ASSET CONFISCATION UPDATE – 13 August 2009

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Morizio v DPP & Ferraro
Extension of time

On 27 July 2009, Osborn J handed down a ruling in relation to an application under s.51(3) of the *Confiscation Act* 1997, granting leave to third party applicants for exclusion to apply to exclude automatically forfeited property out of time.

In summary, the applicants for exclusion, the grandparents of the offender, claim an interest in real estate which was automatically forfeited. As third parties, they were entitled to make application for exclusion of their interests in automatically forfeited property pursuant to s.51 of the *Confiscation Act* 1997.

However, s.51(2) required such application to be made within 60 days after the date on which automatic forfeiture occurred. The application for exclusion was not made within those 60 days.

Pursuant to s.51(3) "*the Court that made the relevant restraining order may grant a person leave to apply after the end of the period referred to in sub-section (2) [being the period of 60 days after the date of conviction] if it is satisfied that the delay in making the application is not due to neglect on the part of the applicant*".

In order to obtain leave to make the application for exclusion, the applicants had to demonstrate that their failure to make application for exclusion within the relevant time was not due to their neglect.

The applicants gave evidence to the effect that they relied upon the advice of a solicitor who told them that it was not necessary to make application for exclusion until after sentencing.

The solicitor may have taken that view, erroneously, based upon the confusion which had surrounded litigation under the *Confiscation Act* 1997 as to the proper date for "conviction". As was explained in the Asset Confiscation Update dated 26 June 2009, the Court of Appeal has now finally determined that a conviction occurs, in the

case of a plea, at the time of the arraignment.

In his ruling, Osborn J at [15] stated:

> "*Accordingly two questions arise for me. Firstly whether the precondition has been satisfied [being the precondition that the delay is not due to the neglect of the applicants] and, secondly, whether if it has been satisfied the Court should exercise its discretion in favour of the applicants*".

Importantly, Osborn J held that it was insufficient merely to demonstrate that the delay in making the application for exclusion was not due to the neglect of the applicants. Something further was required, namely to demonstrate that there was some merit to the application for exclusion. Osborn J was satisfied on both counts and, accordingly, granted leave.

Although the test in s.51(3) is different to the test set out for the extension of time within which to make an application for exclusion from a restraining order under s.20(1B) of the *Confiscation Act* 1997, it is likely that, in order to satisfy the test under s.20(1B), the Court will also be interested in the merits of the application at the time that it makes an order for an extension of time.

To date, applications for an extension of time under s.20(1B) of the *Confiscation Act* 1997 have generally been resolved without the need to demonstrate some merit. Having said that, the threshold in respect of "merit" is likely to be very low and should only require an applicant for exclusion to demonstrate that they could arguably demonstrate some interest in the restrained property.

About the author

Christian Juebner is a barrister at the Victorian Bar. Christian practices predominantly in confiscations and proceeds of crime.

Before coming to the Bar, Christian was a partner with Deacons. 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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