the 2003 year was at least as he declared in his return, and I think it more likely than not that it was somewhat higher because he is likely to have not declared some cash income from the panel beating business. There is no tax return yet filed by him for the 2004 year.

[12] Ms McCabe has worked as a hairdresser for many years and for the same employer since September 2003. In the nine months to 30 June 2004, according to her PAYG payment summary, she earned gross wages of $17,830. She and Mr Brooks have no children.

[13] From this evidence, it appears that their household has had sufficient legitimate income for them to live comfortably although not in luxury. Until 2003, when the Toowong unit was purchased, none of the properties in which they lived could be regarded as luxurious. I have already mentioned that the whole of its purchase price came from Adelaide Bank Limited. The only personal property which could be considered luxurious was the boat purchased by Mr Brooks in January 2005 at a price of $72,000. But that was after the Toowong property had been sold.

[14] Through Ms Bundesen, evidence was given of the expenditure of the Brooks/McCabe household. I accept Ms Bundesen's analysis that the expenditure was able to be funded from his legitimate income and her income. Accordingly the State's case is not assisted through s 83(3).

[15] On the face of things then, at least before account is taken of the various real estate transactions and the cost of borrowings for them, the legal income of Mr Brooks together with the income of Ms McCabe was commensurate with their apparent expenditure and their lifestyle. I turn then to consider their various property dealings.

[16] In 1987, before her relationship with Mr Brooks, Ms McCabe purchased a property at Manly West for $58,000 with a loan of $32,500. She sold it in March 1995 for $119,500. About $110,000 was paid to Suncorp to release a mortgage over it, because it had been further encumbered to secure other loans.

[17] In 1993 Mr Brooks and Ms McCabe purchased 50 Spoonbill Street, Birkdale, for $119,500. They sold it in June 2003 for $225,000.

[18] They purchased 3 Estelle Street, Birkdale, in January 1994 for $132,500. They sold that property in December 2000 for $165,000.

[19] In December 2000 (it seems almost simultaneously with the sale of 3 Estelle Street) they purchased the house at Archer Court, Chambers Flat. They paid $140,000. They sold this property in August 2004 for $352,500. Clearly this was a very profitable investment.

[20] In September 2003 they purchased the Toowong apartment. As I have mentioned, the price was $600,000. They sold the apartment in January this year for $699,999.

[21] There is also a property at Kyogle, which Mr Brooks had purchased in 1992 and transferred to Ms McCabe in 2001. Although that is presently the subject of a restraining order, the State concedes that it is proved not to be illegally acquired property.

[22] It can be seen then that since August of 2004 (which is the end of the period of the criminal activity relied upon by the State) they have sold the properties at Archer Court and Toowong at prices realising substantial capital gains. The purchase of the boat occurred shortly after the settlement of the Toowong sale. The substantial funds remaining on bank deposit can also be fairly attributed to these capital gains.

[23] From the acquisition of the Toowong apartment Mr Brooks and Ms McCabe had high mortgage commitments, totalling about $4,500 per month. This reduced to $3,298 per month once Archer Court had been sold, because part of its proceeds was used to repay the smaller of the two loans ($175,000) borrowed for the apartment. Ms Bundesen has reconstructed their current account with Suncorp, from which it appears that all of these monthly payments were drawn. When the apartment was purchased (September 2003) its balance was between $8,000 and $9,000. Largely because of the mortgage payments, the balance fell to less than $100 by late January 2004. Then on 28 January, an amount of $23,800 was deposited. It came from the sale of a motor vehicle. It had been sold to a dealer in exchange for another motor vehicle (of lesser value) and a payment by the dealer to Ms McCabe of that amount of $23,800.

[24] Over the next six months (more precisely to 19 July 2004) in which a total of $27,083.30 was deposited to this account, the credit balance fell from $24,892.16 to $3,117.42. The debits were $48,858.04, of which instalments on the apartment loans accounted for $22,845. During this period, Mr Brooks and Ms McCabe appeared to have been living beyond their incomes (apart from his criminal income). But it appears that in substance they did so by using up the funds yielded by the motor vehicle sale in January.

[25] On 19 July 2004 they borrowed a further $90,000 from Adelaide Bank Limited, of which $88,274 was then deposited to this account. This was a short term loan: it was repaid in full on 10 August 2004 from part of the proceeds of the sale of Archer Court. I infer that the contract for that sale was made prior to this loan being drawn down. On drawing the loan, they immediately paid $20,000 from this account to buy a Porsche car. It is subject to the restraining order, but the State now concedes

that the source of the funds was this (July) loan and that it is proved that it is not illegally acquired property for the purposes of s 50(1) and s 68(2).

[26] Between 19 July and 10 August there were no deposits to this account, but further to the $20,000 for the Porsche, there were withdrawals of about $35,000. On 10 August the proceeds of sale of Archer Court paid out the $175,000 loan for the apartment and the $90,000 loan and a balance of $76,199.57 was paid to the Suncorp account.

[27] At a point coinciding with the end of the period of criminal activity which is relied upon by the State, the assets held by Mr Brooks and Ms McCabe were the Toowong apartment (encumbered to about $452,000), the Goodna property (then encumbered to about $95,000), the Kyogle property, the Porsche and a credit balance in the Suncorp account of $112.567.54. Undoubtedly they had other property such as furniture and personal effects. But as far as the evidence reveals, their substantial assets were as I have described. The value of their interest in Toowong had come from repaying part of the Toowong debt from the successful sale of Archer Court, which they had owned from before the period of criminal activity which is relied upon. That was also the major contributor to the credit balance in their bank account.

[28] The monies originally borrowed to purchase Archer Court had been repaid at least by October 2003 (when it was mortgaged to Adelaide Bank to secure the $175,000 loan for the apartment).[4] Again, that predates the period of the criminal activity which is relied upon by the State.

[29] The Goodna property was mortgaged to Suncorp. The balance at 3 January was $95,007 and on 6 August 2004 it was almost the same ($95,054.98). I have already found that Mr West was paying $150 per week for this house. Those payments were sufficient to meet the interest on this loan. As I have noted already, it is significant that payments to this loan account were usually in multiples of $150. None of the proceeds of Mr Brooks' criminal activity had to be applied towards this loan.

[30] The assets of Mr Brooks and Ms McCabe as at mid August 2004 can thereby be traced to their success in real estate investments, and in particular a very successful investment in the Archer Court property. But importantly, until Archer Court was sold, their liquidity was apparently poor. Within the period of January to August 2004, they met their commitments and their various expenses only by selling a vehicle and by further borrowing. Apart from the Toowong apartment, they were not living what could be described as an affluent lifestyle. Conceivably Mr Brooks could have been turning over in excess of $1 million in drug trafficking within this seven or eight months in 2004, and hiding all the profits, even at the cost of having to borrow further from Adelaide Bank. But in my view the evidence of their assets and their Suncorp account strongly indicates that he did not have a cash income of anything like $1 million.

[31] Mr Brooks bought a Toyota Hilux utility in September 2004 for which he paid $4,000. The State applies for its forfeiture. There is no corresponding withdrawal from the bank account, and it is likely that cash was paid. I am not satisfied that all of the $4,000 was not the proceeds of any criminal activity. It may or it may not

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[4] The original mortgage to Suncorp was then discharged

have been at least partly the proceeds of a supply of drugs. Mr Brooks has failed to prove that this asset was not at least partly acquired using "illegally acquired property",[5] and specifically the proceeds of drug sales.

[32] The balance of the Suncorp account progressively fell after 10 August 2004 to about $278.65 on 21 December. Mr Brooks and Ms McCabe then refinanced the Goodna property. They borrowed $143,000 through Aussie Mortgages, of which $95,197.61 was applied to pay out the existing mortgage. The balance of $45,975.16 was paid to their Suncorp account. Again, in this case, they were borrowing further to meet an apparent liquidity problem.

[33] At the end of January 2005, they settled their sale of the Toowong apartment. After payment of the mortgage debt and other expenses there was a balance of $222,261 which was paid to the Suncorp account. This money was partly derived from selling the apartment for $100,000 more than they paid for it, and partly because, as mentioned, they had already repaid one of the apartment loans from the profitable sale of Archer Court.

[34] On 18 February 2005, when the balance in the Suncorp account was approximately $200,000, Mr Brooks withdrew $72,000 with which he purchased the boat which is subject to the restraining order and the forfeiture application. That left a credit balance in this account of about $128,000. There are no account statements after then which are in evidence. The present restraining order specifies Mr Brooks' one half interest in this account as being in the sum of $62,377.05.[6]

[35] There is another Suncorp account which is also the subject of the restraining order.[7] It is in the names of Mr Brooks and Ms McCabe and the property restrained is his one half interest quantified at $1,195.30. From 21 August 2004 until 12 October 2004 there were deposits to this account of $24,300. But $20,000 of that came from a transfer from the Suncorp account I have been describing. The source of the balance of these deposits is not demonstrated. Nor is the ultimate source of the funds in this account, of which Mr Brooks' half share of $1,195.30 is restrained. But nor is there anything about this account which furthers the State's case for a proceeds assessment order by indicating a large and unexplained income.

[36] Against this background of the financial position and liquidity of Mr Brooks and Ms McCabe during any relevant time, I will now consider the more direct evidence of the extent of Mr Brooks' drug trafficking.

[37] The State seeks to prove Mr Brooks was selling, on average, at least 10 pounds of cannabis per week during this 31 week period. It heavily relies upon a statement which undeniably Mr Brooks made to Mr Fenton on Friday, 27 February 2004, which was that he was then selling 10 to 12 pounds a week. They were not the precise words he used but it is clear that this was the effect of his claim. Mr Brooks had sold cannabis to Mr Fenton on three occasions prior to this date. Mr Fenton was wanting more. In their telephone conversation of 26 February, Mr Brooks had said, in effect, that he did not then have any cannabis but that he did have some "paint" (which was a code for methylamphetamine). The meeting on 27 February involved the supply of methylamphetamine and ecstasy tablets. At this meeting, Mr

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[5] As defined in s 22

[6] Being one half of the balance as at 28 February 2005 according to a facsimile from Suncorp

[7] No 046214703

Brooks claimed that he was about to travel to Perth (by road) but he would be back by "Monday night". This meeting was at about 10.30 am on a Friday. He claimed that he would "…. ten grand out" of the trip. A little later in the conversation there was this said:

> "Mr Fenton: So how come you're having to go to Perth to get your green?
>
> Mr Brooks: Cause I can't keep it out up here, can't keep it up mate deadset, I go through about ten to twelve a week. Well I've got three growers and they can't keep it up to me and I need new growers. And every cunt around here is thirty two. If I can drive over there and pick up twelve, which is all I can afford, yeah, I'm saving myself four hundred bucks a throw, which is giving me a fuckin four grand drive isn't it. And I'm not paying because he's going any way. So, and he's quite willing to bring it back, I've just got to look after him with a bit. So I'll save a good four grand, and right now I'm out of hoochey man, I can't get any for another ten days. They're just about ready to pick. So, fuck it bro, you gotta do what you gotta do. See I own a panel shop bro but this is what I do on the side. The boys run the shop, this is my cream. …"

[38] At this time the Australian Crime Commission was intercepting calls to and from Mr Brooks' mobile telephone. The State has tendered the recordings which include calls on 27 and 28 February and 1 March. These indicate that Mr Brooks did not go to Perth. For example in the conversation of 28 February, he is recorded as making arrangements to meet someone "up on the hill", a reference to his panel beating shop at Richlands. Possibly Mr Brooks intended to go to Perth but changed his mind. His counsel argued that he was falsely claiming to Mr Fenton that he was going to Perth as part of his false claim to be selling 10 to 12 pounds per week. They argued that Mr Fenton's superiors, to whom he immediately reported these claims by Mr Brooks, could not have treated the claims seriously, for otherwise they would have had him watched with a view to intercepting such a large importation of cannabis. It does seem that those to whom Mr Fenton reported were not sufficiently concerned by the claims to pursue Mr Brooks in that way. There may be many reasons why they did not do so but ultimately their reaction is of little relevance to this case. There are better indicators of the truth or otherwise of this claim of 10 to 12 pounds per week.

[39] First, trafficking to that extent would have resulted in a different financial position for Mr Brooks than the one I have described. Whilst the evidence would not be expected to give a complete picture of his finances, the view it does provide is clear enough to make it unlikely that Mr Brooks had a trafficking business of this level, from which he would have been expected to derive profits of at least $100,000 over this seven month period.

[40] Secondly, with one exception there is no evidence of a sale to anyone other than Mr Fenton of cannabis in a quantity of a pound or even half a pound. That exception is the evidence of Mr West, who says that he saw Mr Brooks deal in a pound once or

twice over a period of five to six years. In his examination, he agreed that there could have been other occasions which he did not witness. He described something of a continuous stream of customers coming to the panel shop to obtain cannabis from Mr Brooks and that a stock of cannabis was kept on those premises. He said that on average there would be "probably between two and six" people per week coming into the panel shop for cannabis which subsequently increased to "probably 10 or something". This evidence was given at the examination and not orally at this hearing. When cross examined at the hearing, he agreed that he had "no idea of what quantity of marijuana Mr Brooks was dealing with in 2004". It was Mr West who had actually delivered the first pound of cannabis supplied to Mr Fenton (on 5 January) and Mr West agreed in cross examination that this could have been the only occasion, of which he was aware, that Mr Brooks sold a pound. But his evidence that there were "two to six" and later about 10 people a week being supplied at the panel shop was not challenged. It is ultimately argued for Mr Brooks that Mr West could have been mistaking members of Mr Brooks' family who called to see him for cannabis buyers. That was not put to Mr West who described those people as leaving with "sandwich bags" of cannabis and "reeking of" it.

[41] Clearly Mr Brooks had other customers. The telephone interceptions prove that. one of those customers was Mr Kirk, who was called by the State and who had been examined before a deputy registrar. He knew Mr Brooks from 2003 until the end of 2004. He would buy about an ounce of cannabis every four weeks from him at a cost of $250. He collected it at the panel shop. I infer that he was one of those visitors described by Mr West.

[42] Another person examined before the deputy registrar was Mr Davies who was also called by the State. He was both a buyer from and seller to Mr Brooks . He would buy "little $25 bags" from him and he would also sell "$100 bags" and on some occasions, one pound bags. Mr Davies was a producer with his own hydroponic operation. According to his evidence at the examination, it was only some way into 2004 that he supplied Mr Brooks in one pound lots. When cross examined at this hearing, he agreed that Mr Brooks told him he needed cannabis in larger quantities to supply a particular customer. He was not supplying Mr Brooks on a continuous basis and he had his own difficulties of production. His evidence indicates that to the extent that Mr Brooks was buying in one pound lots from him, it was for resupply to Mr Fenton.

[43] The hydroponic operation at Archer Court was, as I have said, a relatively sophisticated one. But it is not demonstrated that it was providing Mr Brooks with a stock of cannabis from which he was selling many pounds a week, by the time the operation was uncovered at the beginning of March 2004.

[44] The telephone interceptions covering the period from 12 February to 4 March 2004 do not indicate a business with a turnover of 10 to 12 pounds per week. What is more likely is that related by Mr West, which is that Mr Brooks dealt usually in relatively small quantities but with many customers who would collect their supplies at his panel shop. Mr Fenton says, and I accept, that when he was at those premises on 13 August 2004, Mr Brooks took the lid off a metal drum kept in a caravan at those premises and revealed several large plastic bags of what appeared to be cannabis. One of those bags was supplied to him and it contained about a pound. I infer that the other bags which he saw were one pound bags. But that is

consistent with the Davies evidence that relatively later in 2004, he was being asked to supply in larger quantities.

[45] In the circumstances of 27 February, Mr Brooks had reason to falsely boast that he was selling 10 to 12 pounds per week. Mr Fenton was a new and potentially very valuable customer. Mr Brooks could have been keen to impress as a substantial operator. He might have wished to avoid the impression that Mr Fenton would have to go elsewhere to be supplied in the quantities he was seeking. And Mr Brooks had been unable to supply cannabis on that particular day.

[46] I am not persuaded that Mr Brooks was then supplying cannabis to the extent of 10 pounds per week, or moreover, that he did so at anything like that rate over these 31 weeks. Undoubtedly Mr Brooks was a busy trafficker but I do not accept that he usually sold in the quantities in which he dealt with Mr Fenton. Perhaps he was selling some of his stock in pound lots by August. But it is more likely that most of his sales were to consumers such as Mr Kirk. Counsel for the State strongly argued that much could be made from Mr Brooks not giving evidence in this hearing. That would result in an inference that his evidence would not have assisted his case. It could not be used to fill "gaps in the evidence, or to convert conjecture and suspicion into inference".[8] It is for the State to prove the extent of the criminal activity from which it then seeks to establish the proceeds of that activity.

[47] In this context, the court is entitled to make an assessment by what is described as a broad approach: *R v Pepin* (1996) 86 A Crim R 327. There are also the considerations mentioned by Hunt J in *R v Fagher* (1989) 16 NSWLR 67 where he said at 80:

> "… the court should not lose sight of reality that the court, to fulfil its statutory obligation, often will have to assess the value of the benefits derived by the defendant on material which is far less satisfactory than what it normally would expect to have in litigation. It is not the nature of criminals to keep records of such a kind as to assist the court: nor is it the nature of criminals to tell the truth when telling a lie would seem more advantageous."

[48] Although Mr West's evidence was in many respects general, it was unchallenged in its account of the number of customers visiting the panel shop for cannabis each week. If, as Mr West said, there were 10 customers such as Mr Kirk per week, that equates to a turnover of about $2,500 per week. Further, from the evidence of what Mr Fenton saw on 13 August, I infer that there were some sales which were somewhat larger than an ounce. Mr West said the number developed from "two to six" customers to 10 per week. An assessment of an average of $2500 per week would allow for an average of eight customers per week at the shop but also for some larger sales and sales elsewhere. The net profit to Mr Brooks from a weekly turnover of $2500, of course, would be much less and such a profit would not be inconsistent with the financial position of Mr Brooks and Ms McCabe as I have described it. In addition, I think it likely that his trafficking decreased for a little while after the police discovered the hydroponic operation at Archer Court. He was telephoned by police on the same day and he must have known that he was under suspicion. This calls for some reduction from what would otherwise be a fair

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[8] Cross on Evidence Australian Edition at [1215]

assessment of $2500 per week over the 31 weeks. Ultimately I conclude that the proceeds of his drug trafficking, apart from those transactions involving Mr Fenton, should be assessed at $65,000. The proceeds of his dealings with Mr Fenton, including the sale of the firearm, are uncontroversial and amount to $36,700.

[49] On the second day of the hearing, the State said that it would also rely upon the fraud of Mr Brooks in obtaining the loans for the apartment. Counsel for Mr Brooks did not object to that, if the witness from Adelaide Bank was made available for cross examination, as she was. The State relies upon the fraud offence as a further basis for saying that the proceeds of sale of the Toowong apartment are illegally acquired monies, as an answer to the application to exclude what remains of them from forfeiture. It is not clear that the State is also seeking a proceeds assessment order in relation to the fraud. It submits that none is necessary, if orders are made for the forfeiture of Mr Brooks' interest in the Suncorp accounts and the boat. When arguing that the fraud offence supports the forfeiture of what can be traced from the proceeds of the apartment, the State submitted that that apartment itself constituted proceeds of an illegal activity, i.e. the fraud, and so became "illegally acquired property" by s 22(1). That submission is considered below.

Forfeiture

[50] The property which is presently the subject of a restraining order[9] is:

- Mr Brooks' interest in the Goodna property;
- The Kyogle property;
- The Toyota Hilux utility;
- The Porsche car;
- The boat;
- A one half interest in Suncorp accounts held by Mr Brooks and Ms McCabe.

[51] Subject to the applications to exclude property from forfeiture, that property would be forfeited to the State upon proof that in the period of six years before the application for a restraining order, Mr Brooks engaged in "serious crime related activity": s 58(1). A forfeiture order may be refused if the court is satisfied that it is not in the public interest to make the order: s 58(4). But here no submission is made in reliance upon that provision. The term "serious crime related activity" is defined as anything constituting a "serious criminal offence" which is relevantly and indictable offence for which the maximum penalty is at least five years imprisonment.[10] There is no issue in these proceedings that by his supply of and trafficking in drugs, he has engaged in conduct which is a serious crime related activity and within the relevant period. The property is not forfeited if it is excluded from the operation of the restraining order pursuant to s 49. Nor is it forfeited if it is the subject of an exclusion order made under s 66, in consequence of an application under s 65 by a person who claims an interest in the property.

[52] Mr Brooks applies under s 65 to exclude each item of property. According to s 68(2) he must prove that he has an interest in the property and it is more probable than not that the property to which his application relates is not illegally acquired property. Ms McCabe applies under s 49 or alternatively s 65 to prevent the

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9 Made on 28 February 2005 as relevantly varied by the Order of 23 June 2005

10 Sections 16 and 17

forfeiture of the Kyogle property and the Porsche car. Under s 50, the court may exclude a property from a restraining order "only to the extent to which the interest in the property concerned was not, when it first became illegally acquired property, acquired using the proceeds of an illegal activity". Under s 68 she must prove that she has an interest in the property and (again) that more probably than not the property is not illegally acquired property.

The Goodna property

[53] This property was purchased by Mr Brooks and Ms McCabe in 2001 at a price of $100,000, the whole of which was borrowed from Suncorp Metway. I have mentioned already that the balance owing on that account was not reduced between 3 January and 6 August 2004. It was slightly higher still ($95,197.61) when Suncorp was repaid by refinance from Aussie Mortgages. The amount which it advanced was $143,000. Accordingly, no part of the purchase price could be attributed to the illegal activity which is relied upon. Nor could it be said that the activity contributed to any reduction in the mortgage debt and some commensurate increase in the extent of the mortgagors' interests, because there was no reduction in the debt. Nevertheless the State argues that Mr Brooks has failed to prove that this is not "illegally acquired property". It submits that the mortgage payments represented both interest and partial repayments of principal. But as I have just said, no principal was repaid until there was a full repayment by a loan from another financier. Still, the State appears to contend that even an interest payment is relevant to the question of whether this is an illegally acquired property.

[54] That term is defined by s 22 as follows:

> "**22 Meaning of illegally acquired property**
>
> (1) Property is ***illegally acquired property*** if it is all or part of the proceeds of an illegal activity.
> (2) Property is also ***illegally acquired property*** if--
> (a) it is all or part of the proceeds of dealing with illegally acquired property; or
> (b) all or part of it was acquired using illegally acquired property.
> (3) For subsection (2), it does not matter whether the property dealt with or used in the acquisition became illegally acquired property because of subsection (1) or subsection (2).
> (4) Subsections (1) and (2) apply whether or not the activity, dealing or acquisition because of which the property became illegally acquired property happened before the commencement of this section.
> (5) Also, if the proceeds of dealing with illegally acquired property are credited to or placed in an account, the proceeds do not lose their identity as proceeds because they are credited to or placed in an account."

The term "proceeds" is defined by s 18 as follows:

"**18 Meaning of proceeds**

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."

[55] The Goodna property is not itself the proceeds of an illegal activity. The State's argument seems to be that "part of it was acquired using illegally acquired property", or at least the contrary is not proved. On my findings, any interest in the property was acquired on no more than two occasions: the original purchase and perhaps on the discharge of the Suncorp debt.[11] As there was no acquisition of property simply by interest payments, the source of the interest payments is irrelevant. In any case, I am satisfied that the source was the rental paid by Mr West.

[56] It follows that Mr Brooks has proved, in terms of s 68, that he has an interest in the property and that it is not illegally acquired property. An exclusion order should be made for the property, subject to the possible operation of s 69(2) which provides as follows:

"**69 What is an exclusion order**

(1) An ***exclusion order*** is an order that--
(a) states the nature, extent and, if necessary for the order, the value, when the order is made, of the applicant's interest in the property; and
(b) if the application for the forfeiture order has not been decided, excludes the applicant's property from the application for the forfeiture order; and
(c) if a forfeiture order has been made for the property, and the property is still vested in the State, directs the State to transfer the property to the applicant; and
(d) if a forfeiture order has been made for the property and the property is no longer vested in the State, directs the State to pay to the applicant the value of the applicant's property.
(2) However, if the applicant is the prescribed respondent and an application has been made for a proceeds assessment order against the prescribed respondent, subsection (1)(b) applies 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."

I shall return to the question under s 69(2) of whether this property is unlikely to be required to satisfy any proceeds assessment order.

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[11] Although that is doubtful at least because the property was simultaneously remortgaged

The Toyota Hilux utility

[57] As I have found already, this was bought for $4,000 in cash which was not drawn from the Suncorp account. I am not satisfied that none of the cash was the proceeds of an illegal activity and was thereby illegally acquired property pursuant to s 22(1). Therefore I am not satisfied that the vehicle was not illegally acquired property by s 22(2)(b). The exclusion application fails in relation to this property and it must be forfeited.

The Porsche

[58] As I have mentioned, the State now concedes that this was not illegally acquired property, but it argues for the operation of s 69(2). As I conclude below, this car is not required to satisfy the proceeds assessment order. But in case s 69(2) does become relevant, I should determine whether it is the property of Mr Brooks or is instead the property of Ms McCabe. If it is hers, s 69(2) cannot apply.

[59] The starting point is that the vehicle is registered in his name, but it was purchased by funds drawn on the joint account. Mr Brooks has claimed that he intended to give the car to Ms McCabe. I am not satisfied that it was his intention or that he did so. But if there was such a gift, s 20(4)(b) would be engaged with the consequence that the car would be treated as under "the effective control" of Mr Brooks. By s 19, the property of a person does not include property of the person that is under the effective control of someone else. So on that basis the car would not be the property of Ms McCabe. In any case, Ms McCabe has failed to prove that the car is not under his effective control quite apart from s 20(4)(b).

The boat

[60] 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).

[61] 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".[12] 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 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?

[62] 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 a 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.

[63] 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).

[64] The State does not argue that 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.

[65] In their oral argument, counsel for the State also said that it was for Mr Brooks to prove that the mortgage payments to Adelaide Bank were made wholly from legally acquired monies. The original advance upon the smaller of the Adelaide Bank loans was $174,405. The balance paid to discharge this debt was $174,388.23. On the larger loan, the original advance was $455,405 and the amount paid to discharge the debt was $457,956.71. Overall then, the amount which had to be paid to discharge the debts exceeded a total of what was drawn down. The position then is relevantly

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[12] Schedule 6

the same as that of the Goodna property. No property was acquired even if it is assumed for the present that any decrease in the principal debt was a commensurate increase in the mortgagor's property and in that way an acquisition of property.

[66] 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).

[67] 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.

The larger Suncorp account

[68] Although the State accepts that the monies paid from this account for the boat came from the apartment's sale, it does not seem to make the same concession for what remains in the account.

[69] On 30 January 2005, immediately before the settlement of the sale of the apartment, this account had a credit balance of $2,358.64. In substance, the large credit balance represents part of the proceeds of the sale of the apartment and the remainder of monies borrowed from Aussie Mortgages on the refinance of the Goodna property. Quite possibly, funds from the drug activity were at some time deposited to this account. Subsection 22(5) provides that "if the proceeds of dealing with illegally acquired property are credited to or placed in an account, the proceeds do not lose their identity as proceeds because they are credited to or placed in an account". However, that provision does not explain how subsequent drawings on such an account should be treated, where the illegal proceeds are mixed with other monies. Should there be some "first in/first out" fiction? Should there be some presumption that the account holder intended to pay away first, or alternatively last, the illegal funds from the mixed pool?

[70] On the facts in this case, in my view it would be artificial to treat the credit balance in this account, as at February or at present, as anything other than derivatives of the Toowong property and the refinance of the Goodna property. Absent those deposits, the account would be well overdrawn even without regard to the purchase of the boat. I am satisfied that the Mr Brooks' interest in this property is not illegally acquired property.

The other Suncorp account

[71] The State concedes that this is shown to be property which is not illegally acquired property. Apart from s 69(2), it should be excluded.

Kyogle Property

[72] The State concedes that this was not illegally acquired property. The issue is whether it is property in which Mr Brooks has an interest, so as to make it available for the operation of s 69(2). Ultimately it is unnecessary to determine that question, because of the amount of the proceeds assessment order and the availability of other property. But in case it becomes relevant, it is appropriate to consider this issue.

[73] Mr Brooks purchased this property in 1992. In November 2001 he transferred it to Ms McCabe. He acknowledged in the form of transfer the receipt of a consideration of $30,000. But no money changed hands and the State argues that Mr Brooks transferred the property to avoid a judgment creditor. In this hearing Ms McCabe was cross examined about that thesis and rejected it. There was a judgment against Mr Brooks for $36,000 in favour of someone who had done some work on this property. I am not prepared to infer that this was a transfer intended to defeat that creditor or was a sham transfer intended to make it appear that Mr Brooks was not the owner.

[74] Although it was Mr Brooks who purchased the property originally, the loan for the purchase monies was secured over Ms McCabe's property at Manly West. The amount originally borrowed was $24,447.47. Because of the passage of time, the evidence as to this loan is incomplete. By July 1993 the balance had reduced to a little over $20,000. I infer that the loan was paid out on the sale of her Manly property in 1995 and probably for about $15,000. If so, then arguably she would have had an interest in Kyogle prior to the transfer of the legal title to her. Accordingly, there may have been some consideration for the transfer to her. If it was a gift, the circumstances would have to be further explored than occurred in this case, before any reliable finding could be made as to whether he intended her to be the owner, that is whether the presumption of a resulting trust was rebutted. But in the present context, the inquiry is not simply as to whose property this is under the general law. If the Kyogle property is under the effective control of Mr Brooks it is to be treated as his property. The evidence strongly suggests that it has been and remains under his effective control and Ms McCabe has failed to prove otherwise. In particular in early 2004 Mr Brooks set about trying to sell the property. In theory he could have been acting simply as her agent and under her direction but that is not indicated by the evidence. Ultimately Ms McCabe has failed to prove that the Kyogle property is hers for the purposes of this Act.

Section 69(2)

[75] According to my findings above at [48] the proceeds of Mr Brooks' criminal activity would be assessed at $101,700. With the exception of the Toyota Hilux utility, Mr Brooks has proved that the other property which is presently restrained is not illegally acquired property. It is to be excluded from forfeiture if I am satisfied that it is unlikely to be required to satisfy a proceeds assessment order. The property in question has a total value of more than $101,700 so not all of it will be required. The question is one of selecting the property which is not required.

[76] In any event the Toyota utility will be forfeited. Under s 79(3) there may be deducted from the value of the proceeds the value of any property forfeited. The van was purchased for $4,000 last year. There is no particular evidence of its present value but I am prepared to infer that it is worth at least $3,000. That amount should be deducted from the proceeds.

[77] The half interest of Mr Brooks in the Suncorp accounts cannot be precisely quantified. When the original restraining order was made the value of his interest was $63,572.35. It is appropriate to deduct that pursuant to s 79(3) reducing the value of the proceeds to $35,172.65. So the forfeiture of money in the Suncorp accounts will be limited to the sum of $62,377.05 in account No 024425782 and the sum of $1,195.30 in account No 046214703.

[78] Of the remaining property, the boat can be distinguished because Ms McCabe makes no claim to it. It is preferable that property which is indisputably his be applied. It was purchased in early 2005 for $72,000 and I am prepared to infer it is worth at least $35,127.65 (the value of the proceeds of crime less the Toyota utility and the Suncorp funds). The other property the subject of the restraining order should therefore be excluded from forfeiture. This is the Goodna property, the Kyogle property and the Porsche.

[79] According to s 69(2) the boat could be excluded "only if the court is satisfied the property is unlikely to be required to satisfy any proceeds assessment order". If the real property and the car are excluded, at present I could not be satisfied in terms of s 69(2) in relation to the boat. Possibly Ms McCabe can meet the balance from her share of the Suncorp account.

[80] Section 69(2) is in terms which require the court's satisfaction that "the property is unlikely to be required". It is not in terms that "*the forfeiture of* the property is unlikely to be required". If property is not forfeited, it is still available to satisfy a proceeds assessment order by the charge which is imposed upon it under s 88. So if the boat is excluded from forfeiture, it would still be charged to the State to the extent necessary to satisfy the order. But according to the terms of s 69(2) it would appear that the boat cannot be excluded.

[81] It is likely that the value of the boat is something like the $72,000 paid for it earlier this year. It would be unjust if that were forfeited to meet an order for the payment of an amount of less than half of its value, where it has been proved that it was not illegally acquired property. In these circumstances Mr Brooks should be given an opportunity to satisfy a proceeds assessment order in that amount of $35,127.65. The application for the forfeiture of the boat should be adjourned to provide that opportunity. There will be no order then for the forfeiture, or exclusion from forfeiture, of the boat. The application and cross application in relation to it will be adjourned until 30 January 2006 and the amount of the proceeds assessment order will be unaffected by the value of the boat.

Orders

[82] The Toyota Hilux utility Queensland registration number 622 CDL registered in the name of Dale Richard Brooks will be forfeited to the State of Queensland.

[83] The interests of Mr Brooks in Suncorp Metway account No 024425782 to the extent of $62,377.05, and in Suncorp Metway account No 046214703 to the extent of $1,195.30, will be forfeited to the State.

[84] Mr Brooks' interest in the real property located at 14-16 Lower Cross Street, Goodna, (Real Property Description Lots 7 and 8, Registered Plan 110911, County of Stanley, Parish of Goodna); the real property located at Lot 393 Iron Pot Creek Road, Kyogle, New South Wales, (Real Property Description Lot 393 in deposited plan 815696 at Toonumbar, Parish of Langwell, County of Rous – Title Folio No 393/815696); and the Porsche motor vehicle Queensland registration number 911 DAT is in each case excluded from the application for forfeiture.

[85] Pursuant to s 79 of the Act, Mr Brooks will be ordered to pay, as a proceeds assessment order, the sum of $35,127.65.

[86] The application and the cross application in relation to the vessel described in paragraph 2 (d) of the restraining order made on 28 February 2005 are adjourned to 30 January 2006.

[87] I will hear the parties as to costs.