HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, GORDON AND EDELMAN JJ

Matter No S110/2019

SANKO LORDIANTO & ANOR — APPELLANTS

AND

COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE — RESPONDENT

Matter No P17/2019

GANESH KALIMUTHU & ANOR — APPELLANTS

AND

THE COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE — RESPONDENT

Lordianto v Commissioner of the Australian Federal Police
Kalimuthu v Commissioner of the Australian Federal Police
[2019] HCA 39
Date of Hearing: 7 & 8 August 2019
Date of Judgment: 13 November 2019
S110/2019 & P17/2019

ORDER

Matter No S110/2019

Appeal dismissed with costs.

Matter No P17/2019

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales (S110/2019) and the Supreme Court of Western Australia (P17/2019)

Representation

B W Walker SC with T P Mitchell for the appellants in S110/2019 (instructed by Lincolns Lawyers & Consultants)

H K Dhanji SC with E W L Greaves for the appellants in P17/2019 (instructed by Putt Legal Migration)

S P Donaghue QC, Solicitor-General of the Commonwealth, with L T Livingston and C Ernst for the respondent in both matters (instructed by Criminal Assets Litigation – Australian Federal Police)

CATCHWORDS

Lordianto v Commissioner of the Australian Federal Police
Kalimuthu v Commissioner of the Australian Federal Police

Criminal practice – Forfeiture of tainted property – Where appellants remitted money to Australia using money remitters or money changers in foreign country – Where large number of cash deposits, usually each less than $10,000, made into appellants' bank accounts in Australia in process known as "cuckoo smurfing" – Where deposits proceeds or instrument of structuring offence under s 142 of *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) – Where Commissioner of Australian Federal Police successfully applied for restraining orders over appellants' bank accounts under s 19 of *Proceeds of Crime Act 2002* (Cth) ("POCA") – Where appellants applied under ss 29 and 31 of POCA to have property excluded from orders – Whether property "ceased" to be proceeds or instrument of offence under s 330(4) of POCA – Whether property acquired by third party for sufficient consideration without third party knowing, and in circumstances that would not arouse reasonable suspicion, that property proceeds or instrument under s 330(4)(a) of POCA.

Words and phrases – "acquisition of property", "cuckoo smurfing", "for sufficient consideration", "in circumstances that would not have aroused a reasonable suspicion", "instrument of a serious offence", "money changers", "money laundering", "money remitters", "proceeds of an indictable offence", "proceeds of crime", "reporting threshold", "structuring offence", "third party", "volunteer".

Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth), ss 5, 142.
Proceeds of Crime Act 2002 (Cth), ss 19, 29, 31, 317, 329, 330, 338.

1 KIEFEL CJ, BELL, KEANE AND GORDON JJ. In both appeals, which were heard together, the appellants had remitted large sums of money to Australia using remitters or money changers in a foreign country. The appellants either deposited foreign currency in a foreign country into accounts nominated by the remitters or gave cash to the remitters. A large number of cash deposits, usually each less than $10,000[1], were then made into the appellants' nominated bank accounts in Australia using a process known as "cuckoo smurfing", a form of money laundering, which was explained by the primary judge in the *Kalimuthu* appeal in these terms:

> "[I]t relies on identifying a person offshore who wishes to transfer funds to a bank account in Australia using a money remitter. The remitter withholds amounts corresponding to the amount of money he has been told is to be laundered in Australia. The customer's bank account details are provided to people in Australia. A team of depositors in Australia deposits cash into the bank account, generally at a series of bank branches and below the threshold for reporting transactions involving physical currency. The account holder sees deposits that match the amounts they intended to remit. Because the amounts of each deposit are below the threshold, there is generally no record that could enable regulatory agencies to intervene."

2 In both cases, the Commissioner of the Australian Federal Police ("the AFP") successfully applied for orders under s 19 of the *Proceeds of Crime Act 2002* (Cth) ("the POCA") restraining the disposal of, or any dealing with, specific bank accounts in the name of one or more of the appellants, including all funds standing to the credit of each account. Each restraining order was made on the basis that there were reasonable grounds to suspect that the "property" was the proceeds of an indictable offence, or an instrument of a serious offence, or both.

3 The alleged indictable or serious offence, relevantly, was a structuring offence, as a result of the cuckoo smurfing, contrary to s 142(1) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ("the AML/CTF Act")[2]. The offence is aimed at those who try to avoid

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1 All references to amounts in dollars in these reasons are references to Australian dollars.

2 The offence under s 142 of the AML/CTF Act is both an "indictable offence" and a "serious offence" under s 19(1)(d) of the POCA. It is an "indictable offence"

Footnote continues

"threshold transactions" of $10,000 or more, so that they are not reported to the Australian Transaction Reports and Analysis Centre[3]. It is committed if two conditions are met. First, a person is, or causes another person to become, a party to two or more non-reportable transactions (that is, transactions under $10,000[4]). Second, it would be reasonable to conclude that the person conducted the transactions in the manner or form in which they did for the sole or dominant purpose of ensuring, or attempting to ensure, that the money or property was transferred in such a way so as not to give rise to a reportable "threshold transaction".

4 Subsequent to the restraining orders being made, the appellants applied under ss 29 and 31 of the POCA to have their interest in the property the subject of the restraining orders excluded from those orders.

5 The property sought to be excluded was the appellants' choses in action in respect of their various bank accounts. Those choses in action entitled them "to require [the relevant bank] to pay to them all or part of whatever amount was credited to the accounts"[5]. There was no dispute that these choses in action were "property" for the purposes of the POCA. The appellants in both cases also conceded that that "property" was proceeds or an instrument of an offence. The appellants' property therefore could not be excluded from the relevant restraining order unless the appellants could establish, on the balance of

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within the definition of that term in s 338 of the POCA, due to the fact that it is punishable by five years' imprisonment: see *Crimes Act 1914* (Cth), s 4G. It is a "serious offence" under para (ec)(i) of the definition of that phrase in s 338 of the POCA, which specifically refers to this offence.

3 A "reporting entity" must report such transactions within ten business days of the transaction being made: see AML/CTF Act, s 5 definitions of "reporting entity" and "designated service", ss 6, 43.

4 AML/CTF Act, s 5 definitions of "non-reportable transaction" and "threshold transaction".

5 *Commissioner of the Australian Federal Police v Lordianto* (2017) 324 FLR 237 at 252 [78]. See, eg, *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110 at 127; *Russell v Scott* (1936) 55 CLR 440 at 450-451; *Croton v The Queen* (1967) 117 CLR 326 at 330; *Parsons v The Queen* (1999) 195 CLR 619 at 627 [17]; *Foskett v McKeown* [2001] 1 AC 102 at 127-128.

probabilities[6], that it had ceased to be proceeds, or an instrument, of an offence within one of the limited circumstances identified in s 330(4) of the POCA.

6 Relevantly, s 330(4)(a) required the appellants to establish that the property had been:

> "acquired by a third party for sufficient consideration without the third party knowing, and in circumstances that would not arouse a reasonable suspicion, that the property was proceeds of an offence or an instrument of an offence (as the case requires)".

7 In *Lordianto*, the primary judge held, and the Court of Appeal of the Supreme Court of New South Wales unanimously agreed, that the appellants had failed to discharge the burden of showing that s 330(4)(a) applied[7]. In *Kalimuthu*, the primary judge held that the appellants had discharged the burden of showing that s 330(4)(a) applied[8], but the Court of Appeal of the Supreme Court of Western Australia unanimously allowed the AFP's appeal[9]. Leave to appeal to this Court was granted in both appeals, in part, because of the differences in, and doubts expressed about, the construction and application of s 330(4)(a) in the judgments below.

8 As these reasons will show, the issues in these appeals require consideration of four issues affecting the construction and application of s 330(4)(a) – what is the "property" restrained by the order which a person seeks to have excluded from that order; how is the reference to "a third party" to be understood; did the applicant for an exclusion order acquire the property "for sufficient consideration"; and was the property acquired in circumstances that would not arouse a "reasonable suspicion" that the property was proceeds of an offence or an instrument of an offence. As these reasons will also show,

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6 POCA, s 317.

7 *Commissioner of the Australian Federal Police v Lordianto* (2017) 324 FLR 237 at 260 [127]; *Lordianto v Commissioner of the Australian Federal Police* (2018) 337 FLR 17 at 53 [165]-[166].

8 *Commissioner of the Australian Federal Police v Kalimuthu [No 3]* (2017) 338 FLR 241 at 261 [139].

9 *Commissioner of the Australian Federal Police v Kalimuthu [No 2]* (2018) 340 FLR 1 at 70 [318], 106 [507].

none of these issues can be considered in isolation. Section 330(4)(a) must be construed and applied as a whole and in light of the operation of the POCA as a whole.

Proceeds of Crime Act

9 The POCA is intended to deprive persons of the proceeds of offences and the instruments of offences, and to undermine the profitability of criminal enterprises[10].

10 The POCA achieves these objects, among others, through a confiscation scheme[11] which provides for orders restraining the disposal of, or otherwise dealing with, particular property where there are reasonable grounds to suspect that the *property* is, among other things, the *proceeds* of an indictable offence or an *instrument* of a serious offence[12]. Each of the italicised words is defined broadly in the POCA.

11 Relevantly, "property" is defined to mean "real or personal property of every description, whether situated in Australia or elsewhere and whether tangible or intangible, and includes an interest in any such real or personal property"[13]. "[I]nterest", in relation to property or a thing, is defined to mean[14]:

> "(a) a legal or equitable estate or interest in the property or thing; or
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> (b) a right, power or privilege in connection with the property or thing;

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10 POCA, s 5(a), (da). See also *Commissioner of the Australian Federal Police v Hart* (2018) 262 CLR 76 at 82 [2], 89 [32].

11 As part of the confiscation scheme, a court may make a forfeiture order where a restraining order has been in place for at least six months and other criteria are satisfied: POCA, Ch 2, Pt 2-2.

12 POCA, s 19. "[S]erious offence" is defined to mean, among others, an indictable offence punishable by imprisonment for three or more years and of a particular type: POCA, s 338 definition of "serious offence".

13 POCA, s 338 definition of "property".

14 POCA, s 338 definition of "interest".

whether present or future and whether vested or contingent."

12 By s 329(1), property is "proceeds" of an offence if:

"(a) it is wholly derived[15] or realised, whether directly or indirectly, from the commission of the offence; or

(b) it is partly derived or realised, whether directly or indirectly, from the commission of the offence;

whether the property is situated within or outside Australia."

13 By s 329(2), property is an "instrument" of an offence if:

"(a) the property is used in, or in connection with, the commission of an offence; or

(b) the property is intended to be used in, or in connection with, the commission of an offence;

whether the property is situated within or outside Australia."

Furthermore, property can be proceeds of an offence or an instrument of an offence even if no person has been convicted of an offence[16].

14 Section 330 extends the circumstances in which property "becomes" and "remains" the proceeds or an instrument of an offence[17]. It also narrows the circumstances in which property "ceases" to be the proceeds or an instrument of an offence[18]. It relevantly provides:

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15 There is an inclusive definition of "derived" in s 336 of the POCA. It has no application in these cases.

16 POCA, s 329(3).

17 POCA, s 330(1)-(3), (5)-(6).

18 POCA, s 330(4).

"(1) Property *becomes* proceeds of an offence if it is:

(a) wholly or partly derived or realised from a disposal or other dealing with proceeds of the offence; or

(b) wholly or partly acquired using proceeds of the offence;

including because of a previous application of this section.

(2) Property *becomes* an instrument of an offence if it is:

(a) wholly or partly derived or realised from the disposal or other dealing with an instrument of the offence; or

(b) wholly or partly acquired using an instrument of the offence;

including because of a previous application of this section.

(3) Property *remains* proceeds of an offence or an instrument of an offence even if:

(a) it is credited to an account[19]; or

(b) it is disposed of or otherwise dealt with.

(4) Property *only ceases* to be proceeds of an offence or an instrument of an offence:

(a) if it is acquired by a third party for sufficient consideration without the third party knowing, and in circumstances that would not arouse a reasonable suspicion, that the property was proceeds of an offence or an instrument of an offence (as the case requires) ..." (emphasis added)

15 It is important to emphasise some aspects of these provisions. First, the provisions speak of "dealing" with proceeds or an instrument of an offence. "[D]eal" is defined as "dealing with a person's property"[20], including:

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19 See POCA, s 338 definition of "account".

20 POCA, s 338 definition of "deal".

"(a) if a debt is owed to that person – making a payment to any person in reduction of the amount of the debt; and

(b) removing the property from Australia; and

(c) receiving or making a gift of the property ..."

16 Second, consistent with the stated objects of the POCA, the text of s 330(1), (2) and (3) intends to capture within the Act's operation a broad range of circumstances in which property might be disposed of or otherwise dealt with, in order to ensure that the property is and remains proceeds of an offence or an instrument of an offence. Indeed, s 330(3) further extends the operation of the Act by providing that property remains proceeds of an offence or an instrument of an offence even if it is credited to an account or it is disposed of or otherwise dealt with.

17 Third, whether specific property has been wholly or partly derived or realised from the disposal or other dealing with proceeds, or an instrument, of an offence necessarily "turns on considerations of substance and economic reality which can be expected to vary in different factual settings"[21]. And the factual setting that may need to be considered includes a gift and any other dealing with the property. Thus, there can be no "detailed exposition in the abstract"[22].

18 It is in that context that s 31 of the POCA provides that a person who claims an interest in property covered by a restraining order may apply for an exclusion order under s 29[23]. The court to which an application for a restraining order is made must, in limited circumstances, exclude a specified interest in property from the restraining order, either at the time the restraining order is made, or at a later time[24]. And the applicant for the exclusion order bears the onus of proving, on the balance of probabilities, the matters necessary to establish the grounds for an exclusion order[25].

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21 *Hart* (2018) 262 CLR 76 at 86 [16]; see also at 100-101 [71], 107 [97].

22 *Hart* (2018) 262 CLR 76 at 86 [16].

23 POCA, s 31(1).

24 POCA, s 29(1).

25 POCA, ss 29(2)(d), 317.

19 In both appeals, the appellants applied, relevantly, for an order under s 29(2)(d) seeking to exclude a specified interest in property from a restraining order on the basis that the interest had ceased to be proceeds, or an instrument, of an offence.

20 A note[26] to s 29(2) records that "[o]ne of the circumstances in which property ceases to be proceeds of an offence ... involves acquisition of the property by an innocent third party for sufficient consideration: see paragraph 330(4)(a)". "[S]ufficient consideration" is defined as follows: "an acquisition or disposal of property is for sufficient consideration if it is for a consideration that is sufficient and that reflects the value of the property, having regard solely to commercial considerations"[27]. In both cases, the appellants sought to establish that they had satisfied s 330(4)(a).

21 Before addressing the proper construction of s 330(4)(a), it is necessary to say something about both the proceedings and the facts that give rise to the present appeals. It is also desirable to spell out, in some detail, how the judges below identified and dealt with the issues arising in relation to the construction and application of s 330(4)(a).

Lordianto

The application for exclusion

22 In June 2016, the AFP successfully applied in the Supreme Court of New South Wales under s 19 of the POCA for a restraining order in relation to "[f]unds standing to the credit" of specific bank accounts in the name of one or more of Mr Sanko Lordianto and Ms Indriana Koernia. The total amount restrained was just under $6 million.

23 Mr Lordianto and Ms Koernia applied under s 29 of the POCA to exclude their interest in the funds from the restraining order on the basis that, by operation of s 330(4)(a), their interest ceased to be proceeds or an instrument of an offence. The exclusion application was made in a manner referable to s 330(4)(a) and set out the circumstances in which Mr Lordianto and Ms Koernia stated that the funds came to be in the bank accounts the subject of the restraining order. Ms Koernia, and then Mr Lordianto, were each examined pursuant to

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26 See *Acts Interpretation Act 1901* (Cth), s 13(1).

27 POCA, s 338 definition of "sufficient consideration".

s 180 of the POCA. The AFP then filed a notice setting out the grounds on which the exclusion application was to be contested. The notice relevantly put in issue the whole of s 330(4)(a).

24 The exclusion application was heard by Simpson J. Each of Mr Lordianto and Ms Koernia made an affidavit and gave oral evidence. As Simpson J recorded, much of the evidence was not in dispute. It may be summarised as follows.

Facts

25 Mr Lordianto and Ms Koernia are Indonesian citizens and are husband and wife. Both have been granted permanent residency in Australia. In order for them to maintain their entitlement to Australian permanent residency, and to secure their future in Australia, they arranged to transfer large sums of money to Australia. Ms Koernia had the task of managing this aspect of their financial affairs.

26 Five Commonwealth Bank of Australia ("the CBA") bank accounts were involved: a Cash Investment Account and a Standard Term Deposit Account in the joint names of Mr Lordianto and Ms Koernia and a second Cash Investment Account and two further Standard Term Deposit Accounts in the name of Ms Koernia ("the CBA Accounts").

27 Between 22 October 2013 and 5 August 2015, Ms Koernia arranged for $4.5 million to be transferred from Indonesia to the Cash Investment Accounts using the services of "money changers" or "money remitters" in Indonesia. The rate was better than that offered by banks. On the instructions of the remitters, Ms Koernia separated large sums of Indonesian rupiah into smaller amounts and deposited them in a series of separate transactions into a number of different bank accounts in Indonesia, including into accounts of persons who were not the remitters and whom she did not know. There were multiple transactions on a single day. On one occasion, on 5 June 2015, Ms Koernia made two separate transfers, each under 500 million Indonesian rupiah, into one account and then three additional transfers, again each under 500 million Indonesian rupiah, into a different account – all within a little over half an hour. Ms Koernia gave evidence that at no stage did she obtain any written receipts for these transfers.

28 The $4.5 million was deposited into the Cash Investment Accounts through cuckoo smurfing. In the period from 22 October 2013 to 5 August 2015, $2,786,062 was deposited by 390 cash deposits of less than $10,000 at various bank branches across New South Wales, Queensland, Victoria, South Australia

and Western Australia. Multiple deposits were made on the one day or over a short period of time. For example, on one day, no fewer than 35 cash deposits, all in amounts less than the reporting threshold of $10,000, were made into one of the Cash Investment Accounts at branches in New South Wales and Victoria. Between 23 and 31 October 2013, 77 cash deposits under $10,000 were made into one of the Cash Investment Accounts in various branches across New South Wales and in other States. The remainder of the money was deposited into the Cash Investment Accounts in various amounts over $10,000. For example, on 24 October 2013, a cash deposit of $80,000 was made in New South Wales; on 29 November 2013, two cash cheques in the sum of $100,000 and $300,000 respectively were deposited in Queensland; and on 2 June 2015, $104,800 was deposited at a branch in Western Australia.

29 Ms Koernia did not use internet banking. Instead, Ms Koernia telephoned her contact in the relevant branch of the CBA to ensure that funds had been deposited. She tallied up the individual deposits to ensure the total sum corresponded to the sum of her deposits in Indonesia. She also received paper copies of her bank statements, which disclosed the deposits, the branches at which they had been made, and the fact that they were cash deposits. From the information given to her by the CBA representatives and from the bank statements, Ms Koernia was aware that numerous cash deposits in small amounts were being made into the Cash Investment Accounts. In particular, Ms Koernia was aware that almost 400 cash deposits of amounts under $10,000 were made. Ms Koernia said that she did not make any inquiry of the money remitters in Indonesia or of the CBA as to why deposits were being made in that form or in those amounts.

30 On 25 February 2015, Ms Koernia deposited, by cheque, $1,500,000 into each of two of the Standard Term Deposit Accounts, and on 16 July 2015 she transferred $1,500,000 from one of the Cash Investment Accounts into one of the Standard Term Deposit Accounts. It was the AFP's contention that these funds were taken from the Cash Investment Accounts and were, accordingly, the proceeds of the structuring offence, contrary to s 142 of the AML/CTF Act.

31 Both Mr Lordianto and Ms Koernia accepted that Ms Koernia kept Mr Lordianto informed of the manner in which the money was paid to the Indonesian money remitters and of the various deposits into the CBA Accounts.

First instance – Simpson J

32 The exclusion application filed by Mr Lordianto and Ms Koernia was dismissed by Simpson J of the Supreme Court of New South Wales. Her Honour held that there had been no acquisition of property by Mr Lordianto and

Ms Koernia because "[t]he property ... remained what it had always been – a chose in action; a contractual right", the value of which rose and fell with deposits and withdrawals. Her Honour held that "[t]he deposits represented an increment in the value of the property, but did not change its nature, and did not constitute an acquisition of property".

33 However, if the deposits did involve an acquisition of property, her Honour found that neither Mr Lordianto nor Ms Koernia was a "third party" for the purposes of s 330(4)(a). Simpson J held that a "third party" is "a party who is, at the time of the criminal conduct, wholly removed from the property constituting the proceeds or instrument; it is not an owner of property who is wholly removed from the criminality that causes the property to be tainted". Thus, the requirement was not met. Her Honour also held that Mr Lordianto and Ms Koernia's interests in that property were not acquired for sufficient consideration.

34 On the issue of knowledge, Simpson J found that Ms Koernia deposited very large sums of money into the accounts of individuals she did not know and that she did so by breaking up the sums deposited into amounts less than 500 million Indonesian rupiah. Her Honour found that Ms Koernia was also aware of the multiple cash deposits in Australia, including multiple transactions under $10,000, which was the reporting threshold[28]. Thus, her Honour held that Mr Lordianto and Ms Koernia had "not established that the property was acquired without their knowledge that it was either proceeds or an instrument of an offence". For the same reasons, her Honour also held that Mr Lordianto and Ms Koernia had failed to establish that the property had been acquired in such a way as not to arouse a reasonable suspicion that it was proceeds of, or an instrument of, an offence.

Court of Appeal

35 Mr Lordianto and Ms Koernia's appeal to the Court of Appeal of the Supreme Court of New South Wales (Beazley P, McColl and Payne JJA) was dismissed. Beazley P and Payne JA concluded that Mr Lordianto and Ms Koernia had acquired an interest in property each time a deposit was made into one of the accounts, because on each such occasion they "acquired a 'right' or 'power … in connection with the property' within the meaning of the term 'interest'". Beazley P and Payne JA held, however, that "[a]s a matter of ordinary English

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28 See [3] above.

expression and in the context of s 330 as a whole, the interest in property the subject of s 330(4)(a) must be acquired after the interest in property becomes proceeds of an offence".

36 Beazley P and Payne JA agreed with Simpson J that a "third party" was someone "wholly removed from the property constituting the proceeds or instrument", by which their Honours meant "a person with no involvement in the transaction by which property first becomes proceeds of an offence or an instrument of an offence". Their Honours found that neither Mr Lordianto nor Ms Koernia was a third party. Their Honours said that the property in issue was not acquired for sufficient consideration because "[t]he property was ... acquired from the unnamed persons who made the deposits", and Mr Lordianto and Ms Koernia "had no connection, contractual or otherwise, with those persons". Further, "there was no transfer of funds, whether electronically or by any other means, between Indonesia and Australia".

37 On the issue of reasonable suspicion, Beazley P and Payne JA said that Mr Lordianto and Ms Koernia "were financially sophisticated and used to transferring large sums of money across national borders, as well as dealing with currency controls and a myriad of national disclosure requirements". Their Honours relied on the advantageous rate offered by the remitters and the almost 400 cash deposits of amounts under $10,000. Thus, their Honours found that "the conclusion that there were abundant circumstances here that would arouse a reasonable suspicion that the interests in property were proceeds of an offence or an instrument of an offence was inevitable".

38 McColl JA dissented on the "third party" issue but otherwise agreed with Beazley P and Payne JA. McColl JA said that a third party was someone who was not "intentionally complicit in the laundering activity" or, "to put it another way", someone who stood "at arms' length to the transaction".

Kalimuthu

The application for exclusion

39 On 24 October 2014, the AFP successfully applied in the Supreme Court of Western Australia, under s 19 of the POCA, for a restraining order in relation to "all funds standing to the credit" of specific bank accounts in the name of one or more of Mr Ganesh Kalimuthu and Ms Macquelene Dass (also known as Mrs Ganesh).

40 Mr and Mrs Ganesh applied under s 29 to exclude their interest in the restrained property on the basis that, by operation of s 330(4)(a), their interest had ceased to be proceeds or an instrument of an offence.

41 The exclusion application was heard by Allanson J. As his Honour recorded, the areas of factual dispute were limited, the primary issue being whether Mr and Mrs Ganesh had established that the circumstances in which they acquired their interest in the restrained bank accounts would not arouse a reasonable suspicion that the property was proceeds, or an instrument, of an offence. That evidence may be summarised as follows.

Facts

42 Mr Ganesh is a Malaysian citizen. Mr and Mrs Ganesh are married and live in Penang. Mr Ganesh said that he acted on the advice of a friend by transferring funds to Australia, with the aim of investing about $5 million in Australia to facilitate a later visa application. Mr Ganesh decided to use a local money changer rather than a bank, for the better exchange rates. He went to an acquaintance, Mr Zamri, whose parents ran a money changing business, and whose services he had used before. Mr Zamri advised him to use a bank, but told Mr Ganesh he could arrange the transfer over several months.

43 Mr Ganesh said that he met Mr Zamri "maybe 7 or 8 times between August and October 2014 to give him the money to transfer to Australia". The amounts were linked to when Mr Ganesh received cash from the sale of a turbine. Each time, Mr Zamri would come to Mr Ganesh's apartment to collect the cash. The cash amounts varied between about RM200,000 and RM1.5 million (approximately $65,000 to $500,000 on the exchange rate he was being given).

44 Mr Ganesh travelled to Australia for the purpose of opening an Australian bank account, which he did on 11 August 2014. Mr Ganesh opened an account with a deposit of $5,000 cash at the Canning Vale branch of the Australia and New Zealand Banking Group Ltd ("the ANZ"). On 13 August 2014, six cash deposits totalling $50,000 were made. Between 13 August 2014 and 30 September 2014, the credit balance increased to more than $730,000. The increased balance was mainly attributable to 96 cash deposits of amounts between $1,000 and $9,500. On more than one occasion there were multiple deposits on the same day.

45 On the same day, 11 August 2014, Mr Ganesh opened an account with a deposit of $5,000 cash at the Canning Vale branch of the CBA. On 13 August 2014, eight cash deposits totalling $150,000 were made. Three of those deposits

were reportable transactions[29]. Between 11 August 2014 and 9 October 2014, the credit balance increased to more than $970,000. During that period, there were nine deposits of amounts in excess of the reporting threshold of $10,000 and 94 deposits of amounts less than $10,000. The majority of the transactions occurred in New South Wales. There were also transactions in Victoria and Western Australia. There were multiple deposits on the same day.

46 Mrs Ganesh opened a third account on 25 September 2014 with a deposit of $5,000 cash at the Canning Vale branch of the ANZ. Mr Ganesh provided cash to Mr Zamri to transfer into that account, as he had done with the other two accounts. On 30 September 2014, 11 cash deposits totalling $93,250 were made. Each deposit was for an amount less than $9,300. On 1 October 2014, 11 deposits totalling in excess of $100,000 were made. Each deposit was for an amount equal to or greater than $9,000, but less than $10,000. Between 25 September 2014 and 13 October 2014, the credit balance increased to more than $755,000. There were 90 deposits of amounts between $1,000 and $9,950, with many of the deposits being in excess of $9,000, but less than $10,000. Numerous deposits were made on the same day.

47 Mr Ganesh had "view only" internet banking with the ANZ and the CBA which enabled him to check the accounts from Malaysia, but not to make transactions. Mr Ganesh said that, in this way, he checked to make sure the amounts he gave to Mr Zamri were being received in the accounts in Australia in the correct amounts. He said he never saw any printed bank statements. In his oral evidence, Mr Ganesh said that he was not aware where the deposits were being made or who was making the deposits. He later became aware that the deposits were being made in cash in Sydney when he was shown statements for the CBA account.

48 Mrs Ganesh made an affidavit but was not cross-examined. Mrs Ganesh's evidence was, relevantly, that: Mr Ganesh had told her that she should open a bank account in Australia; she and Mr Ganesh travelled to Perth between 25 and 28 September 2014 to do so; she opened the third bank account, with the ANZ, in her name, on 25 September 2014; and she first saw a statement of that account in August 2016.

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29 See [3] above.

First instance – Allanson J

49 Allanson J allowed the exclusion application. His Honour found that Mr Ganesh held existing contractual rights against the bank with regard to the current balance of his account. His Honour concluded that "third party" did not "simply refer to someone not a party to the offence". His Honour gave three reasons for finding that Mr Ganesh was a third party. First, "Mr Ganesh was not in a legal relationship (such as a director, partner, or fiduciary) with anyone involved in the transaction that would make [it] a transaction between related parties". Second, "Mr Ganesh had no interest in the Australian physical currency, or any property derived from it, before the cash was deposited into his account". Third, "Mr Ganesh's position [was] relevantly no different from that of a person who sells property to a stranger and is paid by direct debit into his bank account".

50 His Honour further held that "Mr Ganesh [had] proved that the amount he paid, through Mr Zamri, was sufficient consideration for what he acquired" and that "[t]he fact that the Malaysian ringgit passed through the hands of one or more intermediaries [did] not affect that Mr Ganesh gave consideration to someone".

51 On the question of reasonable suspicion, his Honour observed that Mr Ganesh "could not have a reasonable suspicion that his interest in his bank account was tainted unless he knew that the deposits were structured (that is, deposits of physical currency in amounts of less than $10,000) and there was some material sufficient to induce a suspicion that they were being done in that manner and form for the purpose of avoiding reporting requirements". His Honour found in favour of Mr Ganesh. Allanson J concluded that his findings necessarily applied also to Mrs Ganesh, "who knew less than her husband".

Court of Appeal

52 The AFP successfully appealed to the Court of Appeal of the Supreme Court of Western Australia (Buss P, Murphy and Beech JJA).

53 On whether there was an acquisition of property, Murphy and Beech JJA noted they were bound to follow the New South Wales Court of Appeal in *Lordianto* unless the decision was "plainly wrong" and thus concluded that there was an acquisition of property. Buss P stated that the term "acquired" had a broad connotation and was satisfied that receipt of the structured deposits by Mr and Mrs Ganesh constituted the acquisition of an "interest" and thus "property".

54 On the question of construction of the words "third party", Murphy and Beech JJA said that if they were deciding the question independently of the Court of Appeal's decision in *Lordianto*, they would have preferred the construction adopted by McColl JA. Their Honours doubted the existence of any "temporal disjunction" such that the interest in property the subject of s 330(4)(a) must be acquired after the interest in property becomes proceeds of an offence. Their Honours were concerned that the AFP's proposed construction would have the consequence of denying protection to innocent vendors. However, their Honours were not satisfied that the decision of the Court of Appeal was "plainly wrong".

55 Buss P took a different view. His Honour concluded that "[t]he text of s 330(4)(a), in its ordinary and natural meaning (in particular, the phrase 'only ceases to be' and the phrase 'if it is acquired by a third party'), indicates that an acquisition of the property will not be by a 'third party' unless the acquisition occurs *after* the property became proceeds of an offence or an instrument of an offence" (emphasis in original). Thus, "a 'third party' [was] a person who was not involved with or connected to any transaction by which the property *became* proceeds of an offence or an instrument of an offence" (emphasis in original). Therefore, his Honour concluded that as "[n]one of the acquisitions by Mr Ganesh or Mrs Ganesh occurred *after* the property became proceeds of an offence" (emphasis in original), and neither Mr Ganesh nor Mrs Ganesh "was involved with or connected to the transaction in that he or she was the recipient of the moneys which were the proceeds of the offence", they were not third parties. His Honour also stated that, in any case, Beazley P and Payne JA in the Court of Appeal were not "plainly wrong".

56 On the question whether Mr and Mrs Ganesh gave sufficient consideration, Murphy and Beech JJA held that "it was not enough to conclude, as the primary judge did, that [Mr and Mrs Ganesh] 'gave consideration to someone', without finding that the property was acquired '*for*' – thus, in exchange for – that consideration" (emphasis in original, footnote omitted). Rather, "no such finding could be made" because Mr and Mrs Ganesh's "lack of connection to the depositors, from whom the property was acquired, [was] a fatal obstacle to a conclusion that they acquired the property for sufficient consideration".

57 Buss P adopted a different construction. His Honour stated that "[t]he preposition 'for' requires, in effect, that the consideration be exchanged for the property", and that the consideration is "adequate or equivalent", in that it reflects "the value of the property, having regard solely to commercial considerations". His Honour held that "the preferable and correct inference is that, by some means, Mr Zamri or [the person to whom Mr Zamri gave the

money] procured the cuckoo smurfers to make the structured deposits into [Mr and Mrs Ganesh's] bank accounts". His Honour further found that "there was accordingly a nexus (that is, a connection or series of connections) between the Malaysian Ringgit banknotes handed by Mr Ganesh to Mr Zamri and the Australian Dollar banknotes deposited by the cuckoo smurfers into the [Australian] bank accounts". Thus, his Honour was satisfied that Mr or Mrs Ganesh had given "consideration 'for' each acquisition of property and that the consideration for the acquisition was sufficient". Despite this, his Honour followed the New South Wales Court of Appeal in *Lordianto* as he was not convinced that decision was "plainly wrong".

58 On the question of reasonable suspicion, Murphy and Beech JJA found that Mr Ganesh had not established that he acquired the property in circumstances that would not arouse a reasonable suspicion that the deposits were proceeds of an offence. Their Honours referred, among other things, to the fact that Mr Ganesh "knew that the very large amounts of cash he provided to Mr Zamri, from time to time, were not leading to deposits in corresponding amounts, but rather to a number of deposits of considerably smaller amounts" and he "did not establish a cogent explanation for why this might be so".

59 Buss P adopted a different approach in reaching the same conclusion. His Honour referred to the fact that Mr Ganesh had "actual knowledge that, despite the fact that the cash amounts he gave to Mr Zamri were between about $65,000 and $500,000, Mr Ganesh's Australian bank accounts were being credited regularly with numerous small deposits in amounts of less than $10,000". His Honour stated that when determining whether the third party acquired the property "in circumstances that would not arouse a reasonable suspicion" that the property was proceeds of an offence or an instrument of an offence, the test is objective. Thus, it is irrelevant that the third party did not know that the actions or omissions constituting the offence were an offence. Moreover, his Honour held that the purpose of the provisions would be "impeded" if ignorance of the law allowed someone to rely on s 330(4)(a).

60 Mrs Ganesh was not in the same position as Mr Ganesh. The AFP's appeal succeeded in relation to Mrs Ganesh on the "third party" and "sufficient consideration" points but failed on the "reasonable suspicion" aspect. Buss P and Murphy and Beech JJA referred to the primary judge's summary of her unchallenged evidence and found that the circumstances of which Mrs Ganesh had knowledge were materially different from the circumstances of which Mr Ganesh had knowledge and, thus, there was no basis for ascribing to Mrs Ganesh any of the knowledge of Mr Ganesh. Their Honours concluded that Mrs Ganesh had established, on the balance of probabilities, that she had acquired the property in circumstances that would not have aroused in the mind

of a reasonable person, in her position, who had actual knowledge of those circumstances, a reasonable suspicion that the property was proceeds of an offence or an instrument of an offence.

Construction of s 330(4)(a)

61 On appeal to this Court, the parties approached the question of construction of s 330(4)(a) as if the paragraph comprised separate elements which are to be construed in isolation from one another. That is not the proper approach to the construction of s 330(4)(a).

62 The paragraph must be read as a whole and in the context provided by the whole of the statutory framework. As seen earlier, that framework commences with a restraining order (or an application for a restraining order) to prevent identified property being disposed of or otherwise dealt with by any person if there are reasonable grounds to suspect that the property is, relevantly, the proceeds of, or an instrument of, an offence[30]. And then, of course, the circumstances in which property *becomes* and when it *remains* proceeds, or an instrument, of an offence are defined broadly in ss 329 and 330 of the POCA. Those sections are intended to, and do, have multiple applications.

63 Against that background, the exclusion provided by s 330(4)(a), by which property *ceases* to be proceeds, or an instrument, of an offence, is limited. It is limited to a person who acquired specific property (necessarily, the subject of an existing or proposed restraining order) for sufficient consideration without that person knowing, and in circumstances that would not arouse a reasonable suspicion, that the property was proceeds, or an instrument, of an offence. In many cases, perhaps most, that will be an inquiry very similar to the inquiry under the general law about whether a person is a bona fide purchaser for value without notice[31].

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30 POCA, s 19.

31 See, eg, *Pilcher v Rawlins* (1872) LR 7 Ch App 259; *In re Nisbet and Potts' Contract* [1906] 1 Ch 386; *Wilkes v Spooner* [1911] 2 KB 473; *Midland Bank Trust Co Ltd v Green* [1981] AC 513; *Corbett v Halifax Building Society* [2003] 1 WLR 964; [2003] 4 All ER 180. See also Australian Law Reform Commission, *Confiscation that Counts: A review of the Proceeds of Crime Act 1987*, Report No 87 (1999) at [12.82].

64 The person who acquired the property which that person seeks to have excluded from a restraining order under s 330(4)(a) is the "third party" referred to in that paragraph. It is not, as the AFP put rhetorically, no more than a "person". Rather, a "third party" is no more, and no less, than a person who meets the description of what follows in s 330(4)(a), in light of the scheme of the Act and, in particular, ss 329 and 330. It is therefore necessary to say something further about s 330(4)(a).

Property

65 Section 330(4)(a) falls for consideration only if a person seeks to exclude from a restraining order specific property which is the subject of a restraining order (or an application for a restraining order). As the applicant for the exclusion order bears the onus of satisfying a court, on the balance of probabilities[32], that specific property should be excluded from the order, the first step is to identify the "property" that the applicant seeks to have excluded.

66 In the present appeals there was no dispute that the property the appellants sought to have excluded was their respective choses in action against the Australian banks, which entitled them "to require [the relevant bank] to pay to them all or part of whatever amount was credited to the accounts"[33].

67 Contrary to the substance and effect of some of the AFP's submissions, the appellants did not contend that they had an interest in, or sought to exclude, the cash that had been deposited to the credit of the Australian accounts through the cuckoo smurfing. The appellants did not acquire the cash or deposit that cash. The banks acquired the benefit of those deposits. Following each deposit to the credit of their bank accounts, the appellants acquired from the relevant bank an interest, in the sense of a "right" or "power" within the meaning of the word "interest"[34], in connection with their respective choses in action. It was because that interest in the restrained property (the choses in action) was said to be acquired in the circumstances specified in s 330(4)(a) that the appellants in each case made applications for exclusion orders of their property.

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32 POCA, s 317.

33 See fn 5 above.

34 See POCA, s 338 definition of "interest".

68 Identifying the property sought to be excluded, and the property said to be acquired (as they may be different), is a critical initial step. It ensures that the property sought to be excluded is the subject of the restraining order and, where relevant, that it is proceeds, or an instrument, of an offence (not disputed in these appeals). Significantly, it also ensures that the balance of the question under s 330(4)(a) is the right question: namely, did the applicant for the exclusion order acquire the relevant property for sufficient consideration without that applicant knowing, and in circumstances that would not arouse a reasonable suspicion, that that property was proceeds, or an instrument, of an offence? If the property is misdescribed, what an applicant needs to prove necessarily proceeds from the wrong starting point.

Acquired for sufficient consideration

69 Having identified the property and determined that the property is proceeds, or an instrument, of an offence, the next step is to determine whether the applicant for the exclusion order acquired that property for sufficient consideration. That necessarily directs attention to the circumstances in which the property was acquired by the applicant as well as the balance of s 330(4)(a) – whether the applicant did not know, and in circumstances that would not have aroused a reasonable suspicion, that the property was proceeds, or an instrument, of an offence. In its terms, the test is objective.

70 As seen earlier, "an acquisition or disposal of property is for sufficient consideration if it is for a consideration that is sufficient and that reflects the value of the property, having regard solely to commercial considerations"[35]. Aspects of that definition should be noted: the consideration must be sufficient and reflect the value of the property and, in assessing both of those matters, the court is to have regard solely to commercial considerations.

71 That inquiry, and analysis, are self-evidently not undertaken in some vacuum divorced from the circumstances in which the applicant acquired the property. As the text of s 330(4)(a) indicates, the focus must be upon what the applicant paid to acquire the property and in what circumstances. The objective inquiry is directed at identifying what the applicant acquired and how, what were the form and amount of the consideration the applicant provided, and when and how that consideration was provided. That list is not exhaustive. It cannot be exhaustive: the analysis of whether the acquisition by the applicant was *for*

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35 POCA, s 338 definition of "sufficient consideration".

sufficient consideration forms *part* of an assessment of whether the circumstances of that acquisition (which must at least include the facts and matters just identified) would not have aroused a reasonable suspicion that the property was proceeds, or an instrument, of an offence.

72 Obviously, different kinds of property are acquired in different ways. The purchase of a house at auction on the open market will be attended by different circumstances from the acquisition of a chose in action against a bank or, indeed, of an "interest" in connection with that chose in action. That last statement needs some unpacking.

73 The statutory focus is necessarily on the sufficiency of the consideration the applicant provided for the acquired property that is sought to be excluded from the restraining order, having regard solely to commercial considerations. In relation to most property – such as the purchase of a house or a car – the sufficiency of the consideration may be assessed by asking what is the price a hypothetical willing but not anxious vendor could reasonably expect to obtain and a hypothetical willing but not anxious purchaser could reasonably expect to pay after proper negotiations between them have been concluded[36]. And the identity of the person who provided that consideration will usually be disclosed by records, electronic or otherwise.

74 But other forms of property raise different commercial considerations and the property in issue in these appeals, a chose in action against a bank, is instructive. In a typical transaction for the payment of a debt or the transfer of money, there is no delivery of a physical asset in the form of notes and coins but a transfer through the electronic clearing and settlement systems used by the banking industry.

75 The essential initiating event is an instruction by a payer (or the originator of a payment) to their bank to reduce the value of their bank balance in an account and to increase, correspondingly, the bank balance of an account held by a named recipient (also known as the beneficiary). The form of the instruction is not fixed. The originator's title to "money" is not transferred. The transfer operates by adjusting the total amount of the debts owed by the participants, the banks, to each other by a process which the banks commercially describe as "netting". It is a process whereby a series of obligations between two participants is replaced with a single obligation which is calculated by adding all of the

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36 *Spencer v The Commonwealth* (1907) 5 CLR 418 at 436-437, 441.

obligations owed by each participant to the other and deducting the smaller from the larger. On any one day, the netting involves multiple participants in the industry, often using clearing houses, which operate as multilateral contracts. The process of netting determines the net sum which each bank owes to each other in the clearing system, which is then settled[37].

76 There are a number of consequences. First, when an originator instructs a bank to make a transfer from their account, the chose in action representing that credit balance is extinguished or reduced by the amount of the transfer. Second, a fresh chose in action is created, or the value of an existing chose in action is increased, for the beneficiary which entitles them to withdraw an equivalent amount from their bank, subject always to the terms of their contract with their bank. Third, the property the beneficiary acquires is wholly distinct from the property which the originator had before the transfer. Indeed, the POCA recognises the change in the nature of property held by a bank by providing that "property" remains proceeds, or an instrument, of an offence even if credited to an account[38].

77 These processes raise significant commercial considerations and, thus, consequences for the proper construction of s 330(4)(a). As stated earlier, different forms of property will necessarily raise different questions about the form, amount, nature and source of the consideration.

78 Once the property in a bank account is properly identified and it is recognised that the value credited to another account is not the property that was deposited, many of the submissions about what was necessary in order for an applicant for an exclusion order to demonstrate that they have provided "sufficient consideration" for the acquisition of an interest in connection with their chose in action in a bank account must be rejected.

79 First, contrary to the AFP's submissions, it was unnecessary for the appellants to establish, and contrary to established banking practice to require proof, that the "funds" deposited into the appellants' respective Australian bank

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37 See, eg, Cranston et al, *Principles of Banking Law*, 3rd ed (2017) at 349-350; Ellinger, Lomnicka and Hare, *Ellinger's Modern Banking Law*, 5th ed (2011) at 562-569; Tyree and Weaver, *Weerasooria's Banking Law and the Financial System in Australia*, 6th ed (2006) at 58-59 [7.5]-[7.7].

38 POCA, s 330(3)(a).

accounts, which they sought to exclude from the restraining order, were "their own funds". As just seen, the funds deposited with the banks were not the property the appellants held and sought to exclude.

80 Second, contrary to the approach adopted by some of the courts below, it was unnecessary for the appellants to establish, and contrary to established banking practice to require proof, that the appellants had a direct connection, contractual or otherwise, with the persons who "made the deposits" into their Australian bank accounts or that there was any contractual relationship, whether as agents or otherwise, between the remitters in the foreign country and the depositors in Australia.

81 Third, a construction that focuses attention away from whether consideration has been paid and instead towards whether the relevant relationships are direct or indirect diverts attention from the fact that a purpose of the provision is to exclude those who have not paid sufficient consideration, including volunteers, from being able to keep proceeds, or an instrument, of an offence.

82 Thus, as Buss P recognised in *Kalimuthu*, the consideration must be by way of exchange but may not be direct. It may be sufficient if the applicant for an exclusion order can demonstrate that there was a connection, or series of connections, between the provision of the consideration by them and the acquisition of the property by them that they seek to have excluded. What the necessary connection or connections might be is as varied as the nature of property itself.

83 For example, when acquiring an asset and paying for that asset by bank transfer, the required connection may be no more than evidence of the instruction of the buyer to their bank to reduce the value of their bank balance, and, correspondingly, to increase the bank balance of an account held by the vendor.

84 In the present appeals, the connections were sought to be explained by the arrangements the appellants had with the remitters in the foreign country. The fact that remitters were used by the appellants, as well as how the remitters were used, might show, if nothing more were known, that the appellants provided foreign currency in cash in exchange for an Australian dollar equivalent being deposited into specific bank accounts in Australia. But, as will be explained, that is not what happened here.

85 Section 330(4)(a) requires that the property in issue was acquired by a third party for sufficient consideration. And s 330(4)(a), read with s 329 and the

rest of s 330, makes it clear that this does not include a volunteer. A volunteer simply does not provide any consideration (let alone "sufficient" consideration) for the property they acquire.

86 In the course of argument, the AFP used an example of a mother and her drug dealing son where the drug dealer gives cash from the sale of the drugs to his mother and the mother uses the cash to buy a car. The example is illustrative of the objective inquiry that must be undertaken in response to an application for an exclusion order. The property the mother has as a result of the gift (the cash she has been given) is, by reason of s 330(1)(a), wholly derived from the disposal of, or other dealing with, the proceeds of an offence and remains proceeds of an offence[39]. And the car remains proceeds of an offence by reason of the operation of s 330(1)(b) and (3)(b). But does the car cease to be proceeds under s 330(4)(a)? There is a distinction to be drawn. If, objectively, the purchase is seen as the mother buying the car with the money provided by the son (which is purchased by the son in the name of the mother or, more accurately, the mother acquiring the car as a gift from the son), then the mother is a volunteer. The mother has provided no value and the car remains subject to the restraining order and then possible forfeiture under the POCA because the mother did not provide the consideration for the car. As a volunteer, she cannot satisfy s 330(4)(a) of the POCA. Put in different terms, the mother, as the acquirer, would not be a bona fide purchaser for *value*, because the acquirer will have provided no *value*[40].

87 This example shows that if the acquisition of property can be characterised as a gift from the proceeds of an offence, then the property acquired will not cease to be proceeds of an offence under s 330(4)(a). The tighter the connection between the gift of money and the acquisition of property (in the sense of both the time between receipt and outlay and the difference between the amount received and the amount outlaid), the more likely the conclusion that she has acquired the car as a gift from the son. Hence, it is an objective test; any one

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39 By reason of s 330(3)(b) of the POCA.

40 See, eg, *Black v S Freedman & Co* (1910) 12 CLR 105 at 109; *In re Diplock; Diplock v Wintle* [1948] Ch 465 at 522, 524; *Foskett v McKeown* [2001] 1 AC 102 at 127. See also, in a related context, *Russell v Scott* (1936) 55 CLR 440 at 450-458; *Wirth v Wirth* (1956) 98 CLR 228 at 235; *Napier v Public Trustee (WA)* (1980) 55 ALJR 1 at 3; 32 ALR 153 at 158; *Nelson v Nelson* (1995) 184 CLR 538; Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 212.

example cannot resolve every case. Thus, different issues might arise if the property acquired is only characterised as being *partially* a gift or *partly* acquired using proceeds of an offence – for example, where a mother, without knowledge or suspicion, buys a car with her own money which has been increased at some time by the gift of money by her son. Those issues were not addressed in these appeals.

Not knowing and in circumstances that would not arouse a reasonable suspicion

88 The balance of s 330(4)(a) is directed at the person who acquired the property not knowing, and in circumstances that would not arouse a reasonable suspicion, that the property was proceeds, or an instrument, of an offence.

89 A reasonable suspicion must have a factual basis[41]. As this Court has previously stated, the test is objective[42]. The question is: would a reasonable person in the position of the acquirer of property have had a suspicion that the property was proceeds, or an instrument, of an offence? It is a positive feeling and more than a mere idle wondering[43]. In the context of a similar provision in the *Confiscation Act 1997* (Vic), the test has been described as "whether the circumstances in which the applicant acquired her interest in the property were such as to arouse *in her* a reasonable suspicion that the property had been used in connection with the [crime]"[44].

90 Two related questions were raised in argument: first, whether the "circumstances" that are taken into account include subjective ignorance of the law; and second, whether it is "reasonable suspicion" of the exact offence committed or an offence of the kind committed (or some illegality generally). The first has been answered. The test is objective, and although knowledge may

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41 *George v Rockett* (1990) 170 CLR 104 at 115.

42 *Director of Public Prosecutions (Vic) v Le* (2007) 232 CLR 562 at 565 [1], 595 [127]-[128], quoting *Director of Public Prosecutions v Le* (2007) 15 VR 352 at 359 [24], 360 [27].

43 *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 at 303.

44 *Director of Public Prosecutions v Le* (2007) 15 VR 352 at 359 [24] (emphasis in original). This decision was overruled by this Court but the test for reasonable suspicion was affirmed: *Director of Public Prosecutions (Vic) v Le* (2007) 232 CLR 562 at 565 [1], 595 [127]-[128].

in some circumstances be relevant, that does not extend to subjective ignorance of the law. The purpose of the scheme of the POCA is to prevent criminals from enjoying the proceeds of crime. To find that ignorance of the law is a defence would subvert this purpose. It would allow anyone to deal with criminals and merely assert ignorance of the law.

91 That construction is reinforced by the Revised Explanatory Memorandum which accompanied the introduction of the POCA[45], as well as the note to s 29(2), which, respectively, use the phrase "innocent third parties" and "innocent third party". This emphasis on innocence weighs against the idea that being on notice but too ignorant to appreciate the significance of the notice would be enough. Further, the wider legal context supports this construction. In criminal law, ignorance of the law is no defence[46]. In property law, ignorance of the law is irrelevant to the question of taking without notice[47].

92 Second, contrary to the submissions of the appellants, the objective inquiry is not whether a reasonable person in the position of the person acquiring the property would have had a suspicion that the property was proceeds of a *specified* crime. The requirement is that the suspicion be that "the property was proceeds of an offence or an instrument of an offence" – not proceeds or an instrument of a particular offence.

Third party

93 Section 330(4) is a provision which identifies when *property ceases* to be proceeds, or an instrument, of an offence. Property only *ceases* to be proceeds or an instrument, under s 330(4)(a), if it is acquired by a *third party* for sufficient consideration without that party knowing, and in circumstances that would not arouse a reasonable suspicion, that the property was proceeds, or an instrument, of an offence. A "third party" is a person who satisfies s 330(4)(a).

94 That the phrase "third party" is no more than a descriptor of a person who satisfies s 330(4)(a) is reinforced by the fact that the alternative constructions proffered were contrary to the scheme of the POCA, or unworkable, or both.

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45 Australia, Senate, *Proceeds of Crime Bill 2002*, Revised Explanatory Memorandum at 119.

46 *Ostrowski v Palmer* (2004) 218 CLR 493 at 500-501 [1]-[2].

47 See generally fn 31 above.

First, the appellants' contention that "third party" refers to someone who is not a party to, and is not criminally responsible for, the criminal offence or offences in question and who satisfies the other requirements of s 330(4)(a) finds no basis in the text of the provision.

95 Second, there are difficulties with the construction adopted by Beazley P and Payne JA in the *Lordianto* appeal that a "third party" was someone who is "wholly removed from the property constituting the proceeds or instrument", being "a person with no involvement in the transaction by which property first becomes proceeds of an offence or an instrument of an offence". (It was on this basis that the AFP submitted that "third party" was referring to a person who was not a party to a transaction by which the relevant property first became tainted as the proceeds, or an instrument, of an offence.)

96 To read the POCA in this way would not be consistent with the scheme of the Act as a whole. There may not be an identified antecedent offence. As Murphy and Beech JJA explained in *Kalimuthu*, when contesting an exclusion application the AFP may particularise an offence, for example of dealing with property reasonably suspected of being proceeds of offences under s 400.9 of the *Criminal Code* (Cth), and rely upon one or more of the deeming provisions in that section. In a case of that kind, it may not be possible to identify the transaction by which the property first became proceeds of an offence or an instrument of an offence. And it is not consistent with the text of the POCA. Sections 330(1) and 330(2) expressly state that they operate repeatedly as proceeds of offences or instruments of offences are used to acquire, wholly or partly, other property. Thus, the nature and identity of the property will change. The POCA does not provide for, or anticipate, a historical tracing of the proceeds of crime back to when they were first tainted. Section 330(4)(a) requires identification of the restrained property which is suspected of being proceeds, or an instrument, of an offence and consideration of whether the person who has applied for the exclusion order can, on the balance of probabilities, satisfy the requirements of that provision.

97 Furthermore, it would present significant practical problems. Beazley P and Payne JA's construction would require the first offence to be identified and that, of course, may not be possible, especially given the breadth of operation of ss 329 and 330. But, even if the first offence can be identified, an applicant for an exclusion order who had not investigated the source of the proceeds or an instrument of an offence (that is, the way in which they were first tainted as proceeds or an instrument of some offence), and put that evidence before the court, could not establish that they satisfied s 330(4)(a). As Murphy and Beech JJA explained in *Kalimuthu*, it would mean that an innocent person who otherwise satisfied s 330(4)(a) would be precluded from relying on the provision

because they had failed to trace the proceeds or instrument of an offence back to the way in which they first became tainted as proceeds or an instrument. That is not what the provision says or requires.

98 The present appeals may be used to demonstrate some of the practical difficulties if an applicant for an exclusion order was required to trace the proceeds or instrument back to the way in which the proceeds or instrument first became tainted. Consistent with the nature of cuckoo smurfing, the appellants conceded that their property was proceeds or an instrument of an offence prior to the structuring offence (indeed, that was the entire point of the cuckoo smurfing), and, thus, the deposits were not in fact "first tainted" through the structuring offence. However, what those prior offences may have been was not known to the appellants or, absent some full blown investigation, capable of being known to them.

99 Next, during the course of argument, the AFP sought to advance a construction that the phrase "third party" should be construed as referring to a "third party to the *transaction* by which property first became the proceeds of crime" (emphasis added). That submission should also be rejected. It is not found in the text. And, contrary to the AFP's submissions, if the construction is rejected, s 330(4)(a) does not operate in a way that leads to absurd results. On the contrary, the AFP's construction would create similar practical difficulties to those just identified: an applicant for an exclusion order would be required to trace the proceeds or instrument of an offence back to the *transaction* in which they first became tainted.

100 Third, the reliance in some judgments below on a "temporal" issue – property "becoming" proceeds or an instrument of an offence under s 330(1) or (2) at the same time as it "ceased" to be proceeds or an instrument under s 330(4)(a) – is inconsistent with the POCA. It does not take account of the operation of s 330(1) and (2), to which reference has just been made[48]. Further, it does not take account of the fact that the inquiry under s 330(4)(a) is objective. Necessarily, there can be no detailed exposition in the abstract.

101 In addressing the AFP's contention that, unless "third party" means a "third party to the transaction by which property first became the proceeds of crime", s 330(4)(a) would lead to absurd results, it is sufficient to address two of the examples referred to by the AFP.

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48 See [96] above.

102 One example was the purchase of a house in a wife's name, using funds gifted to the wife by the husband for that purpose. The house is purchased at auction. There is no issue about the sufficiency of the consideration. Part of the funds used to purchase the house are proceeds of an offence but the wife has no grounds to suspect this. The funds held by the husband, whether credited to a bank account or otherwise, were and remained proceeds of an offence under s 330(1) and (3). The property, the house, was "acquired" in the wife's name using proceeds of an offence and, thus, the house became proceeds of an offence by reason of the operation of s 330(1)(b). The wife, however, cannot take the benefit of s 330(4)(a). She did not provide the consideration for the house[49]; she acquired the house using funds that were gifted to her[50]. The vendor of the house stands in a different position. The amount that the vendor received is proceeds of an offence by reason of the operation of s 330 but the vendor, absent anything further, would be able to exclude the proceeds by reason of s 330(4)(a).

103 The further example of the mother and the drug dealing son has been addressed[51]. In both examples, the property – the house and the car – would cease to be proceeds of an offence only on a further sale to what might conveniently be described as a bona fide purchaser for value.

104 In this context, it is necessary to consider the position of a bank. When receiving a deposit in cash or by way of bank transfer, the bank acquires that property for sufficient consideration. The sufficient consideration is the bank's promise to credit the account of the relevant account holder with the amount deposited or transferred. Absent any other information, the bank remains entitled to retain the cash or the benefit of the bank transfer by reason of s 330(4)(a). But the entitlement of the bank to that property says nothing about the entitlement of the account holder to retain and exercise their chose in action over the funds standing to the credit of the account, which is different property from that held by the bank.

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49 That is not to say that if she is a dependant, she may not be entitled to make an application under s 72 of the POCA to be relieved from the hardship effected by a forfeiture order.

50 See [85] above.

51 See [86] above.

105 The AFP's submission would lead to the absurd result that absent any other information, a bank would not be entitled to retain the cash or the benefit of the bank transfer by reason of s 330(4)(a). That would occur in the case of, for example, an offence against s 142 of the AML/CTF Act where the money first became proceeds, or an instrument, of an offence upon depositing to the bank. That is a strong indicator that the reference in s 330(4)(a) to "third party", read in the context provided by this understanding of the way in which the POCA operates, reinforces what follows – that is, that s 330(4)(a) is directed to an acquisition of property that is the proceeds or an instrument of an offence by someone who acquires that property by providing sufficient consideration for that property, without knowing, and in circumstances that would not arouse a reasonable suspicion, that the property was proceeds, or an instrument, of an offence. It has no larger purpose or effect than that.

106 Finally, the construction adopted is consistent with the legislative history and the extrinsic materials that preceded the introduction of the POCA. The predecessor Act to the POCA allowed a restraining order to be made where a person had been convicted of an indictable offence, had been charged with an indictable offence, or was about to be charged with an indictable offence[52]. Forfeiture orders could be made where a person was convicted of a serious offence (and where a restraining order had been granted over property in connection with that offence)[53]. In that context, an applicant could obtain relief where they met two conditions. The first was that the applicant was not involved in any way in the commission of the offence in respect of which property was to be restrained or forfeited[54]. The second was that if the applicant acquired the interest in property at or after the commission of such an offence, the applicant acquired the interest for sufficient consideration, without knowing the property was tainted and in circumstances such as not to arouse a reasonable suspicion that the property was tainted[55]. That Act did not use the phrase "third party" as part of these requirements.

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52 *Proceeds of Crime Act 1987* (Cth), s 43(1). The orders could extend to specified property of another person: s 43(1)(f).

53 *Proceeds of Crime Act 1987* (Cth), s 30(1).

54 *Proceeds of Crime Act 1987* (Cth), ss 21(6)(a), 31(6)(a)(i), 48(3)(f)(i).

55 *Proceeds of Crime Act 1987* (Cth), ss 21(6)(b), 31(6)(a)(ii), 48(3)(f)(ii). Section 21(6)(b) referred to the applicant's knowledge about the property at the

Footnote continues

107 The circumstances under which restraining orders may be made under the POCA are wider. A restraining order may be made where there are "reasonable grounds to suspect" that the relevant property is the proceeds of an indictable offence, or an instrument of a serious offence. The scope of property captured under the POCA is therefore wider than under the predecessor Act. As a result, the POCA has the potential to affect the property interests of a wider class of people who are not connected in any way to the commission of an offence. Thus, it would not be expected that the POCA would narrow the circumstances in which such people could have their property excluded from a restraining order. The words "third party" in s 330(4)(a) do not impose some extra limit on the ability of an applicant to have an exclusion order made.

108 This is confirmed by the Revised Explanatory Memorandum accompanying the introduction of the POCA, which stated that the new law would "replicate[] the safeguards for innocent third parties"[56]. As the AFP accepted, there was nothing in the Revised Explanatory Memorandum or the 1999 Australian Law Reform Commission report[57] (which preceded the new law) that suggested that the intention behind the third party requirement in s 330(4)(a) was to cast the net wider.

***Lordianto* analysis**

109 The property which Mr Lordianto and Ms Koernia sought to have excluded from the restraining order was their respective choses in action against the Australian banks, which entitled them "to require [the relevant bank] to pay to them all or part of whatever amount was credited to the accounts"[58]. There was no dispute that that property was proceeds, or an instrument, of an offence under s 330(1)(a) or s 330(2)(a), as it was wholly or partly derived or realised from the structuring offence under s 142 of the AML/CTF Act.

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time of acquisition. It was a requirement under s 31(6)(a)(ia) that the applicant's interest in the property was not subject to the effective control of the person who was convicted of the offence.

56 Australia, Senate, *Proceeds of Crime Bill 2002*, Revised Explanatory Memorandum at 2.

57 Australian Law Reform Commission, *Confiscation that Counts: A review of the Proceeds of Crime Act 1987*, Report No 87 (1999).

58 See fn 5 above.

110 The AFP did not dispute that each of Mr Lordianto and Ms Koernia had acquired that property, or that the consideration was sufficient, but disputed that the acquisition was *for* sufficient consideration. In addressing the question of the sufficiency of the consideration, as well as whether they had provided that consideration, Mr Lordianto and Ms Koernia relied upon the arrangements Ms Koernia had with the remitters in Indonesia. The fact that remitters were used, as well as how the remitters were used, might show, if nothing more were known, that Mr Lordianto and Ms Koernia provided foreign currency in cash in exchange for an Australian dollar equivalent being deposited into specific bank accounts in Australia. But that does not complete the s 330(4)(a) inquiry. The objective inquiry under s 330(4)(a) is directed at identifying what Mr Lordianto and Ms Koernia acquired and how, the form and amount of the consideration they provided, when and how that consideration was provided, and whether Mr Lordianto and Ms Koernia did not know, and in circumstances that would not arouse a reasonable suspicion, that the property they acquired was proceeds or an instrument of an offence.

111 As Beazley P and Payne JA stated, Mr Lordianto and Ms Koernia "were financially sophisticated and used to transferring large sums of money across national borders, as well as dealing with currency controls and a myriad of national disclosure requirements". Moreover, they were aware of the advantageous rate offered by the remitters and the almost 400 cash deposits of amounts under $10,000 into their nominated Australian bank accounts. Thus, they did not discharge the onus they bore of establishing that they acquired the property, the "interests" in connection with their respective choses in action against the Australian banks, for sufficient consideration and in circumstances that would not have aroused a reasonable suspicion that that property was proceeds or an instrument of an offence. As their Honours stated, "the conclusion that there were abundant circumstances here that would arouse a reasonable suspicion that the interests in property were proceeds of an offence or an instrument of an offence was inevitable". Mr Lordianto and Ms Koernia did not discharge the onus that they bore to prove the matters necessary to establish that they were each a third party within the terms of s 330(4)(a). They were not.

***Kalimuthu* analysis**

112 Similarly, in the case of both Mr and Mrs Ganesh, the property which they sought to have excluded from the restraining order was their respective choses in action against the Australian banks, which entitled them "to require [the relevant bank] to pay to them all or part of whatever amount was credited to the

accounts"[59]. And there was no dispute that that property was proceeds or an instrument of an offence for the same reason as in *Lordianto*.

113 It is necessary, however, to address Mr and Mrs Ganesh separately. Mr Ganesh stands in substantively no different position from Mr Lordianto and Ms Koernia. Mr Ganesh sought to address the question of the sufficiency of the consideration by the fact that he provided that consideration by the arrangements he had with Mr Zamri in Malaysia. However, the fact that Mr Zamri was used, as well as how he was used, raised more questions than it answered.

114 Mr Ganesh did not own other assets outside Malaysia and, unlike Mr Lordianto and Ms Koernia, had not previously been involved in international financial transactions. However, Mr Ganesh "knew that the very large amounts of cash he provided to Mr Zamri, from time to time, were not leading to deposits in corresponding amounts, but rather to a number of deposits of considerably smaller amounts". And, although he made an inquiry of Mr Zamri about that fact, he did not establish a cogent explanation for why that might be so. Thus, Mr Ganesh did not discharge the onus he bore of establishing that he acquired the property, the "interests" in connection with his choses in action against the Australian banks, for sufficient consideration and in circumstances that would not have aroused a reasonable suspicion that that property was proceeds or an instrument of an offence.

115 As noted above, Mrs Ganesh must be considered separately. As an applicant for an exclusion order, Mrs Ganesh bore the onus of proving, on the balance of probabilities, the matters necessary to establish the grounds for the exclusion order[60], which included the requirements of s 330(4)(a). The property Mrs Ganesh sought to have excluded was her chose in action against the Australian bank. It was held by the lower courts, and not challenged on appeal, that the circumstances of which Mrs Ganesh had knowledge would not have aroused a reasonable suspicion that the property was proceeds, or an instrument, of an offence. In this Court, Mrs Ganesh appealed against the finding that she had not provided sufficient consideration for the interests she acquired in connection with her chose in action against the Australian bank because she did not have any connection to the persons who deposited the funds into her bank account. That ground of appeal cannot succeed.

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59 See fn 5 above.

60 POCA, ss 29(2)(d), 317.

116 Mrs Ganesh did not challenge the following factual findings. Mrs Ganesh opened an Australian bank account. The account was opened with a cash deposit of $5,000. Though Mrs Ganesh's affidavit was not before this Court, the primary judge summarised her evidence, including the fact that the relevant funds were provided by her husband drawing on his business. It was Mr Ganesh who provided the cash to Mr Zamri, and the timing of Mr Ganesh's payments to Mr Zamri was linked to when Mr Ganesh received cash from the sale of a turbine. Mrs Ganesh did not make any case to suggest that the finding that the relevant funds were provided by her husband drawing on his business was not open or that she had herself provided any consideration.

117 Thus, Mrs Ganesh does not answer the description of a third party who acquired the relevant property for sufficient consideration. Mrs Ganesh was a volunteer. She provided no value. Her position was no different from the mother who bought a car entirely with cash from her son, which was the proceeds of drug dealing, or the wife who purchased a house with a gift of funds from her husband, part of which was the proceeds of an offence. A different conclusion might have been reached if, for example, Mrs Ganesh had established that she had withdrawn cash from her bank account in Malaysia, given it to her husband to give to Mr Zamri, and, without more, was told that an Australian dollar equivalent was now in her bank account in Australia. But that did not occur. Although this may, at first blush, appear harsh, s 72 of the POCA does provide for a dependant to make an application to be relieved from the hardship caused by a forfeiture order.

118 Although Mrs Ganesh must be considered separately, on the facts before this Court she stands in no different position from her husband. In the absence of identified facts or submissions to show that she was not a volunteer it is pure speculation as to what case she might have mounted, an exercise which should not be undertaken by this Court.

Conclusion

119 For those reasons, both appeals should be dismissed with costs.

EDELMAN J.

Introduction

120 I agree with the reasons in the joint judgment in the *Lordianto* appeal and, with one exception, I agree generally with the joint judgment in the *Kalimuthu* appeal. The exception concerns the appeal in so far as it relates to Macquelene Patricia Michael Dass, whose preferred description, used by the courts below, is Mrs Ganesh[61].

121 The Commissioner of the Australian Federal Police ("the AFP") resisted the appeal, in so far as it related to Mrs Ganesh, on two bases. I agree with the joint judgment that the AFP's submissions on both of those bases should be rejected[62]. However, in my respectful view, that conclusion should require the appeal, in so far as it concerns Mrs Ganesh, to be allowed. To treat Mrs Ganesh as a volunteer, unlike her husband, is contrary to an assumption made at trial. It is contrary to the continuation of that assumption before the Court of Appeal of the Supreme Court of Western Australia. And it is a matter as to which in this Court there was no notice of contention, no written or oral argument, and no questions from the bench.

The onus of proof and the pleaded issues

122 Mr and Mrs Ganesh applied under s 31 of the *Proceeds of Crime Act 2002* (Cth) ("the POCA") to exclude from the restraining order their "bank accounts", that is the respective rights that they held against the Australia and New Zealand Banking Group Ltd and Mr Ganesh's rights against the Commonwealth Bank of Australia. Apart from their initial deposits into those accounts, the value of Mr and Mrs Ganesh's rights against the banks had increased as a result of deposits by Australian depositors who were colloquially described as "cuckoo smurfs", apparently as a description of a large number of people making small deposits into the "nest" of others.

123 Mr and Mrs Ganesh's application for exclusion relied upon s 330(4)(a) of the POCA, which provides that property, relevantly the bank accounts, "ceases to be proceeds of an offence or an instrument of an offence ... if it is acquired by a third party for sufficient consideration without the third party knowing, and in circumstances that would not arouse a reasonable suspicion, that the property was proceeds of an offence or an instrument of an offence (as the case requires)".

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61 *Commissioner of the Australian Federal Police v Kalimuthu [No 3]* (2017) 338 FLR 241 at 243 [3].

62 Reasons of Kiefel CJ, Bell, Keane and Gordon JJ at [64], [79], [99].

124 Mr and Mrs Ganesh bore the onus of proving that they satisfied the conditions in s 330(4)(a)[63], with matters of fact to be proved on the balance of probabilities[64]. But the onus of proof operated in a forensic setting. Mr and Mrs Ganesh were not required to prove matters that were not in issue. In *Commissioner of the Australian Federal Police v Hart*[65], this Court considered the conditions in s 102(3) of the POCA, as to which an applicant bears the onus of proof, and the joint judgment said of proof by the applicant:

> "It is proof in an adversarial proceeding conducted in accordance with the civil procedure of that court, including such procedure as exists in that court for the definition of issues between parties. ... [W]here an application for orders under s 102 proceeds on pleadings, an applicant need not negative possibilities which the Commonwealth does not raise in its defence."

125 The relevant forensic setting was as follows. In their application to exclude property from the restraining order, Mr and Mrs Ganesh relied on the following grounds[66]:

> "[Mr and Mrs Ganesh] acquired their interests in the property for sufficient consideration, without knowing, and in circumstances that would not arouse a reasonable suspicion, that the money was the proceeds or an instrument of 'structuring offences'; so as to invoke s 330(4)(a) of the [POCA]. Specifically, [Mr and Mrs Ganesh] contend that on each relevant occasion:
>
> i. They paid Malaysian Ringgit to a money remitter in Penang (Zamri);
>
> ii. Zamri agreed to remit an Australian dollar equivalent to the relevant Australian bank account;
>
> iii. on each relevant occasion, such an Australian dollar equivalent was remitted to the relevant account, albeit in a structured fashion;

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63 POCA, ss 29(2)(d), 317(1).

64 POCA, s 317(2).

65 (2018) 262 CLR 76 at 83-84 [7] (footnotes omitted).

66 *Commissioner of the Australian Federal Police v Kalimuthu [No 3]* (2017) 338 FLR 241 at 245 [11].

iv. [Mr and Mrs Ganesh] had no knowledge or control over how Zamri remitted funds to them, nor any intermediaries that Zamri may have used to do so,

v. The properties, by virtue of s 330(4)(a), are not proceeds nor an instrument in [Mr and Mrs Ganesh's] hands."

126 The AFP opposed the application, relevantly in relation to s 330(4)(a), on two grounds[67]: (i) the property was not acquired by a third party for sufficient consideration; and (ii) the circumstances would arouse a reasonable suspicion that the property is proceeds of an offence or an instrument of an offence. The AFP did not dispute the assertion by Mr and Mrs Ganesh, made in point (i) of their grounds, that *they* (ie jointly) paid Malaysian Ringgit to Mr Zamri, the money remitter in Malaysia.

The evidence and the way that the case was run at trial

127 At first instance, in the Supreme Court, Allanson J identified the two matters that were in issue concerning Mr and Mrs Ganesh's claims that their rights against the banks had ceased to be proceeds of an offence under s 330(4)(a) of the POCA. The first question was whether Mr and Mrs Ganesh had shown that they were third parties and had acquired their interest for sufficient consideration[68]. The second question was whether Mr and Mrs Ganesh acquired their interest in circumstances that would not arouse a reasonable suspicion that the funds deposited in their bank accounts were the proceeds of an offence or an instrument of an offence[69].

128 As to the first question, the "factual issue[s] on which the case was fought"[70] did not include any issue about whether the payment of Malaysian Ringgit to Mr Zamri, as a matter of Australian or Malaysian law, should be characterised as a payment only by Mr Ganesh and not by Mrs Ganesh. The focus was upon the meaning of "third party" and whether the consideration was sufficient.

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67 *Commissioner of the Australian Federal Police v Kalimuthu [No 3]* (2017) 338 FLR 241 at 245 [12].

68 *Commissioner of the Australian Federal Police v Kalimuthu [No 3]* (2017) 338 FLR 241 at 257 [110].

69 *Commissioner of the Australian Federal Police v Kalimuthu [No 3]* (2017) 338 FLR 241 at 259 [125].

70 *Henderson v Queensland* (2014) 255 CLR 1 at 15 [33].

129 The evidence at trial was that funds provided to Mr Zamri led to 112 deposits in September and October 2014 into Mrs Ganesh's ANZ bank account, increasing its balance by $750,000. There was evidence that the cash payments to Mr Zamri were linked to the receipt of cash by Mr Ganesh from the sale of a turbine by MGE Ramesh Metal in 2014. The business, MGE Ramesh Metal, was registered in the name of Mr Ganesh's brother, Mr Ramesh, because Mr Ganesh had been an undischarged bankrupt. Mr Ganesh's evidence was that the letters M and G in the business name were a reference to himself and Mrs Ganesh.

130 The trial judge concluded that "the respondents [Mr *and* Mrs Ganesh] have proved that, at the relevant time, *they* earned money sufficient for *them* to transfer the amounts to Australia which they claimed"[71]. The trial judge specifically observed that there was no factual allegation raised by the AFP that the payment to Mr Zamri should be characterised as having been made by Mr Ganesh only[72]:

> "[N]o distinction was drawn between Mr and Mrs Ganesh in these proceedings. In particular, it was not submitted that some distinction should be drawn because the relevant funds were provided by her husband's drawing on his business."

131 The trial judge concluded that Mr and Mrs Ganesh were third parties, as that term did not "simply refer to someone [who was] not a party to the offence"[73]. He also concluded that the consideration given by Mr and Mrs Ganesh was sufficient and that no reasonable suspicion would have been aroused in the circumstances known to Mr and Mrs Ganesh (focussing upon Mr Ganesh because Mrs Ganesh knew less than her husband)[74].

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71 *Commissioner of the Australian Federal Police v Kalimuthu [No 3]* (2017) 338 FLR 241 at 247 [34] (emphasis added).

72 *Commissioner of the Australian Federal Police v Kalimuthu [No 3]* (2017) 338 FLR 241 at 257 [112]. See also at 258 [115].

73 *Commissioner of the Australian Federal Police v Kalimuthu [No 3]* (2017) 338 FLR 241 at 258 [118].

74 *Commissioner of the Australian Federal Police v Kalimuthu [No 3]* (2017) 338 FLR 241 at 258 [124], 260 [130].

The way that the case was run in the Court of Appeal

132 In the Court of Appeal, no ground of appeal alleged that Mrs Ganesh, separately from Mr Ganesh, had not provided sufficient consideration or that she was a volunteer. Rather, the grounds of appeal proceeded on the same assumption that had been made before the trial judge. Ground 2 alleged that sufficient consideration had not been provided by Mr and Mrs Ganesh, treating them collectively. The basis for ground 2 was that the consideration for the credits to their bank accounts was given by the payments from the Australian cuckoo smurf depositors to the banks rather than the payments from Mr and Mrs Ganesh to Mr Zamri.

133 As to ground 2, all members of the Court of Appeal also proceeded on the same basis as the trial judge, namely that the funds provided to Mr Zamri had come from both Mr and Mrs Ganesh. Buss P treated Mrs Ganesh in the same way as Mr Ganesh and found that Mrs Ganesh "gave consideration 'for' each acquisition of property" and that the consideration was sufficient[75].

134 Murphy and Beech JJA also considered that the issue was whether Mr and Mrs Ganesh *collectively* could "prove that they gave sufficient consideration for the acquisition of their rights in relation to the increased balance of their accounts after the deposits"[76]. However, their Honours concluded that Mr and Mrs Ganesh had not provided consideration because although "the payment by the respondents [Mr and Mrs Ganesh, plural] to Mr Zamri" was equivalent to the amount ultimately deposited in the accounts of Mr and Mrs Ganesh, they lacked a connection with the cuckoo smurf depositors. Their collective payment to Mr Zamri was insufficient[77].

135 In the overall result, Mr and Mrs Ganesh were unsuccessful in the Court of Appeal because: (i) they were not third parties to the transaction; (ii) by majority: they did not give sufficient consideration because they lacked a connection with the cuckoo smurf depositors; and (iii) in relation to Mr Ganesh only, he had not established that he acquired the relevant property in circumstances that would not arouse a reasonable suspicion that the property was proceeds of an offence or an instrument of an offence.

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75 *Commissioner of the Australian Federal Police v Kalimuthu [No 2]* (2018) 340 FLR 1 at 52-53 [230]-[231], 53 [233].

76 *Commissioner of the Australian Federal Police v Kalimuthu [No 2]* (2018) 340 FLR 1 at 98 [471].

77 *Commissioner of the Australian Federal Police v Kalimuthu [No 2]* (2018) 340 FLR 1 at 98-99 [472].

The way that the appeal was run in this Court

136 The appeal to this Court, in so far as it concerned Mr Ganesh, relied upon the same three grounds upon which he had been unsuccessful in the Court of Appeal. In so far as it concerned Mrs Ganesh, the appeal relied upon the same two grounds upon which she had been unsuccessful in that Court. To succeed on this appeal, Mrs Ganesh needs to succeed on both of the grounds of appeal which relate to her. I agree with the joint judgment that a third party is a person who satisfies s 330(4)(a) (the first ground of appeal). Mrs Ganesh's success in the appeal in this Court therefore depends upon the second ground of appeal, which she shares in common with Mr Ganesh. That ground is as follows:

> "The Court of Appeal erred in law in concluding that the appellants did not acquire property for 'sufficient consideration' for the purposes of s 330(4)(a) and s 338 of the [POCA] because they did not have any connection to the persons who deposited money into their bank accounts."

137 The AFP submitted that to establish that they had acquired property "for sufficient consideration", Mr and Mrs Ganesh were required to prove that value passed between the parties to the relevant transaction, establishing a "causal connection" between the payment of money and the receipt of property. The AFP submitted that Mr and Mrs Ganesh could not establish the requisite nexus because their case was that (i) they provided consideration to Mr Zamri in Malaysia but Mr Zamri did not make the relevant deposits in Australia and (ii) they acquired the relevant property from the cuckoo smurf depositors in Australia, with whom they had no relationship, and to whom they paid no money.

138 Mr and Mrs Ganesh submitted that the POCA did not require them to establish a legal relationship or a direct relationship with the Australian cuckoo smurf depositors. They submitted that the deposits in Australia were not made gratuitously and that the only available inference was that the deposits into Australian bank accounts were made by people who had a connection or a series of connections to Mr Hameed, the Malaysian money remitter engaged by Mr Zamri, and thereby Mr Zamri, and ultimately Mr and Mrs Ganesh. This submission should be accepted for the reasons given in the joint judgment[78]. The appeal should therefore succeed in so far as it relates to Mrs Ganesh.

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78 Reasons of Kiefel CJ, Bell, Keane and Gordon JJ at [80]-[83].

Issues that might have been raised if consideration from Mrs Ganesh had been an issue

139 No notice of contention was filed by the AFP in this Court seeking to uphold the decision of the Court of Appeal on the basis that Mrs Ganesh was a volunteer. Nor was such a submission made by the AFP in written or oral submissions to this Court. No question was raised about this issue during the oral hearing by any member of this Court. If the AFP had sought to rely on a notice of contention to raise such an issue in this Court, it would have been sufficient for Mrs Ganesh to say that it is "elementary that a party is bound by the conduct of his case"[79]. Even if the matter had been raised in the Court of Appeal, in this Court Mrs Ganesh could also have added that the absence of evidence before this Court, including the absence of her witness statement, means that this Court does not "have before us all the facts bearing upon this belated [claim] as completely as would have been the case had it been raised in the court below"[80].

140 These matters that Mrs Ganesh might have raised would not have been sterile points attempting to dispute "facts ... established beyond controversy"[81] that, if raised, could never have been met by Mrs Ganesh. There may have been good reasons why, at every stage of this litigation, every party and every judge proceeded upon the basis that Mrs Ganesh was not a volunteer.

141 Mrs Ganesh gave evidence by a witness statement and she was not cross-examined. Her witness statement might have revealed the reason for the assumption that Mrs Ganesh was not a volunteer or, at the very least, if the AFP had made such an allegation the witness statement might have been amended to include facts from which an inference could be drawn that she was not a volunteer. Those facts include, or might have included: (i) whether it was the practice of Mr and Mrs Ganesh to treat income from the business as the family's income, especially in circumstances in which evidence had been given by Mr Zamri that in the past he had dealt with both Mr and Mrs Ganesh and that Mrs Ganesh was more frequently his first point of contact; (ii) whether Mrs Ganesh had any interest in the business herself, or any interest in Mr Ganesh's shareholding in the business, which had apparently been named after both her and Mr Ganesh, including any interest as a result of any Malaysian laws relating to marital property; and (iii) presuming, in the absence of evidence

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79 *University of Wollongong v Metwally [No 2]* (1985) 59 ALJR 481 at 483; 60 ALR 68 at 71.

80 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438.

81 *Water Board v Moustakas* (1988) 180 CLR 491 at 497.

of Malaysian law, that Australian law is relevantly the same[82], whether there was any evidentiary basis for a joint endeavour constructive trust as between Mr and Mrs Ganesh[83] in relation to cash received from the business and any other income received by Mrs Ganesh, including from her role in the business.

Conclusion

142 I agree with the orders proposed in the joint judgment in relation to the *Lordianto* appeal.

143 In the *Kalimuthu* appeal, orders should be made allowing the appeal in part, in so far as it relates to Mrs Ganesh, but otherwise dismissing the appeal. The orders that should be made are:

(i) appeal allowed in part;

(ii) set aside paragraphs 1 to 5 of the orders of the Court of Appeal and in their place order as follows:

(a) the appeal be allowed in part;

(b) set aside paragraphs 3 and 4 of the orders made by the Supreme Court on 19 April 2017;

(c) vary paragraph 1 of the orders made by the Supreme Court on 19 April 2017 by replacing "respondents'" with "second respondent's";

(d) the respondents' application by way of chamber summons dated 15 June 2016 (exclusion application) be otherwise dismissed; and

(e) the matter be remitted to the Supreme Court for an assessment of the second respondent's damages pursuant to the undertaking proffered by the applicant in that Court on 14 October 2014; and

(iii) the parties have seven days liberty to file an agreed minute or brief submissions to this Court concerning:

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82 *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at 352 [43], 396 [202], 415 [261].

83 See, eg, *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 149.

(a) the terms by which paragraph 2 of the orders made by the Supreme Court on 19 April 2017 should be varied; and

(b) the orders as to costs of the primary proceeding, the appeal to the Court of Appeal and the appeal to this Court, including whether the respondent should pay the second appellant's costs on an indemnity basis under s 323(1) of the POCA for each of the primary proceeding, the appeal to the Court of Appeal, the special leave application, and the appeal to this Court.