

ASSET CONFISCATION UPDATE – 23 February 2011

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***Burnett v DPP (2007) 21 NTLR
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that the property sought to be restrained is “tainted property”.

Redacted Affidavits

In recent times, I have noticed that there has been an increase in the OPP’s practice of redacting affidavits in support of restraining order applications before providing such affidavits to practitioners.

The issue was considered by the NT Court of Appeal, which determined that in such circumstances the Court could provide an un-redacted copy of the affidavit to the legal adviser upon receiving an undertaking that the legal adviser would keep the information confidential and / or by the publication of sufficient reasons for the making of the restraining order.

The difficulty practitioners and their clients face when in receipt of a redacted affidavit is that they will commonly not be in a position to assess whether the evidence relied upon by the DPP was sufficient to cause the Court to make the restraining order. In order words, the practitioners are deprived of the opportunity to advise their clients whether any error has been committed which could be challenged on appeal or in an *inter partes* rehearing of the restraining order application.

Mildren J made the following observations from [246]:

This is particularly relevant to applications for civil forfeiture restraining orders, which require the DPP to demonstrate that there are reasonable grounds to suspect

*[246] However in this case, the court did not provide any reasons for the making of the order. It was submitted that no reasons are necessary because the order was only an interlocutory order, but in my opinion, interlocutory or not, a judge should give reasons when making such an ex parte order based upon material which is not fully disclosed to the parties affected by the order: see *Re Criminal Proceeds Confiscation Act 2002 (Qld)* at [9] per Williams JA and at [62]–[63] per White J. That is not to say that reasons are always required when all of the affidavits relied upon are to be served*

with the order. Much will depend upon the circumstances.

[247] Under the provisions of the Supreme Court Act ss 51 and 53 the plaintiffs in these proceedings have a right to seek leave to appeal to the Court of Appeal from the orders made by the judge. If reasons are not given the defendants to the restraining order are not in a position to know whether they have a case to exercise their right to apply for leave to appeal. In order to obtain leave, they must demonstrate that the correctness of the judgment of the court is attended with sufficient doubt to warrant the granting of leave: see Nationwide News Pty Ltd v Bradshaw (1986) 41 NTR 1. Without reasons, the defendants will not know whether the judge applied the correct test or tests in deciding whether to grant the order. For example, in relation to a restraining order on the basis that the property is crime-used or crime-derived, the court has to be satisfied that there are reasonable grounds for suspecting that the property is crime-used or crime-derived. ...

In a case where the court has received material which is based upon information which, if released, might materially prejudice an ongoing investigation, the reasons ought to disclose as much as possible consistent with the need to protect the confidential material. The judge ought to address questions such as what balancing considerations have been taken into account, whether it is sufficient to suppress the names of any informants or the circumstances under which information has come to the attention of the Director of Public Prosecutions or the police, or whether it is necessary to

go so far as to decide that the nature of the information is such that release of any of it could result in a significant risk that it would lead to the sources being discovered....

[249] Similarly, in my view, the court in exercising its powers under s 45(2) should consider whether, for example, a summary of the information contained in the confidential material can be released or alternatively if there is some other course which may be able to be adopted such as releasing the information to the defendant's lawyer upon receiving an appropriate undertaking to the court not to reveal the information to the defendant. Perhaps in order to achieve this, the court ought in the first place make only an interim order, and require the proceedings to be served before making a restraining order. I note that the Act provides, in s 40, for the applicant to apply to the Local Court for an interim order. However, I consider that the Supreme Court could also make an interim order, even though there are no specific legislative provisions relating to this court. Where, by an Act of parliament, a right or power is created, there must by implication carry with it the power to do everything which is indispensable for the purpose of exercising the right or power, or fairly incidental or consequential to the power itself: *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 115 NTR 25 at 35.

[250] It is my view that the failure to give reasons in this case is not only an error of law, but it has deprived the defendants of procedural fairness: Re Criminal Proceeds Confiscation Act 2002 (Qld); Pettitt v Dunkley [1971]

1 NSWLR 376; Mobasa Pty Ltd v Nikic (1987) 47 NTR 48.

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[251] Likewise, I consider that his Honour should have provided more expansive reasons for the refusal of the plaintiffs' application for access to the confidential affidavits when that application was subsequently made to his Honour. [Underlining added]

Practical effect of decision

The practical effect of the decision is that practitioners should, when in receipt of a redacted affidavit, consider whether to make application for reasons to be given, alternatively, whether to seek access to the redacted information pursuant to an undertaking.

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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