26/06; [2006] VSC 267

SUPREME COURT OF VICTORIA

DPP (Vic) v TIEN DUC VU

Gillard J

13 July 2006

PROCEDURE – APPLICATION MADE UNDER *CONFISCATION ACT* 1997 – APPLICATION FOR A RESTRAINING ORDER – APPLICATION MADE WITHOUT NOTICE TO PERSON WHO MAY HAVE AN INTEREST IN THE PROPERTY THE SUBJECT OF THE APPLICATION – WHETHER NOTICE SHOULD BE GIVEN: *CONFISCATION ACT* 1997, S16(1)(a).

1. As a general rule, notice must be given to any person who may have an interest in the property sought to be restrained by an order under s16(1)(a) of the *Confiscation Act* 1997.
***Navarolli v DPP (Vic)*, Vic Sup Ct, (CA), [2005] VSCA 323; 159 A Crim R 347, applied.**

2. Whilst s16(1)(a) of the Act makes it clear that the DPP has a right to apply for a restraining order without notice, the right to be heard could be denied if there was some compelling reason for that to be denied to the person concerned. Where there were no real concerns that a person in custody might access and dissipate the property the subject of the application, notice of the application should be given to the person who has an interest in the property.

GILLARD J:

1. This is a return of an application brought under s16 of the *Confiscation Act* 1997 ("the Act") seeking a restraining order against Mr Tien Duc Vu ("Mr Vu").

2. The application is brought by the Director of Public Prosecutions for the State of Victoria ("DPP"). It was filed yesterday. In support of the application is an affidavit sworn by Paul Adam Stow, sworn 20 June 2006.

3. The application is made pursuant to Part 2 of the Act. By reason of s16(1)(a), the DPP may apply without notice to any person who may have an interest in the property the subject of the application. The DPP seeks to make the application without notice to the said Mr Vu. It is alleged that he has an interest in a sum of cash.

4. Two members of the Court of Appeal in the proceeding *Navarolli v DPP (Vic)*[1] held that as a general rule, it was necessary to give notice to any person who may have an interest in the property. Before considering that case, it is necessary to state further historical facts concerning this application.

5. This is the second application made by the DPP in respect of property in which Mr Vu is alleged to have an interest. The property is identified in the application as $24,235 cash.

6. The earlier application was filed on 20 June 2006. In support of the application was the affidavit of Paul Adam Stow sworn that day. The DPP relies on the same affidavit in the present application.

7. The application came on before Dodds-Streeton J on 21 June 2006. Senior counsel appeared for the Director of Public Prosecutions. Apparently, in the course of discussion before her Honour the question arose as to whether the Court of Appeal decision in *Navarolli* required that the applicant give notice to any person whom the Court had reason to believe had an interest in the property pursuant to s17(1) of the Act.

8. Apparently, her Honour was of the view that if the application wished to proceed it would be necessary to give notice to Mr Vu by reason of the decision in *Navarolli*. Evidently, counsel for the applicant informed the Court that if it was necessary to give notice then the applicant would not proceed with the application. As a result her Honour dismissed the application.

9. By summons filed 26 June 2006, the applicant sought leave to appeal from her Honour's order. The matter came on before Ashley and Redlich JJA on 30 June 2006. Some doubts were raised by the judges as to whether leave should be granted in the circumstances, bearing in mind that the application had been dismissed because the applicant did not wish to proceed, and after the judge had indicated she would require that notice be given to Mr Vu. It was clear from the affidavit filed in support of the application that the Director of Public Prosecutions was anxious that the Appeal Court should reconsider the decision in *Navarolli*.

10. I interpolate to observe that application was made for leave to appeal to the High Court against the Court of Appeal's decision in *Navarolli*, but the High Court refused special leave on 16 June 2006 because it was considered that the *Navarolli* case was not a suitable vehicle for leave. However, I am led to believe that some doubts were raised by the learned members of the High Court concerning the correctness of the Court of Appeal decision.

11. Apparently, because of the doubts expressed by the two Appeal Judges on the application for leave to appeal against the order made by Dodds-Streeton J, the present application has been made seeking a further order. I interpolate to observe that the Court of Appeal ordered that the application for leave to appeal against her Honour's order be heard and determined together with the proposed appeal.

12. In the present application the Director of Public Prosecutions seeks a restraining order *ex parte*. The question arises whether the Court should require that notice be given to Mr Vu as the person who has an interest in the property.

13. The effect of the Court of Appeal's decision in *Navarolli* is that as a general rule, notice must be given to any person who may have an interest in the property sought to be restrained by the order. It is a general rule. It may be departed from in appropriate circumstances.

14. I have difficulty with the reasoning in the Court of Appeal decision of *Navarolli.*[2] I was in fact the judge at first instance who ruled that the Director was not obliged to give notice to Mr Navarolli, and I made an order *ex parte* pursuant to s18 of the Act. Section 18 requires the Court to make an order if it is satisfied of certain matters. In *DPP v Navarolli,*[3] I carefully analysed the provisions of Part 2 relating to an application for a restraining order under the Act. I held that the DPP had a statutory right to apply without notice for a restraining order, and the Court had power in an appropriate case under s17(1) to require the applicant to give notice to any person whom the Court had reason to believe had an interest in the property.

15. Two judges of the Court of Appeal disagreed with my approach. The Court criticised my conclusion[4] because it was said that my reasoning overlooked what Dixon CJ and Webb J said in *The Commissioner of Police v Tanos*[5] about the "deep rooted principle of law that before any one can be punished or prejudiced in his person or property by any judicial or quasi judicial proceeding he must be afforded an adequate opportunity of being heard."

16. The reason why no mention was made to that well-known principle is, first, because counsel did not refer to the well-established and well-known principle that as a general rule, no order should be made against any person affecting his or her rights without giving that person an opportunity to be heard, unless there were circumstances justifying such a course.

17. This principle is well-known to all members of this Court and, in particular, those who sit regularly in the Practice Court and deal with applications made *ex parte*. In some areas of the law, it is necessary to make orders *ex parte* to avoid the risk of injury or damage to the applicant. Classic examples are a *Mareva* injunction and an *Anton Piller* order. Any judge, when dealing with an *ex parte* application, raises the question of whether notice should be given.

18. The second reason why I did not refer to that principle was because in my view, the statutory jurisdiction which is given to this Court under Part 2 expressly deals with the question of an *ex parte* application being made and the requirement that the Court may require notice to be given under s17(1). Indeed, I approached the question on that basis.

19. In the *Tanos* case, Dixon CJ and Webb J,[6] after stating the principle set out above, went

on to say this:

> "In *Cooper v Wandsworth Board of Work*s, Byles J said that a long course of authority established 'that, although there are no positive words in a statute requiring that a party shall be heard, yet the justice of the common law will supply the omission of the legislature'."

20. I interpolate to observe that this statute did address in positive words the requirement of notice in certain circumstances. There were express words in the statute.

21. Their Honours then went on to say this, which was not referred to by the learned judges of the Court of Appeal:

> "It is hardly necessary to add that its application to proceedings in the established courts is a matter of course, but the rule is subject to a sufficient indication of an intention of the legislature to the contrary. Such an intention is not to be assumed, nor is it to be spelled out from indirect references, uncertain inferences or equivocal considerations. The intention must satisfactorily appear from expressed words of plain intendment."[7]
> (Emphasis added).

22. As is clear from what their Honours said in that case, the requirement to give notice is often implied into statutory provisions, but where the Legislature expressly deals with the situation, then the Court is not concerned with the implied obligations under the common law, but is concerned with the intention of the Legislature. The *Confiscation Act* dealt with the very matter. Its application depended upon the intention of Parliament, the primary source of which was the words of the Act. The Act prescribes the conditions of the exercise of the jurisdiction.

23. It is interesting to observe that in the *Tanos* case, a regulation was made dealing with an *ex parte* application. And their Honours said in relation to that regulation, which did empower a judge to hear it *ex parte*:

> "This regulation may perhaps be read as leaving the choice of courses at large to the judge. But it ought not so to be interpreted. It should be understood as meaning that *prima facie* the course provided for in paragraph (ii) should be followed, and only in exceptional or special cases should an immediate declaration be made. The analogy is that of an interim injunction, but the caution should be greater because the declaration, unless it is framed as provisional or conditional concludes the right subject to rescission."

24. It is noted that the authority to hear a matter *ex parte* was given in the regulations. But as the High Court made clear, there may be certain circumstances which demand that the matter should not proceed *ex parte*, especially as the effect of the application was drastic.

25. The *Tanos* case should be read very closely. It concerned a declaration being made under the *Disorderly Houses Act* of New South Wales. As their Honours said:[8]

> "The effect of the declaration while it is in force is somewhat drastic."

26. Their Honours then pointed out that once the declaration was made, it was published in the gazette, twice published in a newspaper circulating in the neighbourhood, and was to be served on the owner and the occupier of the premises. It was to be affixed, if necessary, on the premises, and the consequences of the declaration fell under four heads. Their Honours' description of "somewhat drastic" was understated. That is not the case here. The case here is concerned with a freezing order and not a confiscation order.

27. Each State of the Commonwealth of Australia and England has similar legislation to the *Confiscation Act*. In England, the jurisdiction is described as "a criminal *Mareva*." See *Jennings v Crown Prosecution Service*.[9] In that case, reference was made to what the former Master of the Rolls had stated with respect to the difference between a restraining order and a confiscation order. They do fulfil different functions. What I am concerned with today, and what I was concerned with in the *Navarolli* case, is a restraining order.

28. Lord Donaldson MR said *In re Peters*:[10]

> "Counsel for the Commissioners points out that a court faced with the making or variation of a restraint order, or to a charging order is not concerned with the making of a confiscation order or a process of execution in satisfaction of such an order. It is concerned solely with the preservation of assets at a time when it cannot know whether the accused will or will not be convicted. Such jurisdiction is closely analogous to that exercised by the courts in relation to *Mareva* injunctions and might, not inaccurately, be referred to as a 'drugs Act *Mareva*.'"

29. I interpolate to observe that there was some discussion in the case of *Jennings v Crown Prosecution Service*, supra, about matters being heard *ex parte*, and I refer to what Laws LJ said at p198. The English position seems to be consistent with what in my respectful submission is a very obvious commonsense approach. The application seeks a freezing order and nothing more, and in most cases, for very obvious reasons, will be heard *ex parte*.

30. The fact is that the initial application under Part 2 results in a freezing order. Of course that interferes with the rights of the true owner to deal with property, but it is on a temporary basis. Any person affected by the order would have a right at common law to return to the Court promptly and seek to be heard in respect to the *ex parte* order. And in regard to that observation, I refer to what Taylor J said in the *Tanos* case.[11] But in addition, s20 of the Act gives to a person claiming an interest in the property the right to apply to the Court for an order under the following sections, and if the person who claims an interest satisfies the Court in respect to a number of matters, then the Court may make an order excluding the property from the operation of the restraining order. The first order that is made is very similar to an interim *Mareva* order and merely freezes dealing with the property in any way.

31. An important factor when considering an application to hear it *ex parte* is whether notice to the person who may have an interest in the property might result in the property being removed and dealt with in some way, thereby devaluing it or putting it beyond the reach of the authorities.

32. Paragraph 40 summarises the reasons of the Court of Appeal in *Navarolli* as follows:

> "It follows in our view that His Honour's exercise of discretion miscarried when he refused to require the Director under s17(1) to give notice of the application. His Honour fell into error in regarding the statute and creating what amounted to a presumption against the giving of notice, or as imposing on a person in *Navarolli's* position the onus of showing why he should be given notice. His Honour failed to consider the fundamental natural justice principle to which we have referred. For the reasons given that principle meant that *Navarolli* had a right to be heard, unless there was some compelling reason for that to be denied to him."

33. I may say I am unaware of any case that requires notice or has considered the question in a criminal *Mareva*. I did not say that the statute created what amounted to a presumption against the giving of notice. What I did say, and made very clear, was that s16(1)(a) gave the right to the DPP to apply without notice for a restraining order. That is clear from the terms of the sub-section. What I then went on to consider was whether or not it was appropriate in the circumstances of that case for the Court to require an applicant to give notice under s17(1) to any person who had an interest in the property.

34. In my view, the principles of natural justice played no part in the consideration. It was a matter for the judge hearing the application and the exercise of his discretion to determine whether notice should be given. It is not a question of calling upon the person with an interest to argue or submit that notice should be given. In the particular circumstances in *Navarolli*, the person who had an interest in the property actually had notice of the application, was present in court when it was made and sought to be heard. But in the usual run of the mill case, that person will not be present for the very obvious reason that the Director seeks to make an application *ex parte* to avoid any loss of property.

35. However, having said all that, clearly the Court of Appeal decision binds me. Accordingly, I must give effect to it.

36. As the Court stated, whilst as a general proposition a person who may have had an interest in the property had a right to be heard in accordance with the principles of natural justice, the right to be heard could be denied if there was "some compelling reason for that to be denied to him."

37. A matter of some importance is the question of what a person who has an interest in the property can do on an application such as the present. The Court must be satisfied of the matters set out in s18 of the Act. Indeed, the Court is obliged to make an order if those matters are proven. In any event, the application to be excluded from the restraining order places the onus upon the person the subject of the restraining order, to prove certain matters before the Court would exclude his interest in the property.

38. I have read the affidavit of Paul Adam Stow. In my opinion, the matters set out in s18 are proven by the contents of the affidavit. The question then arises whether or not notice should be given to the said Mr Vu, as a person having an interest in the property.

39. The affidavit reveals that on 12 January 2005, Mr Vu was arrested. At the time, he had ten grams of heroin in his possession and $3,380 cash. On the execution of a search warrant as his home at 10 Cherry Avenue, Altona North, 56 grams of heroin and $20,855 in cash were located and seized. The applicant now has control over the money.

40. On 24 April 2006, Mr Vu pleaded guilty to trafficking of a commercial quantity of heroin and was sentenced to a period of imprisonment. The sentence is currently under appeal. He is at present an inmate of a prison. The basis of the application is for an order to restrain him dealing with the cash, and the purpose of the order is to satisfy any forfeiture order that may be made under the *Confiscation Act*, to satisfy any automatic forfeiture that may occur, or to satisfy any pecuniary penalty order.

41. One thing is very clear. There is no question of Mr Vu getting his hands on the cash, and hence any fears he may do anything to deal with the cash are indeed extremely remote. He is presently in prison. He is unaware of this application this day. His solicitors have written to the DPP and requested that the cash be refunded. The letter was received on 12 July 2006.

42. The question then arises as to whether or not he should be given notice of the application. Because there are no real concerns about Mr Vu getting his hands on the money and dissipating it, and following the decision of the Court of Appeal, it is my opinion that notice of this application must be given to the person who has an interest, Mr Vu.

43. Accordingly, I order as follows.

1. That the applicant, the Director of Public Prosecutions of Victoria, give notice of this application for a restraining order under s16 of the *Confiscation Act* (1997) to Mr Vu, pursuant to s17(1) of the Act.

2. That the application be adjourned.

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[1] [2005] VSCA 323; 159 A Crim R 347.
[2] *Supra*.
[3] [2005] VSC 395.
[4] See paragraph 29.
[5] [1958] HCA 6; (1958) 98 CLR 383 at 395; [1958] ALR (CN) 1057.
[6] At p395.
[7] At p396.
[8] At 391.
[9] [2005] EWCA Civ 746; [2005] 4 All ER 391; (2006) 1 WLR 182 at 199.
[10] [1988] QB 871 at 879; [1988] 3 All ER 46; [1988] 3 WLR 182.
[11] *supra*, at p397.

APPEARANCES: For the plaintiff DPP (Vic): Dr G Griffith QC with Mr SG O'Bryan SC, counsel. Stephen Carisbrooke, Acting Solicitor for Public Prosecutions. For the defendant Tien Duc Vu: No appearance.
