

ASSET CONFISCATION UPDATE – 23 September 2010

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Moloney v AG of Victoria & DPP (No 2) – Enforcement of Undertaking as to Damages

On 19 May 2010, Judge Saccardo of the County Court handed down his decision in *Moloney v AG of Victoria & DPP* [2010] VCC.

I provided a newsletter to practitioners dated 20 May 2010 which deals with that decision. A copy of the newsletter can be downloaded from www.confiscation.com.au.

Following on from the first decision, on 8 September 2010, Judge Saccardo delivered his reasons in relation to the application for an enquiry in respect of the undertaking as to damages given by the State of Victoria in the restraining order.

This is the first time (as far as I am aware) that a decision has been delivered in relation to the enforcement of an undertaking as to damages against the State of Victoria arising from a restraining order made under the *Confiscation Act*.

In short, the Court ordered the State of Victoria to pay damages equal to the value of Mr. Moloney's house which had been automatically forfeited.

The decision helpfully sets out the relevant principles applicable to the

enquiry into damages arising from an undertaking as to damages given upon an application for a restraining order.

The principles were expressed as follows:

- A failure to make full disclosure in response to which the Court decides to discharge an injunction does not prevent the making of a new application for the same injunction which the Court may grant.
- The onus is upon an applicant seeking damages to show that the loss claimed would not have been sustained but for granting the injunction.
- The loss claimed must be directly caused by the wrongly obtained injunction.
- Effect should be given to the undertaking unless special circumstances exist.
- Special circumstances which may result in the undertaking not being enforced include conduct by the respondent to the injunction such as would render the enforcement of the undertaking inequitable.
- Account is to be taken of all matters that bear upon the justice or

injustice of enforcing the undertaking.

- Unreasonable delay can be a relevant circumstance which acts as a disqualifying factor in respect of the making of an award of damages.
- There is little to be gained from an examination of the authorities dealing with causation of damage in contract, tort or other situations; the Court is better advised to look at the purpose which the undertaking as to damages is to serve and to identify the causal connection or standard of causal connection which is most appropriate to that purpose.
- That in a proceeding of an equitable nature, it is generally proper to adopt a view which is just and equitable or fair and reasonable in all the circumstances, rather than to apply a rigid rule. However the view that the damages should be those which flow directly from the injunction and which could have been foreseen when the injunction was granted, is one which will be just and equitable in the circumstances of most cases.

In the decision delivered 19 May 2010, Judge Saccardo determined that the DPP had breached its duty to make full disclosure to the Court when obtaining the restraining order over Mr. Moloney's home. The application for the restraining order had been made *ex parte*.

Mr. Maloney did not become aware of his ability to have the restraining order set aside until after the house had already been automatically forfeited to

the State of Victoria. His attempt to have the restraining order declared *void ab initio* failed.

The Court found that Mr. Maloney would have been entitled to have the restraining order set aside. However, it could not be set aside because automatic forfeiture had already occurred.

Interestingly, the Court ordered damages against the State of Victoria despite the fact that Mr. Maloney was convicted of a Schedule 2 (automatic forfeiture) offences and the fact that Mr. Maloney could not have excluded the property from a restraining order, had one been lawfully made.

In summary, the Court was not satisfied that the DPP would have made a subsequent application for a restraining order or, if a subsequent application had been made, the Court was not satisfied that it would have succeeded.

The DPP has filed an appeal.

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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