CITATION:	*Commissioner of Police v Glen & Glen* [2006] NTMC 045
PARTIES:	COMMISSIONER OF POLICE v HAROLD DAVID PETER GLEN & PETER RAYMOND GLEN
TITLE OF COURT:	Local Court
JURISDICTION:	Local Court Act
FILE NO(s):	20313655
DELIVERED ON:	8 May 2006
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JUDGMENT OF:	Jenny Blokland SM

CATCHWORDS:

CRIMINAL PROPERTY FORFEITURE – COSTS
Criminal Property Forfeiture Act NT
Crimes (Victims Assistance) Act
Rule 5.18 *Local Court Rules*
Proceeds of Crime Act (CW)

William Mahamet Ahmat v Commissioner of Police, 10 October 2005
Donald Campbell & Co v Pollack [1927] AC 732
Northern Territory of Australia v Couzens [2004] NTSC 50
Halsburys [325-9510]
Grant Andrew Bissett v Director of Public Prosecutions (C'th), (VIC) (SC), 24 February 1993
Commonwealth Director of Public Prosecution v Adjorjany [2000] NSWSC76
Commonwealth Director of Public Prosecutions v Diez [2003] NSWSC 949
Facer v Burke [2006] NTSC 30
Diez v Director of Public Prosecutions (2004) 213 ALR 554
Director of Public Prosecutions v Diez [2005] NSWSC 306, 15 April 2005
R v Dietrich (1992) 177 CLR 292
Latoudis v Casey (1990) 170 CLR 534

REPRESENTATION:

Counsel:

Applicant:	Mr Duguid
Respondent:	Mr Buckland

Solicitors:

Applicant:	Office of the Director of Public Prosecutions
Respondent:	Anthony Buckland

Judgment category classification:	B
Judgment ID number:	[2006] NTMC 045
Number of paragraphs:	25

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20313655

BETWEEN:

COMMISSIONER OF POLICE
Applicant

AND:

HAROLD DAVID PETER GLEN
First Respondent

PETER RAYMOND GLEN
Second Respondent

COSTS RULING

(Delivered 8th May 2006)

JENNY BLOKLAND SM:

History of this Matter

1. This matter originally concerned orders made pursuant to the *Criminal Property Forfeiture Act* NT against certain property (various amounts of cash) seized from both respondents. The original restraining order was made on 18 July 2003. The applicant and both respondents filed notices of objection. Ultimately I am advised that the matter was settled by arrangement between the applicant Commissioner of Police and both respondents/objectors. I was referred initially to the Consent Order made by His Honour the Chief Magistrate on 1 June 2005 that reads as follows:

> "1. That $4290.00 of the money restrained, be forfeit to the Territory.
>
> 2. Balance of funds restrained to be returned to the 2nd Defendant.

3. No order as to costs between Applicant and 2nd Respondent.

4. Question of costs between Applicant and 1st Respondent (sic) to 11.30 on the 6th June, 2005 for Mention".

2. I was also advised that prior to this order the matter concerning Harold Peter Glen (the first respondent) was settled on or about 19 July 2004, recorded in a consent order made by the learned Judicial Registrar that reads:

"1. $990 be returned to Harold Peter Glen.

2. That Harold Peter Glen be removed as a respondent.

3. The restraining order in relation to the balance of the money, $6,988.00 be extended to close of business on 30 August 2004".

3. The remainder of the proceedings before me concerns an application for costs on the part of the first respondent Harold Peter Glen for legal costs associated with the return of $990 cash. These reasons relate solely to that question.

Costs Generally in Criminal Property Forfeiture Actions

4. Both counsel referred to this being an unusual situation given the relative "newness" of the *Criminal Property Forfeiture Act* and the manner in which the matter was finalised. In relation to costs it was suggested that although the applicant Commissioner accepted that the Court had the power to order costs, the exercise of the discretion needed to be informed by aspects of the *Criminal Property Forfeiture Act*, ("the Act") given the competing policy considerations evident within the Act. The concession made by Mr Duguid that the Court had the power to order costs was based on the decision of His Honour Mr Wallace SM in *William Mahamet Ahmat v Commissioner of Police*, 10 October 2005 (File No. 20506020). His Honour stated, (Transcript page 4).

> "It doesn't seem to me that there's enough reason in the Act to displace the normal run of things in the Local Court, and it seems to me that the general power to award costs in the Local Court does exist in this case and in any other case involving the restraining of property for a time and its restoration to either a somewhat tainted owner like Mr Ahmat or a completely innocent owner as would happen in other cases"

5. On behalf of the first respondent it was argued that I should have the principles of *Donald Campbell & Co v Pollack* [1927] AC 732 in mind (at 811-812) where it was said that a successful party

> "….has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the [unsuccessful party]; but he has no right to costs unless and until the Court awards them to him, and the Court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must of course be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case".

Mr Buckland submitted this was the primary principle applicable, even in *Criminal Property Forfeiture Act* cases and this principle was applied by His Honour Justice Angel in *Northern Territory of Australia v Couzens* [2004] NTSC 50, involving a question of costs under the *Crimes (Victims Assistance) Act*. I note also with respect His Honour made the comment in that Judgement that I will also adopt (at paragraph 10):

> "It has been said that there is only one immutable rule in relation to costs, and that is that there are no immutable rules".

In any event, it was impressed on me that I must award costs unless there is a special feature that would persuade me to the contrary. I readily accept that is the case.

The Effect of "Discontinuance"

6. I was advised by Counsel for the first respondent that a decision had been made by the applicant Commissioner of Police to discontinue against the

first respondent and that although a Notice of Discontinuance had been drafted it was not filed. I was advised that there was however an agreement to discontinue and my attention was drawn to Rule 5.18 *Local Court Rules* that provides:

> **"5.18 Discontinuance or withdrawal**
>
> (1) At any time before the date fixed for the hearing of a proceeding, a party may, without the leave of the Court –
>
> (a) discontinue a statement of claim, counterclaim or claim by third party notice; or
>
> (b) withdraw a notice of defence.
>
> (2) A notice of discontinuance or withdrawal in accordance with Form 5B is to be filed and served on each other party.
>
> (3) Discontinuance or withdrawal is not effective until the notice is filed under subrule (2).
>
> (4) A party who discontinues or withdraws must pay the costs of the other party incurred before the discontinuance or withdrawal unless the Court orders otherwise."

7. The submission was, that given the Court had not "ordered otherwise", the applicant ought to pay the first respondents costs. It was submitted that given an order for discontinuance had been made and the action was in fact discontinued, then with no other order being made by the Court, the ordinary rules of costs should follow. Looking at the various orders made by the Court in this matter, it seems it was being contemplated by the parties to consider the question of costs at a later date after settlement of the matter. I note the prepared Notice of Discontinuance was not ever filed.

8. In relation to Rule 5.18 of the *Local Court Rules*, Mr Duguid submitted that that rule does not fit in well with the *Criminal Property Forfeiture Act*; he submitted that although the Local Court is given jurisdiction to deal with issues under the *Criminal Property Forfeiture Act* it should not necessarily be assumed that all practices and procedures of the Local Court are

automatically applicable. He raised the example that Western Australian courts have held that discovery rules under the Local Court are sometimes appropriate but that not all rules necessarily apply to *Criminal Property Forfeitur*e actions. He submitted that the *Local Court Rules* are built around the concept of the statement of claim filing of the defence and various well know pleadings. He also pointed out that there are a number of ways that Criminal Property Forfeiture matters can be finalised under the *Criminal Property Forfeiture Act*, without any need for recourse to the *Local Court Rules*.

9. I agree that the *Criminal Property Forfeiture* Act (2002) provides its own mechanisms for "discontinuing" restraining orders, under the Act. Primarily restraining orders for *crime derived* or *crime used* property lapse if they are not extended: (*Criminal Property Forfeiture Act ss50, 51, 52*). The applicant Commissioner is of course at liberty at any stage to simply not apply to extend the restraining order and the order will lapse by force of law.

10. I agree to a large extent with the submission placed on behalf of the Commissioner of Police that Rule 5.18 does not apply in circumstances where the action is discontinued by operation of the *Criminal Property Forfeiture Act*. The statute provides its own mechanism and must override the rules in that instance. Having said that, the Court has made an order "removing" Harold Peter Glen as a respondent, effectively discontinuing the matter. Although there are some circumstances where Local Court Rule 5.18 will be applicable to *Criminal Property Forfeiture* matters, (such as where the Commissioner of Police files a Notice of Discontinuance), I am not persuaded it specifically applies here given the history of, and the ambiguity around how the discontinuance was effected in the proceedings. Despite that interim conclusion, the costs question remains and the current state of the law is that the unsuccessful litigant will pay the costs of the successful litigant unless certain disentitling factors are present. In my

view, the mode of discontinuing is not determinative of the issue. Whatever mode is used to effectively bring the proceedings to an end, almost invariably the party who discontinues will pay costs: (discussed in a different context recently in *Facer v Burke* [2006] NTSC 30). With respect I accept what His Honour Mr Wallace SM said in *Ahmat* (cited above), in as much as the general rules concerning costs apply.

Application of General Cost Rules to Criminal Property Forfeiture Matters and This Matter in Particular

11. It was submitted that those circumstances where I would not order costs must be matters connected with the running of the litigation; that I am not punishing the losing side who may have incurred costs but rather am indemnifying for costs. Relying on *Campbell* (supra) it was argued that any relevant misconduct must be brought about by conduct within the context of the litigation and I was referred to particular extracts from *Halsburys* [325-9510] (footnotes omitted):

> "The discretion to deprive a successful party of costs must be exercised judicially and must be confined to grounds relating to the litigation. Any relevant misconduct must be connected with, or lead up to, the litigation. Usually a plaintiff is entitled to costs up to the acceptance of an offer of compromise, an offer to consent to judgment or an offer to settle, depending upon the jurisdiction in which the offer is made. Where the plaintiff does not accept the offer and ultimately judgment is no greater than the offer, he or she is not entitled to costs incurred after the date of offer. A successful party may be deprived of costs where it was not necessary for that party to be before the court because its interests were adequately protected by another party. A successful appellant may be deprived of the costs of appeal where it succeeds on a point not argued before a lower court. Issues may not be apportioned for the purpose of determining costs unless a particular issue or group of issues is dominant or separable. A successful party who has failed on certain issues may not only be deprived of the costs of those issues, but may also be ordered to pay the other parties costs of those issues".

12. It was submitted on behalf of the first respondent that any matters leading up to the commencement of the forfeiture proceedings were not relevant and

that I needed to confine my consideration to matters concerning the first respondent and not the second respondent. It was also argued that if I went beyond Rule 5.18.4 then the same considerations applied in relation to the exercise of the discretion in any event. I was reminded of s 136 *Criminal Property Forfeiture Act* (1):

> "Proceedings on an application under this Act are to be civil proceedings for all purposes".

And also under s 136(2)(b) Criminal Property Forfeiture Act:

> "That the Rules of Evidence applicable only in criminal proceedings do not apply and that questions of fact are to be determined on the balance of probabilities".

13. I was referred to the general power under the *Local Court Rules* to award costs: (LCR 38.03.1) I was urged to regard these as ordinary civil proceedings and was reminded that the proceedings are commenced on the basis of *ex parte* proceedings when the original restraining orders are applied for and that if the full extent of cost rules as applicable in civil cases were not applied, there would be no restraint on authorities who exercise broad powers of seizure and restraint under the *Criminal Property Forfeiture Act*.

14. Mr Duguid focussed on what he considered to be "disentitling conduct". In the documents filed before me, Mr Duguid referred to the Record of Conversation. At p 5 of the Record of Conversation when the first respondent is asked about the money in his possession, he told Police that he had to send some money away to get a pair of pannier bags for bicycles and to pay for some stainless steel tubing being sent from Perth. He said he drew the money from the bank "a while back" and he had to pay a few things off. He said he bought three motorbikes. At p 13 he was asked about the money and told Police he withdrew the money from the bank about six weeks previously at the ANZ bank. He said this was before he obtained three motorbikes and he had paid "38" and later he said that that was

$2,100. He said he thought he withdrew $4,000 from the bank or $3,000 but he said "I had to go a couple of times". He agreed with Police that he thinks it was three, "thousand lots" at one time; he said he wasn't sure what the maximum withdrawal was; he said he had to withdraw more because he had to do some work on his car; he said he got "paid out" from the Council and he had about $14,000 or $18,000 from that payout. He said that the money seized by Police on the day of his arrest (11 July 2003) came from what was left from that money. He also told Police that he had two accounts and he put $1,000 into his cheque account about three to four weeks previously.

15. In his affidavit concerning his objection the first respondent has sworn that the contents of para 2.2 and 2.3 of Officer Pusterla's affidavit are substantially correct and at para 3 states:

> "The amount of money at subparagraph 2.4 is money from the sale of a metal dinghy to Billy Herbert on Wednesday 9/7/03 for $1,000".

The original affidavit justifying the restraining order of Officer Andrew Pusterla attests to the following:

> "2.3 Police located both respondents at the Alyungula Mall at about 11.20am the same morning, where they were arrested and taken into custody.
>
> 2.4 The first respondent was found in possession of $990 cash and two clip seal bags containing approximately one gram of cannabis each.
>
> 2.6 When interviewed by Police the first respondent admitted ownership of the cannabis located in the freezer and stated that he had been growing cannabis in the spa room of the house for the last four or five years. He denied having ever sold cannabis, stating it was for his own use. He also denied any knowledge of the cash and cannabis found in the green sports bag".

16. There is one letter annexed to the first respondent's supplementary affidavit sworn on 31 May 2004 from a Billy Herbert stating:

> "I, Billy Herbert declare that on or about the early part of the month of July 2003 I paid Peter Glen (Bunji) $1,000 for 1 x 12 foot dingy and 1 x 15 hp Yamaha outboard engine and dingy trailer".

There is also a hand written letter to the Commissioner of Police on the Court file bearing the signatures "P.Glen", (as witness) and "B Herbert", (presumably Billy Herbert). That letter is dated 8 August 2003 stating:

> "I Harold D P Glen Lot 151 Umbukumba Groote Eylandt NT. do somonily (sic) swear the money seized from me on my arrest ($1,000) was not illegal money. It was drawn from my savings account to purchase a motor cycle namely Yamaha 250cc Narago".

Mr Duguid strongly submitted that the patent inconsistencies in the material supplied by the first respondent was disentitling conduct, for the purpose of the first respondent's costs application. He also submitted the first respondent had been convicted of cannabis offences relating to this matter and received a suspended sentence of imprisonment for possessing a commercial quantity and cultivation of cannabis as well as a fine for possession. (Certificate of Proceedings 22 October 2003).

17. Counsel for the first respondent submitted that I should bear in mind that ordinary people at the police station involved in interviews with police are not in the best position to give accurate information without their records available and relying on memory. Further, he submitted there was some support for using money to buy a motorbike and evidentiary support for obtaining the money for the sale of a dingy. In particular, the conduct of the litigation, in the sense of the affidavit material clearly states the money came from the sale of the dingy. It was submitted that on the balance of probabilities, if the matter had gone to hearing, clearly the first respondent would be successful. He said this needed to be balanced against the fact also that Officer Pusterla's affidavit does not specify whether the money is "crime derived" or "crime used". I don't consider this last point as particularly persuasive. The point had not been previously taken in the proceedings and a restraining order could have been made on either ground.

On the totality of the material filed, it would appear there was significant material pointing to the money being "crime derived".

Comparative Decisions from Other Jurisdictions

18. Mr Duguid referred me to and discussed a number of decisions from other jurisdictions which are of significant assistance concerning developing an approach in this area, although understandably Mr Duguid told the court he accepts significant allowance must be made for the divergent statutory schemes. *Grant Andrew Bissett v Director of Public Prosecutions (C'th)*, (VIC) (SC), 24 February 1993, Hayne J, (unreported), concerned *ss101 Proceeds of Crime Act (CW)* that allows a Court to award costs against the Commonwealth when a person is successful against the Commonwealth in forfeiture or restraining order matters if the court is satisfied that the person was not involved in any offence in respect of which the forfeiture or restraining was sought or made. His Honour indicated that given the requirements of *s101 Proceeds of Crime Act (CW),* it was not enough to show that the property concerned had been lawfully acquired to enliven the section and lead to an order for costs. Although Mr Bissett was successful in having a restraining order lifted on the basis that the property in question was not used in connection with unlawful activity and was not derived from unlawful activity and was lawfully acquired, the operation of *s101 Proceeds of Crime Act (CW)* prevented him from obtaining an order for costs involved in the restraining order lifted. I should explain that Mr Bissett was convicted of importing cocaine and possessing a prohibited import and at the same time was subject to a restraining order on his home that he had purchased three years previously. His Honour did not finally decide whether there was a wider source of power to grant costs when *s101* applied, however, he went on stating that if such a power did exist, he did not think it should be exercised in favour of the applicant, if all that can be demonstrated is that the applicant lawfully acquired the property. Part of His Honour's reasoning was to suggest that one of the penalties on those

convicted of "serious offences" is that ordinarily the costs of defending their property against forfeiture will fall upon them.

19. In *Commonwealth Director of Public Prosecution v Adjorjany* [2000] NSWSC76, Simpson J, after dealing with considerable technical arguments about the applicability of *s101 Proceeds of Crime Act (CW)* determined that in circumstances where action under the *Proceeds of Crime Act* had been initially successful combined with the fact of conviction for the relevant offence, the applicant would be excluded from a successful ruling on costs, notwithstanding success in having the original declaration disregarded. Her Honour said her conclusion on this matter was also consistent with the general tenor of the Act, [14]: "A restraining order may be made even before a person has been charged with an offence. Property of that person is restrained pending the procedures relevant to the charge and to the proceeds of crime legislation. Guilt of the offence precludes a costs order, even where an exclusion order is made; it cannot be thought that the legislature intended to or did, leave open an avenue for an award of costs in the specific circumstances that here appertain."

20. *Commonwealth Director of Public Prosecutions v Diez* [2003] NSWSC 949, Greg James J followed *Bissett* (above) and *Adjorjany* (above) declining to award costs sourced in the general powers of the Court, declaring *s101 Proceeds of Crime* to be the exclusive power in the circumstances. That decision was successfully appealed *in Diez v Director of Public Prosecutions* (2004) 213 ALR 554 where the Court of Appeal (NSW) held the general powers concerning costs could apply. Santow JA was influenced by the reasoning in *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 67:

> *"The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish the unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party. If the litigation had not been brought, or defended,*

by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation. As a matter of policy, one beneficial by-product of this compensatory purpose may well be to instil in a party contemplating, commencing, or defending, litigation a sober realisation of the potential financial expense involved. Large scale disregard of the principle of the usual order as to costs would inevitably lead to an increase in litigation with an increased, and after unnecessary, burden on the scarce resources of the publicly funded system of justice."

21. When the matter was remitted back to Greg James J, His Honour ordered costs on a party / party basis, rejecting an argument on behalf of the Commonwealth Director of Public Prosecutions that there should be "exceptional circumstances" shown before costs could be awarded. On my reading of the decision, His Honour was influenced by the following considerations; (*Director of Public Prosecutions v Diez* [2005] NSWSC 306, 15 April 2005):

- The public purpose in this type of litigation, (although not to the point where exceptional circumstances need to be shown). (para [5])

- The circumstances extended well beyond the mere fact of lawful acquisition.

- The property was innocently acquired but in any event would not be used by the applicant, (because of his sentence), but would be used by his wife and daughters who would be deprived of housing if there had not been exclusion.

- The only prospect of defending the occupation of the premises on behalf of his family was to enliven the litigation that was highly complex and without legal representation he would have been unable to defend the property against forfeiture; that the principles in *R v Dietrich* (1992) 177 CLR 292 applied to these proceedings.

- The availability of legal costs to fund representation as outlined in *Latoudis v Casey* (1990) 170 CLR 534 *Oshlack* (above). Unless a costs order were made it would be almost impossible to obtain legal assistance.

- The ordinary rule in civil litigation is that costs follow the event.

Balancing the Relevant Considerations in This Matter

22. Factors that favour awarding costs in this instance are:

- The ordinary rules of civil litigation should, prima facie apply, costs follow the event.

- The Local Court Rules expressly apply to actions under the *Criminal Property Forfeiture Act* (NT).

- The *Criminal Property Forfeiture Act* (NT) does not include express provisions excluding costs orders in these circumstances (there are no equivalents to *s101 Proceeds of Crime Act* (CW)).

- In the light of the filed affidavit material of the first respondent, the applicant Commissioner would be unlikely to disprove the claim that the money was innocently received and therefore would be unlikely to succeed.

- The powers granted to law enforcement officials under the *Criminal Property Forfeiture Act (NT)* are wide and need to be exercised with great care and restraint; the prospect of costs orders in the event of wrongful seizure and restraint of property go some way to ensuring that those powers will only be exercised according to law and after some serious consideration of the consequences: (*Oshlack*)

23. Factors that tend to favour the argument not to award costs are:

- The public purpose of this type of litigation, of its nature requires law enforcement to act early in the criminal process, during investigation rather than during formal litigation.

- The fact that the first respondent was convicted of significant cannabis offences arising from the same set of facts that are the source of the restraining order.

- The explanation given by the first respondent to police concerning the source of the money is at odds with the later affidavit material. Although I do not consider this would always be a "disentitling" factor, in my view the disparity is not credibly explained.

- Although I accept the record of interview with police would not ordinarily form steps in the litigation relevant to costs, it has some relevance in this context; what a person in the first respondent's position chooses to say must inform to a degree the action subsequently taken.

- There are no factors evident to the effect that the restraint of the money had any negative impact on the first respondent's ability to defend himself.

- The affidavit material favourable to him indicates nothing more than lawful acquisition.

- There is no material before me indicating any negative impact on any third party or dependant of the first respondent (as may be the case if this concerned a larger sum, or involved real property: (as in *Diez*)).

24. In all the circumstances, although I have acted under the general principles concerning costs, the special context and circumstances of this case lead me to the conclusion that I should not award costs. Lest anyone should interpret this decision as meaning I take the view that this will inevitably be

the result in discontinued *Criminal Property Forfeiture* matters, far from it. There were particular factors in this case that led me to the ultimate conclusion. In *Latoudis v Casey*, member of the High Court referred to the possibility of defendants being denied costs because they "provoked" the prosecution against themselves. Although these are not criminal proceedings, by analogy, the first respondent, although he hasn't "provoked" the original restraining order, his conduct in my view almost invites it. Although the applicant Commissioner has been successful in this argument, there will be no order for costs.

25. These reasons will be forwarded to counsel today.

Dated this 8th day of May 2006.

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Jenny Blokland
STIPENDIARY MAGISTRATE