



Siddique v DPP [2015] VSC 99

ASSET CONFISCATION UPDATE

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Variation to restraining order for legal costs

by Christian Juebner

Siddique v DPP

On 20 March 2015, Ginnane J refused an application by Mr Siddique, who sought that a restraining order be varied to permit him to pay past and future legal expenses. The restraining order had been made under the *Confiscation Act 1997* (Vic).

There is nothing surprising about the refusal to vary the restraining order to pay legal expenses. The *Confiscation Act 1997* (Vic) contains an express prohibition, precluding the payment of legal expenses from restrained property in the following terms (s.14(5)):

A court, in making a restraining order, must not provide for the payment of legal expenses in respect of any legal proceeding, whether criminal or civil, and whether in respect of a charge to which the restraining order relates or otherwise.

Ginnane J found that the prohibition operated not only at the time that the restraining order was made, but also at the later time when the variation was sought.

Similar prohibitions on the payment of legal expenses are contained in the various pieces of proceeds of crime legislation throughout

Australia, including the *Proceeds of Crime Act 2002* (Cth).¹

Although the result in *Siddique* is not surprising, the case raises an important point of practice for solicitors. Although a restraining order cannot be varied to permit the payment of legal expenses, if restrained property is excluded it can be used for any purpose,² including the payment of legal costs.

In order to exclude property, the applicant for an exclusion order must have an interest in the relevant property sought to be excluded.

Relevantly, a solicitor holding monies in his or her trust account on to secure fees to be incurred in acting for a client holds a lien over those monies to secure payment of fees. Such a lien is a sufficient interest to found an exclusion application.

Hence, if a restraining order is made restraining property of a client, including monies standing to the credit of a solicitor's trust account, the solicitor will have the ability to seek exclusion of so much of the monies as are required to pay the solicitor's fees **up to the time of making the restraining order.**

Importantly, no money can be appropriated from the trust account in such circumstances until an exclusion order (or similar order) is made.

Costs agreements need to be carefully drawn to cater for the prospect that monies in a solicitor's trust account may be restrained and, therefore, no longer be available for the payment of fees.

Although there have been instances of specific trust accounts being restrained, more often than

not the issue arises by reason of the "catch all" orders, which restrain all property of an accused or a suspect (and, thereby, monies placed on trust with a solicitor).

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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For more information about proceeds of crime litigation in Australia visit www.confiscation.com.au

¹ *Proceeds of Crime Act 2002* (Cth), s.24(2)(ca).

² Each proceeds of crime statute throughout Australia contains provisions whereby restrained property may be excluded from a restraining order.