

# ASSET CONFISCATION UPDATE – 18 November 2010

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## *DPP v Khodi & Dounia Ali*

### **Application for Civil Forfeiture and Exclusion Application**

On 10 November 2010, Hargrave J handed down the decision in *DPP v Khodi & Dounia Ali* [2010] VSC 503.

The decision is the fourth “Ali” decision under the *Confiscation Act*. To put the most recent decision in context, the following short history is required.

Mr Ali and his co-offenders were charged with certain drug offences, said to have been committed on Mr Ali’s farm property. The farm property was restrained. Mr Ali was subsequently acquitted but his co-offenders were convicted of Schedule 2 (automatic forfeiture) offences. Upon acquittal of Mr Ali, the restraining order ceased to operate over the farm property.

After the restraining order ceased to operate, the DPP sought to restrain the same property again, this time relying upon civil forfeiture (which is not charge or

conviction based). The application was opposed and, at first instance, the DPP’s application was refused by Smith J.

The DPP appealed to the Court of Appeal and succeeded (3:0), thereby obtaining, for the second time, a restraining order over the farm property (albeit for a different purpose – solely civil forfeiture).

Exclusion applications were made by Mr and Mrs Ali in respect of their respective (asserted) interests in the restrained property. Concurrently, the DPP sought civil forfeiture of the farm property.

The decision of Hargrave J dealt with the exclusion application of Mrs Ali (the application by Mr Ali was withdrawn) and the DPP’s application for civil forfeiture.

The decision is of significance for a number of reasons.

First, it provides a discussion of the interplay between parts of the *Confiscation Act* and certain provision of the *Charter of Human Rights and Responsibilities Act*

(**Charter**). The particular rights under consideration were:

- a person's right not to have his or her family home arbitrarily interfered with;
- the entitlement of families to be protected by society and the State;
- the right of a child to such protection as is necessary in his or her best interests by reason of being a child.

It was submitted on behalf of Mrs Ali that the hardship discretion (which enables a court to exclude particular property or any particular interest in property from the operation of a civil forfeiture order if satisfied that otherwise hardship may reasonably be likely to be caused to any person by the order<sup>1</sup>) is circumscribed by the relevant human rights and that, unless the making of a civil forfeiture order can be demonstrably justified under the Charter, the court must exclude the property from the operation of the civil forfeiture order.

Hargrave J rejected Mrs Ali's submission, principally on the basis that such construction would be inconsistent with the express terms of section 38(1) of the *Confiscation Act* and would,

thereby, defeat the purpose of the legislation.

The next issue determined in the case was whether Mrs Ali had a beneficial interest in the property capable of being excluded. Without going into the detail of the evidence, his Honour found that Mrs Ali had no legal or equitable interest in the property. In coming to that conclusion, his Honour analysed various trust principles.

Having found that Mrs Ali had no interest in the farm property, his Honour went on to determine whether the property should be excluded from civil forfeiture on the grounds of hardship, relying upon section 38(2) of the *Confiscation Act*.

That section permits the court to exclude particular property or any particular interest in property from the operation of a civil forfeiture order if satisfied that otherwise hardship may be reasonably be likely to be caused to any person by the order. It must be remembered that this hardship discretion only comes into play in civil forfeiture (but not automatic forfeiture) cases. This was the first time that a superior court has reviewed the manner in which to exercise such discretion.

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<sup>1</sup> Section 38(2) of the *Confiscation Act*.

Hargrave J determined that “*in exercising the court’s discretion, the fact that it is an all or nothing discretion is an important matter to be taken into account*”. His Honour observed that “*there will be cases where the court takes the view that total forfeiture would be unduly harsh in all the circumstances, but the conduct of the owner of the relevant interest is such that the ends of the civil forfeiture regime would be defeated if the whole of the property was excluded from the operation of a civil forfeiture order. In such cases, the further discretion arising under section 45(1) of the [Confiscation] Act, which permits the court to order payment of a specified amount out of the forfeited property in order to avoid hardship to any person, is enlivened*”.

His Honour determined that guidance can be obtained from the approach adopted by the courts in connection with discretionary forfeiture, relying upon cases such as *Lake v R* (1989) 44 A Crim R 63, *Taylor v Attorney-General for the State of South Australia* (1991) 55 SASR 462 and *R v Winand* (1994) 73 A Crim R 497. Those cases stand for the proposition that something more than ordinary hardship in the operation of the *Confiscation Act* is required to invoke the hardship discretion.

His Honour determined that Mr Ali’s involvement in the illegal drug manufacturing was such that the discretion ought not be exercised to exclude the property.

Having determined that the specific civil forfeiture hardship discretion was not to be exercised, his Honour then considered whether to make an order under section 45 of the *Confiscation Act* which enables the court, if satisfied that hardship may reasonably be likely to be caused to any person by a forfeiture order or a civil forfeiture order, to make an order that the person is entitled to be paid a specified amount out of forfeited property, being an amount that the court thinks is necessary to prevent hardship to the person.

After having heard evidence about the cost of renting alternative accommodation, his Honour determined that Mrs Ali should receive the sum of \$125,000 (approximately 40% of the anticipated sale proceeds of the property) so as to alleviate her hardship.

Interestingly, the Court made an order to pay money to Mrs Ali in circumstances where it had been found that she had no interest in the property. In other words, the court recognised that even though

a person may not have an interest in a particular property, they can still suffer hardship from its forfeiture.

### **About the author**

Christian Juebner is a barrister at the Victorian Bar. Christian practices in commercial law and confiscation litigation.

Before coming to the Bar, Christian was a partner with Deacons (now Norton Rose). Through his commercial experience, he has a detailed knowledge of property, equity and trust issues, all of which are relevant to and impact on proceedings under the Confiscation Act.

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