

ASSET CONFISCATION UPDATE – 28 February 2012

Lemoussu v DPP [2012] VSCA 20 – time for exclusion application



On 24 February 2012, the Court of Appeal (Redlich and Mandie JJA and Kyrou AJA) delivered the decision in *Lemoussu v DPP*.

The decision concerns the time by which an application for exclusion must be made under the *Confiscation Act*.

The Court determined that there are two separate opportunities for an applicant for exclusion to obtain an exclusion order in respect of restrained property.

The first opportunity arises by making application for exclusion within 30 days of the service of the restraining order,¹ save that

the Court has the ability to extend the time for making an exclusion application where it is just to do so. As to the principles governing an extension of time, see *Finn v DPP* [2011] VSC 234 and *Pham v DPP* (Warren CJ, unreported, 25 October 2011).

The second opportunity arises after conviction and, in that case, the time limits for making such application for exclusion are governed by section 35 of the *Confiscation Act*. That section provides that an application for exclusion can be made within 60 days after the date of conviction.

¹ Or 30 days of the making of the restraining order where the

applicant for exclusion was given notice of the application to obtain such restraining order.

Based on the reasoning of the Court of Appeal in *Lemoussu*, it would appear that an applicant for exclusion can file an application seeking an exclusion order between the date of conviction and 60 days thereafter without the need to obtain an extension of time under section 20(1B) of the *Confiscation Act*.

Until the decision in *Lemoussu*, the courts and practitioners had proceeded on the basis that, where an application for exclusion had not been made within 30 days of the service of the restraining order, it was necessary to obtain an order extending time for the filing of an application under section 20(1B) of the *Confiscation Act*.

Although the decision in *Lemoussu* will avoid the need to obtain orders extending time where an application for exclusion is filed between the date of conviction and 60 days thereafter, practitioners should be careful to accurately calculate that time period. That is so because, for the purposes of the *Confiscation Act*, a defendant who pleads guilty is deemed to be convicted at the time of the arraignment, which may be some time prior to the

plea and sentence; see *DPP v Nguyen* and *DPP v Duncan* [2009] VSCA 147.

In the author's view, it is still preferable to file an exclusion application as soon as possible, even if that requires an application for an extension of time, since it will minimise the risk of filing an application after automatic forfeiture has already occurred and because, based on the principles set out in *Finn v DPP*, it is now relatively easy to obtain an order extending time.

Further information

For further information concerning litigation under the *Confiscation Act* 1997, visit www.confiscation.com.au.

About the author

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