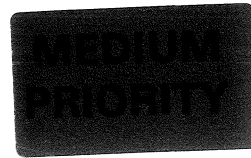


IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY



1202

M26/95

IN THE MATTER of an application pursuant
to the Proceeds of Crime
Act 1991

BETWEEN THE SOLICITOR-GENERAL
OF NEW ZEALAND

Applicant

AND MELVILLE BRUCE BLACK
of 28 Larch Place,
Christchurch, Beneficiary

Respondent

Hearing: 5 March 1997

Counsel: R W Raymond for Applicant
M J Knowles for Respondent
K G Feltham for Nominee Company

Judgment: 6 March 1997

ORAL JUDGMENT OF CHISHOLM J.

This application has developed into a test case. The key issue is whether there is jurisdiction to make an order under s42(2) of the Proceeds of Crime Act 1991 after a forfeiture order has been made. Ultimately it comes down to a matter of statutory interpretation. Argument by counsel has been of considerable assistance.

Background

A restraining order in relation to the property at 20 Winston Avenue, Christchurch ("the property") was made on 19 March 1996. The earlier

history is not relevant to the issue to be determined. On 16 September 1996 the restraining order was renewed to 19 March 1997. A forfeiture order was made in respect of the property on 12 December 1996. The mortgagee of the property was granted relief to the extent of its interest pursuant to s18 of the Act. The property has not yet been sold.

By an undated application lodged on 28 February 1997 the respondent sought an order that the sum of \$3,075.06 be reserved from the property for payment of the respondent's legal costs in defending the application for a forfeiture order. The Solicitor-General has taken the attitude that the application is too late. His view is that the forfeiture order having been made there is now no jurisdiction to make an order pursuant to s42(2) of the Act. As I understand the position, the Solicitor-General does not oppose the application on its merits. He simply relies on the jurisdictional point.

Jurisdictional Issue

The respondent's application relies on s42(2) which provides:

"A restraining order against a person's property may be made subject to such conditions as the Court thinks fit, which conditions may include, but are not limited to, conditions which make provision for meeting, out of the property included in the order, all or any of the following:

- (a) The reasonable living expenses of the person and the person's dependants, if any:
- (b) The person's reasonable business expenses:
- (c) The person's reasonable expenses in defending any criminal proceedings (including any proceedings under this Act):
- (d) Any specified debt incurred by the person in good faith:
- (e) Any other expense allowed by the Court."

Subsection (3) requires the Court to have regard to the ability of the person to meet the expenses or debt concerned out of property which is not subject to a restraining order.

Ancillary orders in relation to the restrained property do not have to be made at the same time as the restraining order. Section 47(1) provides:

“Where the court makes a restraining order against any property, the Court may, at the time it makes the order *or at any later time*, make such ancillary orders in relation to the property as the court considers appropriate” (emphasis added).

Subsection (3) of s47 authorises ancillary orders to be made on the application of a person whose property is subject to the restraining order. It follows that the respondent qualifies under s47(1) and is entitled, subject to the underlying jurisdictional issue, to bring this application at this time.

It is common ground that the respondent’s application can only succeed if the restraining order has not come to an end. The duration of restraining orders is governed by s65 of the Act, of which subsection (1) provides:

“Subject to subsections (2) and (3) of this section and to section 66 of this Act, every restraining order shall expire at the end of the period of 6 months after the making of the order, and, on the expiry of a restraining order, that order, and any ancillary order made under s47 of this Act in relation to that order, shall cease to be in force.”

Where a restraining order has been extended pursuant to s66, as was the case here, ss(1) needs to be read in conjunction with ss(3)(g) which provides that the restraining order “shall cease to be in force at such time as is specified in the Court’s order under that section”.

Two observations need to be recorded. First, ancillary orders under s47 enjoy the same life as the restraining orders to which they attach.

Secondly, on a plain reading of s65(1) and (3)(g) the restraining order originally made on 19 March 1996 and extended on 16 September 1996 will not expire until 19 March 1997.

It is now necessary to consider the specific statutory rules in paragraphs (c) to (f) of s65(3) which govern when restraining orders cease to be in force in particular situations.

Paragraphs (c) and (d) cover situations where the charge is withdrawn, the person is acquitted, or a conviction is quashed. In those situations the restraining order ceases to be in force when the charge is withdrawn, the person is acquitted, or the conviction is quashed, as the case may be. It is to be noted that those paragraphs only apply if the event arises "before the order would otherwise expire under subsection (1)".

Paragraph (e) is the key provision in the context of this application. It provides:

"If a Court makes a confiscation order in reliance on the person's conviction of the offence or a related serious offence, and the confiscation order is satisfied or otherwise ceases to be in force, the restraining order shall cease to be in force when that order is satisfied or otherwise ceases to be in force..." (emphasis added).

The emphasised words make it plain that a restraining order does not automatically cease to be in force when a confiscation order, which by

definition includes a forfeiture order, is made by the Court. While the paragraph is not particularly happily worded, it seems to me that in their context the words "that order" on the second to last line relate back to the "confiscation order". It follows that a restraining order ceases to be in force when the confiscation order *is satisfied or otherwise ceases to be in force*. Unlike paragraphs (c) and (d) events referred to in para (e) are not tied to events prior to the expiry of a restraining order under ss(1) of s65. This leads me to conclude that when a confiscation order is made the restraining order may remain alive after the date on which it would have otherwise expired under ss(1). Indeed it will remain alive until the confiscation order is "satisfied or otherwise ceases to be in force".

Paragraph (e) is specific. There is no difficulty in construing the words in their ordinary sense. During the hearing the purpose to be served by a restraining order remaining in operation after a confiscation order has been made was debated. The plain wording of the statutory provision renders it unnecessary to explore that issue. Plainly a restraining order does not automatically come to an end when a confiscation order is made. If that had been the statutory intention then paragraph (e) could have said so in straightforward terms. To the contrary, the legislation has expressed its intent that when a confiscation order is made the restraining order only ceases to be in force when the confiscation order is satisfied or otherwise ceases to be in force.

It is then necessary to consider when the forfeiture order in respect of the property will be satisfied or will otherwise cease to be in force. It is

significant that the confiscated property is subject to a mortgage and that the mortgagee's interest was confirmed pursuant to s18 of the Act. As I understand the decision granting the forfeiture order, the mortgagee is entitled to accruing interest based on a daily rate. It is only when the property is sold that the amount due to the mortgagee can be fixed. And the amount payable to the mortgagee will determine the amount to be ultimately received by the Crown. In my opinion, the forfeiture order will not be "satisfied" until that time. In its ordinary commercial sense the word "satisfied" connotes the making of a payment or the satisfying of a debt. It can be comfortably read in that sense in the context of the statutory provision under consideration.

There do not appear to be any other provisions within the Proceeds of Crime Act which are capable of supporting a conclusion that the restraining order "otherwise ceases to be in force" at an earlier time. There may be some situations where a restraining order ceases to be in force before the property is sold in terms of a forfeiture order. But it is unnecessary for me to explore that issue. This application involves a mortgaged property where interest is accruing and will continue to accrue until the property is sold.

It follows that there is no underlying jurisdictional obstacle to the respondent's application.

Application on its Merits

As already mentioned, the Solicitor-General does not oppose the application on its merits. Nevertheless two arguments advanced by Mr Raymond still remain to be considered.

First, Mr Raymond questioned whether s42(2)(c) was wide enough to cover the expenses referred to in the application. He suggested that the word "property" used in ss(2) did not include realty. His argument, as I understood it, was that the provision could only be sensibly interpreted if the word "property" was taken to apply to cash or assets immediately convertible into cash. That argument is destroyed by the wide definition of "property" in s(2) which includes real and personal property of any kind. There can be no justification in reading down that word in the context of s42(2).

Secondly, it was submitted by Mr Raymond that the specific provision in s88 for costs to be awarded where a forfeiture order is fought effectively rules out an application for costs pursuant to s42(2)(c) in such a situation. I am unable to agree with that submission. Section 88 covers an award of costs against *the Crown*. On the other hand, s42(2)(c) makes provision for reasonable expenses to be met *out of property*. Moreover, s88 is only available where there has been a successful defence of proceedings. Section 42(2)(c) does not carry that limitation; it is available for expenses arising from defending any proceedings under the Act.

Before turning to the orders that should be made, I should observe that on my interpretation of the legislation, the orders in favour of the respondent I am about to make under s42(2) will survive the expiry of the restraining order on 19 March 1997. This follows from s65(3)(e) which has already been discussed. It would be surprising if the benefit of an order under s42(2) could be negated by a forfeiture order under circumstances where the person having the benefit of the s42(2) order would be powerless to seek an extension of the restraining order (that power is vested in the Solicitor-General under s66).

Orders

- (1) On the sale of the property at 20 Winston Avenue, Christchurch, the sum of \$3,075.06 is to be reserved from the nett sale proceeds for payment of the respondent's legal costs in defending the forfeiture application. The nett proceeds shall be deemed to mean the sale proceeds of the property after payment in full to the mortgagee and payment in full of all expenses of sale.
- (2) The respondent is entitled to costs of \$1,250 on this application. That order for costs shall be deemed to be made under s42(2)(e), being an expense allowed by the Court.
- (3) Leave to apply is reserved.

