IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 19/2024
[2024] NZSC 84

BETWEEN		TERRENCE MCFARLAND Applicant
AND		COMMISSIONER OF POLICE Respondent

Court: Glazebrook, Kós and Miller JJ

Counsel: S N B Wimsett KC for Applicant
K South and C C White for Respondent

Judgment: 30 July 2024

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondent costs of $2,500.

REASONS

[1] No 31 Vickerys Road, Wigram in Christchurch is owned by a company, Lincoln Property Investments Ltd (LPIL), the shareholders of which were persons associated with the Epitaph Riders motorcycle gang. The membership of that organisation had dwindled; its remaining members then "patched over" to the Head Hunters motorcycle gang. As part of that restructuring, the shares in LPIL were transferred to three men associated with the Head Hunters gang: Lyndon Richardson, Simon Turner and the applicant, Terrence McFarland.

[2] Neither the current shareholders of LPIL nor the Head Hunters gang paid money to acquire the property. The gang did however apply funds arising from significant criminal activity, including the proceeds of sale of methamphetamine, towards its renovation. The exact amount applied remains unclear.

[3] On 30 November 2022 the High Court ordered forfeiture of the property under the Criminal Proceeds (Recovery) Act 2009 (CRPA) on the basis that it was tainted.[1] The Court declined the applicant's application to exclude the property from forfeiture under s 51 of the CPRA, concluding he would not suffer undue hardship if the property were forfeited.

[4] The applicant appealed to the Court of Appeal, arguing that the High Court had erred in finding that the property was tainted and in refusing his application for relief from undue hardship. The Court of Appeal however upheld the decision of the High Court on all grounds, dismissing the appeal.[2]

[5] The applicant seeks leave to appeal from that judgment. First, he seeks to contend that s 51 may contemplate hardship to persons other than a person identified as a respondent in an assets forfeiture order application. Secondly, he wishes to contend the CPRA should not be applied in a punitive manner, and that an assets forfeiture order may cause undue hardship for the purposes of s 51 if it amounts to a disproportionate punishment under s 9 of the New Zealand Bill of Rights Act 1990 (NZBORA).[3]

Our analysis

[6] We accept that the second question—the extent to which s 9 of the NZBORA informs undue hardship for s 51 purposes—raises a matter of public

---

1 *Commissioner of Police v Richardson* [2022] NZHC 3184 (Dunningham J).

2 *McFarland v Commissioner of Police* [2024] NZCA 16 (French, Thomas and Fitzgerald JJ) [CA judgment].

3 He would also rely on ss 21 and 26, protecting against unreasonable seizure of property and double punishment.

importance.[4] That question remains unsettled at appellate level, and there is divergent High Court authority.[5]

[7] However, we do not consider this an appropriate case in which to address that question. That is primarily because of the difficulties standing in the way of the applicant on the first question—whether s 51 may contemplate hardship to persons other than a person identified as a respondent in an assets forfeiture order application—on which any success on the second question must in turn depend. The statutory scheme appears clear, and nothing raised by the applicant suggests a risk that the construction adopted in the Courts below may have been wrong. The Court of Appeal correctly identified that the relevant inquiry under s 51 of the CPRA is not whether there will be a "windfall" to the Crown, but whether undue hardship is reasonably likely to be caused to the respondent as a result of the forfeiture.[6] Here there are concurrent findings of fact below that the applicant's sole interest in the property is as a shareholder of LPIL; he does not live in Christchurch, does not reside at the property and has not himself contributed to its acquisition or renovation. In those circumstances we do not consider forfeiture of the property can be said to be disproportionately severe for the purposes of s 9, if it applies, or to give rise to undue hardship. Accordingly, there is no risk of a miscarriage of justice.[7]

[8] Finally, and in any event, the second question was touched on only tangentially in the Court of Appeal, so this Court lacks the benefit of any assessment below of the merits of the proposed argument to inform the present decision as to whether leave should be granted.

---

4 Senior Courts Act 2016, s 74(2)(a).

5 See for example cases where s 9 was specifically addressed: *Solicitor-General v Sanders* (1995) 2 HRNZ 24 (HC); *Solicitor-General v Keefe* HC Napier CIV-2009-441-000608, 26 May 2011; and *Solicitor-General v Moss* [2010] BCL 373 (HC). And compare cases where disproportionality was discussed without reference to s 9: *Solicitor-General v Fisher* [2003] BCL 751 (HC); *Commissioner of Police v Winsor* [2014] NZHC 161; and *Commissioner of Police v Cheah* [2018] NZHC 2825.

6 CA judgment, above n 2, at [83].

7 Senior Courts Act, s 74(2)(b).

Result

[9] The application for leave to appeal is dismissed.

[10] The applicant must pay the respondent costs of $2,500.

Solicitors:
Crown Law Office | Te Tari Ture o te Karauna, Christchurch for Respondent