

ASSET CONFISCATION UPDATE – 13 March 2012

Chalmers v R [2011]
VSCA 436 – used in or
in connection with
the offence



On 16 December 2011, the Court of Appeal (Maxwell P, Redlich JA and Kyrou AJA) delivered the decision in *Chalmers v R*.

The decision for the first time provides appeal court guidance on how the expression “*used in or in connection with*” is to be construed in Victoria.

The relevant issue in the case was whether an apartment, at which a murder occurred, was “*used in or in connection with*” the murder, such as to render it “*tainted property*” under the *Confiscation Act*.

The offence of murder is a Schedule 1 offence (i.e. not an automatic forfeiture offence). The DPP made application for a forfeiture order of the offender’s interest in the apartment. Such order could only be made if the apartment was tainted property (i.e. used in or in connection with the offending). The trial judge had made such a forfeiture order.

The Court of appeal allowed the appeal on that issue and determined that the apartment was not used in or in connection with the offence of murder. Since the observations of the Court of Appeal are relevant to many applications for exclusion, I have set them out in detail below:

“Used in connection with”

[76] This court has not previously had occasion to consider the correct interpretation of the phrase “used in connection with the commission of the offence”, as used in the definition of “tainted property”. Over the past two decades, however, the intermediate appellate courts of several other states have given detailed consideration to the same phrase, or close equivalents of it, in cognate statutory contexts. The High Court, too, has recently expressed relevant views, although the court did not need to decide this particular question of construction.

[77] We have found the analyses by the respective courts illuminating, and they disclose a high degree of unanimity of approach. We would respectfully adopt the following propositions which emerge from those authorities:

- 1. The word “used” should be given its ordinary meaning of “employed, or made use of, for a particular end or purpose”.*
- 2. The statutory phrase is of wide scope. The inclusion of the words “in connection with” was plainly intended to extend the scope of the definition of “tainted property” beyond circumstances where the property could be said to have been “used in the commission of” the offence.*
- 3. Whether there is a connection between the use of the property and the commission of the crime is a question of fact and degree. It is not necessary for it to be established that there was a “substantial” connection, or that the crime could not have been committed without using the property.*
- 4. The nature, extent and significance of the use of the property in connection with the commission of the crime will be matters which go to the Court’s discretion whether or not to order forfeiture of the property.*

[78] Very often, the decisive issue will be whether the relevant property can be said to have been “used”, since “use” is (by definition) employment for a purpose. Once it is concluded that the offender “used” the property at or around the time of the commission of the offence, it will usually follow that there was the requisite

connection between the use of the property and the commission of the offence. Put differently, if the offender (or some other person) “employed or made use of” the property for a purpose associated with the offending, then it would follow that the property was “used in connection with the commission” of the offence.

[79] The importance of the “use” question is illustrated by cases in which the requisite connection was found to exist between the use of the property and the commission of the offence, as follows:

- the use of a yacht to monitor arrangements for the importation of drugs*
- the use of a car for storage, concealment and/or transportation of drugs in connection with drug trafficking;*
- the use of a farm or a house to grow cannabis;*
- the use of cash to facilitate drug trafficking deals;*
- the use of (activities in) a boat or a house as a lure for intended victims of sexual assault; and*
- the use of a fenced property to facilitate murder, and to store the body of the victim.*

[80] Express statutory provision apart, the mere fact that an act is done in or on a particular property will ordinarily not suffice to bring that property within the definition. That is because, as a matter of ordinary language, this could not be characterised as a “use” of the property. In their joint judgment in White, French CJ and Crennan and Bell JJ said:

On the face of it, the mere doing of an act in or on a property in connection with the commission of a confiscation offence, does not necessarily fit comfortably within the concept of use applied to property. The relevant ordinary meaning of the verb “use” is to [m]ake use of [a thing], esp for a particular end or purpose; utilise, turn to account.

[81] It is only when the property, or some feature or attribute of it, has been turned to advantage by the offender, or enlisted to the offender’s purpose, that it will be possible to say that the property has been “used”. In King, for example, the offending took place on board a boat but it was held that the boat was no more than the location of the offending. The boat had not been “employed” for any purpose related to the offending. In Garner, by contrast, the court held that the offender had used a houseboat to provide the intended victims with “a pleasurable environment and exciting activities”, such that the boat became “an

efficient tool of seduction”.

[82] Conduct after an offence is completed may also constitute a use of property in connection with the commission of the offence. In White, for example, the West Australian Court of Appeal held that the use of the relevant property to store the body of the murder victim was use in connection with the offence. The issue arose in the context of the commission of a murder by White on an industrial property that was leased by him.

[83] The property was enclosed by a six foot cyclone fence, with two double cyclone metal gates at the front of the property. While the victim was at the property, and before White arrived, he arranged for the gates to be locked. After White arrived, he shot the victim in the shoulder. As the victim ran through the yard, White pursued him and fired three more times. As the victim climbed on top of the gate in order to escape, White shot him in the buttocks. The victim fell to the ground outside the property. White left the property through the gate and, as the victim lay on the ground struggling for breath, White fired a sixth shot at the victim’s head and killed him. White then dragged the victim’s body back onto the property.

[84] McLure P, with whom Owen and Buss JJA agreed, held that the expression “in connection with” required that there be “a link between the relevant use of, or act or omission on, the property on the one hand and the commission or facilitating the commission of a confiscation offence on the other”. Her Honour concluded:

It is clear from the statutory language that the relationship between the use of, or the act or omission on (the conduct), the property and the confiscation offence does not have to be direct and immediate. However, having regard to the consequence of falling within the definition of crime-used, it is not sufficient if the relationship be merely tenuous and remote. The requisite relationship would fall between these two extremes and involve matters of degree and judgment. In considering whether the relationship is sufficiently proximate, the purpose and effect of the conduct would be relevant considerations.

[85] On the facts of the case before her, McLure P held that, as intentional locking of the gates of the property was for the purpose, and had the effect, of preventing or impeding the victim departing from the property before White finished dealing with him, the use of the property facilitated the murder. Her Honour held that White’s subsequent conduct in using the land to store the body

away from public view pending its disposal was also a relevant use.

[86] Whether there has been a relevant use will depend upon the property in question and the precise way it was used. As the same property can be put to different uses, the determination of whether there is a connection between the particular use of the property and the commission of the offence will involve questions of fact and degree that need to be determined in a commonsense manner.

[87] In George, the Full Court of the South Australian Supreme Court was concerned with land on which was situated a shed in which cannabis plants had been grown hydroponically. Doyle CJ (with whom White J agreed) held that the composite expression “used ... in connection with the commission of an offence” involved practical considerations and matters of degree, such that each case would turn on its own facts. His Honour held that the composite expression did not require a causal connection between the property and the offence. Nor was it necessary that the property be something which was essential or necessary for, or made a unique contribution to, the commission of the offence. His Honour concluded as follows:

As a matter of ordinary language, and bearing in mind that the word defined is “instrument”, I consider that the definition refers to a use of property that facilitates, assists or contributes to the commission of an offence. That is a starting point, not a conclusion. The use of the property must be sufficiently significant (I realise that this is question begging) to warrant a conclusion (especially when the property is the place where the offence is committed) that the property is used in connection with the commission of the offence. This invites attention to the role that the property plays in the commission of the offence, to the extent to which the property is so used, and to how much of the property, or what part of it, is used. I doubt whether one can usefully go any further than that.

[88] Doyle CJ held that the land was used in connection with the commission of the offence of producing cannabis. It could be inferred that the offender had chosen the shed “as a suitable place to grow the cannabis.” The use of the land “facilitated and contributed to the commission of the offence. It was not just the place where the offence was committed.” (Vanstone J dissented, holding that the property was merely the place where the crime occurred.)

[89] At one end of the spectrum are cases where the property is deployed in an instrumental sense to commit the offence. An obvious example is the weapon that

is used to inflict an injury. Land can be used to cause death or injury, such as where a domestic pool is used to drown the victim. Another example is where a beam in a ceiling of a house is used to support a rope for the purpose of hanging the victim. A further example is where the victim is thrown off a second floor balcony. These are examples of cases where an attribute or feature of the property is actively used in the commission of the offence.

[90] At the other end of the spectrum are cases where the property is merely the passive location at which the offence is committed. An example is where a discussion takes place in the offender's home which constitutes a conspiracy to commit an offence at another location. Another example is where, during dinner in the family home, a domestic dispute erupts spontaneously which leads to one person reaching across the table and assaulting another person. These are examples of cases where an offence is committed at the property (the home) but there is no relevant connection between the use of the property and the commission of the offence.

[91] There will, of course, be cases along this spectrum where the question whether the requisite connection exists (between the use of the property and the commission of the offence) will be a matter of difficulty. Those cases will require a close examination of the nature of the property, its precise use, the nature of the offence that was committed and the manner, if any, in which the property was used in connection with the commission of the offence. The more passive the use of the property and the more incidental its role, the less likely it is that the requisite connection will be found to exist.

[Footnotes omitted]

Further information

For further information concerning litigation under the *Confiscation Act 1997*, visit www.confiscation.com.au.

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