CITATION: *Commissioner of Police v Burnett* [2006] NTMC 016

PARTIES:	COMMISSIONER OF POLICE
	v
	MARTIN JOHN BURNETT
TITLE OF COURT:	Local Court
JURISDICTION:	Criminal Property Forfeiture
FILE NO(s):	20427557
DELIVERED ON:	23 February 2006
DELIVERED AT:	Darwin
HEARING DATE(s):	22 November 2005 and 24 January 2006
JUDGMENT OF:	Dr J.A. Lowndes

CATCHWORDS:

Criminal Property Forfeiture – Application for Stay – Costs –
Criminal Property Forfeiture Act s138
Commissioner of Police v Hopkins [2004] NTMC 078

REPRESENTATION:

Counsel:

Plaintiff:	Mr Duguid
Defendant:	Mr Tippett Q.C.

Solicitors:

Plaintiff:	DPP
Defendant:	Priestleys

Judgment category classification:	B
Judgment ID number:	[2006] NTMC 016
Number of paragraphs:	37

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20427557

BETWEEN:

COMMISSIONER OF POLICE
Plaintiff

AND:

MARTIN JOHN BURNETT
Defendant

REASONS FOR DECISION

(Delivered 23 February 06)

Dr J.A.LOWNDES SM:

1. The Respondent seeks a costs order against the Applicant in relation to his application filed 11 March 2005, which sought an order that the application for forfeiture filed on 23 February 2005 be stayed until the determination of the prosecution proceedings in respect of the charge under s5(2)(a)(4) of the *Misuse of Drugs Act.*

2. It is useful to record the history of the stay application so as to enable the application for costs to be put in perspective.

3. As mentioned above the application was filed on 11 March 2005. That application was returnable on 16 March 2005. On 14 March 2005 the applicant advised the Court that it would not be ready to proceed on 16 March. The respondent advised that he needed to check suitable hearing dates and the availability of counsel. The hearing date was vacated and the matter was listed for mention on 16 March for the purpose of allocating a new hearing date.

4. On 16 March the Court extended the existing restraining order up until 16 June 2005, also adjourning the matter to that day for mention only according to the court record. However, the respondent's solicitor wrote to the Court Co-ordinator on 5 April 2005 advising that it was intended that the stay application be heard on 16 June, the magistrate having omitted to note the court file accordingly. The respondent's solicitors indicated in their correspondence that the applicant was consenting to the application being heard on 16 June. The matter did not proceed on that day. The result was that the matter was further adjourned to 24 June – presumably for mention – and the order was extended up until that date.

5. On 24 June the application was then adjourned to 15 August 2005 and the restraining order again extended up until that date. On the adjourned date the matter was further adjourned to 29 August 2005 with the restraining order also being extended to that date.

6. On 29 August the matter (presumably the application for forfeiture) was listed for hearing on 22 November and the restraining order extended up until that day.

7. By way of letter the respondent's solicitors requested the Court to list the application for mention on 16 November 2005. In that letter the solicitors brought to the attention of the Court the fact that the stay application had not yet been heard and determined by the Court. The solicitors requested that the stay application be heard prior to the application for forfeiture being heard.

8. On 16 November it was ordered that the hearing listed for 22 November not proceed as a forfeiture matter but proceed as a hearing of the respondent's application for stay. The Court further ordered that the respondent was to advise the legal representatives for the Commissioner of Police of the grounds for stay in writing by 21 November.

9. On 21 November the solicitors for the respondent wrote to the Director of Public Prosecutions informing that office that it was their client's intention to rely upon the authorities of *Commissioner of Police v Wendy Dorothy Hopkins & Ors* [2004] NTMC 078 and *State of Queensland v Shaw* [2003] QSC 436. They also advised that their client intended to rely on the following grounds: (1) the existence of a considerable risk that the respondent's full participation in the criminal forfeiture proceedings would subject him to prejudice in his criminal trial; (2) that in defending the forfeiture proceedings the respondent would be disclosing information which would otherwise be subject to his right to remain silent and that this would place the Commissioner of Police in the beneficial position of being alerted to the need for further evidence and the existence of further chains of inquiry in order to meet the defence raised by the accused and (3) if the criminal forfeiture proceedings continued the Commissioner would be alerted to further information concerning the respondent's financial situation.

10. At the hearing of the stay application on 22 November 2005, Mr Duguid, who appeared on behalf of the Commissioner, submitted that the Court should not grant the stay until such time as the respondent indicated whether he was merely putting the Commissioner to proof in relation to the application for forfeiture or was defending the application on the basis of a formal objection made pursuant to ss 59 and 60 of the *Criminal Property Forfeiture Act*.

11. The Court agreed with the submission made by Mr Duguid and adjourned the application for stay to 24 January 2006 to enable the respondent to assess his position in relation to the application for forfeiture. The Court also extended the time for filing an objection up until 6 December 2005.

12. An objection was filed on behalf of the respondent on 6 December 2005. The objection was supported by an affidavit sworn by the respondent on 6 December 2005.

13. When the application for stay came before the Court on 24 January 2006 the Court ordered a stay of the application for forfeiture until further order. The proceedings were adjourned until 10 April 2006.

14. In seeking an order that the Commissioner pay the costs of and incidental to the application for stay, the respondent relied upon the following matters:

    1. That the costs incurred in relation to the court appearance on 22 November 2005 were "thrown away" because the Commissioner had not prior to that date raised any need on the part of the respondent to consider filing an objection. The issue was first raised by the Commissioner at the hearing on 22 November 2005.

    2. That the Commissioner never responded to the letter from the respondent setting out the grounds for the stay. Consequently the respondent did not anticipate the argument advanced by Mr Duguid on 22 November 2005.

15. Essentially, the respondent argues that had he been put on prior notice as to the possible need to file an objection, the court appearance on 22 November might have been avoided or at least the length of that attendance substantially reduced. The respondent says that costs were unnecessarily incurred in relation to the November 2005 court appearance, and those costs should be borne by the Commissioner.

16. For the following reasons I do not agree with the respondent's submission.

17. The general power to stay proceedings under the *Criminal Forfeiture Act* emanates from s 28A of the *Local Court Act* which provides:

> "The Court may, at any stage of a proceeding, except where otherwise provided by this or any other Act, order a stay of the proceeding on the terms and conditions (if any) as it thinks fit."

18. Of course that provision must be read subjection to s 138 of the *Criminal Property Forfeiture Act* which provides:

> "Proceedings for an order or declaration under this Act are not to be stayed for the purpose of awaiting the outcome of any criminal proceedings that have commenced or are to commence involving a person whose property is or may be affected by the proceedings under this Act."

19. Prior to determining the application for stay I had the benefit of Ms Blokland's decision in *Commissioner of Police v Hopkins* supra, with which I agree. According to that decision there is a residual discretion to order a stay of proceedings under the *Criminal Property Forfeiture Act*. Indeed, Mr Duguid did not seek to dissuade the Court from following the *Hopkins* decision.

20. It is fundamental that in order to obtain a stay of proceedings the applicant must demonstrate a basis for the stay beyond the mere filing of an application. Furthermore, the onus is on the applicant to show that he or she will suffer a disadvantage if the stay is refused and that the balance of advantage and disadvantage of granting the stay favours a stay: see *Asia Pacific International Pty Ltd v Peel Valley Mushrooms Ltd* [1999] 2 Qd R 458.

21. As for the onus on the respondent to demonstrate a basis for the stay, it is necessary to keep in mind the procedures established under the *Criminal Property Forfeiture Act* for dealing with crime-used or crime –derived property and for resolving disputes as to such property.

22. Sections 39 and 40 of the *Criminal Property Forfeiture Act* respectively empower members of the Police Force to seize crime –used or crime –

derived property and the Local Court to make interim restraining orders in relation to such property.

23. Section 43 of the Act empowers the Local Court to make restraining orders in relation to crime-used or crime-derived property. Section 47 provides that as soon as practicable after a restraining order is made the applicant must arrange for a copy of the order and an accompanying notice to be served personally on the person or persons from whom the property was taken and on any person or persons known to the applicant who has , may have or claims to have an interest in the subject property. The accompanying notice must, inter alia, advise the person on whom the order is served that the subject property may be forfeited under the Act, that he or she can, within 28 days after being served with the copy of the order, file an objection to the restraint of the property and that he or she is obliged to make and lodge a statutory declaration in accordance with s 48 of the Act. That latter section requires the person served with a copy of a restraining order to make and file a statutory declaration which states the name and address of any other person whom the declarant is aware who has, may have or claims to have an interest in the subject property. If the declarant is not aware of any such person then he or she must make a statement to that effect.

24. Section 50 of the Act contains machinery for setting aside restraining orders.

25. Part 5 of the Act deals with objections to restraint of property. Section 59 allows a person to file an objection to restraint of property: the objection is to identify the property to which the objection relates and specify the grounds for objection against the property being restrained. Section 60 of the Act provides that the objection must be filed within 28 days following service of the restraining order or within such further period as allowed by the Court. Section 62 gives the Court power to set aside a restraining order upon hearing an objection.

26. Section 95 of the Act deals with applications for forfeiture order. Pursuant to subsection (1) a member of the Police Force or the Director of Public Prosecutions may apply to the Local Court for a forfeiture order in respect of restrained property, being either crime-used property or crime-derived property. On hearing such an application the Court may forfeit restrained property if it satisfied that it is more likely than not that the subject property is either crime –used or crime-derived. Section 95 (3) provides that an application for a forfeiture order is not to be made until after the objection period has expired for any persons served with a copy of the restraining order. The subsection further provides that the Court must not hear such an application until any objection has been heard and determined.

27. The filing of an objection plays an important role in the dispute resolution processes under the *Criminal Property Forfeiture Act*. The objection process can lead to the setting aside of a restraining order. Furthermore, no application for forfeiture can be heard where there is a pending objection which has not been heard and determined by the Court.

28. One would think that in the great majority of cases the most effective way for a person, from whom suspected crime –used or crime-derived property has been seized and made the subject of a restraining order, to avoid a forfeiture order in relation to that property is to object to the restraint of the property and to seek to have the restraining order set aside. The objection, if successful, would put an end to any application for forfeiture. The usual ground for the objection is an assertion that the property is neither crime – used nor crime –derived. In fact, the objection filed by the respondent in the present case makes that very assertion. If a person does not lodge an objection, then the outcome of any application for forfeiture depends solely upon whether or not the applicant can satisfy the Court as to the likelihood that the restrained property is either crime-used or crime-derived. In discharging that burden, the applicant would not have to contend with and

answer any specific allegation by the respondent that the property was not crime –used nor crime –derived.

29. In the present case it was important to ascertain the intentions of the respondent in relation to the application for forfeiture which was filed on 25 February 2005. In my opinion, the strength of the application for stay depended on the approach that the respondent intended to take in relation to the application for forfeiture. Did he intend to file an objection or simply put the applicant to proof? If the former, then the basis for the stay would be considerably stronger than if the respondent were simply to leave it to the applicant to satisfy the Court in relation to forfeiture of the subject property. That was in the mind of the Court when the application for stay was adjourned on 22 November 2005 to 24 January 2006 and the time for filing an objection was extended up until 6 December 2005.

30. In his affidavit sworn 16 June 2005 the respondent requested that the Court exercise its discretion in granting a stay of the forfeiture application. In paragraph 7 of that affidavit the respondent indicated the likelihood that in order to defend the application he would have to disclose information that would tend to undermine his right to silence in relation to the forthcoming criminal proceedings. In paragraph 9 of that affidavit he adverted to the likelihood of giving evidence at the hearing of the forfeiture application in order to properly defend the application. The contents of the affidavit sworn on 16 June 2005 evinced an intention on the part of the respondent to do far more than simply put the applicant to proof in relation to the forfeiture application: they disclosed an intention to positively challenge the application by adducing contrary evidence, that is evidence tending to show that the restrained property was neither crime-used nor crime-derived. However, at that stage the respondent had not filed an objection to the restraint of the property – a course one would have expected the respondent to have pursued given the stance taken by him in his sworn affidavit.

31. Following the hearing on 22 November 2005, the respondent did in fact file an objection: see his application filed on 6 December 2005. In support of that application the respondent relied upon the contents of an affidavit sworn 6 December 2005. In paragraph 3 of that affidavit the respondent stated that he objected to the restraint of the property on the ground that the subject vehicle was not crime-used, a position which had been suggested at an earlier time but not adequately articulated. The point is that at no time prior to 22 November 2005 did the respondent sufficiently communicate the fact that he was defending the application for forfeiture on the grounds that the restrained property was neither crime-used nor crime –derived. This fact was not even communicated in the respondent's solicitor's letter dated 21 November 2005 to the Director of Public Prosecutions.

32. Ms Blokland's direction on 16 November 2005 that the respondent advise the Commissioner of Police of the grounds for stay is particularly telling. That direction was made against the backdrop of the respondent's affidavit of 16 June 2005 – the then only supporting material filed in support of the application for the stay. It is evident that the Court was concerned about the grounds for the stay and did not consider the matters deposed in the affidavit of 16 June 2005 as a sufficient indication of the grounds supporting the application.

33. It was my view that the material which was before the Court on 22 November 2005 did not adequately disclose the reasons why the respondent wished to contest the forfeiture application. At its highest, the material put forward in support of the application went only to the "balance of advantage/disadvantage" test which is commonly applied in stay applications. The application was deficient in that a proper basis for the stay had not been demonstrated. It was not made clear whether the respondent intended to contest the application in an affirmative manner by asserting that the restrained property was neither crime-used nor crime-derived and adducing evidence in support of that contention or to merely put the

Commissioner to proof in relation to the application for forfeiture. Although there was material suggesting that the respondent intended to actively defend the application, the general nature of the defence was not disclosed. In those circumstances, it would have been open to the Court to dismiss the application for stay on 22 November 2005.

34. In my view, the respondent cannot complain about the costs incurred by reason of the court appearance on 22 November 2005. The application did not "pass muster", and the Court granted the respondent an indulgence by adjourning the matter to enable the respondent to address the deficiencies of the application.

35. The respondent complains that costs were thrown away on 22 November 2005 because of the conduct of the Director of Public Prosecutions in relation to the application for stay. In particular, the respondent says that Mr Duguid raised the issue of a failure to file an objection for the first time on 22 November 2005: see the affidavit of Sophia Maree Ziebell sworn 24 January 2006. The respondent says that he was taken by surprise.

36. In my view there is no substance to the respondent's complaint. It is important to bear in mind that the application for stay was listed for hearing on 22 November 2005. The respondent was required to advise the Commissioner of the grounds for the stay prior to the hearing, that is by 21 November 2005. The purpose of that direction was to inform both the Commissioner and the Court of the grounds for the stay. There is no indication on the Court file that the application for stay was being consented to by the Director of Public Prosecutions. Nor is there any evidence of extra-curial communications between the Director of Public Prosecutions and the respondent indicating that the stay would be consented to. For all intents and purposes the application for stay remained a contested matter, to be resolved by the Court after hearing submissions and legal argument. It was entirely proper for Mr Duguid to raise any matters that were relevant to

the application for stay, such as the equivocal nature of the application, which could possibly be cured by the respondent filing a notice of objection. Any complaint by the respondent that he was taken by surprise has no basis whatsoever.

37. In my view it is appropriate to order that the costs of and incidental to the application for stay be "costs in the cause", subject to one exception. Mr Duguid was not opposed to an order that the applicant pay the respondent's costs in relation to the court appearance on 24 January 2006. I make orders accordingly, and I certify the matter fit for Counsel.

Dated this 23 day of February 2006.

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Dr J.A. Lowndes
STIPENDIARY MAGISTRATE