

[2] Registration of the order is challenged on the grounds that –

- the Polish authorities had not established that the assets represented benefits to the appellant of, or were tainted by, his alleged offending;
- the order was for the forfeiture of, rather than restraint in dealing with, the appellant's assets;
- in the judgment now under appeal the Court of Appeal had departed from some of its own findings in an earlier judgment, in breach of the principles of res judicata and issue estoppel;
- a Polish prosecutor had provided evidence about the proceedings against the appellant and the Polish legal system, but was not an independent witness.

Before considering these arguments, we will summarise the history of this litigation and examine the statutory scheme.

Litigation history

[3] The Polish authorities have brought numerous charges against Mr Bujak alleging the misappropriation of funds, vehicles and other property. Pursuant to the Polish Code of Penal Procedure 1997,¹ an order freezing the property of Mr Bujak was proposed by the prosecution and confirmed by a Regional Court in Poland.

[4] Poland requested the Attorney-General of New Zealand to register the Polish Order against Mr Bujak's assets believed to be in New Zealand. The Attorney-General instructed the Solicitor-General to take the necessary steps to register the Polish Order as a foreign restraining order under the Act.² After an ex parte hearing before Clifford J in the High Court at Wellington, the Court made an order registering the Polish Order. It gave no reasons for doing so.

¹ Articles 291 – 295.

² Mutual Assistance in Criminal Matters Act, s 2.

[5] Mr Bujak appealed to the Court of Appeal.³ The Court remitted the proceeding to the High Court because it considered that “it was important to ensure that the respondent could come into court and challenge the making of the order.”⁴ Further, the Court expressed a preliminary opinion that Mr Bujak was “entirely correct”⁵ in his submission that the Polish Order does not “on its face”⁶ fall within the statutory definition of foreign restraining order in s 2(1) of the Act.

[6] On the return of the proceedings to the High Court, Clifford J found that the definition of foreign restraining order could not accommodate the Polish Order.⁷ He concluded that the Solicitor-General had not established that the Polish Order “does no more than restrain” Mr Bujak’s property, a requirement of the statutory definition.⁸ Clifford J drew a distinction between the concepts of “restraint” and “seizure” of property, placing the Polish order in the latter category. The Judge drew support for this conclusion from the decision of Mandie J in the Supreme Court of Victoria in *DPP (Cth) v Peniche*.⁹ Clifford J rejected evidence provided by a Polish district public prosecutor on the nature and scope of the Order, holding that:¹⁰

Given the onus on the Crown, and the significance of the registration of a foreign restraining order – as commented on by the Court of Appeal – I therefore do not consider that the Solicitor-General has discharged the onus as regards the need for me to be satisfied that the Polish Court made its decision in respect of benefits derived [from the alleged offending].

[7] The Solicitor-General appealed against that judgment and the proceedings went to the Court of Appeal for a second time.¹¹ On this occasion, the Court held that, even if the Polish Order were to go further than restraining Mr Bujak’s property, it nonetheless may be registered in New Zealand and have effect within the narrower scope permissible under New Zealand law.¹² Unlike the High Court, the

³ *R v Bujak* [2007] NZCA 347 (CA 185/07, 15 August 2007) (William Young P, Hammond and Robertson JJ).

⁴ At para [36].

⁵ At para [49].

⁶ At para [49].

⁷ *Solicitor-General v Bujak* (unreported, High Court, Wellington, CIV-2007-485-522, 16 November 2007, Clifford J).

⁸ At para [82].

⁹ (1999) 106 A Crim R 438.

¹⁰ At para [60].

¹¹ *Solicitor-General v Bujak* (2009) 1 NZLR 185 (CA) (Chambers, Robertson and Baragwanath JJ).

¹² At para [27].

Court of Appeal was prepared to accept the evidence of the Polish district public prosecutor that the Polish Order was made “in respect of the benefits derived” from Mr Bujak’s alleged offending.¹³ The Court thus allowed the appeal, ordering the registration of the Polish Order.¹⁴ Mr Bujak now appeals to this Court against that judgment.

The statutory scheme

[8] The relevant provisions of the Act include the following definitions in s 2:

Foreign forfeiture order means an order, made under the law of a foreign country by any court or other judicial authority, for the forfeiture of property that is tainted property in respect of an offence against the law of that country.

Foreign pecuniary penalty order means an order, made under the law of a foreign country by any court or other judicial authority, imposing a pecuniary penalty in respect of benefits derived by a person from the commission of an offence against the law of that country; but does not include an order for the payment of a sum of money by way of compensation, restitution, or damages to an injury person.

Foreign restraining order means an order –

- (a) That is made under the law of a foreign country by any court or other judicial authority in respect of –
 - (i) Property that is or may be tainted property in respect of an offence against the law of that country; or
 - (ii) Benefits that have been derived, or may have been derived, by a person from the commission of such an offence; and
- (b) That restrains a particular person, or all persons, from dealing with property.

[9] A number of points emerge from these definitions. First, a foreign forfeiture order is an order directed to the confiscation of property which is itself tainted by foreign offending. In contrast, a foreign pecuniary penalty order is directed to the benefits derived from such offending. Secondly, an order to compensate the victims of offending is expressly excluded from the definition of a foreign pecuniary penalty order. Thirdly, a foreign restraining order is anticipatory in nature and encompasses

¹³ At paras [31] – [39].

¹⁴ At para [49].

both property that is tainted by the alleged offending (and which may therefore subsequently be the subject of a foreign forfeiture order) and benefits that are derived from the alleged offending (and which may later be reflected in a foreign pecuniary penalty order). Finally, a restraining order cannot be made in anticipation only of an order for compensation, because such an order could not in law be a foreign pecuniary penalty order.

[10] Section 55 of the Act reads:

- (1) A ... foreign country may request the Attorney-General to assist with the enforcement of a foreign restraining order in respect of property that is believed to be located in New Zealand.
- (2) Where, on receipt of a request made under subsection (1) of this section, the Attorney-General is satisfied –
 - (a) That the request relates to a criminal investigation, or criminal proceedings, in respect of a foreign serious offence; and
 - (b) That there are reasonable grounds for believing that some or all of the property to which the order relates is located in New Zealand, –the Attorney-General may authorise the Solicitor-General, in writing, to apply to the High Court for the registration of the order.

The Attorney-General thus has the responsibility of ensuring that the subs (2) criteria are satisfied.

[11] Section 56(1) then provides that, when the Solicitor-General applies to the High Court for registration of a foreign order in accordance with a s 55 authorisation, the Court “shall” register the order “if it is satisfied that the order is in force”. The Court therefore has no discretion; it must register any qualifying order which is established to be in force.

[12] Unlike a foreign forfeiture order or a foreign pecuniary penalty order, a foreign restraining order does not, upon registration in this country, deprive the owner of property of that ownership. It does no more than restrain the owner from dealing with the property. The evidence required to justify restraint will usually be less compelling than that required to justify the more extreme step of confiscation of property.

The background to the Act

[13] As was identified by the Court of Appeal in its second decision,¹⁵ the Act constitutes New Zealand's response to the United Nations Model Treaty on Mutual Assistance in Criminal Matters.¹⁶ The Model Treaty refers to concerns surrounding the “escalation of crime, both national and transnational” and “[u]rges all states to strengthen further international co-operation and mutual assistance in criminal justice”.¹⁷ The Act facilitates New Zealand's co-operation with other states for this purpose. Although New Zealand does not have a formal mutual assistance arrangement with Poland, the legislative regime accommodates mutual assistance requests made on an ad hoc basis. Other jurisdictions have adopted legislation with similar intent.

[14] Before this Court, counsel for Mr Bujak placed considerable reliance on the *Peniche* decisions of the Supreme Court of Victoria. In *Peniche* the Supreme Court considered the meaning of the term “foreign restraining order” in the Mutual Assistance in Criminal Matters Act 1987 (Cth), the equivalent Australian legislation. At the time, the statutory definition of foreign restraining order referred only to “an order ... restraining a particular person or all persons from dealing with property being an order made in respect of an offence”. Mandie J held that an order which purported to “seize” property did not fall within the definition of foreign restraining order.¹⁸

I accept that an order that property be seized may have the consequence, by controlling possession, that it is more difficult for persons to deal with that property but clearly there is a real distinction between an order calling on appropriate authority to seize property and an order directly restraining a particular person or all persons from dealing with property.

The decision of Mandie J was upheld on appeal by the Full Court.¹⁹ A prompt legislative response followed.²⁰ The Australian legislation now makes clear that the term “foreign restraining order” may include orders expressed as orders for seizure,

¹⁵ At para [23].

¹⁶ GA Res 45/117 (14 December 1990).

¹⁷ Preamble and cls 3 (italics in original).

¹⁸ At para [10].

¹⁹ *DPP (Cth) v Peniche (aka Merrit)* [2000] VSCA 40.

²⁰ Crimes Amendment (Forensic Procedures) Act 2001, Schedule 2.

orders that property not be disposed of or dealt with or orders that property be taken into official custody or control. The two qualifying requirements under the new definition are that the order was made under the law of a foreign country in respect of an offence against the law of that country, and was made for the “purpose of preserving property (whether or not the order also purports to do other things)”.

[15] For completeness, we note that amendments to the New Zealand Act affecting foreign restraining orders will come into force on 1 December 2009.²¹ The purpose of these amendments is to ensure that the Act provides for foreign restraining orders and foreign forfeiture orders that are civil, as well as criminal in nature.²² Changes are also made to the definitions of foreign forfeiture order, foreign pecuniary penalty order and foreign restraining order. These amendments appear however to be unrelated to the issues which arise on the present appeal.

Tainted property and benefits

[16] Although the Act draws a clear distinction between tainted property and benefits, there will often be considerable overlap between them, because the acquisition of tainted property constitutes a benefit. That indeed is the position here.

[17] The Polish prosecutor provided extensive sworn evidence in support of the registration of the Polish Order. Very significantly, no part of this evidence was challenged by the appellant or any witness on his behalf. Among the evidence of the prosecutor were statements (as translated by an official translator) that:

There is a high probability that Mr Bujak, if the Court finds him guilty of committing offences of which he is charged, will be ordered to pay a fine and sentenced to penalties in the form of reparations or ordered to pay compensation for the damage caused to physical and legal persons.

During the investigation ... information has been received that Slawomir Bujak entered the territory of New Zealand in June 1999 carrying with him, without declaring, US\$150,084.59 US and NZ\$8,690, which he deposited with Bank of New Zealand. Considering the findings made during the investigation ... it is indisputable that the money was proceeds from the crimes the suspect is charged with.

²¹ Mutual Assistance in Criminal Matters Amendment Act 2009, s 2.

²² Mutual Assistance in Criminal Matters Amendment Act 2009, s 4.

Currently, Slawomir Bujak owns in New Zealand a house worth over NZ\$400,000 and shares in four companies, and he holds private bank accounts with various banks. It is indisputable that the subject has used the money he brought to New Zealand on 1 June 1999 as the base for multiplying his property.

[18] The unchallenged evidence of the prosecutor thus established that the appellant's property in this country may be tainted by the alleged offending and may represent a benefit derived from the offending.

[19] The evidence also establishes that the property may be required to be applied in the payment of a pecuniary penalty (a fine) or for reparation. Provided that the property may be required for those authorised purposes, it matters not if the foreign court also makes the order with the unauthorised (for present purposes) intention of ensuring that the property is available to compensate the victims of the offending, or with any other purpose outside the New Zealand Act.

Seizure or restraint

[20] After detailing the numerous charges of dishonesty against the appellant, the Polish Order recorded that the Court had granted an application by the prosecutor "to impose security on property" "to secure the fine" to which the appellant was "likely to be sentenced" and "claims for repairing property damages" by the "seizure" of funds in domestic and foreign bank accounts of the appellant and companies in which he is a shareholder, the "seizure" of other property of the appellant and the imposition of a "compulsory mortgage" on real estate owned by the appellant outside Poland.

[21] When the Polish Order is looked at as a whole, its intended purpose appears to be the taking of security to ensure that the property thus secured will be available in due course, if required, to satisfy any final orders for penalty, reparation or forfeiture which may be made. The reference in the order to the "seizure" of property is, in context, to seizure to provide security rather than to seizure by way of confiscation. The reference in the order to the taking of a mortgage over real property, rather than to the forced sale of that property, confirms that the purpose of the Polish Order was to obtain security. The Polish Order therefore operated in very

much the same way as a restraining order made by a New Zealand Court under s 42 of the Proceeds of Crime Act 1991 directing that property is “not to be disposed of or otherwise dealt with by any person except as provided in the order”.

[22] We consider the Polish Order to have been unambiguous on its face but, even if it had not been, the following evidence of the prosecutor would have established beyond doubt that its purpose was to take security:

The purpose of asset seizures is to ensure the enforceability of the future pronouncement of the Court in the case of certain types of penalties (fines) and penal measures (obligation to make reparation), and also to facilitate the successful collection of claims for reparation.

The enforcement of a decision to seize assets is carried out on the basis of the requirements set down in the Polish Code of Civil Procedure regarding seizures to secure monetary claims. These actions must not be confused with the actual execution procedure, which takes place only after the issuing of a court judgment with legal force. In a criminal case this would be a judgment ordering a convicted person to pay a fine or reparations.

... under current Polish law the seizure of assets in the context of the enforcement of a decision to seize assets is not, and cannot be, construed as a “confiscation of assets”. The purpose of such a decision is to prevent the disposal by the accused of specific assets as defined in the seizure decision, so that the suspect (accused) will not get rid of the assets before the issuing of a court judgment with legal force, in order to avoid paying a fine or reparation to wronged parties (underlining in original).

[23] To the extent that *Peniche* is authority for the proposition that an order which refers to the seizure of property cannot be a foreign restraining order for the purposes of the Act, it should not be followed in this country. The substance of the order, rather than specific words which may appear within it, should determine whether or not it constitutes a foreign restraining order. Looking at the Polish Order as a whole, it is directed to the restraint rather than the seizure of the appellant’s property. The unchallenged evidence of the prosecutor confirms that conclusion. The Polish Order therefore qualifies as a foreign restraining order.

Court of Appeal

[24] In its first judgment, the Court made clear that it was not expressing any final views. Indeed, if it had done so, there would have been no reason to refer the matter

back to Clifford J. Any doubt as to the status of the observations of the Court of Appeal is readily resolved by the Court's statement that.²³

As a matter of caution, it will of course be open to the parties to address whether the particular Polish foreign order is or is not within the definition in the New Zealand Mutual Assistance Act, and *the High Court will determine that point*. Nothing we have said in this judgment is intended to preclude any other relevant authorities or affidavit material being placed before the High Court. (Emphasis added).

Clifford J obviously understood correctly the status of the statements made by the Court of Appeal; he repeatedly referred to them as "comments".²⁴

[25] Such comments could not raise the principle of res judicata, or that of issue estoppel. They did not prevent Clifford J from deciding the point, or the Court of Appeal from coming to a different conclusion from the tentative view which it had expressed previously.

Expert evidence

[26] The prosecutor was undoubtedly expert in Polish law and was well qualified to give evidence of fact as to the nature of the proceedings in Poland and the relevant provisions of the Polish legal system. In the absence of any challenge to her evidence from an independent expert there was no reason not to accept it.

Result

[27] The appellant has not made out any of the grounds on which registration of the order was challenged. The appeal should therefore be dismissed.

[28] The appellant should pay to the respondent costs of \$15,000 and reasonable disbursements, to be fixed if necessary by the Registrar.

²³ At para [53].

²⁴ Compare paras [7], [9], [13] and [60].

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