HIGH COURT OF AUSTRALIA

13 November 2019

LORDIANTO & ANOR v COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE;
KALIMUTHU & ANOR v COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE
[2019] HCA 39

Today the High Court dismissed two appeals from decisions of the Court of Appeal of the Supreme Court of New South Wales and the Court of Appeal of the Supreme Court of Western Australia. The High Court held that property in respect of bank accounts into which deposits were made through a money laundering process known as "cuckoo smurfing" had not "ceased" to be proceeds or an instrument of an offence under the *Proceeds of Crime Act 2002* (Cth) ("the POCA"). That was because interests in connection with the property – the choses in action in respect of the bank accounts – were not acquired for sufficient consideration in circumstances that would not arouse a reasonable suspicion that the interests were proceeds or an instrument of an offence.

The appellants in each appeal 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, but together equivalent to the amounts paid by the appellants to the remitters, were then made into the appellants' nominated bank accounts in Australia as part of a cuckoo smurfing process.

The Commissioner of the Australian Federal Police successfully applied for orders under s 19 of the POCA restraining the disposal of, or any dealing with, specific bank accounts in the name of one or more of the appellants on the basis that they were proceeds or an instrument of a structuring offence contrary to s 142(1) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth). The offence was aimed at those who conduct transactions with the sole or dominant purpose of avoiding "threshold transactions" of $10,000 or more, so that they are not reported to the Australian Transaction Reports and Analysis Centre. 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. The property sought to be excluded was the appellants' choses in action in respect of their various bank accounts.

The appellants in both cases conceded that that "property" was proceeds or an instrument of an offence. They sought to establish that their property had "ceased" to be proceeds or an instrument of an offence pursuant to s 330(4) of the POCA. 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)".

The High Court unanimously held that, in the *Lordianto* appeal and in relation to the first appellant in the *Kalimuthu* appeal, the appellants did not discharge their onus to prove the matters necessary under s 330(4)(a). The High Court also held by majority that the second appellant in the *Kalimuthu* appeal did not establish the requirements of s 330(4)(a) because the second appellant was a volunteer who did not acquire the property for sufficient consideration.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.

Please direct enquiries to Ben Wickham, Senior Executive Deputy Registrar
Telephone: (02) 6270 6893 Fax: (02) 6270 6868
Email: enquiries@hcourt.gov.au Website: www.hcourt.gov.au