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| IN THE COUNTY COURT OF VICTORIAAT MelbourneCOMMON LAW DIVISION | ANONYMISED AND ADAPTED FOR EDUCATIONAL PURPOSES  |
| Confiscation 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: | 19 October 2017 |
| DATE OF RULING: | 22 November 2017 |
| CASE MAY BE CITED AS: | Adams (a pseudonym) v DPP (Ruling No 2) |
| MEDIUM NEUTRAL CITATION: | [2017] VCC 2999 |  |

**RULING**

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Subject: CIVIL CONFISCATION

Catchwords: Tainted property – cultivation of a narcotic plant – application for forfeiture of applicant’s interest in property – whether the granting of the order would result in “undue hardship” – meaning of “undue” – relevant considerations in the exercise of discretion to find “undue hardship”

Legislation Cited: *Confiscation Act* 1997 (Vic); *Criminal Organisations Control and Other Acts Amendment Act* 2014; *Crimes (Confiscation of Profits) Act* 1985 (NSW); *Criminal Organisations Control and Other Acts Amendment Bill* 2014

Cases Cited: *Lake v R* (1989) 44 A Crim R 63; *Kinealy v Director of Public Prosecutions* (2013) 224 A Crim R 553; *DPP v Tran* [2004] VSC 218; *R v Tran* [2004] VSC 218; *R v Winand* (1994) 73 A Crim R 497; *DPP v Ali (No 2)* [2010] VSC 503; *R v Wealand* (2002] 136 A Crim R 159; *Taylor v Attorney-General (SA)* (1991) 55 SASR 462; *Director of Public Prosecutions (Vic) v Cini* (2013) 38 VR 83

Ruling: The application is dismissed and an order for forfeiture is made in favour of the respondent.

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

HIS HONOUR:

Introduction

# On 17 March 2017, I dismissed the applicant’s application for an exclusion order made pursuant to s36U of the *Confiscation Act* 1997 (Vic) (“the *Confiscation Act*”) from a restraining order made on 20 January 2015 relevant to a property at 16 Valley Street, Black Rock [[2]](#footnote-2) (“the property”).

# I handed down a written Ruling on 17 March 2017.[[3]](#footnote-3) In that Ruling, I set out a summary of the facts which I incorporate into these Reasons.

This application

# Counsel for the respondent referred me to what must be proved under s38(1) of the *Confiscation Act*. No issue was taken by counsel for the applicant that those matters had not been proved satisfactorily. Indeed, the only issue raised by counsel for the applicant was whether I should exercise the discretion under s45(1) to make an order for forfeiture or not.

# Counsel for the applicant referred me to a number of authorities which he submitted demonstrate the basis upon which I should exercise the discretion in s45(1) of the *Confiscation Act* not to make an order for forfeiture of the applicant’s equitable interest in the property.

# Counsel for the respondent submitted that the authorities relied upon by the applicant considered the basis for the exercise of discretion before s45(1) was amended.

# Before amendment, the relevant part of s45(1) was as follows:

“(1) If a court is satisfied that hardship may reasonably be likely to be caused to any person by a forfeiture order or a civil forfeiture order made by that court, the court -

 (a) may order that the person is entitled to be paid a specified amount out of the forfeited property, being an amount that the court thinks is necessary to prevent hardship to the person; and

 (b) may make ancillary orders for the purpose of ensuring the proper application of an amount so paid to a person who was under 18 years of age.”

# Section 45 (1) was amended by the *Criminal Organisations Control and Other Acts Amendment Act* 2014. It amended ss(1) to include ss(1A). With the addition of the amendments, the relevant part of s45 now is as follows:

“(1) **Subject to subsection (1A),** if a court is satisfied that **undue** hardship may reasonably be likely to be caused to any person by forfeiture order or a civil forfeiture order made by that court, the court -

 (a) may order that the person is entitled to be paid a specified amount out of the forfeited property, being an amount that the court thinks is necessary to prevent **undue** hardship to the person; and

 (b) may make ancillary orders for the purpose of ensuring the proper application of an amount so paid to a person who was under 18 years of age.

(1A) **For the purposes of subsection (1), when determining whether undue hardship may be caused by a forfeiture order to the person convicted of the offence in relation to which the forfeiture order has been made, the court must not take into account the impact on that person of the sentence given for that offence**.”

(Emphasis added).

# Counsel for the respondent referred me to the Second Reading Speech of the Criminal Organisations Control and Other Acts Amendment Bill2014 by the then Attorney-General which explained the purpose of the addition of the word “undue”, qualifying the word “hardship” found in s45(1), thus:

“The bill will also amend provisions in the Confiscation Act that allow persons to seek relief from the hardship caused by the forfeiture of property. Currently the Compensation Act allows a person (such as a dependent spouse or child) who might suffer hardship due to the forfeiture of property to seek a payment out of the forfeited property to relieve such hardship. The amendments will clarify that in considering this question, the court should have regard to the level of undue hardship caused by the forfeiture that is hardship above and beyond the ordinary hardship that can be expected to occur as a result of the forfeiture of assets. These amendments will ensure that the provisions operate as intended - that a person is not left destitute as a result of asset forfeiture, rather than restoring a person to the circumstances that existed prior to forfeiture.”[[4]](#footnote-4)

# Of course, the scheme established by the *Confiscation Act* is given its proper context by the objects stated in s3A, which are:

“The main objects of this Act are—

(a) to deprive persons of the proceeds of certain offences and of tainted property; and

(b) to deter persons from engaging in criminal activity; and

(c) to disrupt criminal activity by preventing the use of tainted property in further criminal activity; and

(d) to undermine the profitability of serious criminal activity.”

# It is with this background that I must now consider what the qualifying word “undue” is intended to achieve, and also the addition of ss(1A) which obliges me to ignore the sentence imposed on the applicant.

The authorities before the amendment

# I think the starting point is to recognise that the forfeiture provisions of the *Confiscation Act* are intended to result in a measure of hardship. In *Lake v R*,[[5]](#footnote-5) Kirby P (as he then was) said as much when considering the question of hardship under the *Crimes (Confiscation of Profits) Act 1985* (NSW):

“… In considering hardship, it is necessary to bear in mind that, of necessity, in achieving its objects, the Act will cause a measure of hardship in the deprivation of property. Indeed that is its intention. It is not that kind of hardship, therefore, that can give rise to the relief under s5(1)(b)(ii). The provision for relief on that ground must not be so interpreted as to frustrate the achieving of the purpose of Parliament in enacting the exceptional provisions of the Act. Something more than ordinary hardship in the operation of the Act is therefore meant. Otherwise the Act would have, within it, the seeds of its own effectiveness in every case.”[[6]](#footnote-6)

# In *R v* *Winand*,[[7]](#footnote-7) the Victorian Court of Criminal Appeal referred to the considerations which are relevant in determining whether property should be excluded from the operation of an order for forfeiture:

“… the value of the subject property, the nature and gravity of the offence, the use made of the property, the degree of the offender’s involvement, the offender’s antecedents, the value of any other property confiscated and the penalty imposed, the nature of the offender’s interest in the property, the value of the drugs involved or the size of the crop, whether the property was acquired with the proceeds of the sale of drugs, the utility of the property to the offender, the length of ownership of the property, the extent to which the property was connected with the commission of the offence, the fact that forfeiture is intended as a deterrent, the interest of innocent parties in the property and the extent (if any) to which the retention of the property might bear on the offender’s rehabilitation.”[[8]](#footnote-8)

The test post the amendment

# Counsel for the applicant accepted that the word “undue” has altered the test applied in the cases which I have referred to. The question is to what extent.

# Counsel for the respondent submitted that when reference is had to the Second Reading Speech and the current Macquarie Dictionary, that a relevant definition of “undue” is “unwarranted” or “excessive” or “too great”. Other dictionary definitions use the same words of definition, and others I have found are “inappropriate”, “excessive” and “disproportionate”. These synonyms at least give flavour to the meaning of “undue”. What is clear, in general terms, is what the legislature intended is for the applicant to demonstrate that an order for forfeiture will result in something more than hardship.

# I should add at this point that whilst there is an attraction to finding synonyms which aid in giving the flavour to the meaning of “undue”, caution must be exercised in not applying the words of interpretation for the actual test. The test is plainly whether forfeiture of the applicant’s interest in the property would result in undue hardship.

# Interestingly, in *Winand*, the Court of Criminal Appeal declined to make a forfeiture order. It would appear that the Court was partially influenced by the trial judge’s impression that the appellant’s trafficking of a drug of dependence would have attracted a much greater sentence had it been heard in the County Court than the sentence actually imposed in the Magistrates’ Court. Keeping that in mind, the observations of the Court which are of interest here are as follows:

“On the different view we take of this matter namely, the characterisation of the penalty imposed, we are left in no doubt that by reason of such error the making of an order did, to an unacceptable degree, operate disproportionately to the nature and gravity of the offence. To order the taking from the appellant of his only asset of any significant value and which is his home the equity in which is worth $65,000-$75,000 is in all the circumstances of this case to make an order which would cause unacceptable hardship and thus we believe to be manifestly unfair.”[[9]](#footnote-9)

# Chief Justice Warren applied the same words of interpretation of hardship in *Tran*:

“Weighing these and other matters up, as distilled in *Winand*, I cannot be satisfied that it is appropriate to make the orders sought. However, the most significant factor in this case is the extent of hardship to the defendant. He would be rendered, as it was put on his behalf, ‘homeless’. I cannot be satisfied, in particular weighing up the factors of deterrence, impact on innocent parties and the defendant’s rehabilitation, that the order should be made. I consider that, in the circumstances of this matter, the making of the order would cause, in the words of the Court of Appeal in *Winand* ‘… unacceptable hardship and… be manifestly unfair’.”[[10]](#footnote-10)

# Where these observations are of interest and become relevant are because of the use of the words “unacceptable”, “disproportionate” (referring to the nature and gravity of the offence) and “manifestly unfair” to demonstrate that the result of an order for forfeiture was more than what was contemplated by the test of hardship. Those particular words are consistent with the words of interpretation to which counsel for the respondent referred me to in the assistance he gave me to arrive at what the legislature intended by the addition of the qualifying word “undue”.[[11]](#footnote-11)

# I can readily appreciate that the entire loss of an asset, such as a home, rendering someone homeless, could be characterised as being beyond “hardship”. Although, I do not read these authorities as creating a hard and fast rule that homelessness or being rendered penniless necessarily equate with undue hardship. No doubt much will depend upon the individual circumstances of each case in weighing up competing considerations.

# It would appear that a result of the kind referred to in *Winand* and *Tran* is toward the extreme end of the likely result of an order for forfeiture, and indeed, one which would be financially crushing. It stands as a matter of reason that something less than a result of that kind may not warrant the descriptors of the quality of the hardship which were used by the courts in each of those cases.

The applicant’s circumstances

# I should start by saying that I am not satisfied that the making of a forfeiture order in the circumstances of the applicant would amount to undue hardship.

# I will now set out the relevant facts which counsel for the applicant submitted I should weigh into account.

# Firstly, I refer to my Ruling of 17 March 2017, and in particular, paragraphs 2 to 7, in which I summarised the prosecution case brought against the applicant. He had set up a sophisticated and extensive system to cultivate cannabis in the rooms at the property. The gross weight of the cannabis plants was 37 kilograms, and the air dried weight was 5 kilograms.

# Secondly, the applicant is a married man who is sixty-five years of age. Neither he nor his wife follow any gainful occupation. They are both receiving Centrelink benefits.

# Thirdly, the applicant and his wife purchased the property twenty-eight years ago. Its present gross value is $675,000. It has a mortgage registered over it to secure borrowings of approximately $250,000.[[12]](#footnote-12)

# Fourthly, the applicant and his wife have no other assets of any significance.

# No evidence was adduced by the applicant which demonstrates that if an order was made for forfeiture, resulting in a loss of his half share of the net equity in the property, that he will be rendered homeless or penniless. He may suffer financial hardship in having to refinance or sell the property, but that result falls short of the language used in *Winand* and *Tran*. I do not accept that the applicant will suffer “unacceptable hardship” or that an order for forfeiture will be “manifestly unfair”.

# The offence with which the applicant was charged, and to which he made a plea of guilty, is a serious example of the cultivation of a large crop of cannabis, and as I have already observed, by use of a sophisticated and extensive system of cultivation from which the applicant intended to reap a significant financial reward. I do not accept that making an order for forfeiture is, therefore, disproportionate to the level of his offending conduct.

# I should now deal with one particular submission made by counsel for the applicant. Counsel referred me to *Director of Public Prosecutions (Vic) v Cini*[[13]](#footnote-13) in which Weinberg JA observed that even though the appellant’s offending was serious, that upon assessing the objective gravity of his offending, that it was not just that he be imprisoned and lose his home as well.[[14]](#footnote-14)

# Counsel for the applicant sought to rely on *Cini*,that the Chief Magistrate did not factor the applicant’s liability to suffer an order for forfeiture, and therefore, if he had, then the sentence might have been moderated further. I understood that to address the issue whether the making of an order for forfeiture would, therefore, be disproportionate to the applicant’s offending conduct given the sentence imposed, and the sentence which might have been imposed had the applicant’s liability for an order for forfeiture been considered.

# Counsel for the respondent submitted that this is to misconceive the objects of the *Confiscation Act* and the purpose served by making an order for forfeiture. He submitted that the applicant’s offending conduct was in all respects serious for the reasons which I have summarised earlier.

# I am not persuaded that the liability for forfeiture would necessarily have led to any greater leniency. It is a difficult matter to judge post the event of sentencing and the evidence led on the sentencing process. In any event, I am of the view that what I am to consider is the evidence of the applicant’s cultivation of cannabis and its level of seriousness despite the deal he was able to strike to plead to a lesser charge.

# Lastly, I should deal with s(1A) of the *Confiscation Act*. I do not think it is relevant to my overall consideration whether to make an order for forfeiture or not. It prohibits me from taking into account “the impact” of the sentence imposed on the applicant. By example, if the applicant were imprisoned and lost gainful employment which resulted in financial loss, then ss(1A) would prohibit me from weighing that into account. As I understand the applicant’s position, he did not lose his liberty and was able to go about his life without restriction subject to his obligation to meet the demands of the Order. In any event, no evidence was adduced by the applicant relevant to any impact on him of the sentence.

Conclusion

# It is for these reasons that I will dismiss the applicant’s application, and it follows that I will make an order for forfeiture in favour of the respondent.

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1. a pseudonym. [↑](#footnote-ref-1)
2. a pseudonym [↑](#footnote-ref-2)
3. (“the Reasons”) [↑](#footnote-ref-3)
4. Hansard - 26 June 2014 at page 2384 [↑](#footnote-ref-4)
5. (1989) 44 A Crim R 63 (“*Lake*”) [↑](#footnote-ref-5)
6. *Lake* at 66-67. *Lake* was followed in *Kinealy v Director of Public Prosecutions* (2013) 224 A Crim R 553 ("*Kinealy*"). J Forrest J referred to *Lake* with approval. When he quoted this passage he considered that the word “effectiveness” found in the last line of the quote was intended to be read as “ineffectiveness”: at paragraph [57], and also *R v Tran* [2004] VSC 218 (“*Tran*”) [↑](#footnote-ref-6)
7. (1994) 73 A Crim R 497 (“*Winand*”) [↑](#footnote-ref-7)
8. *Winand* at 500-1. These observations were applied in a number of authorities including *Tran* at paragraph [11], *Kinealy* at paragraph [59] and *DPP v Ali (No 2)* [2010] VSC 503 at paragraph [101]. Additionally, in *R v Wealand* (2002] 136 A Crim R 159, Kirby P (as he then was) observed that it is relevant to whether an order for forfeiture of property may be disproportionate to the offence which was committed: at 164-5 [↑](#footnote-ref-8)
9. at 503 [↑](#footnote-ref-9)
10. at [15] [↑](#footnote-ref-10)
11. Counsel for the respondent also referred me to *Taylor v Attorney-General (SA)* (1991) 55 SASR 462, and the observations of Debelle J, who used the expressions “severely disproportionate” when referring to the circumstances of the offence and the nature and degree of offending as relevant, and the word “unnecessary” as qualifying hardship which he considered might justify the court in refusing an order [↑](#footnote-ref-11)
12. These were estimates submitted by counsel for the applicant. They were not the subject of contest by counsel for the respondent. [↑](#footnote-ref-12)
13. (2013) 38 VR 83 [↑](#footnote-ref-13)
14. at paragraph [72] [↑](#footnote-ref-14)