

ASSET CONFISCATION UPDATE – 20 May 2010

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Moloney v AG of Victoria & DPP

DPP's duty of disclosure in *ex parte* applications

On 19 May 2010, Judge Saccardo of the County Court handed down his decision in *Moloney v AG of Victoria & DPP* [2010] VCC.

The facts

Mr Moloney was charged with and convicted of a Schedule 2 (automatic forfeiture) offence (and other related Schedule 1 offences) pertaining to the cultivation of cannabis.

A restraining order was made after Mr Moloney was charged and, after his conviction of a Schedule 2 offence (cultivation of cannabis in a commercial quantity), the restrained property was automatically forfeited.

After automatic forfeiture occurred, Mr Moloney sought to have the restraining order declared void, alternatively, have it set aside on the basis that the affidavit in support of the application for the

restraining order contained significant inaccuracies; namely that it alleged that Mr Moloney had been charged with certain offences which the DPP had already agreed not to pursue.

The decision

The Court found that the deponent of the affidavit in support of the application for the restraining order had a duty to inform the Court of the fact that certain charges were not being pursued.

The Court found that the deponent had breached that duty.

The breach of the duty did not render the restraining order void ab initio. However, the breach would have entitled Mr Moloney to an order (under s.26 of the *Confiscation Act*) to have the restraining order set aside (if the restraining order still operated).

In circumstances where automatic forfeiture had already occurred, there was no longer any power to set aside the restraining order – since it was no longer in force.

Effect of decision

The decision is a useful reminder that the DPP bears a heavy onus in *ex parte* applications to ensure that the material relied upon in support of an application for a restraining order is accurate and comprehensive.

Further, the decision points up the fact that s.26 of the *Confiscation Act* (being the section dealing with further orders) can be relied upon to seek that a restraining order be set aside.

It ought to be borne in mind that even if a restraining order is set aside on the basis that there was not full disclosure in the course of the *ex parte* application, the DPP may attempt to seek a further restraining order with comprehensive and accurate affidavit material at a later stage. A question arises whether the DPP has such entitlement in the absence of some new evidence which was not available to the DPP at the time that the first application was made.

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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