ASSET CONFISCATION UPDATE – 10 December 2010

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McMunn v DPP

On 16 November 2010, the Court of Appeal (Maxwell P, Weinberg and Mandy JJA) handed down its unanimous decision in *McMunn v DPP* [2010} VSCA 330 dismissing the appeal by Cornelia McMunn. She had sought to appeal the orders of Harper J, who had dismissed her application for exclusion in respect of her interest in the family home.

The Facts

Cornelia McMunn was the wife of the offender, John McMunn. John McMunn had, throughout the course of marriage, engaged in a long history of dishonest offending, had been imprisoned on numerous occasions was described by one sentencing judge as a career conman.

In 1998, three years after his release from prison (in respect of offences that had nothing to do with the subsequent restraining order) Mr and Mrs McMunn decided to buy a new family home. At that time, they were living in a home which Cornelia McMunn had inherited. They agreed between themselves that the inherited property would be sold and that Cornelia McMunn would pay half of the proceeds of sale of that property towards the purchase price of the new family home. John McMunn had told his wife that he would be getting about $400,000 from the sale of software which he was going to contribute towards the purchase of the new family home to fund the balance.

The new family home was subsequently purchased and, because settlement of the sale of the inherited property had at that time not taken place, the entire deposit and settlement proceeds were provided by John McMunn from the sale of software (so he told his wife).

Subsequently, Cornelia McMunn did pay to her husband half of the sale proceeds of the inherited property, as she had earlier agreed with him.

John McMunn was subsequently charged and convicted with obtaining a financial advantage by deception. The quantum of the deceptions were such that the convections were of Schedule 2 (automatic forfeiture) offence.

After Mr McMunn was charged, the new family home was subsequently restrained by the DPP for, amongst other things, automatic forfeiture.

Cornelia McMunn made an application for exclusion, seeking to exclude her half interest in the family home. It was conceded before Harper J that the property was “tainted property”, it having been derived, or substantially derived, from the commission of John McMunn’s offending.

In the circumstances, Mrs McMunn was required to satisfy the exclusion test set out in section 22(b) which required her, amongst other things, to demonstrate that "*where the applicant acquired the interest at the time of or after the commission, or alleged commission, of the Schedule 2 offence, the applicant acquired the interest without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was tainted property*".

The Reasons

Harper J dismissed the application for exclusion and stated that "*I cannot be satisfied that Mrs McMunn acquired her interest in the Bendall Street property in circumstances such as not to arouse a reasonable suspicion that the property was tainted. No person dealing with Mr McMunn and knowing of his criminal history as at the end of 1994 could sensibly rely on his honesty in relation to any issue or dealing of any financial magnitude, especially if it was financially opportune for him to be dishonest*".

In dismissing the appeal, Maxwell P (with whom Weinberg and Mandy JJA agreed) referred to Harper's reasons (as set out above) and observed at [8]:

> *"As those paragraphs made clear, his Honour was addressing the question posed by the section, which is whether a reasonable person in the circumstances of Mrs McMunn, knowing what she knew, would have formed a suspicion that the property was tainted property. It is common ground that that is the test to be applied. It pays attention to what the applicant for exclusion actually knew, but asked the question "would a reasonable person in her position have had a suspicion?". Mrs McMunn had to satisfy the Judge that the question should be answered in the negative."*

At [15], Maxwell P made the following further observation:

> "*As Weinberg JA pointed out in the course of argument, an applicant in a proceeding of this kind may wholly believe in what she says about her state of knowledge, and may believe when she says, "I had no suspicion". But that will not avail the applicant if a reasonable person in her position would have had a suspicion.*"

Observations

The decision highlights the fact that, where an application for exclusion is pressed by a third party in respect of tainted property, it is critical to carefully consider the question of "reasonable suspicion".

In circumstances where the facts would give rise to such suspicion (which, as Weinberg JA, pointed out is a very low threshold) it may well be necessary to assert positive facts as to the steps taken by the applicant with a view to alleviating such suspicion.

It is necessary to bear in mind that the exclusion tests are conjunctive and that, unless each limb of the exclusion test is satisfied, an application for exclusion is bound to fail.

About the author

Christian Juebner is a barrister at the Victorian Bar. Christian practices in

commercial law and confiscation litigation.

Before coming to the Bar, Christian was a partner with Deacons (now Norton Rose). Through his commercial experience, he has a detailed knowledge of property, equity and trust issues, all of which are relevant to and impact on proceedings under the Confiscation Act.

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