



HIGH COURT OF AUSTRALIA

Public Information Officer

20 July 2006

NIGEL CUNNINGHAM MANSFIELD v DIRECTOR OF PUBLIC PROSECUTIONS FOR WESTERN AUSTRALIA

The WA Supreme Court had the power to make orders to require the DPP to undertake to compensate Mr Mansfield for any damage resulting from the freezing of assets and to enable him to access some of his frozen assets to pay his legal costs, the High Court of Australia held today.

Mr Mansfield, facing insider trading charges, has had all property owned or controlled by him frozen since 2002 when the Supreme Court granted the DPP's application under WA's *Criminal Property Confiscation Act* for a freezing order. The order was granted because the DPP was seeking to examine Mr Mansfield about suspected confiscable property and was also likely to apply for a criminal benefits declaration which if granted would require Mr Mansfield to pay to the State the amount equivalent to the criminal benefit acquired. "Criminal benefits" are certain property, services, advantages and benefits obtained as a result of a person's alleged involvement in a "confiscation offence", whether or not it was committed in WA and whether or not anyone has been charged or convicted. The Act provides for automatic confiscation of frozen property unless an objection is taken to the freezing order within a certain time. Mr Mansfield lodged an objection so no confiscation has occurred. In 2004, the freezing order was varied to release \$2,500 a fortnight for the reasonable living expenses of Mr Mansfield and his wife, with \$102,500 also released to cover their living expenses since the order was made in 2002. Neither the application for a criminal benefits declaration nor the criminal proceedings have yet been dealt with by the Supreme Court.

Mr Mansfield sought leave to appeal to the WA Court of Appeal, claiming that Justice Leonard Roberts-Smith had erred in two respects when granting the freezing order. First, the judge found the Court had no power to require an undertaking by the DPP on damages to protect the interests of parties like Mr Mansfield whose property is bound by the order. Second, the judge found the Court had no power to make allowance in a freezing order for payment of reasonable legal costs incurred in related civil or criminal proceedings. Mr Mansfield argued the Court did have jurisdiction to make both kinds of orders. The Court of Appeal, by majority, refused to grant him leave to appeal on these two grounds. He appealed to the High Court.

The Court, by a 5-1 majority, allowed the appeal on both grounds. It held that the Supreme Court had the power to require the DPP's undertaking before granting an application for a freezing order. Earlier legislation expressly provided for power to grant an undertaking as to damages in what were then called "restraining orders", but the Court held that the absence of an express limitation in the Act upon the scope of the power to grant freezing orders meant the Supreme Court's inherent jurisdiction when granting a discretionary remedy to act judicially and to have regard to considerations of justice was not displaced. Other sections in the Act upon which the DPP relied did not prevent the Supreme Court from exercising its discretion to require an undertaking to pay compensation if Mr Mansfield suffered loss.

The High Court also held that the Supreme Court had power to vary the freezing order to allow him to pay legal costs. The DPP argued that the Act implicitly denied the Supreme Court the power to make such an order. The Court said legal representation of parties benefits the adversarial system of litigation. While the Second Reading Speech stated that no property could be released for legal expenses, neither the Bill nor the Act did so. The Court adopted Justice Christopher Pullin's dissenting view in the Court of Appeal that the Supreme Court may exempt some property from a freezing order on condition that it is used for legal expenses. Such conditions would need careful framing to ensure exempted funds were not misused or abused, such as by overservicing or overcharging by lawyers. The High Court ordered that Mr Mansfield's applications be referred to a single Supreme Court judge for determination in light of its reasons.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*