

DIRECTOR OF PUBLIC PROSECUTIONS FOR VICTORIA v LE (M65/2007)

Court appealed from: Court of Appeal, Victoria

Date of judgment: 15 February 2007

Date special leave granted: 25 May 2007

The respondent's husband ("Roy Le") was convicted of trafficking in heroin on 1 February 2005. At the time he committed the offence, the couple were living together in an apartment in the Melbourne suburb of Sunshine. The apartment had originally been in Roy Le's name only, but shortly after he was charged, he transferred a joint interest in the apartment to the respondent, the consideration being "natural love and affection". Because Roy Le used the property to store and prepare heroin for sale, it was "tainted property" for the purposes of the *Confiscations Act 1997* (Vic) ("the Act"), and, on application by the appellant ("the DPP"), a restraining order was made in respect of it. The effect of the order was that the property would be forfeited to the Minister 60 days after Roy Le's conviction unless the respondent applied for an exclusion order.

The respondent's application to the County Court of Victoria (Judge Campbell) for an exclusion order was successful. The judge noted that the substantive issues were first, whether the respondent had satisfied the Court that she acquired her interest in the property without knowing, and in circumstances such as not to arouse a reasonable suspicion, that it was "tainted property", and secondly, whether her acquisition of her interest in the property was for a "sufficient consideration". His Honour, having regard to the evidence and having observed the respondent in the witness box, was not prepared to say that her denial of any knowledge or suspicion of her husband's drug dealing should not be believed. With respect to the second issue, he found that while natural love and affection may not be sufficient to justify a commercial contract between people at arms length, it is a common consideration in respect to the alteration of property interests between husband and wife, and was sufficient in this case.

The appellant's appeal to the Court of Appeal (Maxwell P and Chernov JA, Neave JA dissenting) was dismissed. Maxwell P and Chernov JA rejected the DPP's contention that the test in relation to "reasonable suspicion" was wholly objective (that is, the court must be satisfied that the circumstances were such as not to arouse a suspicion in *any* reasonable person). Their Honours found that the question to be asked was: would a reasonable person in the respondent's position have had a suspicion? After examining the evidence given in the application, they found Judge Campbell's conclusion regarding the respondent's lack of suspicion was unimpeachable. With respect to the consideration issue, Maxwell P and Chernov JA held that the term "sufficient consideration" included both "valuable consideration" and "good consideration" as those terms have been understood at common law. As "good consideration" in conveyancing transactions at common law includes natural love and affection, there was sufficient consideration in this case, for the purposes of the Act.

The DPP also argued that the power to make an excluding order could only be exercised to exclude so much of the property as relates to the interest of the person applying for the order. The majority of the Court rejected that argument on the basis that the language of the Act makes it clear that the property, and the applicant's interest in the property, are separate and distinct. It is the *property* which the Court excludes. It is the applicant's *interest in the property* which gives that applicant standing to seek that exclusion. Neave JA dissented on this point.

The grounds of appeal include:

- The learned Judge erred in concluding that the respondent acquired her interest in the property without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was tainted property within the meaning of s 52(1)(a)(iii) of the *Confiscation Act 1997(Vic)*;
- The learned Judge erred in concluding that he was satisfied that the respondent had acquired her interest in the property from the defendant for sufficient consideration within the meaning of s 52(1)(a)(v) of the Act.