IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY No. P 17 of 2019

BETWEEN: **GANESH KALIMUTHU**

First Appellant

MACQUELENE PATRICIA MICHAEL DASS

Second Appellant

and

THE COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE

10 Respondent

APPELLANTS' REPLY

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PART I: CERTIFICATION

1. This submission is in a form suitable for publication on the internet.

PART II: SUBMISSIONS

2. The respondent Commissioner's submissions (**RS**) at [7] say the money remitter was known only as Hameed. Mr Hameed represented to Mr Zamri that his full name was Shahul Hamid Basha {CAB 17.41 [47]}. Mr Hameed operated from commercial premises in a Penang shopping mall {CAB 18.20 [52]} {AFM 138-9 [45] – [50]}. A photograph of the premises was received by the primary judge and was before the CA.[1]

3. RS [11] and the Commissioner's submissions in Lordianto RS (**Lordianto RS**) at [23] refer to characterisation of the *property*. All parties in the CA adopted the characterisation preferred by N Adams J in *Tjonsutiono* [2018] NSWSC 48. This view was, however, rejected by the NSW CA {Lordianto CAB 83.16 [75]}. While the appellants maintain their position as advanced in the CA, it is not suggested (consistent with the view of the CA majority {CAB 155.17 [348]}) that the difference in approach is material to the disposition of any ground of appeal.[2]

4. Lordianto RS at footnote 1 refers to s5(da) of the Act. This paragraph has no application to this matter {CAB 24.35 [91]}.

5. The suggestion in Lordianto RS [20] (and see also Lordianto RS [34]) that s330(4)(a) is not *beneficial* must be rejected. It has never been suggested that the Act is beneficial. However the sub-section is clearly a carve out from, or an exception to, the manner in which the statutory scheme would otherwise operate. The Commissioner refers (Lordianto RS at fn 6) to *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232. At [92][93] Gageler J noted *legislation rarely pursues a single purpose at all*

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[1] Attachment MZ-3 to the affidavit of Mr Zamri sworn 25 August 2016. Reproduced at page 47 of the green appeal book in the WA Court of Appeal. See green appeal book index {CAB 204.45}.

[2] If it is thought otherwise, the appellants note the CA majority at footnote 100 {CAB 155.53} referred to the Commissioner's supplementary submissions to that Court (filed 3 October 2018) at [2], [9]. Those submissions by the Commissioner also referred, at [7], to the parties *"common position"* on this issue, and at footnote 10 referenced the Further Amended Submissions filed in the CA by Mr and Mrs Ganesh dated 31 January 2018 at [13] and [33]-[39]. The relevant portion of Mr and Mrs Ganesh's submissions are found in the CA Amended White Appeal book at pages 36-37. The law as stated in those submissions is correct.

costs and *it frustrates rather than effectuates legislative intent simplistically to assume that* ***whatever*** *furthers the statute's primary objective must be the law.*[3]

Ground 1 – third party

6. "Third party" is not defined (in contrast with many other terms in the Act). It takes its meaning from s330 read in context. Accepting that on Murphy & Beech JJA's preferred construction the words third party have "little work to do" – the term is nonetheless illustrative of the position of property (and thereby people) sought to be protected from forfeiture, despite the possession of (otherwise) tainted property; cf Lordianto RS [30][31].

7. It is not to the point that criminal law describes liability in terms of primary or secondary liability (or principal liability and derivative liability), cf Lordianto RS [28]. In any event, a person who is primarily or secondarily liable (as a matter of criminal law) will not be able to satisfy the final criteria in s330(4)(a). A person who is not so liable **can** linguistically and sensibly be described as a third party.

8. In addition to the various anomalous results that follow the Commissioner's construction[4], the construction that third party refers to a person *who was not involved in the transaction by which the property first became the proceeds or instrument of an offence* (Lordianto RS [29]) would mean that, had the appellants been capable of identifying an earlier offence from which the cash was obtained by the unknown depositors, they would be third parties.[5] These considerations also militate against the significance of the "temporal element" to s330 relied on at Lordianto RS [32].

9. The application of Lordianto RS [35] to this case is telling. The primary judge's undisturbed factual findings, taken as a whole and particularly at {CAB 31.30 [121]}, clearly portray Mr Ganesh as a *bona fide* party to an arm's length transaction. The appellants thus fall within the Commissioner's formulation of the legislative object of s330(4)(a).

10. Lordianto RS [36] contends that the Commissioner's construction of third party will cause innocent bystanders to be more *vigilant*. The submission erroneously assumes that a

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[3] See also *Carr v Western Australia* (2007) 232 CLR 138 per Gleeson CJ at [6]; *Alcan (NT) v Territory Revenue* (2009) 239 CLR 27 per French CJ at [11].
[4] See for example AS [40]-[42] and Lordianto AS at [19]-[24].
[5] Of course the offence in the present case is one directed to the detection of antecedent offending. Further, the possession of the money would be a relevant "dealing" (for the purpose of Div 400 *Criminal Code*) and thus an offence prior to its deposit in any event.

person who is already contractually entitled to payment of money has some way of controlling the manner and form by which they are paid.

11. The Commissioner speaks of property being *converted into different forms* but maintaining its status as tainted property: (Lordianto RS [37], page 13, line 5). This detracts from the Commissioner's arguments. Section 329(2)(b) provides property is, and thus temporally speaking *becomes*, an instrument when the intention to use the property in connection with a (future) offence is formed. Broad as that is, that is the clear scheme of the Act. So, in this case, when the unknown depositors formed the **intention** to deposit the bank notes in the manner and form that they **subsequently** did (either minutes, hours or days before walking into the bank) the bank notes **became** an instrument.[6] If the bank notes are ***converted*** into a right held by an appellant against a bank, the relevant appellant acquired that right (and property) at a point **after** the property became tainted (i.e. when the deposit was in fact made).

12. The Commissioner has not confronted (in Lordianto RS [37], RS [18], or at all) the significance of s400.9 of the *Criminal Code* (Cth) and in particular the deeming provisions: see Appellants' Submissions (**AS**) [40] and footnote 6. The Commissioner's arguments assume there is always a prior offence before a money laundering offence. That is incorrect.

Ground 2 – sufficient consideration

13. The Commissioner (like the lower Courts in *Lordianto*) speaks of a *transfer* of funds to Australia. The present case involves alternative remittance, a legitimate means for "transfer" of funds. Mr Smith gave unchallenged evidence that *Alternative remittance systems [also known as] informal value transfer systems… often do not involve the physical movement of money, but rather a notional transfer of value* {AFM 172.50 [35]}. There was no *failure to transfer funds*: cf Lordianto RS [44].

14. Mr Ganesh gave evidence that *I understood that [Mr Zamri] would need to use someone else to put money into my account. But I had no knowledge about who that was or how they would do it.* {AFM 17.41 [110]}.

[6] The money would also become an instrument of crime by operation of s329(2)(a), having regard to s400.8(1)(b) of the *Criminal Code*.

Ground 3 – reasonable suspicion

15. RS [8] refers to the finding of the CA that Mr Ganesh did not provide a *cogent explanation* for the manner and form of the deposits. The Act did not call upon Mr Ganesh to provide an explanation for the actions of others. The Act required him to satisfy the test enunciated in *DPP (Vic) v Le* (2007) 15 VR 352 at [21] – [27].[7] The absence of a cogent explanation (for the actions of other people) was an irrelevant consideration.

16. RS [25] incorporates Lordianto RS [48][49] which have no application to this case. There are no findings of anything untoward occurring at the Malaysian end.[8]

17. The Commissioner submits {Lordianto RS [50] (page 18.03)} that a person may form a *reasonable suspicion that property is the proceeds of an offence without knowing what offence*. That ignores the way the Commissioner ran his case below. Section 31(6) required the Commissioner to articulate his grounds and he did. This Court recently held *[a]n applicant need not negative possibilities which the Commonwealth does not raise in its defence*.[9] The Commissioner squarely put in issue that *[t]he property standing to the credit of [the specified bank accounts] is proceeds and an instrument of an offence contrary to s 142 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006* {CAB 12.01 [12(1)]}. No other offence was identified. Nor did the Commissioner flag an intention to rely upon some unknown offence in the abstract. The Commissioner defended Lordianto's exclusion application by reference to the broader offence in s400.9 of the *Criminal Code* (Cth) {Lordianto AFM 7.24}. He did not rely on that offence in this case.

18. There are *strong reasons of public policy* for binding the Commissioner to the manner in which he conducted his case at first instance and no reason for departing from those strong considerations of public policy arises.[10]

19. RS [27][28] mischaracterise AS [61] – [63], which say nothing about the existence of subjective knowledge of the offence. RS [29] reads AS [64] in isolation. That was not its intention. The appellants' position is clear: AS [65][66].

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[7] As discussed at AS [53].
[8] Indeed Mr Ganesh *gave plausible reasons for using a remitter to send the money instead of a bank* {CAB 34.12 [133]}.
[9] *Commissioner of the AFP v Hart* (2018) 262 CLR 76 at [7] (Kiefel CJ, Bell, Gageler and Edelman JJ), [85] (Gordon J).
[10] *Commissioner of the AFP v Courtenay Investments Limited* (2016) 263 A Crim R 94 at [105] (Martin CJ), [161] (Newnes JA), [162] (Mazza JA).

Costs

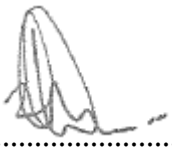
20. RS [30] complains that the appellants have not provided an explanation for the orders sought. AS [74] identified the statutory basis upon which indemnity costs are sought. Such costs will be sought by each appellant should he, she or they succeed.

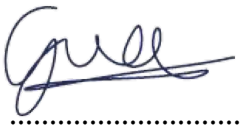
21. There is scant case law on s323. All things being equal the orders sought are the appropriate orders where an exclusion application succeeds. So much is clear from s323(2). The test for exclusion is high. If an applicant for exclusion meets the high bar for exclusion s/he ought not suffer a costs gap. That is the clear policy decision to ameliorate the consequences of the equally clear policy that proceeds of crime authorities may seek (and Courts *must*[11] grant) restraining orders based on only slight evidence (i.e. suspicion[12]).

22. Section 323 is in the same terms as s101 of the *Proceeds of Crime Act* ***1987***. In ***Fowkes v DPP*** [1997] 2 VR 506 at 524, that section was described as *beneficial*. Similarly in ***Diez v DPP*** (2004) 62 NSWLR 1 at [38] it was observed the term "all costs" must be *understood against long-settled legal background whereby indemnity costs are treated as the maximum costs recoverable, in that legal sense representing "all" costs*. The Court clearly still has a discretion: ***Diez*** at [34]. No reason has been advanced by the Commissioner why, if the appellants are successful, it ought not be exercised. Section 323 must be given work to do, it cannot simply be reciting the usual rules in civil litigation.

23. Costs cannot be fully argued at the hearing of the appeal proper.[13] The above matters are raised at this time to afford the Commissioner and the Court the opportunity to raise the construction or general application of s323 at the hearing of the appeal proper if desired.

Dated: 25 June 2019





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[11] See sub-sections 1, 2 and 5 of each of ss 18 and 19.
[12] See sub-sections 1 of each of ss 18 and 19.
[13] Costs were not argued in the primary Court. Liberty to apply for a special costs order was preserved {CAB 38.35 [4]}. There is further material that would be relevant to the exercise of the discretion, and to costs generally.