IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY

No. P 17 of 2019

BETWEEN:

GANESH KALIMUTHU
First Appellant

MACQUELENE PATRICIA MICHAEL DASS
Second Appellant

10 and

THE COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE
Respondent

APPELLANTS' OUTLINE OF ORAL ARGUMENT

Solicitor for the Appellants
Putt Legal
236 Rokeby Road
SUBIACO WA 6008

Telephone: 08 9221 7682
Fax: 08 6210 1378
Email: jessica@puttlegal.com.au
Ref: Jessica Edis

PART I: CERTIFICATION

1. This outline is in a form suitable for publication on the internet.

PART II: SUBMISSIONS

2. It would be wrong to conclude that the Proceeds of Crime Act 2002 (Cth) *"pursues a single purpose at all costs"*: ***NSW Aboriginal Land Council v Minister Administering the Crown Lands Act*** (2016) 260 CLR 232 at [92]; {JAB V3 T19 P929-930}; AR [5]. Nor will success by the appellants open floodgates. The appellants' construction still sets a high bar for exclusion from forfeiture. Many applicants will fail.

10 **Ground 1 – third party**

3. The preferred construction of Murphy & Beech JJA should be adopted: AS [29]-[42]. Unless the appellants' construction of *third party* is adopted, worthy cases that would pass even the Commissioner's test for suspicion will fail on a technical point for no cogent purpose. Mrs Ganesh's is such a case. See AS [36].

4. *Third party* is not defined; cf the Act defines most important concepts. It is not to be construed as an element of s330(4)(a); as in a criminal statute. See also {CAB 178 [434]}. The words *third party* describe a concept without having independent work to do: ***The Queen v LK & RK*** (2010) 241 CLR 177 at [133] {JBA V3 T24 P1180}.

5. S330(4)(a) here applies by operation of s29(2)(d). The note to s29 (part of the Act)
20 uses ***innocent*** *third party* {JBA V1 T3 P75}. The note (part of the Act: s13(1) *Acts Interpretation Act 1901*) is a shorthand form of the concept in s330(4)(a).

6. Headings to s45(6) {JBA V1 T3 P92} and s259 {JBA V1 T3 P274} also refer to *third parties* in the sense of people outside the scope of criminality.

7. The words *third party* were not used in the 1987 Act, and cannot have been added to serve an additional purpose, not referred to by the ALRC nor in the explanatory materials: cf ***The Queen v Lavender*** at [50] {JBA V3 T25 P1203}. The EM to the Consequential Bill supports the preferred construction {JBA V3 T29 P1272}: AS [38].

8. S29 is concerned with whether property is or is not tainted, not timing in the sense of whether it became, remained or ceased.

30 **9.** S329 defines property that is tainted. S330(1), (3) & (4) set out when property becomes, remains and ceases to be tainted. A vendor of a house sold on open market, who receives payment to their account, acquires new property. It is described as a different right or power {Lordianto CAB 83 [76], 85 [81]}. It is tainted (and can cease to be) on creation.

10. The Commissioner has not confronted (in Lordianto RS [37], RS [18], or at all) the significance of s400.9 of the *Criminal Code* (Cth) and particularly the deeming provisions {JBA V2 T7 P430}.

11. The Commissioner seeks to avoid the result created by (for example) s400.9 by relying on when property first becomes proceeds of crime. The consequence is that had the appellants (as against the Commissioner) been able to prove the cash deposited was proceeds of drug dealing, they would be third parties on the Commissioner's construction. There is no legislative purpose for this search for an antecedent crime. Note also the insider trading problem: Lordianto AS [22] and Lordianto RS [40].

10 **12.** Extrinsic material: per Murphy & Beech JJA {CAB 168-177 [407]-[432]}; ALRC report {JBA V3 T26}; Consequential Amendments Bill EM {JBA V3 T29}.

Ground 2 – sufficient consideration

13. The appellants adopt the interpretation preferred by Buss P. The statutory focus is sufficiency of consideration, not to whom it passed: see defn in s338 {JBA V1 T3 P372}.

14. The appellants paid money to Mr Zamri. What they received corresponded {CAB 34 [134][136]}. There were no *gratuitous* deposits cf {Lordianto CAB 97.1 [120]} {CAB 113.40 [198], 115.46 [207]}. The method was opaque to Mr Ganesh {CAB 16 [41]}. That is not unusual: AUSTRAC {AFM 177-181}. Smith said *Alternative remittance systems [involves] a* ***notional*** *transfer of value* {AFM 172 [35], 171-3}.

20 **15.** The Commissioner's construction of *sufficient consideration* gives rise to clearly unintended consequences in ordinary banking, which is similar to alternative remittance. If individuals A and B both live in Australia and use different banks, when A transfers $100 to B, A's bank may not actually make any payment at all to B's bank. For a general statement of rights in connection with bank transfers see Fox *Property Rights in Money* {JBA V3 T30} particularly at [5.05] [5.20-22] [5.29] [5.31] [5.46]. See also Tyree *Banking Law in Australia* (2017) {JBA V3 T32}, expanded upon in his article {JBA V3 T31 P1300-1}. Domestically banks 'net out' their obligations via a clearing agent.

16. In a domestic transfer involving two banks, it would not be suggested that the customers' lack of connection to the clearing house bore upon the issue. Nor should the

30 appellants' lack of direct connection to Mr Hameed and the depositors.

17. Alternative remittance is lawful. AUSTRAC describes the first step of cuckoo smurfing as involving *"A legitimate customer* [the appellants] *deposits funds with an alternative remitter in a foreign country... This is a legitimate activity ..."* {AFM 181.17}.

Alternative remittance is **not**, as was suggested below {CAB 32 [126]} an *unofficial means of overseas transfer.*

18. Buss P was correct {CAB 121-2 [231]}. The majority's reasoning gives *"for"* unwarranted breadth {CAB 187 [468][469]}.

Ground 3 – reasonable suspicion

19. The ground applies only to Mr Ganesh. The knowledge limb was not engaged. The Commissioner's case was based solely s142 AML Act {CAB 11-12 [12]}: AR [17][18].

20. The fault element in s142 AML Act {JBA V1 T6 P407-8} is the *sole or dominant purpose* of avoiding the report mentioned in s43 of that Act {JBA V1, T6, P406}. The elements of the predecessor to s142 (s31 of the *Financial Transaction Reports Act 1988*) were discussed ***Lee v The Queen*** (2007) 71 NSWLR 120. The text of s31 is found at [43]. The Court described as *correct* ([17] and [84]), the Jury direction that proof of knowledge in a *common form of what constituted a significant cash transaction would be required* (at [58]).

21. This Court has endorsed {JBA V2, T16} the Victorian CA in ***DPP (Vic) v Le.*** {JBA V2 T15 P734-5}: AS [53]. [21]-[27] of the Victorian CA decision are incorporated.

22. The appellants refer to the primary judge's undisturbed factual findings, including {CAB 15 [34], 33-34 [131]-[138]}. He accepted the Ringgit paid to Mr Zamri was lawfully derived from the turbine sale {AFM 219} {CAB 19 [66], 15 [34], 34 [136]}.

23. The relevant test must be applied considering Mr Ganesh's *position* including what he knew: AS [65][66]. The factual matters relevant to his position are set out at AS [54]. As to the circumstances of the transactions see AS [10]-[23], [55].

24. Unless Mr Ganesh knew in *a common form what constituted a [threshold] transaction*, a reasonable person in his position could not form the relevant suspicion. See the reasoning below {CAB 33.48-49 [129], 34.48-52 [138], 139.40-140.38 [289] [290]}. Per the CA majority *...Mr Ganesh did not, subjectively, know... the reason for the structuring...* {CAB 198.13-15 [501][502]} which passages also reveal the error below.

25. This appeal does not necessarily stand or fall with Lordianto. Mr Ganesh invites the Court to focus upon the elements of s142 AML Act (and consequently s43). Mr Ganesh was not the subject of an 'unconvincing evidence' finding; cf {Lordianto CAB 107 [162]}.

7 August 2019

Hament Dhanji Edward Greaves Counsel for the Appellants