

# SUPREME COURT OF QUEENSLAND

CITATION: *Meredith v State of Queensland* [2006] QCA 465

PARTIES: **SCOTT ANDREW MEREDITH**  
(applicant/respondent)  
**v**  
**STATE OF QUEENSLAND**  
(respondent/appellant)

FILE NO/S: Appeal No 1568 of 2006  
SC No 4081 of 2003

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 10 November 2006

DELIVERED AT: Brisbane

HEARING DATE: 9 October 2006

JUDGES: McMurdo P, Keane JA and Mackenzie J  
Separate reasons for judgment of each member of the Court,  
each concurring as to the orders made

ORDER: **1. Appeal dismissed**  
**2. The State of Queensland to pay the respondent's costs of the appeal**

CATCHWORDS: CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - ORDERS FOR COMPENSATION, REPARATION, RESTITUTION, FORFEITURE AND OTHER MATTERS RELATING TO DISPOSAL OF PROPERTY - FORFEITURE OR CONFISCATION - *Criminal Proceeds Confiscation Act 2002* (Qld) - examination of respondent ordered pursuant to Act - dispute over scope of order permitting the examination - interpretation of s 38(1)(c) of the Act - meaning of "affairs" - whether s 38(1)(c)(i) of the Act permits an examination avowedly and entirely unrelated to the finances or property of the examinee

*Criminal Proceeds Confiscation Act 2002* (Qld), s 15, s 16, s 37, s 38, s 40, s 48, s 58

*Daniels Corp v ACCC* [2002] HCA 49; (2002) 213 CLR 543, applied

*NSW Crime Commission v Murchie* [2000] NSWSC 591; (2000) 49 NSWLR 465, considered

COUNSEL: R J Douglas SC, with J B Rolls, for the appellant  
B W Walker SC, with P J McCafferty, for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant  
Boe Lawyers for the respondent

- [1] **McMURDO P:** The appellant, the State of Queensland, contends that the learned primary judge was wrong to declare that upon an examination of the respondent, Scott Andrew Meredith, under the provisions of the *Criminal Proceeds Confiscation Act 2002 (Qld)* Ch 2 Pt 3 Div 4 Subdiv 1, the appellant is not authorized to ask and Mr Meredith is not obliged to answer questions exclusively about whether he has engaged in serious criminal activity.
- [2] I agree with Keane JA's reasons for dismissing the appeal and add only the following brief observations. The rejection of the appellant's contention is entirely consistent with the following statement of legislative intent in the Explanatory Notes to the Criminal Proceeds Confiscation Bill 2002:<sup>1</sup>
- "The examination provisions were included in the original confiscation legislation and were introduced because normal powers were considered inadequate to obtain complete information about the affairs of a person subject to a confiscation application. The justification for the power is that it enables investigators to obtain **full details of a person's property and financial dealings** which in turn would allow appropriate action to be taken under the Bill to forfeit illegally obtained property or release legitimate property from restraint. The information sought could include information which is exclusively within the knowledge of the person concerned."  
(my emphasis)
- [3] The rejection of the appellant's contention is also consistent with the important and well established principle of statutory interpretation, referred to with approval by the primary judge and recently affirmed by Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Daniels Corp v ACCC*:<sup>2</sup>
- "It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect."
- [4] The appeal should be dismissed with costs.
- [5] **KEANE JA:** In September 2003, an examination of the respondent was ordered pursuant to s 38(1)(c) of the *Criminal Proceeds Confiscation Act 2002 (Qld)* ("the Act"). In this appeal, the respondent and the State of Queensland dispute the scope of that examination.
- [6] Before the learned primary judge, it was contended by the State, and denied by the respondent, that the order permits the examination of the respondent about matters which have nothing to do with the respondent's financial circumstances or property and which relate solely to whether the respondent committed serious crimes.

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<sup>1</sup> [Criminal Proceeds Confiscation Bill 2002, Explanatory Notes, 5.](#)

<sup>2</sup> (2002) 213 CLR 543, 553.

- [7] The learned primary judge resolved this dispute in the respondent's favour, declaring that the State "has not been authorised to ask, and the [respondent] is not obliged ... to answer, questions exclusively about whether [the respondent] has engaged in serious criminal activity".<sup>3</sup>
- [8] On appeal, the State argues that the learned primary judge took an erroneously narrow view of the authority conferred on the State by the order made under s 38(1)(c) of the Act. The determination of the appeal turns upon the interpretation of the phrase "the affairs of any person whose property is restrained under [a] restraining order" used in s 38(1)(c) of the Act. To appreciate the arguments which bear upon that question, it is necessary to understand the statutory and factual context in which the issue falls to be determined.

### **The Act**

- [9] The Act sets up a regime whereby the State may confiscate the proceeds of criminal activity even where the offender has not been convicted of any crime.<sup>4</sup> The confiscatory process may begin with the making of an order restraining a person from dealing with the property stated in the order.<sup>5</sup> Such a restraining order may "relate to all or any" of a person's property if that person is "suspected of having engaged in 1 or more serious crime related activities".<sup>6</sup> Proceedings may then be brought seeking the forfeiture of the restrained property.<sup>7</sup> A forfeiture order must be made if the court finds that it is more probable than not that the respondent engaged in the defined form of criminal activity.<sup>8</sup> An order for the exclusion of property from an application for forfeiture may be made if the court is satisfied that "it is more probable than not that the property to which the application relates is not illegally acquired property".<sup>9</sup> A proceeds assessment order may be sought against a person whose property is not the subject of a restraining order.<sup>10</sup> A proceeding under the Act for such relief is civil, not criminal, in character.<sup>11</sup>
- [10] Section 37(1) of the Act provides:  
 "The Supreme Court may make the other orders in relation to a restraining order the court considers appropriate, including, but not limited to, orders mentioned in section 38."
- [11] Section 38(1) provides relevantly as follows:  
 "For section 37, the orders are as follows -  
 (a) an order varying the property restrained under the restraining order;  
 (b) an order imposing additional conditions on the restraining order or varying a condition of the order;  
 (c) an order (*examination order*) requiring a person whose property is restrained under the restraining order or a stated person to attend for examination on oath before the court or a stated officer of the court about the following -

<sup>3</sup> *State of Qld v Meredith* [2006] QSC 009 at [42].

<sup>4</sup> See s 4(1) and s 13(1) of the Act.

<sup>5</sup> Section 28 of the Act.

<sup>6</sup> Section 28(3)(a) of the Act.

<sup>7</sup> Section 36(2)(a) and s 56(1) of the Act.

<sup>8</sup> Section 58(1)(a) of the Act.

<sup>9</sup> Section 65 and s 68(2)(b) of the Act.

<sup>10</sup> Section 77 of the Act.

<sup>11</sup> Section 8 of the Act.

- (i) the affairs of any person whose property is restrained under the restraining order;
- (ii) the nature and location of any property of a person whose property is restrained under the restraining order;
- (iii) the nature and location of any property restrained under the restraining order that the applicant for the order reasonably suspects is serious crime derived property;

...

- (f) an order (*property particulars order*) directing either of the following to give to the commission or the public trustee, within a stated time, a sworn statement of particulars of the property, or dealings with the property, in which the owner has or had an interest, as the court considers appropriate -
  - (i) a person who is or was the owner of restrained property;
  - (ii) if the owner of restrained property is or was a corporation - an executive officer of the corporation;

...

- (i) an order (*property seizure order*) requiring or authorising a commission officer or a police officer to seize property restrained under the restraining order."

[12] Section 39B(1) of the Act provides that the examination must take place in private. A lawyer representing the examinee may be present.<sup>12</sup>

[13] Section 40 of the Act provides relevantly:

- "(1) A person examined under an examination order is not excused from answering a question, or from producing a document or other thing, on the ground that -
  - (a) answering the question or producing the document may tend to incriminate the person or make the person liable to a forfeiture or penalty;
- ...
- (2) A statement or disclosure made by a person in answer to a question asked in an examination under an examination order, or a document or other thing produced in the examination, is not admissible against the person in any civil or criminal proceeding, other than -
  - (a) a proceeding about the false or misleading nature of the statement or disclosure; or
  - (b) a proceeding on an application under this Act; or
  - (c) a proceeding for the enforcement of a confiscation order; or
  - (d) for a document or other thing, a proceeding about a right or liability it confers or imposes."

[14] Section 41(d) makes it an offence for an examinee to fail to answer a question that he or she is directed to answer in the course of an examination under s 38(1)(c).

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<sup>12</sup> Section 39B(3)(a) of the Act.

### The proceedings

- [15] In June 2003, a restraining order was made pursuant to s 28 of the Act in respect of almost all of the respondent's property. In September 2003, it was ordered that "[p]ursuant to section 38(1)(c) of the [Act], [the respondent] attend for examination on oath before the Court...".
- [16] Because of the dispute as to the scope of the examination, the respondent made an application to the Supreme Court. On that application before the learned primary judge, the State asserted, and the respondent denied, that the examination order authorised the State to enquire into, and obliged the respondent to answer in respect of, "matters that have nothing to do - even indirectly - with financial circumstances or property. These contentious questions relate solely to whether [the respondent] committed serious drug offences".<sup>13</sup>

### The decision at first instance

- [17] As I have mentioned, the learned primary judge resolved this dispute in favour of the respondent. The kernel of his Honour's reasoning appears in the following passage:<sup>14</sup>

"'Affairs' in s 38(1)(c)(i) comprehends such activity as ventures with a potential to lead to the identification and preservation of interests in property that are or might [be] comprehended by forfeiture orders. As the New South Wales Court of Appeal has said (*DPP v Chidiac* (1991) 25 NSWLR 372, 380) of a counterpart to s 38(1)(c), an examination about 'affairs ...' may cover 'an ambit wider than a mere inquiry as to the location of real or personal property'. But an examination order does not permit an interrogation that could not possibly touch upon the identification of proprietary interests that are or might be affected by restraining, forfeiture or proceeds assessment orders.

It is not necessary to recall that 'statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect' (*The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 553. See also J J Spigelman, 'Principle of Legality and the Clear Statement Principle', (2005) 79 ALJ 769) to arrive at this view of the scope of 'affairs ...' in s 38(1)(c) (See also s 4(3)(f) *Legislative Standards Act 1992*). In context, and having regard to the evident purpose (cf *Newcastle City Council v GIO General Limited* (1997) 191 CLR 85, 99, 112-113; *Attorney-General of the Commonwealth v Oates* (1999) 198 CLR 162, 175) of the legislative provisions concerning an examination order, 'affairs ...' in s 38(1)(c)(i) does not extend to matters that have nothing to do with property or financial circumstances and instead relate exclusively to involvement in 'serious criminal activity' (Incidentally, this view accords with that taken in respect of an examination order under s 48(1)(c) of the *Proceeds of Crime Act 1987* (Cth) in *Director of Public Prosecutions (Commonwealth) v Beljajev*, No 37 of 1989, 10 June 1992, Supreme Court of Victoria, where Byrne J said (at 9, 12): '... the Court in

<sup>13</sup> *State of Qld v Meredith* [2006] QSC 009 at [10].

<sup>14</sup> *State of Qld v Meredith* [2006] QSC 009 at [27] - [28] (citations footnoted in original).

exercising its powers under s 48 should not hesitate to use them in all their breadth in the appropriate case. But Parliament has imposed one important qualification – the power to examine is ancillary to that conferred by s 43. It is necessary therefore in each case, before considering such matters as may bear upon the discretion, [to] examine whether the order sought is in truth sought in aid of the restraining order itself ... If the order may or will assist in the location, identification or recovery of restrained property, which is or may be presently unknown or concealed, then it meets this requirement.)"

### **The issues on appeal**

- [18] The State's contention is that the word "affairs" encompasses the examinee's activities and, in particular, criminal activities considered independently of the financial consequences of such activities for the suspect. The State argues that his Honour's view artificially narrows the scope of examination under s 38(1)(c) by restricting "affairs" to "financial affairs". It is said that a broad view of "affairs" best aids the objects of the Act. It is also said that the view taken by the learned primary judge renders otiose the provisions of s 40 of the Act. Finally, the State argues that the learned primary judge erred in failing to apply the approach of Greg James J in *NSW Crime Commission v Murchie*.<sup>15</sup> I shall discuss these arguments in turn.

### **Financial affairs?**

- [19] In my respectful opinion, this Court should reject the State's argument that the expression "affairs" should not be understood as meaning "financial affairs".
- [20] The provisions of s 38(1)(c)(ii) and (iii) and s 38(1)(f) serve to place the "affairs" spoken of in s 38(1)(c)(i) in a context which relates to the property of a person whose property is subject to a restraining order.<sup>16</sup> In this context, "affairs" is an expression which is apt to refer to the activities of the examinee insofar as those activities relate to the property of a suspect.
- [21] It is, in my view, a compelling answer to the State's argument that, on the State's approach to the meaning of "affairs", s 38(1)(c)(i) of the Act should be read as if it referred instead to "activities". It is obvious that the legislature could easily have employed that expression in s 38(1)(c)(i), but chose not to. The breadth of meaning encompassed by "activity" is evident in the Act's definitions of "illegal activity" and "serious crime related activity" in s 15 and s 16 respectively. In a piece of legislation which operates by reference to the "activity" of a suspect,<sup>17</sup> it is very significant that the expression used in s 38(1)(c)(i) was "affairs" rather than "activity" or "activities". The expression "affairs" was a distinctly inept choice of language if the intention of the legislature was to permit an examination of activities of a suspect which had no bearing at all on the finances of the suspect.

### **The objects of the Act**

- [22] It is important to bear in mind that the main object of the legislation is, as s 4(1) of the Act declares, "to remove the financial gain and increase the financial loss associated with illegal activity, whether or not a particular person is convicted of an

<sup>15</sup> [2000] NSWSC 591; (2000) 49 NSWLR 465.

<sup>16</sup> See also s 13 of the Act.

<sup>17</sup> Cf s 4, s 16(1), s 28(3) and s 29 of the Act.

offence because of the activity". There is no hint in s 4 of the Act of any legislative intention to facilitate inquiries into criminal activity on the part of an examinee where that criminal activity has nothing to do with financial gain or financial loss.<sup>18</sup> Nor is there any hint of such an intention in the Explanatory Notes to the *Criminal Proceeds Confiscation Bill*.

- [23] It was submitted on behalf of the State that other provisions of the Act expressly contemplate that the results of an examination under s 38 may be "called in aid for a purpose wholly unrelated to property".<sup>19</sup> The provisions of s 47, s 48, s 49, s 65, s 66 and s 68 were cited by the State in this regard. It is unnecessary to set out in full the text of these provisions in order to expose the flaw in this argument.
- [24] It may be accepted that the Act contemplates the exclusion of property from a restraining order or an application for a forfeiture order on the basis that "the property to which the application relates is not illegally acquired property".<sup>20</sup> Provisions such as s 48, however, do not suggest that the Act is a measure directed against illegal activity where that activity has no consequence for the property or financial circumstances of the suspect. On the contrary, they confirm that the mischief at which the legislation is directed is the augmentation of the finances of criminals and their associates by illegal activity. The possibility of exclusion from a restraining order or from an application for forfeiture necessarily directs attention to **the relationship** between illegal activity and property.
- [25] Section 58(1)(a) of the Act contemplates that a forfeiture order must be made in respect of restrained property where the State demonstrates that it is more probable than not that the suspect has engaged in serious crime related activity. The State emphasised that there is no burden on the State to show a relationship between the demonstrated serious crime related activity and the property to be forfeited. But that does not mean that such a relationship is irrelevant for the purposes of the forfeiture order, much less that, as the State contends, the making of a forfeiture order under s 58(1)(a) of the Act is "a purpose wholly unrelated to property".
- [26] An exclusion order may be made under s 65, s 66 and s 68(2) of the Act. Under such an order, property will be excluded from forfeiture upon it being shown to be more probable than not that the property in question is not "illegally acquired property".<sup>21</sup> The provisions for the making of an exclusion order on this basis show that s 58(1)(a) does not operate independently of any relationship between illegal activity and the property acquired as a result of that activity.
- [27] It is important to appreciate that the examination contemplated by s 38(1)(c)(i) is not an end in itself. Section 38(1)(c)(i) is a provision which may be invoked in order to aid and enhance the operation of the substantive provisions of the Act. The making of a forfeiture order is necessarily and directly concerned with property. The forfeiture of property is one of the objects of the Act. But it is not the forfeiture of property unconnected with criminal activity which is an object of the Act. The relationship between illegal activity and property is at the heart of the substantive operation of the Act. If s 38(1)(c)(i) were to be read as if it authorised an inquiry into illegal activity which had nothing at all to do with the financial consequences of

<sup>18</sup> See also s 13 of the Act.

<sup>19</sup> *State of Qld v Meredith* [2006] QSC 009 at [36].

<sup>20</sup> Section 48(1)(a). See also s 65, s 66 and s 68(2)(b).

<sup>21</sup> As defined in s 22 of the Act.

that activity for the suspect, one would be left to wonder at the ultimate purpose to be aided by such an inquiry. The results of an inquiry having nothing at all to do with property would not be apt to aid the State in any way in the confiscation proceedings for which the Act provides; and, by virtue of s 40(2) of the Act, the use of those results in any other proceedings is forbidden.

- [28] For the sake of completeness, it may also be noted that the Act contemplates orders, such as proceeds assessment orders, which do not depend upon property being the subject of a restraining order. But, even here, the focus of the Act's concern is explicitly upon the proceeds of illegal activity.<sup>22</sup>

#### **Section 40**

- [29] The State argued that only the broad interpretation of "affairs" for which it contends leaves s 40(1) of the Act with work to do. This submission was rightly rejected by the learned primary judge.<sup>23</sup>

- [30] To say that s 38(1)(c)(i) authorises examination about illegal activity which impinges on the financial circumstances of the suspect is not to deny the possibility that, absent a provision such as s 40(1), a suspect would be entitled to refuse to answer such a question on the ground of self incrimination. Questions about illegal activity are no less likely to provoke an answer which may tend to incriminate the examinee because they are also directed to establishing a connection between the illegal activity and the examinee's finances.

- [31] Furthermore, as I have noted, the provisions of s 40(2) serve to confirm that the objects of the Act, the furtherance of which is facilitated by s 38(1)(c)(i), are confined to the confiscation of the proceeds of illegal activity rather than the creation of a freestanding inquisition not directed to any ultimate purpose.<sup>24</sup>

#### ***Murchie's Case***

- [32] Finally, the State argued that the learned primary judge erred in failing to follow the broad approach to "affairs" in s 38(1)(c)(i) taken by Greg James J in *NSW Crime Commission v Murchie*.<sup>25</sup> There it was said that:

**"... 'the affairs' of which the section speaks are those activities of persons suspected of serious crime related activity whose property is restrained by a restraining order under the Act which activities might affect the making of further orders under the Act.**

**Such a wide construction reflects the breadth of potential effect under the Act of the restraining order and accords with the statutory scheme under which the examination is ancillary, not only to the order, but also to an order for forfeiture ...**

The ancillary orders available ... have the common feature of assisting the operation of the restraining order in its application to property, but they also are apt to assist the proper determination of applications for forfeiture orders by enabling the ascertainment of matters to which s 22 relates. I see no reason to cut down the width

<sup>22</sup> Section 77 of the Act. For the definition of "proceeds" see s 18 of the Act.

<sup>23</sup> *State of Qld v Meredith* [2006] QSC 009 at [35].

<sup>24</sup> Similar confirmation is provided by the Explanatory Notes to the *Criminal Proceeds Confiscation Bill*, p 6 and p 16.

<sup>25</sup> [2000] NSWSC 591; (2000) 49 NSWLR 465 at 479 [62] - [66].

that the language, context and purpose of the Act suggests should be accorded to those measures.

I therefore conclude that the examination is intended to allow the eliciting of information of such activities as might be relevant to the existence of serious crime related activity within the six year period ... **This construction allows the examination to supplement the effect of the order in its full statutory operational effect, that is, it allows assistance to the operation of the order not only as freezing property interests, but as potentially triggering forfeiture or as assisting the making and enforcement of proceeds assessment orders. The question plainly sought information of this kind.**" (emphasis added)

- [33] In my view, this passage from the reasons of Greg James J does not go so far as to say that questions which are avowedly irrelevant to the financial affairs of an examinee may be pursued under s 38(1)(c)(i).
- [34] The observations of Greg James J in *Murchie's Case* may be understood as indicating that the absence of an immediately demonstrable connection between a question asked on an examination under s 38(1)(c)(i) and the finances of the examinee will not necessarily relieve the examinee from the obligation to answer. To that extent, these observations may readily be accepted: it may sometimes be the case that the connection between illegal activity the subject of questioning and the finances of the examinee will not be able to be immediately demonstrated by the examiner if objection is raised to a particular line of inquiry. The connection may be "arguable" rather than clear to the point of immediate demonstration. In such a case, it may be appropriate to extend some latitude to the examiner to prevent the frustration of the examination. But there must be some arguable connection, as there usually will be, between criminal activity and a suspect's finances. That is why Greg James J described the scope of examination as being related to "activities which **might affect** the making" (emphasis added) of orders for confiscation.
- [35] The respondent submitted that *Murchie's Case* was wrongly decided. It is not necessary to determine whether this submission is correct. It would be wrong, in my respectful opinion, to regard the observations of Greg James J cited above as supporting the view that the Act does not require at least an **arguable connection** between an activity of a suspect and the finances of the suspect to support the questioning permitted by s 38(1)(c). His Honour's remarks were made in a context where the question as to the limits of an examination permitted by the NSW analogue of s 38(1)(c)(i) of the Act was not raised in the stark terms in which that question is raised in this case.
- [36] In the conduct of an examination under s 38(1)(c) of the Act, an examiner should, no doubt, be allowed a proper opportunity to explore the possible connection between illegal activity and property so as to prevent the frustration of an order made under s 38(1)(c), and the frustration of the substantive objects of the Act which such an order is intended to serve. In some cases, the relevance of a question may have to be determined as a matter of impression and degree. But the resolution of questions as to relevance is a familiar aspect of the business of the courts. The prospect that such questions may arise for determination in the course of an examination under s 38(1)(c)(i) of the Act cannot be so disturbing as to incline a court to read the expression "affairs" as "activities" if such a construction were open

on the language which the legislature has used. For the reasons given earlier, I do not consider that such a construction of the language used by Parliament is open.

**Conclusion and orders**

- [37] The question, raised in stark and abstract terms, is whether s 38(1)(c)(i) permits an examination avowedly and entirely unrelated to the finances or property of the examinee. For the reasons I have set out, I consider that this question must be answered in the negative.
- [38] In my respectful opinion, the decision of the learned primary judge was correct. I would dismiss the appeal.
- [39] The State should pay the respondent's costs of the appeal.
- [40] **MACKENZIE J:** I agree that the appeal should be dismissed for the reasons given by Keane JA.