



Commissioner of AFP v Ma [2016] VSC 553

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Revocation of restraining orders

Commissioner of the Australian Federal Police v Ma

On 16 September 2016, Dixon J handed down his decision in *Commissioner of the Australian Federal Police v Hongjie Ma* [2016] VSC 553.

The facts

The Commissioner of the Australian Federal Police (**Commissioner**) had obtained a restraining order under section 19 of the *Proceeds of Crime Act 2002 (Act)* over a property in California. No person had been charged or convicted of any offence. The restraining order had been made *ex parte* on the basis that it was alleged that there were reasonable grounds to suspect that the property was proceeds of the offence of dealing with property reasonably suspected of being proceeds of crime in

contravention of section 400.9(1) of the Criminal Code. Ms Ma's husband had originally purchased the property and then transferred it to her. It was alleged that the property had been purchased by Ms Ma's husband from his gambling winnings. He was a very significant gambler, held several Australian passports and was said to be a dual Chinese/Australian citizen.¹ The Commissioner alleged that it was suspected that he was involved in large-scale money-laundering.

After the restraining order was made, Ms Ma sought to have the restraining order revoked under section 42 of the Act.

¹ At [3]. Although it was not mentioned in the judgement, China does not permit dual citizenship.

Dixon J refused to revoke the restraining order. As a result, Ms Ma will now need to press applications for exclusion/compensation under the Act.

Reasons

Section 42(5) of the Act provides that a court may revoke a restraining order if it is satisfied that:

- there are no reasonable grounds on which to make the order at the time of considering the application to revoke the order; or
- it is otherwise in the interests of justice to do so.

Applications for revocation are notoriously difficult, having regard to the low evidentiary threshold which the Commissioner must satisfy in order to obtain a restraining order. This was noted by Dixon J at [11]:

A heavy onus rests on the applicant. In Sunshine World Holdings, Greg James J explained the applicable test:

Since, under s 19, the court must make the order if the statutory conditions are met, I would state the test this way: it is not open to me to revoke the order under s 42 unless the applicant affirmatively satisfies me that there are no grounds at the time of this consideration of the application to revoke, on which the restraining order would be made if now sought.

The grounds of which s 42 speaks are those which would found such an order, that is, the reasonable grounds for suspicion that the property is the proceeds of an indictable offence reasonably suspected of being committed in the 6 years preceding the application.

And at [23]:

The AFP submitted that Hongjie Ma failed to clear the high bar facing an applicant for the relief she seeks. As Shaw J said in DPP (Cth) v Tan:

This is a tough test for the applicant to meet. It seems to me to mean there must be literally no grounds for the foundation of the order for it to be revoked. I leave open the question of whether irrational, improper or unlikely grounds for suspicion are sufficient to sustain an order.

Dixon J found that it was not necessary for the Commissioner to identify the predicate offence relevant to the dealing in proceeds of crime offence. In other words, Dixon J found that the Commissioner was able to assert a reasonable suspicion that the money used to purchase the Californian property was proceeds of crime notwithstanding the fact that the Commissioner did not point to any offence which was said to be the source of such funds. His Honour observed (at [31]):

Hongjie Ma acknowledged that no direct evidence need be presented that a crime had been committed and that a reasonable suspicion may be based upon technically inadmissible material. I do not accept Hongjie Ma's central submission that there was a need for Federal Agent Prior, as part of her grounds for suspicion, to identify a predicate offence that made the funds used to purchase the California property derived from proceeds of crime. It is not necessary for the authorised officer to have identified particular criminal activity that led to a need to engage in money laundering. The requirement is that there must be a suspicion on behalf of the authorised officer, reasonably held, that the property in question is proceeds of crime. I will later explain how the suspicion of money laundering is reasonably based without suspicion of specific laundering transactions.

In refusing to revoke the restraining order, Dixon J observed the following at [33] and [34]:

The power to revoke under s 42(5) is only to be exercised where there are 'literally no grounds for the foundation of the order.' [8] Accordingly, if the respondent is able to show any reasonable ground for Federal Agent Prior's relevant suspicions the application must fail.

The words 'reasonable suspicion' in s 19 do not require proof or admissible evidence. I would adopt, with respect, the analysis of Allanson J in Re Application Pursuant to Section 19 of Proceeds of Crime Act 2002 (Cth); Ex parte Commissioner of the Australian Federal Police.

Whether a person has reasonable grounds to suspect something is to be judged on the facts known to that person at the time. The concept of reasonable suspicion is well known in the law. In George v Rockett, the High Court approved the definition of

'suspicion' given by Lord Devlin in *Hussien v Chong Fook Kam*:

in its ordinary meaning [suspicion] is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'.

The court referred also to the comments of Kitto J in Queensland Bacon Pty Ltd v Rees:

A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence', as Chambers' Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.

For there to be reasonable grounds to suspect there must be material which is sufficient to induce the state of suspicion in a reasonable person. It is not, however, necessary that the material which establishes the reasonable grounds for suspicion be limited to admissible evidence: Walsh v Loughnan (Vincent J); Director of Public Prosecutions (SA) v Tregenza.

His Honour noted (at [38]):

Investigations, and subsequently the affidavits filed for Hongjie Ma's application, show that Jin gambles huge sums of money that cannot be reconciled with his known legally obtained income. He is person who has held multiple identity documents. Those matters can support a suspicion that Jin uses funds supplied by others to gamble and the multiple passports can mask who is controlling the funds that he gambles with.

Interestingly, Dixon J observed (at [42]):

I am satisfied that there is a proper basis of reasoning in Federal Agent Prior's suspicions. It is not necessary that I share her suspicion. All that is required is that the court be able to understand the authorised officer's reasoning. In this context in the circumstances disclosed in the affidavits read on the application, I see no reason to doubt that Federal Agent Prior's suspicions have been reasonably formed.

On one reading of that passage, it suggests a move away from an objective assessment of the suspicion. However, a better reading of that passage may be simply to suggest that his Honour noted that it was unnecessary for him to subjectively share the suspicion, provided that there was an objective basis for it.

Comment

The decision reinforces the difficulty in succeeding with a revocation application. For that reason, applications for revocation are rarely made. Instead, persons whose property has been restrained generally pursue only exclusion and compensation applications.

There will, however, be some cases where it may be advisable to bring revocation applications. They are cases where the origin of the restrained property or its use can be readily explained. For example, cases where property was inherited, but restrained on the basis that it was suspected to have been derived through some unlawful activity.

Further, the "interest of justice" ground upon which a restraining order may be revoked could be relied upon where there was a material non-disclosure or inaccuracy in an affidavit in support of an application for a restraining order.

About the author

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