COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE v ZHAO & ANOR (M92/2014)

Court appealed from:	Court of Appeal, Supreme Court of Victoria [2014] VSCA 137
Date of judgment:	27 June 2014
Date special leave granted:	12 September 2014

The second respondent ('Jin') was charged with dealing with the proceeds of crime. The Crown alleges that Jin is a brothel owner who aided and abetted the commission of offences by dealing with cash taken from illegal sex workers. The charges are listed for trial next year. The first respondent ('Zhao') is Jin's wife but she has not been charged.

Zhao is the registered proprietor of a property in Donvale and Jin owns an apartment in Southbank. On 2 July 2013, a judge of the County Court made orders on the application of the appellant ('the Commissioner') pursuant to ss 25 and 26(4) of the *Proceeds of Crime Act* 2002 (Cth) ('the POC Act') to restrain the disposition of the properties and other personal items. The Commissioner then filed an application for forfeiture of the property pursuant to s 49 of the POC Act. On 22 November 2013, Jin and Zhao filed applications for a stay of the forfeiture proceedings until after the hearing and determination of the charges pending against Jin, on the grounds that if Jin was required to make a detailed affidavit or be cross examined regarding the purchase of the property and source of any relevant funds, there would be a real risk that any such evidence would prejudice the criminal case.

Judge Lacava rejected the stay applications. His Honour found that there was no evidence as to how the respondents giving evidence in the forfeiture proceedings might give rise to a real risk of prejudice in the criminal proceedings, and that a stay of those proceedings would frustrate the clear intention and purpose of the POC Act.

Jin and Zhao's appeal to the Court of Appeal (Nettle, Tate and Beach JJA) was successful. The Court considered it was bound by the decision of the Queensland Court of Appeal in *Director of Public Prosecutions (Cth) v Jo* (2007) 176 A Crim R 17 that, although s 319 of the POC Act provides that, the fact that criminal proceedings have been instituted is not a basis to stay forfeiture proceedings under the POC Act, an accused should be granted a stay of forfeiture proceedings if he or she can demonstrate that matters to be raised in those proceedings may prejudice his or her defence in the criminal proceedings. The Court rejected a submission by the Commissioner that the New South Wales Court of Appeal had cast doubt on the reasoning in *Jo* in *Lee v Director of Public Prosecutions (Cth)* (2009) 75 NSWLR 581.

The Court of Appeal noted that in *Lee v The NSW Crime Commission* (2013) 302 ALR 363 ('***Lee No 1'***), a majority of this Court spoke in terms which implied that the privilege against self-incrimination was not as broad as *Jo* held that it was. The Court further noted that more recently, however, this Court had spoken unanimously in *Lee v The Queen* (2014) 308 ALR 252 ('***Lee No 2'***) in terms which implied that,

where the subject matter of forfeiture proceedings is substantially the same as the subject matter of criminal proceedings, unless the forfeiture proceedings are stayed until completion of the criminal proceedings, the Crown may be advantaged in a manner which fundamentally alters its position vis-à-vis the accused and therefore renders the trial of the criminal proceedings unfair.

The Court held that it followed from the logic of ***Lee No 2*** that it was bound to do what it could to protect the accused's right to require the Crown to prove its case without the accused's assistance. And, if the facts were such that the only way in which that could be achieved was by staying forfeiture proceedings until after the related criminal proceedings had been heard and determined, it was bound to adopt that course.

The Court noted that there had been a contested committal hearing and the date for trial of the criminal charges had been fixed. Consequently, Jin had a fair idea of what the Crown would allege and seek to prove, and a fair idea of the evidence which the Crown might adduce. Thus, there was not only a prima facie significant overlap between the subject matter of the charges and the matters to which he would need or wish to depose in the forfeiture proceedings, but importantly he could not defend the forfeiture proceedings without telegraphing his likely defence of the criminal proceedings. It followed that, if the forfeiture proceedings were to precede the criminal proceedings, the Crown would be informed in advance of trial of Jin's likely defence to the criminal charges. The Court interpreted ***Lee No 2*** to imply that, were that to occur, the criminal charges would be altered in a fundamental respect contrary to Jin's privilege against self-incrimination. Since that was not expressly, or by necessary implication, provided for by statute, the Court must do what it could to prevent it. The Court of Appeal therefore ordered a stay of the forfeiture proceedings until the hearing and determination of the criminal proceedings.

The grounds of appeal include:

- The Court below erred when it failed to apply properly the decisions of this Court in *Lee v The NSW Crime Commission* (2013) 302 ALR 363 and *Lee v The Queen* (2014) 308 ALR 252, and held erroneously that the latter decision required it to stay the Commissioner's and the respondents' applications under the Act to prevent any further abrogation of the privilege against self-incrimination.

- The Court below erred when, in determining the principles applicable to a stay of *in rem* forfeiture proceedings under the Act, it did not apply the test of whether there was a real risk to the administration of justice in allowing the trial to continue with parallel criminal proceedings, but instead substituted a test of whether there was an overlap in the subject matter between the two proceedings, and concluded that an affirmative answer required a mandatory stay.