SUPREME COURT OF QUEENSLAND

CITATION:	*Christensen v Director of Public Prosecutions & Anor* [2002] QSC 365
PARTIES:	**KIRSTEEN CHRISTENSEN** (applicant) **v** **DIRECTOR OF PUBLIC PROSECUTIONS** (first respondent) **STATE OF QUEENSLAND** (second respondent)
FILE NO/S:	S 8408 of 2002 S 9415 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application for leave pursuant to s 29(5) of the *Crimes Confiscation Act* 1989
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	11 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	4 November 2002
JUDGES:	Holmes J
ORDER:	**That the applicant have leave to apply for an order under s 29(7) and/or s 29(11) of the *Crimes (Confiscation) Act* 1989.**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – FORFEITURE OF PROPERTY – LEAVE TO APPLY FOR DECLARATION OF THIRD PARTY INTEREST IN FORFEITED PROPERTY Applicant seeks leave to apply under s29 *Crimes (Confiscation) Act* 1989 re interest in forfeited property – whether failure to apply for exclusion from restraining order resulted from applicant's neglect within meaning of s29(6) *Crimes (Confiscation) Act* 1989– whether neglect on the part of applicant's solicitors to be regarded as applicant's neglect. *Crimes (Confiscation) Act* 1989, s 29(7), s 29(11) *Limitation of Actions Act* 1974 *Motor Vehicles Insurance Act* 1936 (now repealed) *Proceeds of Crime Act (Commonwealth)* 1987 *DPP v Logan Park* (1995) 37 NSWLR 118, distinguished *Neilson v Peters Ship Repair Pty Ltd* [1983] 2 Qd R 419,

applied
Randel v Brisbane City Council [1984] 2 Qd R 276, applied

COUNSEL: Mr A Kimmins for the applicant
Mr C May for the respondents

SOLICITORS: Price and Roobottom for the applicant
Director of Public Prosecutions (Queensland) for the respondents

[1] The applicant wishes to seek declarations as to the nature, extent and value of her interest in certain property which was forfeited on 1 May 2002 pursuant to s 25 of the *Crimes (Confiscation) Act* 1989, and orders directing the State of Queensland to transfer, or pay to her the value of, her interest in such property. Section 29 of the *Crimes (Confiscation) Act* 1989 enables application for such orders. Because the applicant had notice of the restraining order made in respect of the property, she may not, by virtue of s 29(5), make her application without leave. Section 29(6) applies to her application for leave:

> "**(6)** The court may give leave under subsection (5) only if it considers that the failure of the applicant to apply, or apply successfully, to have the property excluded from the relevant restraining order was not because of the applicant's neglect."

The scheme of the Act

[2] It is worth mentioning so much of the scheme of the Act as has relevance to this application for leave. The main object of the Act is expressed (in s 3(1)) to be the deterrence of serious offences "by removing the financial gain, and increasing the financial loss, associated with their commission". Where a defendant is charged with a serious offence (a term which includes any indictable offence) an application may be made on affidavit in relation to the defendant's property (s 40). The affidavit must state a belief either that the property is tainted or that the defendant derived a benefit from the commission of the offence. Where a restraining order is made, a person with an interest in the property may apply, under s 43(2), for its amendment to exclude that interest from the order. An exclusion order may be made if the court is satisfied of various matters, including that the interest is not tainted property and, if the offence is a serious drug offence, that the applicant was not involved in its commission. No time limit is set for application under s 43(2); it seems that an exclusion order may be sought at any time during the life of the restraining order.

[3] Where a restraining order has been made and remains in force at the end of a period of six months beginning on the day of the defendant's conviction, the property is by virtue of s 25(1) of the Act forfeited to the State at the end of that period. The effect of forfeiture is to vest the property absolutely in the State, although it must not deal with it during the appeal period. Section 29, however, makes certain relief available to third parties. A person claiming an interest in forfeited property may apply for declarations as to his interest, and orders directing the State, if the property remains vested in it, to transfer it to the applicant or, if the property is not longer vested in it, to pay to the applicant the value of the interest. Such an application must be made within six months after forfeiture, subject to the granting of leave for a later application, except where the applicant had notice of the application for the

restraining order or was present at its hearing or had notice of its making (subs (5)). In that instance s 29(6) applies.

The proceedings against Kim Christensen

[4] The applicant's husband, Kim Soberg Christensen, was charged on 26 May 2000 with a number of offences under the *Drugs Misuse Act* 1986, including production of, and trafficking in, methylamphetamine. On 13 June 2000 a restraining order was made in respect of all of the property of Kim Christensen, including some property in which the applicant claims an interest: two vehicles, the proceeds of three bank accounts and the matrimonial home, which had been purchased jointly in February 2000. It is clear from the affidavits filed by the applicant that she was aware of the restraining order.

[5] Kim Christensen had solicitors acting on his behalf in relation to the drug charges. According to the applicant's affidavit, most of the consultations with the solicitors up to the time of her husband's sentencing on 1 November 2001 were concerned with preparation of his case, although she says she did discuss with them "on occasion, the need to sort my own financial affairs and assets from the joint property which was restrained".

[6] On 1 November 2001 Kim Christensen was sentenced to 10 years imprisonment. A pecuniary penalty order in the sum of $500,000 was made against him. In the course of submissions about how the pecuniary penalty order would be met, there was reference to the restrained property, which was liable to automatic forfeiture upon the lapse of six months from conviction. Counsel for Mr Christensen raised the fact that the applicant, whom he did not represent but who, he said, was present in court, might wish to bring her own application. Counsel for the Crown responded in the following terms:

> "For her benefit she has got six months from today to deal with that. Otherwise we might automatically forfeit"

[7] The applicant says on affidavit that, while she had gone to the court for her husband's sentencing, she felt too upset and unwell to remain and had left the courtroom before the proceedings commenced. It seems entirely possible that defence counsel's allusion to her presence was based on his having seen her prior to the commencement of proceedings, with the not unreasonable, but incorrect, assumption that she remained present throughout them.

The applicant's contact with solicitors

[8] The applicant says that she spoke to the solicitor who had acted for her husband, and was acting on her behalf also, as early as January 2002 "in relation to the need to take steps to recover my share of property I owned jointly with Kim". Thereafter she spoke with him at least monthly until August 2002. She says that he told her it was likely that she would need to engage another solicitor to pursue her interests, but suggested that she wait until he could engage someone suitable to act for her, briefing them with all the necessary information. Meanwhile he obtained counsel's advice on prospects in relation to a possible proceeding in the family court.

[9] In the first week of August 2002 the applicant's solicitor gave her advice obtained from another counsel to the effect that any application by her needed to be made by 1 November 2002. If that was the effect of counsel's advice, it seems,

inappropriately, to have adverted to subs 29(3) of the *Crimes (Confiscation) Act* 1989 which provides for application within six months after forfeiture, but which has, by virtue of subs 29(5), no application to a person with notice of the restraining order. It may have been based on a misapprehension either as to the fact of the applicant's knowledge of the restraining order, or as to the effect of subs 29(5).

[10] In late August the applicant's solicitor made an appointment for her to see a solicitor with another firm on 28 August 2002. In the interim, another opinion from counsel had been obtained. Whatever the effect of that opinion, on 28 August the applicant was told that she could not make her application without leave. On 10 September 2002 the applicant engaged her present solicitors to bring an application for leave. The applicant swears that at no time prior to 26 August 2002 (presumably, in context, an error: 28 August seems to be the relevant date) did she know that an application needed to be made on her behalf by 1 May 2002.

Construction of 29(6)

[11] Subsection 29(6) has not, so far as I have been able to establish, received judicial consideration. Mr Kimmins, for the applicant, relied on the decision of the New South Wales Court of Appeal in *DPP v Logan Park*[1] in relation to a similar provision of the *Proceeds of Crime Act* 1987 (Cwth). Unfortunately, and crucially, the relevant section in that Act is similar, but not identical to that in the *Crimes (Confiscation) Act* 1989. It is in the following terms:

> "(5) The court may grant a person leave to make an application if the court is satisfied that the person's failure to seek to have the property excluded from the relevant restraining order was not due to any neglect on the part of the applicant."

[12] In *Logan Park* the question was whether an applicant who had previously brought an unsuccessful application for relief from a restraining order could obtain leave to make an application under s 31 of the *Proceeds of Crime Act* 1987, which permitted orders of a similar kind to those sought by the applicant here. The court held that the applicant was not precluded from being granted leave to make a further application. Mr Kimmins relied in particular on this statement by Handley JA:

> "However subs (5) is an enabling provision which defines one circumstance in which the court can grant leave. It does not purport to be exhaustive and is not in substance a prohibition against the court granting leave in all other cases. The court therefore has a general discretion to grant leave in a proper case, even though the requirements of subs (5) are not satisfied."[2]

Mr Kimmins also relied on more general statements in the judgment of Kirby A-CJ to the effect that the *Proceeds of Crime Act* 1987, providing as it did for forfeiture of property, should be strictly construed, with clear words required to divest property owners of their rights; while, on the other hand, those beneficial provisions providing, as s 31 did, for relief against forfeiture, were not to be construed narrowly.

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1 (1995) 37 NSWLR 118.

2 At p 129.

[13] While those statements of principle are, of course, of general application, I do not think that Handley JA's construction in *Logan Park* of the leave provision relevant there can assist in the present case. It seems to me that the use of the word "only" to qualify the giving of leave in subs 29(6) of the *Crimes Confiscation Act* 1989 manifests a clear intention on the part of the legislature to confine leave to circumstances where the court is satisfied that the applicant's neglect was not the cause of the failure to have the property excluded from the restraining order; or, to put it in the converse, that application was not previously made, or not made successfully, in respect of the restraining order for reasons other than the applicant's neglect. (It is to be noted that in addition to the distinguishing adverb "only", the subsection differs from the *Proceeds of Crime Act* section in contemplating the situation of an earlier unsuccessful application, which was at the heart of the controversy in *Logan Park*.) That being so, the question is whether I can be satisfied that the applicant's failure to apply for an exclusion order was not the result of neglect on her part; otherwise I cannot grant leave for the application she now wishes to bring.

What amounts to 'neglect' under s29 (6)?

[14] The applicant might have sought amendment of the restraining order to exclude whatever interest she held in the property subject to it at any time until it ceased in effect by the automatic forfeiture of the property; that is at any time until 1 May 2002. The question is whether her failure to apply throughout that period was the result of her "neglect" within the meaning of s 29(6). It seems on the material before me to have been the product of her solicitor's ignorance as to the necessity to do so. But Mr May, for the Crown, argued that any neglect on the part of the applicant's solicitors ought to be regarded as her neglect. He suggested that the applicant's recourse lay against them, and that the State should not be hindered in carrying out its task of recovering proceeds of crime under the Act.

[15] The principle that legislation providing for relief against forfeiture is not to be construed narrowly against a person seeking such relief weighs against the construction contended for by the Crown. There is, I think, something in Mr Kimmins' argument that if the legislature had intended the "neglect" referred to in the sub-section to comprehend negligence on the part of solicitors, that could, and should, have been prescribed by clear language. (Section 4F(4)(b) of the now repealed *Motor Vehicles Insurance Act* 1936, which required the court's satisfaction that failure to give notice of a claim "was not occasioned by any act or omission of the claimant or any person acting on his behalf", provides an instance of how that might have been achieved.)

[16] Some assistance as to how s 29 (6) may be approached can be gained by reference to two cases on extension of time under the *Limitation of Actions Act* 1974, in both of which legal advice had been sought by the applicant plaintiff. Those cases have this in common with the present case: they involved a plaintiff seeking relief against loss of a right of action, and the question was how the provision governing the granting of that relief was to be construed. Sub-section 30(d) of the *Limitation of Actions Act* 1974 provides, in effect, that a material fact is not within a person's knowledge at a given time if (i) he does not then know it and (ii) he has taken "all reasonable steps" to ascertain it.

[17] In *Neilson v Peters Ship Repair Pty Ltd*[3] the material fact (that a vessel was on charter to a company which should, consequently, have been joined) was known to the plaintiff's solicitors. One of the questions for the Full Court was whether the plaintiff should be regarded as possessed of his solicitor's knowledge, and another was whether he had taken all reasonable steps to learn the relevant fact. The court declined to impute to the plaintiff the knowledge of the solicitor as his agent.

[18] Macrossan J went on to make these observations:

> "The ordinary unskilled litigant can only act effectively by engaging a solicitor and he would usually only act through such a solicitor in ascertaining those material facts to which s. 30 refers. Indeed, he will need a solicitor's advice to enlighten him upon the nature of those "material facts" and upon the best way to go about ascertaining them. Still, if he displays no interest in following progress and keeping himself acquainted with what is discovered upon these matters, his behaviour would not conform with the hypothetical standard constituted by the test under s. 30(d)(ii)."[4]

In the event he concluded that the failure of the plaintiff over a period of some months to communicate with his solicitors amounted to a failure to take reasonable steps. The majority, consisting of McPherson J and Thomas J found otherwise, although their reasoning was similar:

> "Placing the matter in the hands of apparently competent solicitors with adequate instructions including information relevant to the cause of action would ordinarily amount to taking all reasonable steps to ascertain the relevant facts, provided that the plaintiff did his best to ensure that the solicitors did not languish in the prosecution of the action."[5]

[19] In *Randel v Brisbane City Council*[6] the Full Court followed *Neilson v Peters Ship Repair Pty Ltd* in holding that a plaintiff had taken reasonable steps to identify the proper defendant when he placed all the information in his possession in the hands of an experienced solicitor. The default of the solicitor in failing to advise the plaintiff as to the appropriate person to be sued was not to be visited on him. The conduct required of a plaintiff in taking reasonable steps would ordinarily extend "to consulting a solicitor, keeping in touch with him, and acting according to his advice"[7]. The test of whether reasonable steps had been taken by an applicant was "an objective one applied to a person with this applicant's background and circumstances"[8] which in that case included youth and impecuniosity.

[20] Given the general principles of construction already referred to, I do not think that, in the absence of clear language to that effect, the negligence of the applicant's solicitors should be attributed to her. An approach similar to that in the limitations cases is appropriate: that is to say, it is the applicant's acts or omissions which require examination to determine whether they reveal neglect, not the conduct and competence of those from whom she sought advice.

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3 [1983] 2 Qd R 419

4 At p 425.

5 Per McPherson J at p 431.

6 [1984] 2 Qd R 276.

7 Per McPherson J at p 281.

8 Per Thomas J at p 285.

Was there 'neglect' by the applicant for the purposes of s 29(6)?

[21] It is relevant in that process of examination to note that the applicant is the full-time carer for four children aged between 20 months and 10 years. Her past employment has been as a worker in the sex industry. She does not have tertiary education, although she hopes to commence tertiary studies in the future. There is nothing to suggest any particular level of sophistication or knowledge of law on her part. In short, she is someone one would expect to rely on the advice of solicitors. Her evidence as to the nature and extent of her contacts with the firm previously acting for her was not challenged.

[22] In my view, the applicant's conduct in seeking advice from the solicitor acting on her behalf, relying on his advice and maintaining monthly contact with him was reasonable. Her failure to make application for amendment of the restraining order was the result of reasonable reliance on her solicitor's advice and cannot be construed as neglect. It follows that I am satisfied as required by s 29(6) of the *Crimes (Confiscation) Act* 1989 that the failure to apply to have the property excluded from the relevant restraining order was not because of the applicant's neglect and that I may, accordingly, give leave for an application for orders under s 29(7) and/or (11) of the *Crimes (Confiscation) Act* 1989. No reason was advanced by the Crown as to why leave should not be given if the discretion under s 29(6) were available; and given the applicant's position as the care giver for her children and the implications for her of loss of any interest she may have in the assets the subject of forfeiture, it seems to me in other respects an appropriate case for the granting of leave.

Order

[23] I give the applicant leave to apply to this court for an order under s 29(7) and/or s 29(11) of the *Crimes (Confiscation) Act* 1989.