IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CRI-2008-485-153

BETWEEN	SOLICITOR-GENERAL OF NEW ZEALAND Applicant
AND	KEVIN JAMES LIDDINGTON Respondent

CIV-2009-485-928

BETWEEN	SOLICITOR-GENERAL OF NEW ZEALAND Applicant
AND	KEVIN JAMES LIDDINGTON First Respondent
AND	JODY LINDA LIDDINGTON Second Respondent

Hearing: 13 November 2009

Counsel: N P Chisnall for applicant
J K W Blathwayt for K Liddington
C L Elder for J Liddington

Judgment: 17 November 2009

RESERVED JUDGMENT OF DOBSON J

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[1] These proceedings constitute an application under the Proceeds of Crime Act 1991 (the Act), primarily seeking a forfeiture order against property that is tainted property in terms of the Act, or alternatively a pecuniary penalty against the first

respondent (Mr Liddington) in respect of benefits derived by him from the commission of relevant offences.

[2] On 11 September 2008, Mr Liddington and his son (Kurt Liddington) pleaded guilty to charges of possession of cannabis for supply, selling cannabis, cultivation of cannabis and theft of electricity. Because the offences carry maximum penalties of more than five years, they all qualify as "serious offences" for the purposes of the Act.

[3] The District Court declined jurisdiction to sentence Mr Liddington and his son, and they were committed to the High Court for sentencing. They were sentenced by Gendall J on 7 April 2009, in each case to two years' imprisonment. The sentencing Judge anticipated that an application under the Act might follow.

[4] It is accepted for Mr Liddington that the jurisdiction exists for the making of a forfeiture order. The convictions are for relevant offences and the circumstances in which the offending occurred renders the property, which the Solicitor-General now seeks to forfeit, "tainted" for the purposes of the Act. However, it is argued for Mr Liddington that the overall circumstances fall substantially short of those that would warrant a forfeiture order.

[5] Independently of Mr Liddington's opposition, Ms Elder applied on behalf of Mrs Liddington to have Mr Liddington's interest in the property transferred to her, and more generally opposed forfeiture or any other form of order that would prejudice Mrs Liddington's on-going interest in the property.

[6] Counsel for all parties helpfully focused their submissions on the opposing views in relation to the criteria to be considered under s 15(2) of the Act, which provides as follows:

> **15 Forfeiture orders**
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> […]
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> (2) In considering whether or not to make an order under subsection (1) of this section in respect of particular property, the Court may have regard to—

> (a) The use that is ordinarily made, or was intended to be made, of the property; and
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> (b) Any undue hardship that is reasonably likely to be caused to any person by the operation of such an order; and
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> (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
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> (d) In addition to the matter referred to in section 14(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.

The use ordinarily made of the property

[7] The property is a residential one in Belvedere Road, Carterton. The property has been owned by Mr and Mrs Liddington since 1992 and was acquired by legitimate means. It has been used throughout the whole time up to the present as their family home. Mrs Liddington continues to reside there during Mr Liddington's imprisonment. Her affidavit emphasises its importance to her, their adult children, and grandchildren whom she helps look after when they are visiting or left at the property.

[8] Neither Mr Liddington nor Kurt were users of cannabis. They were embarked upon a relatively sophisticated cannabis growing operation in what appears from photographs to have been a relatively large garage on the property. The equipment used included lighting, hydroponics and fans. Electricity was supplied via the house, and had been procured illegally, resulting in the charge of theft of electricity.

[9] As to the level of connection between the property and the offending that this establishes, Mr Chisnall was inclined to submit that it sat somewhere near the middle of a continuum. At one end of that continuum is where the property is very heavily committed to the relevant offending so that its primary purpose is for drug dealing, such as use of an address as a "drug house". See *Lyall v Solicitor-General* [1997] 2 NZLR 641 (CA) where the property was not actually lived in and was heavily fortified. At the other end of such a continuum are cases like *Solicitor-General v*

Loftus HC AK CIV-2003-404-3085 5 May 2005 Ellen France J. There, the respondent had allowed a co-offender to manufacture methamphetamine in his spare room. On the facts of that case there was a finding that the ordinary use of the respondent's property was not for manufacturing methamphetamine as it had operated as the respondent's home for 12 years before part of it was allowed to be used for manufacture of the drug for a short period of time. Sitting somewhere near the middle of the continuum are cases like *Cooksley-Mellish v Solicitor-General* CA209/05 27 March 2006. There, the respondent had been convicted and sentenced for cultivating cannabis that involved a large amount of cannabis grown on the property that had been bought shortly before the offending commenced with the proceeds of a Lotto win. The Court of Appeal characterised the offending as subordinate to the main use of the property as a residential dwelling to suit the respondent's particular needs.

[10] So too here, the offending within the garage is clearly subordinate to the main use of the property as Mr and Mrs Liddington's home, and as used by other members of their extended family. The use of the garage has been for a relatively short period of time compared with the length of time during which they have owned the property and used it as their residence.

[11] Accordingly, the use of the property for offending can be characterised as deliberate and relatively sophisticated for an entirely commercial purpose, but confined both as to the portion of the property used and the period during which the activity occurred.

Undue hardship reasonably likely to be caused to any person

[12] The decision in *Solicitor-General v Sanders* (1994) 2 HRNZ 24 (HC) broke this consideration down into a number of non-exclusive factors previously recognised as useful in comparable applications in Australia, in the decision of *Taylor v Attorney-General of South Australia* (1991) 55 SASR 462 (SASC) at 474. Both Mr Blathwayt and Ms Elder submitted that a consideration of these factors led overall to the view that a forfeiture order would likely cause undue hardship, in

particular to Mrs Liddington, and also, from a somewhat different perspective, to Mr Liddington.

[13] Reviewing the list of factors as they apply to the circumstances of this application, the first is the value of the property sought to be forfeit. Although a valuation suggests a somewhat higher value, counsel are agreed it is appropriate to treat the property as worth approximately $260,000 and that it is subject to a mortgage to the ANZ Bank of $80,000, giving an equity of some $180,000. The couple do have other debts which appear to be long-standing, and which Mr Liddington claims were the reason he sought to make money from cannabis. It is accepted that the bank's interest as mortgagee is untainted, and for reasons analysed below I have come to the view that forfeiture of Mrs Liddington's interest is not warranted.

[14] Accordingly, if forfeiture were ordered on some terms that excluded her interest and that of the mortgagee, the initiative would be pursued for the sake of approximately $90,000.

[15] The next factor considered is the value of drugs or the size of the crop that the tainted property was used for. Here, a disputed facts hearing accepted that something between $10,000 and $15,000 had been received for sale of cannabis. The submissions for Mr Liddington sought to challenge that, but on the balance of probabilities I am satisfied that such an extent of monies received is established.

[16] One hundred and thirty two seedling cannabis plants were in the process of cultivation and six mature plants were growing. On sentencing, Gendall J characterised it as a well-organised commercial operation which, if the 132 seedlings had reached maturity, had a potential gain in excess of $300,000. Mr Blathwayt was inclined to dismiss that as unrealistic or optimistic, in part because he claimed the experience Mr Liddington had had thus far suggests a relatively high failure rate.

[17] I treat the scale of the offending as relatively high, compared with the value of Mr Liddington's interest in the property. As against this, Mr Blathwayt argued that offending in respect of class C drugs can be seen as less serious than, for

example, manufacture of class A drugs. That point was acknowledged in *Solicitor-General v Fisher* HC WHA M44/02 27 June 2003 Harrison J at [26].

Nature and extent of offender and other person's interests

[18] Mr Liddington owns an undivided half share as tenant in common with Mrs Liddington. In addition to the registered mortgage, there is a caveat dating from 1998 but counsel were agreed that it can be disregarded. This factor is one of a number that invites consideration of Mrs Liddington's position. Mr Chisnall submitted that her knowledge of what was occurring in the garage was sufficient to implicate her. For Mrs Liddington, Ms Elder submitted that that was quite unrealistic for a woman in Mrs Liddington's position. She made clear her disapproval and deposes that they argued about the cannabis growing operation. I accept that, logically, the next step in her opposition would have been to bring the matter to the attention of the Police, or by other means ensure that they came to learn of it. Conceptually, the law can expect all citizens to take steps open to them to prevent criminal conduct but, in the context of the present application, Ms Elder is persuasive in questioning the reasonableness of such an expectation of Mrs Liddington in the circumstances confronting her.

[19] I certainly accept that she was not a positive participant in the criminal conduct, and am also inclined to accept that she made what were, by her own terms of reference, reasonable steps by expressing her opposition. In that sense, her interests and that of the mortgagee line up as other interests that would add nothing to the justification for forfeiture, and may well weigh against it.

[20] Perhaps the most relevant consideration from the non-exclusive list in *Taylor* when assessing undue hardship is the likely consequences of a forfeiture order on third parties, and on the offender. Mr and Mrs Liddington are in their mid 50s and both face relatively limited employment prospects. Mrs Liddington works part-time, having recently lost one job. Mr Liddington's debt situation was caused by the failure of a business he was operating, apparently through no fault of his own. His rehabilitation on release from prison would no doubt be significantly more pressured

if his family home of some 17 years is forfeited. It is likely to be important as a base for him in re-integrating himself in society.

[21] Perhaps more importantly from Mrs Liddington's perspective, I accept that loss of the home would be extremely harsh. She seeks to support adult children and help in the care of grandchildren, and the upheaval of a move would no doubt have substantial incidental costs. She would be most unlikely to present as a realistic lending proposition, if she sought to buy a replacement residence for herself. I am therefore of the view that in the particular circumstances here, there would be undue hardship caused to her. Were it not for her position, I would take substantially more persuading that there was any undue hardship in respect of Mr Liddington.

[22] The analysis under these headings effectively traverses the remaining considerations under s 15(2). My conclusion on it is that a forfeiture order is not warranted.

[23] One purpose of orders under the Act is to serve as a further deterrent to others minded to use property in the commission of serious offences. Whilst deterrence does not of itself warrant forfeiture, it is a factor in recognising the alternative of some form of pecuniary penalty, as appropriate in the circumstances. This was cynical offending in the sense that Mr Liddington had no personal interest in the drugs being grown, but simply wanted to make money out of the preparedness of others to pay for class C drugs. In converting the garage for that purpose, he committed his property to the illegal enterprise.

[24] A material difference between the considerations on any forfeiture, and the imposition of a pecuniary penalty, is that the latter can only reflect the proceeds of the offending. However, s 27(3) of the Act enables the extent of proceeds to be measured on a gross basis so that it is no answer, for instance, for Mr Liddington to complain that the sums received for cannabis previously sold were all "reinvested" in the equipment and supplies being used to grow more cannabis.

[25] Both as a deterrent, and as the appropriate response to the nature and extent of the criminality, relative to his interest in the property, I consider that a pecuniary

penalty against Mr Liddington, reflecting the proceeds that had been achieved, is justified and appropriate.

[26] In opposing both any forfeiture order and a pecuniary penalty on behalf of Mr Liddington, Mr Blathwayt submitted that any additional penalty now imposed would result in disproportionality of the overall outcome as between this offender, and his son, the co-offender. However, the material distinction between the two is that Mr Liddington was prepared to run the additional risk of committing his property to the commission of relevant offences. In the relevant sense, that is an additional element to his offending and the scheme of the Act would be frustrated were the Court's evaluation of such applications to be constrained by the need to achieve proportionality between a convicted person whose property had been used, and a co-offender who had not used property. the aim in sentencing must be to achieve proportionality at that point, with any subsequent application under the present Act being subject to its own range of criteria. Those do not extend to considering overall proportionality between offenders who put their property at risk, and co-offenders who do not.

[27] I discussed at some length with counsel the means by which such an order could operate in a way, first, that did not impinge on Mrs Liddington's interest in the property, and secondly, in a form that did not impose disproportionate pressure on Mr Liddington. That is not a consideration that is often likely, but given his age and the interest in rehabilitation after serving a term of imprisonment, the Solicitor-General's interest in recovery should appropriately be deferred so as to lessen the pressure.

[28] I am satisfied that the proceeds of the offending produced at least $12,500 for Mr Liddington. Indeed, that is, on the balance of probabilities, a conservative projection. I intend making a pecuniary penalty order for that amount. The consequence of doing so is that by operation of the terms of s 55 of the Act a charge is created in respect of the Liddingtons' ownership of the property to secure payment to the Crown of the amount payable under the pecuniary penalty order. I direct that the pecuniary penalty is payable on the earlier of the sale by the Liddingtons of the property, or the expiry of four years from the making of this order. That

contemplates that, unless Mr Liddington has paid the amount of the penalty or the property is sold sooner (in which event the obligation to meet the pecuniary penalty will rank ahead of the allocation of any of the net proceeds to the Liddingtons), then the terms of the statutory charge will empower a sale of the property to recover the extent of the order.

[29] My discussions with counsel traversed the prospects of directing a change in the mode of ownership of the property so that Mr and Mrs Liddington were, instead of their present joint tenancy, registered as owners as tenants in common in equal shares. The charge securing the pecuniary penalty order would then attach solely to Mr Liddington's interest. However, I am not satisfied that that could be achieved on terms that did not create difficulties for any subsequent exercise of the power of sale, should that become necessary. Instead, I direct that, in the event it becomes necessary to exercise the power of sale, then recovery of all sums payable in relation to the pecuniary penalty order is to be deducted from Mr Liddington's interest in the property, and not contributed to by the interest that Mrs Liddington has in the property.

[30] Accordingly, the Solicitor-General's application for a forfeiture order is dismissed. The alternative application for a pecuniary penalty is made out, and I order that a pecuniary penalty, chargeable against Mr Liddington's interest in the relevant property for the sum of $12,500, with such obligation to be deferred until the earlier of sale of the property, or four years from the making of this order.

Dobson J

Solicitors:
Crown Law, Wellington for applicant
W C M Legal, Carterton for K Liddington
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