ORIGINAL

**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' SUBMISSIONS

### Part I: Certification

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

### Part II: Issues

2 The appeal concerns the proper construction of para 330(4)(a) of the *Proceeds of Crime Act 2002* (Cth) (**the Act**). It is a provision enacted for the beneficial purpose of allowing acquirers of property in certain circumstances to keep that property, despite it otherwise being characterised as proceeds or an instrument of an offence and therefore subject to forfeiture under the Act. Three elements of para 330(4)(a) arise for consideration.

(a) **Third party**: the appellants acquired property when amounts owed to the appellants were deposited into their bank accounts in a manner that involved the commission of an offence. Are the appellants 'third parties' if they were not involved or complicit in the conduct constituting the offence?

(b) **For sufficient consideration**: the appellants paid Indonesian currency, as directed by two money remitters in Jakarta, in exchange for the remitter's promise to deposit specified, commercially equivalent, Australian dollar amounts in the appellants' Australian bank accounts. The appellants received the specified sums but cannot identify the depositors. Does the appellants' inability to prove the precise dealings between the remitters and the depositors preclude a finding that the acquisition was for sufficient consideration?

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(c) **In circumstances that would not arouse a reasonable suspicion**: a reasonable suspicion may only arise from subjective knowledge of a person. The Court of Appeal applied by analogy the principle that ignorance of the law is no defence to criminal liability. The court did not determine whether the appellants knew of the technical offences by which the property is alleged to have been tainted. Does para 330(4)(a) permit the imputation of knowledge to a third party before drawing conclusions as to what suspicions should reasonably arise from their knowledge?

**Part III: Section 78B of the *Judiciary Act 1903***

10 **3** It is unnecessary to give notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth).

**Part IV: Citations**

**4** At first instance: *Commissioner of the Australian Federal Police v Lordianto* (2017) 324 FLR 237, [2017] NSWSC 1196.

**5** On appeal: *Lordianto v Commissioner of the Australian Federal Police* [2018] NSWCA 199.

**Part V: Facts**

**6** The appellants are Indonesian citizens who spend time in Australia and have
20 permanent residency here {Core Appeal Book (**CAB**) 63.55 [10]}. The first appellant (**Mr Lordianto**) is 70 years of age {Appellants' Book of Further Materials (**AFM**) 55}. The second appellant (**Ms Koernia**) is aged 68 {AFM 60}. Between 22 October 2013 and 5 August 2015, Ms Koernia arranged for AU$4,500,000 to be transferred into the appellants' two Commonwealth Bank accounts {CAB 64.30 [12]}, to invest in Australia for their retirement {CAB 17.10 [36], AFM 13.25 [9]}. Of that total, $2,786,062 was deposited in 390 cash deposits in amounts of less than $10,000 {CAB 66.25 [20]}. To obtain the Australian dollar deposits, Ms Koernia deposited specified sums into nominated accounts in Indonesia. She later confirmed that she had received the correct amount into her nominated Commonwealth Bank account {CAB 64.50-65.20 [14]-[15]}. Ms Koernia does not know how
30 to use internet banking. She checked bank account balances by visiting a branch in Australia or telephoning the Commonwealth Bank {CAB 64.15 [11]}.

**7** The sub-$10,000 cash deposits to the appellants' accounts were made by strangers in the course of a money laundering process known as 'cuckoo smurfing' {CAB 64.30 [12]}. That process involves an international money remitter withholding customer remittance funds

and directing his employees (described as collectors) to receive proceeds of crime in an equivalent amount, which the collectors then deposit into Australian bank accounts to satisfy the international remittance requests {CAB 67.1 [22]}.

**8** When the respondent successfully applied to restrain the funds standing to the appellants' credit in five Commonwealth Bank accounts on 28 June 2016, they totalled just under $6,000,000 {CAB 12.50-13.20 [19]-[20]}. The appellants applied to exclude the funds from the restraining order on the basis that, by operation of para 330(4)(a) of the Act, the appellants' interest in those funds was not proceeds or an instrument of an offence. The application was dismissed {CAB 42} as was the appeal against its dismissal {CAB 131}.

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## Part VI: Argument

A. Third party

**9** Paragraph 330(4)(a) provides one basis on which property will cease to be proceeds or an instrument of an offence, which may be described loosely as a statutory bona fide purchaser exception. It is a requirement of para 330(4)(a) that the property be acquired by a 'third party'. The term is not defined. It supposes separation from something, without identifying what. Reading the provision purposively provides the context to flesh out the meaning of the term.

**10** The Court of Appeal was divided on the meaning of 'third party', as was the Western
20 Australian Court of Appeal in *Commissioner of Australian Federal Police v Kalimuthu (No 2)* [2018] WASCA 192 (***Kalimuthu***). Beazley P and Payne JA concluded that a third party is a person who has 'no involvement in the transaction by which property first becomes proceeds of an offence or an instrument of an offence' {CAB 95.45 [115]}. By contrast, McColl JA concluded that a third party is a person who is not intentionally complicit in the criminal conduct and stands at arms' length to the transaction {CAB 128.32 [227]}.

**11** As explained below, the construction preferred by the majority: (1) promotes rigid literalism over purposive construction, (2) produces inconsistencies in the operation of the Act by denying para 330(4)(a) a field of operation it is expressly intended to have, in defiance of the Act's Revised Explanatory Memorandum, and (3) produces absurd results.

30 **12** Paragraph 330(4)(a) is intended to operate when a person whose property may otherwise be considered proceeds or an instrument of an offence demonstrates their 'innocence'. 'Innocence' is founded in the Act on the dual requirements of having given commercial consideration for the property, and not having reason to suspect the requisite

nexus between the property and the offence. To state the obvious, para 330(4)(a) contemplates that notwithstanding third parties receiving proceeds or instrument of an offence, they may avail themselves of its operation. Indeed, acquisition of property is a qualifying criterion.

**13** When construing the provision, the majority imposed an additional temporal element, separation between the offence and the acquisition. It follows that on the majority's construction, there are circumstances in which the timing of receipt alone will deny a party the benefit of para 330(4)(a). A construction by which a recipient of property fails to be considered a third party merely because the innocent acquisition was contemporaneous with the offence is not consistent with the intended purpose of the provision.

**14** Just as McColl JA emphasised the need to construe all of subsec 330(4) by reference to the broader legislative framework {CAB 112.24-123.30 [179]-[207]}, focus on the words 'third party' in isolation is apt to mislead. They must be construed in their historical and legislative context. The phrase 'third party' was not used in the *Proceeds of Crime Act 1987* (Cth) (**the 1987 Act**). It was introduced with the passage of the Act and emanated from *Australian Law Reform Commission Report 87: Confiscation that Counts*, chapter 12. The Commission never defined the term. It was simply the label the Commission applied to the people protected by the 5 discrete provisions: subsecs 21(6), 23A(7), 31(6), 48(3) and 59(2) of the 1987 Act. There is no basis to conclude that the Commission, or Parliament, intended to introduce a new hurdle by using the term: cf *The Queen v Lavender* (2005) 222 CLR 67 at 75-86 [19]-[54].

**15** The Explanatory Memorandum to the contemporaneously enacted, complementary legislation, the *Proceeds of Crime (Consequential Amendments and Transnational Provisions) Bill 2002* (Cth), described the operation of para 330(4)(a) thus: 'Under [the] Act, property ceases to be proceeds if acquired by a person for value and without knowledge that it was proceeds of the offence (eg an innocent third party)'. That explanation sits harmoniously with McColl JA's construction. By contrast, the majority's interpretation is shown to involve undue complexity and unintended constraints on its operation.

**16** The provision's use of the word 'ceases' was instrumental in the majority's interpretive choice. The majority concluded that the proper construction of the section demands that the appellants' valuable property interests, even if innocently acquired, must yield to the temporal limitation imposed by the use of the word 'ceases' {CAB 95.55 [116]}. The better approach is to adopt McColl JA's construction – reasonably open on the text – which best gives effect to the purpose of the provision, and allows the Act as a whole to work harmoniously: *CIC Insurance v Bankstown Football Club* (1995) 187 CLR 384 at 408,

*Cooper Brookes (Wollongong) Pty Ltd* v *Commissioner of Taxation (Cth)* (1981) 147 CLR 297 per Gibbs CJ at 305, Stephen J at 310-311, Mason and Wilson JJ at 319-321, sec 15AA of the *Acts Interpretation Act 1901* (Cth).

**17** For the reasons identified by McColl JA, 'ceases' cannot be construed to have effect only if property was tainted prior to acquisition. Paragraph 330(4)(a) does not prescribe when the cessation occurs. The Act does not cause property to cease to be tainted *when* acquired by a third party, but *if* it is acquired by a third party.

**18** On a literal reading, cessation can equally validly take place upon the hearing of an application under sec 29, 49 or 73 of the Act. Reading cessation in this way avoids anomalous and capricious operation of the Act and better promotes the legislative intent of the provision – to prevent the deprivation of property except for sufficient cause.

**19** Paragraph 330(4)(a) is expressed to operate in respect of both proceeds and instruments of offences. But as McColl JA recognised, every acquisition of property that is the proceeds of crime involves dealing with the proceeds of crime. Dealing with the proceeds of crime is itself a serious offence, against Div 400 of the *Criminal Code* (Cth) and the acquirer will be – even if unwittingly – a party to an unlawful transaction {CAB 126.33-128.50 [219]-[227]}.

**20** On the construction adopted by the majority, no acquirer of the proceeds of an offence may ever avail themselves of para 330(4)(a). Paragraph 330(4)(a) would only ever apply to instruments of offences, despite its express words. The majority's construction involves an insoluble inconsistency in the operation of the Act.

**21** The error in the majority's construction is further demonstrated when applied to the worked example in the Revised Explanatory Memorandum, quoted by McColl JA {CAB 118.31 [191]}. The majority's construction produces the opposite outcome to that which is said to result from the operation of para 330(4)(a). On the majority's construction, the Explanatory Memorandum is wrong because the 'third party' requirement is not met. The vendor of a house who innocently receives money defrauded from the Commonwealth in payment of the purchase price cannot call on para 330(4)(a) because the money became, by subsec 329(2), an instrument of an offence through the purchase of the house. The money was property that was dealt with, contrary to sec 400.4 of the *Criminal Code*. Despite the seller giving sufficient consideration and having no reason to suspect criminal activity, she acquired property at the time it became an instrument of the second offence. This will always hold when the proceeds of an offence are dealt with.

**22** On the majority's construction, the Act's reach is so extensive that the absurd results it produces must be taken to be unintended. The seller of publicly listed shares to a purchaser possessing inside information must forfeit the sale proceeds. Those funds will (by para 329(1)(a)) be the proceeds of the offence of insider trading, in contravention of sec 1043A of the *Corporations Act 2001* (Cth), because they were wholly derived or realised, directly or indirectly, from the commission of the offence committed by the purchaser (of which the seller was ignorant). The funds will also be an instrument of the offence, and when credited to the seller's account will remain an instrument by virtue of para 330(3)(a) of the Act. In these circumstances the majority's construction compels the forfeiture of the proceeds of sale because the seller's interest in the proceeds of sale was acquired in the transaction which constituted the offence.

**23** Further, it would not only be the sale proceeds that would be liable to forfeiture, rather the entire balance of the bank account, which is 'partly derived', regardless of whether the degree of derivation is substantial or proportion to the forfeiture: *Commissioner of the Australian Federal Police v Hart* (2018) 262 CLR 76 at 85-6 [14]. That would be the case even if the seller were a merchant bank with a billion-dollar bank balance into which a relatively small amount of proceeds was deposited.

**24** We need not speak of silly examples that flow from the application of the majority's construction – such as the victim rendered liable to forfeit the small payment she receives when defrauded into selling a valuable asset – but the proper construction of the provision should not be one that depends on the good grace of proceeds of crime authorities for sensible operation. The majority should have joined in McColl JA's construction, which was endorsed by Murphy and Beech JJA in *Kalimuthu* at [458]-[461], to eliminate these deficiencies in the operation of the Act.

B. For sufficient consideration

**25** 'Sufficient consideration' is defined in sec 338 of the Act to be consideration that is sufficient and that reflects the value of the property, having regard solely to commercial considerations. The payments made in Indonesia by the appellants were equivalent in amount to the deposits they received into their bank accounts {CAB 96.50 [120]}. Sufficiency of consideration is not in issue. The Court of Appeal affirmed the trial judge's finding that the appellants had not proven they gave any consideration for the bank deposits because:

(a) the appellants acquired property from unidentified persons who deposited money into their bank accounts {CAB 101.29 [137]};

(b) the appellants did not prove any contractual relationship between the remitters and depositors {CAB 102.1 [139]}; and

(c) by relying only on their payments in Indonesia, the appellants did not identify the means by which they acquired an interest in property {CAB 102.15 [140]}.

**26** This path of reasoning misreads para 330(4)(a). Where, as in this case, the sufficiency of consideration is not doubted, the 'for' sufficient consideration requirement pertains only to causality. What was the reason for the deposits? Was it the appellants' Indonesian payments that caused the Australian bank deposits to occur? Did consideration pass from the third parties **for** the acquisition? If so, it is unnecessary to consider who ultimately transferred the property to the third party.

**27** The Court of Appeal distracted itself from applying the statutory language by looking to what intermediate steps occurred between the performance by the appellants of their obligations, and their receipt of the benefit of their bargain. The Court of Appeal erected new hurdles, not found in the Act, to the effect that either (1) the consideration given by the appellants must pass directly to, and establish enforceable contractual rights against, the immediate transferor of the property, or (2) the transferee must establish by evidence the dealings by which a servant, agent, subcontractor or bailee was authorised to transfer the property to the third party. There would be few vendors of property in Australia who could satisfy those requirements. The Court of Appeal's approach should be rejected. 'For sufficient consideration' requires only that consideration reflecting the value of the property is given by the third party, causing the acquisition of the property.

**28** The money Ms Koernia transferred in Indonesia was paid in performance of the appellants' obligations and was the sole reason for the deposits in Australia. In proof beyond argument of that fact, she was even asked to and did repay money directly to the remitter when a slight overpayment was made into her Commonwealth Bank account {CAB 99.59-100.2 [130]}.

**29** If, against these submissions, 'sufficient consideration' requires an enforceable contract, the Court of Appeal still should have been satisfied that the requirement was met. A contract was formed when the appellants offered to make payments as directed by the remitter in exchange for an outcome – the deposit of sums agreed by the remitter into their Australian bank accounts. The Court of Appeal found that the bank deposits were the proceeds of cuckoo smurfing, and that the process of cuckoo smurfing involves deposits made by employees (and therefore agents) of the remitter, which resulted from payments made and remittance

instructions given by Ms Koernia in Indonesia {CAB 64.30 [12], 67.1 [22]}. Each party to the bargain got what was bargained for.

**30** Valuable and commercially equivalent consideration moved from the appellants, for which they received the Australian deposits they bargained for. The Court of Appeal should have upheld the appeal against the primary judge's finding and concluded that the appellants gave sufficient consideration for the bank deposits they received.

C. No reasonable suspicion

*C-1. The proceedings at trial and on appeal below*

**31** When invoked, para 330(4)(a) of the Act requires the court to determine whether the circumstances of acquisition of property would arouse in the acquirer a reasonable suspicion that the property was proceeds or an instrument of an offence. Under subsec 317(1), an exclusion applicant bears the onus of negativing a reasonable suspicion, but the inquiry is not at large. Subsecs 31(4) and 31(6) of the Act require parties to mark out the boundaries of their dispute in written grounds, which were served before trial.

**32** In response to the appellants' notice of grounds, which relied on para 330(4)(a) to exclude their property from the restraining order {AFM 1}, the Commissioner's grounds identified two offences in respect of which he alleged the appellants would not disprove a reasonable suspicion arose in the circumstances. Those offences were: dealing with money that is reasonably suspected of being proceeds of crime, contrary to sec 400.9(1) of the *Criminal Code* (**dealing offence**), and structuring deposits to avoid reportable transactions, contrary to sec 142 of the *AML Act* {AFM 5} (**structuring offence**). The Commissioner accepted that the exchanged notices of grounds were 'something like a pleading' {AFM 76, T162.13-.19}.

**33** The primary judge recounted the evidence on which her Honour relied in relation to reasonable suspicion {CAB 38.22-39.19 [114]-[116]}. Her Honour placed weight on the manner in which Ms Koernia was directed to deposit the appellants' money into Indonesian bank accounts of individuals she did not know, and the receipt into her Australian bank accounts of many sub-$10,000 transactions. Both appellants were aware of the manner in which deposits were made into their accounts over a period of years {CAB 40.16 [120]}.

**34** From those circumstances the primary judge found 'a reasonable suspicion that something untoward had occurred' {CAB 41.12 [126]} and held that the appellants failed to prove they did not know that, when received, the bank deposits were the proceeds or an

instrument of an offence {CAB 40.45 [123]}, and '[f]or the same reasons', her Honour was not satisfied that the property was acquired in circumstances that would not arouse a reasonable suspicion that it was proceeds or an instrument of an offence {CAB 41.1 [125]}. No offence was identified in the reasons. The primary judge made no finding that either appellant knew or suspected of the existence of either offence in issue.

**35** The Court of Appeal did not depart from the facts as found by the primary judge but undertook a different analysis. The majority, with McColl JA agreeing on this issue {CAB 108.42 [166]}, began its consideration of the no reasonable suspicion requirement by recalling the principle that ignorance of the law is no defence to criminal liability {CAB 105.30-107.8 [154]-[160]}. Applying that principle by analogy, the Court of Appeal concluded that the arousal of a reasonable suspicion in para 330(4)(a) 'does not require the person to have known that the conduct identified by the known circumstances constituted an offence' {CAB 107.10 [161]}.

**36** The Court of Appeal affirmed the primary judge's conclusions on no reasonable suspicion, relying on the substantial number of cash deposits under $10,000, and the additional fact of the 'advantageous' exchange rate offered to Ms Koernia {CAB 107.48 [163]}. The Court of Appeal did not identify any particular offence of which the suspicion was not negatived, and did not find that the appellants knew of, or had reason to suspect the existence in the law of, the structuring offence or the dealing offence.

**37** On its application of the no reasonable suspicion test, the majority fell into error in two ways. First, by wrongly employing a principle of criminal responsibility in a civil forfeiture context, the Court of Appeal failed to undertake the task required by the statute.

**38** Secondly, the Court of Appeal should have corrected the trial judge's erroneous finding that the appellants had not discharged their onus to negative the reasonable suspicion. A reasonable suspicion is dependent on proof of the underlying subjective knowledge from which it will arise. The only conclusion open was that the appellants' unchallenged evidence was sufficient to discharge their onus to negative the existence of reasonable grounds to suspect that the money deposited into their accounts was the proceeds or an instrument of a dealing offence or a structuring offence.

*C-2. Deeming a state of knowledge of offence provisions subverts that statutory language*

**39** The no reasonable suspicion test has been considered by this Court. In *Director of Public Prosecutions (Vic) v Le* (2007) 232 CLR 562 (***DPP v Le***) at 565 [1] and 595 [127]-[128], a majority affirmed the Victorian Court of Appeal's approach to the identically drafted

words in the Victorian confiscation legislation. It was held that the court should consider whether a reasonable person, in the circumstances of the acquirer of the property, and knowing what she knew, would have formed a suspicion. In doing so, the court must not import 'some fictitious "reasonable person" to whom must be attributed some (arbitrary) state of knowledge': *Director of Public Prosecutions v Le* (2007) 15 VR 352 at 360 [24].

**40** In construing 'reasonable suspicion' the Victorian Court of Appeal applied the reasoning of Kitto J in *Queensland Bacon v Rees* (1966) 115 CLR 266 at 303-4, which contained two critical elements:

(a) suspicion is not idle wondering. It is a positive feeling of actual apprehension or mistrust, amounting to a slight opinion but without sufficient evidence; and

(b) a reasonable suspicion will exist if, in all the circumstances existing for the subject person, a reasonable person in their position would form an actual apprehension or fear of what the statute describes.

**41** At trial and on appeal, neither party had contended the Court should apply the principle that ignorance of the criminal law is not a defence. The primary judge had not considered the point. Nonetheless, the principle was applied as the first plank of the majority's reasoning on no reasonable suspicion {CAB 105.30-107.20 [154] – [161]}.

**42** As the reasoning continued, Beazley P and Payne JA were not wrong to state that actual knowledge that the conduct constituted an offence was not necessary for a reasonable suspicion to arise {CAB 107 [161]}. It is true that knowledge of matters that would arouse a reasonable suspicion of the offence would be sufficient. But the court's statement skipped the necessary inquiry of whether the appellants had reason to suspect the existence and commission of either identified offence. Because the answer to that question was assumed against the appellants, the majority impermissibly imputed knowledge of the law to them without considering whether that state of mind was open on the evidence.

**43** The purpose of para 330(4)(a) is to protect innocent third parties who acquire property in certain circumstances. The 'innocence' of the third party is negated when the party knows or should reasonably suspect, knowing what they do, that the property is tainted. There is no sound reason, consistent with the objects of the Act, to deny third party property rights when an acquirer is ignorant of law, but to protect those rights when the party is ignorant of facts. The capriciousness of the distinction is manifest when the alleged offence is of a relatively technical kind such as an offence against s. 142 of the *AML Act*.

**44** If the language of the Act does present a constructional choice which allows reasonable suspicions to arise from deemed knowledge of the law, that choice should yield to

the preferable construction, which tends against a fictitious attribution of knowledge of the law. The former is the construction with greater encroachment on entrenched common law property rights, and thus an interpretation that would violate the principle of legality: *R&R Fazzolari v Parramatta City Council* (2009) 237 CLR 603 at [40]-[44] per French CJ.

**45** The inappropriateness of importing criminal law norms is underscored by sec 315 of the Act, which emphasises the civil nature of applications under the Act and expressly excludes criminal law rules of construction and procedure.

**46** Para 330(4)(a), as interpreted in *DPP v Le*, permits only suspicions that arise from circumstances known to the acquirer of property. It does not distinguish an applicant's subjective knowledge of facts from their subjective knowledge of the law.

**47** That error in the Court of Appeal's reasons would ordinarily require remittal, but in this case the Court can and should go further. For the reasons set out below, the appellants' credible, unchallenged evidence compels the finding that the appellants discharged their onus of proving that the circumstances of acquisition would not arouse a reasonable suspicion that the bank deposits were proceeds of an instrument of the identified offences.

*C-3. The Appellants discharged their onus of negativing a reasonable suspicion*

**48** An objectively reasonable suspicion can only arise from proven subjective knowledge of an appellant. Logically, before it could be considered reasonable that a person would suspect that they received property that was the proceeds or an instrument of a specified offence, the recipient must first have reason to form a positive feeling of apprehension of the existence of the offence. In the case of a structuring offence, the person would need a sufficient basis of knowledge to suspect that structuring was an offence. There was no such basis in the evidence at trial. On the contrary, the appellants' evidence positively excluded any basis for a reasonable suspicion to arise.

**49** The evidence-in-chief at trial was given by affidavit on which deponents were cross-examined. The appellants adduced all relevant evidence to deny the factual basis for any reasonable suspicion. That evidence is detailed below. It was not relevantly challenged, and the primary judge made no finding that she disbelieved – or even considered – that part of the appellants' evidence.

**50** Ms Koernia gave affidavit evidence that she did not know there was a reporting threshold for transactions in Australia and had never been told that 'structuring' deposits to avoid reporting constituted an offence {AFM 14.15 [15], 16.35 [28]}. When the Commonwealth Bank teller read Ms Koernia's bank account transaction listing she joked that

it was 'very crowded' but did not say there was anything wrong with it {AFM 16.50 [30]}. Ms Koernia had 'no idea that international money transfers could involve money laundering by criminal organisations'. She believed that using money remitters in Indonesia was normal and legal {AFM 18.10 [38]}.

**51** Mr Lordianto's affidavit evidence disclosed that he did not know and was never warned that criminals laundering money could subvert foreign exchange transfers {AFM 52.30 [13]}. He did not know there was a reporting threshold for financial transactions in Australia, or that it was an offence to structure transactions to avoid reporting {AFM 52.45 [15]}.

10 **52** Each appellant did everything necessary to disprove any basis for the arousal of a reasonable suspicion.

**53** The cross-examination on the facts from which a reasonable suspicion might arise was cursory and imprecise. The primary judge recorded the extent of the Commissioner putting his case to Ms Koernia at {CAB 24.41-25.2 [63]}. It was put to Ms Koernia, and she denied, that she suspected the transactions were effected to 'avoid mandatory reporting requirements' or to 'avoid money laundering laws'. It was suggested to her, and rejected, that she suspected the money deposited into her accounts was the proceeds of 'some form of criminal activity'. No fact was proven or even put to Ms Koernia that could displace her avowed lack of knowledge of any basis for identified offences at the time of receipt.

20 **54** Mr Lordianto's cross-examination on the topic was even briefer. Just one vague assertion was put to Mr Lordianto: counsel for the Commissioner suggested that he was aware it was a possibility that the cash deposits were the proceeds of some type of unlawful activity {AFM 74 T114.28-.32}. He rejected it, for the reasons he explained in re-examination – in Mr Lordianto's mind, the source of the deposits into the Commonwealth Bank accounts was his income {AFM 75 T115.1-.8}.

**55** It was not put to either appellant that they knew or suspected of the structuring offence. It was not put to either appellant that they knew or suspected that circumventing reporting requirements was an offence. The dealing offence was not the subject of any cross-examination at all. It was therefore not open to the primary judge or the Court of Appeal to

30 conclude that the appellants had subjective knowledge or suspicion of either offence. Without subjective knowledge or suspicion of the existence of the offence, there can be no basis for a reason to suspect its contravention.

**56** The primary judge's limited findings about the appellants' evidence were expressed to be made on the basis of inherent plausibility rather than demeanour {CAB38.10 [112]}. The

appellants' evidence was objectively credible. The circumstances of the appellants eliminated the possibility of any reasonable suspicion.

**57** First, it was not alleged that the appellants were complicit in any offence.

**58** Secondly, they had paid lawfully derived money in Indonesia as directed by money changers who held themselves out as authorised money changers {CAB 64.40 [13], AFM 19, 21}.

**59** Thirdly, non-bank money remittance is legal and regulated in Indonesia {AFM 67}.

**60** Fourthly, the appellants expected (indeed contracted) that their Indonesian currency would be exchanged into an equivalent amount of Australian dollars, and it was. Absent actual knowledge of money laundering techniques, there was no reason for them to speculate about what might have happened between Jakarta and Australia. There was no reason to suspect that the money going into their bank accounts had any source other than their own funds.

**61** Fifthly, the appellants had no fear of deposits into their accounts being reported to AUSTRAC, as demonstrated by the many large deposits they made, before and during the period in which the structured deposits were made {AFM 29, 32, 38}.

**62** The Court of Appeal relied on two uncontested pieces of evidence to displace the unchallenged and inherently credible evidence: the 'advantageous rate' obtained by Ms Koernia, and the number of cash deposits.

**63** The Court of Appeal's use of the 'advantageous rate' as a circumstance relevant to the arousal of a suspicion was uninformed speculation. The Court of Appeal did not refer to Ms Koernia's evidence of the extent of the advantage – in most cases the so-called advantageous rate she obtained varied by less than 1% from the published mid-market exchange rate (that is, the rate half way between the available buy and sell rates) {AFM 44.1 [5]}. Such a minor benefit is hardly sufficient to form a positive apprehension of criminality. In the same period the mid-market Indonesian rupiah to Australian dollar exchange rate fluctuated by 7%, from 10,104:1 to 10,835:1 {AFM 44.1 [5]}.

**64** The other fact pointed to by the Court of Appeal – a large number of cash deposits – without much more could not extend to the requisite statutory suspicion that the source of the funds was the proceeds or an instrument of crime.

**65** In addition, the majority erroneously attributed knowledge to the appellants, as the following passages reveal:

(a) 'Financially sophisticated international investors may be taken to know that many national requirements are related, broadly speaking, to the detection and prevention of money laundering' {CAB 107.33-.35 [162]};

(b) 'It would have been obvious to a reasonable person in the position of the appellants that for the Indonesian money changers to have offered a better rate than all of the most sophisticated financial institutions in Asia, Australian regulatory requirements (including anti-money laundering laws), which all create costs, may have been circumvented' {CAB 107.49-.53 [163]}.

**66** Putting to one side the fact that what is said to be obvious is not correct – the costs of reporting to AUSTRAC fall on the Australian institution and not the Indonesian remitter – neither of these matters was proven to be known to the appellants. The court's task was to make findings about what was known, and then draw conclusions about what suspicions reasonably arise from that knowledge. It was not entitled to build a finding of suspicion on a foundation of unproven assumptions.

**67** When the evidence closed, the appellants' evidence as to their state of knowledge remained unchallenged. Nothing was adduced by the Commissioner to diminish the force of the appellants' evidence. Matters necessary to lay a foundation for the requisite reasonable suspicion, or at least to undermine the appellants' denials, were not put to the appellants.

**68** The appellants' unchallenged evidence was at a minimum sufficient to raise a prima facie case, to shift the evidentiary burden to the Commissioner. When the Commissioner adduced no contrary evidence, the Court of Appeal should have found that the appellants had discharged their onus of proof: *Purkess v Crittenden* (1965) 114 CLR 164 at 168; *DPP v Brauer* [1991] 2 Qd R 261 at 267-9.

**69** The primary judge's failure to accept the unchallenged and uncontradicted evidence was unreasonable and erroneous: *Precision Plastics v Demir* (1975) 132 CLR 362 at 371; *Poricanin v Australian Consolidated Industries* [1979] 2 NSWLR 419 at 426C-D. The finding that ought to have been made on appeal was that the appellants did not know, and there were no circumstances arousing a reasonable suspicion, that the funds held in their bank accounts were the proceeds or an instrument of an offence.

## Part VII: Orders sought

**70 The appellants seek the following orders.**

1 Appeal allowed.

2 The orders of the Court of Appeal dated 11 September 2018 in 2017/300289 are set aside and in lieu thereof order:

(a) the appeal is allowed.

(b) the orders of the primary judge made on 7 September 2017 in 2016/00197077 (**the primary proceeding**) are set aside.

(c) pursuant to sec 29 and 31 of the Act, the appellants' interest in the property identified in schedule one of the orders made in the primary proceeding on 28 June 2016 (**the property**) is excluded from the restraining order.

(d) pursuant to sec 39 of the Act the Official Trustee in Bankruptcy is directed to return the property, together with accrued interest, to the appellants.

3 The respondent pay the costs of the primary proceeding, the appeal to the Court of Appeal and the appeal to the High Court.

4 The matter is remitted to the Supreme Court of New South Wales for directions on the appellants' application for damages on the respondent's undertaking as to damages given in the primary proceeding on 28 June 2016.

5 Such further or other orders as the Court may deems appropriate.

**Part VIII: Time estimate**

**71** The appellants seek no more than 2 hours for the presentation of the appellants' oral argument.

7th May 2019


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