

**IN THE COURT OF APPEAL  
SUPREME COURT OF QUEENSLAND**

**Appeal No. 3942 of 2003**

**BETWEEN**

**STATE OF QUEENSLAND  
(APPLICANT)**

Respondent

AND

**NOEL RAYMOND McGARRY  
(FIRST RESPONDENT)**

First Appellant

AND

**LEVINGTON HOLDINGS PTY LTD  
(SECOND RESPONDENT)**

Second Appellant

AND

**COLT HAULAGE PTY LTD  
(THIRD RESPONDENT)**

Third Appellant

**OUTLINE OF ARGUMENT ON BEHALF OF THE APPELLANTS**

**GROUND 1A: The learned primary Judge erred in purporting to act pursuant to provisions of the *Criminal Proceeds Confiscation Act 2002* which are beyond the power of the Parliament of Queensland to enact, are incompatible with the Supreme Court's exercising the judicial power of the Commonwealth, compromised the integrity of the Supreme Court and the appearance of independence of the Court, and are invalid.**

- 1.1 The Appellants seek leave to amend the Notice of Appeal to include ground 1A.
- 1.2 Pursuant to the provisions of the *Criminal Proceeds Confiscation Act 2002*, the State may apply to the Supreme Court for an order restraining any person from dealing with property stated in the order other than in a stated way or in stated circumstances [s.28(1)]. The application must be supported by an affidavit of an authorised officer of the Commission or a police officer [s.28(2)(a)].

- 1.3 The application may be made without notice to any person to whom it relates [s.28(2)(b)]. The application may relate to stated property or a stated class of property or to all property of a person suspected of having engaged in one or more serious crime related activities [s.28(3)].
- 1.4 If the State applies for a restraining order without notice to any person to whom it relates, the Supreme Court **must** hear the application:
- (a) in the absence of the person whose property is the subject of the application;
  - (b) in the absence of any legal representative of the person;
  - (c) without the person having been informed of the application.
- (See s.30).
- 1.5 Pursuant to s.31, the Supreme Court **must** make a restraining order if, after considering the application and affidavit, it is satisfied there are reasonable grounds for the suspicion on which the application is based. This obligation is qualified only to the extent that the Court may refuse the application if it is satisfied that in the particular circumstances it is not in the public interest to make the order or if the State fails to give undertakings the Court thinks appropriate for the payment of damages or costs [s.31(2)].
- 1.6 Whilst pursuant to s.28(4) the Court may refuse to consider the application until the State gives the Court all the information the Court requires about the application in the way the Court requires, the Supreme Court, in considering the terms of s.31(2), has before it only those circumstances as determined by the State.
- 1.7 It is a condition of every restraining order that the person whose property is restrained must preserve the property [s.32(1)] and the Supreme Court may impose other conditions it considers appropriate, including a condition about who is to have possession of the property and a condition of a kind mentioned in s.33 or 34.
- 1.8 Pursuant to s.45, as soon as practicable after the restraining order is made, the Commission must give each person whose property is restrained, and anyone else affected by the order, a copy of the order. The Act contains no provision concerning the giving to such persons of a copy of the application or affidavit upon which the application was based. Pursuant to s.258, the Supreme Court may make orders it considers appropriate about the publication of any matter arising under the Act. In this case, the learned primary Judge made an order concerning the non-publication of the application and affidavit.
- 1.9 It is submitted that a State legislature may not invest the Supreme Court of the State with a function which is incompatible with Chapter III of the Constitution and the exercise by that Court of the judicial power of the Commonwealth. [See *Kable v DPP* (1996) 189 CLR 51].

1.10 It is submitted that statutory procedures of this Act compromise “*the institutional impartiality of the Supreme Court*” (*Kable* – McHugh J at 121) and are “*repugnant to the judicial process in a fundamental degree*” (*Kable* – Gummow J at 132).

1.11 The particular features which are repugnant to the judicial process:

- (a) the making of a decision which, as in this case, may restrain all property, without the persons whose rights are affected having any opportunity to be heard to resist the order;
- (b) the making of such a decision without the persons whose rights are affected having any opportunity to furnish material to the Court in reply or at all;
- (c) the absence of any provision for the persons whose property is the subject of restraining orders to be provided with a copy of the application and affidavit, and thus know the material upon which the restraint of his or her property is based;
- (d) the absence of any provision for the persons whose property is the subject of restraining orders to be provided a copy of the reasons on which the Court has acted and thus know why the orders were made;
- (e) the existence of a provision in the Act, s.258, facilitating the non-publication of the application and affidavit;
- (f) the existence of a right to appeal from restraining orders being rendered, at the very least, difficult, by the inability of the persons affected to know the material upon which the ex parte orders were based or the reasons of the Court for making the orders.

1.12 As Spigelman C J noted in *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* (2001) 181 ALR 694 at [19], each member of the majority in *Kable* referred to the significance of public confidence in the administration of justice and, particularly, the appearance of impartiality and independence of the judiciary from the legislature and the executive (Toohey J at 98; Gaudron J at 107; McHugh J at 117, 118-119, 121 and 124; Gummow J at 133-134). Whilst the Court in *Kable* was concerned with a specific function of power, rather than an aspect of procedure, the reasoning, particularly of Gaudron and Gummow JJ supports a broader principle extending beyond matters capable of characterisation as a “*function*” to encompass aspects of procedure. See also Spigelman CJ in *John Fairfax* at [34].

**GROUND 1: The Primary Judge erred in failing to give and publish any reasons for the making of the orders made.**

2.1 The learned primary Judge gave no reasons for his decision.

- 2.2 In this case, particularly as the decision of the learned primary Judge is susceptible to appeal, the failure to give reasons was an error of law. See *Pettitt v Dunkley* (1971) 1 NSWLR 376 and *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247.

*“... I agree with the statement by Mahoney JA in Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd (at 386) that the extent of the duty to give reasons is related ‘to the function to be served by the giving of reasons’. Thus more elaborate reasons are required where legislation gives a right of appeal against a decision than where no appeal lies. In the first class of case, unless the basis of the decision is properly articulated, the losing party may be effectively deprived of his right of appeal.” (Soulemezis – McHugh J at 280).*

- 2.3 The application for the restraining order was supported by an affidavit of an authorised Commission officer, John Edward Richardson.
- 2.4 The affidavit asserted that Richardson suspected that the First Appellant had engaged in serious crime related activities. The affidavit asserted that Richardson’s suspicion was held having regard to the contents of a document created by a police officer – see R10-14.
- 2.5 Pursuant to s.31 of the Act, the Court must make a restraining order if, after considering the application and the relevant affidavit, it is satisfied there are reasonable grounds for the suspicion on which the application is based.
- 2.6 The suspicion must be that of Richardson. However, the Court must be satisfied that there are reasonable grounds for that suspicion.
- 2.7 In the absence of reasons, one does not know upon what basis the learned primary Judge was satisfied that there were reasonable grounds for the suspicion. It is submitted that the contents of the document relied upon by Richardson fell well short of disclosing reasonable grounds for suspecting the First Appellant’s involvement in serious crime related activities.
- 2.8 One does not know what part or parts of the police document the learned primary Judge relied upon for his decision. It follows that it makes it impossible on appeal to argue whether the learned primary Judge could properly come to his decision.
- 2.9 Of particular concern is whether the learned primary Judge relied upon the final paragraph at R11 of the document created by the police officer. It is submitted that the final paragraph at R11 could not be used by Richardson in forming a suspicion and it could not be used by the Court in assessing reasonable grounds for Richardson’s suspicion. The paragraph fails to set out any relevant evidence for the consideration of Richardson or the Court. Rather, the paragraph sets out an opinion or interpretation of matters by the police officer who created the document.

- 2.10 Further, in the absence of articulated reasons, one does not know whether the learned primary Judge exercised his discretion not to refuse to make the order [see s.31(2)(a) and (b)], or, if His Honour did exercise the discretion, the basis for so doing.

**GROUND 2: The primary Judge erred in making the orders when there were no reasonable grounds for suspecting that –**

- (a) **The First Appellant (or any of the Appellants) had engaged in one or more serious crime related activities.**
- 3.1 The application for the restraining order related to all property of the Appellants [s.28(3)(a)(iii) of the Act].
- 3.2 The application was supported by an affidavit of an authorised Commission officer, John Edward Richardson [s.29(a) of the Act].
- 3.3 The affidavit asserted that Richardson suspected that the First Appellant had engaged in serious crime related activities. The affidavit asserted that Richardson’s suspicion was held having regard to the contents of a document created by a police officer – see R10-14.
- 3.4 Pursuant to s.31 of the Act, the Court must make a restraining order if, after considering the application and the relevant affidavit, it is satisfied there are reasonable grounds for the suspicion on which the application is based.
- 3.5 The suspicion must be that of Richardson. However, the Court must be satisfied that there are reasonable grounds for that suspicion.
- 3.6 It is submitted that on the limited material relied upon by Richardson for his suspicion, there were no reasonable grounds for that suspicion.
- 3.7 The contents of the document relied upon by Richardson fell well short of disclosing reasonable grounds for suspecting the First Appellant’s involvement in serious crime related activities.
- 3.8 The final paragraph at R11 of the document created by the police officer cannot be used by Richardson in forming a suspicion and it cannot be used by the Court in assessing reasonable grounds for Richardson’s suspicion.
- 3.9 This paragraph fails to set out any relevant evidence for the consideration of Richardson or the Court. Rather, the paragraph sets out an opinion or interpretation of matters by the police officer who created the document.
- 3.10 It is submitted that a Court must approach its determination under s.31 of the Act with caution. In this case the application for a restraining order was not in relation to stated property, nor even a stated class of property. The application related to the restraint of the Appellants’ entire property. The restraining order, which has such a devastating, immediate and continuing effect

including the loss of livelihood for the First Appellant, was made on an assessment of vague material.

- 3.11 The Act envisages at s.28(4) that a Court may refuse to consider the application if all the information the Court requires is not provided and in the way the Court requires.

**GROUND 3: In circumstances where:**

- (a) **the orders were made ex parte;**
- (b) **the orders restrained the First Appellant from dealing with any of his property;**
- (c) **the orders had the effect of preventing the First Appellant from carrying on his business as a cartage operator;**
- (d) **the orders had the effect of preventing the First Appellant from paying proper mortgage, insurance and other property expenses in relation to the real property identified in Order 3;**
- (e) **the orders had the effect of preventing the Second Appellant from using its funds in any of the accounts identified in the orders for the purposes of paying proper mortgage, insurance and other property expenses in relation to its interests in the real property identified in Order 3;**
- (f) **the orders had the effect of preventing the Second Appellant from using funds available in any of the accounts referred to in the orders to complete the purchase of a contract for the purchase of land at 119 Zenith Crescent, Pacific Pines Estate;**
- (g) **the orders had the effect of preventing the Third Appellant from carrying on its business as a cartage operator;**
- (h) **otherwise the orders restricted the Appellants in their lawful activities,**

**the primary Judge erred in the exercise of his discretion in making the orders without requiring the Respondent to provide an undertaking as to damages.**

- 4.1 Whilst the material before the learned primary Judge was sparse, it at least suggested that the First Appellant may be earning his livelihood as a cartage operator (Colt Haulage Pty Ltd). Further, the material disclosed that the First Appellant had interests in real property.
- 4.2 The obvious effect of the restraining order was to prevent the First and Third Appellants from carrying on the business of cartage operations and to prevent the First and Second Appellants from dealing in any way whatever with the

real property identified in the material, including payment of mortgages and other expenses.

- 4.3 Pursuant to s.31(2)(b) the Court may refuse to make the restraining order if the State fails to give appropriate undertakings as to damages.
- 4.4 The State failed to give any undertaking as to damages.
- 4.5 In the circumstances, the Court ought to have refused to make the restraining order. Alternatively, it is submitted, the Court could only properly make the restraining order upon requiring appropriate undertakings from the State to pay the Appellants' lawfully sustained damages resulting from the restraining order.

#### **GROUND 4, 5, 6 AND 7**

- 4. The primary Judge erred in making the orders:**
  - (a) which restrained the First Appellant from dealing with any of his properties;**
  - (b) which had the effect of preventing the First Appellant from carrying on his business as a cartage operator;**
  - (c) which had the effect of preventing the First Appellant from paying proper mortgage, insurance and other property expenses in relation to the real property identified in Order 3;**
  - (d) which had the effect of preventing the Second Appellant from using its funds in any of the accounts identified in the orders for the purposes of paying proper mortgage, insurance and other property expenses in relation to its interests in the real property identified in Order 3;**
  - (e) which had the effect of preventing the Second Appellant from using funds available in any of the accounts referred to in the orders to complete the purchase of a contract for the purchase of land at 119 Zenith Crescent, Pacific Pines Estate;**
  - (f) which had the effect of preventing the Third Appellant from carrying on its business as a cartage operator;**
  - (g) which otherwise restricted the Appellants in their lawful activities.**
- 5. Alternatively, the primary Judge erred in failing to require the Respondent to provide to him, and in failing to refuse to make any order**

until the Respondent had provided to him, all information relevant to the effect on the Appellants, and other persons, of the making of the orders.

6. **Alternatively, the primary Judge erred in failing to impose as conditions of the orders he may, conditions which would permit:**
- (a) **the First Appellant to carry on his business as a cartage operator;**
  - (b) **the First Appellant to pay proper mortgage, insurance and other property expenses in relation to the real property identified in Order 3;**
  - (c) **the Second Appellant to use funds in any of the accounts identified in the order for the purposes of paying proper mortgage, insurance and other property expenses in relation to the real property identified in Order 3;**
  - (d) **the Second Appellant to use funds available in any of the accounts referred to in the orders to complete the purchase of a contract for the purchase of land at 119 Zenith Crescent, Pacific Pines Estate;**
  - (e) **the Third Appellant to carry on its business as a cartage operator.**
7. **The primary Judge erred in failing to conclude that, in the circumstances, (namely those set out in grounds 3, 4 and 5), it was not in the public interest to make the orders and accordingly in not refusing to make the orders.**
- 5.1 If a restraining order were made in relation to all property, at least the potential for serious adverse consequences for the Appellants was obvious on the material placed before the learned primary Judge.
- 5.2 It is submitted that the learned primary Judge erred in proceeding to make the restraining order in relation to all property without being informed of the consequences of such an order. See again s.28(4) of the Act.
- 5.3 In consequence, the learned primary Judge erred in failing to conclude, let alone consider, that, given the circumstances, it was not in the public interest to make the restraining order and that the learned primary Judge erred in failing to conclude, let alone consider, appropriate additional conditions which would have permitted the Appellants to lawfully carry on their businesses.

**GROUND 8: There was no basis for orders which restrained the Third Appellant (or any of the Appellants) from dealing with the prime mover and utility referred to in Order 4.**

- 6.1 Nothing was disclosed in the material before the learned primary Judge which could justify restraining the two vehicles used by the Third Appellant. The

effect of the order was to prevent the Third Appellant from operating the cartage business.

**GROUND 9: The primary Judge erred in making Order 5 ex parte when no circumstance existed which made such a course necessary or appropriate.**

7.1 This ground requires no elaboration in the outline.

**GROUND 10: The primary Judge erred in making orders which entitled the Public Trustee to take control of the restrained property and not making that entitlement subject to dealings permitted under the terms of Orders 6 and 7.**

8.1 This ground requires no elaboration in the outline.

**GROUND 11: The primary Judge erred in making Order 9 ex parte when no circumstance existed which made such a course necessary or appropriate.**

9.1 This ground requires no elaboration in the outline.

**GROUND 12: The primary Judge erred in making Order 10:**

- (a) ex parte when no circumstance existed which made such a course necessary or appropriate;
- (b) it being oppressive to require the First Appellant to list all property of whatever value in which he had or at any time had had an interest, and when no circumstance existed which made such a course necessary or appropriate.

10.1 No circumstance existed which warranted this order being made ex parte. The order is oppressive and impossible to comply with.

**GROUND 13**

11.1 The Appellants abandon this ground.

**T D MARTIN SC**  
Counsel for the Appellants  
22 May 2003