IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

97/386

M No 47/96

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

BETWEEN THE SOLICITOR-GENERAL OF NEW ZEALAND

Applicant

AND JUDY WONG
of 17 McGeorge Avenue, Dunedin,
Hairdresser

Respondent

Hearing: 9 & 10 April 1997

Counsel: W J Wright for Applicant
J Ablett Kerr QC for Respc

Decision: 18 April 1997

488 — Forfeiture of property — Residential property wholly owned by a third party — Property used for cannabis cultivation by owner's partner — Partner subsequently convicted of serious offences — Whether to make order for forfeiture — Matters to be considered — Matters going to Court's discretion — Proceeds of Crimes Act 1991, ss 15, 17, 18. The respondent, W, had lived with H in a de facto relationship for some years. They lived in a house owned by W. H had set up a sophisticated cannabis growing operation in the house and had subsequently been convicted of cultivation and sale of cannabis. W had pleaded guilty to having knowingly permitted her house to be used for the commission of an offence under the Misuse of Drugs Act 1995 and was discharged without conviction upon payment of $1000 towards the prosecution cost. The Crown sought a forfeiture order in respect of the house. W applied for relief.

RESERVED DECISION OF GENDALL J

Gendall J considered it appropriate to consider firstly whether a forfeiture order should be made taking into account the wide discretionary matters which would apply to an application for relief against forfeiture. Relevant factors included: (1) the use made of W's property by H; (2) her limited knowledge and lack of involvement in the cannabis growing operation; (3) the substantial value of the property ($150,000); and (4) the undue hardship which would result to W if the property were forfeited. Weighing these factors the Court declined to order forfeiture, concluding that such a penalty would not sit easily with the circumstances of her involvement or wrongdoing. *Solicitor-General v Wong* (High Court, Dunedin M 47/96, 18 April 1997, Gendall J). [16 pp]

Solicitors:

Crown Solicitor's Office, Dunedin for Applicant
J Ablett Kerr QC, Dunedin for Respondent

This is an application by the Solicitor-General for an order pursuant to s15(1) of the Proceeds of Crime Act 1991 seeking forfeiture of a residential property at 17 McGeorge Avenue, Dunedin, owned by the respondent. She has applied pursuant to s17 of the Proceeds of Crimes Act 1991 for an order granting relief against forfeiture under s18 of the Act. Such application for relief only arises to be considered if the forfeiture order is made.

The essential facts are that the respondent is the sole registered proprietor of 17 McGeorge Avenue, Dunedin. It is her home and it is subject to a mortgage to the National Bank of New Zealand which secures any overdraft indebtedness she might have to the bank in relation to her business as a hairdresser. She is a single woman aged 44 years. In late 1994 she commenced a relationship with a man named Bruce Haussman, he being six years younger than her. He moved in to live with the respondent in her home in about February 1995. He worked, at times, as a sole practitioner in the field of therapeutic massage. From time to time he undertook this work in the home. The respondent and Mr Haussman lived together in a de facto relationship until 19 December 1995. On that day the Police executed a search warrant on the property of 17 McGeorge Avenue, Dunedin and there located a sophisticated cannabis growing operation in the space between the ceiling and the roof of the property ("the attic"). A total of 54 cannabis plants were at various stages of cultivation some of which were in a chamber specifically built for such purpose, it being lined with silver insulating paper. There was provided sources of heat and light and temperature and circulation was regulated in a reasonably sophisticated manner through the use of fans, timers and thermostats. Some of the smaller plants were growing in polystyrene pottles of the type used as insulated drinking cups. Bags of fertiliser, potting mix and other items associated with cultivating plants were located in the attic. In the master bedroom of the home, in a cupboard, was a set of electric kitchen scales and an electric food dehydrator which had traces of cannabis on it. Within the property there was secreted, in a cavity above a converted fireplace, a number of books associated with the cultivation of cannabis including a notebook containing entries written by

Haussman. Those entries recorded progress of the growing operation which, it seems, had taken place from at least July 1995, and was intended by him to continue. Those documents recorded in a careful manner items such as "stock and plant as at 4 July 1995, further plant required, particulars of projected costs and income from the proceeds of sale of the cannabis growing operation". Those notes recorded that "Judy" was owed a sum of money in respect of a loan, which is recorded as follows:

"Depts Judy at present	$ 740
Proposed loan	$2,000
Total depts	$2,740"

I interpret the word "depts" as being mis-spelling of the word "debts". The notes of Haussman record that a person named "Trev" was "to pay me whenever $2,000" and the notes record a projected proposed revenue as at 28 December 1995 of $117,000 and that:

> "Income by Xmas = each $58,500".

Haussman was arrested and admitted cultivating cannabis in the attic of the property. He admitted owning the electric scales used to weigh cannabis, and the dehydrator used to dry it.

It is necessary to mention that a further search of another property at 158 Melbourne St, Dunedin, owned by Pauline Booth, which property she shared with her husband Trevor Booth, revealed a similar cannabis growing operation in the attic area of that home. A photocopy of the documents found at the respondent's home, was also located at the Booth home. It was abundantly clear that both operations were being run in conjunction with the occupants of both houses, or at least Messrs Haussman and Booth, intending to share the proceeds. The estimated income of the two operations was fixed at $360,000 by the Police with revenue of

$194,400 being generated, it is said, from the cannabis found or grown at the respondent's address. The respondent disputed those figures but, however one views the operation, it is clear that the intended revenue was very substantial and well exceeded $100,000.

Messrs Haussman and Booth pleaded guilty to jointly cultivating cannabis in breach of s9(1) and to jointly selling cannabis in breach of s6(1)(e) of the Misuse of Drugs Act 1975. They were each sentenced to three years imprisonment.

The respondent was charged that she jointly with Haussman, Mrs Booth and Trevor Booth, cultivated cannabis in breach of s9(1), and that she further jointly with Haussman and Booth sold cannabis in breach of s6(1)(e). She was further charged that she jointly with Haussman cultivated cannabis and also jointly with Haussman sold cannabis. She pleaded not guilty and elected trial by jury. After a depositions hearing, she was not committed for trial on those charges by the Justices who presided. She was further charged with a breach of s12(2) of the Misuse of Drugs Act 1975 in that between 1 November 1994 and 19 December 1995 she knowingly permitted the premises at 17 McGeorge Avenue to be used for the commission of an offence against the Misuse of Drugs Act 1975, namely cultivating the prohibited plant cannabis. This carries with it a maximum penalty of three years imprisonment, because cannabis is a Class C drug. It is not a "serious offence" under the Proceeds of Crimes Act 1991. Upon a plea of guilty she was discharged without conviction pursuant to s19 of the Criminal Justice Act 1985 upon payment of $1,000 towards the prosecution cost. Unlike Haussman, she had no previous convictions.

The application for forfeiture was originally filed in the District Court at Dunedin. However, because the District Court Judge declined jurisdiction to sentence Haussman the Crown applied to transfer the forfeiture application to the High Court. This was proper because in terms of s8(2)(a) of the Proceeds of Crime Act 1991, the "appropriate Court" to deal with an application for a forfeiture order is the Court before which a person, in respect of whose conviction for a serious

offence a confiscation order is sought, is sentenced. In this case Haussman was the person who committed the "serious offence" which gave rise to the forfeiture application, even though that application related to the dwelling house of the respondent, on the basis that that dwelling was "tainted" property in terms of s2 of the Act. Hansen J, on 23 March 1996, made the order transferring the forfeiture application to the High Court.

Under s15(1) jurisdiction to make a forfeiture order arises. It provides:

> "On the hearing of an application for a forfeiture order in respect of a person's conviction of a serious offence, the Court may, if it is satisfied that property specified in the application is tainted property in respect of the offence, order that such of the property as is specified by the Court is forfeited to the Crown."

"Serious offence" means an offence punishable by imprisonment for a term of five years or more. It includes the offence of cultivating cannabis in respect of which Haussman pleaded guilty but, as already mentioned, it does not include the offence of knowingly permitting premises to be used for the purpose of cultivating cannabis in respect of which the respondent pleaded guilty and was dealt with pursuant to s19 of the Criminal Justice Act 1975. However, the property which is the subject of this application falls within the definition of "tainted property" which is described in s2 of the Act as being:

> "'Tainted property', in relation to a serious offence, means -
>
> (a) Property used to commit, or to facilitate the commission of, the offence; or
>
> (b) Proceeds of the offence; -
>
> and when used without reference to a particular offence means tainted property in relation to any serious offence."

Tainted property must relate to the commission of a serious offence and can relate to property other than that owned exclusively or in part by the person convicted of the serious offence. In this case the property is not the proceeds of the offence, but the dwelling clearly falls within the definition in paragraph (a).

The Court may have regard, in determining whether or not to make a forfeiture order under s15(1), to

(a) the use that is ordinarily made, or was intended to be made, of the property; and

(b) any undue hardship that is reasonably likely to be caused to any person by the operation of such order; and

(c) the nature and extent of the offender's interest in the property (if any), and the nature and extent of any other person's interest in it (if any); and

(d) any sanction or sentence or penalty imposed upon conviction of the serious offender, as well as any other matter relating to the nature and circumstances of the offence or the offender, including the gravity of the offence.

I record that any question of fact to be determined by the Court on this application is to be determined on the balance of probabilities (s85).

It is clear that the forfeiture application, whilst arising because of the conviction of the serious offence on the part of Haussman, relates to this respondent solely because it is her home that is "tainted" property being used to commit or facilitate the commission of the offence. That was conceded by the respondent in argument.

This is not a case where the serious offender, Haussman, owns or had any interest in the property.

Section 15(3) provides:

> "A Court that makes a forfeiture order against property may, if it considers that it is appropriate to do so, by order, -
>
> (a) declare the nature, extent, and value of any person's interest in the property; and
>
> (b) declare that the forfeiture order may, to the extent to which it relates to the interest, be discharged pursuant to section 22 of this Act".

That subsection seems to envisage the situation where more than one person has an interest in the property the subject of the forfeiture application and that interest can be declared and valued so as to enable that person to acquire, by payment to the Crown, a "buy-back" of the interest. It has no application in this case.

The Proceeds of Crimes Act 1991 does not preclude the forfeiture of an innocent co-owners interest in the property; *Tareha v Solicitor General* (1996) 13 CRNZ 481 (CA).

It is for that reason, in order to ameliorate hardship or injustice arising to a third party as a result of a forfeiture order, that s17 provides that a person who claims an interest in any of the property the subject of a forfeiture application may apply pursuant to s18 of the Act for relief. A person convicted of a serious offence and whose own property, or interest in property, is subject to the forfeiture order application cannot seek such relief. It is quite clear that the provisions of s17 and 18 relate to a third party who has some interest in property which has been ordered to be forfeited. Section 18 requires the Court when considering such a relief application to make an order: -

> "(c) declaring the nature, extent, and value of the applicant's interest in the property; and

(d) Either -
(i) Directing the Crown to transfer the interest to the applicant; or
(ii) Declaring there is payable by the Crown to the applicant an amount equal to the value of the interest declared by the Court; or
(iii) In the case of an application under s17(1) of this Act, directing that the interest shall not be included in a forfeiture order made in respect of the proceedings that gave rise to the application;"

Section 18(2) vests in the Court a discretion to refuse to make an order granting relief to a third party if it is satisfied that:

"(a) The applicant, was, in any respect, involved in the commission of the offence in respect of which forfeiture of the property is or was sought; or

(b) If the applicant acquired the interest at the time of or after the commission of the offence, the applicant did not acquire the interest in the property in good faith and for value, without knowing or having reason to believe that the property was, at the time of acquisition, tainted property -

but nothing in this subsection shall be taken to require such a refusal".

It seems to me that the provisions in s17 and 18 of the Act were largely intended to cater for the situation where a person, not convicted of a serious offence, had some interest in tainted property, in which the serious offender also had an interest, and such interest did not extend to the entire legal and beneficial ownership. Nevertheless on the wording of s17 it remains open for such a person to seek relief from forfeiture. However, I would have thought that if the Court granted forfeiture of such tainted property wholly owned by a third party, then the considerations that would have been taken into account in determining the forfeiture application would almost surely include the wide discretionary matters which would apply to an application for relief against forfeiture. In other words, in the context of this application, if the respondent is unable to succeed in resisting the forfeiture application which can only relate to the entire property, it is difficult to see how she

could successfully obtain an order granting relief which in terms of s18 applies to "the "nature", extent, and value of [the respondents] interest in the property", that is, the whole property.

The mortgagee, the National Bank, does have an interest in the property in terms of s10 of the Proceeds of Crime Act 1991 and would, if a forfeiture order followed be entitled as a third party to apply for relief pursuant to s17, in respect of that interest. Crown counsel and counsel for the mortgagee have concurred that if a forfeiture order is made then the basis of that order would be that it contained a term:

> "This order is made subject to the interest of the National Bank of New Zealand Limited and mortgage number 718996/2 (Otago Land Registry) and without prejudice in any way to all the rights and remedies of the National Bank of New Zealand Limited thereunder".

I turn now to whether a forfeiture order should be made in respect of the respondent's property pursuant to s15.

"Tainted Property"

There is no doubt that the dwelling house at 17 McGeorge Avenue, Dunedin is "tainted property". It provided the secret location and it was essential in the commission of the offence by Haussman. Without the property there could have been no offence in which it was carried out. The respondent concedes that it is "tainted property".

The use that is ordinarily made, or was intended to be made, of the property.

The property is the home of the respondent. Its ordinary use now, and intended, is as a residential dwelling house. She purchased it in December 1988 and it has been subject to the National Bank mortgage since that time. It has a value of approximately $150,000 and the mortgage indebtedness is small fluctuating only

with the extent of the respondent's business overdraft. Whilst there was no specific evidence before me as to the exact extent of such overdraft at present, it is unlikely to exceed $10,000. From early 1995, the home was used as the home of both the respondent and Haussman and, it is intended that the home (if a forfeiture order has not been made) remains the private dwelling of the respondent.

"Any undue hardship that is reasonably likely to be caused to any person by the operation of such an order".

An order for forfeiture of this property results in no hardship to Haussman. Beyond doubt it would result in hardship to the respondent. There are no other occupiers of, or family members residing in the home. It is the respondent's home and in which she has, subject to the mortgage, the entire interest. I think the Court must look at the degree to which the forfeiture, which is a punishment, equates with the wrong-doing of the respondent. But balanced against that consideration is the factor that the legislature intended forfeiture to be a severe punishment and no doubt produce hardship in many cases.

Although the test of undue hardship is not necessarily restricted to a respondent, in this case it is only she who will suffer hardship by a forfeiture order. As was said by Williamson J in *Solicitor-General v Sanders* [1994] 2 HR NZ 24 at 30:

> "The word "undue" indicates a level of hardship above that ordinarily contemplated when a person is convicted of serious cannabis related offences (see *R v Lake* (1989) 44 A Crim R 63 at page 66). A severe penalty imposed upon conviction can bear on the gravity of the hardship but is not itself a hardship arising from the forfeiture order".

Of course in the respondent's case she faces the sanction of a forfeiture order not because of her serious conviction nor does the question of any penalty imposed upon her in relation to her conviction, come into play in this case.

Any forfeiture, which must be of the whole property, would unquestionably result in severe hardship to the respondent. She loses her home.

"The nature and extent of the offenders interest in the property (if any), and the nature and extent of any other persons interest in it (if any)".

As I have said Haussman, as the offender, has no interest in the property. The nature and extent of the respondent's interest in it is, subject to the mortgage, total. It is forfeiture of that total interest which the respondent submits aggravates the "hardship" that is reasonably likely to be caused pursuant to s15(2)(b). But this must always be the case where a person, not "the offender", is the sole owner of property which is "tainted" through the serious offence committed by another.

"In addition to the matter referred to in s14(1)(b) of this Act, any other matter relating to the nature and circumstances of the offence or the offender, including the gravity of the offence."

In the factual circumstances of this forfeiture application this provision has only limited application. This consideration concerns the penalties imposed upon the conviction of a person for a "serious offence", and speaks of "the offender' who is Haussman. However where it refers to circumstances of the "offence ... including the gravity of the offence" I am of the view that the Court is entitled to look at the total surrounding circumstances of what occurred, its nature and gravity. This is because it was the respondent's property which facilitated the commission of the offence and the degree to which she was aware of the offending, her acquiescence or complicity in it, are relevant matters in determining whether forfeiture, being an ultimate deterrent penalty to her, which may be draconian, should occur. The comments of the Court of Appeal in ***R v Dunsmuir*** [1996] 2 NZLR 1, at 6, may be pertinent.

> "Where a forfeiture order is made in respect of property representing the proceeds of crime, it merely takes from the criminal his ill-gotten gains. There can be no complaint as to that. The forfeiture order in respect of

> property used for the commission of a crime goes further. It is an additional penalty provided by Parliament as a deterrent. The criminal is sentenced for his crime, and in addition any of his property used to commit or facilitate the crime is liable to forfeiture. If this is draconian, that appears to be the intention of the legislation".

Where the Court is concerned with the property that belonged to another, yet was used by the criminal to commit or facilitate the crime, the exercise of the discretion becomes difficult. This is not like the usual case, for example such as *R v* Matamua (CA 569/95, Court of Appeal, 10 July 1996) where a person had only a partial interest in the forfeited property and was granted relief under s18

It is the circumstances of the offence and the offender, including the gravity of the offence which require to be weighed against the hardship caused by the forfeiture, which assists in determining whether such hardship may be "undue". Of course, there are other considerations. In the end the Court has to endeavour to do what is just so as to ensure that the "punishment fits the crime".

The respondent in her affidavit evidence deposed that she had lent moneys to Haussman of about $2,750 believing this was to be used by him to purchase items for his massage business and further to purchase diving gear. She deposed that she was totally unaware of Haussman's illegal activities. She said that she spent a considerable time away from her home in the course of her business and in recreational activities at weekends, so that there was an extraordinary amount of time available to Haussman for him to set up his cannabis cultivation operation in the ceiling. A large quantity of (apparently used) potting mix was located by the Police in a relatively prominent position in the respondent's garden. She deposed that she was unaware that that was present and it could not be clearly seen from the house itself. She deposed that it was Haussman who performed all gardening tasks at the home, so that (by inference) she seldom ventured into the back garden. It was her evidence that Haussman at times smoked cannabis in the home and that he had mentioned to her, in a casual way, that he might grow some cannabis but only of a small amount for his own use. She denied any knowledge of the presence of

the electronic scales or food dehydrator and explained that items found in the attic which had come from her hairdressing salon (such as the polystyrene cups) would have found their way there because Haussman used to remove rubbish and other items from the salon. There was evidence that when first interviewed by the Police the respondent stated that Haussman had said to her he may grow something in the roof for his own personal use. In oral evidence, when cross-examined, she confirmed that she understood that it was "drugs" that was to be grown but she went on to say that she did not think Haussman would go ahead and "do anything like this". She said that she refused him permission to grow drugs in the roof and did not know he was doing so. She said it was a complete mystery as to how all the items came to be in the attic and that the substantial increase in the electricity consumption at the home did not concern her unduly because of the massage business and extra laundry that it created.

Having carefully considered all the evidence as well as the demeanour of the respondent, I am not at all satisfied that she was as ignorant of the circumstances as she claims to be. Some of her explanations were too pat. Indeed she pleaded guilty to permitting the premises to be used for the cultivation of cannabis. She says that she was unaware of the extent of the operation and would never have permitted Haussman to carry out the extensive undertaking that was obviously the case if she had been fully aware of what he was doing. It must be a factor to be taken into account that she has not been found guilty of being a party to the commission of the "serious" offence. I am of the view that she was naive in the extreme and to a large extent turned a blind eye to what her younger lover was up to. She suspected something was amiss but chose not to intervene or inquire too much. The offence of Haussman was serious. The circumstances of the respondent's involvement in the offence were that she was used by Haussman to provide the secret venue for his operation. I find on the facts that she knew that Haussman was growing cannabis and permitted him to do so. She may not have known the extent of the operation but nevertheless foolishly permitted him to do as he pleased without her challenging him or questioning him to any great extent. That may well have arisen because of

the nature of the relationship, her emotional involvement with Haussman and her own busy life operating her hairdressing salon.

The power vested in the Court to make a forfeiture order is entirely discretionary. The considerations set out in s15(2) are not exclusive and there are other matters which in my view the Court may take into account in the exercise of its discretion, especially where the interest in the tainted property is total and held by a person other than the serious offender. In a case such as this I consider that the considerations in s18(2) - which relate to a relief application - may also be looked at. Whilst the Court of Appeal in *R v Dunsmuir* [1996] 2 NZLR 1, 4 said;

> "These provisions [s18(2)] may not be inconsistent with the interpretation of s15(1) ... but they seem to point strongly in the other direction. The flexibility of the Court's powers to grant relief to a third party under s18(1)(d) would seem equally desirable under s15, if that section was intended to encompass the partial forfeiture of an item of property. These powers apply only to third parties, however, and it would be difficult to read them into s15(5)",

those comments of course related to a forfeiture of tainted property owned by or in which the serious offender had an interest. Although the considerations set out in s18 apply only to third parties, who apply for relief, it does not seem to me that if the third party owns the property in its entirety, then the Court need disregard the extent to which the respondent was involved in the commission of an offence, in terms of s18(2)(a). The degree of involvement in the offence comes within the words "nature and circumstances of the offence" as used in s15(2)(d). The "nature and circumstances of the offence" equally apply to the degree to which a third party is involved in the commission of an offence.

I have carefully considered the decisions in *R v McCormick* (CA 180/94, 21 December 1994), *R v Matamua* (CA 569/95, 10 July 1996), *Solicitor-General of New Zealand v Turner* (DCT 210/94, 10 December 1996), *R v Dunsmuir* (ibid), *Solicitor-General v Sanders* (1994) 2 HR NZ 24, *R v Brough* [1995] 1 NZLR 419 (CA), *R v Merwood* (CA 27/95, 23 May 1995) and *Tareha v Solicitor General*

(1996) 13 CRNZ 487. Where those cases related to relief being sought against forfeiture, all involved a third party having only a partial interest in the property the subject of the application for forfeiture. My researches have not revealed any decisions to date where the property the subject of a forfeiture application was wholly owned by a third party, as is the situation before me.

The crucial issue for this Court is whether any or all of the factors contained in s15(2), when viewed together with other relevant circumstances, are such as to satisfy a Court that the respondent's home should be forfeited. In looking at the issue of undue hardship factors contained in *Taylor v The Attorney-General of South Australia* (1991) 55 SASR 462 at 474, and adopted in *Solicitor-General v Sanders* (ibid) are of course relevant. They include the value of the property, the total extent of the interest of the respondent, and the absence of any interest in the property by the offender, the value of drugs involved, the utility of the property to the offender, whether the property was acquired through tainted money, the ownership of the property, the extent with which the property was connected with the commission of the offence and the deterrent effect of the forfeiture provisions.

This is not a case where any pecuniary sanction against the respondent is something that can be taken into account, as was the case in *Solicitor-General v Sanders*, because the respondent faces the prospect of a forfeiture order as a third party and not because of her own offence. To that extent the distinction between the proportionality of a sanction package to offences and appropriate punishment for offences, as aptly described by Williamson J in *Solicitor-General v Sanders*, does not have the same relevance or significance in this case. Nevertheless the punitive impact of a forfeiture order upon the respondent ought not be grossly disproportionate to the circumstances surrounding her permitting the use of her property by Haussman. A global approach has to be adopted in cases such as these and the deterrent aspect cannot be overlooked. Regard has to be had to society's need to prevent the use of property to commit or facilitate the commission of a serious offence. But in the end the Court has to determine whether the punishment to be imposed on a third party, not the serious offender, is of such a nature and

degree as to fit the "crime", in the sense of the extent of involvement of the third party. Weighing up all matters surrounding the use of this respondent's property by Haussman, her involvement or knowledge in such use, the substantial value of the property, the obvious hardship that a forfeiture order would bring to her - which I find would be undue hardship in all the circumstances - I am of the view that it is not appropriate or just for the Court to exercise its discretion and order forfeiture of the respondent's home. Such a penalty would not sit easy with the circumstances of her involvement or wrong-doing. It is not to be thought that there can never be a situation where a forfeiture order would be granted as against a third party who has a total interest in tainted property. Each case is dependent upon its own particular facts and much depends upon the nature and type of the tainted property, the circumstances and gravity of the offence, the value of the property and consequent hardship upon the third party, and all the matters contained in s15(2) as well as other discretionary considerations. The situations where such a forfeiture order would be justified remain yet to be determined, although some can be envisaged but do not need to be discussed in this judgment.

The application for a forfeiture order being dismissed, it is not necessary to consider the respondent's application for relief.

J W Gendall J