Commissioner of AFP v Huang [2016] WASC 5

ASSET CONFISCATION UPDATE

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Exclusion application - important lessons

Commissioner of the Australian Federal Police v Huang

On 8 January 2016, Kenneth Martin J handed down his decision in *Commissioner of the Australian Federal Police v Huang* [2016] WASC 5.

The decision provides useful guidance for preparing evidence in support of exclusion applications.

The background facts

Mr Huang was charged and convicted of conspiring to import drugs. He was sentenced to a lengthy term of imprisonment in Western Australia.

A restraining order under s.17 of the *Proceeds of Crime Act* 2002 (**POCA**) was made over funds in two bank accounts and a residential property.

Mr Huang sough to exclude the two bank accounts and the residential property from forfeiture. Absent an exclusion order under s.94 of the POCA, the restrained property was liable to forfeiture by reason of Mr Huang's conviction of a *serious offence*[1].

In order to obtain an exclusion order, Mr Huang was required to show that, on the balance of probabilities, his *interest* in the restrained property was:

- neither *proceeds* of *unlawful activity* nor an *instrument* of *unlawful activity*; and

[1] Italicised words are defined in the POCA.

- *lawfully acquired*.

Mr Huang had been the sole registered proprietor of the residential property since 2005; some years prior to the commencement of his drug related offgending.

The judge observed (at [98]) that:

> *For the purposes of assessing the present exclusion from forfeiture application, it is necessary to appreciate in respect of this land that the second respondent's precise interest, as regards this real property, is an interest as the registered fee simple proprietor. It is an interest in real property he has held (and continues to hold) since 2005, when he acquired this interest from the former owners.*

There was no suggestion that the residential property was used in connection with the drug related offending. It was, however, submitted on behalf of the Commissioner of the Australian Federal Police (**Commissioner**) that the property was an instrument of unlawful activity because Mr Huang had furnished a loan application to the bank at the time of its purchase which contained false details. The judge, however, was not satisfied that the loan application had been submitted fraudulently and found that Mr Huang:

> *may have been lax and careless in signing what he said was put before him by the mortgage broker, without reviewing what he was signing – but that is not enough to meet the mental element needed to prove fraud in relation to these loans from Westpac*.

Therefore, the exclusion application in respect of the residential property turned on whether Mr Huang had demonstrated that:

- his interest in that property was not *proceeds*; and
- his interest had been *lawfully acquired*.

Time of assessment

The residential property was purchased with a $130,000 Westpac loan and a $30,000 gift from Mr Huang's father. The judge found that Mr Huang's father had provided the gift from lawful savings.

Critically, the judge found that the source of funds used to service the Westpac loan (after settlement of the purchase) was not relevant to the exclusion test. The only relevant source of funds concerned the funds used to settle the purchase. His Honour observed (from [149)]:

> *As I indicated, the second respondent's legal interest in this property is as a registered proprietor in fee simple. That is the interest in real property which he has held since the property was acquired in 2005 and which the second respondent continues to hold.*
>
> *...*
>
> *The misconduct of the second respondent, relating to the 'serious offence' drugs charge of which he was convicted in 2014, then sentenced to a period of 14 years' imprisonment with a non-parole period of 9 years 6 months (currently being served), does not relate or connect to the events of 2005, under which the second respondent obtained a loan from Westpac to assist his acquisition of his fee simple interest in the Girrawheen real property as a registered proprietor, as and when he did.*
>
> ***After 2005, how the second respondent found the funds to meet his monthly secured loan repayments in respect of the Girrawheen property, once it had been acquired, and across subsequent periods, is another question entirely. By then his interest as registered proprietor had been acquired. How he met the monthly repayments does not as a matter of law, bear upon the earlier temporal question concerning whether or not the Girrawheen land was lawfully acquired in 2005. Nor does it bear upon whether his interest as a registered proprietor in fee simple can be said to be the proceeds of unlawful activity.*** *(It has not been suggested that the Girrawheen property was ever a potential instrument of unlawful 'activity', for the purposes of s 94(1)(e)).*
>
> *...*

So, in all the circumstances, as regards the Girrawheen property, I am sufficiently persuaded by the second respondent that all requirements under s 94(1) POCA have been met by him, as regards the showing of his acquisition of his fee simple registered proprietor ownership interest in the Girrawheen property in 2005.

Consequently, by the terms of s 94(1), I must exclude the Girrawheen property from forfeiture. There is no exercise of judicial discretion in rendering that determination, given the mandatory terminology 'must', seen used in s 94(1) of the POCA.

[Emphasis added]

<u>Implications of decision</u>

The implications of the decision are significant. It is the first time a Court has squarely considered the significance (or otherwise) of the source of funds used to service a mortgage over property in the context of the exclusion test under the POCA.

Based on this decision, provided that the source of funds used to settle the purchase can be shown to come from lawful sources (e.g. a bank loan, savings etc.), it matters not how the loan was subsequently serviced. If this now represents the state of the law, then it will impact the way in which affidavits in support of exclusion applications are to be drawn.

Although the judge did not refer to authority for arriving at this conclusion, it is consistent with the general principle discussed by the High Court in *Calverley v Green* (1984) 155 CLR 242, where it was held that the making of loan repayments does not change the extent of a person's interest in property; the proportional interest being fixed at the time of the acquisition.

<u>Bank accounts</u>

Although Mr Huang was able to exclude his residential property from forfeiture, he failed in his exclusion application in respect of the funds standing to the credit of his bank accounts.

His Honour described the rights of Mr Huang in the restrained funds as follows (at [101] and [102]):

The two CBA bank accounts, in legal terms, are choses in action of the second respondent. By that it is meant, essentially, that he enjoys a legal right as the account holder to require the CBA to pay him on demand the amount of funds standing to the credit of each account. Until that occurs, the bank is, in effect, at liberty to hold and enjoy the benefit of the funds and to deal with them as it thinks fit.

Choses in action have the character of 'personal' property rights. They stand in contrast to a property right in relation to land – which is characterised as an interest in 'real' property.

The Commissioner alleged that the funds standing to the credit of the bank accounts were, at least in part, derived from tax evasion. The Commissioner had put in evidence the declared taxable income of Mr Huang, together with a financial analysis that showed that it was improbable that Mr Huang could have lived on his declared income alone.

His Honour observed (at [171] and [172]) that:

The result of the second respondent's gaining a benefit of that portion of his taxable income, upon which he failed to pay the applicable income tax thereon is that the level of the funds standing to the credit amount due to him in respect of the Streamline account, is higher than it would otherwise have been had he been meeting the income tax due on all his income receipts in these periods. The funds in a bank account such as the second respondent's Streamline account have been mixed and s 329(1) provides that property may be proceeds of an offence, if it is wholly or ***partly*** *derived or realised from the commission of an offence.*

Consequently, the second respondent has failed to satisfy me for the purposes of meeting s 94(1)(e) and/or (f) that his interest in the credit balances in both accounts (with the funds in the NetBank Saver account being moved from the Streamline account, by the direct transfer of $40,000 in 2010 by the second respondent, some 11 months after the Ellenbrook property had

> *been sold, with its net proceeds realised and paid into the second respondent's Streamline account) was not the proceeds of unlawful activity and/or was lawfully acquired.*

His Honour was particularly critical of the affidavit material upon which Mr Huang relied. He noted that Mr Huang had not made complete disclosure of his taxation affairs and had failed to provide many bank statements for his accounts without explanation for such failure.

The criticisms of the judge highlight the need to carefully prepare affidavit material in support of exclusion applications, never losing sight of the fact that the burden of proof rests squarely with an applicant for exclusion orders.

About the author

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