IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S110 of 2019

BETWEEN

SANKO LORDIANTO

First Appellant

INDRIANA KOERNIA

Second Appellant

And

COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE

Respondent

APPELLANTS' OUTLINE OF ORAL ARGUMENT

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Outline of propositions to be advanced in oral argument

A. Third party

2 The purpose of subsec 330(4) of the *Proceeds of Crime Act 2002* (Cth) (**the Act**) is to define the class of persons whose acquisition of an interest in tainted property is sufficiently remote from the offending to protect that interest from forfeiture to the Commonwealth. The 10 'third party' exception is para 330(4)(a) is a statutory analogue of the concept well-known to the general law, the bona fide purchaser for value without notice {AS [9]-[12], AR [16]}.

3 Drawing the limits of the class at those who are third parties to the offending, rather than third parties to a transaction by which the property became tainted, ensures the consistent operation of the Act, accords with the reason Parliament provided the exception, and coheres with the general law {AS [19]-[24], ASR [3]-[4] and [11]-[12]}.

4 The infelicitous drafting of para 330(4)(a) forces a constructional choice. The preferable choice best promotes the purpose of the provision, avoids absurdity, and is supported by the legislative history and extrinsic materials to which regard may be had {AS [11]-[24], ASR [11]}. That preferable choice requires 'ceases' to be construed in the manner approved by 20 McColl JA {AS [16]-[18]}. A narrow temporal construction fails to serve the purpose for which the provision was enacted.

5 In any event, the appellants prevail on a narrow temporal construction of 'ceases' by operation of para 329(2)(b) of the Act {ASR [8]-[9]}.

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B. Sufficient Consideration

6 'Sufficient consideration' means a quid pro quo, reflecting the value – money or money's worth moving from the acquirer of property {AS [25]-[30]}. The appellants' acquisition was 'for sufficient consideration'. They paid the commercial equivalent of the amount they received.

C. No reasonable suspicion

7 As subsecs 31(4) and (6) of the Act require, the parties limited the grounds of their contest for trial. The relevant offences in issue were those identified by the Commissioner by notice {ASR [21]-[23]}. There was no offence or untoward conduct alleged in Indonesia {AFM 6-8}.

8 The appellants gave specific direct evidence that they did not know of a reporting threshold for transactions in Australia, or that foreign remittance could be subverted by money launderers {AS [50]-[51]}. The respondent's cross-examination of the appellants did not put to the appellants any matters that might establish any factual basis for them to suspect the funds they received had come from either identified offence {AS [52]-[55]}. The respondent made no effort to establish knowledge, based on the Australian life or dealings of the appellants, from which a reasonable suspicion was available. What little cross-examination took place was speculative and conclusory. The evidence did not show any basis to doubt the appellants' averred absence of knowledge.

9 The primary judge's findings of fact were similarly scant {CAB 38.20-39.30 [113]-[117] and 41.10-.40 [126]}. The minimalist findings of fact at first instance do not lend themselves to satisfaction that the appellants' circumstances could arouse a reasonable suspicion.

10 The trial judge did not find that the appellants' circumstances would have aroused a reasonable suspicion that the money they received was proceeds or an instrument of an offence. Her Honour found that they had not discharged their onus. That finding implicitly involved a rejection of the appellants' affidavit evidence, for reasons that were not expressed, and in the absence of primary findings of fact.

11 Like the primary judge, the Court of Appeal sidestepped the necessary primary fact-finding {AS [62]-[66]}, wrongly imputing knowledge of the criminal law {CAB 106.10-40 [156]-[158]} and of contextual facts to the appellants to do so {CAB 107.23-55 [162]-[163]}.

12 One would expect – but will not see in the primary judgment or the Court of Appeal's reasons – findings of what the appellants knew. Such knowledge would establish whether there

existed a subjective basis for any reasonable suspicion to arise. Without those facts, both courts necessarily failed to consider whether an objectively reasonable suspicion would arise for a person in the position of these appellants.

13 The appellants' actions took place in Indonesia. They only knew of the structured nature of the deposits after receipt. A single deposit of $9,999 is perfectly legal. Unlike offences involving violence or theft, making multiple structured deposits into a bank account has no inherent criminality or immorality that might of itself cause suspicion. Commission of an offence depends on an evaluative judgment of, inter alia, the array of factors in subsec 142(3) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth). The objectively ascertained intentions of the person causing the deposits might render multiple sub-threshold deposits lawful.

14 There was no evidence to suggest that the appellants should have concerns on receiving deposits into their account equalling the amount Ms Koernia contracted in Indonesia to receive. To the appellants, the small cash deposits could be innocently explained as the repatriation of funds by Indonesian nationals working in Australia – perfectly lawful parallel transactions arranged by a remitter that would avoid the need for physical currency to cross national borders, or for the parties to incur foreign exchange commissions charged by international banks.

15 The primary judge's finding was that the appellants has not disproven a reasonable suspicion that 'something untoward had occurred' {CAB 41.29 [126]}. The Court of Appeal's explanation of that finding was unfairly generous {CAB 106.55-107.21 [160]-[161]}.

16 There was no rational basis in the evidence to reject the appellants' evidence – which if accepted could give rise to no reasonable suspicion.

7th August 2019

Bret Walker

Counsel for the appellant