IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-2532

IN THE MATTER OF	an application under the Proceeds of Crime Act 1991
BETWEEN	THE SOLICITOR-GENERAL OF NEW ZEALAND Applicant
AND	HUANG CHEN-WEI Respondent

CIV 2009-404-2478

AND

IN THE MATTER OF	an application under the Proceeds of Crime Act 1991
BETWEEN	THE SOLICITOR-GENERAL OF NEW ZEALAND Applicant
AND	WEI ZHONG Respondent

Hearing: 12 November 2009

Appearances: B Finn for the Applicant
S Bonnar for Mr Huang
R Mansfield for Mr Wei

Judgment: 17 November 2009 at 5:30 p.m.

JUDGMENT OF WOODHOUSE J
(application for pecuniary penalty orders)

This judgment was delivered by me on 17 November 2009 at 5:30 p.m.
pursuant to r 11.5 of the High Court Rules 1985.

Registrar/Deputy Registrar

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Solicitors / Counsel:
Mr B Finn, Meredith Connell, Office of the Crown Solicitor, Auckland
Mr S Bonnar, Barrister, Auckland
Mr R Mansfield, Barrister, Auckland

[1] Mr Huang and Mr Wei were convicted of serious methamphetamine dealing charges on 26 February 2009 and 21 January 2009 respectively. The Crown applied for forfeiture and pecuniary penalty orders under the Proceeds of Crime Act 1991 (the Act).

[2] The Crown's applications were heard on 12 November 2009. There was no opposition to the forfeiture orders by either respondent and those orders were made. The pecuniary penalty orders were opposed by both of the respondents. The principal grounds of opposition were that there was no evidence, or no sufficient evidence, that either of the respondents had any assets other than those being forfeited and that it would be wrong in principle to make pecuniary penalty orders in those circumstances. I reserved my decision on the question.

Background facts

[3] Mr Huang was found guilty by a jury on six counts of supplying a total of 75 ounces of methamphetamine to Mr Wei over a period of just under three weeks in October 2006. I am satisfied, from the evidence adduced at the trial, that the price per ounce payable by Mr Wei to Mr Huang was $7,700. The Crown acknowledged that there was some uncertainty as to whether 10 ounces was in fact paid for. I also was in some doubt as to the price paid for 3 ounces. But I am satisfied that Mr Huang received from Mr Wei $7,700 per ounce for at least 62 ounces of methamphetamine. The total is $477,400.

[4] The property seized from Mr Huang and now forfeited to the Crown is the following:

a) A 2006 Lexus car. This was purchased by Mr Huang in November 2006 for just over $74,000. Mr Huang paid cash.

b) A 1999 BMW registered in the name of Mr Huang and his former girlfriend. This car was used by Mr Huang for the purpose of a drug deal with Mr Wei. The purchase price was $40,000.

c) A total of $118,520 in cash found in Mr Huang's home.

[5] Under s 15(4) of the Act, the value of the forfeited cars needs to be fixed. That is still to be done. For present purposes, because of the view I take on the question of penalty, it is unnecessary to fix the value with precision. I will simply assume that the cars are now worth around $80,000. This puts the total value of property forfeited by Mr Huang at around $200,000.

[6] Mr Wei pleaded guilty to one count of supplying methamphetamine and one count of possession of methamphetamine for supply. There was a disputed facts hearing before me for the purposes of sentencing. I concluded that Mr Wei had supplied or had possession for supply of a total of 5.358 kilograms of methamphetamine. Of that total I was satisfied that Mr Wei had sold at least 152 ounces (approximately 4.3 kilograms). I am satisfied that Mr Wei received payments at $9,000 an ounce. The total received by Mr Wei on these figures is $1,368,000.

[7] The property seized from Mr Wei and now forfeited to the Crown is the following:

a) $558,400 in cash. This was found in an ASB bank vault held in Mr Wei's name.

b) $11,000 found in an apartment in Auckland with which Mr Wei was connected and in which the Police also found 499 grams of methamphetamine.

c) $38,000 in a Chrysler Crossfire car which was being driven by Mr Wei when stopped by Police on 9 November 2006. There was also 522 grams of methamphetamine in the car.

d) The Chrysler car was also forfeited to the Crown.

[8] The value of the Chrysler car still has to be assessed. For present purposes I will assume the car is worth around $20,000 to $25,000. This puts the total value of the property forfeited at around $630,000.

[9] Mr Huang and Mr Wei were both sentenced on 8 May 2009 to imprisonment for 15 years. They will almost certainly be deported on their release from prison, Mr Huang to Taiwan and Mr Wei to China.

[10] There is no evidence that either of them has any assets other than the property that has now been forfeited. In Mr Huang's case Mr Finn, for the Solicitor-General, did not seek to argue otherwise to any real extent. Mr Finn did submit that an inference could be drawn that Mr Wei has assets in China. This was based on evidence that Mr Wei remitted substantial sums to a person named Xiao Pang in China. There were intercepted phone discussions between Mr Wei and Xiao Pang referring to money transfers. Receipts were found by Police for remissions to China by Mr Wei totalling $255,900. However, my conclusion on the balance of probabilities is that the money transferred by Mr Wei to China was not transferred for his benefit.

Discussion

[11] Pecuniary penalty orders may be made under s 25 of the Act. The material provisions are:

> **25 Pecuniary penalty orders**
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> (1) On the hearing of an application for a pecuniary penalty order in respect of benefits derived by a person from the commission of a serious offence, the Court may, if it is satisfied that the person derived benefits from the commission of that offence,—
>
> (a) Assess, in accordance with sections 27 and 28 of this Act, the value of the benefits so derived; and
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> (b) Order the person to pay to the Crown a pecuniary penalty not greater than the penalty amount.
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> (2) The penalty amount is the value of the benefits assessed under sections 27 and 28 of this Act, reduced by—

> (a) An amount equal to the value of any property that has been forfeited, or is proposed to be forfeited, to the Crown under this Part of this Act as proceeds of the relevant serious offence; and
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> …

[12] The first step is to assess "the value of benefits" obtained by each respondent from the drug dealing. If those benefits do not exceed the value of the property forfeited then, pursuant to s 25(2)(a), no pecuniary penalty order should be made.

[13] Mr Mansfield, for Mr Wei, did not submit that benefits derived by Mr Wei did not exceed the value of the property forfeited. Based on my conclusion, earlier recorded, that the total cash received by Mr Wei when he sold methamphetamine was $1,368,000, the sum remaining after deducting the value of the property forfeited is $738,000.

[14] Mr Bonnar, for Mr Huang, submitted that there was no evidence that Mr Huang derived benefits from his crime in excess of the value of the property seized. Mr Bonnar submitted that although Mr Huang was found to have made the deliveries, at least for some of them the money may not have been handed over to Mr Huang. The basis for the submission appears to be that there was direct surveillance evidence of Mr Huang's receiving money in exchange for methamphetamine on only one occasion of supply by Mr Huang, out of the total of six counts of supply. However, there is a body of other evidence, including intercepted conversations, indicating that Mr Huang received the required sum for each delivery except, possibly, for one delivery of 10 ounces. This conclusion is supported by the fact that, in November 2006, a few weeks after the deliveries were made, Mr Huang had possession of cash totalling almost $200,000 out of the total of $477,400 he had received in October.

[15] This is the evidence, in outline, which satisfies me that the total received by Mr Huang was $477,400 as earlier recorded. The value of the property forfeited, deducted from the total received by Mr Huang, leaves a balance of $277,000. Subject only to any necessary adjustment for the actual value of the two cars, a pecuniary penalty order could be made for that amount.

[16] The issue that remains is whether a pecuniary penalty should be ordered when it has been established that benefits derived from the offence exceed the value of property to be forfeited, but there is no evidence that the offender has other assets.

[17] Mr Finn submitted that penalties should be imposed even if I concluded, as I have done, that there is no evidence of other assets. Mr Finn relied on a passage in the joint judgment of Cooke P and Richardson J (delivered by Cooke P) in *R v Pedersen*[1]. The President said, at 391:

> In simple cases of serious drug selling the courts should be slow to award less than the maximum penalty against sellers.

[18] I do not read this statement, in its context, as intending to convey an opinion that the maximum penalty should generally be imposed even though the offender has no means of paying it. That was not a circumstance which required consideration in *Pedersen*. The statement relied on by Mr Finn was one intended to lend emphasis to the broad purpose of the penalty provisions in the Act. The point being emphasised was that the policy of the Act would be thwarted if the word "benefits" in s 25 was held to mean what would be termed net profit in cases of legitimate commerce. It was the meaning of the word "benefits" which was the point in issue in *Pedersen*.

[19] In the preceding paragraph Cooke P said:

> The discretion to order a lesser amount falls to be exercised in the light of the policy of the Act. We do not think that the mere fact that the price received by an illegal seller exceeded his ultimate profit would be enough to justify a lesser penalty.

This statement recognised that there may be other circumstances which could justify a lesser penalty. Section 25(1) gives the Court a discretion to order a penalty and, if a decision is made to impose a penalty, a further discretion to fix the penalty at a sum less than the "penalty amount". Cooke P referred to one reason why a Court might decide to impose a penalty less than the penalty amount. The example he gave was co-operation with the Police, being "a ground on which a sentencing discretion can be exercised in a defendant's favour". He went on to say, at 391:

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[1] *R v Pedersen* [1995] 2 NZLR 386 (CA).

> This appeal does not require us to try and visualise all the circumstances which might justify a reduction. It would not be sensible to make that attempt at this stage. Experience of a range of cases in which the Act falls for practical application may be expected to be helpful.

[20] As a matter of law, therefore, the Court does have a discretion to reduce the penalty that might otherwise be imposed, or to impose no penalty at all, if the defendant's assets are less than the penalty amount assessed under s 25, or if the defendant has no assets at all. This was the conclusion reached by Winkelmann J in *Solicitor-General v McQuade*[2], a decision relied on by Mr Mansfield and Mr Bonnar on this point.

[21] Mr McQuade was convicted of methamphetamine dealing offences. He had been arrested in the course of the same operation that led to the arrest of Mr Huang and Mr Wei. Winkelmann J found that the value of the benefits derived by Mr McQuade was $624,000. Mr McQuade's evidence was that he had no assets other than a sum of just under $85,000, being his share of the net proceeds of sale of his home. This cash was not subject to forfeiture under s 15.

[22] After rejecting a number of arguments for Mr McQuade, Winkelmann J came to the point that arises in the present case.

> [23] A more significant issue arises in relation to the level at which a pecuniary penalty order should be set, given Mr McQuade's evidence that the $94,000 is the only money he has. The offender's ability to pay any pecuniary penalty is a relevant consideration. Where, as here, there is no suggestion that the respondent has secreted away proceeds of his offending, there is no reason to impose a penalty greater than the amount the respondent can pay. I see no point in fixing a pecuniary penalty order that Mr McQuade will not be able to pay when he is to serve a lengthy sentence of imprisonment. It is highly undesirable that Mr McQuade face a substantial penalty on his release from prison, many years in the future, that he must then set about paying. That is likely to hinder his rehabilitation and therefore will not be in the public interest. I record, however, that if there were any suggestion that Mr McQuade had funds hidden away, the attitude I would take on this issue would most likely be different.

[23] In *Solicitor-General v Dear*[3] Patterson J came to a different conclusion. He said, at 7:

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[2] *Solicitor-General v McQuade* (HC AK, CIV 2008-404-4161, 18 September 2009)
[3] *Solicitor-General v Dear* (HC AK, M1354/95, 24 April 1997)

> [Section 52(2)] provides that the pecuniary penalty is to be the amount of the benefit fixed in accordance with the provisions of ss 27 and 28 less certain reductions. None of those reductions apply in this case so the pecuniary penalty is fixed at $237,450 notwithstanding that in practical terms this is well above the amount which the Solicitor-General will receive.

[24] This could be taken to mean that there can be no reduction of a penalty except as provided for in ss 27 and 28. If that is the meaning intended then, with respect, I disagree. If that were the case there would have been no point in making provision for the discretions that are provided in s 25(1).

[25] I am of the opinion that the discretion should be exercised in this case to decline to make pecuniary penalty orders at this date. My reasons are, in part, the reasons that led to Winkelmann J's conclusion in *McQuade*. I will set out my reasons, including those recorded in *McQuade*.

[26] Pecuniary penalty orders are intended as a deterrent, beyond the deterrent and other purposes of a sentence stipulated in the Sentencing Act 2002: see *R v Pedersen.* That does not mean, however, that principles and purposes taken into account on sentencing are to be ignored on an application for a pecuniary penalty order. That point was also made in *Pedersen* with the reference to co-operation with Police. If Mr Huang and Mr Wei are not deported on their release from prison, the existence of an unpaid pecuniary penalty would, as Winkelmann J said, be likely to hinder rehabilitation and for that reason not be in the public interest. If Mr Huang and Mr Wei are deported, as seems likely, the imposition of pecuniary penalties would be futile. The Court should not, in my judgment, make penal orders which are futile. It would be futile to impose penalties that Mr Huang and Mr Wei would be incapable of paying prior to deportation and which would remain unpaid on deportation. Following deportation, the prospects of enforcing a penalty in a foreign jurisdiction such as Taiwan or China would probably be fairly remote. I do not consider that Court orders of a serious, penal nature should be made in such circumstances.

[27] For these reasons I consider, in exercise of my discretion, that pecuniary penalty orders should not be made having regard to the evidence presently available.

However, to cover the possibility that other assets are located, I will dismiss the application without prejudice to a new application being made.

Result

[28] The applications in each case for pecuniary penalty orders are dismissed, but with leave reserved to the Solicitor-General to bring a fresh application against either respondent if there is evidence that a respondent has assets in addition to those in respect of which the forfeiture order was made.

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Peter Woodhouse J