



Summary of Judgment

NGUYEN v DIRECTOR OF PUBLIC PROSECUTIONS

[2019] VSCA 20

13 February 2019

Today, the Court of Appeal (President Maxwell, Justice Tate and Justice Niall) dismissed an appeal by Thi Thu Ha Nguyen ('Nguyen') from an unexplained wealth restraining order made against her under the *Confiscation Act 1997* ('the Act').

Under s 40I of the Act, a court has power to make an unexplained wealth restraining order to preserve property so that it is available for forfeiture. The Director of Public Prosecutions ('the DPP'), or an appropriate officer, may seek a restraining order without notice (that is, *ex parte*) to the person affected. A restraining order may be self-executing so that the property restrained may be automatically forfeited after six months despite there being no rehearing between the DPP and the person affected.

On 27 October 2015 an unexplained wealth restraining order was made *ex parte* prohibiting any person from disposing or dealing with property owned by Nguyen. Nguyen was given notice after the order was made and she applied unsuccessfully to have her property excluded. On 9 October 2017 an order was made declaring the property forfeited.

Nguyen applied for leave to appeal. She challenged the constitutional validity of s 40I of the Act on the basis that it infringed the principle in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 because it did not guarantee a right to participate in an *inter partes* hearing before forfeiture. She submitted that s 40I substantially impairs the institutional integrity of the court by restricting its ability to afford procedural fairness and by failing to provide for curial enforcement of the duty of full disclosure governing an *ex parte* application.

The Court of Appeal granted leave to appeal but dismissed the appeal. It observed that under the Act the court has the power to direct that the DPP give prior notice of an application for an unexplained wealth restraining order to an affected party. The Act does not exclude the inherent or implied power of a court to set aside a restraining order made *ex parte*. The Act also confers a broad power to make 'any order ... it considers just' which, interpreted in accordance with the principle of legality and the *Charter of Human Rights and Responsibilities*, permits orders to be made enforcing the duty of full disclosure. The court retains control over the fairness of its own processes. There is no impairment to the court's institutional integrity.

NOTE: This summary is necessarily incomplete. It is not intended as a substitute for the Court's reasons or to be used in any later consideration of the Court's reasons. The only authoritative pronouncement of the Court's reasons and conclusions is that contained in the published reasons for judgment.