



*Commissioner
of AFP v
Zhang & Shen
[2016] VSCA
171*

ASSET CONFISCATION UPDATE

22 JULY 2016

Order of proceedings - exclusion from restraint and forfeiture

Commissioner of the Australian Federal Police v Zhang & Shen

On 22 July 2016, the Victorian Court of Appeal (Tate, Priest and Beach JJA) handed down its decision in *Commissioner of the Australian Federal Police v Zhang & Shen* [2016] VSCA 171.

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 (**POCA**) over two houses and a car. No person had been charged with any offences. The Commissioner made an application for a forfeiture order in respect of the restrained property, which fell to be determined under section 49 of the POCA.

Mr Zhang and Mrs Shen, who are the owners of the restrained property, made an application under section 31 for an exclusion order from the restraining order, an application under section 74 for an exclusion order from forfeiture and an application under section 78 for a compensation order.

At the commencement of the trial, on the application of Mr Zhang and Mrs Shen, the trial judge ruled that he would first determine the Commissioner's application for a forfeiture order and, if necessary, thereafter deal with the remaining applications. Essentially, the trial judge took the view that where the State sought to forfeit property, it ought to present its case first.

The central issue on the application for leave to appeal/appeal was whether the trial judge had erred in deferring to hear the application under section 31 for an **exclusion order from the restraining order** until after he had heard and determined the Commissioner's **forfeiture application**. In other words, the central issue was: *which application must go first?*

Decision

The Court of Appeal determined that, where an application for exclusion from a restraining order under section 31 was pending, the structure of the POCA required that such exclusion application be determined prior to the determination of the forfeiture application. At [80] the Court observed:

Properly construed, the Act does not permit exclusion applications made under s 31 of the Act to be heard after the hearing and determination of forfeiture applications.

And at [81]:

Under the Act, Zhang and Shen were either required to pursue the s 31 exclusion applications before the forfeiture applications were determined, or to withdraw the s 31 exclusion applications. The Act does not allow for s 31 exclusion applications to be kept on foot, with the consequence that s 49(3) is deprived of any operation, without determination.

And at [84]:

It follows that an exclusion application must be determined before the court considers whether the property should be forfeited pursuant to s 49(1)(c).

Discussion

The Court of Appeal's determination rests on the basis that, if the forfeiture application is determined first, the application for exclusion from the restraining order will never fall to be determined. That is so because, if the application for forfeiture succeeds then there will be no relevant property restrained to which the application for exclusion from the restraining order can apply. Alternatively, if the application for

forfeiture fails, then the restraining order ceases to operate pursuant to section 45(3)(a)(i). Hence, an application for exclusion from a restraining order cannot not be filed solely for the purpose of ensuring that the Commissioner must meet his evidentiary onus under section 49(1)(c); and to prevent reliance on section 49(3).

The construction which the Court of Appeal gave the POCA, namely that applications for exclusion from restraint must be determined before an application for forfeiture is determined, is mandated by new section 315A(2), introduced with effect from 1 March 2016. That amendment operates only prospectively (i.e. in respect of applications for exclusion filed on 1 March 2016 or later). However, by reason of this decision of the Court of Appeal, all applications for exclusion from a restraining order must now be determined before an application for forfeiture is determined. Hence, there is no remaining relevant distinction between applications filed prior to and after 1 March 2016.

Order of proceedings

The practical effect of the decision in Zhang is as follows:

1. a person whose property has been restrained by a section 19 restraining order should first consider whether to make an application for revocation of the restraining order under **section 42** (but it is noted that such applications are rare and difficult to succeed on having regard to the low evidentiary threshold for the making of a restraining order);
2. if no application for revocation is made, a person whose property has been restrained must, unless they wish to concede forfeiture, make and persist with an application for exclusion from the restraining order under **section 31**;
3. if the application for exclusion from the restraining order succeeds, the relevant interest in property is freed from restraint;
4. if the application for exclusion from the restraining order fails, the property will not thereafter automatically forfeit; at that point in time the Commissioner must pursue his application for forfeiture and establish, on the balance of probabilities, that the relevant property either

- constitutes proceeds or an instrument of a relevant offence;
5. a property owner can oppose the application for forfeiture and, if the application for the forfeiture order is refused, the restraining order ceases to operate in respect of the property;
 6. a property owner can also seek exclusion from forfeiture by application under **section 74**;
 7. in so far as an application for exclusion from forfeiture succeeds, the relevant interest in property is released and, in so far as it fails, the property will then be forfeited;
 8. lastly, a property owner can seek a compensation order by application under section 78, which allows a court to order payment in circumstances where it is satisfied that some of the property forfeited was not derived from the commission of any offence, provided that the property is not an instrument of a relevant offence;
 9. in practice, applications under sections 31, 74 and 78 are filed at the same time.

Having regard to the fact that the primary burden has now been placed squarely back with an applicant for exclusion from restraint, it may well be the case that the Commissioner will reduce his reliance on examinations under section 180 of the POCA. The recent spike in examinations arose from the Commissioner's perceived need to gather evidence in support forfeiture applications.

About the author

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