34/06; [2006] VSCA 188

SUPREME COURT OF VICTORIA — COURT OF APPEAL

DPP v TIEN DUC VU

Chernov, Nettle and Neave JJ A

9 August, 20 September 2006 — (2006) 14 VR 249; (2006) 165 A Crim R 548

CRIMINAL LAW – CONFISCATION OF PROPERTY – RESTRAINING ORDER – WHETHER COURT REQUIRED TO ORDER THAT NOTICE OF APPLICATION FOR RESTRAINING ORDER BE GIVEN TO PERSON WHO HAS AN INTEREST IN RESPECT OF THE PROPERTY THE SUBJECT OF THE APPLICATION: *CONFISCATION ACT* 1997, S14.

It is to be expected that the bulk of applications for restraining orders under s16 of the *Confiscation Act* 1997 will be made and determined under s18 without notice and *ex parte*. However, there will be some cases where it is plain that there is no risk of dissipation or of flight or of prejudice to imminent arrest or otherwise sufficient reason to weigh against the common law right to be heard. In those cases, it is to be expected that the judge will order that notice of the application be given.
***Navarolli v DPP* [2005] VSCA 323; 159 A Crim R 347, followed.**

NETTLE JA for the Court (CHERNOV, NETTLE and NEAVE JJ A):

1. This is an appeal by leave from an order made by a judge in the Practice Court that the appellant give notice to the respondent of an application proposed to be made under s16 of the *Confiscation Act* 1997 for a restraining order under s18 of the Act. It raises again the question of whether *Navarolli v DPP*[1] was correctly decided.

2. In *Navarolli* a court composed of Maxwell P and Eames JA held that a defendant had a *prima facie* right to be heard before a restraining order is made and, therefore, unless there are compelling reasons to proceed without notice,[2] a right to notice of the application for restraining order.

3. In this case, the judge in the Practice Court said that he disagreed with *Navarolli*. In his view, Part 2 of the Act armed the Director of Public Prosecutions with a statutory right to apply without notice and authorised the court to deal with the application *ex parte* and without notice; albeit with power "in an appropriate case" to require the Director to give notice. The judge said, however, that he considered that he was bound by *Navarolli* and therefore that he should not make an order without notice unless there were compelling reasons to proceed without notice; and, since the property to which the order was directed had already been seized and was under the Director's control, there were no compelling reasons to proceed without notice. Thus, his Honour ordered that notice be given.

4. The Director contends that *Navarolli* was wrong and therefore that the judge in this case was wrong. He submits that Part 2 of the Act in terms or by implication excludes the common law right to be heard, and therefore any presumption in favour of notice, and contemplates that an application for restraining order would be made and dealt with *ex parte* without notice unless the judge is persuaded that there is good reason for notice to be given.

5. Furthermore, the Director says that in this case there was no such good reason, because the respondent's rights were sufficiently protected by his right to apply at a later date for exclusion of property from the order.

***The scope of the decision in* Navarolli**

6. Before turning to the substance of the Director's argument, it is relevant to note some details of the way in which the appeal in *Navarolli* came to be decided and hence of the scope of the decision.

7. First, it should be understood that counsel for Mr Navarolli was in court when the

application for restraining order came on for hearing before the judge at first instance and that the judge nevertheless refused to hear him. On appeal, the question was whether the judge had been wrong to refuse to hear the respondent's counsel in those circumstances. Not surprisingly, the court held that the judge was wrong.

8. Secondly, given the circumstances just described, it may be wondered why the question of notice arose for consideration at all. Evidently, Mr Navarolli was not concerned about a lack of notice. One way or another, he had got wind of the application and he had his counsel in court ready to argue against the application when it was called on for hearing.[3] The issue was whether the legislation compelled the judge to proceed *ex parte* even though counsel for Mr Navarolli was in court and wished to be heard.

9. Thirdly, the idea that notice was relevant started with the judge at first instance, presumably at the instance of the Director. His Honour construed s17 of the Act as meaning that the only persons who may be heard in opposition to an application for a restraining order are persons to whom it is appropriate to give notice in accordance with s17. Since, in his Honour's view, there were no grounds to require that notice be given to Mr Navarolli, it followed that Mr Navarolli's counsel should not be heard. As the judge put it:

> "... *I am not persuaded that there is any ground for requiring notice to be given to Mr Navarolli before the order is made.* He will ultimately be served with a copy of the order, and if he wishes property to be excluded from the effect of the order he will have every opportunity to make an application for exclusion which will involve the Court in determining different issues. *The Legislature has given the right to the DPP to make the decision to bring the application without notice to any person.* The application is in respect of property. No person may deal with the property if the order is made. The Court decides the question on the material before it and makes an order against property. Any person who may have an interest in the property may not deal with it. The Legislature has provided a procedure, not to attack the merits concerning the original order, but giving the right to any person to exclude property from the order. The Court in those circumstances is concerned with different issues. The onus is on the applicant for the order. *Those matters lead to the conclusion in my opinion that s17(1) notice would rarely be given, and no ground has been advanced to this Court which leads to the conclusion that Mr Navarolli or indeed any other person, should have notice of the application.*"[4]

10. Fourthly, it is not clear whether Maxwell P and Eames JA accepted the validity of the judge's premise that the only persons who may be heard in opposition to an application for restraining order are persons to whom it is appropriate to require that notice be given. On one view, however, the following passage of their Honours' judgment suggests that they treated the entitlement to notice and the entitlement to be heard as being co-extensive:

> "As we said to counsel for the Director during argument, given that counsel for Navarolli were present in court and ready to make those submissions, *it was counter-intuitive for the Court to refuse to give notice to Navarolli and, in consequence, to refuse to hear submissions* on behalf of the very person whose bank account was the subject of the application. In our view, that course could only have been justified if there were some compelling reason for conducting the hearing *ex parte*. As we have said, not only was there no compelling reason, there was, in our view, no reason at all to conduct the hearing *ex parte*.[5]"

The reference to the court refusing to give notice is presumably a reference to the judge's decision that it would not have been necessary to give notice.

11. Fifthly, unlike *Navarolli,* this appeal is not concerned with the question whether the entitlement to notice and the entitlement to be heard are co-extensive.[6] It is to do only with the circumstances in which notice should have been given in this case and, for that reason, it is distinguishable from *Navarolli*. But, while the appeal in *Navarolli* could perhaps have been decided on the narrow basis that counsel was in court and wished to be heard, and therefore should have been heard, that is not the way in which it was decided. As Maxwell P and Eames JA ultimately expressed themselves, the ratio of their decision was that Mr Navarolli was entitled to notice and, because he was entitled to notice, he was entitled to be heard. In their Honours' words:

> "... [The judge] fell into error in regarding the statute as creating what amounted to a presumption against the giving of notice, or as imposing on a person in Navarolli's position the onus of showing why he should be given notice. His Honour failed to consider the fundamental natural justice principle to which we have referred. For the reasons given, that principle meant that Navarolli had a right to be heard, unless there was some compelling reason for that to be denied to him."[7]

12. Finally, and despite the fact that *Navarolli* was decided by a court constituted by only two members, it would be inappropriate for us not to follow it in this appeal, even if we thought it were wrong. The preferable course would be to refer the matter to a bench of five judges or, alternatively, to dismiss the appeal and leave the issue for determination by the High Court.[8] But as it happens, although we consider that it is unnecessary to approach the operation of s17 by reference to presumptions, we do not disagree with the substance of what Maxwell, P and Eames JA said in *Navarolli* about the circumstances in which it is appropriate for a judge to order that notice be given under s17... *[The Court then considered the matter in detail and continued...]*

***The reasoning in* Navarolli**

53. That leaves the Director's contention that the Court in *Navarolli* went too far in exposition of the factual circumstances that may result in a decision to order that notice be given. In our view that is not so.

54. In substance, the court in *Navarolli* said no more than that, when a judge is faced with an application for restraining order under s16 of the Act, the judge must consider whether to order that notice be given under s17 of the Act; and that, in determining whether to order that notice be given, the judge must bear in mind the common law right to be heard and balance it against other competing considerations. As the court said, such competing considerations include, in particular, the risk that notice may result in dissipation of the property the subject of application. Obviously, however, they also include things such as "the risk of criminals being tipped off" with consequent prejudice to an anticipated arrest or a continuing criminal investigation or danger to persons or property.

55. In our view, it is to be expected that the bulk of applications for restraining orders under s16 of the Act will be made and determined under s18 without notice and *ex parte*. That is because an application for a restraining order involves a defendant who is suspected or charged or about to be charged with a serious criminal offence, or who has been convicted of a serious criminal offence or, alternatively, involves reasonable grounds to believe that the property the subject of application is tainted property.[31] In the scheme of things it is likely that in most such cases the risks entailed in giving notice of the application will be seen to outweigh the right to be heard. But, as the Court in effect said in *Navarolli*, there will be some cases where it is plain that there is no risk of dissipation or of flight or of prejudice to imminent arrest or otherwise sufficient reason to weigh against the common law right to be heard. And, in those cases, it is to be expected that the judge will order that notice of the application be given.

The need for notice

56. In this case the judge at first instance found that there was no risk of the respondent getting his hands on the property the subject of the application and, so far as can be told from his Honour's reasons, it was not suggested that there was any other risk of prejudice likely to result from giving notice.

57. It has not been contended before us that the judge was wrong so to find and it is not now suggested that there was any other risk or consideration which weighed against giving notice.

58. In those circumstances, we are of the view that the judge was not in error to order that the Director give notice under s17 of the Act.

Conclusion

59. It follows, for the reasons which we have given, that the appeal will be dismissed.

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[1] [2005] VSCA 323; 159 A Crim R 347.

[2] Special Leave to appeal to the High Court was later refused on the basis that the case was not an appropriate vehicle for the determination of the question of principle.

[3] Cf. *Re Gasbourne Pty Ltd* [1984] VicRp 70; [1984] VR 801 at 810-811; (1984) 79 FLR 394; (1984) 8 ACLR 618; (1984) 2 ACLC 103; (1984) 15 ATR 303.

[4] Emphasis added.

[5] Emphasis added.

[6] About which, for present purposes, it is unnecessary to express an opinion.

[7] [2005] VSCA 323 at [40]; 159 A Crim R 347.

[8] Assuming that the High Court considered that the matter was one appropriate for its consideration.

[31] Cf. *Jennings v CPS* [2005] EWCA Civ 746; [2005] 4 All ER 391; [2006] 1 WLR 182 at 198, per Laws LJ.

APPEARANCES: For the appellant DPP: Dr G Griffith QC with Mr SG O'Bryan SC, counsel. Ms A Cannon, Solicitor for Public Prosecutions. For the respondent Tien Duc Vu: Mr DFR Beach SC with Mr JB Saunders, counsel. Valos Black & Associates, solicitors.
