

Form 27A -- Appellant's submissions

(rule 44.02.2)

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B 22 of 2014

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND

BETWEEN

JOHN WILLIAM HENDERSON
Appellant

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and

THE STATE OF QUEENSLAND
Respondent

APPELLANT'S OUTLINE OF SUBMISSIONS

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Part I: Certification as to form

1. This submission is in a form suitable for publication on the Internet.

Part II: The Issues

2. The principle questions raised by the appeal are these:
 - (a) Where property is seized under the *Criminal Proceeds Confiscation Act 2002* (Qld) does an applicant in an exclusion application need to prove more than that he obtained possessory title in good faith in order to retain ownership of the property?
 - (b) Does the general law provide the basis for the proof of ownership of an interest in a chattel where funds have been derived from the sale of that chattel and those funds are sought to be confiscated?

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FILED ON BEHALF OF: the Appellant
DATE OF DOCUMENT: 19 June 2014

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Part III: Certification as to section 78B of the *Judiciary Act* 1903 (Cth)

3. The Appellant considers that notice need not be given pursuant to section 78B of the *Judiciary Act* 1903 (Cth).

Part IV: Citations

- 4 The reasons for judgment of the primary Judge in the Supreme Court of Queensland are not reported: *State of Queensland v Henderson* [2011] QSC 300 (i.e. the Trial judgment (“TJ”)).
- 10 5. The reasons for judgment of the Queensland Court of Appeal are also not reported: *Henderson v State of Queensland* [2013] QCA 82 (i.e. the Court of Appeal Judgment (“CA”)).

Part V: Facts

6. The primary judge made the following findings in paragraphs 6 to 18 below that were subsequently adopted by the Court of Appeal.¹
7. The appellant had received some jewellery from his father in December 1996 in Picola. The appellant understood the jewellery was given so he could provide for his siblings.² His father gave “him a pair of gold earrings in which were set some diamonds; a gold bracelet with diamonds; a gold necklace with a diamond pendant; and a brooch encrusted with diamonds of varying sizes. At the time, Mr. Marijancevic said to him words to the effect, “[l]ook after your family”. Mr. Henderson understood Mr. Marijancevic to be referring to Joseph, Frank, and Ms. Murphy, as well as himself. Mr. Henderson took the jewellery to Melbourne, and it was kept for some years in a safety deposit box in the name of his then wife, Ms. Warwick, at the Collins Street branch of the ANZ Bank.”³
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8. The appellant had shown the jewellery to his siblings after the death of his father.⁴ “After the death of his father, Mr Henderson, Joseph, Frank, and Ms Murphy met at Mr Henderson’s house, where he showed them the jewellery. They decided to have the jewellery valued and sold, and to invest the proceeds.”⁵
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9. The appellant took the jewellery to a jeweller, Mr. Komianos, who drew the jewellery and valued it in December 2001.⁶ “In about December 2001 Mr Henderson took the jewellery to a jeweller, Mr Komianos. Mr Komianos told

¹ CA [64]-[65]

² TJ [58]; CA [9]

³ TJ [5]; CA [10]

⁴ TJ [58]; CA [11]

⁵ TJ [58]; CA [11]

⁶ TJ [56]; CA [12]

Mr Henderson that the jewellery had a wholesale value of between \$600,000 and \$700,000, and a retail value of \$1 million. Mr Komianos produced drawings of the jewellery.”⁷

10. The appellant then sold the jewellery for \$620,000 cash.⁸ “Some time thereafter, a person whose first name was Daniel contacted Mr Henderson. He ultimately purchased the jewellery for \$620,000 in cash. Mr Henderson kept the cash in a safety deposit box.”⁹
- 10 11. In January-February the appellant negotiated the purchase of a property in Coondoo Street Queensland, a verbal agreement was made to purchase but there was no agreement on price. The appellant travelled to Cairns in April 2002 with the cash to encourage Mr. Dredge associated with the vendor Lynxhaven Pty Ltd to accept a lower price.¹⁰ The appellant subsequently purchased the property without the cash financed by a bank loan and he sale of other property.¹¹
12. On the 4 April 2002 the appellant was convicted and fined \$600 for possession of cannabis for an offence that took place on 20 February 2001.¹² As a result of this conviction, the appellant was a prescribed person who engaged in a serious crime related activity within the relevant limitation period.¹³
- 20 13. On 20 April 2002, \$598,325 was found in the Appellant’s bag in the boot of a car that was parked at the Reef Palm Motel in Cairns. On the 22 April 2002 the cash was deposited in the Commonwealth Bank in Lake Street, Cairns in the strong room. This money was the proceeds of the sale of the jewellery.¹⁴
14. On 10 February 2003 an application was made for a restraining order with the supporting affidavit referring to the order sought in respect of property being “cash to the value of \$598,325 in Australian currency.
15. On 5 March 2003 an application was made under the *Criminal Proceeds Confiscation Act 2002 (Qld)* for the forfeiture of property described as “\$598,325.00 in Australian currency.” On 30 May 2003, and application was filed on behalf the appellant for exclusion from forfeiture of money. It was contended by the appellant that the money came from the sale of some
30 jewellery.
16. At trial the appellant’s siblings, Joseph, Frank and Ms Murphy gave evidence generally supportive of the appellant. Joseph gave evidence that he had been told by his mother and father that the jewellery was given to his great grandfather or his great grandfather’s father as a reward for providing transportation services for Russian royalty around the 1900s or late 1800s. He claimed a quarter share in the money seized.¹⁵ Frank thought the jewellery was

⁷ TJ [7]; CA [12]

⁸ TJ [57]; CA [13]

⁹ TJ [8]; CA [16]

¹⁰ TJ [9] CA [17]

¹¹ CA [22]

¹² TJ [34]; CA [57]

¹³ TJ [42]; CA [59]

¹⁴ TJ [57]; CA [63]–[65]

¹⁵ TJ [45]–[46]; CA [50]–[51]

junk when he first saw it. Ms Murphy thought it was valuable when she first saw it.¹⁶ The hearsay nature of the evidence was not objected to.¹⁷

17. Mr Penfold examined the sketches produced by Mr Komianos and opined that the jewellery was not consistent with Russian styles and was post 1950s. He made an intensive study of the age of the jewellery, described as “just as a hobby”.¹⁸
18. The siblings of the appellant were content that the appellant conducted the litigation on their behalf, and the State was content that the proceedings were conducted in that way. The appellant failed as he could not establish how his father came into possession of the jewellery, and that he could not persuade the court that his father had not unlawfully acquired the property.¹⁹

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Part VI: Arguments

Grounds 1, 5 and 6: Failing to distinguish between the appellant’s father’s interest in the jewellery with the interest of the appellant.

19. The appellant applied for an exclusion order under the *Criminal Proceeds Confiscation Act 2002* (Qld) (“the Act”). The test for the making of an exclusion order is provided for in section 68:

68 Making of exclusion order

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The Supreme Court must, and may only, make an exclusion order if it is satisfied—

- (a) the applicant has or, apart from the forfeiture, would have, an interest in the property; and*
(b) it is more probable than not that the property to which the application relates is not illegally acquired property.

20. The appellant is required to show that the money was not “illegally acquired property”. “Illegally acquired property” is defined in section 22:

22 Meaning of illegally acquired property

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(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*

¹⁶ TJ [47]; CA [52]–[54]

¹⁷ TJ [52]; CA [55]

¹⁸ TJ [50]

¹⁹ TJ [61]–[62]; CA [92], [96]

(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.”

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21. The money was proceeds of dealing with the jewellery. Was the jewellery “all or part of the proceeds of an illegal activity?” It is submitted not. “Proceeds” is defined in section 18:

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.

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22. To be proceeds of an illegal activity there must be a causal link between the illegal activity and the person doing the activity.²⁰ There is no evidence or suggestion that the appellant had anything to do with his father’s acquisition of the jewellery or that he directed or requested his father to acquire the jewellery.

23. There is no evidence of any act of the appellant that is an “illegal activity”. This cannot include the acceptance of the jewellery from the father in the absence of evidence of knowledge of the appellant. “Illegal activity” is defined in section 15:

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15 Meaning of illegal activity

An illegal activity is an activity that is—

(a) a serious crime related activity; or

(b) an act or omission that is an offence against the law of Queensland or the Commonwealth; or

(c) an act or omission committed outside Queensland that—

(i) is an offence against the law of the place in which it is committed; and

(ii) would be an offence mentioned in paragraph (b) if it were committed in Queensland.

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²⁰ In a different context section 18 has been referred to as “crucial” in providing the causal context. See *State of Queensland v Brooks* [2008] 1 Qd R 484 at [61] per Keane JA, Jerrard and Jones JJA agreeing.

24. The primary judge found the reverse, that the appellant did not have the knowledge but the property could still be confiscated.

“However, it would appear to be anomalous that property may be confiscated, because the ultimate origin of the property is beyond the knowledge of, and means of proof available to, a prescribed respondent. Such a case would appear to be well outside the intended scope of the legislation, as identified in s 13(1) and s 13(4) of the Confiscation Act.”²¹

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25. The requirement of a causal link between the illegal activity and the proceeds of that activity is central to the interpretation of the exclusion provisions, and the stated objects of the legislation. A reinforcement of the distinction that should be made between the activity of the appellant and that of his father is in section 13(1), (4) and (7) where Chapter 2, the Chapter containing section 68 as to the test for exclusion applications, is contained. A similar distinction is highlighted as an “important object of the Act” in section 4(2)(a) and (b). The sections read relevantly as follows:

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13 Explanation of ch 2

(1) This chapter enables proceedings to be started to confiscate property derived from illegal activity whether or not a person who engaged in the relevant activity has been convicted of any offence.

.....(4) The court must make a forfeiture order confiscating the property (unless it is not in the public interest to make the order) if it finds it is more probable than not that—

(a) the person whose suspected serious crime related activity was the basis of the relevant restraining order engaged in a serious crime related activity; or

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(b) the property is serious crime derived property because of a serious crime related activity of a person, even though a particular person suspected of having engaged in the serious crime related activity can not be identified.

.....(7) The chapter contains other ancillary provisions including provisions giving persons opportunities to have lawfully acquired property excluded from the effect of restraining orders and forfeiture orders.

26. **4 Objects**

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(1) The main object of this Act is to remove the financial gain and increase the financial loss associated with illegal activity, whether or not a particular person is convicted of an offence because of the activity.

(2) It is also an important object of this Act—

²¹ TJ [65]

- (a) to ensure that property rights are affected by orders under this Act, including orders limiting a person's ability to deal with the property, only through procedures ensuring persons who may be affected by the orders are given a reasonable opportunity to establish the lawfulness of the activity through which they acquired the relevant property rights; and
- (b) to protect property honestly acquired by persons innocent of illegal activity from forfeiture and other orders affecting property. ...

- 10 27. "Interest" is undefined in the Act. The exclusion of interests in property requires applicants to prove the lawful acquisition of the interest under section 68. This contemplates an interest acquired under the general law. The appellant's interest in the jewellery was acquired when he received it from his father. The appellant's acquisition was unrelated to any proceeds of illegal activity.
28. *Russell v Wilson*²² provides the principle that ought to have been applied in circumstances of police seizure. The principle has been applied throughout Australia for a long time.²³ The applicant had title to the jewellery when given to him by his father. This was the activity from which the jewellery was derived. The appellant's evidence was accepted. He should have succeeded.
- 20 29. The test that the appellant was required by the primary judge and the Court of Appeal to meet, was that he had to satisfy the primary judge that his deceased father had not unlawfully acquired the jewellery.²⁴ The test was an almost impossible one, given his father's death. If Joseph's evidence was correct, even the survival of his father would have been insufficient, as the jewellery may have come from the great grandfather.
- 30 Grounds 2, 3, and 4
30. In setting the test above the primary judge and Court of Appeal failed to take into account the possessory title of the father when the jewellery was given to the son. This would be sufficient to establish title. Possessory title had not been excluded by the legislation specifically, or at all. The legislation contemplates that the general law would establish the legality of the appellant's title. The words accompanying the giving of the jewellery were admissible as evidence of a donative intention.²⁵
- 40 31. The varying accounts of the origin of the jewellery did not detract from the above. Ground 3 in the Court of Appeal ought to have succeeded.

"In all the circumstances – including the learned judge's acceptance of the evidence of the appellant and his siblings, the absence of any evidence that the appellant's father had unlawfully acquired the jewellery and the

²² (1923) 33 CLR 538 at page 546 per Isaacs and Rich JJ.

²³ *Gollan v Nugent* (1988) 166 CLR 18; *Simonson Properties Pty Limited v Bruce Lachlan Hardy and Anor* [2014] NSWSC 229 at [53]; *Levy v Watt* [2012] VSC 539 at [43]; *Schneider v Alusa Pty Ltd & Ors* [2011] QSC 366 at [23]; *The Director of Public Prosecutions for the State of South Australia v Duggan* (1996) 66 SASR 538, *Littlejohn v Wicks* [1990] Tas R 34.

²⁴ TJ [61]; CA [92]

²⁵ *Nolan v Nolan* (2003) 10 VR 626 at 646-650 [121]-[145].

*inherent limitations in the evidence of Kenneth Penfold – it was not open to fail to be satisfied on the balance of probabilities that it was more probable than not that the jewellery was not illegally acquired.*²⁶

32. There was merit in the submission made in support.

“Mr Henderson contends that even if what he and his brothers and sister were told was not accurate there was no reason to fail to be satisfied on the balance of probabilities that the jewellery was not illegally acquired:

10 *‘Their parents may have been told the same stories. Families often have legends or stories that are less than accurate, that grow with time or in the telling.’ (Appellant’s Outline of Submissions, para 43.)*

*That may well so, but it was for Mr Henderson to persuade his Honour that his father had not unlawfully acquired the jewellery. The primary judge was quite entitled to conclude that Mr Henderson had not discharged that onus.*²⁷

33. What the siblings had been told by the parents was not relevant to the possessory title of the father and the son. If the evidence was not accepted, then it was the equivalent of there being no evidence at all on the subject.²⁸ There was no adverse inference drawn by the primary judge after cross-examination.

20 34. The finding by the primary judge that the result of the case was an anomaly²⁹ and the observation in the Court of Appeal that *“The relevant public interest is not about fairness or how difficult it might be to obtain sufficient evidence to discharge the evidentiary burden in s 68(2)”*³⁰ only arises because of the omission of evidence of possessory title and the misconstruction of the legislation.

30 35. The equivalent of an exclusion order in other States usually requires a person in the appellant’s position to prove that the property is not illegally obtained or used illegally.³¹ Although differently expressed in different jurisdictions, the fundamental task is similar. An extension beyond the general law to necessitate

²⁶ CA [87]

²⁷ CA [92]

²⁸ *Steinberg v The Commissioner of Taxation of the Commonwealth of Australia* (1975) 134 CLR 640 at page 684 per Barwick CJ, and 694 per Gibbs J; *Edwards v R* (1993) 178 CLR 193 at 208 per Deane, Dawson and Gaudron JJ.

²⁹ TJ [65]

³⁰ CA [96]

³¹ For example: *Proceeds of Crime Act 2002* (Cth) section 29(2) “neither proceeds or an instrument of unlawful activity”; *Criminal Assets Recovery Act 1990* (NSW) section 25(2) “not illegally acquired property”; *Confiscation Act 1997* (Vic) section 50 “satisfied... not tainted property”; *Criminal Property Confiscation Act 2000* (WA) section 82(1) by proving property is not “crime-used”, section 83(1) not “crime derived”; *Criminal Assets Confiscation Act 2005* (SA) section 34(1)(b) “neither proceeds or an instrument of unlawful activity”, “owner’s interest in the property was lawfully acquired”; *Crime (Confiscation of Profits) Act 1993* (Tas) section 22(4) “satisfies the court... due to causes unrelated to the commission of the offence or offences”; *Confiscation of Criminal Assets Act 2003* (ACT) section 77(2) “satisfied... was lawfully acquired..., and is not tainted property”; *Criminal Property Forfeiture Act 2002* (NT) section 64(1)(b) “establishes that it is more likely than not that the property is not crime-derived”.

a proof of a chain of title overriding possessory title is a leap in executive power. This release from the constraints of the general law, with the fairness associated with such concepts, to a circumstance where no matter how honest an applicant and his witnesses are, the possessory title can be disregarded, is a step too far. Gifts and inheritances may be seized, no matter how unfairly, as exceptions to the general principle. All this is said to apply in the absence of specific legislative authority. The extension of this principle to other jurisdictions beyond the words of the empowering statute would be concerning.

- 10 36. It can be no part of the purpose of the legislation to take chattels from people whose accounts have been accepted. Section 4(2)(b) of the Act says as much.
37. Orders are sought for the present value of the goods seized pursuant to section 69 of the Act. The sum of money seized has been invested with the Public Trustee. It is sought that the original sum seized and the invested amount be excluded and the application for forfeiture be dismissed.

Part VII: Legislation

38. Copies of the relevant statutory provisions are attached as an Annexure.
- 20 39. Except where otherwise indicated in the Annexure, each of the provisions was in force in that form as at the date that rights accrued under section 20(2)(c) of the Acts Interpretation Act 1954 (Qld). Subsequent amendments are referred to in the Annexure.

Part VIII: Orders sought

40. The appellant seeks the following orders:

1. The appeal be allowed.
2. The orders of the Court of Appeal on 16 April 2013 dismissing the appeal with costs be set aside, and in its place order that the Appellant's appeal in respect of the orders made by his Honour Lyons J. in proceeding number SC No 1246 of 2003 on 7 October 2011 on the Supreme Court of Queensland be allowed.
3. The orders made by Lyons J. on 7 October 2011
 - (a) be set aside; and
 - ~~(b) in their place~~
 - (i) the respondent's application for forfeiture be dismissed and/or the appellant's application for exclusion be allowed;
 - (ii) the respondent's pay the appellant the sum of \$598,325; and

(iii) the respondent pay interest and other sums acquired as a result of the seizure of the amount referred to in 3(b)(ii).

4. The respondent pay the appellant's cost of the Court of Appeal and at first instance, and the costs of this proceeding.
5. Any other order that this Honourable Court deems fit.

10 **Part IX: Time estimate.**

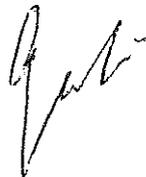
41. The Appellant estimates that 1 hour will be required for the presentation of his oral argument.

Dated: 19 June 2014

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ANNEXURE TO THE APPELLANTS OUTLINE OF SUBMISSIONS**APPLICABLE STATUTE AS IT EXISTED AT THE RELEVANT TIME**

Queensland
CRIMINAL PROCEEDS
CONFISCATION ACT 2002
Act No. 68 of 2002

4 Objects

- (1) The main object of this Act is to remove the financial gain and increase the financial loss associated with illegal activity, whether or not a particular person is convicted of an offence because of the activity.
- (2) It is also an important object of this Act—
 - (a) to ensure that property rights are affected by orders under this Act, including orders limiting a person's ability to deal with the property, only through procedures ensuring persons who may be affected by the orders are given a reasonable opportunity to establish the lawfulness of the activity through which they acquired the relevant property rights; and
 - (b) to protect property honestly acquired by persons innocent of illegal activity from forfeiture and other orders affecting property; and
 - (c) to ensure that orders of other States restraining or forfeiting property under corresponding laws may be enforced in Queensland.
- (3) This Act provides for 2 separate schemes to achieve its objects.
- (4) One of the schemes relies on a person being charged and convicted (as defined in this Act) and is administered by the DPP.
- (5) The other scheme does not depend on a charge or conviction and is administered by the Crime and Misconduct Commission.
- (6) Despite the similarities between the schemes, each is separate and neither scheme is to be construed as limiting the other, unless this Act otherwise expressly provides.

Section 4 has since been amended but not in a way relevant to the issues raised by this Appeal

13 Explanation of ch 2

- (1) This chapter enables proceedings to be started to confiscate property derived from illegal activity whether or not a person who engaged in the relevant activity has been convicted of any offence.
- (2) Also, this chapter enables proceedings to be taken to confiscate property derived from a serious crime related activity even though the person who engaged in the relevant activity has not been identified.
- (3) The chapter enables the Supreme Court, as a preliminary step, to make a restraining order preventing property, whether the property of the person who engaged in the relevant illegal activity or the serious crime derived property of someone else, being dealt with without the court's leave.
- (4) The court must make a forfeiture order confiscating the property (unless it is not in the public interest to make the order) if it finds it is more probable than not that—
 - (a) the person whose suspected serious crime related activity was the basis of the relevant restraining order engaged in a serious crime related activity; or
 - (b) the property is serious crime derived property because of a serious crime related activity of a person, even though a particular person suspected of having engaged in the serious crime related activity can not be identified.
- (5) The court may also make a proceeds assessment order against a person who has engaged in a serious crime related activity, requiring the person to pay to the State the amount the court decides is the value of proceeds derived from the person's illegal activity over a period of up to 6 years before the application for the order is made.
- (6) The amount payable under the proceeds assessment order may be recovered as a debt payable to the State.
- (7) The chapter contains other ancillary provisions including provisions giving persons opportunities to have lawfully acquired property excluded from the effect of restraining orders and forfeiture orders.

Section 13 has since been amended but not in a way relevant to the issues raised by this Appeal

15 Meaning of “illegal activity”

An “illegal activity” is an activity that is—

- (a) a serious crime related activity; or
- (b) an act or omission that is an offence against the law of Queensland or the Commonwealth; or
- (c) an act or omission committed outside Queensland that—
 - (i) is an offence against the law of the place in which it is committed; and
 - (ii) would be an offence mentioned in paragraph (b) if it were committed in Queensland.

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.

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.

68 Making of exclusion order

The Supreme Court must, and may only, make an exclusion order if it is satisfied—

- (a) the applicant has or, apart from the forfeiture, would have, an interest in the property; and
- (b) it is more probable than not that the property to which the application relates is not illegally acquired property.

Section 13 has since been amended but not in a way relevant to the issues raised by this Appeal