

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S110 OF 2019

BETWEEN: THE HIGH COURT OF AUSTRALIA

SANKO LORDIANTO



First Appellant

INDRIANA KOERNIA

Second Appellant

AND:

COMMISSIONER OF THE
AUSTRALIAN FEDERAL POLICE

Respondent

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

NO P17 OF 2019

BETWEEN:

GANESH KALIMUTHU

First Appellant

MACQUELENE PATRICIA MICHAEL DASS

Second Appellant

AND:

COMMISSIONER OF THE
AUSTRALIAN FEDERAL POLICE

Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE RESPONDENT

Filed on behalf of the Respondent by:

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PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the Internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

II. Knowledge and reasonable suspicion

2. An applicant for an exclusion order bears the onus of disproving both knowledge and circumstances that would arouse a reasonable suspicion that property was the proceeds of an offence or an instrument of an offence: s 317(1).

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3. The *Lordianto* appellants cannot succeed on appeal without overturning the primary judge's finding that they failed to establish that they acquired property without knowing it to be the proceeds or an instrument of an offence: *Lordianto PJ* at [123] (CAB 40). That finding was made in part on the basis of the primary judge's finding that the evidence of the second appellant was "unconvincing": *Lordianto PJ* [115], [116] (CAB 39)

4. In any event, the *Lordianto* appellants, and the first appellant in *Kalimuthu*, failed to establish that they acquired the property in circumstances that would not have aroused a reasonable suspicion that the property was the proceeds or an instrument of an offence.

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- 4.1. The courts below identified ample grounds for that conclusion, which they characterised as 'inevitable' (*Lordianto CA* at [163]) (CAB 108) and 'the only conclusion reasonably open' (*Kalimuthu CA* at [298] (CAB 143)). Those facts included the making of hundreds of sub-\$10,000 cash deposits over a period of several weeks: *Lordianto RBFM 82-138* and *Kalimuthu ABFM 222-231*.

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- 4.2. A person's subjective ignorance of the law is irrelevant to whether the circumstances would arouse a reasonable suspicion. The 'reasonable suspicion' limb calls for an objective enquiry by reference to the factual circumstances known to the relevant person: *George v Rockett* (1990) 170 CLR 104 at 112, 115 (JBA V2:T17); *DPP (Vic) v Le* (2007) 232 CLR 562 at 595 [127] (JBA V2:T16). As such, the circumstances that would arouse such a suspicion cannot be disproved by evidence that a person was subjectively unaware of s 142 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML

Act), or more generally that structuring was unlawful, because even if that is established it does not prove that the circumstances would not arouse the relevant suspicion in a reasonable person.

- 4.3. The courts below did not hold that the appellants who failed on this limb were required to negate a reasonable suspicion of offences other than those particularised by the respondent pursuant to s 31(6). Those appellants failed because they did not discharge their burden with respect to the particularised offences (their attempt to discharge that burden by relying on subjective ignorance of the law being rejected).

10 **III. Property not acquired ‘for sufficient consideration’**

5. The appellants failed to prove they acquired the property ‘for sufficient consideration’.

5.1. The appellants claimed that they were innocent victims of cuckoo smurfing, that the deposits into their accounts were the proceeds of crime, and that they lacked any connection (direct or indirect) to the depositors. Further, the appellants did not show (indeed, they denied) that the funds deposited into their accounts were their own funds: *Lordianto* CA [119]-[120], [137]-[138] (**CAB 96-97, 101**); *Kalimuthu* CA [470]-[472] (**CAB 187-188**).

20 5.2. Running their case in that way was inconsistent with the appellants proving that they provided sufficient consideration “for” the deposits that were made into their accounts, because those deposits were not shown to be in exchange for the payments made to, or at the direction of, the money remitters.

5.3. There is no analogy to be drawn with ordinary banking practices, or with inferences supported by those practices, in light of the extraordinary circumstances in which the hundreds of cash deposits were made.

IV. Appellants not ‘third parties’

- 30 6. The appellants are not ‘third parties’ within the meaning of s 330(4)(a). The courts below correctly construed the words ‘third party’ to refer to a person not party to the transaction by which property first becomes the proceeds or an instrument of an offence: *Lordianto*

CA at [115] (**CAB 95**); *Kalimuthu* CA at [176], [189], [363]-[364] (**CAB 107, 111, 157-158**). That construction aligns with the statutory text, context and purpose, and does not lead to absurd outcomes.

6.1. Examples: Various examples illustrate that to treat the phrase ‘third party’ as meaning no more than ‘person’ would create a gap in the legislative regime that would be inconsistent with its central purpose.

6.2. Text: The ordinary meaning of ‘third party’ directs attention to transactions or agreements. The term ‘third party’ is not ordinarily used in connection with criminal offending. Where Parliament intended to refer to involvement in criminal offending, it did so expressly: *POCA 2002* (as enacted), s 102(2)(a) (**JBA V1:T4**); *POCA*, s 323(1)(c) (**JBA V1:T3**); *Proceeds of Crime Act 1987* (Cth), s 48(3)(f)(i) (**JBA V2:T9**). Further, the appellants’ construction of ‘third party’ gives that term very little, if any, work to do, as a person involved in criminal offending would not satisfy the ‘knowledge’/‘reasonable suspicion’ test.

6.3. Context: The context of the words ‘third party’ in s 330(4)(a) focuses attention on the transaction by which property was ‘acquired’, including whether for sufficient consideration. The temporal sequence of s 330 is inconsistent with the notion that property can simultaneously become, and cease to be, proceeds of an offence. Section 330(4), in contrast to s 330(3), is concerned with circumstances in which property ceases to be proceeds of an offence. Enquiries into involvement in criminal offending are dealt with elsewhere in the statute e.g. ss 94, 102 (**JBA V1:T3**).

6.4. Purpose: The legislative object would be frustrated if a person could transform property into ‘clean’ property merely by laundering it into the account of a person not involved in the crime by which it was obtained: *POCA*, s 5(a), (d) (**JBA V1:T3**). A person who acquires property through an unlawful transaction, which first causes the property to become proceeds or an instrument, cannot be a third party. The absurd consequences said to arise from the above interpretation do not in fact arise.

Dated: 8 August 2019

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