



HENDERSON V STATE OF QUEENSLAND

Henderson v State of Queensland [2014] HCA 52

18 DECEMBER 2014

Evidential Burden in Proceeds of Crime Litigation

by Christian Juebner

On 16 December 2014, the High Court handed down its decision in *Henderson v State of Queensland* [2014] HCA 52.

Mr Henderson had failed in an application to exclude approximately \$500,000 cash found in his car from a restraining order. He had unsuccessfully appealed to the Queensland Court of Appeal. By a 4/1 majority (Gageler J dissenting), the High Court dismissed Mr Henderson's appeal.

In short, Mr Henderson contended that the cash was proceeds of sale of jewellery which had been given to him by his late father. Evidence was admitted at the original trial that Mr Henderson's father had told Mr Henderson that the jewellery had been a gift to Mr

Henderson's grandfather from Russian royalty in the late 19th or early 20th century.

Evidence tendered on behalf of the Crown was to the effect that the jewellery had been produced some time after 1950.

In order to obtain an exclusion order, Mr Henderson needed to demonstrate that the cash was not illegally acquired property, which in turn required Mr Henderson to demonstrate that the jewellery (which had been converted into the relevant cash by him) had itself not been illegally acquired property.

Based on the evidence of the Crown that the jewellery was produced sometime after 1950, the only explanation of the provenance of the

jewellery proffered by Mr Henderson, namely that it had been a family heirloom provided to Mr Henderson's grandfather from Russian royalty in the late 19th or early 20th century, was rejected.

On that basis, the court found that Mr Henderson had not discharged the evidential burden placed upon him to satisfy the court that the cash (and the jewellery) was not illegally acquired property.

The separate reasons given by the Court contain a useful explanation of the evidential burden placed on applicants making exclusion applications. Those principles are applicable to all proceeds of crime legislation around Australia, including the *Proceeds of Crime Act 2002* (Cth).

The reasons highlight the need to exercise great care in the preparation of affidavits in support of exclusion applications and to ensure that all available evidence is put before the court.

Although Gageler J dissented and was prepared to allow the appeal, his Honour engaged in a detailed analysis of the evidential burden cast upon an applicant for exclusion. His Honour observed the following in respect of the need to prove a negative and the switching of the evidential burden to the Crown (at [90]):

That description of the ordinary operation of the civil standard of proof applies equally to a case in which the legal burden of a party is to prove the non-happening of an event or the non-existence of a particular state of affairs as to a case in which a party's legal burden is to prove the happening of an event or the

existence of a particular state of affairs. As Davidson J earlier explained in the Supreme Court of New South Wales in Ex parte Ferguson; Re Alexander:

"In all legal proceedings the basic principle at common law is that in civil cases a plaintiff must prove the essential elements of his case even if that course involves establishing the assertion of a negative ... He must establish what is really the affirmative in substance, not what is merely affirmative in form ... But if the party bearing the onus furnishes some evidence which gives rise to a presumption or inference of fact in his favor or that presumption already exists, the onus shifts to the other party".

About the author

Christian Juebner is a barrister at the Victorian Bar and practices extensively in proceeds of crime litigation in various Australian jurisdictions. He was admitted to practice in 1996 and, prior to coming to the Bar 10 years ago, was a partner with Deacons (now Norton Rose Fulbright).

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