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"Prosecuting Proceeds of Crime – Civil Forfeiture and the Challenges Ahead" by:

Josaia Naigulevu
DPP, Fiji.

I have been asked to speak on the subject "Civil Forfeiture and the Challenges Ahead". One may be forgiven for believing that this rather unusual procedure, its exact nature and character lacking clear description, is destined to bring ill-foreboding of some kind, that will constantly challenge us in the future. I do not believe that that is a fair representation.

I think an explanation about what it is is warranted. Civil forfeiture is a remedial recovery action in rem against the property itself, as opposed to an action in personem against the person, a hallmark of criminal forfeiture. It rests on the idea, a legal fiction, that the property itself, not the owner has violated the law. Through this civil action, the State seeks to remedy the harm with the view to restore the status quo ante by striking at the property's quilt, and

effectively challenging title. In this way, it focuses on the property and its 'activity'. In contrast, criminal forfeiture is a punitive action by the State against the offender, and typically follows conviction.

In rem forfeiture, as it is historically known is not a modern specie. Its root goes back to feudal England when a felony could quite easily result in forfeiture of one's estate and chattels to the King, Barons and sometimes the church. Oliver Wendell Holmes in his 1880 lectures on Common Law recalled:

> *"If a man fell from a tree, the tree was deodand [in Latin, literaly a thing to be given to God; in this case Holmes means the tree was chopped down]. If he drowned in a well, the well was to be filled up. It did not matter that the forfeitured instrument belonged to an innocent person".*

What underpins modern civil forfeiture are also arguments that have been asserted in its defence. It has been argued that civil forfeiture is the State's response to certain societal problem, and that the response has been both necessary and proportional. In a large number of jurisdictions the challenge has been removing illicit property

from circulation as a method of suppressing the conditions leading to crime. In many cases, the acquisition of property are associated with serious crimes linked to drug trafficking. This remedial objective therefore targets unjust enrichment of criminals, particularly the directing minds which are able to insulate themselves from liability.

The second argument is that the process is quick, cheap and effective. According to this argument, the State has a moral imperative to elect the most effective and efficient policy option that serves to address the challenge. In its defence, it is asserted that in common law jurisdictions at least, this process is judicially controlled. An independent judicial officer exercises a discretion to freeze and forfeit. Private actors cannot bring these proceedings. The State bears the onus and burden of proof, and special protection is afforded to legitimate property interests.

The third argument is that as a remedial process, it attempts to return the property to status quo ante, and where possible compensate victims. In this way, it addresses the traditional civil tort of unjust enrichment.

Functionally, the State brings the proceedings against the property itself. Notice is given to all known parties with a

property interest in the litigation: title holders, bailors, mortgagors, lessors and so on. The State bears the burden of establishing their case to the satisfaction of the court on a balance of probabilities. If the State satisfies the court that the property ought to be the subject of forfeiture, the other parties then have an opportunity to show the court that their interest is deserving of the court's protection.

Legislative Scheme in Fiji

Fiji introduced its civil forfeiture provisions in 2005, as an amendment to the Proceeds of Crime Act 1997. In doing so, it joined a growing community that have enacted similar laws. These include the USA, Italy, South Africa, Ireland, United Kingdom, five Canadian Provinces, the Commonwealth of Australia and individual states of Australia, Antigua and Barbuda.

Division 2A of the Act introduced Civil Forfeiture, providing the opportunity to take out a restraining order over tainted property (Section 19A and 19B), and a non-conviction based forfeiture order (sections 19C, 19D and 19E) over tainted property. A tainted property, a property defined in section 3 as property used in connection with, or intended to be used in or the proceeds of a serious crime,

may be restrained upon a written exparte application by the DPP, after the court is satisfied that there are reasonable grounds to suspect that the property was a tainted property.

A non conviction civil forfeiture over a property may be granted to the State if the court was satisfied on a balance of probability that the property was tainted (section 19E). It is a requirement of the Act however that the DPP gives all persons who are known to have an interest in the property written notice 30 days prior to the hearing. Additionally, the court may direct the DPP to give other persons notice at any time before the final determination, or publish the notice in the gazette or newspaper. Any person who has been given such notice may attend and produce evidence at the hearing. If the person satisfies the court that he/she has an interest in the property, which predates the serious offence, and did not acquire the interest as a result of a serious offence but for fair value, that interest will not be affected. Where the person acquired the property for fair value after the serious offence, his/her interest may be protected if he/she is able to show that he/she did not know at the time or could not have reasonably known at the time of acquisition that the property was tainted.

Section 19C and 19E mention non conviction based forfeiture, in their headings. Section 19E(4) reaffirms this, providing assurance that a forfeiture order granted under s.19E(i) will not be affected by the ultimate outcome of the criminal proceeding or investigation.

Policy Justification

We had examined in the early part of this paper general policy justifications for civil forfeiture. I believe it applies here too.

Parliament in 2005 had perhaps acknowledged societal problems in the form of circulation of illicit assets and unjst enrichment of offenders existed in Fiji and needed to be addressed. And while criminal forfeiture was available, Parliament believed that it had the moral imperative and authority to determine and provide the most effective and efficient process of dealing with the problem. This it did in 2005. The form and substance of the new civil forfeiture process in my view attempts genuinely to address key issues concerning constitutional safeguards. Of note is that the entire process is judicially controlled and seeks to provide protection of individual rights, particularly those that pertain to interest in the property.

Possible challenges to Civil Forfeiture in Fiji

Whilst they have never been raised, it is instructive to anticipate and be aware of the possible challenges. The challenges may relate to issues connected to the policy underpinnings I had discussed earlier in this paper. The range of challenges may also cover the rights protected by the Bill of Rights in the Constitution. I suggest it could perhaps include challenges to article 28(i)(a) Constitution of Fiji 1997 relating to the presumption of innocence; article 40(1) concerning the protection of property rights; article 28(1)(j) retrospective application; article 28(1)(k) double jeopardy; and article 26(1) relating to unreasonable seizure of property.

It is not the intention of this paper however to produce a thesis that advances the case against these important constitutional rights. That might be best left tor another day. It is sufficient at least to point out at this stage that most of these substantive rights are limited or qualified in one respect or another. There is for example the permitted limitation if the action by the State were *"….. in accordance with the law"*. A number of other grounds can be expressed

as falling within the permissible limitation envisaged by the terms 'public order', 'public morals' and 'public safety'.

It would also be helpful to examine how courts in some jurisdictions have dealt with these issues.

One of the seminal points considered by courts in a number of jurisdictions involve the relationship between the legislative purpose behind civil forfeiture and the existing societal problems. It has been used to advance the case of civil forfeiture. In **R v Benjafield** (HL(E)) 2002 2 WLR 235, the court reasoned:

> *"The nature of the activity and the harm it does to the community provide a sufficient basis for the making of these assumptions. They serve the legitimate aim in the public interest, of combating that activity. They do so in a way that is proportionate. They relate to matters that ought to be within the accused's knowledge, and they are rebuttable by him at a hearing before a judge on the balance of probabilities. In my opinion a fair balance is struck between the legitimate aim and the rights of the accused".*

In **Raimondo v Italy**, the court observed:

> *"Confiscation which is designed to block these movements of suspect capital, is an effective and necessary weapon in the combat of this cancer. It is therefore proportionate to the aim pursued".*

The **Court in Welch v United Kingdom** said:

> *"The Court … does not call into question the powers of confiscation conferred on the courts as a weapon in the fight against the scourge of drug trafficking".*

The proceeds of Crime Act 1996 of Ireland has survived a number of constitutional challenges. Examining its purpose, the court in **M v D (Ireland)** 1997 had this to say:

> *"The Act is designed to enable the lower probative requirements of civil law to be utilized in appropriate cases, not to achieve penal sanctions, but to deprive such persons of such illicit fruits of their labours as can be shown to be the proceeds of crime"*

The same legislation was the subject of litigation in **Gilligan v The Criminal Assets Bureau** [1998] 3 IR 185 (HC) where the central argument became why a person holding property

with an illicit provenance should be entitled to assert a higher property interest than the State.

Litigants have also contended that civil forfeiture is in reality criminal masquerading as civil process. They therefore argue that they are entitled to the safeguards that a civil forfeiture is in reality criminal process masquerading as civil process. They are entitled to the safeguards that and the incident of criminal trials. In **Walsh and ARA v H** [2004] All DR 30, the Queen's Bench Division ruling on a challenge to the UK legislation, stated that the question whether it was civil or criminal could be resolved by asking three questions : how has the State characterized the proceeding? What is the nature of the conduct in question? What is the penalty? The court answered these questions in the following way : The proceeding was civil; it was brought against the property; and there was no penalty. A similar approach was taken by the Supreme Court of Canada in **Martinean v Minister for National Revenue** [2004] SCC 81 when refusing to invoke the applicant's right of self-incrimination it pointed to 3 criterion : the objective of the statute; the purpose of the sanction and the process leading to imposition of the sanction.

The principles enunciated in these cases may very well become key issues in similar litigation in the future here in Fiji. They appear to be sound principles that are in constant with international tribunals such as the European Court of Human Right, which in an unreported statement stated:

> *"The confiscation regime is a proportionate and fair response by Parliament to a recognized international attempt to ensure that the proceeds of criminal conduct are not kept by the criminal and returned to be used to cause more misery or produce more profit for the criminal".*

Conclusion

At the beginning of my speech I intimated that though we recognized the challenges ahead, we should not despair. Ladies and gentlemen, the character of our own legislation and the pronouncements of the courts in other countries so far give us some confidence.

ODPP, Suva.

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