# HIGH COURT OF AUSTRALIA

**Manager, Public Information**

12 November 2009

INTERNATIONAL FINANCE TRUST COMPANY LTD & ANOR v NEW SOUTH WALES CRIME COMMISSION & ORS [2009] HCA 49

Section 10 of the *Criminal Assets Recovery Act* 1990 (NSW) (the Act) is constitutionally invalid, a majority of the High Court held today.

On 13 May 2008 the New South Wales Crime Commission commenced proceedings in the New South Wales Supreme Court which sought, amongst other things, restraining orders under section 10 of the Act in relation to various bank and share trading accounts over which the appellants in this case (International Finance Trust Company Ltd and International Finance Trust Company Broking Services Ltd) exercised effective control.

Section 10(2)(b) of the Act effectively provides that the Commission may make an ex parte application (ie – an application made without notice to the affected party and determined in the absence of that party) to the Supreme Court for a restraining order preventing dealings with interests in property which is suspected to have been derived from serious crime related activity. Under section 10(3) of the Act the Supreme Court *must* make the order if the application for the order is supported by an affidavit of an authorised officer which deposes to the grounds upon which the officer suspects the property is serious crime derived property, and, having regard to the matters raised in the affidavit, the Supreme Court considers there are reasonable grounds for the suspicion. The party whose property interest is affected by the order may apply under section 25 of the Act for orders excluding those interests from the operation of the restraining order, but must prove that it is more probable than not that the property was not acquired fraudulently or illegally.

A single judge of the Supreme Court made the order sought. On appeal the Court of Appeal of the Supreme Court of New South Wales set aside the restraining order – a majority of that court found there was no admissible evidence before the primary judge that provided reasonable grounds for the suspicion asserted by the authorised officer in the affidavit supporting the original application. However, the Court of Appeal unanimously rejected an argument that section 10 was constitutionally invalid. The High Court granted special leave to appeal against that decision.

By majority the High Court determined that section 10 was invalid. The majority considered that section 10 did not *require* the Commission to make ex parte applications for restraining orders. However, if the Commission did make an ex parte application, then the Supreme Court was required to make the restraining order if it was satisfied that the authorised officer's affidavit reasonably supported that officer's suspicions about the derivation of the property the subject of the application. Once the order was made, it could only be discharged in two circumstances: if an application for assets forfeiture was no longer pending in the Supreme Court (however the legislation imposed no limit on the time within which an assets forfeiture application had to be determined); or upon an application by the affected party under section 25 of the Act, which could only succeed if the affected party was able to prove it was more probable than not that the relevant property was not fraudulently or illegally acquired – a negative proposition of broad import. The majority concluded that in these circumstances section 10 was "repugnant to the judicial process in a fundamental degree". The Court allowed the appeal, ordered that the relevant proceedings in the Supreme Court should be dismissed with costs, and declared section 10 invalid.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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