

# SUPREME COURT OF QUEENSLAND

CITATION: *Re Criminal Proceeds Confiscation Act 2002 (Qld)* [2003]  
QCA 249

PARTIES: **S**  
(applicant/respondent)  
**v**  
**MC**  
(first respondent/first appellant)  
**L**  
(second respondent/second appellant)  
**C**  
(third respondent/third appellant)

**S**  
(applicant/respondent)  
**v**  
**M**  
(respondent/appellant)

FILE NO/S: Appeal No 3942 of 2003  
Appeal No 4051 of 2003

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 13 June 2003

DELIVERED AT: Brisbane

HEARING DATE: 30 May 2003

JUDGES: Williams JA and White and Wilson JJ  
Separate reasons for judgment of each member of the Court,  
each concurring as to the orders made

ORDERS: **In appeal 3942 of 2003:**  
**(i) Appeal allowed;**  
**(ii) Declare that s 30 of the *Criminal Proceeds Confiscation Act 2002* is invalid as being beyond the power of the Queensland Parliament;**  
**(iii) Set aside the orders of the Supreme Court of 7 April 2003;**  
**(iv) Order that the application be remitted to the Trial Division of the Supreme Court to be heard and determined according to law;**  
**(v) Order that the respondent pay the appellants' costs of and incidental to the appeal to be assessed.**

**In appeal 4051 of 2003:**

- (i) Appeal allowed;**
- (ii) Declare that s 30 of the *Criminal Proceeds Confiscation Act 2002* is invalid as being beyond the power of the Queensland Parliament;**
- (iii) Set aside the orders of the Supreme Court of 11 April 2003;**
- (iv) Order that the application be remitted to the Trial Division of the Supreme Court to be heard and determined according to law;**
- (v) Order that the respondent pay the appellant's costs of and incidental to the appeal to be assessed.**

**CATCHWORDS:** STATUTES – ACTS OF PARLIAMENT – VALIDITY OF LEGISLATION – where s 30 *Criminal Proceeds Confiscation Act 2002* directs the court to hear and determine an application for an order restraining property from being dealt with in the absence of any interested party under certain circumstances – whether this provision so interferes with the essential character of the exercise of judicial power as to make the provision constitutionally invalid

*Commonwealth of Australia Constitution Act 1901* (Cth), s 71  
*Judiciary Act 1903* (Cth), s 39, s 39A, s 68

*Proceeds of Crime Act 1987* (Cth), s 44(7A)(b)

*Constitution of Queensland 2001* (Qld), s 57, s 58

*Criminal Proceeds Confiscation Act 2002* (Qld), s 4, s 13, s 26, s 28, s 30, s 31, s 32, s 33, s 35, s 36, s 37, s 38, s 39, s 40, s 45, s 47, s 48, s 49, s 50, s 52

*Uniform Civil Procedure Rules 1999* (Qld), r 667(2)(a)

*Bonaker v Evans* (1850) 16 QB 162, discussed

*re Cannon* [1999] 1 Qd R 247, cited

*Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, discussed

*The Commonwealth v Queensland* (1975) 134 CLR 298, discussed

*Craig v Kanssen* [1943] KB 256, cited

*Director of Public Prosecutions v Toro-Martinez* (1993) 33 NSWLR 82, discussed

*Fencott v Muller* (1983) 152 CLR 570, discussed

*George v Rockett* (1990) 170 CLR 104, cited

*Grant and McLeary and Others v The Commonwealth*

*Director of Public Prosecutions* [1998] WASCA 181, cited

*HA Bachrach Pty Ltd v State of Queensland* (1998) 195 CLR 547, followed

*Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, discussed

*In re Hamilton; In re Forrest* [1981] AC 1039, discussed

*Kable v The Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, followed

*Liyanage v The Queen* [1967] 1 AC 259, discussed

*Nicholas v The Queen* (1998) 193 CLR 173, followed

*Public Service Board of NSW v Osmond* (1986) 159 CLR 656, cited

*R v Abrahams* (1895) 21 VLR 343, discussed

*R v Robert Jones* [1972] 1 WLR 887, cited

*R v Stuart* [1973] Qd R 460, cited

*R v Stuart and Finch* [1974] Qd R 297, cited

*Taylor v Taylor* (1979) 143 CLR 1, cited

COUNSEL: T Martin SC for the appellants  
M D Hinson SC for the respondent

SOLICITORS: Boe Callaghan for the appellants  
Director of Public Prosecutions (Queensland) for the respondent

- [1] **WILLIAMS JA:** These appeals essentially question the validity of certain provisions, particularly s 30, of the *Criminal Proceeds Confiscation Act* 2002 (“the Act”). The submission of the appellants is that s 30 is so inconsistent with the essential character of the exercise of judicial power that, given the reasoning in *Kable v The Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, it is invalid.
- [2] Notices were given to all Attorneys-General pursuant to section 78B of the *Judiciary Act* 1903 and all responded indicating an intention not to intervene.
- [3] The Act broadly follows legislation previously enacted in Queensland (*Crimes (Confiscation) Act* 1989) and has counterparts in other States and the Commonwealth, but there is no provision in any of that other legislation comparable to s 30. That for present purposes represents the only major difference between the Act and its counterparts in other States and the Commonwealth.
- [4] The objects of the Act are set out in s 4 thereof as follows:
- “(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.”

- [5] No one could dispute the reasonableness and appropriateness of those objects. Society must take legitimate steps to ensure that people do not profit from criminal activity; that is particularly so given the significant amounts which can be obtained from criminal activity such as trading in illicit drugs. But importantly the definition of the objects also recognises that property of persons innocent of criminal activity may be utilised by unscrupulous criminals in order to maximise profit from their criminal activities. (A good illustration is the use of the property at 6 Uplands Drive referred in *re Cannon* [1999] 1 Qd R 247).
- [6] Given those considerations one would reasonably expect the Act to make due provision for the protection of legitimate property rights, and to provide for procedures which recognise the principles of natural justice.
- [7] Chapter 2 of the Act deals with “Confiscation without Conviction”. Section 13 provides that proceedings may be started to confiscate property derived from illegal activity whether or not a person who engages in the relevant activity has been convicted of any offence. The chapter enables the Supreme Court “as a preliminary step, to make a restraining order preventing property . . . being dealt with without the court’s leave”. Subsection (7) thereof provides that the chapter “contains other ancillary provisions including provisions giving persons opportunities to have lawfully acquired property excluded from the effect of restraining orders.”
- [8] “Illegally acquired property” is defined as property which is all or part of the proceeds of an “illegal activity” which in turn is defined as, in effect, anything done which constituted an indictable offence for which the maximum penalty is at least five years imprisonment. Property only stops being illegally acquired property when one of the provisions of s 26 applies to it; it is sufficient for present purposes to say that such a stage is reached when the property “is acquired by a person for sufficient consideration, without knowing, and in circumstances not likely to arouse a reasonable suspicion, that the property was illegally acquired property”.
- [9] The next important provision of the Act is s 28, which provides that the State may apply to the Supreme Court for an order restraining any person from dealing with property other than in a stated way or in stated circumstances. Subsection (2) thereof provides that the application must be supported by an appropriate affidavit and “may be made without notice to any person to whom it relates”. Absent s 30, that would permit the application to be brought on notice to affected parties, or to be brought *ex parte* in the first instance (as that expression is generally understood) if the circumstances justified that course. The section goes on to define the property to which a restraining order may relate and then subsection (4) is in terms:
- “The court may refuse to consider the application until the State gives the court all the information the court requires about the application in the way the court requires.”
- [10] Then comes s 30 which is the most critical for purposes of the present appeals; it provides:

“(1) This section applies if the State applies for a restraining order without notice to any person to whom it relates.

(2) The Supreme Court must hear the application in the absence of anyone other than –

(a) an appropriate officer; or

(b) a commission officer; or

(c) a police officer; or

(d) an officer of a law enforcement agency of another State or the Commonwealth; or

(e) a lawyer representing anyone mentioned in paragraphs (a) to (d).

(3) Also, the court must hear the application –

(a) in the absence of a person whose property is the subject of the application; and

(b) without the relevant person having been informed of the application.”

[11] That, as already noted, is the provision which has no equivalent in comparable legislation in other States or the Commonwealth. It clearly constitutes a legislative command to the judge of the Supreme Court hearing the application to proceed “in the absence of” either or both the person alleged to have engaged in the “illegal activity” or the property owner whose property has been used by the person engaged in the “illegal activity” for the purpose of gaining profit therefrom.

[12] The wording of the provision is so specific that if either of those persons, that is either the person engaged in the illegal activity or the innocent property owner, sought to appear on the hearing of the application for a restraining order brought by the State without notice (say because, as judges know sometimes happens, that person became aware of the application) the judge would be obliged to have that person removed from the court and proceed to hear the application for the restraining order without hearing submissions from that person.

[13] It is clear that, because of the operation of s 30, the application without notice goes beyond what is encompassed by an *ex parte* application as generally known to the Supreme Court. Where an order is made *ex parte* it may be set aside by reliance on either Rule 667(2)(a) of the *Uniform Civil Procedure Rules* or the general principle referred to by the High Court in *Taylor v Taylor* (1979) 143 CLR 1 and by the Court of Appeal in *Craig v Kanssen* [1943] KB 256. But neither that Rule nor that principle would have application where s 30 of the Act applied. As that section provides that the application must be heard in the absence of the party, the absence of the party could not constitute a ground for setting aside the order. Section 30 is incompatible with the grounds on which an *ex parte* order may be set aside and (if valid) s 30 must have the consequence that the restraining order cannot be set aside because no notice was given to any party affected thereby.

- [14] Before considering further the implications which flow from that it is desirable to set out other provisions of the Act.
- [15] Section 31 of the Act provides that the court “must make a restraining order in relation to property if, after considering the application and the relevant affidavit, it is satisfied there are reasonable grounds for the suspicion on which the application is based.” That provision is similar to (if not identical with) what is found in s 44(7A)(b) of the *Proceeds of Crime Act 1987* (Commonwealth). That provision was considered by the Court of Appeal in New South Wales in *Director of Public Prosecutions v Toro-Martinez* (1993) 33 NSWLR 82. Speaking of the provision Kirby P said at 91:
- “It follows that the court’s function under the Act is not merely ministerial or executive in character. The duty of the court to assess the reasonableness of the ground for the police officer’s holding the stated belief makes it plain that the court is far from a “rubber stamp”. It has a determinative role in the process of evaluating the application for the making of the restraining order with the drastic consequences which, once made, it will have. . . . To the latter [judicial officer Parliament] has assigned the proper judge-like responsibilities of ensuring, objectively, that the case is one where it is reasonable and proper to make the orders sought. There is thus no offence to the limitations and requirements of the exercise of Federal judicial power under the Constitution.”
- [16] Mahoney JA at 96 expressed the opinion that “the functions conferred upon the court are judicial in nature”. Handley JA at 99 held that the judge was not bound to “rubber-stamp” the affidavit but “must determine whether the statutory conditions for making a restraining order have been satisfied.” It followed, as he said at 100, that the questions raised “a justiciable issue, and the court’s jurisdiction is not ministerial.”
- [17] I agree with that reasoning and it follows that the court is exercising judicial power when determining whether or not to make a restraining order under s 31.
- [18] Following the decision of the High Court in *George v Rockett* (1990) 170 CLR 104 the judge hearing the application need not hold the relevant suspicion and belief, it is sufficient that the judge is satisfied there were reasonable grounds for the suspicion deposed to in the relevant affidavit.
- [19] Section 31(2) of the Act provides that the court may refuse to make the restraining order if it is “satisfied in the particular circumstances it is not in the public interest to make the order” or if the State “fails to give the court the undertakings the court considers appropriate for the payment of damages or costs . . . in relation to the making and operation of the order.” The relevance and scope of operation of such an undertaking in cases of this type is illustrated by the reasoning in *re Cannon and Grant and McLeary and Others v The Commonwealth Director of Public Prosecutions* [1998] WASCA 181. The decision whether or not to require an undertaking is an important part of the exercise of judicial power in making orders pursuant to the Act.
- [20] Clearly, even on an application heard as directed in the absence of any interested party other than the applicant, the court would have to consider each of those

matters. In these particular cases no undertaking was offered by the applicant and the orders made did not contain any such undertakings. One of the complaints made by counsel for the appellants was that no reasons were given by the learned judge at first instance for holding, in particular, that no undertaking was required. That is one of the grounds on which the appellants sought to challenge the decisions under appeal. Whilst there is no “inflexible rule of universal application” that reasons should be given for judicial decisions (*Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 667), and that is particularly so where a matter is heard *ex parte*, it is my view that generally reasons should be given on the hearing of an application for a restraining order indicating that the judge has directed attention to the requirements of s 31(2) of the Act in making the order.

- [21] The consequence of the making of a restraining order is that “the person whose property is restrained under the order must preserve the property.” (s 32) Further, conditions may be imposed authorising the disposal of the property in accordance with conditions contained in the order, (s 33). In specific circumstances the court may direct “the public trustee to take control of some or all of the property restrained under the order,” (s 35).
- [22] A restraining order remains in force for 28 days after it is made (s 36), but continues in force thereafter if before the end of the 28 days an application has been made but not determined seeking a “forfeiture order for the restrained property”.
- [23] Section 45 of the Act provides that, if the court makes a restraining order, as soon as possible after the order is made a copy of the order must be given to “each person whose property is restrained under the order and anyone else who is affected by the order.” However, the order does not stop having effect only because a person required to be served has not in fact been served.
- [24] Sections 37 and 38 of the Act are particularly relevant for present purposes. A person whose property is restrained may apply to the court seeking to have it “make the other orders in relation to a restraining order the court considers appropriate, including, but not limited to, orders mentioned in section 38.” Such an application must be made on notice. Pursuant to s 38 the court may make a variety of orders including:
- (i.) an order varying the property restrained under the restraining order;
  - (ii.) an order imposing additional conditions on the restraining order or varying a condition of the order;
  - (iii.) an order for the payment to Legal Aid, from property restrained under the restraining order, of expenses payable by the person whose property is restrained because the person is a party to proceedings under the Act or the person is a defendant in criminal proceedings.
- [25] Also of relevance for present purposes are ss 47, 48, 49 and 50 of the Act. Section 47 provides that the person suspected of having engaged in crime-related activities may apply to the court to amend the order by excluding particular property from operation of the order. Notice must be given to the State, and the State must in turn give notice of the grounds on which it opposes the application. But that notice need not be given “until the DPP has had a reasonable opportunity to examine the

applicant under an examination order” (ss 38, 39 and 40) requiring the person to attend for examination on oath about the affairs and property of that person. The Supreme Court may only exclude the property from the order if “it is satisfied it is more probable than not that the property to which the application relates is not illegally acquired property” (s 48). In other words the onus is on the person whose property is restrained to establish that it is more probable than not that the property in question is not illegally acquired property. It also has to be shown that “the property is unlikely to be required to satisfy a proceeds assessment order”.

- [26] A person, other than the person suspected of having engaged in serious crime-related activities, whose property is restrained by the order may apply pursuant to s 49 to have the property in question excluded from the operation of the order. The limitations on such an application are similar to that where the application is by the person suspected of having engaged in crime-related activities. Pursuant to s 50 property may be excluded if the court is satisfied the applicant acquired the property in good faith, for sufficient consideration, and without knowing, and in circumstances not likely to arouse a reasonable suspicion, that the property was illegally acquired property. Again it is clear that the onus of establishing those matters is on the applicant.
- [27] Finally for present purposes s 52 should be noted which makes it an offence to do anything with the intention of directly or indirectly defeating the operation of the restraining order.
- [28] Clearly therefore it is a consequence of the making of a restraining order that property is restrained, it is an offence to defeat the operation of that restraining order, and the onus thereafter is on a person seeking to have the terms of it varied to show that it should be varied. It can thus be seen that the consequences of the making of a restraining order are considerable; significant property rights are interfered with by the making of the order. That is so even though the restraining order is only a prelude to the making of a confiscation order.
- [29] If the State applied for a restraining order on notice to a person affected thereby then there could be no complaint about the process. The judge of the Supreme Court hearing the application would exercise judicial power and make a decision pursuant thereto. The person affected would have the opportunity of placing material before the court at that initial stage seeking to show that there were no reasonable grounds for the suspicion on which the application was based. Further, the person affected could seek to demonstrate to the court that the making of the order was not in the public interest or that the order ought not be made without the State giving undertakings which the court considered appropriate in all the circumstances.
- [30] The court is not now concerned with that situation. Rather the issue now before the court is whether the legislature can validly interfere with the judicial process by directing the court to hear and determine the application in the absence of any interested party when the State elects to seek the restraining order without notice to any person to whom it relates.
- [31] As already noted a hearing pursuant to s 30 is significantly different from the hearing of an ex parte application as that expression is generally used. Frequently judges are asked to grant interim injunctions, make Anton Pillar orders, grant Mareva injunctions, and make other urgent orders on an ex parte basis. In the usual case the judge hearing such an application has a discretion whether or not to

proceed ex parte. In deciding whether or not to proceed ex parte the court would ordinarily consider the urgency of the application, the ease with which the other party could be served, and the possible adverse consequences of giving the other party notice of the application. In appropriate cases the judge would decline to hear the matter ex parte and direct that there be service, perhaps on short notice. If the judge decided to proceed ex parte, the order made would be on an interim basis only, would provide for service of all material on the party affected, and would ensure that the party affected was not adversely prejudiced by the making of the interim order. There would in such circumstances be no reversal of the onus of proof. The ex parte hearing and the subsequent further hearing on notice would comply with the requirements of proper judicial process. Because the judge was in control of the proceedings at all times there would be no infringement of the rights of natural justice and there would be no impairment of the judicial process. That is why, as noted above, if the application pursuant to s 28 of the Act was made on notice it could not be suggested that there was any legislative interference with the exercise of judicial power.

[32] The question for the court is whether s 30, by commanding the court to hear the application for a restraining order in the absence of any interested party when the State elects to proceed without notice, so interferes with the essential character of the exercise of judicial power as to make the provision invalid.

[33] In *In re Hamilton; In re Forrest* [1981] AC 1039 Lord Fraser of Tullybelton (with the concurrence of the other Law Lords) said at 1045:

“One of the principles of natural justice is that a person is entitled to adequate notice and opportunity to be heard before any judicial order is pronounced against him, so that he, or someone acting on his behalf, may make such representations, if any, as he sees fit. That is the rule of audi alteram partem which applies to all judicial proceedings, unless its application to a particular class of proceedings has been excluded by Parliament expressly or by necessary implication.”

[34] In support of that he quoted a passage from the reasoning of Baron Parke in *Bonaker v Evans* (1850) 16 QB 162 at 171, to the following effect:

“. . . no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless indeed the legislature has expressly or impliedly given an authority to act without that necessary preliminary.”

[35] The learned author of the Fourth Edition of De Smith *Judicial Review of Administration Action* quotes Baron Parke and in references cited on pages 157-8 demonstrates that the principle can be traced at least back to Biblical times. Superior courts have over the centuries been at pains to ensure that lower courts in the hierarchy, and tribunals exercising judicial or quasi-judicial power, observe the rules of natural justice. One of the requirements thereof is that a party likely to be affected by the decision shall be duly notified when and where the matter will be heard and then be given full opportunity of stating the case in response. There are throughout the law reports innumerable cases containing statements to the effect

that a person may not be condemned unheard or without being given reasonable opportunity of putting forward a case.

- [36] That is a universal principle which applies to both civil and criminal proceedings. In *R v Abrahams* (1895) 21 VLR 343 Williams J said at 346:

“The primary and governing principle is, I think, that in all criminal trials the prisoner has a right, as long as he conducts himself decently, to be present, and ought to be present, whether he is represented by counsel or not. He may waive this right if he so pleases, and may do this even in a case where he is not represented by counsel. But then a further and most important principle comes in, and that is, that the presiding Judge has a discretion in either case to proceed or not to proceed with the trial in accused’s absence.”

- [37] The reasoning in that case was cited with approval by Lucas J in *R v Stuart* [1973] Qd R 460 and by the Court of Criminal Appeal on appeal in *R v Stuart and Finch* [1974] Qd R 297; it was also cited with approval by the Court of Appeal in England in *R v Robert Jones* [1972] 1 WLR 887. In *Stuart’s* case s 617 of the *Criminal Code* applied; it provided that where an accused conducts himself as to render the continuance of the proceeding in his presence impracticable, the court may order him to be removed and direct the trial proceed in his absence. The validity of that provision was not challenged, and it represents an instance of the legislature abrogating in particular circumstances the audi alteram partem rule.

- [38] There is no doubt that the legislature could enact a law which, for example, provided for the automatic confiscation of the property of a convicted criminal, or that a person be automatically restrained from dealing with property on being charged with a particular offence. That would amount to a political decision to legislate in that way and it would be the legislature which had to justify the enactment of that law to society at large. However the Queensland Parliament, perhaps understandably, decided not to take that course of action but rather adopted the expedient of empowering a judge of the Supreme Court to make orders of the type in question. The motivation for so doing was clearly to give a restraining order (and also a confiscation order) the aura of respectability and public acceptance which ordinarily attaches to an order of the Supreme Court made in the exercise of an independent judicial process.

- [39] The Parliament was not prepared to allow the normal judicial process to operate at the stage of the making of the restraining order where the State elected to apply for such an order without notice to the person to whom it related. That clearly abrogated the audi alteram partem rule where an order was sought in those circumstances despite the fact that the making of such an order had, at least, serious property ramifications for the affected citizen. The question now for the court is whether that interference with the exercise of judicial power by the Supreme Court of this State is valid, given constitutional issues peculiar to Australia.

- [40] The starting point in determining the answer to that question is s 71 of the Constitution which, so far as is relevant, provides that the “judicial power of the Commonwealth shall be vested in ... the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction”. Relevantly for present purposes the Parliament has conferred such jurisdiction on the Supreme Court of Queensland by ss 39, 39A and 68 of the

*Judiciary Act* 1903. There have been numerous observations by High Court judges to the effect that “judicial power” for purposes of Ch III of the Constitution has never been exhaustively defined, but there are many statements identifying essential components thereof. Sir Samuel Griffith in *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 said “the words “judicial power” as used in s 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.”

- [41] After referring to that statement Mason, Murphy, Brennan and Deane JJ observed in *Fencott v Muller* (1983) 152 CLR 570 at 608: “The unique and essential function of the judicial power is the quelling of such controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion”. As Brennan CJ put it in *Nicholas v The Queen* (1998) 193 CLR 173 at 186, “the court exercises the judicial power of the Commonwealth by the making of its judgment or order”. (See also the discussion of “judicial power” by Gaudron J in *Nicholas* at 207-8).
- [42] Section 57 of the *Constitution of Queensland* 2001 provides that there must be a Supreme Court of Queensland, and s 58 goes on to provide that the “Supreme Court has all jurisdiction necessary for the administration of justice in Queensland”. It is, as sub-section (2) thereof provides, a court of general jurisdiction having, subject to the Commonwealth Constitution, unlimited jurisdiction at law, in equity and otherwise. When making a judgment or order in the exercise of that jurisdiction the Supreme Court of Queensland is exercising judicial power. In using that expression in a purely State context the expression must have the same meaning as it does for purposes of s 71 of the Constitution.
- [43] Even before *Kable* there were references in judgments of the High Court to legislation being invalid because of inconsistency with Ch III of the Constitution. In *The Commonwealth v Queensland* (1975) 134 CLR 298 at 315 Gibbs J recognised that legislation would be invalid if it was “contrary to the inhibitions which, if not express, are clearly implicit in Ch III”. The issue was next relevantly discussed in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1. Brennan, Deane and Dawson JJ at 27 recognised that there were “some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character”. They recognised that the most important of such functions was “the adjudgment and punishment of criminal guilt”. They then observed that legislative power did not “extend to the making of a law which requires or authorises the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power”. More significantly they said at 36-7: “It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Ch III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch III vests

exclusively in the courts which it designates.” (See also *Grollo v Palmer* (1995) 184 CLR 348 especially at 365).

[44] The principle derived from the majority judgments in *Kable* can be stated in the following terms – a State Supreme Court as one of the judicial institutions invested with federal jurisdiction may not act in a manner inconsistent with the requirements of Ch III of the Constitution. In support of that formulation reference can be made to the reasons of Toohey J at 94, Gaudron J at 100, 102-3, and 107-8, McHugh J at 109, 114, 116, 118, and 121 and finally Gummow J at 132 and 143. In particular the following passages from those judgments demonstrate the extent of the principle and its application to the circumstances now under consideration.

[45] After referring to the fact that the Constitution provided for “an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth”, Gaudron J went on to say at 103 that “Ch III requires that the Parliaments of the States not legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth”. Her Honour referred to the Act under review providing for proceedings which “are not proceedings otherwise known to the law” and being the “antithesis of the judicial process”. (106) McHugh J, referring to the Act of the New South Wales Parliament then under consideration, said at 108 that the “Act attempts to dress up as proceedings involving the judicial process” the proceedings contemplated by s 5 (1) thereof. He went on to say that in “so doing, the Act makes a mockery of that process and, inevitably, weakens public confidence in it. And because the judicial process is a defining feature of the judicial power of the Commonwealth, the Act weakens confidence in the institutions which comprise the judicial system brought into existence by Ch III of the Constitution”. He then went on to say at 109 that “the Act is invalid because it purports to vest functions in the Supreme Court of New South Wales that are incompatible with the exercise of the judicial power of the Commonwealth by the Supreme Court of that State”.

[46] Later he said at 114-5:

“Under the Constitution, therefore, the State courts have a status and a role that extends beyond their status and role as part of the State judicial systems. They are part of an integrated system of State and federal courts and organs for the exercise of federal judicial power as well as State judicial power. Moreover, the Constitution contemplates no distinction between the status of State courts invested with federal jurisdiction and those created as federal courts. ... It is axiomatic that neither the Commonwealth nor a State can legislate in a way that might alter or undermine the constitutional scheme set up by Ch III of the Constitution”.

[47] That led McHugh J to conclude that “no State or federal parliament can legislate in a way that might undermine the role of those courts as repositories of federal judicial power. Thus, neither the Parliament of New South Wales nor the Parliament of the Commonwealth can invest functions in the Supreme Court of New South Wales that are incompatible with the exercise of federal judicial power”. (116). That involved a recognition that one of the basic principles underlying the Constitution was that judges exercising federal jurisdiction must be independent of the legislature and the executive government, and that must be apparent. In his

view as the New South Wales Act in question “expressly removes the ordinary protections inherent in the judicial process” (122) it was invalid.

- [48] The proceedings before the Supreme Court of New South Wales in *Kable* involved the exercise of Federal jurisdiction (see Toohey J at 95 and Gummow J at 136), but that was not critical to the formulation of the test for invalidity of the State law. That was confirmed by the approach of the High Court to the problem which arose for its consideration in *HA Bachrach Pty Ltd v State of Queensland* (1998) 195 CLR 547. The question arose there because the Parliament of Queensland passed legislation approving the use of land for a particular purpose when that issue was before the Court of Appeal on appeal from the Planning & Environment Court. The High Court unanimously held that the Act was valid as it did not constitute an impermissible interference with the judicial process, nor was its effect incompatible with Ch III of the Constitution. But some passages in the judgment of the court are significant for present purposes. It was clearly recognised that the Act would be invalid if it involved an interference with the exercise of judicial power; see passages at 558-9. The judgment noted at 561 that the litigation in the Court of Appeal did not involve the exercise of federal jurisdiction and thus the appellant had to rely upon the decision in *Kable* to succeed. After analysing the legislation the Court concluded that the parliament was not acting beyond power in passing the Act or “interfering in any relevant sense with the exercise of judicial power”. (562) Significantly the court went on to say at 563:

“... the distinction between powers that are exclusively judicial and those that take their character from the body or tribunal on which they are conferred is important. A statute affecting litigation with respect to the guilt of a particular individual or group of individuals charged with criminal offences will involve quite different considerations from one affecting litigation as to rights which the Parliament may choose to have determined either by a judicial or non-judicial body”.

- [49] The High Court considered the *Kable* principle at some length in *Nicholas v The Queen*. The legislation there under challenge was the *Crimes Amendment (Controlled Operations) Act 1996* (Cth) passed in response to the decision in *Ridgeway* (1995) 184 CLR 19. The challenge to the validity of the Act was based on the *Kable* principle and a majority of the court (Brennan CJ, Toohey, Gaudron, Gummow and Hayne JJ) held there was no interference with the exercise of judicial power such as rendered that Act invalid; McHugh and Kirby JJ dissented and would have held that the Act did constitute an impermissible interference with the exercise of judicial power. Again some passages from the reasoning therein are material for present purposes.
- [50] Brennan CJ said at 186 that whilst “the Parliament can prescribe the jurisdiction to be conferred on a court ... it cannot direct the court as to the judgment or order which it might make in exercise of a jurisdiction conferred upon it”. After dealing with the nature of the “judicial power of the Commonwealth” he went on to say at 188:

“Some characteristics of a court flow from consideration of this function, including the duty to act and to be seen to be acting impartially. We are not concerned with these characteristics in the present case, except in so far as the duty to act impartially is

inconsistent with the acceptance of instructions from the legislature to find or not to find a fact or otherwise to exercise judicial power in a particular way. A law that purports to direct the manner in which judicial power should be exercised is constitutionally invalid”.

[51] His Honour then went on to consider in some detail the power of Parliament to pass laws regulating the practice and procedure of courts and the admissibility of evidence. Such laws of themselves, as he pointed out, did not constitute an impermissible direction to the Court. But, with reference to observations of Isaacs J in *Williamson v Ah On* (1926) 39 CLR 95 at 108, he emphasised the difference between a rule of evidence and a provision which, though in the form of a rule of evidence, is in truth an impairment of the curial function. Taking the example from the reasons of Isaac J, it is one thing to say that a person found in possession of stolen goods shall be conclusively deemed to have stolen them, and quite another to say that he shall be deemed to have stolen them unless he personally proves that he got them honestly. Brennan CJ went on to say (at 190): “If a court could be directed by the legislature to find that an accused, being found in possession of stolen goods, had stolen them, the legislature would have reduced the judicial function of fact finding to the merest formality. The legislative instruction to find that the accused stole the goods might prove not to be the fact”.

[52] In her judgment Gaudron J comes close, in my view, to providing the answer to the question now before this court; she said at 208-9:

“In my view, consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means, moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute”.

[53] To similar effect is the passage in the judgment of Gummow J at 232 where he said that the “legislative powers of the Commonwealth do not extend to the making of a law which authorises or requires a court exercising the judicial power to do so in a manner which is inconsistent with its nature”. It is clear from the authorities to which I have referred that the restrictions referred to by Gaudron J and Gummow J would also apply to the legislative powers of a State with respect to a State court invested with Federal jurisdiction pursuant to Ch III of the Constitution.

[54] Finally the passage from the reasoning of Hayne J in *Nicholas* should be noted:

“I have said that the distinction between legislation dealing only with questions of evidence or procedure and legislation dealing with questions of guilt or innocence will not always be easy to draw. It is possible to imagine changes to evidence or procedure which would

be so radical and so pointed in their application to identified or identifiable cases then pending in the courts that they could be seen, in substance, to deal with ultimate issues of guilt or innocence”. (278)

- [55] In that regard it should be noted that Brennan CJ at 190, Gummow J at 235-6 and Hayne J at 274 all pointed out that a provision merely reversing the onus of proof was not open to Constitutional objection “provided it prescribes a reasonable approach to the assessment of the kind of evidence to which it relates”. (190)
- [56] Passing reference should also be made to the decision of the Privy Council in *Liyanage v The Queen* [1967] 1 AC 259 dealing with legislation in Ceylon having similarities to that considered in *Kable*. Of particular significance was the fact that the legislation affected the mode of trial. It was recognised (at 289) that there exists in the judicature a separate power which cannot be usurped or infringed by the executive or the legislature. It was noted, for example, that parliament could not pass legislation instructing a judge in exercising judicial power to bring in a verdict of guilty. The legislation there under consideration was held to be invalid basically because the pith and substance of it was a legislative plan ex post facto to secure the conviction and enhance the punishment of designated individuals. That constituted an impermissible interference with the functions of the judiciary. As their Lordships said (290) the “aim was to ensure that the judges in dealing with these particular persons ... were deprived of their normal discretion ...”.
- [57] Returning now to the Act under consideration. As already noted the initial order made on an application brought pursuant to s 28 affects significant property rights in that the property owner is prevented from dealing in any way with the property, and must subsequently discharge the onus of proving that the property the subject of the order was not illegally acquired property if it is to be released from the order. Further, and not without significance for present purposes, the Supreme Court in making the initial order must also be satisfied that the “public interest” is not such as to require the court to refuse to make the order. How could a judge possibly be so satisfied in the exercise of judicial power when the only entity entitled to place material before the court on which a judgment on that issue could be formed was the State? Similarly, how could a judge possibly determine whether or not it was appropriate to require the State to give an undertaking as to damages and costs when the only entity entitled to place material before the court was the State? Asking a judge to make a decision on such issues in those circumstances makes a mockery of the exercise of the judicial power in question. The statutory provision removes the essential protection of the citizen inherent in the judicial process. Effectively the provision directs the court to hear the matter in a manner which ensures the outcome will be adverse to the citizen and deprives the court of the capacity to act impartially.
- [58] Given the reasoning in, and in particular the passages quoted from, *Kable*, *Bachrach* and *Nicholas*, I have come to the conclusion that the direction or command to the judge hearing the application to proceed in the absence of any party affected by the order to be made is such an interference with the exercise of the judicial process as to be repugnant to or incompatible with the exercise of the judicial power of the Commonwealth. Then, because the Supreme Court of Queensland is part of an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth, such a provision is constitutionally invalid.

- [59] It therefore follows that s 30 of the Act is invalid. Importantly, it should be noted that the remainder of the Act can work effectively without s 30. In an appropriate case (and when one is dealing with criminal activity it is often justifiable for such an application to be made speedily and without notice) an application under s 28 may be made *ex parte*, and would then be dealt with by the Court as any other *ex parte* application. The judge would be in control of the proceedings, could determine the appropriateness of proceeding *ex parte*, and could mould any interim order to ensure that the rights of all parties were adequately protected. Such a procedure would give full recognition and effect to the objects stated in s 4(2) of the Act.
- [60] Senior Counsel for the State of Queensland in each matter indicated that if the court held s 30 to be invalid and set aside the orders made to date in each matter, the applications would be brought on again before a judge of the Supreme Court and dealt with as applications on notice. That was a proper concession to make; if it was not made the court would have made a formal direction in that regard. The orders of the court should therefore be:

### Orders

In appeal 3942 of 2003:

- (i) Appeal allowed;
- (ii) Declare that s 30 of the *Criminal Proceeds Confiscation Act 2002* is invalid as being beyond the power of the Queensland Parliament;
- (iii) Set aside the orders of the Supreme Court of 7 April 2003;
- (iv) Order that the application be remitted to the Trial Division of the Supreme Court to be heard and determined according to law;
- (v) Order that the respondent pay the appellants' costs of and incidental to the appeal to be assessed.

In appeal 4051 of 2003:

- (i) Appeal allowed;
- (ii) Declare that s 30 of the *Criminal Proceeds Confiscation Act 2002* is invalid as being beyond the power of the Queensland Parliament;
- (iii) Set aside the orders of the Supreme Court of 11 April 2003;
- (iv) Order that the application be remitted to the Trial Division of the Supreme Court to be heard and determined according to law;
- (v) Order that the respondent pay the appellant's costs of and incidental to the appeal to be assessed.

- [61] **WHITE J:** I have read the reasons for judgment of Williams JA and agree with him that s 30 of the *Criminal Proceeds Confiscation Act 2002* is invalid as being beyond the power of the Queensland Parliament.

- [62] I would just add a few observations on the requirement to give reasons. Accepting that there may be occasions, particularly in interlocutory proceedings, when it will not be necessary for a judicial officer to give detailed reasons, for example, in

arguments about the provision of particulars, it should be regarded generally as a normal incident of the judicial process; *Deakin v Webb* (1904) 1 CLR 585 at 604-5; *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 at 386; *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 666-7.

- [63] It has been said that the obligation to give reasons is to enable the case to be “properly and sufficiently” laid before the higher appellate court, *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 388. Making an order *ex parte* seems to me similarly to be a case where the party adversely affected by the order as well as any subsequent court hearing the matter, needs to know the basis upon which a court exercised its discretion or was satisfied that the legislative conditions for making the order had been met. Here, although it may be concluded that the judge was satisfied that there were reasonable grounds for the suspicion on which the application was based because the order was made, it is impossible to know whether any consideration was given to the question of undertakings or, indeed whether that matter was even raised orally for the written material is silent on this issue. No matter how brief, record of what the court had regard to seems a necessary aspect of the judicial process.
- [64] **WILSON J:** I have had the advantage of reading the reasons for judgment of Williams JA. I agree with the proposed orders, for the reasons expressed by his Honour.