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| IN THE COUNTY COURT OF VICTORIAAT MelbourneCOMMON LAW DIVISION | ANONYMISED AND ADAPTED FOR EDUCATIONAL PURPOSES  |

 General List

Case No. CI-15-00123

IN THE MATTER of the *Confiscation Act* 1997 (Vic)

-and-

IN THE MATTER of property which a member of the police force suspects on reasonable grounds to be tainted in relation to a Schedule 2 offence

-and-

IN THE MATTER of an application by the DIRECTOR OF PUBLIC PROSECUTIONS for Victoria

BETWEEN

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| PETER ADAMS (a pseudonym)[[1]](#footnote-1) | Applicant |
|  |  |
| v |  |
|  |  |
| DIRECTOR OF PUBLIC PROSECUTIONS | Respondent |

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| JUDGE:  | HIS HONOUR JUDGE MISSO  |
| WHERE HELD: | Melbourne |
| DATE OF HEARING: | 8 March 2017 |
| DATE OF RULING: | 17 March 2017 |
| CASE MAY BE CITED AS: | Adams (a pseudonym) v DPP (Ruling) |
| MEDIUM NEUTRAL CITATION: | [2017] VCC 111 |  |

**RULING**

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Subject: CONFISCATION – Exclusion Application

Catchwords: Cultivation of cannabis by the applicant at his domestic property – whether the applicant committed a Schedule 2 offence under the *Confiscation Act* 1997 (Vic) – quantification of the volume of cannabis which had been cultivated – where the cannabis had a wet weight of 37 kilograms and a dry weight of 5 kilograms – whether the criminal activity tainted the applicant’s domestic property – application for exclusion of the property from forfeiture

Legislation Cited: *Drugs, Poisons and Controlled Substances Act* 1981, s81; *Confiscation Act* 1997 (Vic)

Judgment: Application for exclusion of the property from forfeiture is dismissed.

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| APPEARANCES: | Counsel | Solicitors |
| For the Applicant | Mr F Scully | WMB Lawyers |
|  |  |  |
| For the Respondent | Mr T Gyorffy QC | Solicitor for the Office of Public Prosecutions |

HIS HONOUR:

Introduction

# The applicant and his wife are the registered proprietors of a property at 16 Valley Street Black Rock[[2]](#footnote-2) (“the property”). It is their family home, and has been since 1986.

# Members of the Victoria Police Drug Task Force obtained a search warrant pursuant to s81 of the *Drugs, Poisons and Controlled Substances* *Act* 1981 to search the property. They executed the warrant on 21 October 2014.

# Ms Lisa McDonald[[3]](#footnote-3) is a police officer who was attached to the Criminal Proceeds Squad. She swore an affidavit on 13 January 2015 in which she summarised the product of a search of the property. In summary, the police located three rooms which had been set up for the express purpose of cultivating cannabis. The property had been modified in an attempt to conceal a functioning hydroponic growing system in each of those rooms. The electricity meter had been bypassed. The operation which the applicant set up needed a large volume of electricity. Such a large volume of use would very probably have been detected by the relevant electricity provider and probably have been reported to the police.

# A forensic scientist in the employ of the Victoria Police Forensic Services Centre attended the property. She identified the plant crop as Cannabis L. The volume of the plants cultivated by the applicant were calculated to be 37 kilograms. The air dried weight was calculated to be 5 kilograms.

# Mr Chen Tsui[[4]](#footnote-4) is also a police officer who was formerly attached to the Drug Task Force. He was one of the police officers who executed the search warrant. He swore an affidavit on 22 August 2016 exhibiting, among other things, a large number of photographs of the property, both from the outside and the inside. In particular were photographs of the rooms set up for the express purpose of cultivating cannabis, and also the cannabis plants. The extent to which the applicant went in setting up the rooms to cultivate cannabis was undoubtedly sophisticated and extensive.

# Mr Allen Jones[[5]](#footnote-5) is also a police officer attached to the Drug Task Force. He swore an affidavit on 26 July 2016 exhibiting, among other things, a record of interview of the applicant relevant to an attempt to cultivate cannabis by setting up a hydroponic growing system in late 2013. The record of interview was conducted on 4 September 2013. The substance of the record of interview was directed to the applicant’s attempt to cultivate cannabis at a property at Sunbury. The Prosecutor referred me to particular sections of the record of interview to demonstrate that the applicant had acquired sufficient knowledge regarding the equipment that was necessary to cultivate cannabis. In addition, Mr Jones exhibited a statement which he made regarding the execution of the search warrant on the property on 21 October 2014, and the record of interview subsequently conducted on 21 October 2014 relevant to the hydroponic growing system found at the property.

# Mr Jones was the informant in relation to the charges brought against the applicant relevant to his cultivation of cannabis at the property. The applicant pleaded guilty before the Chief Magistrate to cultivating cannabis on 10 August 2015, and was sentenced that day. The applicant was originally charged with cultivating a commercial quantity of cannabis. The charge was amended to remove the reference to “commercial quantity”. The evidence led by the prosecution was based upon the air-dried weight of 5 kilograms. The applicant was convicted and released on a Community Correction Order.

# Counsel for the applicant did not contest any of the matters deposed to by Ms McDonald, Mr Tsui nor Mr Jones.

# I will next refer to how this proceeding began and a short summary of the legislative scheme on which this application is based.

The proceeding

# The Director of Public Prosecutions filed an application dated 13 January 2015 seeking a civil forfeiture restraining order pursuant to s36K(1) of the *Confiscation Act* 1997 (“the *Confiscation Act*”). A number of interlocutory orders were made by a judge of this Court, culminating in an Order setting this application down for trial.

# An Order was made dated 20 January 2015 pursuant to s36M of the *Confiscation Act*, that no person shall dispose or otherwise deal with the property. A further Order was made pursuant to s36W that, upon the applicant paying the sum of $41,200[[6]](#footnote-6) to Asset Confiscation Operations of the Department of Justice and Regulation, the property be excluded from the operation of the *Confiscation Act*.

The legislative scheme

# In short, the following provisions of the *Confiscation Act* are relevant to this proceeding:

# The applicant may apply for an exclusion order: Section 36U.

# Any question of fact to be decided by the Court is to be decided on the balance of probabilities: Section 132.

# The proceeding is civil in nature except where otherwise provided by the *Confiscation Act*: Section 133(1).

# The Court may make an order excluding the applicant’s interest in property from the operation of the civil forfeiture restraining order if it is satisfied that the property is not “tainted property”: Section 36V(1)(a)(ii).

# What amounts to “tainted property” is defined in section 3(1).

# The Court may make an order excluding the applicant’s interest in the property from the operation of the civil forfeiture restraining order if the Court is satisfied that the property is not “tainted property”, but is satisfied that the applicant was not, in any way, involved in the commission of any relevant Schedule 2 offence: Section 36V(b)(1).

# Cultivation of a narcotic plant in a quantity of a drug of dependence that is not less than the commercial quantity applicable to that narcotic plant is a Schedule 2 offence: Schedule 2, Section 1(ba).

The issues

# There was no issue that the evidentiary and legal burden is borne by the applicant to satisfy me that the property should be excluded, and that any dispute on the facts is to be determined on the balance of probabilities.

# After considering all of the evidence and the submissions made by counsel, I am satisfied, on the balance of probabilities, of the following:

# The applicant has an interest in the property.

# The applicant set up a sophisticated hydroponic growing system at the property.

# The applicant cultivated a significant crop of cannabis amounting to 37 kilograms gross, and 5 kilograms when air dried.

# All of the evidence points to a clear intention on the part of the applicant to use the property to cultivate cannabis.

# The property became “tainted property” consistent with the definition of that expression in s3(1), and in particular, paragraph (a)(i), because it was used in connection with the commission of a Schedule 2 offence.

# It is the gross weight of 37 kilograms which is relevant in determining whether the offence committed by the applicant is a Schedule 2 offence and not the air-dried weight of 5 kilograms.[[7]](#footnote-7)

# The gross weight of 37 kilograms brings the applicant within Schedule 2.

# The effect of these findings is that the applicant has failed to discharge the evidentiary and legal burden to satisfy me that the property should be excluded.

# In the course of the debate I had with counsel for the applicant, the submissions he made in support of the property being excluded were reduced to whether it is the gross weight of 37 kilograms or the air-dried weight of 5 kilograms which is relevant.

# Counsel for the applicant submitted that I am bound by the Prosecution case before the Chief Magistrate and am estopped from proceeding to make any findings of fact inconsistent with those made by the Chief Magistrate. Therefore, the applicant has not committed a Schedule 2 offence.

# That submission cannot succeed. There are many reasons why that is so, but principally it is because the *Confiscation Act* is a legislative scheme designed to meet each of the purposes referred to in s1 of the Act. It deals with what applications can be made, what evidence can be admitted and describes the proceeding as civil in nature, governed by the civil standard of proof.

# No authority was advanced by counsel for the applicant which has satisfied me that an estoppel can operate to circumvent the application of a statutory scheme of this kind. Counsel for the respondent referred me to authority going the other way.

# Counsel for the applicant also submitted that in some way the fact that the Chief Magistrate was not informed that the applicant was liable to lose his property is relevant to my consideration of whether the property should be excluded. Whether the Chief Magistrate was informed of that or not is of no relevance to my consideration. The authority I was referred to supports an entirely different proposition, and that is, that an application of this kind might be relevant in the sentencing process if it were the case that a sentence of imprisonment were imposed, and the loss of a house through forfeiture were not weighed into account.

# The last submission was that I should exclude the property because I could not be satisfied, pursuant to s36V(1)(b)(ii)(A) and/or (B), that the applicant did not know that the property would be used in the commission of a Schedule 2 offence.

# That submission contemplates a very different factual matrix to the one I am dealing with here. It appears to me to deal with property acquired by an applicant and which is subsequently used in the commission of a Schedule 2 offence by a third party. It appears to me that it cannot have been contemplated that someone like the applicant could avail himself of that provision, because it would go to completely defeat what is contemplated by ss(1)(a)(ii), that is, that the use for which the applicant used the property, resulted in it becoming tainted.

Conclusion

# In summary, it is very clear to me that the applicant established a sophisticated hydroponic growing system at the property which resulted in the cultivation of a cannabis crop consistent with a Schedule 2 offence, and that conduct so tainted the property that it cannot be excluded.

# Therefore, the applicant’s application for exclusion is dismissed. I will now make the relevant Order for forfeiture.

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1. Peter Adams is a pseudonym. [↑](#footnote-ref-1)
2. a pseudonym [↑](#footnote-ref-2)
3. a pseudonym. [↑](#footnote-ref-3)
4. a pseudonym. [↑](#footnote-ref-4)
5. a pseudonym. [↑](#footnote-ref-5)
6. I will continue to refer to the cash sum as “the property” [↑](#footnote-ref-6)
7. Section 72A and Part 2 of Schedule 11 of the *Drugs, Poisons and Controlled Substances Act* 1981 [↑](#footnote-ref-7)