
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : RE APPLICATION UNDER SECTION 20A OF THE
PROCEEDS OF CRIME ACT 2002 (CTH); EX
PARTE COMMISSIONER OF THE AUSTRALIAN
FEDERAL POLICE [2017] WASC 114

CORAM : BANKS-SMITH J

HEARD : 8 MARCH 2017

DELIVERED : 8 MARCH 2017

PUBLISHED : 19 APRIL 2017

FILE NO/S : CIV 1350 of 2017

MATTER : Section 20 of the *Proceeds of Crime Act 2002* (Cth)

The property of or under the effective control of the
respondents and property suspected to be an instrument
of serious offences

EX PARTE

COMMISSIONER OF THE AUSTRALIAN
FEDERAL POLICE
Applicant

AND

P
First Respondent

N
Second Respondent

Catchwords:

Proceeds of Crime Act 2002 (Cth) s 20A - Restraining orders - Unexplained wealth - Ex parte application - Turns on own facts

Legislation:

Criminal Code (Cth), s 135.1, s 401.9, s 409.1A, s 400.2

Proceeds of Crime Act 2002 (Cth), s 20A, s 179B, s 179G, s 337, s 338

Result:

Restraining orders made

Category: B

Representation:

Counsel:

Applicant	:	Ms L B Black
First Respondent	:	No appearance
Second Respondent	:	No appearance

Solicitors:

Applicant	:	Australian Federal Police - Proceeds of Crime Litigation
First Respondent	:	No appearance
Second Respondent	:	No appearance

Case(s) referred to in judgment(s):

Commissioner of the Australian Federal Police v Kalimuthu [No 2] [2015]
WASC 376

Director of Public Prosecutions (Cth) v Hart [2005] QCA 51; [2005] Qd R 246

Director of Public Prosecutions (SA) v Tregenza [2002] SASC 414; (2002) 84
SASR 346

1 **BANKS-SMITH J:** On 8 March 2017, I made ex parte orders including
 2 restraining orders under s 20A of the *Proceeds of Crime Act 2002* (Cth)
 3 directed at each of two individuals, P and N. Those orders prevent them
 4 from disposing of certain property except on terms. These are my reasons
 5 for making the restraining orders.

Application

6 The Commissioner of the Australian Federal Police applies for
 7 restraining orders under s 20A of the Act against P and N. P and N are in
 8 a de facto relationship. Section 20A operates in circumstances of
 9 unexplained wealth.

10 The restraining orders relate to four separate properties registered in
 11 the name of N or company 1 (DNA), two vehicles in the name of
 12 company 2 (DN), nine bank accounts in the name of P, N, DN or DNA
 13 (some being joint accounts), and rental receipts from the properties.

14 The primary residence of P and N and a third motor vehicle are
 15 excluded from the orders.

16 Federal Agent Reilly provided an affidavit in support of the
 17 application. In summary, he states that he reasonably suspects that
 18 property in the name of P, N, DN, DNA, a third company DND and a
 19 family trust (DN Family trust) is all controlled by P and N. He suspects
 20 that DN is a vehicle primarily to launder money and property. He
 21 suspects the total wealth of each of P and N exceeds the value of their
 22 lawfully acquired wealth.

23 Federal Agent Reilly also states that he reasonably suspects that each
 24 of P and N have committed offences against the Commonwealth.

25 The primary question in this application is whether he holds those
 26 suspicions on reasonable grounds.

27 The effect of the order under s 20A is that the property to which it
 28 relates must not be disposed of or otherwise dealt with by any person,
 29 except in the manner and circumstances specified in the order.

Section 20A

30 Section 20A provides as follows:

When a restraining order must be made

(1) A court with *proceeds jurisdiction must order that:

(a) property must not be disposed of or otherwise dealt with by any person; or

(b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;

if:

(c) a proceeds of crime authority applies for the order; and

(d) there are reasonable grounds to suspect that a person's total wealth exceeds the value of the person's wealth that was lawfully acquired; and

(e) any affidavit requirements in subsection (3) for the application have been met; and

(f) the court is satisfied that the authorised officer who made the affidavit holds the suspicion or suspicions stated in the affidavit on reasonable grounds; and

(g) there are reasonable grounds to suspect either or both of the following:

(i) that the person has committed an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect;

(ii) that the whole or any part of the person's wealth was derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect.

10 Relevantly, s 20A(3) sets out the requirements which must be addressed in an affidavit in support of the application. Section 20A(6) provides that a restraining order may extend to future property if specified. Section 20A(4) provides that the court may refuse to make a restraining order if there are not reasonable grounds to suspect that the person's total wealth exceeds by \$100,000 or more the value of the person's lawfully acquired wealth.

Jurisdiction

11 The Supreme Court, as a court with jurisdiction to deal with criminal matters on indictment in Western Australia, has 'proceeds jurisdiction'. At least part of the conduct constituting the relevant offences on which the applicant relies occurred, or is reasonably suspected to have occurred in

Western Australia. Accordingly, I am satisfied that this Court has jurisdiction to make an order under s 20A: s 314 and s 335(2) of the Act.

Proceeding without notice

12 The Commissioner asks the court to consider the application without notice to P and N. Under s 26(4), the court is required to consider the application without notice having been given if requested by the responsible authority to do so.

13 The consequences of an order made without notice will produce some prejudice to the respondents, particularly with regard to the procedural consequences that flow from a restraining order being in place.¹ However, Federal Agent Reilly has deposed to the reason why the application is brought ex parte, that reason being to avoid dissipation of property which may occur if P and N have notice of the application. In particular, the applicant points to the following:²

- (a) P has been declared a 'drug trafficker' under s 32A of the *Misuse of Drugs Act 1981* (WA);
- (b) P has taken steps to remove his name from the legal title to property sought to be restrained;
- (c) P and N have made accelerated mortgage payments with respect to at least one property and that property is subject to a contract for sale;
- (d) P and N have access to large sums of money in bank accounts and are able to dissipate that money easily;
- (e) P has spent considerable periods of time overseas for unknown reasons.

14 In my view, the interests of justice required the court to consider the application and make the order restraining the property ex parte. The nature of the property restrained includes funds in bank accounts. The account holders are able to move funds quickly if they are given notice of the application. Further, at least one property is in the process of being sold and P has a history of transferring interests in real property to related parties. It is appropriate to ensure that the objects of the Act are not defeated by any withdrawal of the funds or transfers of property.

¹ *Commissioner of the Australian Federal Police v Kalimuthu [No 2]* [2015] WASC 376 [42].

² Affidavit of Federal Agent Reilly filed 2 March 2017 [114].

- 15 Section 42 allows the respondents to ask the court to revoke a restraining order on grounds including where 'it is otherwise in the interests of justice to do so'. Those rights alleviate the prejudice the respondents might otherwise suffer.

Formal matters relating to the application

- 16 The applicant is a 'proceeds of crime authority' and so has standing under s 20A (1)(c) to bring the application: s 338.
- 17 The Commonwealth has given an undertaking under s 21 with respect to the payment of damages or costs, or both, for the making and operation of the order.
- 18 The application is supported by the affidavit of Federal Agent Reilly. I am satisfied that Federal Agent Reilly, as a member of the Australian Federal Police, is an authorised officer.

Unexplained wealth - relevant definitions

- 19 Part 2.6 of the Act deals with unexplained wealth. It contains definitions of 'wealth' (s 179G(1)) and 'total wealth' (s 179G(2)). Relevantly, 'wealth' means property owned by a person at any time, property under the effective control of the person at any time and property that has been disposed of by the person at any time. 'Total wealth' is the sum of all of the values of the property that constitutes the person's wealth.
- 20 These definitions direct attention to the meaning of 'property' and 'effective control'. 'Property' is defined broadly in s 338 (and by reference to the definition of 'interest' in the same section) and includes all property real or personal, whether situated in Australia or elsewhere, and includes a legal or equitable interest or a right, power or privilege whether present or future, vested or contingent in property.
- 21 'Effective control' is defined in s 337. A person may have effective control of property regardless of whether they have a legal or equitable interest or right, power or privilege with respect to the property. The court may have regard to shareholdings in a company with a direct or indirect interest in property, a trust that has a relationship to the property and family, and domestic or business relationships between persons, companies or trusts having an interest in the property. Property held on trust for a person is taken to be under the person's effective control. Property may be under the effective control of more than one person. In

short, 'effective control' does not import any requirement of beneficial ownership.³

Three suspected offences against law of Commonwealth

22 The first of the alleged offences is intentionally causing a loss to the Commonwealth contrary to s 135.1(3) of the *Criminal Code* (Cth). The applicant alleges that P and N each failed to properly disclose income to the Australian Taxation Office, failed to properly disclose assets and property and received government assistance to which they were not entitled. Section 135.1 falls under the heading 'general dishonesty', and falls within pt 7.3 of the *Criminal Code* which deals with fraudulent conduct.

23 The second alleged offence is under s 400.9(1) of the *Criminal Code*. The applicant alleges that each of P and N have 'dealt with money or other property' that it is reasonable to suspect is the proceeds of crime and that the value of the money or property exceeds \$100,000. Section 400.9(1) falls within pt 10 of the *Criminal Code* which deals with money laundering.

24 By *Criminal Code* s 400.2:

A person 'deals with money or other property' if the person does any of the following:

- (a) receives, possesses, conceals or disposes of money or other property;
- (b) imports money or other property into Australia;
- (c) exports money or other property from Australia;
- (d) engages in a banking transaction relating to money or other property.

25 The third alleged offence is under s 400.9(1A) of the *Criminal Code*. That is an allegation of the same offence as under s 400.9(1) but where the value of the money or property is less than \$100,000. The penalties are less under s 400.9(1A) than under s 400.9(1).

AUSTRAC Report on money laundering

26 In carrying out his investigations, Federal Agent Reilly had regard to some of the tools which the Australian Transaction Reports and Analysis

³ *Director of Public Prosecutions (Cth) v Hart* [2005] QCA 51; [2005] Qd R 246 [22].

Centre (AUSTRAC) has reported are used to launder money by processing illicit profits in ways which mask ownership.⁴

27 Those tools include:

- (a) the use of multi layered legal entity structures such as companies and trusts to obscure the destination of funds;
- (b) the purchase of high value goods such as real estate and vehicles using cash from a mix of sources (legitimate and illegitimate) and concealing ownership by registering property in the names of family members or associates; and
- (c) the use of the gaming sector as a significant money laundering channel, including by gambling using racing and sporting betting facilities and the exchange of illicit cash for gaming chips or winning betting tickets, which are then cashed in as winnings which appear legitimate.

Facts

28 In his affidavit, Federal Agent Reilly reports on his investigation of the wealth and total wealth of the relevant group of entities (DN, DND, DN Family Trust, DNA, P and N). He discloses the source of the information upon which he relies. He focuses on the period 1 January 2010 to 31 December 2016, being the period for which he has been able to obtain copy bank statements. The facts stated below are taken from his affidavit and lengthy attachments, comprising almost 2,000 pages.

Income

29 DN was incorporated in 2009. N is its sole director. Its secretary is TP, thought to be P's brother. A company, PC, is its sole shareholder. TP is the sole shareholder of PC. DN conducts a website business for the sale of a particular type of tree. There is no online method for ordering the trees, but there are contact details.

30 Tax returns for DN for each of the years ended 30 June 2010 - 30 June 2015 are provided. In three of those years DN disclosed losses or only a notional profit. The total net profits during the period were approximately \$200,000. Additional income of \$52,058 by way of a

⁴ AUSTRAC report 'Money Laundering in Australia' 2011, Reilly Affidavit [17], [59], [69], [81], [90]; attachment 6.

distribution under the DN Family trust is disclosed in an amended tax return for the year ended 30 June 2015.

31 DND was incorporated in 2010. N is its current director. P was also a director until February 2014. P and N are the beneficial joint shareholders. Tax returns suggest there is no operating business and no income or profits are recorded.

32 The DN Family trust was established in 2010. P and N were originally its trustees. P and N and their three children were named beneficiaries. By a deed executed in December 2014, P and N were removed as trustees and DNA substituted.

33 The DN Family Trust tax returns disclose income by way of rental. The only year for which profit is disclosed is 2015 with a net profit of \$52,058. That accumulated profit was distributed to DN.

34 DNA (the trustee of the DN Family Trust) was incorporated in 2014. N and VP (thought to be N and P's daughter) are its directors. N is its sole shareholder. The ATO has no records for the company.

35 According to ATO records, P was employed by DN as a contract administrator during the financial years ended June 2010 to June 2015. His total income for those 6 years was \$232,173.

36 According to ATO records, N was employed by DN as a manager and director during the financial years June 2011 to June 2015. Her total income was approximately \$206,000. She has received no income from DN since August 2016 (or from any other employer, based on bank accounts).

37 DN appears to have no other employees. Neither P nor N has received any payments from DN into their superannuation accounts since May 2016.

Bank accounts

38 Enquiries of ANZ, CBA and Westpac reveal that during the relevant period, between them P, N, DN, and the DN Family Trust held 15 bank accounts with ANZ. Between them N, DN, DND and the DN Family Trust held 16 bank accounts with CBA. N held six bank accounts with Westpac.

39 In summary, P has only three current bank accounts in his name, one with ANZ into which his superannuation is paid, and two with CBA

which he holds jointly with DNA as the trustee of the DN Family trust. He has no day to day account or account into which his salary is paid.

40 There are three accounts where the signatory is unknown. N is otherwise a signatory to all current bank accounts of the group entities, apart from P's ANZ superannuation account.

41 Not all accounts were open at the same time or during the whole of the relevant period. However, after removing inter-account transfers, the statements for all accounts over the period show total debits of some \$6.1M and total credits of some \$6M.⁵

Real property

42 DNA is the registered proprietor of three properties which I will refer to as Morley, Landsdale and Balga.

43 Morley was transferred to DNA from DND in July 2015.

44 P and N were the former owners of Landsdale and Balga. They transferred those properties to DNA in May 2015.

45 N is the registered proprietor of two properties, the primary residence and a property which I will refer to as Southbank.⁶ The primary residence is also the registered office of each of DN, DND and DNA.

46 There are mortgages on three of the five properties. The total approximate amount owed and secured by the mortgages is \$134,812. The total equity in the five properties based on valuations provided by CoreLogic is \$2,846,209.⁷

Vehicles

47 Searches indicate that from July 2008 until July 2015, DN or N purchased and sold five vehicles. The purchase price was \$514,774.

48 DN currently owns three vehicles, including a 2015 and a 2016 Mercedes Benz. The purchase price for those vehicles was \$307,730.

49 Further, in June 2014, N purchased a 2014 Mercedes Benz apparently for her mother. Purchase funds were withdrawn from one of

⁵ Reilly Affidavit [58].

⁶ Southbank was subject to a sale contract at the date of the hearing and its sale may have subsequently settled under the terms of the orders which permitted its sale with funds to be held on trust.

⁷ Reilly Affidavit [67].

N's CBA accounts. The vehicle was sold in 2016 but the receipt of sale proceeds is not reflected in any of the accounts.

50 There are no vehicles registered in P's name.

Income and expenditure

51 Federal Agent Reilly's assessment of income and expenditure based on the bank statements for the relevant period and annexed to his affidavit discloses total income for the relevant period of some \$5.1M and total expenditure of some \$5M.

Travel

52 Immigration records reveal extensive overseas travel by P and N. For example, during the period 30 June 2010 to 30 June 2015 P and N spent 331 and 303 days overseas respectively. Since 1 July 2016 P and N have spent 161 and 105 days overseas respectively. Travel expenses and overseas spending of some \$136K are recorded in the bank accounts.

Betting

53 During 2014, P held a TAB account. He deposited some \$30K into the account from one of N's CBA accounts. During that month he wagered \$59,690 on bets.

54 According to Racing and Wagering Western Australia (RWWA) records, since 2013 N wagered some \$229,020 in bets and received payments in the total of \$1,027,610. Taking into account the level of payments to N, the returns may have included returns on other winning betting tickets acquired by N.⁸ The known bank accounts do not record payments to RWWA.

55 Between 2013 and 2014 N received payments from SM in the total of \$934,660 described (generally) as winnings. The credits are recorded in one of N's ANZ bank accounts. The relationship between N, P and SM is unknown.

⁸ According to Counsel, the purchase of winning betting tickets is a technique recognised as a money laundering tool by AUSTRAC: ts 14.

Federal Agent Reilly's suspicion**Effective control of property**

56 Federal Agent Reilly suspects that property in the name of P, N, DN, DND, DNA and the DN Family Trust is under the effective control of P and N and that it is held for their ultimate benefit.

57 His suspicion is based on the common address of those persons and entities; N and P are in a de facto relationship; N is the sole director of DN and DND and a director of DNA; P is not an office bearer for those entities; P was previously a director of DND; N is the sole shareholder of DNA; P and N are the sole employees of DN; N and P are beneficiaries of the DN Family Trust; P is a declared drug trafficker and has taken steps to divest his registered ownership of real property to related parties; P does not have a day to day bank account and does not have a motor vehicle; P's TAB bank account utilised funds from N's bank account; N in effect controls all but one bank account as signatory.

Reasonable suspicion that P and N have committed an offence contrary to s 135.1(3)

58 Federal Agent Reilly has reason to suspect that P and N have committed such offences based on failing to declare their true income to the ATO; receiving government assistance when not entitled; and failing to declare true income received in cash.

Reasonable suspicion that P and N have each committed offences contrary to s 400.9(1) or s 400.9(1A)

59 Federal Agent Reilly's suspicion as to money laundering is based on P and N dealing with money to place bets on horse races via P's TAB account; dealing with money to place bets on horse racing; dealing with money from bets cashed in by N at RWWA; dealing with money by receiving purported winnings from SM; dealing with the proceeds of offences to purchase motor vehicles and properties; and obtaining mortgages where loans quickly reduced.

60 Federal Agent Reilly takes into account that the techniques of cashing in horse betting winnings, receiving winnings from third parties, and the purchase of vehicles and real estate are recognised as methods of integrating proceeds of crime, and constitute known money laundering techniques.

Reasonable suspicion that total wealth of P exceeds P's wealth lawfully acquired

61 Federal Agent Reilly addresses the three elements of the definition of 'wealth' in s 179G for each of P and N.

62 The value of property effectively controlled by P comprises cash at bank (\$241,324), vehicles (\$307,730) and real property (\$2,981,021) and totals \$3,530,078. The value of property that has been disposed of or consumed by P based on the net withdrawals from the various bank accounts is some \$5M. His declared taxable income for the period is \$232,173.

63 Having undertaken the same calculations with respect to N, Federal Agent Reilly suspects that N currently has assets under her effective control to the value of some \$3.5 M. The value of property that N has disposed of or consumed based on the net withdrawals from the various bank accounts is some \$5M. N has declared taxable income for the relevant period of approximately \$206,000.

64 Federal Agent Reilly therefore suspects that the total wealth of P and N exceeds their lawfully acquired wealth and by well more than the \$100,000 referred to in s 20A(4).

Suspicion held on reasonable grounds

65 The question is whether the facts outlined above give rise to a suspicion on reasonable grounds that P and N's total wealth exceeds their wealth lawfully acquired, and that they have committed an offence against the Commonwealth.

66 For there to be reasonable grounds to suspect there must be material which is sufficient to induce the state of suspicion in a reasonable person. It is not, however, necessary that the material which establishes the reasonable grounds for suspicion be limited to admissible evidence.⁹

67 On the facts outlined above, I am satisfied there are reasonable grounds for the suspicions deposed to by Federal Agent Reilly. The relatively modest level of disclosed income of P, N, DN and DNA and their receipt of government benefits stand in stark contrast to the accumulation of real properties (with secured debt rapidly reduced) and vehicles and the extensive overseas travel with its associated expenses. Such wealth is unexplained. Those matters reasonably lead one to suspect

⁹ *Director of Public Prosecutions (SA) v Tregenza* [2002] SASC 414; (2002) 84 SASR 346.

that P and N's total wealth exceeds their wealth lawfully acquired, and that they have failed to disclose their true income position to the ATO and so committed an offence under s 135.1 of the Code.

68 Those matters taken together with the evidence as to what appear to be very successful gambling patterns would reasonably lead one to suspect, in the absence of explanation, that the transactions were conducted in circumstances that comprise an offence under s 400.9(1) or s 400.9(1A) of the Code.

69 Taking into account the inter-relationship of the relevant entities, there are reasonable grounds to suspect that the funds standing to the credit of the bank accounts, real property and vehicles referred to in the application, whether in the name of N, P, DN, DNA, or DNA jointly with P are subject to the effective control of both P and N and held for their benefit. There are also reasonable grounds for suspecting that future rentals from the specified properties, although presumably payable to the registered proprietor, are under the effective control of and for the benefit of P and N.

70 Those matters are sufficient basis to make the restraining orders addressed separately to each of P and N as sought.

Other orders requested and subsequent developments

71 At the hearing, I also made certain custody and control orders to facilitate the sale of the Southbank property and payments to the third party financier of one of the motor vehicles if required. Custody and control orders were also made to protect the specified property generally. I also made certain orders for the provision of a statement of assets and liabilities and for examinations, although in both cases on a more limited basis than requested by the applicant. The applicant did not press for certain other ancillary orders to be determined ex parte. A preliminary unexplained wealth order was also made under s 179B based on the same evidence of Federal Agent Reilly referred to above, and the hearing of the application for a final order has not yet been listed.

72 I have subsequently stayed on an interim basis the operation of the orders with respect to the examinations and listed a further hearing. Matters relating to the examinations will be addressed separately following the hearing if required.