SUPREME COURT OF QUEENSLAND

CITATION:	*State of Queensland v Rodd* [2004] QSC 312
PARTIES:	**STATE OF QUEENSLAND** **(applicant)** **v** **DANIEL JAMES RODD** **(respondent)**
FILE NO/S:	SC 5788/04
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	22 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	22 July, 9 August 2004
JUDGE:	Atkinson J
ORDER:	**Application allowed, upon counsel for the applicant undertaking to the court on behalf of the applicant that the applicant will pay to any party restrained or affected by this order any damages or costs which such party may sustain by reason of the order and which the court or a judge may think the applicant ought to pay.**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – ORDERS FOR COMPENSATION, REPARATION, RESTITUTION, FORFEITURE AND OTHER MATTERS RELATING TO DISPOSAL OF PROPERTY – FORFEITURE OR CONFISCATION – where the State seeks a restraining order pursuant to a statutory non-conviction based scheme – whether the State required to provide the usual undertaking as to damages or costs *Criminal Proceeds Confiscation Act* 2002 (Qld), s 28, s 31 *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1981) 146 CLR 249, cited *F Hoffmann – La Roche & Co AG & ors v Secretary of State for Trade and Industry* [1975] AC 295, cited *McCleary v DPP (Cth)* (1998) 20 WAR 288, cited *Re Cannon* [1999] 1 Qd R 247, considered

COUNSEL:	RJ Douglas SC for the Applicant P Davis for the Respondent
SOLICITORS:	Director of Public Prosecutions for the Applicant Russo Lawyers for the Respondent

[1] In 2002, the Queensland Parliament passed the *Criminal Proceeds Confiscation Act* ("the Act") which has as its main object, "to remove the financial gain and increase the financial loss associated with illegal activity, whether or not a particular person is convicted of an offence because of the activity." The Act provides for two separate schemes to achieve its object: one relies on the person being charged and convicted and is administered by the Director of Public Prosecutions; the other scheme does not depend on a charge or conviction and is administered by the Crime and Misconduct Commission. It is the latter scheme that is relied upon in this matter. That scheme is dealt with by Ch 2 of the Act.

[2] The schemes under the Act are similar to those found in Commonwealth legislation which was also introduced in 2002: the *Proceeds of Crimes Act* ("the 2002 Cth Act"). Both the 2002 Cth Act and the Act here under consideration replaced legislation where confiscation by the State depended on a conviction being secured. Both now have a non-conviction based scheme of confiscation as well as the conviction based scheme.

The non conviction based scheme – restraining order

[3] Section 28(1) of the Act provides that:

> "The State may apply to the Supreme Court for an order (**"restraining order"**) restraining any person from dealing with property stated in the order (the **"restrained property"**) other than in a stated way or in stated circumstances."

Section 28(3)(a)(iii) provides that the application may relate to all of the property of a person suspected of having engaged in one or more serious crime related activities. As required by s 28(2)(a) of the Act, an authorised commission officer swore an affidavit in support of an application under s 28(3)(a)(i), (iii) and 31(1) of the Act for restraining orders against certain identified property, some of which belonged to the respondent and some apparently to third parties but was allegedly under the control of the respondent.

[4] Section 31 of the Act provides:

> "**Making restraining order**
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> **(1)** The Supreme Court must make a restraining order in relation to property 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.
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> **(2)** However, the court may refuse to make the order if –
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> (a) the court is satisfied in the particular circumstances it is not in the public interest to make the order; or
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> (b) the State fails to give the court the undertakings the court considers appropriate for the payment of

damages or costs, or both, in relation to the making and operation of the order.

(3) The commission or, if the application is made by a police officer, the commissioner of the police service may, for the State, give the court the undertakings the court requires.

(4) A restraining order does not apply to property of a person acquired after the order is made unless the order expressly states it applies to the property.

(5) Also, the making of a restraining order does not prevent the person whose property is restrained under the order from giving Legal Aid a charge over the property as a condition of an approval to give legal assistance under the Legal Aid Act in relation to –

(a) a proceeding under this Act; or

(b) a criminal proceeding in which the person is a defendant, including any proceeding on appeal against conviction or sentence."

[5] The only issue in real contention in this case was whether or not the State should be required to give the court an undertaking for the payment of damages or costs, or both, as a condition of making the restraining order. There was no contest that there were reasonable grounds for the suspicion on which the application was based. The question was whether the restraining order should nevertheless be refused, on discretionary grounds, unless an undertaking was offered by the State. The State was, if necessary, prepared to offer such an undertaking.

[6] Section 31(2)(b) is in similar terms to s 40(20) of the *Crimes (Confiscation) Act* 1989 which was replaced by the Act under consideration. That section was considered in some detail by Williams J in *Re Cannon* [1999] 1 QdR 247. In that case, his Honour considered whether an enquiry as to damages should be ordered after the acquittal of a person against whom a restraining order had been made. The only source of the power in the court to order such an enquiry was the undertaking given by the State. The undertaking had been offered by the State when the restraining order was made and was in the following terms:

> "Upon counsel for the Applicant having undertaken to the Court on behalf of the Applicant that the Applicant will pay to any party restrained or affected by this Order any damages or costs which such party may sustain by reason of the Order and which the Court or a Judge may think the Applicant ought to pay."

Both parties have agreed that any undertaking in this case should be in similar terms.

[7] Section 31 of the Act does not grant to the court the power to require an undertaking nor does it specify the situations in which an undertaking should be sought or provided. Rather it assumes that an undertaking may be required by the court as a condition of granting a restraining order and does not purport to fetter the court's discretion as to when such an undertaking may be required. Accordingly it is appropriate to consider the general law as to injunctive relief and undertakings as to damage. A "restraining order" of the type referred to in the Act is a statutory

version of an equitable remedy – the interlocutory injunction.[1] The application for a restraining order is a 'civil proceeding'.[2] Ordinarily an undertaking as to damages is required when an interlocutory injunction is granted in the civil jurisdiction of the court. It is often referred to as the "usual undertaking as to damages": see eg *Uniform Civil Procedure Rules* (UCPR) r 264; *New South Wales Supreme Court Rules* Pt 28 r 7(2); *Federal Court Practice Note* No 3.

[8] The UCPR in Queensland provides that such an undertaking will be required unless there is a good reason to the contrary whenever a Mareva or an Anton Pillar order is made. Rule 264 provides:

> "(1) Unless there is a good reason, the court must not grant a part 2 order until the trial or hearing or until a stated day without the usual undertaking as to damages having been given.
> (2) The usual undertaking as to damages for a part 2 order applies during an extension of the period of the order.
> (3) If the usual undertaking as to damages is contravened, the person in whose favour the undertaking is given may apply to the court for an order conditional on the assessment of damages.
> (4) If the court finds damages are sustained because of a part 2 order, the court may assess damages or give the directions it considers necessary for the assessment of damages.
> (5) In this rule or an order –
> **"usual undertaking as to damages"**, for a part 2 order, means an undertaking to pay to a person (whether or not a party to the proceeding) who is affected by the order an amount the court decides should be paid for damages the person may sustain because of the order."

[9] That rule reflects the law which applies to the grant of any interlocutory injunctions in the civil jurisdiction of the court. There are two principal reasons for the offering of the undertaking being a usual requirement: firstly, it mitigates the risk of injustice to the person restrained; and secondly, it enables the court to make an order summarily without determining all the factual matters in dispute between the parties.[3]

[10] The exacting of an undertaking as a price for the granting of an injunction dates from the middle of the nineteenth century. It is a well-established incident of the power of the court to restrain a person from dealing with property in circumstances where the applicant needs to move promptly to prevent potential irreparable loss. Its history and justification was examined by Aitkin J in *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd*:[4]

> "It is a procedure said by Jessel M.R. in *Smith v Day*[5] to have been invented by Knight Bruce L.J., when Vice-Chancellor. The first

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1 It may, even more precisely, be considered the statutory equivalent of a Mareva Order: *McLeary v DPP (Cth)* (1998) 20 WAR 288 at 303.
2 *Criminal Proceeds Confiscation Act*, s 8.
3 *F Hoffmann – La Roche & Co AG & Ors v Secretary of State for Trade and Industry* [1975] AC 295 at 361 per Lord Diplock.
4 (1981) 146 CLR 249 at 260.
5 (1882) 21 Ch.D. 421 at 424.

reported case in which an injunction had been granted on such an undertaking appears to be *Novello v James*[6] from which it appears that on 15th December 1851 Knight Bruce L.J. (then Vice-Chancellor) granted an interlocutory injunction upon such an undertaking being given by the plaintiff. The injunction was dissolved without opposition in view of a later decision by the House of Lords governing the substantive question involved. On an appeal in relation to the question of damages Knight Bruce L.J.[7] said in effect that the fact that law was doubtful at the time of the grant of the interlocutory injunction provided no reason for not ordering damages. Turner L.J.[8] agreed with that view. In *Chappell v Davidson*[9] Knight Bruce L.J. said in the course of argument, "Has it not been for the last twelve or thirteen years an almost universal practice to require, on granting an injunction, an undertaking on the part of the Plaintiff to be answerable in damages?" In 1865 Kindersley V.C. said in *Wakefield v Duke of Buccleugh*[10] "the practice is settled, that not only on ex parte applications, but on injunctions granted upon motion by notice, the plaintiff should give an undertaking as to damages".

In *Graham v Campbell*[11] the Court of Appeal, James, Cotton and Thesiger L.JJ., said "The undertaking as to damages which ought to be given on every interlocutory injunction is one to which (unless under special circumstances) effect ought to be given. If any damage has been occasioned by an interlocutory injunction, which on the hearing is found to have been wrongly asked for, justice requires that such damage should fall on the voluntary litigant who fails, not on the litigant who has been without just cause made so."

[11] It is therefore, in my view, open to conclude that the legislature did not intend to displace the commonplace power of the court to require an undertaking as to damages and costs before it will exercise its power to restrain a person from dealing with property which they would otherwise be free to deal with as they wish.[12] That is the assumption on which s 31(2)(b) of the Act is based. The existence of the undertaking would tend, as Ipp J observed in *McCleary v DPP*,[13] "to satisfy any concerns the court might have that the making of a restraining order might cause innocent persons to sustain damage in a context in which, upon acquittal of the person charged, it could well be regarded as unfair and unjust for such persons to be without means of recovering such damage." There would no doubt be circumstances where the applicant would be able to show that an undertaking was not necessary, but this is not such a case.

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6 (1854) 5 De G.M. & G. 876 [43 E.R. 1111].
7 (1854) 5 De G.M. & G. at 878 [43 E.R. at 1112].
8 (1854) 5 De G.M. & G. at 879 [43 E.R. at 1112].
9 (1856) 8 De G.M. & G. 1 [44 E.R. 289].
10 (1865) 11 Jur. N.S. 523 at 524.
11 (1878) 7 Ch.D. 490 at 494.
12 cf *Corporations Act* s 1323(4) which specifically provides that when a court is determining an application under s 1323(1), it must not require the applicant or any other person to give an undertaking as to damages.
13 (supra) at 304.

[12] In conclusion, the order sought by the applicant should be granted, "upon counsel for the applicant undertaking to the court on behalf of the applicant that the applicant will pay to any party restrained or affected by this order any damages or costs which such party may sustain by reason of the order and which the court or a judge may think the applicant ought to pay."