

BETWEEN:

GARY ERNEST WHITE

Appellant

and

10 **THE DIRECTOR OF PUBLIC PROSECUTIONS (WA)**

Respondent

APPELLANT'S SUBMISSIONS IN REPLY

Factual issues

1. The respondent's submissions in paragraphs 8 to 11 concerning the evidentiary conclusions for the closure of the gates are disputed and unsupported.
- 20 2. Contrary to the respondent's submission in paragraph 8, there was no evidence available to permit a conclusion that Rainbow closed the gates at the Property "at the behest of the appellant". Reid's evidence was that he asked Rainbow to lock the gates as he did not have his key with him¹. There was no evidence that Rainbow knew the reason for Reid's request.
3. The respondent's submission at paragraph 9 that Rainbow must have been aware that the appellant wanted the gates locked on the third occasion that evening is without foundation. The request by Reid to lock the gates and the subsequent opening and closing of the gates by the appellant is not evidence of the knowledge of Rainbow. It is only evidence that those two events occurred.
- 30 4. The respondent's submission in paragraph 10 that the locking of the gates by Rainbow on the third occasion "maintained the status of the Property as locked, as intended by the appellant" is an unsustainable assertion. There is no evidence of Rainbow's reason for locking the gate or that the appellant knew Rainbow had locked the gates.
5. The factual conclusions asserted by the respondent in paragraph 11 which was the finding of the Court of Appeal as to the purpose for which the gates were locked are themselves without foundation and cannot support what was an erroneous factual finding. Therefore, the factual conclusions of the Court of Appeal as set out in paragraph 11 of the respondent's submissions are without foundation and erroneous.

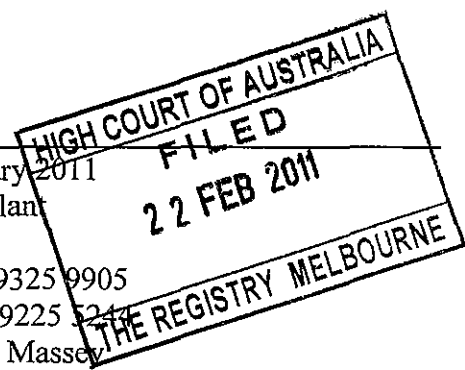
¹ [AB 43.65-73; 73.38-50]

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6. It was reasonably open on the evidence at trial that the gates Property were closed for other reasons. In particular, there was a trucking business operating from the Property² and, at the time, there were trucks together with Reid's sea containers stored therein³. The appellant gave evidence that the gates were closed for security reasons as he kept two dogs at the Property that were aggressive and needed to be restrained⁴.
7. The factual matters relied upon by the respondent in paragraph 12 are insufficient to impute knowledge to the appellant that Tapley was present at the Property before the appellant arrived. The matters relied on by the respondent in paragraphs 12(c) to (h) are matters subsequent to the appellant's arrival at the Property and cannot be relied on to infer an earlier state of knowledge of the appellant.
8. Contrary to the respondent's assertion in paragraph 14 the appellant denied making the phone call to Reid requesting him to close the gates but did give evidence that he asked Reid to bring amphetamines to the Property for Miller⁵.
9. Further, that the appellant confronted Tapley after he arrived at the Property, as referred to by the respondent in paragraph 15, is not evidence of the appellant's intention to confront Tapley at the time of the phone call to Reid. There is no evidence that he knew Tapley was at the Property, prior to his arrival.

Approach to Statutory Construction

10. Contrary to paragraphs 24 and 56 of the respondent's submissions, the purpose of the Act is to be derived from the Act itself, not the Second Reading speech, the Explanatory notes to the Bill⁶ or confiscation legislation of other jurisdictions. In particular, the Commonwealth confiscation legislation which gives to the court a discretion and is therefore not equivalent to the Act. It is only when there is unresolved ambiguity that it is appropriate to have recourse to extrinsic material⁷.

Statutory interpretation

11. Contrary to paragraph 35 of the respondent's submissions, not only does the ordinary meaning of "use" import a purpose but the language of section 146(1)(a) is concerned with the intention of the person. When section 22 (3) is engaged, as it was here, that intention must be with respect to the relevant confiscation offence.
12. The requirement for the "value judgment" referred to in paragraphs 37 and 38 of the respondent's submissions, only arises if the intention of the person in using the property is disregarded. It is a judgment beyond the prescription of the Act.

² [AB 35.20-30; 148.60 – 70]

³ [AB 42.58-65; 65.30-35; 148 45-55]

⁴ [AB 154.55-65; 219.20-25]

⁵ Respondent's submissions paragraph 57

⁶ [AB 190.31-50]

⁷ DPP v Xian Xuan Xu & Anor [2010] NSWSC 842 at [27]

Sections 146 and 147

13. The term “crime-used property substitution declaration” referred to by the respondent in paragraph 61, is a heading for section 22. The term is not used within section 22. The section states:

(1) On hearing an application under section 21, the court must declare that property owned by the respondent is available for confiscation instead of crime-used property if –

...

10 14. Section 32(2) of the *Interpretation Act 1984* (WA) provides that “a heading to a section, regulation ..., shall be taken not to be part of the written law”.

15. The respondent seeks to constrain the terms of section 22 through the terms of the heading to the section and in particular, the term “crime-used”. The submission that the use of the term ‘crime-used’ in the heading indicates that the section is to apply to all property which is crime-used fails to take into account the terms of the section which distinguish between crime-used property and criminal use of crime-used property. This distinction cannot be ignored by reason of the words in the heading to the section. As Murray CJ stated in *Ragless v Prospect District Council*⁸

20 Where the language of the section is clear, and is actually inconsistent with the headings, the headings must give way.

16. The language in section 146 is clear and unambiguous. Therefore, the words used in the heading “must give way” and the words of the section prevail. Those words distinguish between ‘crime-used property’ and criminal use of crime-used property.

17. The ambit or purpose of section 147 is not limited to persons as asserted by the respondent in paragraph 73. The glossary to the Act states that criminal use is in relation to a person and property. It is those concepts that are incorporated in section 147 in order for the conduct to constitute criminal use.

30 18. Section 147 incorporates ‘crime-used property’ as one element of the definition of ‘criminal use’. If crime-used property and criminal use were intended to be the same thing, it would be unnecessary and circular to define one by reference to the other and to use the different terms throughout the legislation.

Sections 82 and 87

19. Both sections 82 and 87 are concerned to protect the property interests of third parties.

20. Further, the respondent’s submission in paragraph 67 fails to take into account that the criteria in sections 82(4) and 87(1) are cumulative requirements. Therefore, the relevant person also has to establish that they are an “innocent party” as defined in

⁸ [1922] SASR 299 at 311

section 153 of the Act in order to have the freezing order set aside or property returned after confiscation.

21. The respondent relies on section 9 of the *Interpretation Act 1984* (WA) to support its interpretation of sections 146 and 147. However, each of the terms 'crime-used' and 'criminal use' is separately defined within the Act and it is those definitions which are relevant to the interpretation of sections 146, 147 and 22. Section 9 has no application where each term is separately defined. The relevant section is section 6 which provides

10 Definitions or rules of interpretation contained in a written law apply to the construction of the provision of the written law that contain those definitions or rules of interpretation as well as to other provisions of that written law.

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