**10/07; [2006] VSC 487**

**SUPREME COURT OF VICTORIA**

# *RENATE MOKBEL v DPP (Vic) and DPP (Cth)*

**Gillard J**

**1, 2, 21 August, 13, 18 September, 14 December 2006**

**(2006) 14 VR 405; (2006) 170 A Crim R 179**

**PRACTICE AND PROCEDURE – CONDITIONS OF BAIL BREACHED – SURETY ORDERED TO PAY AMOUNT UNDERTAKEN – APPLICATION BY SURETY FOR RELIEF AGAINST FORFEITURE ORDER – PRINCIPLES APPLICABLE TO NATURE OF SURETY'S OBLIGATIONS – RELEVANCE OF FINANCIAL IMPACT – TAKING ALL REASONABLE STEPS – WHETHER GENUINE SURETY – APPLICANT LACKING CREDIBILITY – WHETHER UNJUST IN THE CIRCUMSTANCES TO REQUIRE SURETY TO PAY AMOUNT UNDERTAKEN: *CROWN PROCEEDINGS ACT* 1958, S6(4).**

M. signed an undertaking as surety in the sum of $1M stating in the Affidavit of Justification that she was worth the amount undertaken and that her real estate consisted of a dwelling house in Brunswick worth more than $1M. When the accused failed to answer his bail, the bail was declared to be forfeited and M. ordered to pay the sum of $1M in default 2 years' imprisonment. M. subsequently applied to the Court to vary or rescind the order on the ground that it would be unjust to require M. to pay the amount undertaken having regard to the circumstances of the case.

**HELD: Application dismissed.**

**1. It is clear from the wording of s6(4) of the *Crown Proceedings Act* 1958 ('Act') that M. carried the burden of persuading the Court on the balance of probabilities that it "would be unjust to require her to pay the amount undertaken to be paid having regard to all the circumstances of the case". The Court's jurisdiction extends to varying or rescinding the order if the circumstances justify it. The question is, would it be unjust to require the applicant to pay the amount undertaken to be paid, taking into account all the circumstances of the case?**

**2. First, to be a surety is a serious matter, and suretyship is not to be entered into lightly. Secondly, the accused person on release is entrusted by the Court to the surety, who has an obligation to ensure that he/she attends the trial. This requires the surety to take positive steps. It is no answer for the surety to stand by and do nothing and then state that he or she believed that the accused would attend his/her trial. By signing an undertaking, the surety guarantees to the Court and the community that he or she will take steps to ensure the presence of the accused at trial. In one sense, it is a guarantee, but the legal principles relating to guarantees in commercial law do not apply to the surety's obligation.**

**3. The first question on an application under s6(4) of the Act is to determine whether or not a surety has fully and properly performed the duties imposed upon him or her by the suretyship. The test is whether or not the surety has taken all reasonable steps to secure the attendance of the principal party to the undertaking. The surety must take some positive step. To do nothing would not satisfy the test.**

**4. Absent any changed circumstances relating to the financial affairs of the surety after the undertaking has been executed, the impact upon the surety's financial position of enforcing the undertaking is not a matter that should be taken into account. The fact is that on occasions, accused persons fail to surrender themselves for trial. The possibility of this occurring is not remote. There is a risk. If the risk materialises, then the undertaking requires the surety to pay the full amount. That is what the surety agrees to do. It would undermine the system if, having given thought to entering into the undertaking and swearing an affidavit as to the assets which he or she has to meet the undertaking, the surety could be relieved from the full obligation and ordered to pay a lesser amount because of the financial impact.**

**5. Having regard to the fact that M. did not take all reasonable steps to ensure attendance of the accused at trial, that there were no new circumstances which should be taken into account in considering the financial impact, that M. was not a genuine surety and that M. did not disclose her true financial position, M. failed to persuade the Court that it would be unjust to require her to pay the amount undertaken to be paid.**

**6. Factors relevant to the Application. See paras 64-67.**

**GILLARD J:**

1. This is an application by a surety, who has been ordered to pay an amount undertaken by her after an accused person, who was bailed, failed to observe a condition of the bail, for an order that the order made be varied or rescinded pursuant to s6(4) of the *Crown Proceedings Act* 1958 ("the Act").

2. On 26 April 2006, the Court ordered that the surety pay the sum of $1m, that in default of payment, her property be seized and sold, and that in default of seizure and sale, in whole or in part, the surety be imprisoned for a period of two years. That order was made pursuant to s6(1) of the Act.

**Parties**

3. The applicant, Mrs Renate Lisa Mokbel ("the applicant"), is aged 35 years. The accused person who was released on bail was her brother-in-law, Antonios Sajih Mokbel ("the prisoner"). The applicant signed an undertaking as the prisoner's surety when he was released on bail in late 2004, and again in early 2005 in respect to two sets of different drug charges. She is married to the prisoner's brother, Milad. She has three young children aged 13, 10 and 2 respectively. She resides with her children in a property situated at 11 Downs Street, Brunswick ("the residential property"). Her husband, Milad Mokbel, was arrested on 25 April 2006 and is presently in custody in respect of a number of charges. He was residing at the residential property with the applicant and their children at the time of his arrest.

4. The respondents to the application are the Crowns in the right of the State of Victoria and the Commonwealth of Australia, represented by the Directors of Public Prosecution of the State and Commonwealth.

**Prisoner's Involvement in Criminal Justice System**

5. The prisoner was arrested on 24 August 2001 and charged with an offence contrary to paragraph 233B(1)(d) of the *Customs Act* 1901. He was charged that he was knowingly concerned in the importation into Australia of a prohibited import, namely, narcotic goods. He was granted bail but it was revoked on appeal on 1 October 2001. Eventually he was granted bail on 4 September 2002.[1] In addition to the Commonwealth charge, the prisoner was charged by the Victoria Police on 24 August 2001 with a number of serious charges relating to the trafficking of drugs in a commercial quantity. On 4 September 2002, he was bailed in respect of both Commonwealth and State charges. The applicant was not a surety at this time.

6. On 26 November 2004, after a committal hearing in respect to the Commonwealth charge, the prisoner was granted bail subject to strict conditions. He signed an Undertaking of Bail for Appearance at Trial and the applicant, as surety, signed the undertaking. On that day, she swore an Affidavit of Justification by Surety to Undertaking, and a number of documents were supplied to the Registrar of the Magistrates' Court purporting to show her interest in the real estate situated at 11 Downs Street, Brunswick, which is the residential property.

7. The committal in respect to the State charges was heard at the beginning of 2005 and on 15 February 2005, the prisoner was committed for trial on three counts of trafficking in drugs. He was released on bail on that day with one surety. The applicant, as surety, signed the Undertaking of Bail.

8. In October 2005, the prisoner was arrested and charged with a number of additional drug charges by the Commonwealth Police. On 23 November 2005, a Magistrate released him on bail in respect to those charges. In the meantime, the prisoner honoured his obligation to attend the Supreme Court on the date of his trial in the Commonwealth prosecution, namely, 26 October 2005, which had earlier been fixed by me. That trial date was vacated, and I fixed 1 February 2006 for the hearing of the Commonwealth charge. It was agreed by the parties that the State charges would be heard after the completion of the Commonwealth trial, and the State charges were adjourned to 1 February 2006. On 26 October 2005, I remanded the prisoner in custody pending the outcome of his application to the Magistrates' Court for bail. When bail was granted by that Court, the prisoner's counsel made application to me to extend his bail. The application was

not for an order granting bail, but was an application to extend the existing bail as the prisoner had complied with the conditions of bail by appearing on the date fixed for trial.

9. On 29 November 2005, I extended the prisoner's existing bail on conditions, *inter alia*, that he attend at the Supreme Court of Victoria on 1 February 2006, and that he report twice daily to the officer in charge at the South Melbourne Police Station. In addition, the Court imposed a curfew between 10.00pm and 7.00am each night. His bail was extended on his own undertaking, with one surety in the sum of $1m. The applicant was the surety and signed an undertaking in respect to it. The bail in relation to the State charges was extended on the same conditions, and the applicant was also the surety in respect of those charges.

**The Undertaking**

10. On 29 November 2005, the prisoner and the applicant attended before the Deputy Prothonotary of this Court.

11. The Deputy Prothonotary explained the conditions of the grant of bail, and their obligations concerning the grant of bail. A document headed Undertaking of Bail was signed by the parties. Paragraph 1 set out the conditions of bail imposed by the order made that day. They included, *inter alia*, the obligations of the prisoner to appear on 1 February 2006 at 10.30am before the Supreme Court of Victoria at Melbourne and then to surrender himself and not to depart without the leave of the Court, and as often as leave is given, to return at the time appointed by the Court and again surrender himself. The prisoner signed the following undertaking:

> "I enter this undertaking of bail and acknowledge receipt of a notice setting out my obligations concerning the conditions of my bail and the consequences of my failure to comply with those conditions."

12. The applicant signed the following undertaking:

> "I enter this undertaking of bail and acknowledge receipt of a notice setting out the obligations of the accused person concerning the conditions of his or her bail and the consequences of his or her failure to comply with those conditions. I further undertake to pay to the Prothonotary/the Registrar of the County Court/the Principal Registrar of the Magistrates' Court the amount of bail specified on the back of this Form, in the event that the defendant fails to observe a condition of bail."

13. I am satisfied that the Deputy Prothonotary fully explained to the applicant the obligations of her undertaking. Another document, also called an Undertaking of Bail, was signed by the Deputy Prothonotary. It identified the applicant as first surety, as follows:

> "First Surety Renate Lisa Mokbel
> Address 11 Downs Street, Brunswick VIC 3056 The amount of $1,000,000.00"

14. In that document, the Deputy Prothonotary stated that she was "satisfied ... before releasing the defendant that he and the surety understood the nature and extent of the obligations of the defendant under the conditions of his bail and the consequences of his failure to comply with them."

15. The procedure followed by the Deputy Prothonotary is prescribed by s9 of *Bail Act* 1977 and the *Bail Regulations* 2003.

16. In evidence, the applicant accepted that she did understand her obligations, that she appreciated she was liable to pay $1m if the prisoner failed to surrender himself in accordance with the Undertaking of Bail, and that she was given a copy of the documents signed by her and the Deputy Prothonotary.

17. As stated, the prisoner was granted bail after the committal on 26 November 2004 in respect to the Commonwealth charge. It was a condition of the grant of that bail that he appear for trial on the day, time and place notified to him. The trial was fixed for 26 October 2005. The prisoner honoured that obligation, although at the time he was in custody, and the order made on 29 November 2005 was an extension of that bail on certain conditions. In support of the original application, the applicant, who was the surety, swore an Affidavit of Justification by Surety to

Undertaking. It provided:

> "I, MOKBEL RENATE
> 11 DOWNS STREET, BRUNSWICK, VIC 3056
> SELF EMPLOYED
> Make oath and say:
> 1. That I am a person who has attained the age of 18 years and not under any disability at law.
> 2. That I am, after payment of all my just debts and liabilities, well and truly worth in real or personal property or both not less than the amount of $1,000,000.
> 3. That my real estate consists of DWELLING HOUSE
> 11 DOWNS STREET, BRUNSWICK, VIC 3056
> 4. That my real estate is not encumbered except by $120,000
> Value of equity $1,140,000
> 5. That my personal property consists of
> 6. That I am not a surety in any other matter."

She swore the affidavit on 26 November 2004 before a Registrar of the Magistrates' Court.

18. This affidavit was false. The applicant did not own the dwelling house. It was registered in the name of JR Mokbel Pty Ltd. Later evidence revealed that the company held the residential property as trustee of a discretionary family trust. It will be necessary to further consider the Trust and ownership when I deal with the applicant's assets and liabilities and the issue of whether she was a genuine surety.

**The Prisoner Absconds**

19. The prisoner pleaded not guilty to the Commonwealth charge. The jury was empanelled on 13 February 2006. At the commencement of his trial, his bail was extended until further order on the same conditions. The trial continued throughout February and into March 2006. Friday, 17 March 2006 was the twenty-eighth day of the trial. The Crown prosecutor had commenced his closing address the previous day. On the morning of Friday, 17 March 2006, the learned prosecutor, Mr David Parsons SC, informed the Court that the Crown wished to apply later that day for an order revoking the prisoner's bail. After hearing submissions, I ruled that the bail would be revoked at the end of counsel's addresses, and this was anticipated to occur on the following Tuesday.

20. On the morning of Monday, 20 March 2006, the Court was informed at 10.30am that the prisoner was missing and had not been seen since 5.00pm the previous evening, when he reported to the South Melbourne Police Station. A warrant for his arrest was issued by the Court. The trial continued in his absence and on 28 March 2006, the jury brought in a verdict of guilty. On 31 March 2006, the Court sentenced the prisoner to 12 years' gaol and fixed a minimum period of nine years before he was eligible for parole.[2]

21. The prisoner has not been apprehended. It is believed he is residing overseas.

**Application Pursuant to s6(1) of the Act**

22. On 24 March 2006, the Crown in the right of the Commonwealth applied for a declaration and orders pursuant to s6(1) of the Act. The Court granted an injunction restraining the applicant from dealing in any way with her real estate or the shares in the company JR Mokbel Pty Ltd. On 29 March 2006, the Crown in the right of the State of Victoria filed a presentment against the prisoner in respect to the three State charges and the Court ordered, when the prisoner failed to appear, that a warrant be issued for his apprehension. The Crown in the right of the State of Victoria also sought an order against the surety pursuant to s6(1) of the Act. Both applications were heard by me on 19 April 2006. I reserved my decision. On 26 April 2006, I published my reasons. See *R v Mokbel & Mokbel.*[3] I declared that the bail be forfeited. I made the following orders relevant to the present application –

> (1) The surety pay the amount of $1,000,000 to the proper officer of the Court at Melbourne within 31 days after the date of this order; and
>
> (2) In default of payment of the amount in accordance with this order the amount be obtained by seizing and selling the property of the surety; and

> (3) In default of seizure and sale of property, in whole or in part, the surety be imprisoned for a period of two years.

23. An order was made in relation to each of the applications by the Crown in the right of the Commonwealth and the State that the total amount to be paid was $1,000,000. That was made clear in both orders. As is apparent from my reasons, once the Court was satisfied that the principal failed to observe a condition of bail, it was bound to forfeit the bail. Once the finding was made, the orders followed as a matter of course, although the period of imprisonment in default was a matter of discretion. However, the orders were not the end of the matter. It has been the law for many years that a surety who is the subject of a forfeiture order may apply to the Court to vary or rescind the order. Section 6(4) gives the right to the surety to make the application.

**Application Pursuant to s6(4) of the Act**

24. Section 6(4) provides –

> "(4) Where bail is declared to be forfeited under sub-section (1) any surety may at any time within 28 days after the making of the order or, if the order was made in the absence of the surety, within 28 days after the order first comes to his notice apply to the Court that made the order to vary or rescind the order on the ground that it would be unjust to require him to pay the amount undertaken to be paid having regard to all the circumstances of the case and the Court may vary or rescind the order and cancel any warrant issued in the case under the provisions of this section before the warrant so issued is executed."

25. On 16 May 2006, application was made to the Court on behalf of the applicant pursuant to s6(4). In addition, an application was made to me to stay the operation of the order made on 26 April 2006. On 26 May 2006, I made an order that pending the determination of the application, the issue or execution of any warrant be stayed.

26. In support of her application, the applicant swore two affidavits on 15 June 2006 and 27 July 2006 respectively. She was cross-examined at some length at the hearing.

27. The two respondents to the applications are the Crown in the right of the Commonwealth and the State. A Federal agent, Detective Sergeant Ragg, swore an affidavit on 21 July 2006. A solicitor, Philip Raimondo, who is an officer in the Office of Public Prosecutions of the State of Victoria, swore an affidavit. Detective Sergeant Daryl Stephen Flynn, of Victoria Police, also swore an affidavit on 21 July 2006 and a later affidavit on 7 September 2006. Messrs Ragg and Flynn were cross-examined at the hearing.

28. The second affidavit of Mr Flynn was filed because after the applicant was cross-examined on 1 and 2 August 2006, Victoria Police carried out a raid on premises in Parkdale. Sergeant Flynn's affidavit dealt with the raid. Gary James Gibbs, an uncle of the applicant and the occupier of the Parkdale premises, swore an affidavit on 13 September 2006. Counsel appearing for the respondents made application that they be permitted to cross-examine the applicant in relation to these events. They made it clear that the application was made because they did not want to be the subject of any criticism thereafter that the applicant had not been the opportunity to give evidence in relation to the new circumstances. As the applicant's cross-examination had been concluded, it was my opinion that counsel for the respondents to the application were not entitled, as of right, to further cross-examine her on the new material, as she had given no evidence in relation to the matter. However, I informed Mr Lasry QC, who appeared for the applicant, that his client should be given the opportunity to explain the events which were deposed to by Messrs Flynn and Gibbs, and that if she failed to do so, the Court might draw adverse inferences against her. Mr Lasry informed the Court that his client did not wish to give any further evidence in relation to the new matters. This decision was made in the knowledge that the Court may draw adverse influences against the applicant.

29. It is clear from the wording of s6(4) that the applicant carries the burden of persuading the Court on the balance of probabilities that it "would be unjust to require her to pay the amount undertaken to be paid having regard to all the circumstances of the case". See *Re Wilkinson*[4] and *Cucu v District Court of New South Wales*.[5] The Court's jurisdiction extends to varying or rescinding the order if the circumstances justify it. The question is, would it be unjust to require the applicant to pay the amount undertaken to be paid, taking into account all the circumstances of the case?

30. This legislation was first introduced in similar form to that which now appears in s6(4) in 1969. Prior to 1969, s6 of the Act gave the right to a defendant to seek to vacate an order that he or she pay a sum of money, if "according to equity and good conscience and the real merits and justice of the case the defendant ought not to be required to satisfy the same". In 1969, the *Crown Proceedings (Forfeited Recognizance) Act* 1969 was enacted. It substituted a new section 5 in the Act and gave the right to a principal or surety to apply to the Court to vary or rescind any order where a Court declared any recognizance to be forfeited, on the ground "that it would be unjust to require him to pay the amount of a recognizance having regard to all the circumstances of the case". When the *Bail Act* was enacted in 1977 it inserted a new section 6 which was in the form similar to the form today.[6]

31. The legislation has been the subject of discussion in a number of cases in this Court. Similar legislation in other jurisdictions has also been considered in a number of cases.

32. Crockett J considered the legislation in *Re Condon*[7] and *Re Wilkinson.*[8] In addition, there is the New Zealand case of *The Queen v Hopewell, Re Langford.*[9] Relief against forfeiture has also been discussed in a number of English cases, namely *R v Horseferry Roads Magistrates' Court, Ex parte Pearson*,[10] *R v Uxbridge Justices, Ex parte Heward-Mills*[11] and the Court of Appeal decision of *R v Maidstone Crown Court, Ex parte Lever.*[12] The principles were discussed by the NSW Court of Appeal in *Cucu v District Court of New South Wales*[13] and by the Queensland Court of Appeal of *Baytieh v State of Queensland.*[14] Whilst the cases deal with different legislation, in each of the jurisdictions the law gives to a surety whose recognizance has been forfeited the right to seek relief from forfeiture. In each of the jurisdictions, the question to be considered in determining whether relief ought to be granted is similar to the issues raised by the provisions of s6(4) of the Act.

**Nature of Surety's Obligation**

33. English law has for many hundreds of years recognised the right of an accused person to bail. It is a right recognised in Australian law. The *Bill of Rights* of 1689 (Imp) provided that excessive bail was not permitted and that the conditions of bail should not be set to deter the release of the accused pending trial. The right to a grant of bail is enshrined in s4(1) of the *Bail Act* 1977. However, that right may be abrogated in certain circumstances.

34. An accused person who is bailed is obliged to comply with the conditions of the bail, the most important of which is the requirement to attend at the place and on the date specified in the bail order. One of conditions of the undertaking given by the prisoner in the present matter was that he was obliged to appear before the Supreme Court of Victoria at Melbourne on a date specified, and to surrender himself and not depart without leave of the Court, and as often as leave is given, to return at the time appointed by the Court and again surrender himself. This was the Undertaking of Bail signed by the prisoner on 29 November 2005.

35. The provision of a surety is an essential part of the bail system. The surety undertakes to ensure that the accused will appear at his trial. That is the prime obligation. In 2 *Hawkins Pleas of the Crown*, Chapter 15, s3, the learned author, writing in 1824, stated that the purpose of granting bail was not to set the accused free, but to release him from the custody of the law and to entrust him to the custody of his sureties, who were bound to produce him to answer on his trial at a specified time and place.

36. In determining whether or not an accused person committed for trial should be granted bail, the primary consideration is whether there is a likelihood of the accused failing to appear at trial. Relevant to the question are the gravity of the charge, the strength of the case against the accused, and the accused's financial position. A Court must take into account the risk that an accused person, especially one charged with a serious offence, may abscond. In order to minimise the risk, the Court has at least two measures open to it. First, to impose conditions designed to minimise the risk, and, secondly, it may require the accused to obtain a surety or sureties who would undertake to have him surrender himself at trial. If it is a condition of bail that a surety provide an undertaking, the result is that the accused person is entrusted into the custody of a surety, who is obliged to ensure that he appears at his trial. This involves a surety in a positive role.

37. By reason of s6 of the *Bail Act* 1977, an accused person who is granted bail is under a duty to appear in accordance with the bail and to surrender himself into custody. Reference is also made to s15. A breach of the duty is now a crime.[15]

38. The importance of the undertaking given by a surety cannot be overstated. The Court, once it grants bail, is not in a position to supervise obedience to the order and conditions. It relies upon a surety to perform that task. In that sense, the surety acts as both "the eyes and ears" of the Court. The surety undertakes a duty to ensure that the principal, that is, the accused, honours his undertaking to the Court to appear at trial and to attend each day of the trial. A surety must be independent and undertake a real obligation. This means that the surety must put his or her money at risk. Hence, by reason of s31 of the *Bail Act* 1977, it is a criminal offence for a person to indemnify a surety, and an agreement by which an accused undertakes to indemnify a surety constitutes a conspiracy to effect a public mischief. See *The King v Porter*.[16] It is vital that a surety understands the obligations of his or her undertaking and the obligation to ensure that the accused honours his undertaking to attend at trial.

39. Section 9 of the *Bail Act* 1977 deals with the prerequisites that must be satisfied before a person becomes a surety. By reason of s9(1), a surety must be at least 18 years of age, must not be under any disability in law, and must be "worth not less than the amount of the bail in real or personal property or both". Section 9(3) requires the Court or a Court official to be satisfied of the sufficiency of the means of the surety, and may require the surety to lodge in cash the amount of a bail or some other security and require the surety to make an Affidavit or Declaration of Justification for Bail. The applicant swore an Affidavit of Justification on 26 November 2004.

40. The *Bail Act* was passed in this State in 1977. Up until then, the law relating to bail was a mixture of the common law and a variety of statutory provisions. The *Bail Act* was passed after the Statute Law Revision Committee of the Parliament of this State published a report on bail procedures dated 13 February 1975. Although the Act was detailed and covered many aspects of bail, it was not a complete codification of the law. See *Re Anderson*[17] and *R v Clarkson*.[18] One matter that the Committee emphasised in the report concerned the importance of the accused and the surety understanding the obligations of the accused in respect to bail, and the consequences of the failure by the accused to honour the undertaking to attend at trial. The Committee referred to the then Form 45 in the Second Schedule of the *Justices Act* 1958, which failed to adequately explain in plain language the obligations or the consequences of the accused breaching a condition.[19]

41. The law now requires a procedure to be followed which ensures that the obligations undertaken by both the accused and the surety, and the consequences of an accused person failing to comply with any condition, are understood by both the accused and the surety. There is no doubt in the present matter that the applicant was made fully aware of the conditions of the bail, that she was given a copy of the document that she had signed, which set out the undertakings given by her, and that she appreciated, as she stated in evidence, that she would be liable to pay $1,000,000 if the prisoner absconded.

42. The nature of suretyship provides the setting in which the present application must be considered and determined. First, to be a surety is a serious matter, and suretyship is not to be entered into lightly. Secondly, the accused person on release is entrusted by the Court to the surety, who has an obligation to ensure that he attends his trial. This requires the surety to take positive steps. It is no answer for the surety to stand by and do nothing, and then state that he or she believed that the accused would attend his trial. By signing an undertaking, the surety guarantees to the Court and the community that he or she will take steps to ensure the presence of the accused at trial. In one sense, it is a guarantee, but the legal principles relating to guarantees in commercial law do not apply to the surety's obligation. See *Thomakakis v Sheriff of New South Wales*.[20]

43. As surety, the applicant in the present proceeding has the burden of establishing the facts on the balance of probabilities in order to prove that it is unjust for the Court to require her to pay the amount of the undertaking or a part thereof. This imposes a heavy burden on the applicant. However, to grant some relief from forfeiture undermines the whole purpose of requiring a surety as a condition of granting bail. For this reason, it is vital that the surety understands the primary obligation of his or her undertaking, and that is to ensure that the accused honours his or her

undertaking to attend the trial. The amount of the undertaking is fixed to provide a disincentive to the accused to abscond. The amount of the surety exerts a pressure on the accused to honour the undertaking. This pressure was described as "the real pull of bail" by Lord Widgery CJ in *R v Southhampton Justices; Ex parte Corker*.[21] There, his Lordship said:

> "The real pull of bail, the real effective force that it exerts, is that it may cause the offender to attend his trial rather than subject his nearest and dearest who has gone surety for him to undue pain and discomfort."

44. The serious and onerous duties that a surety undertakes cannot be undermined or minimised. If a surety is concerned about the undertaking, there are avenues open to the surety to protect his or her interest. If concerned that the accused may not attend his trial, the surety is empowered under s21(1) of the *Bail Act* to apprehend the accused and to bring him before the Court prior to the date when he was obliged to attend, and may call upon members of the police force to assist. Further, under s21(2), the surety may apply to the Court to be discharged in any event, and the Court has power to so order. In these circumstances the surety is not obliged to apprehend the accused.[22]

45. It follows that before entering into an undertaking, a surety must be properly informed of his or her obligations. Secondly, he or she must appreciate the effect of a breach of any condition by the accused. Thirdly, the surety must understand that he or she must take positive steps to ensure that the accused attends his trial. Finally, and importantly, the surety must be a genuine surety.

46. In *Re Wilkinson*,[23] Crockett J discussed the importance of a surety being a genuine surety. At p254 his Honour said –

> "But the proposition that a surety's obligation in law is to take all reasonable steps to ensure the attendance of the principal at his trial has to be judged in the context of the surety's being a "genuine" surety. If the surety herself had not provided the money or gone into debt in order to obtain it but was acting as a mere cipher, or had been given the money by the principal, particularly if that money were the proceeds of the commission of the offence for which the bail was granted, or if, to the surety's knowledge, the principal still possessed the proceeds of the crime and was prepared, if necessary, to use those proceeds to recompense the surety in the event of the loss of the security provided as surety upon the principal absconding, then, in those circumstances it is not possible to treat the so-called surety as a surety in the appropriate sense."

47. His Honour at p255 went further and said –

> "The fundamental notion behind the requirement of a surety who is called on to enter into an undertaking and swear an affidavit of justification is that the surety is the owner of the asset put forward as security for the performance of the undertaking. It is the risk of its forfeiture with the concomitant penalty that such forfeiture involves that is meant to provide the incentive to the surety to perform his duty. Thus, if he who becomes a surety is not risking his own asset or is not involving himself in a genuine liability to repay a borrowed asset - the typical example of which is the provision by the principal himself of the money which may or may not be the proceeds of the alleged offence - that person is not to be regarded as a true surety. In such a case the surety has no incentive to endeavour to ensure the principal's attendance at trial and, in consequence, the surety will ordinarily have difficulty in having his contacts with the principal interpreted as efforts to deter the principal from breaking bail." (Emphases added).

48. The nature of a surety, the obligations undertaken and the importance of the surety being genuine, lead to the conclusion that a heavy duty rests upon an applicant seeking to establish the case for relief from forfeiture of the amount undertaken.

49. The point is made in the decision of *R v Maidstone Crown Court; Ex parte Lever*.[24] In that case, Butler-Sloss LJ stated that the basic obligation of the surety is to bring an accused to Court for trial and that the forfeiture of the recognizance is not a matter of punishment, but is "because he has failed to fulfil the obligation which he undertook". Her Lordship went on to say at 930 –

> "The starting point on the failure to bring a defendant to Court is the forfeiture of the full recognizance. The right to estreat is triggered by the non-attendance of the defendant at Court. It is for the surety to establish to the satisfaction of the trial Court that there are grounds upon which the Court may

> remit from forfeiture part or, wholly exceptionally, the whole recognizance. The presence or absence of culpability is a factor but the absence of culpability, as found in this case by the judge, is not in itself a reason to reduce or set aside the obligation entered into by the surety to pay in the event of a failure to bring the defendant to Court. The Court may, in the exercise of a wide discretion, decide it would be fair and just to estreat some or all of the recognizance."

50. The point is further emphasised by Hoffmann LJ in the same case at p934, where his Lordship said –

> "It follows that in one sense the system has unfairness built into it. It may result in persons entirely innocent having to suffer on account of a wrong doing of another. The Courts rely upon the moral pressure which this prospect should apply to the mind of the accused. But the pressure would evaporate if Judges were not willing, as a general rule, to harden their hearts against a plea of lack of culpability when it turns out that the surety's trust in the defendant was misplaced." (Emphasis added).

**Question of Culpability**

51. With the nature and object of the suretyship firmly in mind, the first question on an application such as the present is to determine whether or not a surety has fully and properly performed the duties imposed upon him or her by the suretyship. Crockett J in *Re Wilkinson*[25] expressed the view that "proof of full and proper performance by a surety of the duties imposed on him by his suretyship will ordinarily entitle the surety to relief under the section."[26]

52. In *Re Condon*,[27] his Honour referred to what Barrowclough CJ said in the New Zealand case of *R v Hopewell; Re Langford*.[28] The learned Chief Justice said "[t]he test is whether or not the surety had taken all reasonable steps to secure the attendance of the principal party to the recognizance."

53. Crockett J posed the test in *Re Condon*[29] as follows:

> "The surety's obligation was to take all reasonable steps to ensure the attendance of a principal at his trial. The primary question on the present application must, therefore, remain – did the applicant take such steps? If she has, then no doubt she would have gone a long way, if not the whole way, to earn the total or partial release sought. If she has not, then before any relief can be granted facts must emerge to establish that notwithstanding such failure, it would be unjust in all the circumstances not to vary or rescind the order."

54. One thing is clear, and that is that the surety must take some positive step. To do nothing would not satisfy that test. This is the culpability issue. The question for the Court is – has the surety taken all reasonable steps to secure the attendance of the accused at his trial in all the circumstances? Did the applicant in the present case take all reasonable steps to secure the attendance of the prisoner at his trial?

**Burden and Standard of Proof**

55. The burden of proof rests on the applicant and the standard is on the balance of probabilities.

**Financial Impact**

56. Judges in a number of cases have referred to the financial impact upon a surety when the order is made, forfeiting the undertaking.

57. In *R v Horseferry Road Magistrates' Court, Ex Parte Pearson,*[30] Lord Widgery CJ, after observing that the enforcement of the undertaking was in no way a penalty imposed on a surety for misconduct, went on to observe:[31]

> "But one must, I think, start all these problems on the footing that the surety has seriously entered into a serious obligation and ought to pay the amount which he or she has promised unless there are circumstances in the case, either relating to her means or her culpability, which make it fair and just to pay a smaller sum." (Emphasis added)

58. However, in an earlier case decided the same year, his Lordship in *Re v South Hampton Justices, Ex parte Corker*[32] had this to say about the question of financial impact:

> "It would defeat the whole system of bail, I think, if it became generally known that the amount payable was strictly limited according to the surety's means and that anybody who had no means would not have to pay. Imagine the relish and speed with which persons would accept the obligation of surety if they were penniless and knew that that was a total answer to any kind of obligation on the recognisance."

59. In *R v Uxbridge JJ, Ex Parte Heward-Mills*,[33] McCullough J summarised the English cases to the date of his judgment and referred[34] to observations made by two judges, in which it was recognised that the extent of the surety's resources and the effect upon the financial position of the surety were factors relevant to the question of exercising the discretion to order that a surety pay a lesser sum or that the sum be remitted. In *Re Condon*,[35] Crockett J held that where proper, the Court could consider compassion or benevolence in determining the application. He referred to the financial question in this context.

60. In my opinion, absent any changed circumstances relating to the financial affairs of the surety after the undertaking has been executed, the impact upon the surety's financial position of enforcing the undertaking is not a matter that should be taken into account. As has been said many times, a person who undertakes as a surety to pay a sum of money if the principal fails to honour a condition of bail, undertakes a very serious obligation. In entering into the undertaking, the surety must turn his or her mind to the question of whether or not he or she can meet the liability which he or she agrees to pay. The fact is that on occasions, accused persons fail to surrender themselves for trial. The possibility of this occurring is not remote. There is a risk. If the risk materialises, then the undertaking requires the surety to pay the full amount. That is what the surety agrees to do. It would undermine the system if, having given thought to entering into the undertaking and sworn an affidavit as to the assets which he or she has to meet the undertaking, the surety could be relieved from the full obligation and ordered to pay a lesser amount because of the financial impact.

61. That is not to say that a change in circumstances after the undertaking has been executed is not relevant, if the changed circumstances have some impact on the financial position of the surety. Whether the changed financial circumstances would result in some relief against forfeiture wholly or in part, will, of course, depend upon the particular circumstances. The mere fact that something has happened to the financial position of the surety does not necessarily mean that it would be unjust to require the surety to pay the full amount or a substantial part thereof. Much would depend upon the nature of the changed circumstances and whether the surety's conduct has in any way affected the surety's financial position.

62. The principle that I have stated is supported by what McMurdo P and Davies JA said in the Queensland case of *Baytieh v State of Queensland*.[36] Their Honours, in a joint judgment, discussed a number of the English cases to which I have referred, and after noting that the culpability of the surety was a relevant and important consideration in considering whether to exercise a discretion in favour of the surety, went on to observe:

> "Other considerations may be financial hardship of the applicant arising since giving the undertaking; and the reasonableness of his or her expectation that the principal would comply with the conditions of his bail, especially where it is asserted against an applicant that he or she should have applied, or applied sooner, to discharge himself or herself from liability." (Emphasis added)

63. Their Honours referred to the question of financial hardship arising after the undertaking was given. In the same case, Jones J referred to a number of cases and summarised some of the factors which were relevant to the exercise of the discretion. The discretion under the Queensland legislation is similar to that under the Victorian legislation. His Honour noted that one of the matters was the extent of the financial impact of the forfeiture on the surety and his or her family. He referred to what was said in *Cucu v The District Court (NSW)*.[37] In that case, Kirby P[38] referred to some of the matters that were relevant to the question. One of the matters to which he referred was expressed as:

> "The surety's means, although these cannot alone detract from the obligations accepted when security was provided as a condition for the grant of bail." (Emphasis added).

**Factors Relevant to Application**

64. Analysis of the cases reveals a variety of factors which have been considered relevant to

an application for relief against forfeiture. It would be impossible to compile an exhaustive list of all relevant matters, which must, of course, depend upon the particular circumstances of each application. However, it is possible to list a number of factors which have been taken into account. In *Re Condon*,[39] Crockett J considered the following factors –

> (i) the surety has an obligation to take all reasonable steps to ensure the attendance of the principal at trial;
>
> (ii) the surety must in fact take some positive action and it is insufficient if a surety merely relies upon a belief however well founded, that the accused will answer his bail;
>
> (iii) what, if anything, the surety has done after the accused has absconded to assist the police;
>
> (iv) the possibility that a surety may be recompensed by the accused or some other person on his behalf.

65. As stated above, in *Re Wilkinson*,[40] Crockett J noted the importance of a surety being a genuine surety, that is, the surety putting at risk his or her asset as security for the performance of the undertaking.

66. In *Cucu v District Court of New South Wales*,[41] Kirby J noted a number of relevant factors, as follows –

> (i) the relationship between the accused and the surety and the latter's motives for facilitating bail for the accused;
>
> (ii) the steps taken to ensure the accused will attend court;
>
> (iii) if the accused absconds and is still at large, the cost of trying to arrest him and return him to the jurisdiction;
>
> (iv) whether the surety assisted the police after the accused absconded and;
>
> (v) the surety's means.

His Honour also emphasised that a surety had a duty not to adopt a passive role, but rather to adopt an active role in performing his or her obligations.

67. In the Queensland case of *Baytieh v State of Queensland*,[42] Jones J considered a number of cases and summarised a number of relevant factors. Most of the factors his Honour identified were those stated above, but in addition the following were noted –

> (i) any circumstances which ought to have alerted the surety that the principal was likely to abscond;
>
> (ii) the nature of the relationship between the surety and the principal and the level of control the surety had over the principal's behaviour;
>
> (iii) whether the relationship was likely to persuade the principal to return.

**Applicant's Case**

68. The applicant has the burden of proving that it would be unjust in all the circumstances to require her to pay the sum of $1,000,000. If she proves that it would be unjust, the Court then has to consider whether the original order should be rescinded or varied. In her written application, the applicant gave particulars of the grounds that she relied upon and they are:

> "(i) the surety took all reasonable steps to ensure the attendance of the principal at trial;
>
> (ii) it would be unjust in all the circumstances not to vary or rescind the order;"

69. The second part of her particulars are not particulars and merely repeat the sub-section. However, in the course of the proceeding, it was apparent that the applicant also relied upon another ground, namely financial hardship. In substance, she asserted that the property, being the residential property which was the security for her undertaking to pay $1,000,000, was the family home and because of orders made by this Court pursuant to the *Confiscation Act* 1997,

which have the effect of restraining her and her husband Milad from dealing with certain property including the family home, she would be in an extremely parlous financial position if the home had to be sold. The applicant asserts that this would cause hardship to the family.

70. It is the applicant's case that she has proven that she did take all reasonable steps to ensure the attendance of the accused at trial, that she was a genuine surety, that she had no reason to believe that the accused would abscond in the time leading up 19 March 2006, and that if she was obliged to pay the sum of $1,000,000, it would constitute a substantial financial hardship to both her and her children and also, to a lesser extent, her husband, who is presently in gaol pending a committal proceeding.

**A. Culpability**

71. All told, the applicant on three separate occasions signed undertakings to pay $1,000,000 in the event that the prisoner failed to observe a condition of his bail. She did so when he was committed for trial on 26 November 2004 in respect of the Commonwealth prosecution. She signed another undertaking on 15 February 2005, when the prisoner was committed for trial in respect of the four serious Victorian drug offences. On 29 November 2005, when the bail was extended in respect to both the Commonwealth and State matters, she again signed undertakings. There was no doubt at all that she was fully aware of all of the relevant circumstances, namely, the effect of the undertaking, her financial position, and also the serious charges that the prisoner was facing. It could not have been lost upon her that the conditions of the bail, including the amount of $1,000,000 by way of surety, demonstrated the seriousness of the alleged offences and a concern that the prisoner might abscond.

72. The applicant was aware that her brother in law had been the subject of much media coverage up to 19 March 2006, in which allegations of criminality were made against him. The Mokbel family was a close knit group who met every Sunday at Mrs Mokbel senior's home. The ever increasing wealth of the members of the family, and especially the prisoner, must have raised questions in her mind as to the sources of the wealth. I do not believe her when she said in evidence that the large sums of cash kept at the residential property were from her husband's gambling. The thrust of the media coverage of the prisoner, and to a lesser extent, her husband, was that they were "career criminals" whose wealth came from illegal activities. Importantly, and a matter of some significance, was that on 25 October 2005, whilst on bail in relation to both the Commonwealth and State matters and waiting for trial in the Commonwealth prosecution, the prisoner was arrested and charged with two charges of inciting another to import a commercial quantity of ecstasy into this country. This alleged activity on the part of the prisoner whilst on bail shows both his contempt for the law and his arrogance. This could not have been lost on the applicant. I do not believe her when she tried to suggest that she knew very little about the Mokbel family's criminal activities.

73. The applicant swore two affidavits and was cross-examined at length. She gave evidence in support of her case that she had taken all steps to ensure the prisoner attended at trial, that she was unaware that the prisoner was contemplating absconding, and that there was nothing to alert her to that fact. The obedience of the prisoner to the conditions of bail and the fact that the Court did not revoke his bail on Friday, 17 March 2006, were prayed in aid to support her belief that the prisoner would not abscond.

74. It was submitted on behalf of the respondents that the applicant had lied to the Court, and that the Court could not accept her evidence. It was asserted that her honesty and credit were central to the application, and that when one considered her evidence as a whole, and in particular her cross-examination, the Court should conclude that her credibility was non-existent. In support of these submissions, counsel for the respondents highlighted a number of aspects of the evidence, namely –

- The applicant swore she had limited familiarity with allegations of criminal activity concerning the members of the Mokbel family, namely, the prisoner, her husband Milad and two of the other siblings.
- The evidence revealed the presence of large sums of cash in her home, and some items in the laundry which suggested drug trafficking; the applicant's explanation was that her husband, who apparently was unemployed for a substantial period, was a good and lucky gambler, and that the income of the family was in the main derived from gambling. She denied that it was from illegal

activities in the drug scene.

- She stated that she did not think that the departure from Australia of the prisoner's girlfriend, Danielle McGuire, or communications from her were important enough to tell the police, even though she accepted that she had an obligation to assist the police after the accused had absconded.
- She gave evidence that she had not asked the members of the Mokbel family where the accused might be.
- She gave evidence that she saw the accused at family functions at least once a week and sometimes more often, and that she told him he must answer bail. It was submitted that this was fanciful and a fiction.
- The subsequent events involving a raid at Parkdale of a substantial sum of cash and a large quantity of valuable jewellery, which had not been disclosed and which she did not seek to give any evidence about, demonstrated that her affidavit as to her assets and means was demonstrably false.

75. It is necessary to briefly summarise the events which occurred after the applicant had completed her evidence.

76. On Tuesday 5 September 2006, a raid by Victoria Police took place at premises situated at 14 Alma Road, Parkdale pursuant to a search warrant. An occupant of the residence, Mr Gary James Gibbs, is the applicant's uncle. During the raid a number of valuable items were found buried in pipes in the back yard, namely, $336,700 in cash, foreign currency notes of approximately US$1,000, and in excess of 100 items of jewellery, including 18 watches and 33 jewellery boxes valued for insurance purposes at about $185,000. Valuation certificates for a gold bracelet and gold earrings were also found. Mr Gibbs swore an affidavit and gave evidence. In substance, his evidence was that he visited the home of the applicant and her husband from time to time and that late last year, her husband asked him on a number of occasions to look after cash for him, as he evidently was sick of his brothers borrowing money from him. Mr Gibbs eventually took the cash and buried it in piping in his back yard.

77. Mr Gibbs also gave evidence that earlier in January or February last year, the applicant asked him to look after a large quantity of jewellery. According to his evidence, the applicant stated that after the police had raided her property a lot of jewellery had gone missing. He stated that he understood that this raid took place in the year 2000-2001. The reason given by the applicant to her uncle is unbelievable. If there was a concern over a raid in 2000-2001, then it seems surprising that some four years later the applicant was taking steps to protect against possible theft by police. What the events do demonstrate is that in 2005 and early 2006, both the applicant and her husband were anxious to hide their assets. It is inconceivable that the applicant did not know that her husband was requesting her uncle to hide his cash. These events also impact on the applicant's assets, income and outgoings as sworn by her in the first affidavit.

78. In her first affidavit, the applicant purported to list her assets and liabilities, her income and her outgoings. The statement of the assets and liabilities, which included the assets of JR Mokbel Pty Ltd, is wrong in that the applicant identified a liability without disclosing an asset of the same amount. More importantly, she made no mention of the cash found at Parkdale, nor did she make any mention of any jewellery. In a raid on the residential property in April this year, the police found large sums of cash in various places and the applicant's explanation for the cash was that her husband, who was unemployed and had been for a number of years, was a good gambler. The suggestion was laughable. The later events concerning Parkdale demonstrate the force of that observation. Her explanation was untrue. She knew it was untrue. Her affidavit concerning the financial position was false. Her failure to disclose the value of the jewellery was a deliberate attempt to hide her assets.

79. One of the two persons who could explain the activities was the applicant. The other, of course, was her husband. The applicant was given the opportunity to give her version of the events. The respondents sought to cross-examine her. She declined to give evidence. I upheld the objection to her being cross-examined. On the other hand, the Court made it very clear to the applicant's counsel that the Court may draw an adverse inference against her. I am satisfied that the applicant chose the well of the Court to the witness box, because she knew that if she gave evidence she would be exposed as a liar and, secondly, that her explanation would not assist her cause in respect to financial hardship – see *Weissensteiner v R*[43] and *O'Donnell v Reichard.*[44]

80. In the affidavit the applicant stated what her assets were. Paragraph 42 is carefully drawn

as it refers to what she describes as "my major assets" and the assets of JR Mokbel Pty Ltd. The phrase "my major assets" was employed to give her room to manoeuvre in cross-examination if other assets were found. The fact is that if a person is bound to reveal her assets, then this means all assets of substance. Jewellery valued in excess of $45,000 is an asset of substance. Her affidavit omitted to reveal that JR Mokbel Pty Ltd was a company that was the Trustee of the JR Mokbel Family Trust. However, it is clear that when she swore her affidavit on 15 June 2006, that was the position. She revealed her assets and liabilities, and those of JR Mokbel Pty Ltd, as being the residence at 9-11 Downs Street, Brunswick, which she valued at $1.1m, a property at 210 Quinns Road, Kilmore valued at $430,000, two Mercedes motor vehicles valued at approximately $155,000, and liabilities of $395,000. One of the liabilities was a loan obtained on the security of the property at Kilmore. The applicant said that the loan was obtained to assist a friend of her husband. However, the friend was in fact lent the money by the applicant and her husband. The loan should therefore have been disclosed as an asset. It appears that the loan was obtained and on-lent by the Family Trust. When corrected, the assets totalled in value $1,985,000, and the liabilities were $365,000.

81. In her affidavit, the applicant stated that the loan was taken out to assist the business of a friend of her husband. She named him as Brian Waikem. When cross-examined, she was extremely vague about her knowledge of this person and where he resided. The affidavit went on to assert that the debtor was paying $2,672.50 per month, which was used by her to pay household expenses and, in addition, interest on the loan. She was also extremely vague about the circumstances of the loan and, in particular, was unable to provide any information as to any security given by the alleged borrower or when the loan might be repaid. In her affidavit, the applicant observed that if there was a default by the borrower, the responsibility for payment of the loan would lie with JR Mokbel Pty Ltd. The affidavit refers to "the borrowers at present", which merely adds to the confusion. The property is owned by the Family Trust. The applicant controls the Trust. She knows much more about the Trust than she was prepared to reveal. I do not believe her evidence in relation to this transaction. Indeed it is difficult to say what is the true position.

82. What emerged in evidence was that JR Mokbel Pty Ltd is the Trustee of the Family Trust. The trust is called the JR Mokbel Family Trust. It is a typical discretionary family trust and was established on 12 July 1996. The sole shareholder and director of the company is the applicant. She is a discretionary beneficiary of the Trust, as are her husband and his family. The Trust estate includes the home at 9-11 Downs Street, Brunswick. As the person in control of the Trustee, it would be open to the applicant to cause the Trust to resolve that the property be transferred to her, as she is a beneficiary. Clause 6 of the Trust Deed empowers the Trustee to transfer part of the Trust fund to a beneficiary. By reason of clause 21, the appointor under the Deed has the power at any time to remove the Trustee. The appointor is the applicant's husband, Milad Mokbel. At present, so long as JR Mokbel Pty Ltd is the Trustee, and so long as the applicant is the sole director and shareholder of that company, the applicant could in the exercise of the powers given to the Trustee under the Deed resolve to transfer property to herself. However, it is clear that the ultimate control of the whole Trust is in the hands of her husband, who could take steps to remove the Trustee.

83. The Affidavit of Justification sworn by the applicant on 26 November 2004 is also false. The applicant swore that she has real property valued at not less than $1,000,000, that her real estate consists of the residential property, and that the value of her equity was $1,140,000. The true position is that the residential property is not owned by her and is instead owned by JR Mokbel Pty Ltd as a Trustee. Since the applicant is one of a number of beneficiaries and the Trust is a discretionary trust, she is not entitled as a beneficiary to demand that the estate be distributed to her. Until the Trustee resolves to transfer to her any property forming part of the Trust estate, she has no interest in the property. She gave evidence that her husband, Milad, requested that she become the surety for his brother back in November 2004. She knew at that stage that JR Mokbel Pty Ltd was the registered proprietor of the property, and that the property formed part of the Trust estate. She was the only shareholder and director of the company at that time, and it is difficult to accept that she swore the affidavit honestly believing that the home was hers.

84. The first affidavit of the applicant is wrong and misleading. It fails to disclose the true position so far as ownership of the residential property is concerned. The fact is that the applicant

herself has very few assets. The Trustee owns both of the properties at Brunswick and Kilmore, which would mean that the assets in the applicant's own name, as revealed by her, total something in the order of perhaps $150,000. That is the value of the two cars. She omitted to reveal the jewellery that was found in the raid at Parkdale. The evidence before the Court shows that the jewellery was valued for insurance purposes at $185,000. The valuer, Michael Walsh, stated that the value on an auction basis would be about one quarter of that amount, which would mean that the jewellery had a value somewhere in the order of $45,000. Although some of the items could be worn by a male person and may not be the applicant's jewellery, she chose not to give evidence to clarify the position and, accordingly, I am prepared to draw the conclusion that the jewellery was, in the main, hers. This is based upon the facts that she requested her uncle to look after her jewellery, and that most of the items fit the description of female jewellery. The fact was that the value of the jewellery was not revealed. Whilst one would accept that if a person had a small amount of jewellery which was of little value, it would not appear in one's list of assets, the omission to reveal jewellery of this value shows a deliberate attempt to hide assets.

85. The applicant was cross-examined at some length as to certain financial transactions and her assets and liabilities. She was asked about obtaining financial assistance from her relatives and said that she had not asked any of them for help. She did not volunteer that her uncle had received a large sum of cash and jewellery to hide in his back yard. The evidence revealed that over the years, she had access to large sums of cash, some of which were secreted in a variety of places around her house. Her explanation for the money, being that her husband was a lucky gambler, defies belief and was a deliberate lie. She denied that she had any knowledge that the family wealth was derived from criminal activity, but the evidence revealed that she had every opportunity to come to that conclusion. There was evidence that certain items in the laundry were items which one might use in peddling drugs. The applicant is not stupid or naïve, and I do not believe her when she said she did not know that the cash was being generated by criminal activities.

86. The applicant was asked about a property purchased by a company called Gannrf Investments Pty Ltd, and in particular was questioned about the source of funds advanced for the purchase of that property. She was a director and shareholder of the company at the time of acquisition, and signed documents seeking a loan for the company. She was vague and uncertain about the transaction and I do not accept for one moment that she did not have a good understanding of it. She was a witness who was vague when it suited her, and who hid behind a lack of memory of events that she should have known about.

87. The applicant is a wife and a mother. She is also a businesswoman. In the early years after leaving school, she assisted with the accounts in her father's business. She later conducted a pizza business and then a butcher's business, and in the last few years has been actively involved in businesses providing hairdressing goods and services to women. She is in partnership with the prisoner's female friend. She has been in control of the Trustee of the JR Mokbel Family Trust for about ten years. As noted above, evidence revealed that she was a director of Gannrf Pty Ltd, which was involved in the acquisition of real estate and was a signatory to the application to borrow funds in respect to it. She was cross-examined at length in relation to the activities of that company and also other financial transactions. She was extremely vague. In my opinion, her attempt to portray herself as somewhat naïve and ignorant of affairs business was deceitful. She set out to mislead the Court in relation to the various business activities. She is not naïve and she is not unworldly in relation to affairs business. Often, the applicant chose to answer in a way that suggested she did not have an understanding of what she was doing. She was cross-examined in relation to a number of other business activities. Whilst one would make allowances for some activities that may purely have been her husband's, I do not accept that she did not fully understand the business transactions that she was cross-examined on. In my opinion, she is a witness without credibility.

88. The fact is that the bulk of what the applicant has revealed as being her major assets and the assets of JR Mokbel Pty Ltd are not owned by her at all, but are owned by the Family Trust. As at today, she has control of the Family Trust. On the other hand, the main assets, being the properties at Brunswick and Kilmore, are the subject of confiscation orders freezing assets in respect to the prosecution of her husband. The criminal "Mareva-type orders" that have been made in the past deny the Family Trust, the applicant and her husband any right to deal with

the property. The applicant has made an application on behalf of the Family Trust to the Court to exclude its properties from the effect of the orders made, but the proceedings have been adjourned *sine die*, and the reality is that they will not be heard until the end of the criminal proceedings against her husband. This could be well in excess of 12 months away.

89. I accept the submissions of counsel for the respondents. I found the applicant to be an unsatisfactory and vague witness. I am satisfied that the oath she took meant nothing to her. She falls into the category of witnesses whose evidence should not be believed on any important fact, unless it is supported by some independent evidence, is inherently probable, is admitted by the opposing parties, or amounts to an admission against interest.

90. The applicant gave evidence that the Mokbels constituted a close family, the members of which saw each other often, and that there were family functions every Sunday. She stated that her contact with the family, and in particular the prisoner, was almost daily. I do not accept that piece of evidence. Despite the fact that the applicant was aware by reading newspaper reports that the prisoner was involved in a number of court cases, she stated that she did not discuss with him in any detail any of the criminal matters. I am satisfied that she did have an excellent understanding of the charges that were brought against the prisoner, and a good understanding of the media coverage relating to him. The applicant gave evidence, which I do not accept, that she told the prisoner that since the residential property belonged to her children, she did not want him to do the wrong thing by absconding, and that he assured her he would not do so. She asserted that she often said to him he must do the right thing and comply with his bail conditions, and that he assured her he would. I do not accept that evidence. I do, however, accept her statement that compliance by the prisoner with the stringent conditions of his various bail orders provided her with some degree of comfort. The evidence was that the prisoner had complied over many years with the conditions, and the conditions were extremely strict when his bail was extended by me on 29 November 2005.

91. The applicant also gave evidence that she reminded the prisoner on a regular basis to comply with the curfew. I think that is fanciful and I do not accept the evidence. She also stated that during the trial she saw the prisoner every day. I also do not accept that evidence. The applicant stated that she had regular contact with the prisoner's partner, Danielle McGuire, which I accept because they were in partnership in business, but I do not accept that she regularly checked through her friend whether the prisoner was complying with the curfew. The evidence revealed that the applicant was in Court on Friday, 17 March 2006 when the application was made to revoke the bail. Her explanation for this was that her friend Ms McGuire had indicated concern because she had ascertained from some source that the Crown was proposing to apply to revoke the bail. The applicant did not attend at any stage until around that Friday and I do not accept her explanation for her presence in Court. There are real suspicions that she was present to later enable her to give evidence that she was performing her duties as a surety, and that she knew the prisoner was contemplating absconding. However, the Court does not act on suspicion.

92. The applicant gave evidence that on the Saturday morning, being 18 March 2006, the prisoner came to her home as he said he was going to see his mother. I have no reason to doubt that evidence. The applicant said she did not notice anything untoward about the meeting.

93. The applicant further gave evidence that she saw the prisoner for a short time on the Sunday.

94. The applicant has three children aged 13, 10 and 21/2 years respectively. The evidence revealed that she and her husband operated a butcher shop business at the Brunswick Market for about 18 months and that this was sold in May 2005. She stated she had done the bookwork for the business. The applicant then began a hair salon business, eventually in partnership with Ms McGuire, and she stated that it was during this period that her husband remained at home with the children. He was arrested on 25 April 2006.

95. In her first affidavit, the applicant deposed that "in the main our financial affairs are taken care of by my husband and there was money coming from the butcher shop and substantial amounts of money that came from horse racing." Other than I accept that there was income generated through the butcher business, I do not accept that evidence. The applicant was involved

in the butcher business, she did the bookwork for the shop, she had previous experience doing bookwork, she was involved in the acquisition of the real estate by Gannrf Pty Ltd, and she was the controller of the Trustee of the Family Trust.

96. The applicant is presently self-employed in partnership with Danielle McGuire at a hair and beauty salon in Toorak Road, which opened in September 2005. She informed the Court that it was a good business and was slowly growing. Danielle McGuire left this country some months ago and has not returned.

97. The primary question is whether the applicant has established that she took all reasonable steps to ensure the attendance of the prisoner at trial? I do not accept that she took all reasonable steps to ensure the attendance of the prisoner at trial. First of all, I do not accept her evidence. She is a witness without credibility. Secondly, having sat through a trial involving the prisoner and observed him in Court, I do not believe that the applicant could ever have thought that the prisoner would comply with her request if he decided otherwise. He came across as a strong, arrogant and determined man, and a very dishonest criminal. Thirdly, her conduct after the flight of the prisoner indicates a person whose loyalty to the Mokbel family and the prisoner far outweighed any obligation she felt as a surety. The applicant gave evidence that she had not asked any of the family where he had gone, nor did she volunteer any information to the police that may have been of any assistance. More importantly, she did not alert the police to her friend going overseas. Fourthly, she was aware that the prisoner was facing a number of serious drug charges and that the cases brought against him were strong. She was aware that extremely stringent bail conditions had been imposed and that as from 29 November 2005, the curfew had been imposed. The evidence of the accounts relating to Hollywood Hair Extensions revealed that a large sum of money had passed from that business to Betfair, London. The applicant was aware that on 25 October 2005, the prisoner was arrested in relation to the attempts to import drugs into Australia. She was also aware that serious allegations were being made in the press about him. More importantly, she was aware that the trial was coming to an end and that he was an extremely wealthy man who seemed to be possessed of much cash. All of these matters should have alerted the applicant during the weekend of 18-19 March to the risk that the prisoner may abscond. She did not take any particular steps to ensure this did not happen. The steps she could have taken included going to the police, or seeking to be released from her undertaking.

98. For these reasons, in my opinion the application should be dismissed. However, there are a number of additional reasons why the application should be dismissed.

**B. Financial Impact**

99. The applicant gave evidence that the enforcement of the undertaking would have a serious impact upon her financial circumstances. She is 35 years of age, has three children, and her husband is the father of the three children. She and her husband conducted a butcher shop business for about 18 months at the Brunswick Market and the business was sold in the first week of May 2005. After selling the business in May last year, the applicant began a hair salon partnership business with Ms McGuire. She said that her husband remained at home looking after the children. Her husband is now in custody. Her mother assists in looking after her children, although her mother's health is not good.

100. Prior to 1997, she and her husband resided with her parents and after establishing the Family Trust and registering JR Mokbel Pty Ltd in 1997, they purchased the home at 11 Downs Street, Brunswick. The existing residence on the property was demolished and the applicant and her husband built a new home. The applicant and her three children currently live at the property. The applicant is presently self-employed, conducting the hair salon business in partnership with Danielle McGuire. She stated that the business is improving and paying its own way, but evidently there is money still owing on it. The business premises are leased. The applicant states that due to the legal costs of the present application, the restraining orders and her husband's legal bills, together with commitments such as mortgage and car payments, she would have to sell her share of the business, in the event that the application fails. Her partner, Ms McGuire, left Australia some time in July this year and has not returned. How this will impact upon the business was not explained. When she gave evidence, the applicant stated that she believed that Ms McGuire was to return to Australia some time in August.

101. There are currently a number of confiscation orders against property because of the charges brought against the applicant's husband. The property which has been restrained includes the residential property, the property at Kilmore, two Mercedes motor vehicles, a number of television sets, and the JR Mokbel Pty Ltd business cheque account. The applicant believes she is unable to borrow any money against any of the assets. She states that she is under considerable financial strain in attempting to support her family and meeting liabilities. Although her current weekly income is in the order of $700, her expenses, according to her affidavit, total approximately $5,895 per month. She also listed the expenses of JR Mokbel Pty Ltd, which apparently total approximately $1,801 per month.

102. The applicant was cross-examined about a number of financial transactions which involved her husband, herself and the trust. As found by the Court, she is not a credible witness. Her evidence given during cross-examination posed more questions as to the financial worth of the family and the Family Trust. It is not possible to say what the true financial position is. It is clear that the applicant has not made a full disclosure of all assets of the family and, in particular, her assets. Accordingly, it is not possible to say what is the true financial position, and what will be the financial impact on her if she pays the sum of $1m. If the impact on her financial position of the order requiring her to pay $1m is relevant on this application, the application also fails on this ground because the applicant has not fully revealed the true financial position.

103. However, in any event, there are no new circumstances relating to the applicant's financial position since she became a surety for the prisoner. The only change relates to the restraining orders, which interfere with the rights of the person or persons who have an interest in the property restrained to deal with it. The Trust has made an application to be excluded from the restraining orders, but the application has not yet been heard. The circumstances, in my opinion, do not constitute new circumstances which should be taken into account in considering the financial impact and whether it is unjust for the applicant to pay the sum of $1m.

**C. Genuine Surety**

104. It is incumbent upon a surety who seeks relief from forfeiture to establish that he or she is a genuine surety.

105. I am not persuaded that the applicant was a genuine surety. The evidence revealed that she has very few assets in her own name. The property that she identified as being of sufficient value to meeting the undertaking in her Affidavit of Justification is not owned by her and she has no interest in it. The property is owned by a trust company and is held for the benefit of contingent beneficiaries. Although the applicant is one of the contingent beneficiaries, until the Trustee resolves in her favour to provide her with any trust asset, she has no interest in any of the Trust assets. In giving the undertakings which she gave in the past, she was not putting at risk any asset to the value of $1m. On the evidence before the Court, the applicant has never had assets of $1,000,000. She misled the officers of both the Magistrates' Court and this Court as to her true interest in the residential property. Her failure to assist the authorities after the prisoner absconded is also relevant to the question of her being a genuine surety. She was not a genuine surety. The application should be refused on this ground also.

**D. Criminal Source of Funds**

106. The Court is not satisfied that the applicant has made a full disclosure of all of her assets, the family assets or the true financial position. The evidence before the Court leads to an inference that the acquisition of assets over the years by the Milad Mokbel family, which of course includes the applicant and the Trust, has in the main been financed through criminal activity. The applicant has not persuaded the Court that this is not so. When the applicant seeks to persuade the Court that she should not have to pay the $1m because it is unjust in all the circumstances, the fact that many of the family assets were derived from criminal activity is a relevant factor to take into account. It would not be unjust in the circumstances for her to have to pay the full amount of the surety undertaken by her, when the Court has been misled as to the true position of the assets of the Milad Mokbel family, the applicant's assets and the Trust's financial position, and when much of the accrued wealth of the family has, on the evidence, come from criminal activity. That conclusion is open on the evidence and the applicant has failed to prove that the assets have been accumulated lawfully. This is another reason why the application should be refused.

**Conclusion**

107. The applicant carries the burden of persuading the Court that it would be unjust to require her to pay the amount undertaken to be paid, having regard to all the circumstances of the case. She has failed to do this.

108. Subject to any submissions by counsel, I propose to order that the application be dismissed. I will hear the parties on the question of costs.

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[1] See *Mokbel v DPP (No. 3)* [2002] VSC 393; (2002) 133 A Crim R 141.
[2] See *R v Mokbel* [2006] VSC 119.
[3] [2006] VSC 158; 199 FLR 176.
[4] [1983] VicRp 85; [1983] 2 VR 250 at 256.
[5] (1994) 73 A Crim R 240 at 242.
[6] See Schedule to Act.
[7] [1973] VicRp 40; [1973] VR 427.
[8] [1983] VicRp 85; [1983] 2 VR 250.
[9] [1958] NZLR 523.
[10] [1976] 1 WLR 511.
[11] [1983] 1 All ER 530; [1983] 1 WLR 56.
[12] [1995] 2 All ER 35; [1995] 1 WLR 928.
[13] (1994) 73 A Crim R 240.
[14] [1999] QCA 466; [2001] 1 Qd R 1.
[15] See s30(1).
[16] [1910] 1 KB 369.
[17] [1978] VicRp 34; [1978] VR 322.
[18] [1981] VicRp 18; [1981] VR 165.
[19] See paragraphs 57 and 58 of the report.
[20] (1993) 33 NSWLR 36 at pp50-1; 71 A Crim R 265.
[21] (1976) 120 SJ 214 quoted in *R v Maidstone Crown Court Ex Parte Lever*, *supra* at p931.
[22] See also s23(1).
[23] *Supra*.
[24] *Supra*.
[25] *Supra*.
[26] *Supra* at p254-5.
[27] *Supra*.
[28] *Supra* at p524.
[29] *Supra* at p431.
[30] [1976] 1 WLR 511.
[31] At p514.
[32] (1976) 120 SJ 214.
[33] [1983] 1 All ER 530; [1983] 1 WLR 56.
[34] At p61.
[35] *Supra* at p433.
[36] [1999] QCA 466; [2001] 1 Qd R 1 at p5.
[37] (1994) 73 A Crim R 240.
[38] At p242
[39] *supra*.
[40] *supra*.
[41] *supra*.
[42] *Supra* at p9.
[43] [1993] HCA 65; (1993) 178 CLR 217 at 227 and at 235; (1993) 117 ALR 545; 68 A Crim R 251; 68 ALJR 23.
[44] [1975] VicRp 89; [1975] VR 916.

**APPEARANCES:** For the applicant Renate Mokbel: Mr L Lasry QC, counsel. Chiodo & Madafferi, solicitors. For the respondents: Mr D Parsons QC (until 21 August 2006), Mr G Horgan QC (from 13 September 2006) and Mr S O'Sullivan (from 13 September 2006), counsel. Commonwealth DPP and Office of Public Prosecutions Victoria.

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