DIRECTOR OF PUBLIC PROSECUTIONS and Another v MOLONEY

COURT OF APPEAL

MANDIE and BONGIORNO JJA and SIFRIS AJA

23 August, 16 September 2011

[2011] VSCA 278

Criminal law — Confiscation — Automatic forfeiture offences — Tainted property — Restraining order — Ex parte application — Disclosure obligation — Material matters of fact — No general discretion to grant or refuse order — Criteria — Alleged drug trafficking offences — Lack of commerciality not a relevant matter — "Any relevant matters" — "Reasonable grounds" — Confiscation Act 1997 (No 108) ss 16, 18, 26, Sch 2.

Section 16(2)(c) of the Confiscation Act 1997 ("the Act") empowered the Director of Public Prosecutions ("the director") to apply without notice to the Supreme Court or the County Court for a restraining order in respect of property if a person had been charged with a Sch 2 offence and that person had an interest in the property or the property was tainted property in relation to that offence.

Section 16(4) of the Act provided that an application under s 16(2)(c) of the Act was to be supported by an affidavit "setting out any relevant matters".

Section 18(1) of the Act obliged the court to make a restraining order if the defined conditions were made out. The section provided that the court must make a restraining order if (relevantly) the court was satisfied that the defendant had been charged with a Sch 2 offence and it considered that having regard to the matters contained in the supporting affidavit and any other sworn evidence there were "reasonable grounds" for making the order.

The director obtained an ex parte restraining order pursuant to s 16(2)(c) of the Act in respect of an accused person's net equity in real property ("the property"). The accused had been charged with the Sch 2 offences of cultivating and trafficking in a commercial quantity of cannabis (which were automatic forfeiture offences in Sch 2 of the Act) and possession of cannabis, and it was alleged that because the property in question had been used in or in connection with the commission of the alleged offences it was "tainted property" as defined in s 3 of the Act. The director, by his counsel, undertook on behalf of the State of Victoria ("the undertaking") to abide any order that the court might make as to damages should the court thereinafter be of the opinion that the accused had sustained any by reason of the restraining order which the director should pay.

At the time of the making of the affidavit in support of the director's application and at the time of the making of that application, an agreement had been reached with the Office of Public Prosecutions that the trafficking charges (together with other charges) would be withdrawn and that the accused would plead guilty to some of the remaining charges, including cultivating a commercial quantity of cannabis, and that the case would proceed on the basis that no commercial trafficking was involved.

The defendant was convicted, no exclusion application was brought by any person and the property was forfeited by operation of s 35(1) of the Act. On the convicted man's application seeking relief in respect of the application for the restraining order, the order itself and the forfeiture of the property, a County Court judge ordered the State to pay $262,720 to the defendant by way of enforcement of the undertaking. The director and the State appealed. On the appeal, the respondent conceded that the withdrawal of the charge of trafficking in a commercial quantity was not a material matter to be disclosed on the application for a restraining order.

Held, allowing the appeal: (1) The court did not have a general discretion under s 18(1) of the Act to grant or refuse a restraining order. That provision obliged the court to make a restraining order if the defined conditions were made out. [44].

Director of Public Prosecutions v Vu (2006) 14 VR 249 referred to.

(2) The expression "reasonable grounds" in s 18(1) of the Act was a reference back to the matters that were required to be proved (relevantly) under s 16. The matters to be proved varied but, in each case, the court had to consider that the material produced provided reasonable grounds for making the restraining order, having regard to the particular statutory requirements. In other words, the requirement of "reasonable grounds" related to the satisfactory proof of the defined conditions (in part facts and in part beliefs) set out in the Act and not to a general criterion of reasonableness in all the circumstances. [45].

Per curiam. If, contrary to the foregoing holding, the court had a general, or even a residual, discretion to refuse to make a restraining order even if the defined conditions were established, the lack of commerciality was not a "relevant matter" within the meaning of s 16(4) of the Act or otherwise a material matter to be disclosed. [49].

Decisions of Judge Saccardo [2010] VCC 0481 and [2010] VCC 1201 set aside.

Appeal

This was an appeal against an order made by a County Court judge for the payment of damages by way of enforcement of an undertaking as to damages given by the State of Victoria in order to obtain a restraining order under the Confiscation Act 1997. The facts are stated in the judgment.

S G O'Bryan SC and *L G De Ferrari* for the appellants.

F I O'Brien SC and *J Buchecker* for the respondent.

Cur adv vult.

1 **Mandie and Bongiorno JJA and Sifris AJA.** The Director of Public Prosecutions ("DPP") and the State of Victoria appeal against orders[1] made by a judge in the County Court whereby the State was in substance ordered to pay the sum of $262,720 to Robert Gerard Moloney ("the respondent" or "Mr Moloney") by way of enforcement of an undertaking as to damages given on behalf of the State in order to obtain a restraining order[2] under the Confiscation Act 1997 ("the Act"). The amount so awarded represented Mr Moloney's net equity in real property situated at 71 Mathiesons Lane, Nirranda ("the property").

Background and procedural history

2 By an application dated 4 September 2008, the DPP sought a restraining order pursuant to s 16(2)(c) of the Act in respect of the property. Section 16(2)(c) of the Act empowers the DPP to apply without notice to the Supreme Court or the County Court for a restraining order in respect of property if:

1. The relevant orders were an order made 8 September 2010 as varied by an order made 1 October 2010.
2. The undertaking was recorded in a restraining order made by Judge McInerney in the County Court on 9 September 2008.

> … a person has been charged with a Schedule 2 offence and that person has an interest in the property or the property is tainted property in relation to that offence.

3 The application recited that the jurisdiction to make the order sought arose because Mr Moloney had been charged with the offences of:

> Cultivate a commercial quantity of cannabis, traffick cannabis in a commercial quantity and possess cannabis, amongst other offences, and some of these offences are Schedule 2 offences within the meaning of [the Act].

4 The application further stated, inter alia, that the purpose of the order sought was to satisfy automatic forfeiture of property that might occur under Div 2 of Pt 3 of the Act.

5 The application was supported by an affidavit of Alexander Kenneth Harris, Detective Senior Constable of Victoria Police ("the deponent"), sworn 4 September 2008. The supporting affidavit disclosed that the police had discovered 26 cannabis plants in bushland on the banks of Whiskey Creek near Nirranda and that surveillance had led to Mr Moloney being identified as the person responsible for cultivating the plants. The deponent said that on 9 April 2008, Mr Moloney had harvested the plants and transported them to his residence, that Mr Moloney had been intercepted by police and that a search of his car produced 3.7 g of cannabis, that, on the same day, police had executed a search warrant at the property and discovered about 52 kg of cannabis material on the property, including 38 cannabis plants, and that a second search warrant, executed at the site in Whiskey Creek, had resulted in about 2.3 kg of cannabis material being discovered. The deponent went on to say that Mr Moloney had made full admissions about cultivating, harvesting and possessing the Whiskey Creek cannabis crop, the cannabis found at the property and the cannabis found in his car.

6 The affidavit went on to state that Mr Moloney had been charged[3] with a number of offences including "cultivate a narcotic plant, commercial quantity" and "traffick cannabis, commercial quantity". A botanist's certificate and statement was exhibited confirming the material to be cannabis L with a total weight of 55 kg. The deponent referred to Pt 2 of Sch 11 of the Drugs, Poisons and Controlled Substances Act 1981 which defined a commercial quantity of cannabis as 25 kg or 100 plants and then stated that it was therefore alleged that Mr Moloney had cultivated and trafficked in a commercial quantity of cannabis and that cultivation and trafficking a commercial quantity of cannabis were automatic forfeiture offences in Sch 2 of the Confiscation Act.

7 The deponent stated that on the basis of the matters described in his affidavit, he believed that the property was tainted property as defined by s 3 of the Act because it was used in or in connection with the commission of the offences with which Mr Moloney had been charged. His affidavit then exhibited a copy of the certificate of title to the property showing that Mr Moloney was registered as the sole proprietor and the deponent stated that there was a current mortgage held by the ANZ Bank.

8 On the basis of that affidavit and upon the DPP, by his counsel, undertaking on behalf of the State to abide by any order that the court might make as to damages in case the court should thereinafter be of the opinion that Mr Moloney had

---

3. A copy of the relevant charge sheets was exhibited.

sustained any by reason of the restraining order which the DPP ought to pay, Judge McInerney granted the restraining order ex parte on 9 September 2008. The order provided that no person should dispose of or otherwise deal with the property and that the order was granted for the purpose, inter alia, of satisfying automatic forfeiture of property under the Act.

9 In fact, at the time that the affidavit in support of the application was sworn and at the time that the application was made, the affidavit was incorrect in that, as a result of negotiations between Mr Moloney's solicitor and the Office of Public Prosecutions, it had been agreed that the trafficking charge (along with a number of the other charges) would be withdrawn and that Mr Moloney would plead guilty to some of the remaining charges, in particular to the charge of cultivating a commercial quantity of cannabis. We interpolate that it is to be noted that this charge to which Mr Moloney indicated that he would be pleading guilty was a Sch 2 offence under the Act, rendering the property liable to be automatically forfeited (if there was a relevant restraining order and a conviction on that charge was obtained). At the time that the affidavit was sworn, there was not only an agreement as above described but, at a committal mention on 1 August 2008, the prosecution had made a formal application for the trafficking and certain other charges to be withdrawn and it was also indicated that there would be a guilty plea to some of the remaining charges, including the charge of cultivating a commercial quantity of cannabis.

10 The deponent has subsequently sworn that he was not aware at that time of the matters outlined in the preceding paragraph above and there has been no evidence or suggestion to the contrary in the subsequent proceedings referred to below. Of course, it is clear that the DPP was under an obligation to ensure that the correct facts rather than incorrect ones were stated to the court, but it is the consequences of not doing so that are raised by this appeal.

11 Another aspect needs to be mentioned. During his initial interview by the police, Mr Moloney, while making full admissions as to the cultivation of a large quantity of cannabis, maintained that he was a heavy user of cannabis and that it was for his own use. In line with that, after he had been charged, his solicitor advised the then informant at an early stage that Mr Moloney would plead guilty to cultivation charges but not trafficking charges. Once the forensic weight of the cannabis had been determined, the then informant advised Mr Moloney's solicitor that the matter needed to be dealt with in the County Court. Subsequently, Mr Moloney's solicitor said to a representative of the Office of Public Prosecutions that Mr Moloney would plead guilty to all charges including cultivation on the basis that the charges relating to trafficking were withdrawn as there was no evidence of that kind of trafficking and that Mr Moloney was a heavy user of cannabis which he asserted was grown for his own use. This stance was subsequently confirmed in writing by Mr Moloney's solicitor to the Office of Public Prosecutions.

12 It was implicit, if not explicit, in the agreement reached that there was no evidence of any trafficking or intent to traffick by Mr Moloney. That matter was carried through to the plea hearing which took place on 19 November 2008 when the prosecutor told the court that:

> … there is no evidence whatsoever of any commerciality about the matter. It is not a hydroponically grown crop or any paraphernalia that would indicate a commercial nature of the growing … [T]he police that interviewed him are satisfied that there is no

> aspect of commercial trafficking involved whatsoever … it's not suggested that the property has been acquired by the process of trafficking or the like.[4]

13 The prosecution's acceptance that there was no evidence of "commerciality"[5] involved in Mr Moloney's conduct was not disclosed to Judge McInerney by the deponent on the application for the restraining order, but the deponent was not personally aware of that "matter".

14 On 24 September 2008, Mr Moloney was served with a copy of the restraining order made on 9 September 2008. On 19 November 2008, Mr Moloney pleaded guilty to three charges, namely, cultivating a narcotic plant, cannabis, commercial quantity, possessing cannabis and possessing a prohibited weapon without an exception (crossbow) and he was convicted thereon within the meaning of s 4 of the Act. The hearing then continued as a plea with statements being made by the prosecution as set out above. The plea hearing was adjourned by the judge hearing the plea until it was known whether the property would be forfeited.

15 No exclusion application was brought by any person within the 60 day period after the conviction and accordingly the property was automatically forfeited on 18 January 2009 by operation of s 35(1) of the Act. On 22 September 2009, a declaration was made in the County Court that the property was forfeited to the minister (the Attorney-General) pursuant to s 36 of the Act. On 28 September 2009, Mr Moloney was sentenced to a total effective sentence of two years and 10 months' imprisonment, wholly suspended for an operational period of three years.

16 On 17 November 2009, Mr Moloney filed an application and summons seeking relief in respect of the application for the restraining order, the restraining order itself, and the forfeiture of the property. On 20 November 2009, the Certificate of Title to the property was amended to reflect that the Attorney-General was the sole registered proprietor and to remove registration of the restraining order. Mr Moloney's application of 17 November 2009 was amended on or about 15 April 2010 and he proceeded before the County Court on an application for a declaration that the restraining order was of no effect and consequential relief including the transfer of the property back to him.

17 The judge heard that amended application on 15 and 16 April 2010 and handed down reasons for judgment on 19 May 2010.[6]

Relevant provisions of the Act

18 Section 15(1) of the Act provides that a restraining order may be made to preserve property or an interest in property in order that the property or interest will be available for a number of purposes including to satisfy automatic forfeiture of property that may occur under Div 2 of Pt 3 of the Act.

---

4. The respondent relied below on these statements by the prosecutor on the plea as being consistent with the acceptance by the DPP at an earlier time before the swearing of the affidavit in support of the application for a restraining order that there was no "commerciality" about the respondent's criminal conduct. The DPP proceeded below, and on this appeal, on the basis that the prosecution had agreed prior to the application for a restraining order that it would accept at the plea hearing that the respondent had not engaged in the cultivation of cannabis as part of a commercial enterprise.
5. The statement that there was no evidence of commerciality may be taken to be convenient shorthand for the lack of evidence that Mr Moloney was trafficking or intending to traffick in cannabis and we will use it in that sense.
6. *Moloney v Attorney-General* [2010] VCC 0481.

19 Section 16 of the Act relevantly provides:

(2) The DPP … may apply, without notice, to the Supreme Court or the County Court for a restraining order in respect of property if—

- (a) a member of the police force suspects on reasonable grounds that the property is tainted property in relation to a Schedule 2 offence; or
- (b) a member of the police force or a person authorised by or under an Act to prosecute the relevant type of offence believes that—
  - (i) within the next 48 hours a person will be charged with a Schedule 2 offence; and
  - (ii) that person has an interest in the property or that the property is tainted property in relation to that offence; or
- (c) a person has been charged with a Schedule 2 offence and that person has an interest in the property or the property is tainted property in relation to that offence; or
- (d) a person has been convicted of a Schedule 2 offence and that person has an interest in the property or the property is tainted property in relation to that offence.

…

(3) An application under subsection (2) for the purposes of automatic forfeiture may only be made before the end of the relevant period in relation to the conviction.

(4) An application under subsection (1) or (2)(b), (c) or (d) must be supported by an affidavit of—

- (a) a member of the police force; or
- (b) a person authorised by or under an Act to prosecute the relevant type of offence—

setting out any relevant matters and stating that the member or person believes the following matters and setting out the grounds on which the member or person holds those beliefs—

- (c) in the case of an application made in reliance on the proposed charging of the accused with an offence, that the accused will be so charged within the next 48 hours; and
- (d) that the accused has an interest in the property or the property is tainted property, as the case may be;

…

(5) An application under subsection (2)(a) must be supported by an affidavit of a member of the police force setting out any relevant matters and stating that the member suspects that the property is tainted property in relation to a Schedule 2 offence and setting out the grounds on which the member has that suspicion.

(6) An application under subsection (1) or (2) in relation to property or an interest in property may be made more than once, whether on the same grounds or different grounds, for any purpose referred to in section 15(1).

…

20 Whereas s 16(2) is concerned with an application without notice, s 17 of the Act deals with the question whether notice of the application should be given to any person who the court has reason to believe has an interest in the property the subject of the application.[7] Section 17(2) provides that any person notified of an application may appear and give evidence at the hearing of the application but the absence of that person does not prevent the court from making a restraining order. Section 17(1C) provides that if the court does not require notice of an application

7. An earlier version of the relevant provisions, including s 17, had given rise to two Court of Appeal decisions: *Navarolli v Director of Public Prosecutions* (2005) 159 A Crim R 347 and *Director of Public Prosecutions v Vu* (2006) 14 VR 249.

to be given, it may hear and determine the application in the absence of any person who has an interest in the property that is the subject of the application.

21 Section 18 of the Act, which governs the power of the court to make a restraining order and which applies both to ex parte and inter partes applications, relevantly provides:

> (1) On an application under section 16(1) or (2)(b), (c) or (d), the court must make a restraining order if it is satisfied that the accused—
> (a) has been, or within the next 48 hours will be, charged with; or
> (b) has been convicted of—
> a Schedule 1 offence or a Schedule 2 offence (as the case may be) and—
> (c) it considers that, having regard to the matters contained in the affidavit supporting the application and to any other sworn evidence before it, there are reasonable grounds for making the restraining order; and
> …
> (2) On an application under section 16(2)(a), the court must make a restraining order if it is satisfied that—
> (a) the deponent of the affidavit supporting the application does suspect that the property is tainted property in relation to a Schedule 2 offence; and
> (b) there are reasonable grounds for that suspicion.

22 Section 19 of the Act provides that the applicant must give written notice of the making of a restraining order to a person whose property is affected in cases where that person has not had prior notice of the application.

23 Section 20 of the Act provides that any person claiming an interest in the property the subject of a restraining order may make an exclusion application under ss 21, 22 or 24. As to cases where the restraining order has been made in relation to a Sch 2 offence for the purposes of automatic forfeiture, s 22 provides that the court may make an order excluding the applicant's interest in the property from the operation of the restraining order if the court is satisfied of a number of matters, including that the property was lawfully acquired and is not tainted property.

24 Section 26 of the Act relevantly provides:

> (1) The court may, when it makes a restraining order or at any later time, make such orders in relation to the property to which the restraining order relates as it considers just.
> …
> (5) Examples of the kind of order that the court may make under subsection (1) are—
> (a) an order varying the property to which the restraining order relates;
> (b) an order varying any condition to which the restraining order is subject;
> (c) an order providing for the reasonable living expenses and reasonable business expenses of any person referred to in section 14(4);
> (d) an order relating to the carrying out of any undertaking given under section 14(7) in relation to the restraining order;
> (e) an order for examination under Part 12;
> (f) an order directing any person whose property the restraining order relates to or any other person to furnish to such person as the court directs, within the period specified in the order, a statement, verified by the oath or affirmation of that person, setting out such particulars of the property to which the restraining order relates as the court thinks proper;
> (g) an order directing any relevant registration authority not to register any instrument affecting property to which the restraining order relates while it is in force except in accordance with the order;

(ga) if the restraining order did not direct a trustee to take control of property in accordance with section 14(3), an order directing a trustee to take control of property at any later time specified in the order under subsection (1);

(h) if the restraining order directed a trustee to take control of property—

(i) an order regulating the manner in which the trustee may exercise powers or perform duties under the restraining order;

(ii) an order determining any question relating to the property;

(i) an order directing a person to whose property the restraining order relates or who has an interest in that property to use or manage specified property to which the restraining order relates, subject to conditions specified in the order;

(j) an order directing a person prescribed for the purposes of subsection (2)(da), if that person so consents, to do any activity specified in the order that is reasonably necessary for the purpose of managing specified property to which the restraining order relates.

25 Section 35(1) of the Act deals with automatic forfeiture and provides:

(1) If—

(a) a person is convicted of a Schedule 2 offence; and

(b) a restraining order is or was made under Part 2 in respect of property for the purposes of automatic forfeiture in reliance on—

(i) the conviction of the accused of that offence; or

(ii) the charging or proposed charging of the accused with that offence or a related offence that is a Schedule 2 offence; and

(c) the restrained property is not the subject of an exclusion order under section 22—

the restrained property, subject to any declaration under section 23, is forfeited to the Minister on the expiry of 60 days after—

(d) the making of the restraining order; or

(e) the conviction of the accused—

whichever is later.

The judgment dated 19 May 2010

26 The judge said that Mr Moloney had submitted that in making the ex parte application for a restraining order, the deponent was under an obligation to make full disclosure to the court of the fact that a number of charges that had originally been laid were not being proceeded with and that there was no commerciality alleged against Mr Moloney in respect of the charges which remained and that the failure to inform the court of those matters involved a fundamental breach of the obligation imposed upon the deponent by s 16(4) of the Act to inform the court of any relevant matters, so that the restraining order was rendered null and void. Alternatively, it had been submitted by Mr Moloney that, if a valid restraining order was made, the order should be set aside by reason of the failure to comply with the obligation to make proper disclosure. The judge said that the appellants (the respondents before him) had submitted that the provisions of the Act did not impose a duty upon the deponent to acquaint the court of the said matters and that, in any event, the property having now been forfeited and transferred, there was no jurisdiction to grant any relief to Mr Moloney.

27 The judge rejected a submission by the appellants that s 16 of the Act set out a definitive list of the matters which were required to be dealt with in the supporting affidavit. The judge referred to *Director of Public Prosecutions v Vu*

("*Vu*")[8] and said that the judgment in that case should not be taken to have exhaustively categorised the matters which were to be contained in such an affidavit. The judge then said:[9]

> I am satisfied that s 16(4) of the Act, when requiring the affidavit in support of the application for a restraining order to set out:
>
> "any relevant matters"
>
> imposed upon [the deponent] an obligation to accurately describe the charges against the applicant which were proceeding and further, to disclose any relevant information which the Crown possessed with respect to those charges. If it was suggested that there was an element of commerciality involved in the cultivation charge, I consider that [the deponent] should have included that information in his affidavit. I consider the absence of any suggestion of commerciality as being equally significant.
>
> My finding in this regard is influenced by the fact that in an ex parte application the Court relies solely upon the material supplied in the affidavit prepared pursuant to s 16(4) of the Act when determining whether there are reasonable grounds for making the restraining order. The Court is required however, when making the order, to "make such orders in relation to the property to which the restraining order relates as it considers just" [a footnote referred to s 26(1) of the Act]. If the contention of [the DPP and the State] that the obligation of disclosure imposed by s 16(4) of the Act is confined to establishing the formalities required by s 16, namely [the judge listed the various requirements of the section] was accepted, it is difficult to see how the Court could take into account and apply issues of justice as required by s 26(1) of the Act.

28 His Honour said that the deponent should have set out in his affidavit that the DPP accepted that there was no suggestion that Mr Moloney was engaged in commercial trafficking and that it should not be contended that the cannabis crop was being grown for commercial purposes.

29 The judge then turned to the meaning of the phrase "reasonable grounds" in s 18 of the Act. The judge rejected a submission by the appellants that "reasonable grounds" related only to the authority of the DPP or other applicant to apply for a restraining order and the reasonableness of the applicant's belief as to the matters set out in s 16 of the Act. The judge said that s 18(1)(c) of the Act required the court to "assess and weigh the totality of the relevant evidence when deciding whether it is reasonable to make the order sought". The judge indicated that the relevant evidence in that regard included the matters that had not been disclosed by the deponent (that is, the withdrawal of some of the charges and the "lack of commerciality" of Mr Moloney's conduct). His Honour said that in this regard his opinion was reinforced by the provisions of s 26(1) of the Act which gave the court the power, when making a restraining order, to make an order which it considered to be just. He added that "[i]t is conceded by the parties that the power provided to the court by s 26(1) includes the power to set aside a restraining order on the ground that it is just to do so" and the fact that the court may consider issues of justice when exercising its power to set aside a restraining order supported his view that in considering whether there were reasonable grounds for making a restraining order "issues of justice" should not be ignored by the court if they arose.

8. (2006) 14 VR 249.
9. At [30]–[31].

30 His Honour concluded that, in considering whether a restraining order should have been made under s 18(1)(c) of the Act, the court was entitled to take into account the said matters that the deponent had not disclosed to the court and which he ought to have made known to the court pursuant to his duty to make proper disclosure.

31 The judge went on to state that a failure to make full and frank disclosure of material facts on an ex parte application for relief in the form of a *Mareva* injunction entitled a defendant to an immediate discharge of the injunction and a restoration of the position that obtained before the injunction was granted. He then dealt with a submission on behalf of the appellants that the failure to disclose material facts might not warrant the setting aside of an ex parte injunction if the facts involved were not of sufficient materiality but said that, having regard to the structure of the Act, which, upon conviction, involved the automatic forfeiture of property the subject of a restraining order, the failure to make full and frank disclosure by the deponent would have warranted an immediate discharge of the restraining order. However, because the property had already been forfeited under s 35(1) of the Act, his Honour decided that the court no longer had the power to set aside the restraining order.

32 The judge summarised his findings as follows:[10]

> The findings I have made may be summarised as follows:
>
> (1) In filing his affidavit in support of a restraining order, [the deponent] was under a duty to inform the Court of any relevant matters. This duty included an obligation to:
>   (a) accurately describe the charges which were proceeding against [Mr Moloney];
>   (b) advise the Court of the fact that the Office of the Director of Public Prosecutions had accepted the position put to it on [Mr Moloney's] behalf:
>   (i) that there was no suggestion that he had engaged in the commercial trafficking of cannabis; and
>   (ii) that it would not be contended that the cannabis crop was being grown for commercial purposes.
>
> (2) Pursuant to the provisions of s 18 of the Act, the Court was entitled to take into account the lack of commerciality involved in the charges brought against [Mr Moloney] when assessing whether there were reasonable grounds for making the restraining order which was sought by [the deponent],
>
> (3) The failure by [the deponent] to properly inform the Court of relevant matters in the course of the ex parte application for the restraining order did not render the order null and void but rather was such that it warranted the setting aside of the order in circumstances in which the court has the jurisdiction to do so.
>
> (4) Having regard to the forfeiture of the property which has now been effected pursuant to s 35(1) of the Act, the Court does not possess the power to discharge the Restraining Order.

Reasons for judgment dated 8 September 2010[11]

33 After the judgment of 19 May 2010, the parties filed written submissions, the State of Victoria was added as a respondent to Mr Moloney's application and the judge granted leave to Mr Moloney to further amend his application to include

10. *Moloney v Attorney-General* [2010] VCC 0481 at [57].
11. *Moloney v Attorney-General (No 2)* [2010] VCC 1201.

a prayer for relief by way of damages and the matter proceeded as a claim for damages in accordance with the undertaking given on behalf of the State at the time that the restraining order was made.

34 A further hearing was conducted before the judge on 19 August 2010 and judgment was handed down on 8 September 2010.

35 In this second judgment, his Honour said inter alia that Mr Moloney's delay in making the application was not in the circumstances so unreasonable as to render inequitable the enforcement of the undertaking as to damages, that the loss by Mr Moloney of the property was directly caused by the wrongful making of the restraining order and that, but for the making of the restraining order, the property would not have been confiscated. The judge accepted that, had the restraining order been set aside on the basis of the non-disclosure, the DPP had a discretion to apply for a fresh restraining order. However, his Honour said that on such a fresh application, the provisions of s 18(1)(c) of the Act would equally have applied and the court would have had to take into account the totality of relevant evidence, including the matters previously not disclosed. His Honour therefore did not accept that the probable result of a fresh application would have been the granting of a restraining order "in circumstances in which the court would have been informed of the absence of any commerciality in the charges".

36 His Honour went on to consider whether, if the original restraining order had been set aside, a fresh application for a restraining order might have been made under s 16(2)(a) of the Act and said that if that had occurred, it was inevitable that a restraining order would have been made under s 18(2). However, his Honour referred to a number of discretionary aspects that would have affected that scenario such that it could not be said that the property would have been lost in any event.

37 The judge concluded that Mr Moloney was entitled to damages and these were ultimately assessed in the sum of $262,720.[12]

Grounds of appeal

38 The appellants' grounds of appeal were as follows:

> GROUNDS OF APPEAL
>
> *Regarding the First Judgment (reasons dated 19 May 2010)*
>
> 1. The learned judge erred in finding that s 16(4) of [the Act] imposed upon the deponent … an obligation to disclose that:
>   (a) a plea bargain had resulted, on 1 August 2008, in four of the charges being withdrawn (including a Schedule 2 charge of trafficking a commercial quantity of cannabis) with the respondent to plead guilty to the remaining three charges (including a Schedule 2 charge of cultivating a commercial quantity of cannabis);
>   (b) as part of the plea bargaining process, [the DPP] agreed that, in respect of the Schedule 2 charge of cultivating a commercial quantity of cannabis, there was "no commerciality" involved.
> 2. The learned judge erred in finding that the matters set out at paragraphs (1)(a) and (b) above were both relevant and material non-disclosures …

12. See order made 1 October 2010.

3. Alternatively, the learned judge erred in finding that the matters set out at paragraphs (1)(a) and (b) above were both relevant and material non-disclosures, in circumstances where:
   (a) the Schedule 2 charge of cultivating a commercial quantity of cannabis remained (further, the respondent would, in accordance with the plea bargain, plead guilty to it, as he in fact did on 19 November 2008); and
   (b) the Property was tainted by reason of the cultivation, at the Property, of the cannabis to which the Schedule 2 charge of cultivating a commercial quantity of cannabis related.
4. The learned judge erred in finding that the non-disclosures which he found to have occurred would have warranted, had an application to set aside the restraining order … been brought within time, the immediate discharge of the Restraining Order.
5. The learned judge erred in the proper construction of the Act as follows:
   (a) In construing the expression "any relevant matter" in s 16(4) as extending further than an obligation to disclose the matters to which subs (1), (2)(b), (c) or (d) of s 16 of the Act are directed.
   (b) In construing s 18(1), and in particular the requirement for the Court to consider that there are "reasonable grounds" for making the restraining order, as conferring a discretion whether to make the restraining order if "reasonable" and/or "just" to do so.
   (c) In construing s 18(1) by reference to s 26(1).

Regarding the Second Judgment (reasons dated 8 September 2010)

6. The learned judge erred in:
   (a) finding that the making of the Restraining Order directly caused the loss of the respondent's interest in the Property; and
   (b) reaching that conclusion independently of, and before considering whether, the respondent had established on the balance of probabilities that, but for the making of the Restraining Order, he would not have lost his interest in the Property in circumstances where he was convicted of the Schedule 2 charge of cultivating a commercial quantity of cannabis and the Property was tainted.
7. Regarding onus, the learned judge erred in:
   (a) finding that the respondent had discharged the onus of proving that the making of the Restraining Order directly caused the loss of the respondent's interest in the Property;
   (b) effectively shifting on the appellants the onus of proving that the making of the Restraining Order did not directly cause the loss to the respondent of his interest in the Property.
8. The learned judge erred in concluding that, had [the DPP] made a fresh application for a restraining order at any time before the end of the six months period after the respondent's conviction:
   (a) the Court would have been required to consider that there was "no commerciality" and that the Property had "not been acquired with any proceeds of crime" in deciding under s 18(1) whether to make the new restraining order;
   (b) the Court had a discretion whether to make the new restraining order (on a new affidavit in support which did not suffer from any material non-disclosure);
   (c) the Court would not have made the new restraining order; and
   (d) had the fresh application been made under s 16(2)(a), an application for an order for civil forfeiture would have been the only possibility.
9. Further to 8(d), the learned judge erred in failing to find that, had a fresh application for a restraining order been made under s 16(2)(a) with automatic

forfeiture as a purpose, the probable, if not inevitable, result would have been that:

(a) a restraining order would have been made; and

(b) the Property would have been automatically forfeited, pursuant to s 35 of the Act, 60 days after the respondent's conviction.

10. The learned judge erred in finding that:

(a) the absence of evidence of a practice in respect of the making of applications by the first appellant under s 58 and s 68 of the Act; and/or

(b) there being "no commerciality" and no evidence of the Property having been acquired with any proceeds of crime,

were:

(c) relevant considerations, in the context of the onus being on the respondent to prove that the loss of his interest in the Property was directly caused by the Restraining Order; alternatively,

(d) matters which negatived:

i. the first appellant's duty to discharge his obligations to enforce the Act as frilly as possible;

ii. the respondent having been convicted of a Schedule 2 charge of cultivating a commercial quantity of cannabis; and

iii. the Property being tainted.

11. The learned judge erred in failing to find that there were special circumstances warranting the non-enforcement of the undertaking as to damages given in connection with the Restraining Order, namely:

(a) the delay by the respondent, resulting in him not initiating any application with respect to the Restraining Order until November 2009;

(b) the prejudice to the first appellant, caused by the respondent's delay in pursuing other applications under the Act in respect of the Property; and/or

(c) the fact that, had the first appellant been able to make within time further applications under the Act, the respondent would have lost his interest in the Property;

(d) the respondent's Schedule 2 criminality resulting in the property being tainted property and therefore the primary cause for the restraining order being made.

Non-disclosure of a material matter?

39 It was common ground that the obligation to make full and frank disclosure on an ex parte application related only to material matters of fact.[13] The appellants submitted that the judge had erred in treating each of the matters that had not been disclosed to Judge McInerney as material matters to the grant of the restraining order. That is to say, it was submitted that neither the withdrawal of the charge of trafficking in a commercial quantity nor the lack of commerciality of Mr Moloney's conduct was a matter relevant or material to whether or not a restraining order should be made. The judge below, as we have said, had treated each of these matters as material. The appellants submitted that the withdrawal of the trafficking charge was irrelevant because there remained the charge of cultivating a commercial quantity of cannabis which was also a Sch 2 offence. The appellants further submitted that the lack of commerciality of Mr Moloney's

13. See *R v Kensington Income Tax Commissioners; Ex parte Princess Edmond de Polignac* [1917] 1 KB 486; *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679; *Savcor Pty Ltd v Cathodic Protection International APS* (2005) 12 VR 639.

conduct was a matter only relevant to sentence and that, in any event, the court had no discretion to grant or refuse a restraining order if the express statutory conditions were made out.

40 On appeal, senior counsel for Mr Moloney conceded that the withdrawal of the charge of trafficking in a commercial quantity was not a material matter to be disclosed and we take it that the reason for that concession, which we think was correct, was that the charge of cultivating a commercial quantity of cannabis was also a Sch 2 offence, so that the requirement of s 16(2)(c) of the Act that the person "has been charged with a Schedule 2 offence" was satisfied in any event.

41 However, the respondent submitted that the failure to disclose the lack of commerciality of Mr Moloney's conduct did amount to the non-disclosure of a material matter because it was a matter that might have been taken into account by the court in deciding whether or not to grant a restraining order. This contention was based upon what the respondent submitted was the proper construction of the relevant provisions. In particular, the respondent referred to s 16(4) of the Act which requires an application to be supported by an affidavit "setting out any relevant matters *and* stating that [the deponent] believes the following matters and setting out the grounds on which [the deponent] holds those beliefs". The respondent argued that this language indicated that there were or might be "relevant matters" other than the specific matters expressly dealt with in s 16(4) or elsewhere in the Act. In addition, and the respondent placed greater emphasis on this, the respondent relied on the language of s 18(1) of the Act which requires the court to be satisfied of the matters in s 1(a) or 1(b) and further to consider that "having regard to the matters contained in the affidavit supporting the application and to any other sworn evidence before it, there are *reasonable grounds* for making the restraining order".[14]

42 The respondent submitted that, in the context, the reference to "reasonable grounds" meant that the court had a "residual" but "narrow" discretion to refuse a restraining order even if the express statutory conditions were made out. The respondent did not explain why, if the court had a discretion to refuse a restraining order even when the express conditions were established, that discretion was only residual or narrow.

43 The respondent said that the judge below had also relied upon the terms of s 26 to support his conclusion that the court had a discretion whether or not to make a restraining order notwithstanding that the statutory conditions were satisfied but the respondent conceded that s 26 was a provision which enabled the court to make ancillary orders and the respondent expressly stated that he did not seek to support the statutory construction adopted below by reference to s 26. In that regard, we note that the appellants stated that they had not conceded below that the power under s 26 of the Act included any power to set aside a restraining order on the ground that it was just to do so despite what the judge had said.[15] The respondent did not dispute the appellants' statement.

44 In our opinion, the court does not have a general discretion under s 18(1) to grant or refuse a restraining order. The judge appeared to consider that the court had an overriding discretion in relation to making a restraining order, based on

14. Emphasis added.
15. [2010] VCC 0481 at [38].

whether it was just or convenient to do so.[16] We think, with respect, that this was incorrect on a proper construction of the relevant provisions. Section 18(1) obliges the court to make a restraining order if the defined conditions are made out.[17] The section provides that the court *must* make a restraining order if (relevantly) the court is satisfied that the defendant has been charged with a Sch 2 offence and it considers that "having regard" to the matters contained in the supporting affidavit and any other sworn evidence there are reasonable grounds for making the order. It should be noted that "other sworn evidence" might be adduced on behalf of the applicant but also might be adduced on behalf of a person who has been given notice of the application under s 17(1).

45 The expression "reasonable grounds" does not import any general discretion based on justice or convenience but is a reference back to the matters that are required to be proved (relevantly) under s 16, namely, that the person making the application is the DPP or other prescribed person (or class of persons), that the person charged with a Sch 2 offence has either an interest in the property in respect of which the restraining order is sought or that the property is tainted property in relation to that offence and that the restraining order is being sought for an authorised statutory purpose. We have referred to the matters relevant to the present case but of course there are a number of other bases for an application for a restraining order and the matters to be proved in respect of those vary but, in each case, the court has to consider that the material produced provides "reasonable grounds" for making the restraining order, having regard to the particular statutory requirements. In other words, the requirement of "reasonable grounds" relates to the satisfactory proof of the defined conditions (in part facts and in part beliefs) set out in the Act and not to a general criterion of reasonableness in all the circumstances.

46 Further, we consider that the expression "any relevant matters" in s 16(4) is a reference back to the matters set out in s 16(2). What the provisions require is that the deponent sets out in his affidavit any matters bearing upon the various facts, suspicions and beliefs described in s 16(2). The requirement to set out any relevant matters effectively reinforces the obligation to set out the grounds on which the deponent holds the various beliefs referred to in s 16(4)(c), (d) and (e). There is a degree of repetition involved but we do not accept that the expression "any relevant matters" evinces an intention to require a reference to all the circumstances of the matter as might be required if the court had a general discretion.

47 A further reason for thinking that the legislature did not intend to vest in the court a discretionary power under s 18(1) is the language of s 18(2). Section 18(2) provides that, on an application under s 16(2)(a), the court *must* make a restraining order if it is satisfied that the deponent suspects that the property is tainted property in relation to a Sch 2 offence and that there are reasonable grounds for that suspicion. In s 18(2), the "reasonable grounds" are not at large but confined to reasonable grounds for the suspicion referred to.

16. Compare s 37(1) of the Supreme Court Act 1986.
17. See *Vu* at 262–3, [37] and 265, [47]. At 262–3, [37], the Court of Appeal (Chernov, Nettle and Neave JJA) compared the earlier legislation with the current Act and said that the current Act had changed the nature of the court's function in relation to a restraining order application from a discretionary power to make a restraining order to an obligation to make the order if the applicant satisfied defined conditions.

There is clearly no wide discretionary element involved in s 18(2). It would be curious, to say the least, if the court had a non-discretionary obligation under s 18(2) but a discretionary power under s 18(1). There would seem to be no good reason for such a distinction or difference.

48 We said earlier that the respondent disclaimed any reliance upon the terms of s 26 to support the statutory construction for which he contended. In our opinion the respondent was correct in so doing. Section 26(1) empowers the court to make orders in relation to the property to which the restraining order relates, either at the time "when it makes a restraining order" or "at any later time" as it considers just. Clearly, any order made by the court under this provision at the time when the restraining order is made can only be an ancillary order. This tends to be confirmed by the examples contained in s 26(5) which all assume the continuing existence of a restraining order. Section 26(5)(a) confirms that the court is empowered to vary the property to which a restraining order relates and such an order could only be made "at a later time". As regards such orders that might be made "at any later time" after the restraining order has been made, perhaps the court is thereby empowered to wholly discharge a restraining order,[18] although it may be that the provisions of ss 20, 21, 22 and 24 impliedly exclude such a power under s 26.[19] At any rate, it could not be the case that the limited grounds for making an exclusion order contained in ss 20, 21, 22 and 24 could be subverted by a power under s 26 to discharge a restraining order whenever the court considers it to be "just". For those reasons, we do not think that the language of s 26 supports the respondent's contention that the court has a general discretionary power under s 18, when making a restraining order, either ex parte or inter partes.

49 If, contrary to what we have concluded above, the court has a general, or even a residual, discretion to refuse to make a restraining order even if the defined conditions are established, we do not think that the lack of commerciality was a "relevant matter" within s 16(4) or otherwise a material matter to be disclosed. As we have said, the reference to a lack of commerciality was simply an acknowledgment that there was no evidence that Mr Moloney had trafficked or intended to traffick cannabis. This would not be a relevant or material matter to take into account on an application for a restraining order, given that cultivating a commercial quantity of cannabis is a Sch 2 offence. Parliament could not have intended that a defendant could avoid the automatic forfeiture or other consequences of a conviction for a Sch 2 offence by reliance on an absence of aggravating circumstances or the presence of mitigating circumstances pertinent to the particular offence. If that were so, a defendant could raise any number of circumstances (that might be relied upon on a plea) as a basis for resisting a restraining order and the deponent (in the absence of the defendant) would be obliged to disclose to the court every conceivable circumstance known to him relating both to the offence and to the person that might reasonably be taken into account, as a matter of justice, in deciding whether or not to make a restraining order. This would render the statutory provisions unworkable.

18. See *Vu* at 266–7, [51].
19. Again, see *Vu* at 266–7, [51].

50 For those reasons, we are of the view that the "lack of commerciality" was not a relevant or material matter to be disclosed. The respondent conceded that if this conclusion was reached the orders below had to be set aside. It follows from the foregoing that grounds of appeal 1–5 are made out. It also follows that it is not necessary to deal with grounds of appeal 6–11.

51 We would allow the appeal, set aside paras 1, 2, 4, 5, 6 and 7 of the orders made below on 8 September 2010 and the whole of the order made below on 1 October 2010 and in lieu thereof we would order that Mr Moloney's application be dismissed with costs, including any reserved costs. We would further propose that an order be made (subject to any submissions from the parties) that Mr Moloney pay the appellants' costs of the appeal.

Appeal allowed.

Solicitor for the appellants: *Craig Hyland*, Solicitor for Public Prosecutions.

Solicitors for the respondent: *Davies Moloney*.

C R WILLIAMS
BARRISTER-AT-LAW