



Commissioner of AFP v Kalimuthu (No 2) [2015] WASC 376

ASSET CONFISCATION UPDATE

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Power to set aside restraining order

Commissioner of the Australian Federal Police v Kalimuthu

On 8 October 2015, Allanson J handed down his second ruling in *Commissioner of the Australian Federal Police v Kalimuthu (No 2) [2015] WASC 376*.

The central issue

The central issue was whether there was a sufficient non-disclosure by the Commissioner of the Australian Federal Police (**Commissioner**) in the course of the *ex parte* application for a restraining order so as to warrant the setting aside of the restraining order.

Power to set aside/revoke restraining orders

In considering the application, the Court considered its power to set aside a restraining order made under the *Proceeds of Crime Act 2002*

(Act). The Court clarified that the only power to set aside a restraining order after it is made arises from the power to revoke such orders under section 42 of the Act. The Court observed (at [24]):

In civil proceedings, the court has a general power to set aside an order made ex parte on various grounds, including where there has been a material non-disclosure in the process of obtaining the order: see Bell Group NV (In Liq) v Aspinall (1998) 19 WAR 561; Popovic v Panagoulas [2014] WASCA 86 [54] - [55]. But that power is not consistent with the intention apparent in s 42. With respect, I agree with McLure P in Director of Public Prosecutions (Cth) v Kamal [2011] WASCA 55; (2011) 206 A Crim R 397 [131], that s 42 is intended to be the exclusive source of power to review an ex parte order. That conclusion is implicit also in the reasoning of Martin CJ (for example at [104] - [111]), and Buss JA ([246] - [252]).

Having determined that the Court's power to revoke restraining orders was confined by the operation of section 42 of the Act, the Court went on to consider the extent of the non-disclosure.

As for the obligation to make disclosure in an *ex parte* application, the Court stated (at [29]):

It is not controversial that the Commissioner, in applying for an order ex parte, was under a duty to make full disclosure of all relevant information in his possession, whether or not it assisted the application: Thomas A Edison Ltd v Bullock [1912] HCA 72; (1912) 15 CLR 679, 681 - 682; Savcor Pty Ltd v Cathodic Protection International APS [2005] VSCA 213; (2005) 12 VR 639 [24] - [36] (Savcor). Whether information is relevant must be considered having regard to the nature of the application and the factors relevant to the exercise of the discretion. A fact is material where it is a 'matter of substance in the decision making process': Savcor [35] - [36].

Importantly, the Court determined (at [43]) that:

Section 42(5) is sufficient to empower a court to revoke a restraining order because of an applicant's failure to comply with the obligation of full disclosure.

Ultimately, the Court was not persuaded that the non-disclosure was such as would be sufficient to result in revocation of the restraining order.

Notwithstanding that fact, the reasons examine some important principles that can guide practitioners seeking to set aside restraining orders made under the Act on the basis of alleged non-disclosure during the *ex parte* hearing for the restraining order.

About the author

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