

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

No. 1647 of 2008
8292 of 2009

DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

v

KHODI ALI
and DOUNIA ALI

Respondents

JUDGE: HARGRAVE J
WHERE HELD: Melbourne
DATE OF HEARING: 23 and 24 August 2010
DATE OF JUDGMENT: 10 November 2010
CASE MAY BE CITED AS: DPP v Ali (No. 2)
MEDIUM NEUTRAL CITATION: [2010] VSC 503

CIVIL FORFEITURE – Property used in connection with commission of Schedule 2 offence – Property owner charged with conspiracy in connection with the Schedule 2 offence – Property owner acquitted by direction of trial judge – Restraining order made on grounds that the property was tainted property – Application by Director of Public Prosecutions for a civil forfeiture order – Exclusion application by wife of property owner – Whether wife had interest in property as beneficiary of a constructive trust – Exclusion application refused – Civil forfeiture order made – Whether property should be excluded from operation of the civil forfeiture order on grounds of hardship – Exclusion on hardship ground refused – Whether wife should receive a portion of sale proceeds of the forfeited property on hardship grounds – Portion of sale proceeds ordered to be paid to the wife – Confiscation Act 1997 (Vic) ss 18, 20, 24, 38, 45.

CONSTRUCTIVE TRUST – Common intention constructive trust – Common intention not proved – Whether constructive trust on principles in Muschinski v Dodds (1985) 160 CLR 583 – Relevant joint relationship continuing – Constructive trust not established.

HUMAN RIGHTS – Forfeiture of property used as family home – Relationship between Confiscation Act 1997 (Vic) and Charter of Human Rights and Responsibilities Act 2006 (Vic) discussed – Charter of Human Rights and Responsibilities Act 2006 (Vic) ss 7(2), 13(a), 17, 32 – R v Momcilovic (2010) 265 ALR 751; [2010] VSCA 50 considered and applied.

APPEARANCES:

Counsel

Solicitors

For the Applicant

Mr S O'Bryan SC with
Mr J Ross

Director of Public
Prosecutions

For the First Respondent
(Khodi Ali)

No appearance

For the Second Respondent
(Dounia Ali)

Mr E Nekvapil

Lewenberg & Lewenberg
Solicitors

For the Attorney-General for
the State of Victoria
(Intervening)

Mr M Moshinsky SC with
Ms K Foley

Victorian Government
Solicitor

For the Victorian Equal
Opportunity and Human
Rights Commission
(Intervening)

Ms K Walker

TABLE OF CONTENTS

Parties and introduction	2
Do the relevant provisions of the Confiscation Act limit human rights?	3
Does Mrs Ali have a beneficial interest in the property?.....	15
Should the property be excluded from forfeiture on hardship grounds?.....	24
Should Mrs Ali receive a portion of any sale proceeds on hardship grounds?	37
Conclusion and orders	38

HIS HONOUR:

Parties and introduction

1 Khodi Ali is the sole proprietor of a property in rural Victoria ('the property').
Mr Ali, his wife Dounia Ali, their three children and a child from Mr Ali's prior
marriage live in a house on the property. It is their family home.

2 In 2004, the family moved out of the house and lived with Mr Ali's family in
Melbourne. Following this move, Mr Ali allowed three men to use the house and an
adjacent garage for the purpose of manufacturing illegal drugs. Mr Ali assisted in
setting-up the drug manufacturing equipment, in the drug manufacturing operation,
and in making some physical alterations to the house and garage for that purpose.
The operation was captured on film by hidden cameras installed by the police.

3 In August 2005, the police executed a search warrant at the property and seized drug
making equipment, pre-cursor chemicals, drugs and cash. Mr Ali and the three
other men were charged with various counts of conspiracy to traffick a drug of
dependence, namely methylamphetamine.

4 In December 2007, Mr Ali and the three co-accused were tried in this Court. At the
conclusion of the prosecution case, counsel for Mr Ali made a no case submission.
The trial judge accepted the submission and Mr Ali was acquitted by direction.

5 The three co-accused were convicted and sentenced to terms of imprisonment.

6 Shortly prior to Mr Ali's acquittal, he and his family moved back to the property and
have lived there ever since.

7 This case concerns the right of the State to confiscate and forfeit the property, and
thus deprive Mr Ali and his family of their home. The applicant for a forfeiture
order is the Director of Public Prosecutions ('DPP'). The Attorney-General for the
State of Victoria ('the State') has intervened to support the DPP's application, insofar
as it raises human rights issues.

8 The State says that it can confiscate the property, sell it and forfeit the proceeds of

sale under the terms of the Confiscation Act 1997 (Vic) ('the Act'). Relevantly, the Act permits the forfeiture of property which is used in connection with the commission of serious offences specified in the Act, including drug trafficking.

9 Mrs Ali resists forfeiture of the property on a number of grounds. She contends that the relevant provisions of the Act breach or limit certain human rights protected under the Charter of Human Rights and Responsibilities Act 2006 (Vic), that the limit cannot be justified and, accordingly, that the Court must exercise its discretion to exclude the property from forfeiture on hardship grounds. The Victorian Equal Opportunity and Human Rights Commission ('the Commission') has intervened to support this contention. Alternatively, if that be wrong, Mrs Ali nevertheless contends that the Court should exercise its discretion to either exclude the property from forfeiture on hardship grounds, or to order payment to her of such portion of the sale proceeds of the property as is necessary to prevent hardship to her. Finally, Mrs Ali contends that she is the beneficial owner of 50 per cent of the property, and seeks to have that interest excluded from forfeiture in any event.

10 Mr Ali also made application to exclude the property from forfeiture. However, he withdrew his application on the day it was listed for hearing.

11 Taken in logical sequence, the following issues arise for determination:

- (1) Do the relevant provisions of the Confiscation Act limit human rights?
- (2) Does Mrs Ali have a beneficial interest in the property?
- (3) Should the property be excluded from forfeiture on hardship grounds?
- (4) Should Mrs Ali receive a portion of any sale proceeds?

Do the relevant provisions of the Confiscation Act limit human rights?

12 The Act establishes a regime for restraining dealings in property that has been used in or is derived from serious criminal activity and, subject to safeguards to prevent injustice, provides for the forfeiture of such property. The object of the regime is to

deprive criminals of the proceeds of their crimes, to disrupt criminal enterprises and to deter criminal activity.

13 The regime is based upon the Court making restraining orders under s 18 of the Act. Relevantly, for the purposes of this proceeding, a restraining order may be made if a member of the police force suspects on reasonable grounds that the restrained property is 'tainted property' in relation to an offence specified in Schedule 2 of the Act. Tainted property is broadly defined. It includes any property that was used in or in connection with, or is derived from, the commission of a Schedule 2 offence. There is no issue that the property falls within this definition, as it was used for the purposes of the offence for which Mr Ali's three co-accused were convicted, which is a Schedule 2 offence.

14 Following the decision of the Court of Appeal in DPP v Ali,¹ the validity of the restraining order in this case is no longer in issue.

15 The making of a restraining order provides the basis for the restrained property to be forfeited to the State. Forfeiture may occur in the following circumstances:

(1) Following conviction for a Schedule 1 offence, property restrained in connection with that offence may, upon application by the DPP, be forfeited by order of the Court.² In considering whether or not to make a forfeiture order in these circumstances, the Court may have regard to specified matters, including the use that is ordinarily made of the restrained property and any hardship which is reasonably likely to be caused to any person by reason of a forfeiture order.³ I will call this process 'discretionary forfeiture'.

(2) Where a person is convicted of a Schedule 2 offence, any property which is the subject of a restraining order made in connection with that offence is automatically forfeited to the State on certain pre-conditions being met.⁴ I will

¹ [2009] VSCA 162.

² Confiscation Act, s 33(1).

³ Confiscation Act, s 33(5).

⁴ Confiscation Act, s 35.

call this process ‘automatic forfeiture’.

(3) Where a restraining order is in force in relation to a Schedule 2 offence, the DPP may apply to a Court for a ‘civil forfeiture order’ in respect of the restrained property and, subject to certain pre-conditions being met, the Court must make a forfeiture order in respect of the restrained property.⁵ I will call this process ‘civil forfeiture’.

16 Following Mr Ali’s acquittal, this case concerns the application of the civil forfeiture regime.

17 The civil forfeiture regime contains a number of safeguards to protect against injustice.

18 First, upon the making of a restraining order for the purposes of civil forfeiture, any person claiming an interest in the restrained property may apply to the Court making the order for an exclusion order.⁶ The Court has a discretion under s 24 of the Act to make an order excluding the applicant’s interest in the property from the operation of the restraining order if it is satisfied of certain matters. In summary, an exclusion order may be made if the applicant establishes that the restrained property is not tainted property, or otherwise derived from the proceeds of crime (‘derived property’).⁷ Alternatively, even if the restrained property is tainted or derived property, an exclusion order may be made if the Court is satisfied that the applicant was not, in any way, involved in the commission of the relevant Schedule 2 offence and satisfies the Court of other specified matters.⁸

19 In this case, if Mrs Ali is successful in establishing that she has a beneficial interest in the property, the DPP acknowledges that she has satisfied the alternative requirements of s 24(b) of the Act, and is accordingly entitled to an exclusion order in respect of that interest, notwithstanding that the property is tainted property. This

⁵ Confiscation Act, s 38(1).

⁶ Confiscation Act, s 20.

⁷ Confiscation Act, s 24(a).

⁸ Confiscation Act, s 24(b).

makes it unnecessary to consider certain submissions made on behalf of Mrs Ali and the Commission as to the satisfaction of the elements required to be established for the making of an exclusion order.

20 Second, although obliged to make a civil forfeiture order if the requirements of s 38(1) are satisfied, the Court has a discretion under s 38(2) of the Act to exclude property from the operation of the civil forfeiture order ‘if satisfied that otherwise hardship may reasonably be likely to be caused to any person by the order.’

21 Third, the Court has a further discretion under s 45(1) of the Act if it is satisfied that hardship is likely to be caused to any person by a civil forfeiture order. By this discretion, the Court may order that an amount necessary to prevent hardship be paid out of the forfeited property to the person who is likely to suffer the hardship.⁹ Although no written application was made by Mrs Ali for an order under this discretion, this matter was argued as an alternative to her claims, and I will consider it.

22 I turn to consider the effect of the Charter on the civil forfeiture regime.

23 The starting point for considering the effect of the Charter on the civil forfeiture regime is s 32(1) of the Charter, which provides:

- (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

24 Where a provision in a statute, so interpreted, is nevertheless inconsistent with a human right, it remains valid.¹⁰

25 In *R v Momcilovic*,¹¹ the Court of Appeal considered the meaning of s 32(1) of the Charter and its relationship to the justification requirement in s 7(2). The following principles emerge from the decision:

⁹ Confiscation Act, s 45(1).

¹⁰ Charter, s 32(3)(a).

¹¹ (2010) 265 ALR 751; [2010] VSCA 50.

- (1) Section 32(1) does not create a ‘special’ rule of interpretation permitting the Court to depart from the purpose of the provision in question, but instead ‘forms part of the body of interpretative rules to be applied at the outset, in ascertaining the meaning of the provision’.¹²
- (2) ‘Compliance with the s 32(1) obligation means exploring all “possible” interpretations of the provision(s) in question, and adopting that interpretation which least infringes Charter rights’.¹³
- (3) In determining what interpretations are possible, the Court should apply ‘the existing framework of interpretative rules, including of course the presumption against interference with rights’ in the absence of express language or necessary implication in the provision at issue.¹⁴ Where Charter rights are engaged, s 32(1) elevates this common law presumption to a statutory requirement in interpreting Victorian Statutes.¹⁵
- (4) When the meaning of the relevant provision has been ascertained in accordance with the body of interpretative rules, including s 32(1), the Court must then consider whether the relevant provision, so interpreted, breaches or limits a human right protected by the Charter. It is only if such a breach or limit is identified that the Court has occasion to apply s 7(2) and consider whether the limit on the relevant human right is justified.¹⁶

26 Section 7(2) of the Charter is in the following terms:

- (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
 - (a) the nature of the right; and

¹² Ibid, [35(1)].

¹³ Ibid, [103].

¹⁴ Ibid.

¹⁵ Ibid, [104].

¹⁶ Ibid, [35(2)].

- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.¹⁷

27 Where a statutory provision which limits a Charter right is not justifiable under s 7(2) of the Charter, the Court may make a declaration of inconsistency under s 36(2). No party sought such a declaration in this case, and no notice in the prescribed form has been given to the Attorney-General and the Commission.¹⁸

28 The human rights which are relevant to the determination of the issues in this proceeding are:

- (1) a person's right not to have his or her family or home arbitrarily interfered with;¹⁹
- (2) the entitlement of families to be protected by society and the State;²⁰ and
- (3) the right of a child to such protection as is necessary in his or her best interests by reason of being a child.²¹

29 In accordance with the general approach to the interpretation of the human rights protected by the Charter, these rights should be interpreted broadly and in a non-technical sense.²² On this basis, it was common ground that the property constitutes the family home of Mr and Mrs Ali, their children and one child of Mr Ali's previous marriage. Further, it was common ground that a civil forfeiture order in this case would interfere with the family and their home.

¹⁷ Charter, s 7(2).

¹⁸ Charter, s 36(3).

¹⁹ Charter, s 13(a).

²⁰ Charter, s 17(1).

²¹ Charter, s 17(2).

²² Re application under the Major Crime (Investigative Powers) Act 2004 (DAS v Victorian Human Rights & Equal Opportunity Commission) [2009] VSC 381; Director of Housing v Sudi [2010] VCAT 328, [32]-[34].

30 I turn to consider whether the civil forfeiture regime limits the rights of Mrs Ali and her family not to have their family home arbitrarily interfered with. It is first necessary to set out ss 38(1) and (2) of the Act, which provide:

- (1) On an application under section 37(1), the Court must order that the restrained property be forfeited to the Minister if the Court is satisfied that—
 - (a) the requirements of section 37 as to notice of the application have been complied with; and
 - (b) not less than 30 days have elapsed since the last notice given in accordance with section 37; and
 - (c) there are no pending applications under section 20 in relation to the restrained property.
- (2) The Court may exclude particular property or any particular interest in property from the operation of a civil forfeiture order if satisfied that otherwise hardship may reasonably be likely to be caused to any person by the order.²³

31 In the notice given by Mrs Ali to the State and the Commission under s 35(1)(a) of the Charter ('Charter notice'), the interpretation question is stated by reference to s 38(2) of the Act, in the following terms:

Does s 32 of the Charter (with ss 13, 17 and/or 20) qualify the Court's discretion under s 38(2) of the [Act], so that when exercising that discretion either:

- (i) Greater weight must be given to the impact of not excluding property from a civil forfeiture order on person's rights with respect to home, family, children and property; or
- (ii) Where those rights are engaged the court should exclude property unless forfeiture can be reasonably justified under s 7(2) of the Charter?

32 The questions stated in the Charter notice do not address the principal issue as to the effect of the Charter upon the civil forfeiture regime. This is because s 38(2) is, by itself, incapable of breaching or limiting any human right. It is a purely ameliorative provision, to be considered only after a civil forfeiture order has been made by the Court under s 38(1). It is s 38(1) which authorises the making of a civil forfeiture

²³ Emphasis added.

order, and which thus has the capacity to arbitrarily interfere with the family home of Mrs Ali.

33 Subsection 38(1) does not give the Court a discretion to decline to make a civil forfeiture order if it is satisfied that it will cause hardship. It requires the Court to make a civil forfeiture order when satisfied of the matters stated in paragraphs 38(1)(a), (b) and (c).

34 Paragraphs (a) and (b) of the subsection specify notice requirements. There is no issue as to them in this case. Paragraph (c) of the subsection provides that a civil forfeiture order cannot be made where there are pending applications for exclusion of the restrained property under s 20 of the Act. Accordingly, the Court must first determine any existing exclusion application before making a civil forfeiture order.

35 If the exclusion application is wholly successful, the restrained property will be released from the operation of the restraining order and there will be no basis for a civil forfeiture order. However, if the whole or part of the restrained property remains subject to the restraining order after determination of the exclusion application, the Court is obliged to make a civil forfeiture order in respect of that property. The fact that the Court has a discretion as to whether or not to make an exclusion order under s 38(2), does not make the Court's task under s 38(1) of the Act a discretionary one.

36 By reason of the form of the Charter notice, the argument before the Court did not focus on the proper interpretation of s 38(1) of the Act. It is accordingly unnecessary and inappropriate to decide whether a civil forfeiture order in this case will limit the right under s 13(a) of the Charter, not to have a person's family or home arbitrarily interfered with.

37 However, counsel for the Commission did advance argument as to proper interpretation of s 13(a) of the Charter, which protects against unlawful or arbitrary interference. Lawful interference may be arbitrary. It was submitted on behalf of the

Commission that arbitrary interference will be established if, although lawful, the interference is not reasonable and proportionate to the end sought in the particular circumstances of the case. Reliance was placed upon *Kracke v Mental Health Review Board*,²⁴ where Bell J considered some general comments of the United Nations Human Rights Committee concerning arbitrary interference and the views of that committee in *Toonen v Australia*.²⁵ In expressing its views in that case, the committee referred to its published general comments concerning the concept of arbitrary interference, to the effect that even lawful interference should be reasonable in the circumstances, and then interpreted its own comment in the following way:

The committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.²⁶

38 Presumably because the issue does not arise for determination in this case, no contrary submission was made on behalf of the DPP or the State. However, in *WBM v Chief Commissioner of Police*,²⁷ Kaye J considered the approach of Bell J in *Kracke* and the comments and views of the Committee, and took a different view as to the meaning of arbitrary interference. In his view, the adjective ‘arbitrary’ is a word of common use and the dictionary definition should be applied to it. Kaye J viewed the Committee’s definition of the adjective ‘arbitrary’ as ‘an unwarranted and impermissible re-writing of the plain terms of the Charter.’²⁸ By reference to the dictionary meaning, Kaye J construed the concept of arbitrary interference as denoting an interference ‘which is capricious and not based on any identifiable criterion or criteria.’²⁹ This decision was not brought to the attention of the Court by counsel for any party, and the conflict on the authorities was not the subject of submissions. In these circumstances, it is unnecessary and inappropriate to resolve the conflict in this case.

²⁴ [2009] VCAT 646, [169]-[172].

²⁵ CCPR/C/50/D/488/1992 (jurisprudence).

²⁶ *Ibid*, [8.3].

²⁷ [2010] VSC 219.

²⁸ *Ibid*, [56].

²⁹ *Ibid*, [57].

39 I turn to consider the issues raised by the Charter notice. For the reasons given above, it is important to state that the Court is obliged to make a civil forfeiture order once Mrs Ali's exclusion application has been determined. Accordingly, the Court must order forfeiture of at least 50 per cent of the property, and the hardship discretion will arise following the making of that order. For convenience, the exclusion application, the civil forfeiture application and the application for a beneficial exercise of the hardship discretions have all been heard together.

40 It was submitted on behalf of Mrs Ali and the Commission that the hardship discretion under s 38(2) is circumscribed by the relevant human rights and that, unless the making of a civil forfeiture order can be demonstrably justified under s 7(2) of the Charter, the Court must exclude the property from the operation of the civil forfeiture order which is mandated under s 38(1) of the Act. Alternatively, Mrs Ali and the Commission contend that the Charter requires the relevant human rights engaged in this case to be given significant weight in the exercise of the hardship discretion. This alternative submission was not in contest. The DPP and the State accept that the relevant Charter rights must be afforded considerable weight in the exercise of the Court's discretion. However, they contest the principal submission that the Court must exercise its discretion to exclude the property from the operation of a civil forfeiture order unless they can satisfy the Court that a civil forfeiture order is demonstrably justified under s 7(2) of the Charter.

41 I reject the principal submission of Mrs Ali and the Commission. That submission is inconsistent with s 38(1) of the Act, which mandates the making of a civil forfeiture order where the Court is satisfied of the matters stated in paragraphs 38(1)(a), (b) and (c). If the Court was required to act in accordance with this submission, and exclude the property under s 38(2) unless forfeiture could be justified under s 7(2) of the Charter, that would be inconsistent with the express terms of s 38(1) and would, moreover, defeat its purpose. The effect of the submission is to ask the Court to re-write s 38(1) where hardship is established, to make it applicable only if the Court considers forfeiture to be justified under s 7(2) of the Charter. That suggested

interpretation of s 38(2) is not possible in light of the clear words and purpose of s 38(1). Section 38(2) remains a purely ameliorative provision according to its terms. It does not limit any human right protected by the Charter. In these circumstances, s 7(2) of the Charter has no relevance.

42 Further, the principal submission would have the effect of imposing an obligation on the Court to act in a way that is compatible with human rights. The Charter does not impose this obligation on courts, only on public authorities.³⁰ No party contended that the exception for courts acting in an administrative capacity has any relevance to this case.

43 The Commission and Mrs Ali sought to support their submission by reference to the Canadian case of *Slaight Communications Inc v Davidson*.³¹ That case does not assist them. The case concerned a very broad discretion, conferred by statute upon an adjudicator in a wrongful dismissal case, to order that the employer act in any manner that is equitable to remedy or counteract any consequence of the wrongful dismissal. Obviously enough, such an order could infringe a human right. In that context, Lamer J (with whom the other members of the Court agreed on this issue) stated that a statutory provision conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed.³² Such a discretion, to make an order infringing human rights, is distinguishable from the discretions arising under ss 38(2) and 45(1) of the Act, which are of an entirely different character. Those discretions authorise the court to ameliorate the harsh effects of a civil forfeiture order, once made, so as to avoid hardship. They do not authorise the Court to make any order infringing rights.

44 The Commission also relied on statements made by Bell J applying *Slaight*. In *Kracke v Mental Health Review Board*,³³ Bell J stated that s 32(1) of the Charter requires open-ended statutory discretions to be exercised compatibly with human rights.

³⁰ Charter, ss 4(1)(j), 38(1).

³¹ (1989) 59 DLR (4th) 416.

³² *Ibid*, 444.

³³ [2009] VCAT 646, [208]-[211].

His Honour repeated this statement in *Lifestyle Communities Ltd (No 3)*.³⁴ In each case, Bell J held that the relevant board or tribunal which was invested with the discretion was a public authority within the meaning of the Charter, and thus bound by s 38(1) of the Charter to act in a way that is compatible with human rights.³⁵ In contrast, this Court is not a public authority and is not bound in that way.

45 However, that does not mean that the Charter rights are irrelevant to the exercise of the Court's discretion under ss 38(2) or 45(1) of the Act. The Charter rights form part of the body of law in Victoria. Without binding the Court as to how it should exercise its discretion, the Charter rights which are engaged in any particular case must form part of the relevant circumstances to be taken into account in the exercise of the discretion. As I have said, this is not in contest. That is unsurprising. It is consistent with the approach to the hardship discretion in cases involving discretionary forfeiture under the Act and equivalent statutory regimes in other states. Where a civil forfeiture order relates to a family home and the family includes children, the Court must necessarily consider the effect of the order on the home, family and children in exercising its discretion. This aspect is considered further below, when considering the way in which the discretions should be exercised in this case.

46 It was submitted on behalf of Mrs Ali that the Court should first consider the hardship discretion under s 38(2), and decide whether to exclude the whole of the property from the operation of the civil forfeiture order. For the reasons stated above, that is an inappropriate course. It is inconsistent with the structure of the civil forfeiture regime, which requires the Court to determine any pending exclusion application prior to making a civil forfeiture order.³⁶ Further, the extent of any beneficial interest held by Mrs Ali in the property, which will be unencumbered by a restraining order, is a relevant consideration in the exercise of the Court's hardship

³⁴ [2009] VCAT 1869, [75]-[91].

³⁵ *Kracke v Mental Health Review Board* [2009] VCAT 646, [320]; *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869, [33]-[37], [78].

³⁶ *Confiscation Act*, s 38(1)(c).

discretion in relation to Mrs Ali's application under s 38(2) of the Act. Accordingly, I turn to consider Mrs Ali's exclusion application based on her claimed beneficial interest in the property.

Does Mrs Ali have a beneficial interest in the property?

47 As stated above, the DPP acknowledges that Mrs Ali has satisfied the pre-conditions to the exercise of the Court's discretion to exclude any interest held by her in the property under s 24(b) of the Act. Accordingly, the only issue for determination is the extent, if any, of Mrs Ali's beneficial interest in the property. She claims a 50 per cent interest in the property, based on constructive trust grounds. The DPP contends that Mrs Ali has no interest in the property, on these grounds or at all.

48 In order to determine this dispute, it is necessary to set out the uncontested facts as stated in Mrs Ali's affidavits. Mrs Ali was not cross-examined.

49 Mr Ali purchased the property for the sum of \$195,000 in March 2002. Since the purchase, the property has been unencumbered.

50 At this time, Mr Ali's previous marriage had come to an end. There were four children from this marriage. Mr Ali wished to find a new wife. He travelled to his homeland, Lebanon, and was introduced to Mrs Ali as a potential husband.

51 Prior to this introduction, Mrs Ali had worked for about five years as a live-in cook and cleaner and was paid about US\$6,000 per year.

52 Mr and Mrs Ali's marriage was 'arranged' according to Lebanese culture. Mrs Ali explained this arrangement as involving an initial introduction with a view to marriage, some social contact between the couple to see if they are compatible, like each other and wish to marry and, if so, agreement by the two families to a marriage. In particular, Mrs Ali described the circumstances in which she obtained her father's consent to the marriage.

53 At the time they met, Mrs Ali was 18 and Mr Ali was 34 years old. Mrs Ali said that

she immediately liked Mr Ali but had some concerns, which were shared by her father, that Mr Ali was older than her and had four children from his previous marriage. Mr Ali told Mrs Ali that, if they were to marry, the four children would be living with them and she would be expected to look after them. Mr Ali said also that Mrs Ali could have children of her own.

54 Mrs Ali and her father were also concerned that if she married Mr Ali she would be living with him in Australia. The concern was that Mr Ali may pre-decease Mrs Ali or leave her. Mrs Ali was concerned that, in such circumstances, she would be left in a foreign country with nowhere to live or any way to support herself and any children of the marriage.

55 Mrs Ali initially deposed that this concern was met by a 'piece of paper' signed by Mr Ali, to the effect 'that if anything were to happen to him or if he were to leave the marriage, the property would be [hers] absolutely.' However, in her second affidavit, Mrs Ali acknowledged that her understanding of this piece of paper was incorrect. She said that she did not know what was on the piece of paper 'because that is also men's business in Lebanese culture'. She exhibited the marriage certificate from a Lebanese court, which says nothing of Mrs Ali obtaining any real estate if Mr Ali died or the marriage ended. The certificate says only that the marriage was agreed with a dowry of one 'golden pound' in advance and 75 million Lebanese pounds to be paid 'late'.

56 A few months after the marriage, but before Mrs Ali left Lebanon to live in Australia, she discussed the form of the marriage certificate with her father. She was told by him that, although the certificate says nothing about her entitlement to a house, it meant 'that if he divorces you, and does not have a home for you, he has to give you that money'. Mrs Ali deposed that she understood, and continues to understand, that if Mr Ali was to leave the marriage, 'he either has to give me a home or pay the money stated in the document.'

57 In addition to her father's statements, Mrs Ali's understanding as to her entitlement

to an interest in the property arose from discussions with Mr Ali prior to her agreeing to marry him. She described those conversations in the following terms.

58 First, Mrs Ali referred to a conversation with her father about a week or two after she had met Mr Ali and had some social contact with him. She described this conversation, which insofar as it contains hearsay was admitted for the fact that it was said and not for the truth of what was said, in the following terms:

My father came into my bedroom and said words to the effect of “Khodi Ali asked for your hand to marry him. He has got a house on a farm. When you get married, that house will be yours and his. It’s up to you now, do you want to marry him? Yes or no?”

I said, “Yes”.³⁷

59 Second, Mrs Ali deposed to a conversation between Mr Ali and her father immediately following this conversation. She said that she came out of her bedroom and heard the following exchange between them:

My father said to Khodi in front of me words to the effect of, “if you are going to marry him, he needs to look after you. He needs to have a house for you to live in, so you are not in the streets”.

Khodi said words to the effect of, “I have got a house on the farm, and that is where she is going to be living with me. That house is for both of us.”

My father said, “If there is ever a problem between you and her, you need to make sure she has a house or money.” I understood that they had this conversation in front of my family members, so that there were witnesses to what Khodi said.³⁸

60 Mrs Ali deposed that her understanding of the private conversation with her father, and the conversation between her father and Mr Ali in her presence, was ‘that the house would be for Khodi and myself to share, and that it would be the family home.’

61 Following these conversations, an appointment was made to go to the local court. Mrs Ali described this appointment as being ‘so that Khodi could sign the piece of paper’. The only relevant document in evidence is the marriage certificate under

³⁷ Ibid, [8].

³⁸ Ibid, [10]. Emphasis added.

Sharia law.

62 Following the marriage, and the completion of migration formalities, Mrs Ali moved to Australia in early 2003 and commenced residing with Mr Ali at the property. At the beginning, the children from Mr Ali's prior marriage all lived with them and Mrs Ali cared for them. Later, some of the children moved out of the family home. One child from the previous marriage continues to reside with Mr and Mrs Ali.

63 Mrs Ali has had three children by Mr Ali. At the time of charges being laid against Mr Ali, she had one child by him. The other children were born after Mr Ali's acquittal in December 2007.

64 Since coming to Australia, Mrs Ali has been a traditional Lebanese housewife, looking after the children of the previous marriage and her own children, and attending to other domestic duties such as cooking, laundry and cleaning the family home.

65 Mrs Ali has not been employed since leaving Lebanon. She has been in receipt of CentreLink benefits which have been pooled with any income or benefits received by Mr Ali. Mr Ali has always been responsible for the banking and finances of the family.

66 In her own words, Mrs Ali claims an entitlement to a 50 per cent beneficial interest in the property 'by virtue of the assurances made to me and my father prior to [the] marriage, the fact that I contributed significantly to the marriage including looking after Khodi's children from a previous relationship, looking after the three children of our relationship, being responsible for and carrying out all domestic duties and the pooling of all my finances throughout the course of the marriage.'³⁹

67 Against this factual background, I turn to consider the applicable legal principles.

68 Mrs Ali's principal contention is that Mr Ali holds one-half of the property on a

³⁹ Mrs Ali's first affidavit, [20].

constructive trust for her, based on a common intention as to the ownership of the property and her detrimental reliance upon that common intention; with effect that it would be equitable fraud for Mr Ali to deny her beneficial interest in the property. It was not in contest that a 'common intention constructive trust' can arise in this way. Both parties accepted that this was the effect of numerous decisions, including *Allen v Snyder*,⁴⁰ *Hohol v Hohol*,⁴¹ and *Rasmussen v Rasmussen*.⁴² Nor was it in contention that the onus of proving a common intention constructive trust lies on the party asserting the beneficial interest against the legal owner.⁴³

69 It was submitted on behalf of the DPP that a common intention constructive trust cannot arise unless the common intention was formed prior to or at the time of acquisition of the relevant property. Reliance was placed upon a number of statements in the authorities which support this proposition. In particular, reliance was placed upon statements made by Fullagar J in two cases, one as a member of a Full Court and the other as a member of the Appeal Division of this Court.

70 In *Thwaites v Ryan*,⁴⁴ the Full Court considered a claim for a common intention constructive trust. The Court held that the alleged agreement upon which the common intention was founded was not proved, and the claim accordingly failed. Fullagar J gave a further reason for holding against the claim. In his Honour's view, even if the common intention had been established, the claim would have failed because such a claim depends upon the existence of the common intention at the time of acquisition of the relevant property.⁴⁵ The other members of the Court (Young CJ and Starke J) expressed no opinion on this further reason given by Fullagar J for dismissing the claim. In my view, the further reason was obiter dicta and is not binding on me.

⁴⁰ [1977] 2 NSWLR 685.

⁴¹ [1981] VR 221, 225.

⁴² [1995] 1 VR 613, 615-6.

⁴³ *Hohol v Hohol* [1981] VR 221, 226.

⁴⁴ [1984] VR 65.

⁴⁵ *Ibid*, 71, 93.

71 In *National Australia Bank Ltd v Maher*,⁴⁶ the Appeal Division considered a constructive trust claim made on alternative grounds. In his judgment, Fullagar J 'set out very compendiously' some relevant principles of law. The second principle was stated in the following terms:

2. Persons may agree at the time of acquisition by an agreement which is expressed or implied, that land put into the name of one of them shall be held upon trust for both of them. Further, cogent evidence of a common intention at the time of acquisition, coupled with evidence of one party acting to his or her detriment upon the footing that the common intention will be carried out, may be sufficient to invoke the aid of equity in producing a resulting trust in favour of the person so acting.⁴⁷

72 The reference to a resulting trust was in error, and should be read as a reference to a constructive trust.

73 Southwell J agreed with the reasons of Fullagar J. Ormiston J said that he substantially agreed with the reasons of Fullagar J but made statements of his own as to the issues for determination.

74 However, as with *Thwaites v Ryan*, the statement by Fullagar J that the common intention must be formed at the time of acquisition of the relevant property was obiter dicta. *National Bank v Maher* was decided on grounds of resulting trust, not common intention constructive trust.⁴⁸

75 I do not accept the submissions made on behalf of the DPP in this regard. The obiter statements of Fullagar J are not binding on me and are inconsistent with contrary statements of principle in Australian and English cases, to the effect that a common intention constructive trust may arise from an agreement or common intention arising after acquisition of the relevant property. The cases to this effect include *Allen v Snyder*,⁴⁹ *Butler v Craine*,⁵⁰ *Grant v Edwards*,⁵¹ *Green v Green*,⁵² *Rasmussen v*

⁴⁶ [1995] 1 VR 318.

⁴⁷ *Ibid*, 321.

⁴⁸ *Ibid*.

⁴⁹ (1997) 2 NSWLR 685, 691.

⁵⁰ [1986] VR 274, 284-7.

⁵¹ [1986] 1 Ch 638, 651-2.

Rasmussen,⁵³ and Austin v Keele.⁵⁴

76 I turn to consider whether Mrs Ali has established the necessary common intention that she was to have an interest in the property.

77 In order to establish such a common intention, the onus is on Mrs Ali to establish either an express agreement between her and Mr Ali that she was to have an interest or conduct from which the necessary common intention can be inferred as a matter of fact.⁵⁵

78 Mrs Ali relies upon direct evidence of common intention, constituted by an agreement, arrangement or understanding between her and her father on the one hand and Mr Ali on the other that, if she married Mr Ali, emigrated to Australia to live with him and looked after his children from a prior marriage, she would be entitled to a one-half interest in the property. I do not accept that the evidence permits such a finding. At its highest, the evidence establishes some form of understanding as to what was to happen in the event that the marriage failed.

79 It was submitted on behalf of Mrs Ali that Mr Ali's statement to her father – 'That house is for both of us' – was direct evidence of Mr Ali's intention that Mrs Ali would have a half interest in the house if she married him, came to Australia and looked after his children from a prior marriage. I do not accept that submission. During the critical conversation after Mrs Ali came out of her bedroom, her father referred only to a requirement that Mr Ali have a house for Mrs Ali to live in and, if the marriage failed, that Mr Ali would ensure that Mrs Ali had a house or money. Mr Ali agreed to the first proposition: 'I have got a house on the farm, and that is where she is going to be living with me.' In that context, the addition by Mr Ali of the words 'That house is for both of us' is too vague to establish an intention on the part of Mr Ali that Mrs Ali would acquire a one-half interest in the property if she

⁵² (1989) 17 NSWLR 343, 355-6.

⁵³ [1995] 1 VR 613, 616.

⁵⁴ (1987) 10 NSWLR 283, 290 (Privy Council).

⁵⁵ Rasmussen v Rasmussen [1995] 1 VR 613, 615.

married, came to Australia and looked after his children from a prior marriage. It is in my view unlikely that Mr Ali would have made such an unequivocal promise, and there is no other evidence to support a finding that he did. He simply left the property in his sole name.

80 I accept that the evidence is capable of supporting an agreement, arrangement or understanding that, if the marriage failed, Mrs Ali would be entitled to either a house in Australia to live in or the money referred to in the marriage certificate. However, that is an entirely different intention to that relied upon to support the common intention constructive trust.

81 It was submitted on behalf of Mrs Ali that, in the alternative, she is entitled to a one-half interest in the property on principles of constructive trust as explained in *Muschinski v Dodds*⁵⁶ and *Baumgartner v Baumgartner*.⁵⁷

82 In summary, a constructive trust of this kind may arise where:

the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that the other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him to do so ...⁵⁸

83 A trust of this kind may arise where the contributions are not made directly to the acquisition or improvement of the relevant property. For example, parties to a relationship may pool their earnings for the purposes of their joint relationship, including the purpose of acquiring a house to live in. Where the relationship fails, and the property is owned by only one party, it may be unconscionable for the owner to deny the interest of the other party.⁵⁹

⁵⁶ (1985) 160 CLR 583.

⁵⁷ (1987) 164 CLR 137.

⁵⁸ *Muschinski v Dodds* (1985) 160 CLR 583, 620.

⁵⁹ For example, *Baumgartner v Baumgartner* (1987) 164 CLR 137.

84 Further, the contributions may be of a non-financial kind and may include contributions such as homemaking and parenting.⁶⁰

85 I do not accept that these principles have any application to this case. The joint relationship between Mr and Mrs Ali was that of marriage. That marriage continues. In these circumstances, there is no room for the operation of these principles of constructive trust. The making of a civil forfeiture order under the Act will not bring the marriage to an end. The evidence does not permit a finding that ownership of the house was a separate joint endeavour or undertaking between Mr and Mrs Ali, either for the purposes of their relationship or at all. Mr Ali had already purchased and fully paid for the property prior to proposing marriage to Mrs Ali.⁶¹

86 It was submitted on behalf of Mrs Ali that a constructive trust of the kind under discussion can arise in the absence of the marriage between Mr and Mrs Ali failing. Reliance was placed upon *Australian Building & Technical Solutions Pty Ltd v Boumelhem*.⁶² I do not accept that submission. That case concerned a complex joint relationship or endeavour between parents and their son. The parents contributed to the acquisition of a property by the son as sole registered proprietor. The joint relationship or endeavour failed when the son chose to voluntarily enter bankruptcy. In these circumstances, Ward J considered that the son's trustee in bankruptcy would act unconscionably if he denied the interest of the parents in the property, thus enlivening the jurisdiction of the Court to declare a constructive trust to reflect the contributions by the parents to the acquisition of that property.⁶³ This case does not assist Mrs Ali because, as I have said, she fails at the first hurdle. The acquisition and ownership of the Ali family home was not the result of any joint endeavour or undertaking between Mr and Mrs Ali. Her contributions to the marriage, by allowing her social security payments to be pooled for the purposes of general family expenditure, and by her role as a wife, parent and homemaker, have

⁶⁰ *Muschinski v Dodds* (1985) 160 CLR 583, 622.

⁶¹ Cf *National Australia Bank v Maher* [1995] 1 VR 318, 335-6, per Ormiston J.

⁶² [2009] NSWSC 460.

⁶³ *Ibid*, [108]-[109].

insufficient relationship to the ownership of the home to justify the imposition of a constructive trust in her favour.

87 For the above reasons, I find that Mrs Ali had no beneficial interest in the property at the relevant time, when Mr Ali was charged in August 2005. Accordingly, Mrs Ali has no standing to pursue her exclusion application and it will be dismissed.

88 Following the determination of Mrs Ali's exclusion application, the Court must make a civil forfeiture order in respect of the whole of the property.

89 I turn to consider Mrs Ali's application to have the property excluded from the operation of the civil forfeiture order on the grounds of hardship.

Should the property be excluded from forfeiture on hardship grounds?

90 Section 38(2) of the Act is in the following terms:

- (2) The Court may exclude particular property or any particular interest in property from the operation of a civil forfeiture order if satisfied that otherwise hardship may reasonably be likely to be caused to any person by the order.⁶⁴

91 The Court was not directed to any authority concerning the proper approach to the exercise of the discretion under s 38(2) or under any equivalent enactment in other jurisdictions. Accordingly, it is necessary to consider the approach to be adopted in such cases.

92 I start with the words of the subsection, which provide for an all or nothing approach to any identified 'particular interest' in the relevant property. If hardship is established, the Court has a discretion to exclude all of the particular interest or none of it. There is no middle ground in the discretion, authorising the Court to exclude part only of an interest from the operation of a civil forfeiture order.

93 In this case, following the dismissal of Mrs Ali's exclusion application, the only interest which has been identified is Mr Ali's interest as the sole registered proprietor

⁶⁴ Confiscation Act, s 38(2).

of the property. There are no encumbrances on the property, no tenancy arrangements or other relevant rights, powers or privileges over or in connection with the property which could fall within the broad definition of 'interest' in s 3 of the Act. Mrs Ali's only application was to have the whole of the property excluded from the operation of any civil forfeiture order, on the basis of hardship to her and her family.

94 In exercising the Court's discretion, the fact that it is an all or nothing discretion is an important matter to be taken into account. There will be cases where the Court takes the view that total forfeiture would be unduly harsh in all the circumstances, but the conduct of the owner of the relevant interest is such that the ends of the civil forfeiture regime would be defeated if the whole of the property was excluded from the operation of a civil forfeiture order. In such cases, the further discretion arising under s 45(1) of the Act, which permits the Court to order payment of a specified amount out of the forfeited property in order to avoid hardship to any person, is enlivened. Section 45(1) gives the Court power to adopt a middle course; involving recognition of the seriousness of the conduct of the property owner on the one hand and relieving, at least in part, against hardship on the other.

95 It was submitted on behalf of Mrs Ali that, in exercising the discretion under s 38(2), the Court should pay no regard to the existence of the further discretion under s 45(1). I reject that submission. The Act must be construed as a whole and all relevant circumstances must be taken into account in the exercise of the discretion under s 38(2). It would be an error of principle to ignore the residual discretion under s 45(1), which authorises the Court to mould orders appropriate to the particular circumstances of the case, and thus recognise the need to balance between the deterrent effect of the civil forfeiture regime on the one hand and the power to ameliorate proven hardship on the other.

96 As to the need to balance these ends, guidance can be obtained from the approach adopted by courts in connection with the discretionary forfeiture regime under

s 33(5) of the Act and corresponding provisions in other states and territories.

97 Section 33(5) of the Act is in the following terms:

- (5) In considering whether to make an order under subsection (1) in respect of particular property, the court may have regard to—
 - (a) the use that is ordinarily made, or had been intended to be made, of the property; and
 - (b) any hardship that may reasonably be likely to be caused to any person by the order; and
 - (c) the claim of any person to an interest in the property having regard to the matters specified in section 50(1).⁶⁵

98 In *Lake v R*,⁶⁶ the Court of Criminal Appeal in New South Wales considered the statutory equivalent of s 33(5) of the Confiscation Act. As to the discretion to refuse a forfeiture order on hardship grounds, Kirby P (as he then was) stated:

In considering hardship, it is necessary to bear in mind that, of necessity, in achieving its objects, the Act will cause a measure of hardship in the deprivation of property. Indeed that is its intention. It is not that kind of hardship, therefore, that can give rise to the relief under s 5(1)(b)(ii). The provision for relief on that ground must not be so interpreted as to frustrate the achieving of the purpose of Parliament in enacting the exceptional provisions of the Act. Something more than ordinary hardship in the operation of the Act is therefore meant. Otherwise the Act would have, within it, the seeds of its own [in]effectiveness in every case.⁶⁷

99 To similar effect is the statement of DeBelle J, as a member of the Full Court of South Australia, in *Taylor v Attorney-General for the State of South Australia*.⁶⁸ DeBelle J stated in respect of the hardship discretion that:

At the end of the day it is necessary to have regard to whether the order of forfeiture would be severely disproportionate to the circumstances of the offence and the nature and degree of the offending. The fact that there is some disproportion is not necessarily a reason for refusing to order forfeiture: that would fail to recognise Parliament's intention to create an additional deterrent. However, if forfeiture were to result in unnecessary hardship, having regard to the circumstances of the offence, a Court might be justified

⁶⁵ Confiscation Act, s 33(5).

⁶⁶ (1989) 44 A Crim R 63.

⁶⁷ *Ibid*, 66-7. Emphasis added.

⁶⁸ (1991) 55 SASR 462.

in refusing the order.⁶⁹

100 In determining whether something more than ordinary hardship has been established, the Courts have considered the effect of a forfeiture order upon the family and home of the offender. For example, in *R v Bolger* Allen J (Hope JA and Studdert J agreeing) stated that the hardship discretion:

may be of great importance where hardship would be caused to persons who are neither offenders nor innocent third parties with interests in the tainted property. If, for example, the forfeiture order would be in respect of a family home the hardship which would follow to innocent persons who lived in the home, albeit that they had no interest in the property in law or in equity, would be material. Likewise it would be material if the tainted property were a car which the wife of the offender could not do without if she were to be able to get her children to and from school. The hardship might not be decisive. But clearly it would be relevant to the exercise of the discretion.⁷⁰

101 In *R v Winand*,⁷¹ a case concerning the Victorian predecessor to s 33(5) of the Confiscation Act, the Court of Criminal Appeal considered that an order forfeiting the offender's family home would 'operate disproportionately to the nature and gravity of the offence' and 'would cause unacceptable hardship' which would be 'manifestly unfair'.⁷² In reaching that conclusion, the Court referred to a number of previous decisions, including *Lake and Taylor*, and stated:

Those cases, which his Honour accepted as having been correctly decided, established that matters which are to be regarded as relevant to a judicial determination of an application under section 5 of the Act include the following: the value of the subject property, the nature and gravity of the offence, the use made of the property, the degree of the offender's involvement, the offender's antecedents, the value of any other property confiscated and the penalty imposed, the nature of the offender's interest in the property, the value of the drugs involved or the size of the crop, whether the property was acquired with the proceeds of the sale of drugs, the utility of the property to the offender, the length of ownership of the property, the degree to which the property was connected with the commission of the offence, the fact that forfeiture is intended as a deterrent, the interest of innocent parties in the property and the extent (if any) to which the retention of the property might bear on the offender's rehabilitation.⁷³

⁶⁹ Ibid, 475.

⁷⁰ (1989) 16 NSWLR 115, 127-8.

⁷¹ (1994) 73 A Crim R 497.

⁷² Ibid, 503.

⁷³ Ibid, 500-501.

102 In summary, the authorities concerning the hardship discretion in the context of discretionary forfeiture reveal the following accepted approach. First, the hardship discretion is only enlivened when something more than ordinary hardship in the operation of the Act is demonstrated. Second, in exercising the discretion, the Court considers the degree of criminality and the circumstances of the offender, including the sentence and pecuniary penalty imposed for the offence. Third, the Court considers whether, in light of the hardship and any other relevant factors, a forfeiture order would be severely disproportionate to the degree of criminality and the circumstances of the offender. Where the property in question is a family home, the circumstances of the family and the effect upon the family will always be relevant and may be decisive; but each case must depend on its own facts.

103 The hardship discretion under s 38(2) of the Act, and s 45(1) where it arises following a civil forfeiture order, arises in the absence of a conviction. Accordingly, there is no proven criminality and no sentence or pecuniary penalty imposed on an offender. In these circumstances, although guidance can be obtained from the discretionary forfeiture cases, the Court must adopt a different starting point as the basis for its consideration of proportionality in the context of hardship. In my view, the starting point is the degree of involvement by the property owner or owners in the commission of the relevant offence. In this case the focus of the inquiry is on the degree of Mr Ali's knowledge about and involvement in the offences committed by his co-accused. Such an approach is consistent with the requirements for an exclusion order in s 24(b) of the Act. The fact that Mr Ali was acquitted by direction is of course highly relevant to that inquiry. The acquittal means that the Court must be satisfied by evidence as to the degree of Mr Ali's knowledge and involvement. Further, if there are circumstances peculiar to Mr Ali which are relevant to the Court's discretion, those circumstances should be the subject of evidence or necessary inference. The standard of proof for all questions of fact to be decided by a Court on an application under the Act is the balance of probabilities.⁷⁴

⁷⁴ Confiscation Act, s 132.

104 Unchallenged evidence was given on behalf of the DPP as to the extent of Mr Ali's involvement in the drug trafficking for which his co-accused were convicted.

105 The evidence of Mr Ali's involvement in the criminal activity is very strong. It consists of unchallenged affidavit evidence from Detective Senior Constable Dean Richards, a police officer attached to the Clandestine Laboratory Squad of Victoria Police, and DVD footage depicting Mr Ali assisting his co-accused in the drug manufacturing operation.

106 In summary, the evidence of Mr Ali's involvement in the illegal drug manufacturing operation at the property was as follows:

- (1) Mr Ali owns the property. He permitted it to be used for the drug manufacturing operation. The operation was principally conducted in a laboratory set up in a freestanding garage on the property, with some aspects conducted on the veranda of the house.
- (2) Between 6 July 2005 and 21 August 2005, the drug manufacturing operation was filmed by a covert video camera installed at the drug laboratory located in the garage. The resulting footage comprised 24 evidentiary DVDs. Later, a 'highlights' package of some of the illegal activity captured on the evidentiary DVDs was compiled.
- (3) The compilation DVD depicts Mr Ali having some involvement in the drug manufacturing operation, as follows:
 - (a) on 9 August 2005, Mr Ali is depicted removing false benches from the laboratory storage area and assisting in replacing those false benches, thus concealing laboratory items;
 - (b) on 16 August 2005, Mr Ali is depicted assisting in setting up water supply to the laboratory and carrying black piping into the laboratory area;

- (c) on 16 August 2005, Mr Ali is depicted with one of his co-accused, pouring chemicals from a stainless steel tray into a blue 200 litre plastic drum;
 - (d) on 19 August 2005, Mr Ali is depicted in the drug laboratory area while drug manufacturing operations were taking place;
 - (e) on 19 August 2005, Mr Ali is depicted assisting one of his co-accused in the drug making laboratory;
 - (f) on 20 August 2005, Mr Ali is depicted walking around in the laboratory with one of the co-accused;
 - (g) on 20 August 2005, Mr Ali is depicted carrying an item into the laboratory;
 - (h) on 20 August 2009, Mr Ali is depicted walking around the laboratory and carrying 20 litre buckets into the laboratory;
 - (i) on 20 August 2009, Mr Ali is depicted walking around the laboratory.
- (4) I accept that, out of many hours of video footage, Mr Ali is shown as having the least involvement of the four co-accused. However, notwithstanding the much lesser degree of his involvement, it is probable that he knew that some form of illegal drug manufacturing operation was taking place, and I so find.
- (5) On 21 August 2005, members of the Victoria Police Special Operations Group executed a search warrant at the property and found the drug manufacturing laboratory, containing equipment and chemicals associated with the manufacture of methylamphetamine and a quantity of that drug. On the basis of the way in which the laboratory was set up, and the quantity of equipment and chemicals found, investigating officers formed the belief that the production of tens of kilograms of methylamphetamine was undertaken at the property or planned to be undertaken. The subsequent conviction of Mr Ali's

co-accused for conspiracy to traffick in a large commercial quantity of methylamphetamine justifies that belief.

107 This evidence is, by itself, sufficient to establish that Mr Ali well knew that an illegal drug manufacturing operation was taking place at his property and that he gave some assistance in the establishment and conduct of that operation. I so find.

108 That finding makes it strictly unnecessary to consider the statements made by the trial judge in the course of rulings given towards the end of the prosecution case against Mr Ali and his co-accused, following four weeks of evidence. However, as the DPP placed significant reliance on these statements, and no objection was taken to reliance upon them, I will consider them. Section 38(4) of the Act permits the Court to take into account any material that it thinks fit 'in determining the application'. A question arises as to whether 'the application' includes an application for the exercise of the Court's discretion under s 38(2). In my view it does, as s 38(4) would have little purpose if it applied only to s 38(1), which confers no discretion. Section 38(4) should be read as applying to any application under s 38 of the Act.

109 The trial judge's rulings reinforce my finding that Mr Ali knew that an illegal drug manufacturing operation was taking place at his property, and that he gave some assistance in the establishment and conduct of that operation.

110 The trial judge directed the jury to acquit Mr Ali of the conspiracy alleged against him, because he concluded that:

a reasonable person could not exclude the reasonable possibility that Mr Ali did not know [the property] was being used for methylamphetamine manufacture and therefore it could not be concluded beyond reasonable doubt that any conspiracy he entered into was to manufacture that drug.⁷⁵

111 Although the trial judge reached this conclusion, and Mr Ali was acquitted of the conspiracy alleged against him, it is clear that the trial judge accepted that Mr Ali knew that some form of illegal drug manufacturing operation was taking place at the

⁷⁵ Ruling No 7, 11 December 2007, 1225 (emphasis added).

property, and that he consented to that course and had some involvement in the operation. The following relevant statements were made by the trial judge:

- (1) that Mr Ali and Mr Bugeja, one of his co-accused, were closely associated. Mr Bugeja assisted Mr Ali to renovate the house at the property at about the time methylamphetamine manufacture was taking place there.⁷⁶
- (2) Mr Ali was given a key to the garage containing the drug manufacturing laboratory.⁷⁷
- (3) The trial judge described Mr Ali's conduct during his record of interview as 'plainly the record of interview of a person seeking to prevaricate, to obfuscate and to lie'.⁷⁸ The trial judge did not accept that this conduct during the record of interview was, alone or with the other evidence, sufficient to establish beyond reasonable doubt that Mr Ali lied because he knew that methylamphetamine, as opposed to some other illegal drug, was being manufactured at his property. In his Honour's view, Mr Ali's conduct during the record of interview was insufficient to exclude the alternative hypothesis, 'that Mr Ali said what he said in order to escape criminal responsibility for illegal activity or wrongdoing at [the property]'.

112 I turn to consider the facts relied upon to establish that hardship is reasonably likely to be caused by the operation of the civil forfeiture order.

113 Mrs Ali contends that she and her family are reasonably likely to suffer hardship by reason of the forfeiture order. In order to consider this contention, it is necessary to recount the Ali family history since the property was acquired by Mr Ali in 2002. As I have said, the property was acquired for cash, and has never been encumbered. This indicates that Mr Ali was previously gainfully employed in some manner and had saved to buy the property. As appears below, there is scant evidence about

⁷⁶ Ibid, 1221-2.

⁷⁷ Ibid, 1222.

⁷⁸ Ibid, 1223.

Mr Ali's employment history or prospects for further employment.

114 Mrs Ali arrived in Australia in early 2003. She immediately commenced living with Mr Ali at the property. At this time, Mrs Ali commenced taking care of three children from Mr Ali's prior marriage. Relevantly, only one of those children (now aged 12 years) continues to reside with the Ali family.

115 After living at the property for between 12 and 18 months, at an unspecified time in 2004 Mrs Ali and her family moved to Melbourne to live with Mr Ali's father in the suburb of Brunswick. Mrs Ali said that the reason for the move was her loneliness at the property, which is in rural Victoria. She spoke little English and had no friends or social outlets while living at the property. Living in Brunswick with Mr Ali's father gave her the opportunity to have regular contact with family and Lebanese women of her own age. Notwithstanding this, Mrs Ali said that 'the move didn't really work' and the family commenced preparations to move back to the property at an unspecified time in 2005, before Mr Ali was arrested on 21 August 2005.

116 While the Ali family resided with Mr Ali's father in Brunswick, Mrs Ali continued to look after the children from Mr Ali's prior marriage. Mrs Ali said that she also looked after her own children during this time, but it is likely that only one young child can have been born by that time. In any event, the Ali family at this time comprised two adults and at least three children. Mrs Ali does not say in her affidavit that there were any space restrictions in the Brunswick home, making it unsuitable for them to share it with Mr Ali's father.

117 Doing the best I can on the vague and unsatisfactory evidence, I infer that the Ali family lived with Mr Ali's father for a period of 12 to 18 months before Mr Ali was arrested on 21 August 2005.

118 Following Mr Ali's arrest, he was released on bail. The Ali family moved back to the property for a short time and then, as the criminal proceedings against Mr Ali progressed, moved back to Melbourne for an unspecified period. For reasons which

were unexplained, they did not move back to the Brunswick home of Mr Ali's father where they had previously lived. Instead, the family lived with other relatives at various times during this period.

119 In very late 2006 or very early 2007, Mrs Ali became pregnant with her second child. That child was born on 24 September 2007. During the pregnancy, the Ali family moved back to the property and has lived there ever since. Another young child was born subsequently. The family presently comprises Mr and Mrs Ali and four children, including a 12 year old child from Mr Ali's previous marriage. In addition, from time to time, other children from the previous marriage come and visit for weekends.

120 Mrs Ali deposed that, over the past three years, she and her family have come to enjoy living at the property, and have a settled lifestyle. The two oldest children attend local schools and have developed friendships. The family has become attached to the home and the rural lifestyle which it offers. If the forfeiture order is carried into effect, Mrs Ali is concerned about the resulting disruption to her children's schooling, routine and friendships, and to the friendships which she has developed with local parents.

121 If the forfeiture order is effectuated, Mrs Ali contends that she and her husband will not be able to afford another home and do not know where they will live. In support of this contention, Mrs Ali gave evidence of the family income. In summary, the family income is \$734 net per week. All of this comes from Government benefits. Although she has never worked since coming to Australia, Mrs Ali is in receipt of two benefits, a Parenting Payment and a Newstart Allowance. Mr Ali receives a Newstart Allowance. Mrs Ali has sworn that the resulting \$734 per week is just enough to pay for running two cars, food, utilities and other necessities of life. No particulars are given of the family expenditure or budget. The cars have no equity in them, having been obtained on finance. There are no other assets upon which the Ali family can call if the forfeiture order is carried into effect.

122 Both parties relied upon publicly available information as to the availability of suitable alternative accommodation in the area surrounding the property. In summary, that evidence discloses that a four bedroom home with two bathrooms can be rented for \$240 to \$260 per week and that it is likely that, in addition to their current benefits, Mr and Mrs Ali would be entitled to rental assistance from Centrelink of \$75 per week. If so, Mr and Mrs Ali would need to find approximately \$200 from their adjusted family income to pay rent.

123 There was some evidence that rental markets in the Bendigo area are tight and there is significant competition between renters. Further, standard rental application forms require references to be given and this may pose a problem for the Ali family, given Mr Ali's lack of employment and the reasons for the Ali family requiring rental accommodation. There is no realistic prospect of the Alis obtaining public housing in the area.

124 The median price range for the purchase of properties in the vicinity of the property is \$238,000. However, it was accepted by the parties for the purposes of argument that the property is valued at approximately \$350,000.

125 The evidence concerning hardship is vague and incomplete in many respects. It poses many questions. In particular, it assumes that Mr and Mrs Ali will continue to be unemployed for the foreseeable future. No evidence is given as to their employment prospects and, if employment is obtained, as to the likely earnings.

126 I accept that Mrs Ali is presently caring for two pre-school aged children and that, in the absence of free child care, she is unlikely to have the ability to work for three or four years, when those children commence school. No evidence has been put forward as to her employment prospects.

127 There was no evidence put before the Court as to Mr Ali's employment prospects. The only evidence before the Court as to Mr Ali's prior employment history is the inferences which can be drawn from the fact he purchased the property for cash in

2002, thus indicating prior employment and saving, and Mrs Ali's evidence that Mr Ali recommenced employment with his previous employer at the time the family moved to Brunswick in 2004. Mr Ali was employed doing concrete work, making balustrades and related products. The evidence does not indicate how long Mr Ali continued to work in that employment, or the wage that he was paid. None of his tax returns or other documents indicating his capacity to earn income have been put before the Court.

128 Taking the evidence as a whole, and notwithstanding its ambiguities and gaps, I accept that the Ali family would have substantial difficulty in finding an extra \$200 per week to pay for rental accommodation if the forfeiture order is effectuated and they are forced to rent.

129 It was submitted on behalf of the DPP that Mrs Ali has not advanced any evidence of special hardship, over and above the ordinary hardship which will flow from the forfeiture of a property constituting a family home. I do not accept that submission. In the circumstances described, there will be real hardship to the Ali family if the forfeiture order is effectuated. Accordingly, the Court's discretion to exclude the whole of the property from the operation of the civil forfeiture order which must be made under s 38(1) has been enlivened. The task of the Court is then to compare that hardship with the extent of Mr Ali's knowledge of and involvement in the criminal drug manufacturing enterprise and the object of the Act to deter such conduct. As appears above, the central question for the Court is whether the likely hardship is disproportionate to the gravity of Mr Ali's knowledge of and involvement in the relevant criminal enterprise, taking into account all of the relevant circumstances – including the residual discretion to provide partial relief against hardship under s 45(1) of the Act.

130 In my view, the extent of Mr Ali's knowledge of and involvement in the relevant criminal conduct is of sufficient gravity to make an order excluding the whole of the property from the operation of the forfeiture order inconsistent with the objects of

the Act, which include deterring conduct of the kind engaged in by Mr Ali. In such circumstances, and having particular regard to the power of the Court to provide partial relief against hardship, I refuse to exercise my discretion under s 38(2) of the Act to exclude the whole of the property from the operation of the forfeiture order.

131 I turn to consider Mrs Ali's final alternative claim, for the beneficial exercise of the hardship discretion under s 45(1) of the Act.

Should Mrs Ali receive a portion of any sale proceeds on hardship grounds?

132 Section 45(1) of the Act is in the following terms:

- (1) If a court is satisfied that hardship may reasonably be likely to be caused to any person by a forfeiture order or a civil forfeiture order made by that court, the court—
 - (a) may order that the person is entitled to be paid a specified amount out of the forfeited property, being an amount that the court thinks is necessary to prevent hardship to the person; and
 - (b) may make ancillary orders for the purpose of ensuring the proper application of an amount so paid to a person who is under 18 years of age.

133 Consequent upon the forfeiture order, the Ali family will need to obtain suitable alternative accommodation. Their present income, comprised solely of government benefits, is insufficient for this purpose, thus causing them hardship. In order to prevent that hardship, it is necessary to place the Ali family in a financial position where they can afford to rent a house in the vicinity of the property.

134 Further, in the exercise of my discretion, and having regard to the fact that the Ali family will lose the right to live rent free in an unencumbered property, I will order that Mrs Ali receive an amount out of the sale proceeds of the property which can be used as a deposit to purchase a house in the future, should circumstances permit.

135 As appears above, a four bedroom home in the vicinity of the property can be rented for approximately \$260 per week, or purchased for approximately \$350,000. If Mrs Ali receives \$125,000 from the net sale proceeds of the property, she will be in a

position to ensure that the Ali family can obtain suitable rental accommodation and, if Mr Ali obtains employment, purchase a home in the future. The \$125,000 will provide sufficient funds to pay rental in the short-term and act as a deposit on a property in the longer term. Of course, if Mrs Ali also obtains employment once all of the children are at school, the prospects of Mr and Mrs Ali purchasing another home will be increased.

Conclusion and orders

136 For the above reasons:

- (1) Mrs Ali has no beneficial interest in the property. Accordingly, her application to exclude one-half of the property from the operation of the restraining order will be dismissed.
- (2) The Court will order under s 38(1) of the Act that the property be forfeited to the Minister.
- (3) The Court will order under s 45(1) of the Act that Mrs Ali be paid \$125,000 out of the proceeds of sale of the property.

137 I will hear the parties as to the precise form of orders, and as to costs.