

SUPREME COURT OF QUEENSLAND

CITATION: *State of Queensland v McGarry & Ors* [2003] QSC 195

PARTIES: **STATE OF QUEENSLAND**
(applicant)
v
NOEL RAYMOND MCGARRY
(first respondent)
LEVINGTON HOLDINGS PTY LTD
(second respondent)
COLT HAULAGE PTY LTD
(third respondent)
AEROTANG PTY LTD
(third party/applicant)

FILE NO/S: SC No. 3903 of 2003

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court Brisbane

DELIVERED ON: 27 June 2003

DELIVERED AT: Brisbane

HEARING DATE: 29 May 2003

JUDGE: Holmes J

ORDER: **I order that the State of Queensland pay the third party/applicant's costs of and incidental to its application to be assessed on the standard basis.**

CATCHWORDS: STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – CONSIDERATION OF EXTRNIC MATTERS – LEGISLATIVE HISTORY OF ACT – where s262 *Criminal Proceeds Confiscation Act* 2002 provides for awarding of costs to a person who brings a proceeding under the Act unless brought under Chapter 2 – whether costs can be awarded for a proceeding brought under Chapter 2 *Criminal Proceeds Confiscation Act* 2002 under the *Uniform Civil Procedure Rules* 1999

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON AN INDEMNITY BASIS – whether costs should be awarded on an indemnity basis

Criminal Proceeds Confiscation Act 2002, s 50
Uniform Civil Procedure Rules 1999

Re Criminal Proceeds Confiscation Act 2002 (Qld) [2003] QCA 249

Di Carlo v Dubois [2002] QCA 225
Latoudis v Casey (1990) 170 CLR 534

COUNSEL: Mr A Boe (solicitor) for the third party/applicant

SOLICITORS: Boe Callaghan Lawyers for the third party/applicant

- [1] The third party/applicant (Aerotang) was successful in obtaining an order pursuant to s 50 of the *Criminal Proceeds Confiscation Act 2002*, excluding certain funds from a restraining order made in respect of the first respondent's assets. What remains at issue is whether it is entitled to its costs of the application.
- [2] There are two provisions in the *Criminal Proceeds Confiscation Act* which deal with costs. They are s 261 and s 262 which are as follows:

“261 Costs incurred on variation of forfeiture or restraining orders on application by third parties

- (1) This section applies if-
- (a) the Supreme Court makes an order under this Act varying a forfeiture order or restraining order that is registered under a corresponding law; and
 - (b) the variation is made on the application of a third party and affects the interests of the third party in relation to property in the other State.
- (2) The Supreme Court may, in relation to the costs the third party incurred in applying for and obtaining the variation-
- (a) order that the third party's actual costs be paid to the third party; or
 - (b) if it is satisfied special circumstances exist, order that part only of the third party's costs be paid to the third party.
- (3) The costs must be paid by a person or authority specified by the Supreme Court.
- (4) The Supreme Court may direct how the costs are to be decided.
- (5) This section does not limit the powers of the Supreme Court to award costs under any other law.

(6) In this section-
 “**third party**”, in relation to a forfeiture order or restraining order,
 means a person who is not the subject of the order.
 “**vary**” includes limit the way in which an order applies.

262 Costs

If-

- (a) a person brings, or appears at, a proceeding under this Act, other than under chapter 2; and
- (b) the person is successful in the proceeding; and
- (c) the court is satisfied that the person was not involved in any way in the commission of the offence to which the proceeding related;

the court may order the State to pay all costs incurred by the person in connection with the proceeding or the part of the costs decided by the court.”

There is a note to s 262. It reads:

“*Note-*

In civil proceedings, the court decides costs and the costs are assessed under the *Uniform Civil Procedure Rules 1999*.”

- [3] Section 261 has no application: there is no suggestion that the order in question has been registered under the corresponding law of another State. Section 262 specifically excludes from its application proceedings brought under Chapter 2, which is headed “Confiscation without Conviction”. This was such a proceeding.
- [4] At first blush the legislature would seem to have limited provision for the granting of costs to proceedings other than those brought under Chapter 2. That would be an extraordinary outcome: applicants would be able to recover their costs, subject to meeting the requirements of s262, where a conviction had occurred, but would, in the absence of any conviction, be without recourse. As it is a case in which, if the provision were given what seems to be its ordinary meaning, the result would be unreasonable, it is appropriate to have recourse to extrinsic material such as the note to the section (which is not part of the Act¹) and the explanatory memorandum².
- [5] There would be no point in the note’s reference to decisions on costs under the *Uniform Civil Procedure Rules 1999* if s 262 were the sole source of a power to award costs. The explanatory memorandum expands on the effect of the note. It reads as follows:

¹ Section 14(6) of the *Acts Interpretation Act 1954*.

² Section 14B(1) of the *Acts Interpretation Act 1954*.

“Clause 262 recasts CCA s 104, and makes provision for the State to pay the costs of a person who is successful in a proceeding under this Bill other than under Chapter 2. The court may make an order provided that the court is satisfied that the person was not involved in the commission of the offence to which the proceedings related. In civil proceedings conducted under the Bill the court has jurisdiction to determine the awarding of costs under the *Uniform Civil Procedures Rules 1999*.”

- [6] Given the reference in the explanatory memorandum to s104 of the repealed *Crimes (Confiscation) Act 1989*, it should be said that the section gave a general power to order the Crown to pay costs in almost identical terms to s 262, but did not contain any exception along the lines of “other than under Chapter 2”. Reference to the section as it previously stood reinforces the significance of the exception; but it does not advance any conclusion as to its purpose. It is clear at any rate from the terms of the note and the explanatory memorandum that it is contemplated that in some proceedings costs may be awarded under the *Uniform Civil Procedure Rules 1999*. Any proceeding under the Act which is not a prosecution for an offence against it (including a proceedings under Chapter 2) is a civil proceeding³. Rule 3 of the *Uniform Civil Procedure Rules* provides for their application to civil proceedings.
- [7] The reason for the exception in s262 relating to Chapter 2 becomes more obvious when one notes that the objects of the Act, set out in s 4, include as ss (3) to (6) the following:
- “(3) This Act provides for 2 separate schemes to achieve its objects.
 - (4) One of the schemes relies on a person being charged and convicted (as defined in this Act) and is administered by the DPP.
 - (5) The other scheme does not depend on a charge or conviction and is administered by the Crime and Misconduct Commission.
 - (6) Despite the similarities between the schemes, each is separate and neither scheme is to be construed as limiting the other, unless this Act otherwise expressly provides.”

The obvious conclusion is that s 262 is concerned only with the first of those schemes, that which is dependent on conviction; hence the requirement that the court be satisfied that the applicant not be involved in commission of the offence. Under Chapter 2 no offence may ever be made out against an individual, and questions of involvement in commission of the offence are inapposite. The conclusion I draw is that questions of costs in respect of Chapter 2 proceedings are to be dealt with under the *Uniform Civil Procedure Rules 1999*.

³ Section 8 *Criminal Proceeds Confiscation Act 2002*.

- [8] The Crown did not advance any submission that costs should not follow the event. Aerotang argued, however, that costs should be awarded on an indemnity basis, because the Crown's conduct had necessitated the making of the application but it had not, in the event, resisted the making of the exclusion order. It is necessary, therefore, to set out the history of the matter in some detail.
- [9] Mr McGarry, the first respondent and the subject of the restraining order, was found in possession of \$29,000 in cash. He gave an account to the police that the owner of it was Aerotang and/or one of its directors, Mr Kelly. This court made a restraining order in respect of all Mr McGarry's property on 7 April 2003. As matters were then understood, s 30 of the Act, (now held by the Court of Appeal in *Re Criminal Proceeds Confiscation Act 2002 (Qld)*⁴ to be unconstitutional) required the court to hear the application in the absence of, and without notice to, any person whose property might be the subject of it.
- [10] Section 47 of the *Criminal Proceeds Confiscation Act* permits an application for exclusion and requires the State, if it proposes to oppose it, to give notice of its intention to do so; but no such notice need be given, and the application cannot be heard until the Director of Public Prosecutions "has had a reasonable opportunity to examine the applicant under an examination order".
- [11] Aerotang filed its application on 19 May 2003. It was supported by an affidavit of Ms Paula Morreau, an employee of its solicitors, in which she deposed that a facsimile had been sent on behalf of Aerotang and Mr Kelly, on 24 April 2003. It had annexed to it a statutory declaration in which Mr Kelly declared the following: Aerotang was engaged in bio-diesel manufacture and transportation. Mr McGarry was a truck driver under contract with Mr Kelly. He had in that capacity transported a load of bio-diesel to a business operated by a Mr Tabaskas in Victoria. Mr Tabaskas had paid \$29,000 for the delivery, although the actual amount due was \$28,050. Annexed to the statutory declaration was an invoice under Aerotang's trading name for the amount of \$28,050, addressed to Mr Tabaskas.
- [12] On 16 May 2003 the applicant's solicitors sent a facsimile to an officer of the confiscation section of the Director of Public Prosecutions Office, referring to a meeting on 12 May at which an officer of the Crime and Misconduct Commission had indicated that it considered the \$29,000 cash to be the property of Mr McGarry, notwithstanding receipt of the statutory declaration. The facsimile formally demanded the return of the \$29,000. A further facsimile on the same date advised that Mr Kelly was prepared to submit to an examination without the need for a formal order, or would agree to a consent order for an examination.
- [13] On 19 May 2003, the Director of Public Prosecutions' Office advised by letter that the Crime and Misconduct Commission was not prepared to release the funds. A decision as to whether Mr Kelly should be examined would be made once his material had been received.

⁴ [2003] QCA 249.

- [14] In addition to the affidavit of Ms Morreau, an affidavit of Mr Kelly consistent with his statutory declaration and an affidavit of Mr McGarry confirming that he was holding the money on behalf of Mr Kelly were filed to support the application for an exclusion order.
- [15] On 22 May 2003, the return date for the application, the parties appeared before Philippides J. An order was then made that Aerotang's application be adjourned and that Mr Kelly attend on 29 May 2003 for examination. On 29 May the parties appeared before me. A further affidavit of Ms Morreau and a facsimile copy of an affidavit of Mr Tsaboukos were filed by leave on Aerotang's behalf, on its solicitor's undertaking to file the original of the latter. Ms Morreau's affidavit, among other things, says that on 27 May 2003 she was advised by an officer from the Director of Public Prosecution's office that the Crime and Misconduct Commission would not require Mr Kelly to attend the examination and would consent to the exclusion of the \$29,000 from the restraining orders, but only on the basis that Aerotang did not seek costs; if it did the Commission would contest the application and require Mr Kelly for examination. Also annexed to Ms Morreau's affidavit is a letter sent by facsimile on 28 May to the Director of Public Prosecution's office. It rejects the offer and, not surprisingly, questions its propriety. The reply, also of 28 May, indicates that the application is not opposed, and that Mr Kelly is not required for examination; but any application for costs is resisted on the premise that s 262 of the Act does not admit of such an order. The letter makes the point that the Crime and Misconduct Commission was entitled to check the veracity of Mr Kelly's statements and that no sworn copy of Mr Tsaboukos' affidavit had yet been received.
- [16] I do not consider that the Crown's conduct in taking some time to consider its position in relation to the application was unreasonable so as to justify an award of indemnity costs. The proposal that the proceedings would continue, absent an agreement not to seek costs, does give me pause. It is difficult to see what possible justification there could be for the position of the DPP, which appears at least to have contemplated persistence with proceedings for no other reason than the extraction of an undertaking not to seek costs. However, costs orders are not designed to be punitive⁵. The position taken was abandoned, relatively promptly, and it seems improbable that it added anything to the applicant's costs. He had already set out for Brisbane.
- [17] In all the circumstances I do not think that the case has any feature, of a kind set out in the cases usefully collected in *Di Carlo v Dubois*⁶ or otherwise of a special or unusual nature, which would justify departure from the usual practice. I order, therefore, that the State of Queensland pay the third party/applicant's costs of and incidental to its application to be assessed on the standard basis.

⁵ *Latoudis v Casey* (1990) 170 CLR 534 at 543.

⁶ [2002] QCA 225.