12/02; [2002] VSC 90

SUPREME COURT OF VICTORIA

DIRECTOR of the ASSET CONFISCATION OFFICE v HIEN VAN NGUYEN & ANOR

Ashley J

21, 28 March 2002 — (2002) 128 A Crim R 531

PRACTICE AND PROCEDURE – PROCEDURAL FAIRNESS – EXAMINATION UNDER *CONFISCATION ACT* 1997, S99 – ORDER BY COURT THAT EXAMINATION BE ADJOURNED FOR NOTICE OF EXAMINATION TO BE GIVEN TO PERSONS WITH A REGISTERED INTEREST IN RELEVANT PROPERTY – NATURE OF S99 EXAMINATION – WHETHER THIRD PARTY WOULD BE DENIED PROCEDURAL FAIRNESS IF NOT GIVEN NOTICE OF EXAMINATION: *CONFISCATION ACT* 1997, S99.

Section 98(4) of the *Confiscations Act* 1997 ('Act') provides:

> "(4) The applicant must give written notice of an application under this section to the defendant and any person whom the applicant seeks to examine under the order."

A court made an order that N. be examined pursuant to the Act. When the examination came before the court, the court ordered that the matter be adjourned until N.'s sister and nephew had been put on notice. Upon appeal—

HELD: Appeal allowed. Declaration granted that court erred in law in adjourning the examination until notice was given to persons who had registered interests in relevant property.
Under the Act, the court is given power to make various substantive orders which affect the rights of persons charged and convicted of offences, and third parties. Specific provisions ensure, before any order is made which concerns a third party, that such party is given notice of the pertinent application and is accorded a right to be heard. S98(4) of the Act means that before an order is made, the defendant and any other person sought to be examined concerning the affairs of the defendant must be put on notice. An examination order is the order for the examination of a named person; none other. Sections 98 and 99 do not contemplate a proceeding at which any person other than the person named will be asked questions. The court is given no active role in the examination. The investigative s99 examination is no more than an available step in a process which may have at its end point the forfeiture of property. A third party would not be denied procedural fairness by failure to ensure that he or she was given notice of such an examination. Accordingly, the court was in error in adjourning the examination of N. until such time as notice was given to the persons who had registered interests in property which was to be the subject matter of the examination.

ASHLEY J:
The Circumstances

1. In August 1999 the first defendant, Hien Van Nguyen ("Nguyen") was charged with offences against the *Drugs, Poisons and Controlled Substances Act* 1981. Specifically, he was charged with conspiracy to traffic and trafficking in heroin in not less than a commercial quantity.

2. On 17 November 1999 a judge of the County Court made a restraining order pursuant to s18 of the *Confiscation Act* 1997 ("the Act"). A schedule to the order specified the property to which the order related. It consisted of three motor vehicles, two parcels of real estate, and certain electrical goods and cash seized by police on 19 August. Pertinently, it appears that one of the motor vehicles was registered in the name of Nguyen's sister, and that the registered proprietor of one of the parcels of land was his nephew.

3. On 23 April 2001 another judge of the County Court made an order that Nguyen "be examined by the Court pursuant to s98 of the *Confiscation Act*". It should more accurately have been an order that he be examined "before" the Court.

4. The examination did not in fact commence on 8 June. On that date Nguyen's counsel submitted, *inter alia*, that although the s98 order had been regularly made the examination

should not be conducted without notice first being given to his client's sister and nephew, this giving them the opportunity of taking such action on the examination as they might be advised. That submission was accepted by the learned County Court judge, who ordered[1] in substance that the matter be adjourned until the sister and nephew had been put on notice.

5. The Director of the Asset Confiscation Office ("the Director"), the applicant in the County Court and the plaintiff in the proceeding before me, did not cause notice to be given to Nguyen's sister and nephew. Instead, he commenced this proceeding, brought under Order 56 of Chapter 1 of the Rules. The examination has not yet been held.

6. On 24 August 2001 Nguyen, having pleaded guilty to trafficking in heroin in not less than a commercial quantity, and four other offences, was convicted of all offences and was sentenced to a total effective sentence of eight years and three months' imprisonment, with a minimum term of five years and nine months before becoming eligible for parole.

7. The offence of trafficking in a drug of dependence in not less than a commercial quantity is an automatic forfeiture offence for the purposes of the Act.[2] So is the related offence of conspiracy, with which Nguyen was charged at the outset. By operation of paragraph 1 of Schedule 1, each is also a forfeiture offence.

8. The practical effect of s35(1) and (2) of the Act in this case was that upon conviction of an automatic forfeiture offence, a pertinent restraining order having been made, the restrained property was forfeit to the Crown 60 days after conviction except if an exclusion application was successfully pursued.

9. In late September 2001 each of Nguyen, his sister and nephew initiated exclusion applications. The sister's application was, it appears, successful. It related to a Honda motor vehicle. The applications by Nguyen and his nephew were apparently unsuccessful.

10. Having regard to the outcome of the exclusion applications, the requirement which was in practical terms imposed by the learned County Court judge – that before the examination was held notice of the same be given to persons with registered[3] interests in property which was to be the subject matter of such examination – now has disclosed relevance only to Nguyen's nephew. At stake from the plaintiff's standpoint, however, is a question of principle.

The Proceeding

11. The Director commenced this proceeding by originating motion filed 20 June 2001, the defendants being Nguyen and the County Court. The latter, in accordance with custom, did not appear before me, indicating that it would abide the Court's decision.

12. As pursued at trial the following relief was sought:

> 4. A declaration that the second Defendant erred in law on 12 June 2001 in deciding that persons with registrable interests in real estate or motor vehicles alleged to be owned by the first Defendant were entitled to receive notice of an application for an order for the examination of the first Defendant under section 98 of the *Confiscation Act* 1997.
>
> 6. An Order in the nature of mandamus requiring the second Defendant to hear and determine the proceedings according to law."

13. Counsel for the Director accepted that it would be sufficient if a declaration were granted; for it could not be supposed that the learned County Court judge would not act in accordance with such a declaration. She submitted, I should add, that it was open to this Court to grant a declaration in an Order 56 proceeding, relying upon *Kuek v Wellens and Anor*[4] and *Ainsworth and Anor v Criminal Justice Commission*[5]. Counsel for Nguyen did not argue the contrary.

14. I accept that it would be open to me to grant declaratory relief in this case. As a matter of comity,[6] I think that if relief was to be granted, it ought be by way of declaration.

15. Before passing from the relief sought by the Director I should make mention of the phrase "registrable interests". Counsel for the Director pointed out that this was a term used by the learned

County Court judge. She submitted that it opened up a possible obligation to notify all sorts of people other than Nguyen's sister and nephew; persons who might presently be unidentifiable.

16. The judge's reasons[7] show that his Honour's single reference to persons with "registrable interests"[8] was a slip – that is, assuming that the transcript accurately records what his Honour said. The reasons otherwise make it clear that he was dealing with a submission concerning persons with "registered interests in ... real estate and ... chattels"[9]. His conclusion was this:

> "It seems to me that it is quite evident that they are persons who's (sic) interests are involved in one way or another in the application and examination to be carried out pursuant to the granting of the order made upon the making of the application. Therefore, it appears to me that the appropriate course to take is to adjourn the further hearing of these proceedings until such time as notice has been given to the people who appear to be people who have registered interests in the property which is to be the subject matter of the examination."

and

> "...It seems to me that in adjourning this matter I should, unless the parties want me to make a decision about the date, leave it to the parties to fix upon a mutually suitable date after those who have registered interests have been notified of the application which has been made and the order which has been made pursuant to it."[10]

17. There is, in the event, nothing to the point raised by counsel for the Director.

Jurisdiction of this Court

18. Counsel for the Director submitted that a judge of this Court has jurisdiction to hear and determine a proceeding for judicial review of a decision of a County Court judge despite s77 of the *County Court Act*. That was the tentative opinion, *obiter dictum*, of Brooking JA in *Palmer Tube Mills*[11]. Counsel for Nguyen submitted that the question was still open, but he advanced no substantive argument. He rather submitted that the availability of an alternative remedy was relevant to the question whether the Court should in its discretion grant an order in the nature of mandamus.

19. In my opinion I do have the jurisdiction contended for by counsel for the Director. First, s12 of the *Administrative Law Act* 1978 is in point. Second, in any event it is doubtful that s77 stands against a proceeding for judicial review, at least in the case of a manifest defect of jurisdiction, *a fortiori* alleged wrongful refusal to exercise jurisdiction[12]. Third, it is doubtful that s77 addresses interlocutory decisions[13]; and this was an interlocutory decision. Fourth, I think that s77 has nothing to say about the jurisdiction of this Court to grant declaratory relief. I add that judges of this Court have on a number of occasions in recent years exercised the jurisdiction now in debate, both in the case of final and interlocutory decisions[14]. It is possible, but improbable, that each decision at first instance in this Court, and on appeal where that occurred, was *per incuriam*.

The Guiding Principle and its Application in the Present Case

20. Counsel, before me, were very largely *ad idem* as to the learning which concerns the duty to accord a person procedural fairness. That duty arises because the power involved is one which may "destroy, defeat or prejudice a person's rights, interests or legitimate expectations"[15]. An intention to exclude the rules of natural justice must be clearly evident in the express words of a statute[16]. The content of the duty in a particular case depends upon the circumstances of the case and the nature of the power being exercised[17]. Where legislation provides for multiple stages in decision-making, the process should be viewed in its entirety in order to determine whether the obligation to accord procedural fairness has been complied with[18]. Whether legislation in fact provides for multiple stages in a single decision-making process or alternatively a series of discrete decisions at different times is itself a matter which requires careful attention. The traditional content of the rules of procedural fairness is the right to be heard, and the right to be heard by an unbiased tribunal.

21. Against that background it is necessary to consider the structure of the legislation of which sub-ss98 and 99 are a part. The starting point is the purposes of the Act. They are set out in s1, which reads in part as follows:

> "1. *Purposes*
> The purposes of this Act are—

> (a) to provide for the forfeiture of the proceeds of certain offences, whatever the form into which they have been converted;
>
> (b) to provide for the automatic forfeiture of restrained property of persons convicted of certain offences in certain circumstances;
>
> (c) to provide for the forfeiture, without requiring a conviction, of property of a person if the Supreme Court finds it more probable than not that the person has engaged in certain drug offences;
>
> (d) to provide for the forfeiture of property used in connection with the commission of certain offences;
> ...
>
> (g) to provide for the effective enforcement of this Act and the management of seized and restrained assets;"

22. Under the Act the Court is given power to make various substantive orders which affect the rights[19] of persons charged and convicted of offences, and third parties. So, restraining orders [20], forfeiture orders[21], civil forfeiture orders[22], pecuniary penalty orders[23], declarations that particular property was subject to the effective control of a defendant at a pertinent time[24] and exclusion orders[25] may be made.

23. The Court is also empowered to act with respect to information-gathering. It may issue search warrants[26] and make production orders and issue search warrants in connection with property tracking documents[27]. Part 12 of the Act[28], too, is undoubtedly concerned with information-gathering. That is clear from s98(2). An order for examination may be made, and the examination conducted, either before or after a restraining order has been made. In the former case, the examination may lead to the identification of property in respect of which a restraining order is then sought. In the latter case it may be that the examination will disclose the existence of property other than that to which the existing order applies, leading on to application for a further restraining order.

24. It is necessary to note other features of ss98 and 99. First, by s98(4):

> "(4) The applicant must give written notice of an application under this section to the defendant and any person whom the applicant seeks to examine under the order."

That is, before an order is made the defendant and any other person sought to be examined concerning the affairs of the defendant must be put on notice.

25. Second, an examination order is an order for the examination of a named person; none other. Sections 98 and 99 do not contemplate a proceeding at which any person other than the person named will be asked questions. The removal of the right against self-incrimination[29] and the provisions dealing with the admissibility of answers given[30] are confined by reference to the person examined. It may be the case that s99(2) is infelicitously drawn in the event that such person is not the defendant. That was an incidental submission made by counsel for Nguyen. The matter does not presently require consideration.

26. Third, subject to the role that a judge or magistrate might play in connection with s99(1) or (3), the Court is given no active role in a s99 examination. That may be compared with the broader role given a court by Part 5.9 of the *Corporations Act* 2001 (Cth), see in particular ss596F, 597(4), (5B), (13) and (15). Contrast also the role of a court upon an examination conducted under the *Judgment Debt Recovery Act* 1984, particularly s15.

27. Let me go back to those sections of the Act which provide for the making of what I have called substantive orders that may affect the rights of persons charged and convicted of offences, and of third parties. Specific provisions ensure, before any order is made which concerns a third party, that such party is given notice of the pertinent application, and is accorded a right to be heard. In the case of restraining orders s17(1)(2) are pertinent; see also s19. In the case of forfeiture orders, see s32(4)-(7). As to civil forfeiture orders, see s37(4)-(7). In the case of "effective control" declarations, see s70(3)(4).

28. Third parties are also given extensive protection in the event that a restraining order,

forfeiture order, or civil forfeiture order is made. Application may be made for exclusion from any such order. See ss20-25; see also s49-54. True it is that under those various sections the third party carries the onus of proof, to the civil standard[31]. But it cannot be said that third parties are denied the opportunity of a substantial hearing. Indeed, the Act provides a right of appeal in the event that an exclusion application fails: see s142. In the case of automatic forfeiture, also, a third party is not without remedy. See s35.

29. Having regard to the scheme of the legislation as described, and before considering particular argument raised by counsel for Nguyen, I should have thought it correct to describe the investigative s99 examination as no more than an available step in a process which may have at its end point the forfeiture of property. Noting that an examination itself culminates in no order of the court, I should have considered that it is the process of which the examination may be a part which, whether by court order or automatically, may in the end produce deprivation of property in which a third party has an interest. I should not have considered that it accords with the scheme of the legislation to treat a Part 12 examination as discrete from the process of which it may be a part; and because, in that process, third parties to whom there may be reference in the course of a s99 examination are given a substantial right to be heard, that it could not be said that such persons are denied procedural fairness.

30. Counsel for Nguyen submitted, however, that the potential exists in a s99 examination for the disclosure for material which may significantly affect the capacity of a third party to mount a successful exclusion application, given also the difficulty that such a party faces by reason of the onus which is borne on an exclusion application. He highlighted also the temporal restraints which apply in the case of an exclusion application in respect of property subject to automatic forfeiture. He contrasted pertinent provisions of the Act with provisions of the predecessor legislation, the *Crimes (Confiscation of Profits) Act* 1986. Under the earlier Act, he submitted, the DPP bore the onus of satisfying a court that a forfeiture order should be made.[32] Again, whilst under the earlier Act there was provision for examination of a defendant or other person[33] yet there was privilege against self incrimination[34]. So there was less risk than is now the case of material being disclosed on an examination which could be used against a third party. He further submitted that under the Act examination must take place before a court; whereas under the 1986 Act examination might have been conducted before either a judge or an officer of the Supreme Court. This showed, he argued, a legislative desire to ensure that the interests of third parties were protected; interests that might be affected by the answers of an examinee not having privilege against self incrimination.

31. Based upon the considerations just mentioned, counsel for Nguyen submitted that the requirements of procedural fairness dictate that notice of s99 examination must be given to third parties whose interests in property may in a practical sense be affected by such an examination. There was no clear intendment in the legislation, he argued, that such a requirement should be excluded. He submitted that the judge, in a particular case, might permit such persons to make submissions after the hearing was concluded; or perhaps permit them to cross-examine the examinee. His submissions, overall, involved treating Part 12 of the Act not as dealing with a stage in a process in which procedural fairness should be afforded overall; but as provisions which carried their own wide-reaching obligation of procedural fairness.

32. The arguments advanced by counsel for Nguyen have not persuaded me that my provisional conclusions, earlier expressed, were incorrect. Those conclusions represented the application of principle to the legislative framework as I described it.

33. It is doubtless the case that the scheme of the Act varies in some respects from that contained in the predecessor legislation. It may be conceded that the position of third parties enmeshed in proceedings under the Act is more difficult than was the case under the 1986 Act. But at the same time the new procedures which deal with the making of substantive orders against a third party contain provisions by which that party may be heard.

34. It may be accepted that the Act does not give third parties an untrammelled right to be heard. See, for example, ss17(1), 32(5)(b) and 37(5)(b). Moreover, the Act emphasises that a court may proceed to make an order despite the absence of a third party to whom notice has been given. See, in this connection, ss17(2), 32(7), 37(7) and 70(4). Again, as I noted earlier, a third party

carries an onus on an exclusion application. But to say that the right to be heard is not without all restriction, or that orders may be made if a third party, once notified, does not attend the court, is not to deny that party a hearing. The right to be heard must be assessed in the context of this particular legislation, about the thrust of which there is no room for doubt.

35. I do not accept, further, counsel's argument that the circumstance that a s99 examination must be heard by a judge or magistrate evidences a legislative intent that the rights of third parties might be protected by exercise of a wide-ranging judicial discretion. So to conclude would be speculative; and, I think, at odds with the position of third parties set up by the Act. Moreover, it is clear that by s99 a defendant may be examined as to his affairs, and must answers questions, even though third parties may be prejudiced. The presence of a third party could not alter that reality. The suggestion that cross-examination by a third party might be permitted is incompatible with the central notion of s99, which is that a person is to be examined before the court concerning the affairs of the defendant – implicitly, if not explicitly, by the person who makes the s98(2) application. Again, counsel's suggestion that a third party might, if present, be permitted to make submissions after the hearing concluded could not be accepted. To what end could submissions be made? The judge or magistrate is not called upon to make findings, or an order. Finally, the examination is to be conducted in open court.[35] There seems to be nothing which would preclude a defendant called for examination informing other persons of the date and place of examination; or which would preclude a person other than the defendant called for examination informing other third parties of those matters.

36. I have thus far assumed, in connection with the procedural fairness argument, that the obligation to afford such fairness could apply, in the case of a s99 examination, to a person not ordered to attend for examination, and other than the defendant. Counsel for the Director submitted that such an assumption was unsupportable. She cited *May v Commissioner of Taxation*[36]. She described that case as involving legislation similar to, though not identical with, the legislation now under consideration.

37. The question in *May* was whether a decision by the Commissioner of Taxation under s264(1) of the *Income Tax Assessment Act* 1936 (Cth) to require a person to provide information and attend for hearing concerning the financial affairs of that person or other persons called the rules of procedural fairness into play so as to oblige the giving of notice of that decision to other persons affected by it. The court concluded that there was no such obligation. Having noted that natural justice[37] had been traditionally confined to two principles – that no man be condemned unheard, and that no person be judge in his or her own case, the court said this:

> "The appellant in the present case is inviting us to extend natural justice's scope in a third direction so as to require a person affected by a decision to be given a warning that decision has been made so that that person may take appropriate steps to protect his or her own interests by challenging the decision if grounds exist for so doing. It is not an invitation we accept."[38]

38. Obviously enough, the issue in *May* was substantially different to that which arose here; for the effect of the judge's order was only that the examination should not be conducted until third parties had been put on notice. It was not suggested by the judge, or in argument before me, that such parties would have any right to challenge the making of the s98 order. Nonetheless, there is a point of connection between the two cases – that is, the point identified by counsel for the Director.

39. Acknowledging that *May* offers some support for the submission made by counsel, I prefer not to rest my conclusion upon that matter. I rather treat *May* as a case in which the rules of procedural fairness were said not to apply to the step initiating an investigation which in turn was a step in a process that might in the end yield an outcome adverse to persons whose affairs were investigated[39]. In that respect it is like *Cornall*.

40. It does not follow from what I have thus far said that, even if a s99 examination was considered to be severable from the process established by the Act, a third party would be denied procedural fairness by failure to ensure that he or she be given notice of such an examination. Sections 98 and 99 may be said to set up their own requirements concerning procedural fairness – obliging that notice be given only to the defendant and to any other person whom it is sought to examine; setting out the obligation of an examinee to answer questions, and the uses to which such answers may be put.

41. The improbability that procedural fairness would impose a requirement to notify other persons that an order for an examination had been made is the clearer when the implications of such a requirement are explored. Where would the requirement begin and end? If, as here, a restraining order had earlier been made, would it end with persons known or suspected of having an interest in the restrained property? If a restraining order had been made but the Director knew or suspected that a defendant had an interest in property not yet restrained, should notice of examination be given to any person known or suspected of having an interest in that property? In the event that a defendant in the course of examination referred to previously identified property in which a third party had an interest, would it be necessary to stop the examination and give notice to such a person? If the examinee made successive disclosures, would it be necessary to stop the examination on each occasion in order to give notice to the particular third party? These questions are not academic. Note the form of the order for examination which was made. Note also that by paragraph 13 of the affidavit of Rodney Youssef sworn in support of the s98(2) application[40] it was said that the applicant sought to examine Nguyen about various matters "in relation to the property restrained, but not limited to this". That is, the examination was not intended to be confined by reference to the property described in the restraining order, but was to be truly investigative.

42. Further considering a s99 examination discretely, I have said that a third party:

- could not prevent an examinee answering a question;
- could not himself or herself give evidence at the examination;
- almost certainly could not be given an opportunity to cross-examine the examinee;
- could have no right of address when the examination was concluded;
- could in any event attend the examination, if informally advised of its having been ordered.

A third party not having, in the circumstances, any right to be heard, how could the rules of procedural fairness sensibly be said to have application so as to require such a person to be formally advised that an examination was to take place?

Did the County Court Refuse to Exercise its Jurisdiction?

43. I have said that the Court has jurisdiction to grant the relief sought by the Director. According to the argument of counsel for Nguyen, however, there was no occasion to exercise it because the learned judge had not declined to exercise jurisdiction. All he had done was to say to the Director "Here it is. I want you simply to give notice". Counsel argued that the situation was analogous to that considered by Gillard J in *Talevski v The County Court of Victoria and Ors* [41].

44. I do not accept that there is any analogy. In this case the learned judge in substance required that notice be given to third parties before he would embark upon the proceeding. To say that the examination was able to proceed if notice which the law does not oblige to be given was given is really to say that the County Court refused to exercise its jurisdiction.

Discretionary Considerations

45. The Director was able to seek leave to appeal against the order adjourning the matter. That right was subject to a time limit which, subject to any extension of time, has now long past.

46. Counsel for Nguyen submitted that the discretionary remedy of mandamus should not go in circumstances where an alternative remedy was available. *A fortiori* that was so when the time for seeking appeal had passed; and *a fortiori* again when the proceeding was civil rather than criminal in nature.

47. Counsel further argued that relief by way of declaration is also discretionary. He contended that the Court should not by way of declaration do what it might not see fit to do – for discretionary reasons – by way of mandamus.

48. In my opinion, for a reason previously explained, any relief granted in this case should be by way of declaration, not mandamus. The question remains whether, in my discretion, a declaration should be granted. I think that in exercising that discretion in the present case it is proper to consider whether I should have refused mandamus on discretionary grounds; this being but one factor pertinent to the exercise of discretion.

49. I am abundantly satisfied that a declaration ought be made. Judicial review is a particularly apt procedure where refusal to exercise jurisdiction, as much as jurisdictional error, is alleged on the part of an inferior court or tribunal. This case is not one where the plaintiff sought to circumvent a limitation placed on appeal. Compare *Kuek v Victoria Legal Aid*[42]. Here the plaintiff evidently chose to proceed by way of an order 56 proceeding on the footing that it was "more appropriate inexpensive and desirable from a judicial point of view;[43] that it was "a more direct and straightforward remedy, and .... probably less expensive than an appeal"[44]. I consider that this choice was appropriate. An error leading to a wrongful refusal to exercise jurisdiction was readily exposed; and relief tailored to the situation can be granted.

50. Concerning the form of the declaration I should add this: although the learned judge appears to have been concerned to protect the position of Nguyen's sister and nephew, his decision was expressed in terms of potentially wider import: "people who appear to be people to have registered interests..." On the other hand, that broad description was tempered by his Honour's reference to "... the property which is to be the subject matter of the examination" – presumably a reference to the property to which the restraining order applied, and in that respect a narrow formulation. In the circumstances I consider it best to make a declaration essentially in the form of the decision.

51. There is but one matter more. I do not have before me the transcript of argument before the learned County Court judge; only his Honour's reasons. They suggest that the argument before his Honour and before me did not altogether coincide. Probably, also, submissions were not advanced, so far as the Director is concerned, in the detail that marked counsel's presentation in this Court. His Honour may have been confronted, in the circumstances, by a situation more difficult of resolution than the situation which emerged after counsel's submissions before me. I have considered whether, in the event, refusal of relief would be justified on discretionary grounds. In the circumstances of the particular case I have concluded that refusal on such a basis would not be appropriate.

Order

52. Subject to anything that counsel may say as to form I shall declare that the second defendant erred in law on 12 June 2001 by adjourning the examination of Hien Van Nguyen under s99 of the *Confiscation Act* 1997 until such time as notice was given to the people who had registered interests in the property which was to be the subject matter of the examination.

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[1] No authenticated order was produced to me, only the transcript of the hearing of 12 June, on which date his Honour determined the questions which had been debated on 8 June.
[2] Schedule 2, paragraph 1(a).
[3] See paragraph [8] below.
[4] [2000] VSC 326 at [104]-[110]. I note that this decision is the subject of appeal.
[5] [1992] HCA 10; (1992) 175 CLR 564 at 581-582 and at 595-596; (1992) 106 ALR 11; (1992) 66 ALJR 271; 59 A Crim R 255.
[6] As to which see *Palmer Tube Mills (Australia) Pty Ltd and Anor v Semi* [1998] 4 VR 439 at 452-453; 13 VAR 30.
[7] Exhibit AS4 to the affidavit of Anna Solovjev sworn 18 July 2001.
[8] At p10 of the reasons.
[9] At p1 of the reasons.
[10] At p11 of the Reasons.
[11] At 452-453.
[12] *Palmer Tube Mills* at 452 lines 47-49; see also *The King v Beecham and Co and Anor; ex parte RW Camerdon and Co* [1910] VicLawRp 38; [1910] VLR 204 at 230-231 and 232-233; 16 ALR 173; 31 ALT 183 per Cussen J, and *R v Foster* [1941] VicLawRp 16; [1941] VLR 77 at 85; [1941] ALR 89.
[13] *Beecham* at 214 per Madden CJ, who dissented in the result, and per Cussen J at 230 and 233-234. *Foster* at 85
[14] *Hansford v Judge Neesham* (1994) 7 VAR 172; *Thompson v His Honour Judge Byrne* [1998] 2 VR 274; (1997) 93 A Crim R 69 (reported on the unsuccessful appeal from my decision); *Flynn v DPP* [1998] 1 VR 322; *Pleming v Jackson and Anor* [2000] VSC 63; *Perkins v County Court of Victoria and Ors* [2000] 2 VR 246 (reported on the unsuccessful appeal from Harper J); and *Kuek v Wellens and County Court of Victoria*, cited earlier.
[15] *Annetts v McCann* [1990] HCA 57; (1990) 170 CLR 596 at 598; 97 ALR 177; (1990) 65 ALJR 167; 21 ALD 651.
[16] *Johns v Australian Securities Commission* [1993] HCA 56; (1993) 178 CLR 408 at 470; 11 ACLC 1; 67 ALJR 850; 31 ALD 417; 11 ACSR 467; 116 ALR 567; see also *Cornall v AB* [1995] VICSC 7; [1995] VicRp 25; [1995] 1 VR 372 at 395.

[17] *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 at 585 and at 612-615; (1985) 62 ALR 321; (1986) 60 ALJR 113; 9 ALN N28.
[18] *State of South Australia v O'Shea* [1987] HCA 39; (1987) 163 CLR 378 at 389; (1987) 73 ALR 1; 26 A Crim R 447; 61 ALJR 477; see also *Ainsworth* at 578 and *Cornall* at 395-400.
[19] In the sense used in *Annetts* at 598.
[20] Section 18.
[21] Particularly ss32, 33.
[22] Particularly ss37, 38.
[23] Particularly ss58, 59 and 63, 64.
[24] Section 70.
[25] Sections 20-24 and 49-54.
[26] Part 11.
[27] Part 13.
[28] Sections 98 and 99.
[29] Section 99(1).
[30] Section 99(2).
[31] As to the latter , see s132.
[32] Counsel referred to ss5 and 49 of the 1986 Act.
[33] See s18(1), (4)(c) of the 1986 Act.
[34] See s18(5).
[35] Contrast the situation which may obtain under Part 5.9 of the *Corporations Act* 2001 (Cth).
[36] [1999] FCA 287; (1999) 92 FCR 152; 163 ALR 357; 42 ATR 270, Full Court of Federal Court.
[37] A synonym for procedural fairness.
[38] At [31].
[39] See *May* at [37].
[40] Exhibit AS9 to Ms Solovjev's affidavit sworn 11 December 2001.
[41] [2001] VSC 171.
[42] [2001] VSCA 80; [2001] 3 VR 289 at [16].
[43] Per Madden CJ in *Beecham* at 224.
[44] Per Cussen J in *Beecham* at 231.

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