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Supreme Court of Victoria - Court of Appeal

Proudfoot v DPP [2020] VSCA 138 (29 May 2020)

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SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2019 0011

GRAHAM PROUDFOOT — Applicant

v

DIRECTOR OF PUBLIC PROSECUTIONS — Respondent

JUDGES:	TATE, McLEISH and HARGRAVE JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	11 March 2020
DATE OF JUDGMENT:	29 May 2020
MEDIUM NEUTRAL CITATION:	[2020] VSCA 138
JUDGMENT APPEALED FROM:	[2018] VCC 2033 (Judge Dyer)

CONFISCATION – Restraining orders – Tainted property – Prohibition on access to restrained property for legal expenses – No common law or constitutionally protected right to counsel – Provision of legal aid – Court's power to direct legal assistance 'on any conditions' – Right to fair trial – *New South Wales Crimes Commission v Fleming* (1991) 24 NSWLR 116, *Dietrich v The Queen* [1992] HCA 57; (1992) 177 CLR 292, *Sypott v The Queen* [2003] VSC 41, *Director of Public Prosecutions v McEachran* [2006] VSCA 286; (2006) 15 VR 268, *R v Chaouk* (2013) 40 VR 356, *Cardamone v Director of Public Prosecutions* [2017] VSC 618 discussed – *Confiscation Act 1997* ss 14(5), 18, 143 – Leave to appeal granted, appeal dismissed.

CONSTITUTIONAL LAW – Chapter III – Challenge to validity of legislation – Unnecessary to answer – Constitutional questions not to be determined on hypothetical facts – Court to determine

rights of parties in actual controversy – *Lambert v Wiechelt* (1954) 28 ALJ 282, *Duncan v New South Wales* [2015] HCA 13; (2015) 255 CLR 388, *Knight v Victoria* [2017] HCA 29; (2017) 261 CLR 306 discussed – Recent decision of the Court – *Nguyen v Director of Public Prosecutions* (2019) 59 VR 27 discussed.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr M Hume	JT Lawyers
For the Respondent	Ms E Ruddle with Ms A Singh	Ms A Hogan, Solicitor for Public Prosecutions

TATE JA

McLEISH JA

HARGRAVE JA:

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Introduction and summary

1 The applicant, Graham Proudfoot ('Proudfoot'), was charged with the cultivation of a commercial quantity of cannabis from a property in Bayswater, Victoria. The County Court made a restraining order over the property under s 18 of the *Confiscation Act 1997* ('the Act')[1] prohibiting Proudfoot from dealing with the property to ensure its availability for forfeiture, or to satisfy a pecuniary penalty order under the Act. The restraining order was made *ex parte* but Proudfoot was given

notice of it. He applied to the County Court to have the restraining order declared void. He was granted legal assistance under the Act in respect of both the criminal charges and his application under the Act.

2 Proudfoot submitted before the County Court that the restraining order was of no force or effect because the Act, while it empowers the court to direct that legal assistance be provided,[2] abrogates the constitutionally protected 'right' to counsel of choice. He further submitted that s 18 is constitutionally invalid by reason of offending the principle in *Kable v Director of Public Prosecutions (NSW)*,[3] as expressed in *International Finance Trust Co Ltd v New South Wales Crime Commission*,[4] because a court cannot guarantee that notice of a restraining order, made *ex parte*, will be given to the affected person before forfeiture. Judge Dyer dismissed Proudfoot's application for a declaration that the restraining order was void.[5]

3 Proudfoot applies for leave to appeal from the decision of the County Court upholding the validity of the restraining order.

4 On the application for leave to appeal, Proudfoot reasserts a 'right' to counsel of choice. More precisely, he submits that there is a 'fundamental principle'[6] of the common law that a person accused of a crime is entitled to employ out of their own resources the legal representation of their choice and the prohibition in the Act on the release of restrained property for the purpose of legal expenses, s 14(5),[7] infringes that right. This affects the validity of s 18. He maintains that the power to direct that legal assistance be given, under s 143,[8] does not rescue s 18 from invalidity. He also repeats the *Kable* argument he made in the County Court despite the recent decision of this Court in *Nguyen v Director of Public Prosecutions*[9] that a relevantly comparable power to s 18, namely, the power to make an unexplained wealth restraining order,[10] is not invalid on *Kable* grounds.

5 Proudfoot issued a notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) to the Attorneys-General of the Commonwealth, the States, the Australian Capital Territory and the Northern Territory, informing them of the *Kable* issue. No Attorney-General has elected to intervene.

6 We consider that leave to appeal should be granted but the appeal should be dismissed.[11] There is no free-standing 'right' to counsel of choice under the Commonwealth *Constitution* or at common law. However, it is significant that the Act provides that where a person's property is restrained it is unavailable to be deployed to fund legal representation. In this context, the power of the court, under s 143, to order that Victoria Legal Aid ('VLA') provide legal assistance, 'on any conditions specified by the court', is important. In our view, this power is cast in sufficiently broad terms to permit the court to order that appropriate legal assistance be provided and to specify the measure of that assistance against the touchstone of ensuring a fair hearing. The court may adjourn the legal proceeding until such assistance has been provided.

7 We consider that it is unnecessary and inappropriate for this Court to determine the constitutional challenge to s 18 as infringing the *Kable* principle because it is not based on 'a state of facts which makes it necessary to decide [the] question'.[12] This conclusion is also supported by the consideration that the validity of the regime for restraining orders under the Act has recently been fully examined and upheld by this Court in *Nguyen*.

The application for a restraining order

8 On 20 July 2016, the Director of Public Prosecutions ('the DPP') made an application for a restraining order in respect of property in which Proudfoot has an interest, or which is tainted property, within the meaning of the Act. The property identified is 6 Dalpura Drive, Bayswater of which Proudfoot is the registered proprietor ('the property').

9 The application was supported by an affidavit sworn 20 July 2016 by Ms Dannielle O'Keefe, a Detective Leading Senior Constable of Victoria Police attached to the Criminal Proceeds Squad. She deposed that on 9 February 2016, a search warrant was executed at the property where police found a number of cannabis plants with a total weight of 57.19 kilograms. The plants were grown on the property which is the subject of the restraining order.[13] On 10 February 2016 Proudfoot was charged with cultivating a commercial quantity of a narcotic plant contrary to s 72A of the *Drugs, Poisons and Controlled Substances Act 1981* ('the DPC Act'),[14] cultivating a narcotic plant,[15] trafficking in a drug of dependence[16] and possessing a drug of dependence.[17] Cultivating a commercial quantity of cannabis is a sch 2 automatic forfeiture offence within the meaning of the Act.

10 Detective Leading Senior Constable O'Keefe further deposed that the property was used by Proudfoot 'in, or in connection with, the commission of' the offences, which is the relevant part of the definition of 'tainted property'.[18]

11 On 26 July 2016 an *ex parte* restraining order was made by Judge Cohen in the following terms:

> PURSUANT TO SECTION 18 OF THE *CONFISCATION ACT 1997*, THE COURT ORDERS THAT:
>
> 1. No person shall dispose of or otherwise deal with the property specified below or any interest in that property:
>
> > (a) Property at 6 Dalpura Drive, Bayswater, more particularly described in Certificate of Title volume 08789 Folio 888, and registered in the name of Graham Leonard PROUDFOOT.
> >
> > ...
> >
> > AND THE COURT DECLARES pursuant to section 15(3)(a) of the *Confiscation Act 1997* that the property specified in paragraph 1 of this order be restrained for the following purposes:
> >
> > (a) to satisfy any forfeiture order that may be made under Division 1 of Part 3 of the *Confiscation Act 1997*;
> >
> > (b) to satisfy any automatic forfeiture of property that may occur under Division 2 of Part 3 of the *Confiscation Act 1997*; and
> >
> > (c) to satisfy any pecuniary penalty order that may be made under Part 8 of the *Confiscation Act 1997*.

12 Proudfoot was notified of the restraining order on or about 28 July 2016.

13 On 4 November 2016, Judge Lacava of the County Court made consent orders requiring VLA to provide legal assistance to Proudfoot with respect to his criminal charges.

14 Proudfoot entered a plea of guilty to a single charge of cultivating a commercial quantity of cannabis and on 12 December 2016 Proudfoot was sentenced to four months' imprisonment and a two-year community correction order.

15 On 12 February 2017, Proudfoot made an application for the exclusion of the property from the scope of the restraining order in accordance with s 22 of the Act ('the exclusion application').[19] He was granted an extension of time within which to bring the application.

16 On 28 September 2017, Proudfoot applied, pursuant to s 143 of the Act, for legal aid in respect of the exclusion application, 'as well as any litigation related to the restraining order'. On 17 October 2017, Judge Murphy amended the earlier orders for legal assistance made by Judge Lacava to include a requirement that the grant of legal aid be extended beyond the criminal proceedings to include 'any litigation related to the Restraining Order made by her Honour Judge Cohen on 26 July 2016'.

17 On 19 March 2018, Proudfoot applied to the County Court for a declaration that the restraining order was void on *Kable* grounds.[20] He sought to remove the proceeding to the High Court. On 13 June 2018, the High Court refused the removal application on the basis that it did not present an issue appropriate for removal to that Court.[21]

18 Judge Dyer of the County Court heard Proudfoot's exclusion application and his application challenging the validity of the restraining order and s 18 of the Act. He dismissed both applications ('the final order').[22]

19 Before examining Judge Dyer's reasons, it is useful to consider the statutory scheme of the Act.

The statutory scheme

20 Part 2 of the Act deals with 'Restraining orders other than civil forfeiture restraining orders and unexplained wealth restraining orders'.

21 Section 14(1) explains that a restraining order prohibits restrained property from being disposed of or otherwise dealt with by any person except in the manner specified in the order. Section 14(5) prohibits the payment of legal expenses from restrained property; it is this prohibition that Proudfoot submits has the indirect effect of rendering s 18 invalid. These provisions state:

> **14 Restraining orders**
> (1) A restraining order is an order that no property or interest in property, that is property or an interest to which the order applies, is to be disposed of, or otherwise dealt with by any person except in the manner and circumstances (if any) specified in the order.
>
> ...
>
> (5) A court, in making a restraining order, must not provide for the payment of legal expenses in respect of any legal proceeding, whether criminal or civil, and whether in respect of a charge to which the restraining order relates or otherwise.

22 Section 16 sets out the circumstances in which an application for a restraining order can be made and allows for applications to be made without notice to the person affected. The application for the restraining order in this case was made under s 16(2)(c).[23] Section 16 relevantly provided:

> **16 Application for restraining order**
>
> ...
>
> (2) The DPP or a prescribed person, or a person belonging to a prescribed class of persons, may apply, without notice, to the Supreme Court or the County Court for a restraining order in respect of property if —
>
> ...
>
> (c) a person has been charged with a Schedule 2 offence and that person has an interest in the property or the property is tainted property in relation to that offence ...
>
> ...
>
> (6) An application under subsection ... (2) ... in relation to property or an interest in property may be made more than once, whether on the same grounds or different grounds, for any purpose referred to in section 15(1).

23 Section 17 confers on the court the power to require that notice of the application for a restraining order be given before the making of an order. If the court does not require that notice be given, it may hear and determine the application in the absence of any person with an interest in the relevant property:

> **17 Procedure on application**
> (1) If, having regard to the matters in subsection (1A), the court is satisfied that the circumstances of the case justify the giving of notice to a person affected, the court may direct an applicant under section 16(1), (2) or (2A) to give notice of the application to any person whom the court has reason to believe has an interest in the property that is the subject of the application.
>
> (1A) In determining whether the circumstances of the case justify the giving of notice, the court must have regard to—
>
> (a) the aim of preserving the property that is the subject of the application so as to ensure its availability for the purpose for which the restraining order is sought; and
>
> (b) any jeopardy to an investigation by a law enforcement agency into criminal activity that could result from the giving of notice; and
>
> (c) any risk to the safety or security of a person, including a potential witness in any criminal proceeding, that could result from the giving of

> notice; and
>
> (d) the provision made by this Act to enable a person claiming an interest in property the subject of a restraining order to apply for an exclusion order to protect that interest from the operation of the restraining order; and
>
> (e) the limited duration of a restraining order; and
>
> (f) the submissions, if any, made by the applicant in relation to the giving of notice.
>
> (1B) In determining whether to direct an applicant to give notice of an application under section 16(1), (2) or (2A), the court may have regard to any other matter that the court considers relevant.
>
> (1C) If the court does not require notice of an application under section 16(1), (2) or (2A) to be given under subsection (1), it may hear and determine the application in the absence of any person who has an interest in the property that is the subject of the application.
>
> (2) Any person notified under subsection (1) is entitled to appear and to give evidence at the hearing of the application but the absence of that person does not prevent the court from making a restraining order.
>
> (3) The court may—
>
> (a) order that the whole or any part of the proceeding be heard in closed court; or
>
> (b) order that only persons or classes of persons specified by it may be present during the whole or any part of the proceeding; or
>
> (c) make an order prohibiting the publication of a report of the whole or any part of the proceeding or of any information derived from the proceeding.
>
> (4) The court must cause a copy of any order made under subsection (3) to be posted on a door of the court house or in another conspicuous place where notices are usually posted at the court house.
>
> (5) A person must not contravene an order posted under subsection (4).
>
> Penalty: Imprisonment for 12 months or 1000 penalty units.

24 Section 18 is the source of the court's power to make a restraining order. An order must be made if the court is satisfied of certain statutory criteria:

> **18 Determination of application**
> (1) On an application made under section 16(1), (2) or (2A), the court must make a restraining order if it is satisfied that the accused—
>
> (a) has been, or within the next 48 hours will be, charged with; or

(b) has been convicted of—

a Schedule 1 offence, a Schedule 2 offence or a serious drug offence (as the case may be) and—

(c) it considers that, having regard to the matters contained in the affidavit supporting the application and to any other sworn evidence before it, there are reasonable grounds for making the restraining order; and

(d) if the restraining order is being sought for a purpose referred to in section 15(1)(e), it is satisfied that—

(i) applications have been, or are likely to be, made for restitution or compensation under the *Sentencing Act 1991* in respect of the Schedule 1 offence or Schedule 2 offence; and

(ii) the order of the court under the *Sentencing Act 1991* is likely to exceed $10 000.

25 Section 19 requires that notice of the restraining order be given to the person affected if notice has not already been given of the application. Section 19 assumed some importance in the appeal in the context of the *Kable* argument. It provides:

19 Notice of restraining order to be given to persons affected
(1) If—

(a) a restraining order is made in respect of property of a person; and

(b) notice had not been given to that person of the application for the order—

the applicant must give written notice of the making of the order to that person.

(2) If a person to whom notice must be given under subsection (1) cannot be found after all reasonable steps have been taken to locate the person, the applicant must cause to be published in a newspaper circulating generally in Victoria a notice containing details of the restraining order or give notice to that person in any other manner that the court directs.

Note

Section 14 provides that a restraining order may be made in respect of property or an interest in property.

26 Section 20 provides that any person claiming an interest in the property restrained may make an application to exclude some or all of the property restrained from the scope of the restraining order. Various statutory criteria apply for the making of an exclusion order under s 21 or s 22 depending on whether the relevant offence is a sch 1 or a sch 2 offence and depending upon whether the applicant for exclusion is the accused or another person. For example, in respect of a

sch 2 offence, an order excluding an applicant's interest in the restrained property from the operation of the restraining order may be made if the court is satisfied that the property was lawfully acquired, is not tainted property, is not derived property, and will not be required to satisfy any pecuniary penalty order or order for restitution or compensation under the *Sentencing Act 1991*.

27 Section 26 confers a broad discretionary power upon the court to make further orders in relation to the restrained property. Proudfoot relied upon s 26 in making his application for a declaration that the restraining order was void:

> **26 Further orders**
> (1) The court may, when it makes a restraining order or at any later time, make such orders in relation to the property to which the restraining order relates as it considers just.
>
> (2) An order under subsection (1) may be made on the application of—
>
> ...
>
> (b) the accused; or
>
> (c) a person to whose property the restraining order relates or who has an interest in that property; or
>
> ...
>
> (3) Any person referred to in subsection (2) is entitled to appear and to give evidence at the hearing of an application under this section but the absence of that person does not prevent the court from making an order.
>
> (4) The applicant for an order under subsection (1) must give written notice of the application to each other person referred to in paragraphs (a) to (d) of subsection (2) who could have applied for the order.
>
> ...
>
> **Note**
>
> ***Property*** is defined as including any interest in property: see section 3(1).

28 Section 35 provides for the automatic forfeiture of restrained property 60 days after the conviction of a sch 2 offence or the making of the restraining order, whichever is later. The time period is suspended if there are exclusion applications pending, and the like:

> 35. **Automatic forfeiture of restrained property on conviction of certain offences**
>
> (1) If—
> (a) a person is convicted of a Schedule 2 offence; and

(b) a restraining order is or was made under Part 2 in respect of property for the purposes of automatic forfeiture in reliance on—

(i) the conviction of the accused of that offence; or

(ii) the charging or proposed charging of the accused with that offence or a related offence that is a Schedule 2 offence; and

(c) the restrained property is not the subject of an exclusion order under section 22; and

(ca) the restrained property is not the subject of an application under section 20 that is still pending—

the restrained property, subject to any declaration under section 23, is forfeited to the Minister on the expiry of 60 days after—

(d) the making of the restraining order; or

(e) the conviction of the accused—

whichever is later.

(2) If an application under section 20 in respect of restrained property is still pending on the expiry of the period of 60 days referred to in subsection (1), the property is forfeited to the Minister—

(a) if the application is refused or dismissed, at the end of the period during which the person may appeal against the refusal or dismissal or, if such an appeal is lodged, when the appeal is abandoned or finally determined without the order having been made; or

(b) if the application is withdrawn or struck out, on that withdrawal or striking out.

(2A) For the purposes of subsections (1) and (2), an application under section 20 is not pending unless an application under section 20(1) has been made—

(a) within the period referred to in section 20(1A); or

(b) where, under section 20(1B), the court has extended the period within which the application may be made—within the period as so extended and before the expiry of the period of 60 days referred to in subsection (1).

...

29 Section 143, in pt 16 of the Act, empowers the court to direct that VLA provide legal assistance, relevantly, to a person whose property is subject to a restraining order. The court can specify 'any conditions' on the provision of that legal assistance. The operation of s 143, and the scope of the condition-specifying power, lies at the heart of the appeal:

143 Provision of legal aid

(1) If a court is satisfied at any time that—

(a) a restraining order or a civil forfeiture restraining order or an unexplained wealth restraining order has been made in respect of property of a person and the restraining order or the civil forfeiture restraining order or the unexplained wealth restraining order, as the case requires, is in force; and

(b) the person is in need of legal assistance in respect of any legal proceeding, whether civil or criminal, and whether in respect of a charge to which the restraining order or the civil forfeiture restraining order or the unexplained wealth restraining order, as the case requires, relates or otherwise, because the person is unable to afford the full cost of obtaining legal assistance from a private law practice or private legal practitioner (within the meaning of the *Legal Aid Act 1978*) from unrestrained property or income of the person—

the court may *order Victoria Legal Aid to provide legal assistance to the person, on any conditions specified by the court, and may adjourn the legal proceeding until such assistance has been provided*.

(2) Despite anything in the *Legal Aid Act 1978*, Victoria Legal Aid *must provide legal assistance in accordance with an order made under subsection (1)*.

(3) If—

(a) a court makes an order under this section; and

(b) a *condition of the provision of legal assistance* is that the cost or part of the cost, and any interest payable on the whole or the part of the cost, to Victoria Legal Aid of providing the assistance be secured by a charge over any land or any other property in which the person has an interest; and

(c) an amount required to be paid to Victoria Legal Aid under such a condition is not paid; and

(d) the person to whom legal assistance is provided is registered as the proprietor of an estate in fee simple ....

Victoria Legal Aid may secure the payment of any amount which has not been paid ... by taking out a charge over that land.

(4) A charge taken out by Victoria Legal Aid is to be for the benefit of the Legal Aid Fund.

(5) Sections 47B, 47D and 47E of the *Legal Aid Act 1978* apply to a charge over land referred to in this section as if it were a charge to which section 47A(2) of that Act applies.

> (6) If an amount owed to Victoria Legal Aid under this section is not paid and Victoria Legal Aid is unable, by enforcing a charge to which subsection (3) applies or otherwise, to recover that amount, then the State must pay that amount to Victoria Legal Aid to the value of any property forfeited to the Minister or the amount of any penalty paid to the State (less conversion costs and any amount paid under section 31 or section 36ZB) in relation to the offence in reliance on which the restraining order or the civil forfeiture restraining order or the unexplained wealth restraining order, as the case requires, was made and the Consolidated Fund is, to the necessary extent, appropriated accordingly.[24]

The judge's reasons

30 Proudfoot submitted before Judge Dyer that s 18 of the Act is invalid because a respondent to a restraining order obtained *ex parte* is prohibited from accessing lawfully obtained funds for the payment of legal costs for any rehearing. He also submitted that s 18 is invalid as contrary to the *Kable* principle 'as a result of the statute requiring the making of self-executing *ex parte* orders in circumstances where a court cannot ensure that notice of the order will ever be given to the respondent prior to self-execution',[25] and where the respondent may be deprived of sufficient time and opportunity for the holding of an *inter partes* hearing.

31 He submitted that the Act — by precluding a court, when making a restraining order, from providing for the payment of legal expenses, under s 14(5), yet enabling a court to order the provision of legal aid administered by an independent public body under s 143(1) — has the effect of compelling a respondent to obtain counsel as paid for or provided by VLA. This was argued to place a respondent at an unfair and arbitrary disadvantage by comparison to the DPP who is not compelled to accept counsel at similar rates. He submitted this was constitutionally impermissible, relying on a decision of the United States Supreme Court, *Luis v United States*.[26] He also submitted that the Act effectively removed the power of a respondent to seek legal funding in open court, thus abrogating what he submitted was a constitutionally protected common law right to counsel.

32 Judge Dyer rejected both submissions. He distinguished *Luis* because it was largely decided on the basis of the constitutional principle of a right to counsel as contained in the Sixth Amendment to the *United States Constitution* whereas there is no similar provision in Australia's *Constitution.* He was not persuaded that Proudfoot had not obtained a fair trial, given that he was granted an extension of time in which to make an exclusion application and orders were made for VLA to provide him with legal assistance for his criminal proceedings, later extended to include any litigation relating to the restraining order. He also rejected the view that the court was divested of any judicial power by s 18, given that s 143 enables a court to order VLA to provide funding for legal assistance.

33 The judge also rejected the submissions based on the potential for lack of notice. He emphasised that the question of whether notice of an *ex parte* application is given before a hearing remains within the control of the court in accordance with s 17 of the Act.[27]

34 He noted that '[no] argument was advanced ... in relation to exclusion'[28] which he described as 'not surprising'[29] given Proudfoot's plea of guilty to the charge of cultivating a commercial quantity of cannabis in respect of plants that were grown on the property. The circumstances thus satisfied the clear words of the Act that Proudfoot 'has used the property in or in connection with the commission of the offence'.[30] As noted, this falls within the definition of 'tainted property'.[31]

The grounds of appeal

35 In his application for leave to appeal, Proudfoot raises two proposed grounds of appeal, the second of which is divided into two sub-grounds:

> Ground 1 – The restraining order and final order are void as a result of the restraining order made under s 18 of the Act prohibiting the court from releasing funds for legal expenses.
> Ground 2A – The restraining order and final order are void as a result of s 18 of the Act requiring the making of self-executing *ex parte* orders in circumstances where a court cannot ensure that notice of the order will be given prior to self-execution.
>
> Ground 2B – The restraining order and final order are void as a result of the restraining order not having made special provision for the order to elapse unless served in sufficient time.

Prohibition on access to restrained property for legal expenses — Ground 1

36 The first ground, in effect, contends that s 14(5) of the Act, together with s 143, is constitutionally invalid for inconsistency with a suggested constitutional right to counsel. The precise source and scope of the suggested right were never identified. Instead, Proudfoot argued that the operation of the impugned provisions variously contravened other constitutional principles.

37 Proudfoot attacks s 143, and the effect it has on proceedings in relation to a s 18 restraining order, by submitting that s 143 amounts to a legislative choice designed 'as a corrective to courts which might allow "Rolls Royce" defences to be run with a respondent's own money'. He claims this results in prosecutors having an unfair advantage. He emphasises that the property restrained here is his family home and it was common ground that it had been purchased by the use of lawful funds. He submits that equity in the property should be available for him to retain counsel of his choice for his various court proceedings.

38 He contrasts the manner in which s 143(1) operates with the power a court has to exclude funds from *ex parte* freezing orders to pay for legal assistance in relation to the conduct of legal proceedings.[32] He submits s 143(1) divests the court of this judicial function and in its place confers a power on a non-judicial body to provide the legal assistance. He identifies what he describes as constitutional 'deficits' that arise by this arrangement.

39 First, echoing the submission made before Judge Dyer, Proudfoot submits that for a litigant to be compelled to obtain counsel as paid for, or provided by, VLA at reduced non-market rates breaches the usual rule applied by courts which authorise the release of funds at market rates, for example, as mentioned, with respect to the release of funds from frozen assets. He submits this necessarily disadvantages an accused who is thereby compelled to litigate against an adversary

who is not similarly confined to counsel willing to appear on similarly reduced rates, but may brief counsel at market rates.

40 Second, he submits that the statutory scheme removes the power of the litigant to have a judicial officer decide how much funding should be allowed for a proceeding. Instead, he submits that VLA, representing the Crown, makes the decision as to how much money, if any at all, may be used in litigating a particular matter. In his Written Case he submits that '[o]nce an order under section 143 is made, Victoria Legal Aid is within its rights to provide legal advice that no application should be made, or to only provide funding at rates so low that no reasonable counsel can be found at the prevailing market rate'.

41 He submits that these deficits strike at what he describes as 'the constitutionally-protected right to a rehearing';[33] interfere with the right that punishment be administered only through a judicial procedure;[34] and destroy the ability of the litigant to apply to the Supreme Court for declarations that certain executive actions or legislation are ultra vires the *Constitution*.[35]

42 We reject Proudfoot's first submission as we do not accept that an accused represented by counsel paid at legal aid rates is necessarily at a disadvantage by comparison with the prosecution. Counsel who accept legal aid rates do so recognising that there is a public benefit in an accused receiving legal representation and that their work, undertaken honestly and conscientiously, contributes to the public good. With that understanding, they are willing to accept less than market rates and nevertheless represent an accused to the best of their ability and in accordance with the highest of standards. The willingness of very many counsel, no matter their rank, to undertake pro bono work, and nevertheless represent their client to the highest of standards, is carried out with a similar recognition that they make a contribution to the public good. The preparedness to take on such work is in keeping with a strong tradition of the Victorian Bar.[36]

43 In any event, the fact that the courts provide for exclusions from freezing orders for the purpose of meeting legal expenses says nothing as to the existence of any constitutional imperative to that effect. Furthermore, as the DPP submits, the regime for imposing freezing orders to which Proudfoot refers is a distinct and unrelated statutory scheme to that imposed under the Act and in relation to which the court has no power equivalent to s 143(1). Its purpose is to prevent frustration or abuse of the process of the court before final judgment in a civil proceeding. On this basis, the value of the assets should not exceed the likely maximum amount of the applicant's claim. The power to impose, or relax, freezing orders in civil proceedings has no bearing on a scheme designed to restrain property where, for example, the property represents the proceeds of offences, or is used in connection with the commission of certain offences, to render it available for forfeiture to the Crown and to preserve assets for the purpose of restitution or compensation to victims of crime.

44 With respect to Proudfoot's second submission, by way of preliminary observation, it should be made clear that VLA does not represent the Crown.[37] Proudfoot is mistaken in his assertion. Moreover, if an order was made by a court under s 143(1) of the Act that VLA was 'to provide legal assistance to the person', a decision by VLA not to provide legal assistance to that person would be in contempt of court as wilful non-compliance. Section 143(2) mandates that VLA provide legal assistance in accordance with an order made under subsection (1) and that it do so '[d]espite

anything in the *Legal Aid Act 1978*'.[38] It is not the case that VLA can choose, in the face of an order made by the court under s 143(1), not to provide any legal assistance. There is no suggestion that VLA would ever conduct itself by way of a wilful refusal to give effect to a court order and the hypothetical example can be put to one side.

45 Proudfoot's second submission can be re-stated as a complaint that the effect of s 143 is that in the ordinary course a non-judicial officer decides how much funding should be allowed for a matter. In our view, there is no substance to this complaint. There is nothing surprising, still less constitutionally suspect, in the executive deciding how much funding should be provided. It is the executive which is in control of the revenue appropriated by Parliament for legal aid purposes, and which, generally speaking, has the authority to determine how it is to be spent. These decisions will be informed by matters of policy and involve the allocation of scarce resources. They are inherently the type of decisions made by non-judicial officers who are members of the executive.[39] In any event, in our view s 143, properly construed, allows for judicial involvement in the question of appropriate legal assistance.[40]

46 Proudfoot identifies what he says is a third deficiency in the Act. He submits that the Act does not allow for submissions to be made and heard in open court as to the amount of actual funding required to be provided. We deal with this proposition in analysing the construction of s 143 below.[41] Before coming to that submission, however, it is important to consider a core argument of Proudfoot's, namely, the right he submits is recognised by the common law to counsel of choice.

Common law right to counsel of choice

47 Proudfoot relies on *Dietrich v The Queen*,[42] and the judgment of Kirby P in *New South Wales Crime Commission v Fleming*[43] as supporting the proposition that Australia does recognise a common law right to counsel and that such a right was considered a fundamental aspect of judicial procedure prior to federation.

48 In response, the DPP submits that Proudfoot's argument amounts to a claim that there is a constitutionally protected right to counsel of choice and that pt 2 of the Act infringes upon such a right by prohibiting the release of restrained property for the purpose of legal expenses. She submits, and we agree, that the common law in Australia does not recognise the right of an accused, or a party to a civil proceeding,[44] to be provided with counsel at public expense and that Proudfoot's reliance on *Dietrich* is misplaced. There is a fundamental right to a fair trial.[45] *Dietrich* stands for the proposition that the courts have the power to grant a stay of a proceeding that will result in an unfair trial. The power to grant a stay extends to a case where legal representation is essential to a fair trial. As Mason CJ and McHugh J in *Dietrich* observed:

> In our opinion, and in the opinion of the majority of this Court, *the common law of Australia does not recognise the right of an accused to be provided with counsel at public expense*. However, the courts possess undoubted power to stay criminal proceedings which will result in an unfair trial, the right to a fair trial being a central pillar of our criminal justice system. The power to grant a stay necessarily extends to a case in which representation of the accused by counsel is essential to

> a fair trial, as it is in most cases in which an accused is charged with a serious offence.
>
> ...
>
> The right of an accused to receive a fair trial according to law is a fundamental element of our criminal justice system. As Deane J correctly pointed out in *Jago v District Court (NSW)*, the accused's right to a fair trial is more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial, for no person can enforce a right to be tried by the State; however, it is convenient, and not unduly misleading, to refer to an accused's positive right to a fair trial. The right is manifested in rules of law and of practice designed to regulate the course of the trial. However, the inherent jurisdiction of courts extends to a power to stay proceedings in order 'to prevent an abuse of process or the prosecution of a criminal proceeding ... which will result in a trial which is unfair'.[46]

49 If there is no right to counsel, it follows that there is no right at common law or under the *Constitution* to counsel of choice at public expense.[47]

50 Nevertheless, the power of the court to stay a proceeding to prevent an abuse of process, or an unfair trial, is an important consideration in interpreting the purpose and scope of the power under s 143(1). This is discussed below.[48]

51 The DPP seeks to distinguish *Fleming*. In *Fleming* the relevant legislation, the *Drug Trafficking (Civil Proceedings) Act 1990* ('the DT(CP) Act'), in contrast to the Act, allowed a court in making a restraining order to make provision for meeting a person's 'reasonable legal expenses' from the restrained property. There was no standard or measure provided for what was 'reasonable'. At first instance Mathews J rejected the submission that the court should make no prospective provision for reasonable legal expenses but should leave the provision to be determined by the taxing officer of the Supreme Court. Instead she determined that the restraining orders be amended to provide that the expenses be taxed, but in accordance with a scale urged upon her by Fleming and the other respondents. The New South Wales Court of Appeal upheld this approach in principle but held that the particular orders made were inappropriate.[49]

52 Kirby P affirmed that there was nothing in the relevant section that precluded the specification in the restraining order of a measure by which the 'reasonable legal expenses' of a person subject to the order might be determined.[50] However, he went on to describe the undesirability of the court having to do so:

> The prospect of judges of the court before (any more than of taxing officers, after) relevant proceedings resolving as issues of fact and opinion the reasonableness or otherwise of legal expenses where these are in contest is an unwelcome one.[51]

53 Kirby P identified what he called 'a conflict in policy' in the DT(CP) Act, namely, ensuring both that restrained property is available for forfeiture to the Crown, and not significantly diminished, while ensuring that an accused receives a fair trial. Kirby P described the 'maintenance of an

independent, private legal profession' as part of the tradition in Australia, and before it in England, and 'arguably a course preferable to the expansion of demands upon the public purse'.[52]

54 Kirby P adopted a construction of the DT(CP) Act that did not endorse the use of restrained property to fund expensive lawyers from the private Bar to act on behalf of an accused:

> Given the objects of the Act, the establishment of the Confiscated Drug Proceeds Account within the Treasury and the purposes for which payments from that account may be made ... *it is scarcely likely that Parliament would have intended that a person*, securing provision for 'reasonable legal expenses', *should have a complete free hand* in that regard to the extent that the person expends funds upon legal expenses, the property of that person is diminished. In that property the Crown, in the form of the Confiscated Drug Proceeds Account, has a contingent interest. *It would be especially surprising, given the objects of the Act, to adopt a construction of its provision which would permit an accused person unrestricted use of property which is clearly the proceeds of drug-related activity to engage a team of expensive private lawyers paid at the full market rates of the private Bar*.[53]

55 Fleming of course involved a question of statutory interpretation and not the identification of any common law (or constitutional) right to counsel. However, to the extent that this passage supports the proposition that there is no right to counsel of choice at public expense, and no obligation by the State to ensure that an accused is represented by counsel of their choosing, by public expense or through access to private assets, we endorse it.

56 However, that is not the end of the matter. Kirby P also observed that an accused 'should not be unfairly deprived of the means of defending themselves'.[54] He said:

> [The DT(CP)] Act is not written on a blank page. It was enacted against a background of settled civil rights. These include the presumption of innocence in criminal proceedings; the *presumption that a person may use his or her property as that person decides, and specifically may use that property to defend serious legal proceedings*.[55]

57 We return to the relevance of such presumptions to the question of statutory interpretation raised by ss 14(5) and 143, below.[56]

Fundamental principle of access to private assets to fund proceedings

58 Proudfoot's submission on the appeal wavered between asserting a free-standing common law right to counsel and a right to be represented by counsel if counsel is available and their rates are privately affordable by the person requiring legal representation. The former submission reflects that relied upon in the County Court, and was, in our view, correctly rejected by Judge Dyer. However, at the hearing of the appeal, counsel for Proudfoot developed that submission further by arguing that the Act interfered with a person's right to be legally represented if counsel was available and affordable. The interference comes about because the Act removes a person's private assets which could have been used to engage preferred counsel. The conclusion urged

upon this Court was that an order made under s 143(1) is not an adequate substitute for access to a person's private funds.

59 In this context, Proudfoot relies upon *Sypott,*[57] a ruling made by Redlich J in response to an application to vary restraining orders to exclude property to pay legal expenses.[58] The application was made to free restrained property so that the accused could be represented at his trial by counsel of his choice. The property had been restrained for the sole purpose of being available to satisfy any compensation order to a victim that might be made under the *Sentencing Act*. The DPP relied on s 14(5)[59] to submit that the court had no jurisdiction to make the variation sought.

60 Redlich J referred to what he described as 'the fundamental principle' that an accused has a right to retain counsel of choice if they have the means to do so. In relying upon the observations of Kirby P in *Fleming*,[60] Redlich J said: '[There is a] fundamental principle that a person accused of a crime is entitled to employ out of his own resources the legal representation of his choice.'[61]

61 He observed that the provisions of the Act that allow for interests in property to be excluded from a restraining order should not be construed narrowly because, providing as they do for relief against forfeiture, they are 'beneficial and protective of the rights of individuals'.[62] He referred to observations made by O'Keefe J who, in *Director of Public Prosecutions (NSW) v King*,[63] adopted a beneficial construction of the *Confiscation of Proceeds of Crime Act 1989* (NSW) due to the importance of the protection of property rights. He decided to adopt the same approach to the Act. Redlich J said:

> O'Keefe J ... observed:
> ... The Act establishes a scheme for the making of orders depriving persons of rights of property, rights which the law recognises and protects. As Kirby A-CJ pointed out in *Director of Public Prosecutions v Logan Park Investments Pty Ltd*:
>
> ... the right to own and to control property is an important civic right in a society such as ours. Indeed, it is an attribute of economic liberty. The ownership of property is recognised in the *Universal Declaration of Human Rights.* Article 17 provides:
>
> 17.1 Everyone has the right to own property alone as well as in association with others.
>
> 2. No– one shall be arbitrarily deprived of his property.
>
> Although these provisions are not, as such, part of Australian municipal law, they reflect fundamental principles of the law of civilised countries including principles upheld by the common law in Australia.
>
> Statutes providing for the forfeiture of property have conventionally been construed strictly: *Murphy v Farmer*. Such an approach to their construction applies to such statutes generally and not just to those provisions under which the ultimate forfeiture is made.

> I adopt such an approach to the construction of the statute.[64]

62 Redlich J concluded that although s 14(5) precludes a court, in making a restraining order, from providing for the payment of legal expenses, there is no prohibition on excluding assets from a restraining order for the purpose of funding legal representation, in response to a subsequent application for an exclusion order, where the express purpose for which the restraining order was sought can be satisfied without those excluded assets. He said:

> The Attorney-General also expressed concern that the legislation which then existed permitted restrained property to be dissipated through legal expenses and referred to a Queensland case where *a defendant had been given access to restrained assets which were then exhausted in payment of legal expenses*. The Attorney-General expressed the view that there was no reason why a defendant 'should receive a benefit from the crime in the form of a Rolls Royce defence funded by illegally-acquired property'. This was clearly a reference to the use of assets which had been acquired with the proceeds of crime. *Those were the reasons which the Attorney-General expressed for the inclusion of sub-s. 5 of s 14 of the Act. It is not clear from the Attorney-General's remarks that such a prohibition was intended when an application is subsequently made for exclusion of assets from a restraining order. In any event the provisions do not have such an effect*.[65]

63 He held that, given that s 21 expressly provides that an order for exclusion cannot be made unless the court is satisfied that the property to be excluded will not be required to satisfy the purpose for which the restraining order was made, no order could be made in the case until the Court was satisfied that sufficient restrained property would be available to meet any compensation order made under the *Sentencing Act,* given the purpose for which the restraining order was made.[66]

64 It may be accepted that the principle requiring a strict interpretation of statutory provisions interfering with private property rights, endorsed by Redlich J in *Sypott*, does not apply to provisions of the Act, such as s 16,[67] that are unambiguous. This Court, in *Director of Public Prosecutions v Ali*,[68] made it plain that where there is no ambiguity 'there is no room for the application of principles dealing with strict interpretation of ambiguous legislative provisions dealing with forfeiture of property'[69] nor any 'room for the operation of the presumption against legislative interference with vested property rights'.[70] However, as *Sypott* shows, those principles may have application to legislative provisions in the Act that are susceptible to more than one interpretation. The condition-specifying power in s 143 is clearly so susceptible.

65 Sypott thus supports an approach to the construction of the Act that acknowledges the Act's significant intrusion upon private property rights but, at the same time, supports a beneficial construction of those broad powers that the Act confers on a court, the purpose of which is to protect an accused or the integrity of court processes (unless of course that construction would offend against an express prohibition). This has implications for the interpretation of s 143.

The court's power to direct legal assistance 'on any conditions'

66 Proudfoot's third submission in support of the invalidity of s 18 is that s 143 is no adequate substitute for access to private assets to fund legal representation. Underlying this submission is a question of construction. The power conferred on the court under s 143(1) to order that VLA provide legal assistance is broad; the power can be exercised 'on any conditions specified by the court'. Before the issue raised by Proudfoot can arise, it is necessary to ask the question: Is it a permissible condition under s 143(1) for the court to specify the appropriate measure of legal assistance to be provided by VLA? If the answer to that question is 'yes', the constitutional issue does not arise.

67 The breadth of the statutory language in s 143(1) indicates that the court has considerable latitude in the conditions it may impose. The legislature has chosen not to impose any express restriction on the range of permissible conditions. Nevertheless, the power is not unconstrained; its lawful exercise depends upon it being exercised within the scope and for the purposes of the Act.[71] The condition identified in s 143(3)(b) relates to the provision of security to VLA for the cost of legal assistance.

68 In *Director of Public Prosecutions v McEachran*,[72] a judge of the County Court made orders under the Act that legal assistance be provided by VLA to a person charged with crimes. He specified a condition that the cost of providing the assistance be secured by a charge over the person's property where that property was already subject to restraining orders. The DPP sought judicial review in the Supreme Court on the basis that the judge had no power to specify conditions of that kind when making orders for compulsory legal aid. In the alternative, the DPP submitted that the judge's discretion had miscarried because the restrained property had to be available to satisfy the interests of victims and, in any contest between victims' interests and the interests of VLA, victims' interests should prevail, yet the orders had the effect of affording priority to the interests of VLA. Bell J dismissed the application for judicial review.

69 On appeal[73] Ashley JA (with whom Nettle JA and Smith AJA substantially agreed) discussed s 143 and its manner of operation. He emphasised the specific conditions that a court may impose, pursuant to s 143(3)(b), namely, that the legal assistance be provided on the condition that the cost of that assistance be secured by a charge over any land or other property in which the applicant has an interest. He acknowledged, however, that the condition-specifying power is a broad one and the range of permissible conditions is not fixed or exhausted by that identified in s 143(3)(b); that is, the conditions that may be imposed are not restricted to those with respect to the provision of security for the payment of legal assistance by VLA.

70 Ashley JA observed that the latitude the court has under s 143(1) to impose conditions stands in contrast to the specific conditions set out under s 27(1) of the *Legal Aid Act* which constrain the power of VLA under s 27(1) to grant legal assistance. Section 27(1) provides that legal assistance may be provided without charge or 'may be subject to all or any of the following conditions' where the conditions impose a requirement upon an applicant to make a contribution towards the cost to VLA of providing the assistance;[74] to pay out-of-pocket expenses incurred by VLA or interest;[75] and to provide a charge over land or other property as security for the assistance.[76]

71 He went on to say:

> In terms, what does s 143 provide?

First, it empowers a court, in some circumstances, to oblige VLA to provide a person with legal assistance. ...
Second, the necessary starting point is that a restraining order has been made; and that such order remains in force.
Third, the court must be satisfied that the applicant is in need of legal assistance and is unable to meet the full cost of obtaining such assistance from a private practitioner from unrestrained property or income. ...
Fourth, it would be wrong to see s 143(3)(b) as the source of a court's power to specify a condition that assistance be granted subject to a condition that the applicant pay all or part of the costs of assistance, and that security for such payment be secured by a charge over property. Such a power, whatever be its ambit, is to be found in subs (1), by which a court may order VLA to provide assistance '*on any conditions* specified by the court' (emphasis added).
Fifth, the power in a court to order VLA to provide legal assistance is thus expressed in broad language. It may be compared with the language of s 27(1) of the *Legal Aid Act*. The latter provides that the assistance may be granted:

> Without charge or ... subject to all or any of the following conditions.
> The conditions set out in s 27(1)(a)–(c) pertain respectively to payment of all or some part of pertinent costs, and/or disbursements, and interest thereon. I should notice para (c). It empowers VLA to impose a condition that all or part of the cost of providing assistance be secured:
>
> (i) by a charge under section 47A(1) over any land or a charge over any other property which is recovered or preserved for that person in the proceedings; or
>
> (ii) in any other manner VLA thinks fit over any property, whether land or any other property, in which the person has an interest or in which the person acquires an interest during the period of assistance.

Sixth, it is implicit in s 143(1) that the assistance which VLA may be ordered to provide will be prospective from the date of the order. It will not be an order which addresses services already provided.

> ...

Tenth, preliminary examination of s 143(6) ... shows, in my opinion, a definite preference that the use of restrained property be prioritised by first meeting claims for compensation and/or restitution by a victim of an offence in those cases where the subsection can apply. The effective system of priorities, out of the value of property forfeited or penalty paid, is compensation/restitution first, VLA second, and the State third.[77]
72 Ultimately, Ashley JA determined that an order under s 143(1) would not entitle VLA to take and enforce a charge over restrained property until and unless the property ceased to be restrained.[78] This construction of the Act avoided inconsistency with the prohibition in s 14(5) which he described as 'a very wide prohibition'[79] on a court providing for the payment of legal expenses:

> In all, I consider that close analysis of s 143, and consideration of the overall structure of the Act ... — including its interrelationship with the restitution and compensation provisions of the *Sentencing Act*, and at greater remove its interrelationship with provisions of the *Victims of Crime Assistance Act* — stands opposed to a reading of s 143 which would give VLA the right to take a charge over then-restrained land or other property. Such a reading would create a situation in which restrained property could in substance be freed from restraint in order to meet an accused's legal costs — a situation not hinted at elsewhere in the Act, and one at odds in sentiment with the express prohibition, broadly expressed, upon a court making provision for legal costs when making a restraining order.[80]

73 In *Cardamone v Director of Public Prosecutions*[81] J Forrest J refused to make an order under s 143. He relied extensively upon Ashley JA's reasons in *Director of Public Prosecutions v McEachran* in describing the purpose of the Act and the role of s 143. He noted that Cardamone's property had been sold and that VLA, the second respondent to the application, did not seek any charge or encumbrance over the funds held by the Asset Confiscation Office. VLA refused to provide legal assistance until an application had been made and determined under s 143, other than providing limited funding to support the s 143 application. J Forrest J took the view that VLA was best placed to consider whether to grant legal assistance. He said:

> VLA can, and should, make up its own corporate mind as to whether or not to grant Mr Cardamone assistance. It is best placed to determine how its funds should be deployed. *This is not a case where the Court should intervene because legal aid has been refused or there is a prospect of Mr Cardamone being subject to an unfair trial process if legal aid is not granted*. Rather, there is a single point on appeal (being the failure to fix a minimum parole period) and VLA can, for itself, determine whether Mr Cardamone meets the criteria [in the *Legal Aid Act*].[82]

74 The authorities that discuss the conditions specified by a court, on a grant of legal assistance, pursuant to s 143, have been largely concerned with the security to be supplied for the provision of that assistance. However, as Ashley JA observed in *Director of Public Prosecutions v McEachran*, the breadth of the statutory language in s 143(1) does not support an interpretation that the range of permissible conditions is restricted to the provision of security. Outside of the context of s 143, it has been accepted in Victoria that if the court considers that legal assistance provided by VLA is inadequate it lies within the inherent power of the court to order a stay of the proceeding, or order that the proceeding be adjourned, until VLA provides adequate legal assistance.

75 In *R v Chaouk*[83] this Court upheld an order of Lasry J that a criminal trial for attempted murder be adjourned to a date to be fixed and not commence until counsel for the accused had the assistance of an instructing solicitor on a day to day basis for the duration of the trial. The trial was estimated to take about two weeks. VLA, in accordance with its then guidelines, was

prepared to allow only two half days of paid attendance by an instructing solicitor in addition to counsel. The accused applied for a stay of the trial until such time as he was provided with the services of both counsel and an instructing solicitor for the duration of the trial. Lasry J first considered s 197 of the *Criminal Procedure Act 2009* which empowers a court to order VLA to provide legal representation to the accused 'on any conditions specified by the court'. It specifically provides, under s 197(5)(d), that the conditions cannot include a requirement 'relating to the identity, number or remuneration of persons representing the accused'.

76 Section 197 provides:

> **197 Order for legal representation for accused**
>
> (1) In this section—
>
> *private law practice* has the same meaning as in the *Legal Aid Act 1978*; *private legal practitioner* has the same meaning as in the *Legal Aid Act 1978*.
>
> (2) Subject to subsection (3) and despite any rule of law to the contrary (other than the Charter of Human Rights and Responsibilities), the fact that an accused has been refused legal assistance in respect of a trial is not a ground for an adjournment or stay of the trial.
>
> (3) If a court is satisfied at any time that—
>
> (a) it will be unable to ensure that the accused will receive a fair trial unless the accused is legally represented in the trial; and
>
> (b) the accused is in need of legal representation because the accused is unable to afford the full cost of obtaining from a private law practice or private legal practitioner legal representation in the trial—
>
> the court may order Victoria Legal Aid to provide legal representation to the accused, *on any conditions specified by the court*, and may adjourn the trial until that legal representation has been provided.
>
> (4) Despite anything in the *Legal Aid Act 1978*, Victoria Legal Aid must provide legal representation in accordance with an order under subsection (3).
>
> (5) Despite anything to the contrary in subsection (3)—
>
> (a) if the court is satisfied that, in relation to the trial, the accused has engaged in vexatious or unreasonable conduct that has contributed to the accused's inability to afford the full cost of obtaining from a private law practice or private legal practitioner legal representation in the trial, the court may refuse to make an order under subsection (3);
>
> (b) the legal burden of proof for the purposes of subsection (3)(b) that the accused is unable to afford the full cost of obtaining legal representation rests on the accused;

(c) for the purposes of proving under subsection (3)(b) that the accused is unable to afford the full cost of obtaining legal representation, regard must be had to property—

(i) that is subject to the effective control of the accused (whether or not the accused has an interest in it); or

(ii) in which the accused has an interest—

as determined in accordance with section 9 or 10 of the *Confiscation Act 1997*;

(d) *the conditions that may be specified by the court under subsection (3) do not include conditions relating to the identity, number or remuneration of persons representing the accused.*

(6) A court must give Victoria Legal Aid an opportunity to appear and be heard before an order is made under subsection (3).

(7) Despite anything to the contrary in this or any other Act, Victoria Legal Aid may appeal to the Court of Appeal, if the Court of Appeal gives leave to do so, from an order under subsection (3) made by the Trial Division of the Supreme Court constituted by a Judge.[84]

77 Lasry J took the view that s 197 was not relevant to the circumstances he confronted. (Had it applied, s 197(5)(d) would have precluded him specifying as a condition that an instructing solicitor, in addition to counsel, be retained for the duration of the trial.) He said:

> In my opinion, s 197(2) has no application to the circumstances I am confronted with. First, Mr Chaouk has not been refused legal assistance in terms. Secondly, in my opinion s 197(2) is formulated to make clear that the refusal of legal assistance is not, of itself, a ground for an adjournment or stay of the trial. This is consistent with, for example, the observation of Deane J in *Dietrich v R* that there could be circumstances where a trial without legal representation would be 'relevantly fair'. Thus, the refusal of legal assistance will not, of itself, be a basis for adjourning or staying the trial. Section 197(3) does not apply to the circumstances confronting me.[85]

78 He considered that the accused would be required to make forensic decisions without the assistance of an instructing solicitor who understood the law and was abreast of the evidence. This increased the likelihood of errors being made or important matters being overlooked by counsel, a risk that would not confront the prosecution. In those circumstances, he concluded that the trial of the accused would likely be unfair in the sense that it carried a risk of improper conviction.[86]

79 In dismissing the appeal, Nettle AP, Buchanan and Osborn JJA emphasised the respective roles that the judiciary and the executive perform in respect of the legal assistance provided to an applicant. They observed that the decision to grant a stay depends on the court's assessment of what is necessary to ensure that justice is done but it is not for the court, in the exercise of its inherent power, to determine what amount of legal funding should be provided.[87] They said:

> [I]t is not part of this court's function to husband legal aid resources, still less to determine what amount of legal aid funding the State should provide. In a federation such as ours, these things may well reflect the present condition of Commonwealth/State finances and, in any event, they involve questions of policy which it is for the executive alone to decide.
>
> The fact that the executive has choices in such matters, however, is something to be borne in mind. The power of the court to stay a criminal trial is the ineluctable concomitant of the court's duty to ensure that a criminal trial is as fair as we can reasonably make it. There is of course a significant public interest in the independent performance of that duty by the court. When it comes to legal representation, a decision to stay a trial reflects the court's assessment of what is necessary to ensure that justice is done. Allowing that the executive has choices as to the extent of legal aid funding, the court's assessment of what is necessary for a fair trial and the dictates of executive policy may not necessarily coincide.[88]

80 It is clear that the purpose of s 143(1) is to ensure that a litigant, whose property has been restrained, and who, by reason of s 14(5), cannot access that property for the purpose of funding either a defence of criminal charges brought against him or her, or funding other litigation including exclusion applications or other applications made under the Act, is provided with legal assistance funded by VLA. In our view, a condition that can be permissibly imposed by the court on the provision of that legal assistance under s 143(1) is a condition directed at the same outcome as identified by this Court in *Chaouk*, namely, to ensure that justice is done by reflecting the court's assessment of what is necessary for a fair hearing. So much is implicit in *Cardamone* when J Forrest J refused to make an order under s 143(1) on the basis that it was not a case where 'there is a prospect of Mr Cardamone being subject to an unfair trial process if legal aid is not granted'.[89]

81 In most instances it is unlikely to be in contest that the legal aid proposed to be provided by VLA is adequate to ensure a fair hearing. VLA is typically the second respondent to an application for an order under s 143 and can make submissions to the court as to whether an order should be made or on what conditions any assistance should be provided. In practice, orders are often made by consent. However, as *Chaouk* reveals, decisions may be made, as a matter of policy and reflected in guidelines, or in the individual case, where the funding proposed to be provided is inadequate.

82 It is in those circumstances that the court's duty 'to ensure that a criminal trial is as fair as we can reasonably make it', of which this Court spoke in *Chaouk*, becomes paramount. By analogy, the statutory power to impose conditions on the provision of legal assistance under s 143 will extend, in our view, to direct that appropriate legal assistance be provided and to specify the measure of that assistance against the touchstone of ensuring a fair trial, including a fair hearing of an application concerning a restraining order.

83 Consistently with the adoption of a beneficial approach to broadly expressed powers designed to protect an accused or the integrity of court processes, s 143(1) might, in an

exceptional case, permit specification of the number and remuneration of persons representing the applicant, and even their identity. Indeed, counsel for the DPP before us agreed with this construction. Submissions may be made and heard in open court as to the type of assistance required to be provided. There is no equivalent restriction in s 143(1) to the prohibition in s 197(5)(d) of the *Criminal Procedure Act* that the conditions imposed by a court 'do not include conditions relating to the identity, number or remuneration of persons representing the accused'. As demonstrated in *Chaouk*, such matters might affect what is needed to ensure a fair hearing.

84 Similarly, it would be open to the court to order that legal assistance be provided of a specialist nature. The examples can be multiplied but in the end the court will be guided by the same touchstone: what is necessary to ensure the applicant receives a fair hearing?

85 We consider that the condition-specifying power in s 143(1) might extend, in an exceptional case, to nominating the identity of a particular member of counsel, or a particular solicitor. While such an order would fall within the scope of the power, it would require an exceptional set of circumstances to warrant such an order being made, because typically no legal representative is irreplaceable regardless of their level of legal skill or knowledge of the history of a matter. A court would also be mindful that, if such a condition were to be imposed, there might be awkward questions as to whether this gave rise to a legal or professional obligation on a particular counsel to accept the brief. Would this require the nominated counsel or solicitor to appear before the court, before an order under s 143(1) was made, or would they be obliged to file an affidavit with the court giving their consent, or conditional consent depending upon the particular rate that might be proposed? These issues could place the court in an embarrassing position of appearing to negotiate with a particular legal representative. Moreover, the court should be confident that considerations of a counsel's legal skill, experience, and knowledge of the history of a matter would be taken into account by VLA in ensuring that it satisfies a non-specific condition concerning an appropriate level of legal representation (for example, representation by experienced senior counsel).

86 Nevertheless, it may be that in an exceptional case a particular relationship of trust has arisen between an accused and a legal practitioner, for example, by reason of the duration of the relationship over a long period of years, or in the context of an accused's deteriorating mental health. A court may be satisfied that it would be almost impossible to recreate that relationship of trust with a new lawyer. In those circumstances, as the DPP accepted, a court may accede to an application that an order be made under s 143(1) nominating the specific lawyer of choice.

87 These conclusions are set against the background of the recognition that public expenditure, and the allocation of scarce resources, is fundamentally a matter for the executive. VLA would of course be entitled to notice of any application to impose conditions and a court will take its views into account in determining the application.[90] If the conditions imposed are not satisfied, the power that the court can exercise is ultimately a power to adjourn, as the concluding words of s 143(1) make clear, including the power to adjourn a criminal prosecution.

88 Proudfoot's third submission is thus based on a misconception as to the scope of orders that might be made under s 143. Proudfoot conceded that if s 143(1) was construed to allow for the court to make orders on the type of conditions discussed then Ground 1 was baseless.

89 In the circumstances, however, the issues raised justify the grant of leave to appeal.

Is s 18 invalid on* Kable *grounds? — Ground 2A

Does lack of guaranteed notice before forfeiture impair the judicial function?

90 In support of Ground 2A, Proudfoot submits that restraining orders under s 18, that may be made *ex parte*, can lead to forfeiture of the restrained property without an aggrieved person having an opportunity to complain in a curial proceeding about the failure of notice.[91] He relies on ss 18, 19 and 35.[92] Section 18 compels a court to make a restraining order on the satisfaction of certain evidentiary requirements. Proudfoot accepts that s 17[93] confers a discretionary power on the court to require that notice be given before entertaining the application for a restraining order. Section 35 interacts with s 18 by providing that property restrained under s 18 is forfeited to the Minister on the expiry of 60 days following conviction, or the making of the restraining order, whichever is later, unless an application for exclusion under s 20 is still 'pending'. If an exclusion application is pending, forfeiture occurs upon the ultimate failure of such an application. An exclusion application may lead to orders being made under s 22 or s 23 excluding an applicant's interest in the restrained property, or a declaration that the restraining order, to the extent to which it relates to the applicant's interest in the property, shall be disregarded for the purposes of s 35.

91 Proudfoot maintains that nothing in s 35 prohibits forfeiture from occurring in the event that the applicant for a restraining order, the DPP or appropriate officer, neglects to give notice to the person affected.

92 Proudfoot submits that in the event that the person affected is not notified, the terms of the Act make it impossible for them to oppose forfeiture by application to the relevant court. He submits further that legislation which purports to vest powers upon courts that must be exercised irrespective of guaranteed notice is contrary to the *Kable* principle. He relies on the observations of Griffith CJ and Gavan Duffy J in *City Finance Co Ltd v Matthew Harvey & Co Ltd*[94] that:

> It is ordinarily a condition of the administration of justice that the person against whom relief is sought shall have an opportunity of being heard. Hence the necessity for service or notice of the writ or other originating proceeding.[95]

93 He also relies on comments made by Heydon J in *International Finance*[96] that he describes as treating the requirement for notice as a constitutionally entrenched principle. He alludes also to the acceptance in the authorities of the importance of a court observing natural justice.[97] He submits that legislation which 'delegates and sequesters' an essential aspect of judicial procedure in favour of the Crown infringes the *Kable* principle.

94 The DPP responds by submitting that it is unnecessary, and therefore inappropriate, for this Court to answer the constitutional issue Proudfoot raises because it is not in contest that Proudfoot was given notice of the restraining order. Moreover, by reason of that notice he was in a position to bring his application for exclusion and his application for legal assistance in respect of his criminal proceedings and the proceedings under the Act. His matters were properly heard and he was given every opportunity to present his case, including by the making of a removal application to the High Court which was rejected. The consequences, constitutional or otherwise, of a lack of notice are not live issues in this case.

Unnecessary to answer

95 In *Lambert v Weichelt*,[98] the High Court said:

> It is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties.[99]

96 In *Duncan v New South Wales*,[100] the High Court reiterated its position that, before determining a constitutional issue, it must be satisfied of the existence of a state of facts that makes it necessary for that issue to be decided:

> This Court does not decide a constitutional question unless satisfied that there exists a state of facts which makes it necessary to decide that question in order to determine rights of the parties in actual controversy. The parties to the ... proceedings have agreed by their special cases to reserve for the consideration of the Full Court a question as to whether cl 11 of Sch 6A to the *Mining Act* is inconsistent with the *Copyright Act*, so as to be inoperative by force of s 109 of the *Constitution* to the extent of the inconsistency. But they have failed to show by those special cases that there exists a state of facts which makes it necessary for that question to be decided.[101]

97 More recently, in *Knight v Victoria*[102] the High Court applied the *Lambert v Weichelt* principle to reiterate that it is unnecessary and inappropriate to determine the constitutional validity of legislation where the issue sought to be raised is no more than hypothetical. Julian Knight sought to invalidate s 74AA of the *Corrections Act 1986* which provided that the Adult Parole Board could only make an order that he be released on parole if satisfied that he was in imminent danger of dying or was seriously incapacitated. Knight submitted that s 74AA was invalid because the Adult Parole Board could be constituted by serving judicial officers. The High Court unanimously held that it was unnecessary and inappropriate to determine whether s 74AA was invalid because the Board had not in fact been constituted to include a serving judicial officer and did not need to be so constituted in the future. Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ referred to *Lambert v Weichelt* and said:

> That approach to the determination of constitutional questions means that it is ordinarily inappropriate for the Court to be drawn into a consideration of whether a legislative provision would have an invalid operation in circumstances which have not arisen and which may never arise if the provision, if invalid in that operation, would be severable and otherwise valid. That is so even where the validity of the provision is challenged by a party sufficiently affected by the provision to have standing: *a party will not be permitted to 'roam at large' but will be confined to advancing those grounds of challenge which bear on the validity of the provision in its application to that party*.[103]

98 In our view, Proudfoot is here seeking to 'roam at large' and, impermissibly, to advance grounds of challenge to s 18 of the Act (and the relationship of s 14(5) to s 18) that do not bear on the validity of s 18 in its application to him. We consider that it is unnecessary and inappropriate in the circumstances of this case to determine the challenge to s 18 based on a contravention of the *Kable* principle.

99 There is an additional consideration, however, which further supports the denial of the *Kable* challenge, namely, the recent determination of this Court in *Nguyen*.

Should this Court depart from its decision in Nguyen*?*

100 This Court delivered judgment in *Nguyen*[104] after Proudfoot had filed his application for leave to appeal in this matter.[105] *Nguyen* held that s 40I of the Act, a comparable provision to s 18, does not infringe the *Kable* principle. Proudfoot submits that the judgment of the Court in respect of what was Ground 2 in *Nguyen* is 'plainly wrong' and ought not be followed on the basis that it ignored the fact that the Act does not prevent unjust forfeiture of property in the case of a lack of notice and it did not accept that the requirement for notice is a constitutionally entrenched principle, as described above.[106]

101 He acknowledges that the applicant in *Nguyen* applied for special leave to appeal to the High Court and that this was refused on the basis that '[t]here is no reason to doubt the correctness of the Court of Appeal's decision'.[107] Nevertheless, he submits, quite correctly, that the High Court has made it clear that a special leave disposition is not to be treated as tantamount to the determination of the appeal.[108] He maintains that in *Nguyen* this Court wrongly sanctioned the delegation and sequestration of a fundamental aspect of judicial procedure.

102 The DPP submits that *Nguyen* ought be followed as a 'recent, and carefully considered, decision of this court'.[109] She submits the issue raised has been dealt with in the context of a part of the Act with near identical sections to those Proudfoot relies upon here. She relies on observations of the High Court with respect to the doctrine of *stare decisis*:

> Where a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasions upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law ... .[110]

103 In *R v Roussety*,[111] Weinberg JA expressed the same need for caution:

> [T]his court, though free to depart from its own earlier decisions, should do so only cautiously, and when compelled to the conclusion that the earlier decision is wrong. Moreover, it should depart from its earlier decisions only infrequently, and exceptionally.[112]

104 This reflects the understanding that '[a]s a general rule, this court will not depart from its own earlier decisions unless we regard those decisions as clearly, or plainly, wrong'.[113]

105 The DPP observes that while this Court may depart from earlier decisions, it will ordinarily only do so when constituted by a Full Court bench comprising five judges.[114] No application was made by Proudfoot for this matter to be heard by a bench of five judges.[115]

106 In *Nguyen* this Court upheld the validity of the power of the court to make an unexplained wealth restraining order[116] in the face of three related grounds of appeal. It is important to see in context the general attack made in *Nguyen* on the scheme of the Act. Ground 1 was that the Act failed to preserve a right of the respondent to a restraining order, made *ex parte*, to obtain an *inter partes* rehearing. The Court distinguished *International Finance* by referring to the discretionary power conferred on the Court to determine whether notice should be given to a respondent when an applicant seeks to obtain an order *ex parte* and before any order is made.[117] The Court also held that a respondent to a restraining order made *ex parte* could apply to the court for those orders to be set aside under the power the court has to 'make any orders in relation to the property to which the unexplained wealth restraining order relates as it considers just'.[118] The grounds for that discharge could include a failure of full disclosure by the DPP in obtaining the *ex parte* order. The Act thus did not contain the 'clearest language' that would be necessary to exclude the right of a party affected by a judicial order made *ex parte* to apply to the court for its discharge. The Act did not exclude the inherent or implied power of the court to set aside an order made *ex parte* on an application of the respondent.[119]

107 Proudfoot makes no challenge to those conclusions.

108 Ground 3 in *Nguyen* was closely connected to Ground 2 which is described below. Ground 3 was that the power to make the unexplained wealth restraining order was invalid because a restraining order was 'self-executing' upon the completion of six months when automatic forfeiture would occur[120] and there might be no *inter partes* hearing within that limited time frame. The Act expressly provides for the suspension of the six-month period if an exclusion application is on foot until it is refused, dismissed, withdrawn, struck out, or an appeal has been abandoned or finally determined.[121] No similar provision suspending the six-month period was expressly provided for in respect of a rehearing.

109 The Court rejected Ground 3 because it was premised on public officials failing to discharge their duties and allowing time to run without providing notice to the respondent when they were required to do so under the Act where notice had not already been given of the application for the restraining order:[122]

> [The] hypothesis suggests that the applicant for the restraining order, the DPP or an appropriate officer, might engineer matters so that nothing is done for months to locate the person whose property is restrained. *The public officers would act so as to undermine the court's supervision of the mandatory requirement under the Act for notice to be given* ... the Act is not to be construed on the basis that a person appointed to a statutory office will countenance, or engage in, the **conscious maladministration** of the Act.
>
> Furthermore, given that the Act is premised upon information being supplied by the person whose property is restrained ... conduct such as that hypothesised ... flouts the entire manner in which the statutory

> scheme is intended to operate. One cannot approach the construction of the Act on the basis that it gives rise to a consequence of arbitrary forfeiture because of consequences that would occur if all the requirements and safeguards of the Act were disregarded.[123]

110 These observations were also relied upon to reject Ground 2.[124]

111 Proudfoot makes no challenge to this reasoning.

112 In the passage above, the requirement to give notice is described as a 'mandatory' requirement. This supports the view that a construction adopted in accordance with the principles identified in *Project Blue Sky Inc v Australian Broadcasting Authority*[125] might result in the invalidity of the restraining order if notice is not given. This would depend on whether it was a purpose of the legislation to invalidate any act done in breach of the condition.[126] It is unnecessary to decide this issue here.

113 Ground 2 in *Nguyen* was to the effect that, even if the Act were to be construed as providing for a respondent to a restraining order made *ex parte* to apply to have the order set aside, the power to make an unexplained wealth restraining order is invalid because it does not guarantee that an affected person will receive notice of the order prior to its execution. In other words, the Act does not provide that a respondent who might be given late notice of a restraining order can compel a rehearing before the order 'self-executes' after six months to effect forfeiture of the restrained property. It is apparent that there is a substantial similarity between Ground 2 in *Nguyen* and Ground 2A[127] relied upon here by Proudfoot. Nguyen submitted that this compromised the court's institutional integrity as involving a fundamental breach of natural justice.[128]

114 More specifically, Nguyen submitted that the Act was not saved by the requirement under s 40J that compels the applicant to notify any affected persons if no notice had previously been given. Section 40J is relevantly comparable to s 19;[129] it provides:

> **40J Notice of unexplained wealth restraining order to be given to persons affected**
>
> (1) If—
>
> (a) an unexplained wealth restraining order is made in respect of property of a person; and
>
> (b) notice had not been given to that person of the application for the unexplained wealth restraining order—
>
> the applicant *must give written notice of the making of the unexplained wealth restraining order to that person*.
>
> (2) If a person to whom notice must be given under subsection (1) cannot be found after all reasonable steps have been taken to locate the person, *the applicant must give notice to that person in any other manner that the court directs*.[130]

115 Section 40J(2) differs from s 19(2) in that the latter specifies a particular means of locating a respondent after the exhaustion of all reasonable steps, namely, by 'publish[ing] in a newspaper circulating generally in Victoria' as an alternative to giving notice in any other manner directed by the court, whereas s 40J(2) provides for the court alone to prescribe the manner in which steps are to be taken to find a respondent if they cannot be found by the taking of all reasonable steps. The requirement for newspaper publication may well be thought ineffectual but it remains the case that in both s 40J(2) and s 19(2) it falls on the court to direct how the notice requirement is to be satisfied. In *Nguyen* this was described as the supervisory role of the court to facilitate the giving of notice which would extend, if necessary, to discharging the order if notice could not be given: [131]

> [I]n the event that there has been a failure to locate the person, the matter falls within the supervision of the court ... this implies that, if the person cannot be located after all reasonable steps have been carried out, there is a duty on the applicant to approach the court. For the steps to be 'reasonable' they must be carried out promptly even if there is no express time limit. The obligation to return to the court in the event of a failure to serve notice of the order also reinforces the notion that the order ought be served promptly.
> ... the extent of the court's powers should a matter return to it under s 40J(2) includes hearing and determining whether there has been a breach of the obligation to use all reasonable steps to locate the respondent to the restraining order and imposing a variety of sanctions. In particular, in the event of a breach, a court could exercise its discretion to discharge a restraining order, either under [its express power to make any orders in respect of the property that are just] or under its inherent or implied powers ... .[132]

116 Emphasis was also placed upon the assumptions made by the scheme of the Act, namely that the scheme was based upon information being exchanged between the DPP and the respondent, with the DPP acquiring additional information from the respondent about their acquisition of the property and interest in it:

> [T]he Act is premised upon an exchange of communications between the applicant and respondent to a restraining order. In particular it is premised upon the respondent to a restraining order having notice of that order and being required, upon further notice ... to give a written declaration of interests in the restrained property having been warned about the consequences that may follow if statements are made in the declaration that are false and misleading in a material way. The written declaration of interests must also include a statement of the nature and extent of the interest, including such matters as, in respect of a mortgage, the current value of the debt secured by the mortgage. There are strict time limits and a breach may result in the imposition of a fine and a court-issued direction for the information to be provided.[133]

117 The Court concluded that the statutory scheme, with its emphasis upon the ongoing interaction between the applicant and respondent, does not, 'convert ... [the institution of the court] into [an] instrument of injustice or unfairness'.[134] The *Kable* challenge was rejected. As Niall JA observed, the Act did not '[impose] a judicial function or an adjudicative process on a court which directs or requires the court to implement a political decision, or a government policy, without following ordinary judicial processes',[135] because of multiple features of the statutory scheme. Under the Act the court: (1) retains the power to order that an application for a restraining order be heard on notice;[136] (2) has the ability to monitor the statutory requirement for service;[137] (3) has the inherent or implied ability to set aside restraining orders in appropriate circumstances;[138] and (4) has the express power to make any orders in relation to the restrained property it considers just.[139] These observations apply equally to the restraining order provisions with which this appeal is concerned.

118 We agree with the DPP that the submissions made by Proudfoot do not engage with this Court's reasoning in *Nguyen* and provide no basis for considering that the decision was 'plainly wrong'.

119 In any event, as explained above, it is unnecessary and inappropriate for this Court to entertain Ground 2A where the relevant state of facts does not exist in the circumstances of this case.

Is there a failure to specify that the order lapses? — Ground 2B

120 Ground 2B was raised by Proudfoot to pre-empt an argument that he considered might be made by the DPP. In his Written Case, he describes Ground 2B in this way:

> This ground deals with the possibility that the DPP argues section 18 of the Act mandated further directions at the time of making the restraining order, ensuring service prior to self-execution. In such a case, the fact that no order was made means that the restraining order was made absent jurisdiction.

121 The DPP does not submit that s 18 requires that, when a restraining order is made, the court must make further directions for service. Instead, the DPP emphasises that there is a statutory requirement under s 19 of the Act for notice to be given. She submits that Proudfoot's submissions necessarily require ignoring the importance of the duty imposed on her by s 19.

122 It follows that there is no need for this Court to entertain Ground 2B.

Conclusion

123 In our view, leave to appeal should be granted but the appeal must be dismissed.

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[1] See [24] below.

[2] Section 143. See [29] below.

[3] [1996] HCA 24; (1996) 189 CLR 51 ('*Kable*').

[4] (2009) 240 CLR 319 ('*International Finance*').

[5] *Proudfoot v DPP* [2018] VCC 2033 ('Reasons').

[6] *Sypott v The Queen* [2003] VSC 41 [20] (Redlich J) ('*Sypott*'). See [59]–[60] below.

[7] See [21] below.

[8] See [29] below.

[9] (2019) 59 VR 27 ('*Nguyen*').

[10] Pursuant to s 40I. Proudfoot concedes that s 40I is relevantly comparable to s 18.

[11] In what follows, we refer simply to 'the appeal'.

[12] *Lambert v Weichelt* (1954) 28 ALJ 282, 283.

[13] Reasons [48].

[14] Part 2 of sch 11 of the DPC Act defines a commercial quantity of cannabis as weighing between 25 and 250 kilogram, or a quantity of between 100 and 1000 plants.

[15] Contrary to the DPC Act s 72B.

[16] Contrary to the DPC Act s 71AC.

[17] Contrary to the DPC Act s 73.

[18] The Act s 3(1) (definition of 'tainted property' para (a)(i)).

[19] Proudfoot's wife was also charged with cultivating a commercial quantity of cannabis at the property but was acquitted by direction at trial and granted a five per cent exclusion of the equity in the property by consent.

[20] He made the application pursuant to s 26 of the Act which provides for the court to make such orders in relation to the property to which the restraining order relates as it considers just. See [27] below.

[21] *Proudfoot v DPP* [2018] HCASL 166 (Bell and Nettle JJ).

[22] Before Judge Dyer, there was no argument supporting the exclusion application and there is no ground of appeal before this Court in relation to the exclusion application: Reasons [11], [45].

[23] Of version 74 of the Act, which was in force at the time of the making of the restraining order and incorporated amendments as at 1 June 2016.

[24] Emphasis added. Section 143(6) refers to amounts paid under s 31 or s 36ZB. These are amounts paid by way of restitution and compensation out of forfeited property to victims, pursuant to orders under the *Sentencing Act 1991.*

[25] Reasons [12].

[26] 136 S Ct 1083 (2016) ('*Luis*').

[27] Judge Dyer considered as correct the observations in this context of Irving JR in *Vu v DPP* (Supreme Court of Victoria, Irving JR, 3 May 2017).

[28] Reasons [45].

[29] Ibid [48].

[30] Ibid [47].

[31] See [10] above.

[32] See Supreme Court of Victoria, *Practice Note SC Gen 17*: *Freezing Orders*, 30 January 2017, 4.10 'The [freezing] order should exclude dealings by the respondent with assets for legitimate purposes, in particular: (a) payment of ordinary living expenses; (b) payment of reasonable legal expenses ...'.

[33] Contrary to *International Finance* (2009) 240 CLR 319.

[34] Contrary to *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

[35] Contrary to *Kirk v Industrial Court (NSW)* [2010] HCA 1; (2010) 239 CLR 531.

[36] Indeed, counsel for Proudfoot, Mr Hume, appeared pro bono.

[37] *Legal Aid Act 1978* s 5: 'VLA does not represent the Crown'.

[38] See [29] above. See also *DPP v McEachran* (2006) 160 A Crim R 98; [2006] VSC 67, [35].

[39] *R v Chaouk* (2013) 40 VR 356, 369 [5] (Nettle AP, Buchanan and Osborn JJA) set out at [79] below.

[40] See [80]–[87] below.

[41] See [83]-[86] below.

[42] [1992] HCA 57; (1992) 177 CLR 292 ('*Dietrich*').

[43] (1991) 24 NSWLR 116 ('*Fleming*').

[44] Proceedings under the Act are civil proceedings: the Act s 133(1).

[45] *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23, 29 (Mason CJ), 56 (Deane J).

[46] *Dietrich* [1992] HCA 57; (1992) 177 CLR 292, 297–30 (emphasis added) (citations omitted).

[47] *R v Williams* [2007] VSC 2; (2007) 16 VR 168, 178 [58] (King J), cited with approval in *R v GZ* [2012] ACTSC 183; (2012) 271 FLR 404, 408 [22] (Refshauge ACJ) (ACT Supreme Court).

[48] See [80]–[81] below.

[49] (1991) 24 NSWLR 116, 125 (Gleeson CJ with whom Hope A-JA agreed), 141 (Kirby P).

[50] Ibid 141.

[51] Ibid 144.

[52] Ibid 136. *Fleming* does illustrate an alternative means by which a legislature has sought to achieve conflicting policy objectives, through permitting a court to carve out from the scope of a restraining order provision for reasonable legal expenses. See *DPP v McEachran* [2006] VSCA 286; (2006) 15 VR 268, 275 [36].

[53] *Fleming* (1991) 24 NSWLR 116, 136 (emphasis added).

[54] Ibid 124.

[55] Ibid 136 (emphasis added).

[56] See [64] below.

[57] [2003] VSC 41.

[58] The application for variation was brought as an exclusion application under s 20. See [26] above.

[59] See [21] above.

[60] See [56] above.

[61] *Sypott* [2003] VSC 41, [20].

[62] Ibid [21].

[63] [2000] NSWSC 394; (2000) 49 NSWLR 727.

[64] *Sypott* [2003] VSC 41, [20] (citations omitted).

[65] Ibid [25] (emphasis added).

[66] Where the purpose of a restraining order is, as here, to satisfy an order for forfeiture or automatic forfeiture the restraining order cannot be varied to permit restrained assets to be used to fund legal expenses: *DPP v McEachran* [2006] VSCA 286; (2006) 15 VR 268, 280–1 [50] (Ashley JA); *Siddique v DPP* [2015] VSC 99, [23] (Ginnane J). These are discussed below.

[67] See [22] above.

[68] [2009] VSCA 162; (2009) 23 VR 203.

[69] Ibid 218 [55] (Maxwell P, Weinberg JA and Kyrou AJA).

[70] Ibid. See also *Markovski v DPP* [2014] VSCA 35; (2014) 41 VR 548, 562 [70] (Whelan JA); *Lee v NSW Crime Commission* [2013] HCA 39; (2013) 251 CLR 196, 310-11 [314] (Gageler and Keane JJ).

[71] *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4; (2009) 237 CLR 501, 523 [59].

[72] [2006] VSC 67 (Bell J).

[73] *DPP v McEachran* [2006] VSCA 286; (2006) 15 VR 268.

[74] Section 27(1)(a).

[75] Section 27(1)(b).

[76] Section 27(1)(c).

[77] *DPP v McEachran* [2006] VSCA 286; (2006) 15 VR 268, 275–7 [37].

[78] In *DPP v McEachran* [2006] VSCA 286; (2006) 15 VR 268, Ashley JA also said of s 26, the power of a court to make orders 'in relation to the property to which the restraining order relates as it considers just', that it did not extend to freeing restrained assets to fund legal assistance: 'That section sets out examples of orders which might be made: see s 26(5). While the list is not intended to be exhaustive, it certainly does not suggest that the section could be used to make an order that legal costs be met out of restrained property, or that property could be rendered unrestrained in order that a defendant's legal costs be met': 281 [50]. This was applied by Ginnane J in *Siddique v DPP* [2015] VSC 99, [23] to conclude that s 26 does not permit the variation of a restraining order to enable the payment of legal expenses. See also *DPP v Benevento Property Investments Pty Ltd* [2019] VSC 54.

[79] *DPP v McEachran* [2006] VSCA 286; (2006) 15 VR 268, 280 [50].

[80] Ibid 286 [65]. See also 269 [2] (Nettle JA). The appeal brought by the DPP 'succeeded in substance [but] in form [was] dismissed': 287 [77]. The Court held that the County Court judge had the power to make an order providing for the giving of security by way of a charge over restrained land but answered 'No' to the question: '[I]f an order for the giving of security by way of a charge over restrained real property is made, and if all the conditions of s 143(3) have been satisfied, can VLA take and enforce a charge over land which is then still subject to a restraining order?': 278 [41]–[43]. This question was described as 'at the heart of the appeal': 278 [42]. See also 287 [71].

[81] [2017] VSC 618.

[82] Ibid [41] (emphasis added).

[83] (2013) 40 VR 356 ('*Chaouk*').

[84] Emphasis added. See *Cook v The Queen* [2019] VSCA 87 where Priest and Beach JJA trace the history of s 197.

[85] *Chaouk* (2013) 40 VR 356, 362 [17] (citations omitted).

[86] See also *MK v Victoria Legal Aid* [2013] VSC 49; (2013) 40 VR 378 where T Forrest J, in the inherent jurisdiction of the court, granted a temporary stay of a criminal prosecution until such time as the accused was provided with legal representation necessary for a fair trial. He denied the application for an order under s 197 of the *Criminal Procedure Act* directing VLA to provide legal representation to the accused as legal representation had been provided by VLA, namely counsel for the duration of the trial and an instructing solicitor only for two half days, so it could not be said

he was not 'legally represented'. His concern was with the adequacy or sufficiency of the legal representation.

[87] In its decision, the Court of Appeal did not consider s 197 of the *Criminal Procedure Act*.

[88] *Chaouk* (2013) 40 VR 356, 369–70 [5]–[6] (citations omitted).

[89] See [73] above.

[90] See [81] above.

[91] He first sought to rely on materials from another proceeding in which he claimed the circumstances showed that the person affected was not given notice after the *ex parte* order was made. The matter was not a proceeding before this Court and the issue of service was in contest between the parties, the DPP submitting that the person whose interest in property had been restrained by an order made under s 18 was served with a copy of the restraining order two days after the County Court had made it. The person affected denied this or denied that notice had been given in the proper manner. Forfeiture had been avoided in that case because of a later order made, by consent, setting aside the restraining order, although the legal basis of that order was unclear: see *DPP v Nguyen* [2009] VSCA 147; (2009) 23 VR 66, 89 [117]-[118]. The circumstances referred to thus did not appear to illustrate the proposition he wished to make. In any event, it is not for this Court to make any findings of fact in an unrelated matter involving a range of circumstances that are at best uncertain.

[92] See [24], [25] and [28] above, respectively.

[93] See [23] above.

[94] [1915] HCA 75; (1915) 21 CLR 55.

[95] Ibid 60.

[96] (2009) 240 CLR 319, 379–80 [141], 388 [164].

[97] He refers to *Nicholas v The Queen* [1998] HCA 9; (1998) 193 CLR 173, 208–9 [74] (Gaudron J) ('*Nicholas*') and *Leeth v Commonwealth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ) ('*Leeth*').

[98] (1954) 28 ALJ 282.

[99] Ibid 283 (Dixon CJ, McTiernan, Webb, Fullagar, Kitto and Taylor JJ).

[100] [2015] HCA 13; (2015) 255 CLR 388.

[101] Ibid 410 [52] (citation omitted).

[102] [2017] HCA 29; (2017) 261 CLR 306.

[103] Ibid 324–5 [33] (emphasis added) (citations omitted).

[104] (2019) 59 VR 27 (Maxwell P, Tate and Niall JJA).

[105] However, Proudfoot filed his further amended written case many months after judgment in *Nguyen* had been delivered. In *Nguyen* the issue of notice was contested until, in the course of the hearing of the proceeding before the Court of Appeal, counsel for the applicant, Mr Hume, conceded that his client had received actual notice of the relevant restraining order: *Nguyen* (2019) 59 VR 27, 32 n 14.

[106] See [93] above.

[107] *Nguyen v DPP* [2019] HCASL 238 (Gageler and Keane JJ).

[108] *DJL v Central Authority* [2000] HCA 17; (2000) 201 CLR 226, 248 [47] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

[109] *R v Roussety* [2008] VSCA 259; (2008) 24 VR 253, 282 [68].

[110] *Nguyen v Nguyen* (1990) 169 CLR 245, 269 (Dawson, Toohey and McHugh JJ, Brennan and Deane JJ agreeing at 247 and 251).

[111] [2008] VSCA 259; (2008) 24 VR 253.

[112] Ibid 284 [81].

[113] *RJE v Secretary, Department of Justice* [2008] VSCA 265; (2008) 21 VR 526, 540 [48] (Maxwell P and Weinberg JA) citing *Avco Financial Services Ltd v Abschinski* [1994] VicRp 76; [1994] 2 VR 659; *Farrar v Western Metropolitan College of TAFE* [1998] VSCA 25; [1999] 1 VR 224, 228–9 [13]–[14] (Winneke P).

[114] *Forster v Forster* [1906] ArgusLawRp 183; [1907] VLR 159, 161 (A'Beckett ACJ, Hodges, Hood, Cussen and Chomley JJ).

[115] Nor was any application made for Tate JA to recuse herself, having been a member of the bench in *Nguyen*.

[116] Section 40I which, as mentioned, is comparable to s 18. See [24] above.

[117] Section 40H which is relevantly comparable to s 17. See [23] above. The legislation considered in *International Finance* required the court to make a restraining order, *ex parte*, if certain criteria were fulfilled. Unlike the Act, there was no discretionary power conferred on the court to order that notice be given before an order was made. See *Nguyen* (2019) 59 VR 27, 55–6 [80]–[84] (Tate JA), 75 [154], 77 [163] (Niall JA) (Maxwell P agreed with the reasons of both Tate and Niall JJA).

[118] Section 40W which is relevantly comparable to 26. See [27] above.

[119] *Nguyen* (2019) 59 VR 27, 63 [108] (Tate JA), 78–9 [171] (Niall JA).

[120] Section 40ZA(1) which is relevantly comparable to s 35, albeit that s 35 has a shorter time frame of 60 days. See [28] above.

[121] Section 40ZA(2) which is relevantly comparable to s 35(2).

[122] Section 40J which is relevantly comparable to s 19. See [25] above.

[123] *Nguyen* (2019) 59 VR 27, 73 [145]–[146] (emphasis added).

[124] See [116] below.

[125] (1998) 194 CLR 355 ('*Project Blue Sky*').

[126] Ibid 390 [93] (McHugh, Gummow, Kirby and Hayne JJ).

[127] See [35] above.

[128] Nguyen, like Proudfoot, relied upon *Nicholas* [1998] HCA 9; (1998) 193 CLR 173, 208–9 [74] (Gaudron J) and *Leeth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ).

[129] See [25] above.

[130] Emphasis added.

[131] Consistently with an interpretation based on *Project Blue Sky* principles, mentioned at [112] above, the court might also make an order declaring the restraining order invalid if there is no compliance with the statutory requirement for notice.

[132] *Nguyen* (2019) 59 VR 27, 71–2 [139]–[140].

[133] Ibid 72 [142] (citations omitted). Section 40K requires a respondent to give a written declaration of interests in the restrained property. This is relevantly comparable to s 19A.

[134] *Nguyen* (2019) 59 VR 27, 72 [141] citing *Assistant Commissioner Condon v Pompano Pty Ltd* [2013] HCA 7; (2013) 252 CLR 38, 108 [187] (Gageler J), quoting *Walton v Gardiner* (1993) 177 CLR 378, 393.

[135] *Nguyen* (2019) 59 VR 27, 75 [153] citing *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393.

[136] Section 40H(1) (s 17(1)).

[137] Section 40J(2) (s 19(2)).

[138] *Nguyen* (2019) 59 VR 27, 63 [108] (Tate JA), 76–7 [159]–[161] (Niall JA).

[139] Section 40W (s 26).