SUPREME COURT OF VICTORIA (COURT OF APPEAL)

Navarolli v Director of Public Prosecutions (Vic)

[2005] VSCA 323

Maxwell P and Eames JA

9, 14 December 2005

Confiscation — Confiscation of property — Restraining order — Ex parte application — Whether right to be heard — Confiscation Act 1997 (Vic), ss 16, 17, 18.

Practice and Procedure — Applications for leave to appeal to Court of Appeal — Whether two judges of appeal can determine appeal if leave granted — Supreme Court Act 1986 (Vic), s 11(1A).

In an application for leave to appeal against a County Court judge's restraining order against certain of the appellant's property, issues included:

- whether the appellant had a right to be heard before the County Court judge at the ex parte application; and
- if leave to appeal was granted, could two judges of appeal hear the appeal.

Held: (granting the application) (1) The restraining order granted by the County Court judge contravened the rules of natural justice. While the Director is authorised under the *Confiscation Act 1997* (Vic), s 16(2), to apply for a restraining order ex parte, it does not give the Director a right to have the application heard in the absence of any other party. The Director has no right to an ex parte hearing.

Observations on the *Confiscation Act 1997* (Vic), ss 16, 17, 18.

Commissioner of Police v Tanos (1958) 98 CLR 383; *Pavic v Magistrates Court (Vic)* (2003) 140 A Crim R 113; *Johns v Australian Securities Commission* (1993) 178 CLR 408, considered.

(2) Having regard to the *Supreme Court Act 1986* (Vic), s 11(1A), and consideration of the issues to decide the leave application, a court of two judges of appeal could satisfactorily dispose of the matter rather than it be adjourned to enable three judges to hear the appeal. Deciding the appeal now reduces cost and workload, and enables the parties to know immediately where they stand.

Observations on the *Supreme Court Act 1986* (Vic), s 11(1A).

Cases Cited

Bennett and Co (a firm) v Director of Public Prosecutions (WA) (2005) 31 WAR 212; 154 A Crim R 279.

Booker McConnell plc v Plascow [1985] RPC 425.

Johns v Australian Securities Commission (1993) 178 CLR 408.

Kioa v West (1985) 159 CLR 550.
Lock International plc v Beswick (1989) 16 IPR 497.
Pavic v Magistrates Court (Vic) (2003) 140 A Crim R 113.
Police, Commissioner of v Tanos (1958) 98 CLR 383.

Application for leave to appeal against order

R Richter QC and *LC Carter*, for the applicant.

J Kennan SC and *L De Ferrari*, for the respondent.

Cur adv vult

14 December 2005

The Court

1 By summons dated 21 October 2005, the applicant ("Navarolli") seeks leave to appeal from an order made by the judge in the Practice Court on 26 September 2005. Before setting out the terms of that order, it is necessary to recount the events which preceded its making.

2 On 24 August 2001, Antonios Sajth Mokbel was charged with a number of drug offences. There are 18 charges in all. They are Schedule 2 charges within the meaning of the *Confiscation Act 1997* (Vic) (the Act).

3 On that day, his Honour Judge Holt in the County Court made a restraining order, under s 18 of the Act, in respect of certain property owned by Mokbel. The order extended to property acquired after the date of the making of the order.

4 On 17 August 2005, it was reported to the Office of Public Prosecutions that a bank account in the name of Navarolli at the South Yarra branch of the ANZ Bank contained funds belonging to Mokbel. Having received this information, the Director of Public Prosecutions applied to the Court on 19 August 2005 seeking an order restraining Mokbel and Navarolli from dealing with the bank account.

5 The application was supported by an affidavit sworn by a solicitor employed by the OPP. The application was made ex parte. It came on for hearing before Whelan, J. Having heard the application, his Honour made an order pursuant to s 18 of the Act restraining Mokbel "and any other person" from disposing of, or otherwise dealing with, funds in the bank account.

6 A copy of the order was served on Mokbel and Navarolli. They subsequently engaged a solicitor and on 29 August 2005 filed an application for an exclusion order pursuant to ss 20 and 22 of the Act. That application was returnable on 19 September 2005, when it was adjourned to 23 September. On 15 September 2005 a further application was made for an exclusion order, this time on behalf of Navarolli alone. The joint application filed on 29 August was subsequently struck out at the request of the applicants.

7 Prior to the hearing on 23 September, counsel for Navarolli had been seeking from the Director copies of the affidavit material relied on in support of the ex parte application before Whelan, J. Initially, the Director refused to provide the affidavit material, but it was eventually provided to Navarolli's advisers.[1] Examination of the material disclosed — as the learned judge subsequently

1 The question of access to affidavits of this kind was recently dealt with by the West Australian Court of Appeal in *Bennett and Co (a firm) v Director of Public Prosecutions (WA)* (2005) 31 WAR 212; 154 A Crim R 279.

held, that the affidavit in support had not been sworn either by a member of the police force or by an authorised person, as required by s 16(4) of the Act. Navarolli's advisers drew this error to the attention of the OPP. The judge subsequently declared that, by reason of the failure of the Director to comply with subs (4)(a) or (b) of s 16, the 19 August order was void and of no effect.

8 Upon the making of that declaration, counsel for the Director sought to make a fresh application for a restraining order pursuant to s 16(2)(c) of the Act. Senior counsel for Navarolli, Mr Richter, was present in court and sought to be heard in opposition to the fresh application. Senior counsel for the Director opposed that course, submitting that the Director was "exercising his right to have the matter heard without notice."

9 Mr Richter sought a direction from his Honour pursuant to s 17(1) of the Act that notice be given to his client of the fresh application for a restraining order. Mr Richter informed his Honour that Navarolli wished to contend that Mokbel had no interest in any money in the bank account and that, accordingly, he (Navarolli) should be able to deal with his own property.

10 On 26 September 2005, the judge ruled that he would not give a direction under s 17(1) requiring that Navarolli be given notice of the application. Without hearing submissions from counsel for Navarolli, his Honour proceeded to make the restraining order against the bank account which the Director had sought.

11 His Honour declared, as required by s 15(3)(a) of the Act, that the property was restrained for the purposes, variously, of satisfying —

> (a) any forfeiture order under Division 1 of Part 3 of the Act;
> (b) any automatic forfeiture of property that might occur under Division 2 of Part 3 of the Act; and
> (c) any pecuniary penalty order that might be made under Part 8 of the Act.

12 The summons originally filed in this Court sought leave to appeal only in respect of the decision of the learned judge not to require notice to be given. The draft notice of appeal, however, sought an order setting aside the restraining order itself. In the course of hearing the application for leave, the Court permitted an amendment of the summons such that the application for leave to appeal extended to the restraining order itself.

The scheme of the Act

13 This application concerned the provisions of Part 2 of the Act, which provides for the making of restraining orders. Section 14(1) provides —

> (1) A restraining order is an order that no property or interest in property, that is property or an interest to which the order applies, is to be disposed of, or otherwise dealt with by any person except in the manner and circumstances (if any) specified in the order.

14 Section 15(1) makes clear that the function of a restraining order is to preserve property in order that the property will be available for one or more of five specified events, namely —

> (a) any forfeiture order that may be made under Division 1 of Part 3;
> (b) automatic forfeiture of property that may occur under Division 2 of Part 3;
> (c) any civil forfeiture order that may be made under Part 4;
> (d) any pecuniary penalty order that may be made under Part 8; or

> (e) any order for restitution or compensation that may be made under the *Sentencing Act 1991*.

15 The purpose for which a restraining order is sought must be stated in the application and, where an order is made restraining property, the court must state the purpose for which the property is restrained.

16 Section 16 of the Act identifies various circumstances in which application may be made for a restraining order in respect of property. The application in this case was made pursuant to s 16(2)(c), which provides as follows:

> The DPP … may apply, without notice, to the Supreme Court … for a restraining order in respect of property if —
>
> …
>
> (c) a person has been charged with a Schedule 2 offence and that person has an interest in the property …

17 Unambiguously, s 16(2) authorises the Director to make an application without giving any notice to any person. Whether notice should be given is a matter for consideration by the Court under s 17, which relevantly provides as follows:

> (1) The court may require an applicant under section 16(1) or (2) to give notice of the application to any person whom the court has reason to believe has an interest in the property that is the subject of the application.
>
> (2) Any person notified under sub-section (1) is entitled to appear and to give evidence at the hearing of the application but the absence of that person does not prevent the court from making a restraining order.

When should notice be given?

18 The discretion conferred by s 17(1) — to require that notice be given of an application for a restraining order — is at large. As the judge noted in his reasons, there is nothing in the Act or in the *Supreme Court (Criminal Procedure) Rules 1998* (Vic) which provides any guidance as to the matters to be taken into account in considering the exercise of that discretion. As will appear, however, there are certain fundamental principles which come into play when the discretionary power conferred is — as it is here — a power to require that a person be given notice of a hearing.

19 As the Court pointed out in argument, s 16(2) authorises the Director to *apply ex parte*. It does not, however, give the Director a right to have the application *heard* in the absence of any other party. According to the reasons for judgment below, it was submitted on the Director's behalf that he —

> was exercising his right to have the matter heard without notice.

It follows from what we have said that this submission was wrong. The Director has no right to an ex parte hearing.

20 As was submitted by counsel for Navarolli, the rationale for permitting a restraining order application to be made and heard ex parte is to guard against the risk of dissipation of assets which might occur if prior notice of the application were given. As counsel pointed out, the following statement appeared in the explanatory memorandum to clause 17 of the *Confiscation Bill*:

> Clause 17 provides that an application for a restraining order may be heard ex parte. *This is because if a person was given notice of a restraining order, they may disperse their assets prior to the making of a restraining order.* However, the court

> retains a power to require an applicant for a restraining order to give notice to any person who may have an interest in the property that is the subject of the application.
>
> If a person is notified of the application, that person may appear at that hearing and may adduce evidence at that hearing.

(Emphasis added.)

21 Counsel for the Director did not suggest that there was any other rationale for an ex parte hearing. Rather, the Director's submissions were founded on what was said to be the clear intention of Parliament as expressed in the Act, namely that such applications should ordinarily be heard ex parte. We will return to this below.

22 Plainly enough, there was no risk in the present case that the giving of notice to Navarolli might lead to the disposal or disappearance of the relevant property. Between 19 August and 26 September 2005, the bank account was the subject of the restraining order made by Whelan, J. Moreover, both Mokbel and Navarolli had been aware of the Director's interest in the bank account since the service upon them of that original order.

23 There was, in our view, nothing which militated against making the direction under s 17 which had been sought. That is, no public or private interest was served by the refusal to direct that notice be given.

24 As we said to counsel for the Director during argument, given that counsel for Navarolli were present in court and ready to make those submissions, it was counter-intuitive for the Court to refuse to give notice to Navarolli and, in consequence, to refuse to hear submissions on behalf of the very person whose bank account was the subject of the application. In our view, that course could only have been justified if there were some compelling reason for conducting the hearing ex parte. As we have said, not only was there no compelling reason, there was, in our view, no reason at all to conduct the hearing ex parte.

25 Submissions for the Director on the application for leave to appeal made clear that the justification sought to be made for the course which his Honour took was to be found in the proper construction of the provisions of the Act. It is to that question that we now turn.

26 In their written submissions, counsel for the Director contended as follows:

> On a proper construction of the provisions of the *Confiscation Act* referred to above … it is plain beyond any doubt there is no requirement to afford a hearing to a person in the position of the applicant (ie, someone who may later be able to show to be the lawful owner of property that is not tainted property, etc.), when an application is made for a restraining order. The contrary is true: the *Confiscation Act* intends these matters to be heard ex parte, unless the Court exercises the discretion under s 17(1).

27 Counsel for the Director relied heavily, as did the learned judge, on the provisions of s 20 of the Act. Sub-section (1) of that section provides as follows:

> If a court makes a restraining order against property under section 18, any person claiming an interest in the property (including the defendant) may apply to that court for an order under section 21, 22 or 24 [excluding the property or part of the property from the restraining order].

28 His Honour expressed the view that the legislature has thus —

> drawn a distinction between the obtaining of [a restraining] order, and an

> application [under s 20] to exclude property from its operation. The procedures are very different and the jurisdictions are different. Obtaining the order does not require the joinder of any party, or the giving of any notice. The Court has to be satisfied on the balance of probabilities that there are reasonable grounds for making the order.
>
> On the other hand, the application for exclusion of property from the restraining order requires the application to be made within a certain time on notice to the original applicant, and the applicant seeking exclusion to prove a number of specified matters set out in the statute.

29 Mr Navarolli's undoubted right to apply under s 20 for an exclusion order, in the event that the Director's application for a restraining order succeeded, was central to his Honour's ultimate conclusion, which he expressed as follows:

> I am not persuaded that there is any ground for requiring notice to be given to Mr Navarolli before the order is made. He will ultimately be served with a copy of the order, and if he wishes property to be excluded from the effect of the order he will have every opportunity to make an application for exclusion which will involve the Court in determining different issues.
>
> The Legislature has given the right to the DPP to make the decision to bring the application without notice any person. The application is in respect of property. No person may deal with the property if the order is made. The Court decides the question on the material before it and makes an order against property. Any person who may have an interest in the property may not deal with it. The Legislature has provided a procedure, not to attack the merits concerning the original order, but giving the right to any person to exclude property from the order.
>
> The Court in those circumstances is concerned with different issues. The onus is on the applicant for the order. Those matters lead to the conclusion in my opinion that s 17(1) notice would rarely be given, and no ground has been advanced to this Court which leads to the conclusion that Mr Navarolli, or indeed any other person, should have notice of the application.

30 With respect to the learned judge, this conclusion cannot be sustained. The reasoning leaves altogether out of account what Dixon, C.J. and Webb, J. in *Commissioner of Police v Tanos*,[2] described as the —

> deep-rooted principle of the law that before any one can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding he must be afforded an adequate opportunity of being heard.

31 In that case, the *Disorderly Houses Acts 1943* (NSW) made provision for an application to be made ex parte for the declaration of premises as a disorderly house, relevantly on the ground that liquor was unlawfully sold or supplied on or from the premises. The relevant Regulations provided as follows:

> If the judge is of the opinion that reasonable grounds have been shown —
>
> (i) he may make the declaration immediately and ex parte if this seems to him necessary or desirable; or
>
> (ii) if he thinks that an opportunity should be given to the owner or occupier or both to oppose the making of the declaration he may direct them to be served with a copy of the affidavit and to be notified of the day on which the matter will be dealt with …

32 Dixon, C.J. and Webb, J. said,

> This regulation may perhaps be read as leaving the choice of courses at large to the judge. But it ought not so to be interpreted. It should be understood as

2 *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395.

> meaning that prima facie the course provided for in par.(ii) should be followed and only in exceptional or special cases should an immediate declaration be made. The analogy is that of an interim injunction, but the caution should be greater because the declaration, unless it is framed as provisional or conditional, concludes the right subject to rescission.

33 What underpinned this conclusion was the Court's view that there was nothing in the New South Wales statute which excluded the basic right to be heard. Their Honours said:

> The rule [requiring a person affected to be heard] is subject to a sufficient indication of an intention of the legislature to the contrary. Such an intention is not to be assumed nor is it to be spelled out from indirect references, uncertain inferences or equivocal considerations. The intention must satisfactorily appear from express words of plain intendment. In the present statute no such evidence of a contrary intention is discoverable. But it is in a broad sense a procedural matter and while the general principle must prevail, it is apparent that exceptional cases may be imagined in which because of some special hazard or cause of urgency an immediate declaration is demanded.

34 A similar issue arose in *Pavic v Magistrates Court (Vic)*.[3] In that case, Nettle, J., (as he then was) said as follows:

> The law is now settled that where a statute confers power on a public official to destroy defeat or prejudice a person's rights, interests, or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment. The first of the rules of natural justice has the effect that a statutory authority having power so to affect a subject is bound to hear the subject. That rule will not yield lightly to manifestations of contrary intention.[4]

His Honour cited, among other things, the passage from *Tanos* which we have set out in this judgment.

35 In short, where what is in issue is a right to be heard before such a statutory power is exercised — that is to say, a statutory power which would enable a public official or a Court to prejudice or defeat a person's interests, in this case interests in property — it is the principles of natural justice, not the statute, which constitute the starting point. The question then is whether the common law right to a hearing is excluded by the words of the statute.[5]

36 In the present case, there is no such exclusion. On the contrary, as in *Tanos*, there is express provision for the Court to require that notice be given. That power is conferred as an unfettered discretion and there is no reason whatever to suppose that Parliament intended thereby to limit the general right to be heard.[6]

37 As we have already said, there will obviously be some situations in which the Court could properly exercise its discretion not to require notice to be given. The position was well summed up by Brennan, J. in *Johns v Australian Securities Commission*[7] (a passage also cited by Nettle, J. in *Pavic*[8]):

> Of course, there would be some situations in which natural justice would not

3 *Pavic v Magistrates Court (Vic)* (2003) 140 A Crim R 113.

4 *Pavic v Magistrates Court (Vic)* (2003) 140 A Crim R 113 at [5].

5 See *Kioa v West* (1985) 159 CLR 550 at 584 per Mason, J.

6 cf. *Pavic v Magistrates Court (Vic)* (2003) 140 A Crim R 113 at 119-120.

7 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 431.

8 *Pavic v Magistrates Court (Vic)* (2003) 140 A Crim R 113 at 120.

> require notice to be given … for example, where an investigation by a State law enforcement agency would be frustrated by informing the examinee … But where no such consideration countervails against a person's right to be heard before a decision prejudicial to his or her interests is taken, the (statutory official) should give that person an opportunity to oppose.

38 Nor is our conclusion in any way affected by the opportunity, afforded by s 20 to a person in the position of Mr Navarolli, to make application for property to be excluded from the scope of a restraining order already made. (We note in passing that the West Australian Court of Appeal recently came to the same view on comparable provisions).[9]

39 What is in issue here is the exercise of the quite separate and anterior power under s 18, to make a restraining order. It is that power which, if exercised, will adversely affect property belonging to Navarolli — and hence his interests — and it is that proposed exercise of power which attracts the principles of natural justice.

40 It follows, in our view, that his Honour's exercise of discretion miscarried when he refused to require the Director under s 17(1) to give notice of the application. His Honour fell into error in regarding the statute as creating what amounted to a presumption against the giving of notice, or as imposing on a person in Navarolli's position the onus of showing why he should be given notice. His Honour failed to consider the fundamental natural justice principle to which we have referred. For the reasons given, that principle meant that Navarolli had a right to be heard, unless there was some compelling reason for that to be denied to him.

41 It is appropriate that we say something more generally about the procedure on such applications. In the ordinary course, applications for restraining orders are made, as s 16 contemplates, ex parte to the judge in the Practice Court. It follows from what we have said about the right to be heard that the Director, and the judge in the Practice Court, should start from the position that notice of the application should be given to any person whose property may be affected if the order is made. To that end, in our view, the Director should as a matter of course at the commencement of each such ex parte application draw to the attention of the judge in the Practice Court the discretion conferred by s 17(1) and the entitlement of a party affected to be heard, as set out in these reasons for judgment. It would, we think, be no less than the ethical obligation of counsel for the Director on any such application to make sure that the Court entertaining the application was aware of that provision and of the power which it conferred. (In the present case the Judge was made aware of s 17). Naturally, once the Court's attention was drawn to s 17, the Director would be at liberty to make such submissions as he thought appropriate against the giving of notice. Accordingly, nothing we have said precludes the judge from exercising his discretion against giving notice where relevant circumstances exist which justify the denial of the right to be heard.

42 It occurs to us that it might be possible by the following means to vindicate the right to be heard in every case. In a case where the Director believes that advance notice of an application might prompt a person to dispose of or otherwise deal with the subject property so as to put it out of reach, the Director could seek — and the Court could be asked to make — only an interim

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9 See *Bennett and Co (a firm) v Director of Public Prosecutions (WA)* (2005) 31 WAR 212; 154 A Crim R 279 at [62].

restraining order on an ex parte basis. This would be analogous to an ex parte application for an interim order to restrain a person from dealing with property. The making of the interim order, and its service on the relevant person or persons, should ensure that the property was not disposed of. As Hoffmann, J. said in *Lock International plc v Beswick*,[10] the Court is entitled to assume that those served with an order of the Court will obey it. Naturally, if there is any reason to assume otherwise, then those matters would be drawn to the attention of the Court. On this hypothesis, on the return of the interim order the interested party should be given the opportunity to make submissions as to why the restraining order should not be continued.

43 This approach would have the consequence, of course, that the onus remained with the Director. The assumption underlying this approach is that the vindication of the right to be heard can only be achieved if the party affected is able to make submissions to the Court — and, if necessary, to file evidence — to show that the grounds for the making of the restraining order are not made out. Since, however, this possible approach was not the subject of the argument on the application for leave, we say nothing further about it.

Hearing the appeal

44 Counsel for the applicant contended in written submissions that this Court should, upon granting leave to appeal, proceed to treat the appeal as having been heard instanter and allowed, and to set aside the restraining order which his Honour made.

45 An application for leave to appeal is heard by a bench of two: see Rule 64.27. Section 11(1A) of the *Supreme Court Act* provides as follows:

> If the President of the Court of Appeal so determines in a particular case, 2 Judges of Appeal constitute, and may exercise all the jurisdiction and powers of, the Court of Appeal.

46 The President made such a determination in the present case, to enable the Court to adopt the course proposed if we concluded that it was appropriate to do so. Counsel for the Director submitted that this was not an appropriate case for the appeal to be treated as instituted and heard instanter, and that the normal course should be followed. The Director submitted that, if we came to the view that a grant of leave was warranted, proper consideration of the issues raised would require further written submissions and oral argument, and should be undertaken by a bench of three.

47 We do not accept that submission. The point in issue was fully and capably argued, both in writing and orally, before us. The consideration of the issues which had to be undertaken in order for us to decide the leave application put us in a position where the substantive question on the appeal could itself be satisfactorily disposed of. Where it is possible for this course to be taken, there is a significant public interest in that occurring. Had we acceded to the Director's submission, there would have continued to be uncertainty about the s 17 question during the period between the grant of leave and the ultimate delivery of judgment on the appeal, which might have been some months into the future. Moreover, that course would have imposed additional costs on both sides and additional burdens on this Court, in preparing for the appeal and delivering judgment. Deciding the appeal now reduces both cost and workload,

10 *Lock International plc v Beswick* [1989] 3 All ER 373 at 383, referring to *Booker McConnell plc v Plascow* [1985] RPC 425.

and enables the parties to know immediately where they stand. In particular, the fresh application which the Director is about to make will be informed by the terms of this decision.

Conclusion

48 For the reasons we have given, the restraining order made by his Honour was made in contravention of the rules of natural justice and must therefore be set aside. Follow an indication given by the Court at the end of oral argument that this was the conclusion the Court had arrived at, counsel for the Director foreshadowed that a fresh application would be made. We are informed that that application is to be made in the Practice Court tomorrow, 15 December.

(Discussion ensued.)

Maxwell P.

The order of the court will be as follows. Subject to the rider which I will read after I have read the orders, the court orders as follows:

1. The application for leave to appeal is granted.
2. The appeal be treated as having been heard instanter and allowed.
3. The order made 26 September 2005 pursuant to s 18 of the *Confiscation Act 1997* be set aside.
4. The respondent pay the applicant's costs of the application and of the appeal.

The rider is as follows. The orders just made are to be read subject to the following.

Despite the disposition of this appeal, the restraining order made in this proceeding on 26 September 2005 under s 18 remains in force until the hearing and determination of the respondent's foreshadowed further application for a restraining order filed 9 December 2005 in proceeding No. 1545 of 2005, or until further order.

Application for leave to appeal against restraining order granted
Order set aside

Solicitors for the applicant: *Vincent Verduci & Associates*.

Solicitor for the respondent: *S Carisbrooke*.

WARWICK J WALSH-BUCKLEY