Commissioner of AFP v Vo [2016] NSWSC 711

ASSET CONFISCATION UPDATE

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False loan applications

Commissioner of the Australian Federal Police v Vo

On 3 June 2016, Adamson J handed down the decision in *Commissioner of the Australian Federal Police v Vo [2016] NSWSC 711.*

The central issue

The central issue was whether an applicant for a compensation order relating to the proceeds of sale of a property could demonstrate that her interest in those proceeds of sale were neither derived from any offence nor constituted an "instrument" of any offence. The issue arose in circumstances where the applicant had purchased the property with a loan obtained through the deliberate provision of false information to the institutional lender.

The case highlights the dangers associated with the provision of false information in support of loan applications. Notwithstanding the fact that, particularly in a rising property market, lenders generally suffer no financial loss from such conduct, the consequences for property owners caught up in subsequent litigation under *the Proceeds of Crime Act* 2002 (or cognate legislation in the various states and territories) are dire.

Facts

In 2011, Ms Vo applied for a loan from BankWest to purchase a property. As part of her loan application, she knowingly falsely asserted that she was employed as an accounting supervisor earning $86,000. She also falsely declared the existence of assets and attached false payslips to her application. She provided that false information with a view to obtaining a loan to purchase the property.

The Commissioner of the Australian Federal Police (**Commissioner**) obtained a restraining order over the property pursuant to section 19 of the *Proceeds of Crime Act* 2002 (**Act**). Subsequently, the property was sold, BankWest was repaid in full and the surplus funds, after payment of BankWest, were with the subject of the litigation. Ms Vo sought a compensation order under section 77 in respect of the surplus funds.

In order to obtain such compensation order, Ms Vo was obliged to demonstrate on the balance of probabilities, inter alia, that:

- a proportion of the value Ms Vo's interest was not derived or realised, directly or indirectly, from the commission of any offence; and

- Ms Vo's interest was not an *instrument*[1] of any offence.

The Commissioner alleged that the following offences had been committed by Ms Vo (albeit, that she had neither been charged nor convicted of these offences[2]):

- obtaining financial advantage by deception in contravention of section 82 of the Crimes Act 1958 (Victoria);
- dealing with property reasonably suspected of being proceeds of crime in contravention of section 400.9 of the Criminal Code (Commonwealth).

The judge observed that it had not been in issue in the proceeding that Ms Vo was aware of the fact that she had made false representations to BankWest and that BankWest had relied upon the false representations in advancing the loan to Ms Vo.

Determination

The fact that the property was subsequently sold did not affect the status of the surplus funds as an instrument of the offending (at [69]).

Relevantly, the Court observed (at [70]):

> *The surplus funds have been realised as a result of the sale of the property which was purchased, in part, with the loan funds from Mrs Schembri and, in part, with funds advanced by BankWest as a result of Ms Vo using false payslips created by Mrs Schembri to obtain a financial advantage by deception. The surplus funds are, therefore, proceeds of an unlawful activity. BankWest was a victim of the criminal conduct that led to its lending on the basis of the false pay slips and it has been paid out, is first registered mortgagee, following the sale.*

Ms Vo's application for compensation was dismissed.

Observations

The decision in Vo is the clearest ruling concerning the impact of a false loan application on subsequent proceedings under the Act. The provision of false information to lenders is a not uncommon occurrence. Relevantly, in *Vo* it was accepted by all litigants that Ms Vo had knowingly provided false information in support of her loan application. There are other cases in which, despite false information having been provided to a lender, the courts have not attributed the false information to the borrower, but at times assumed that intermediaries were involved in the provision of the false information. For example:

- in *Commissioner of Australian Federal Police v Huang* [2016] WASC 5, Kenneth Martin J observed (at [146]-[148]):

> *The second respondent's evidence to explain what were pointed out to him as obvious errors in the listing of his assets (such as a car he did not own, jewellery he did not own and furniture he did not own) was to accept that those statements about assets were inaccurate. The tenor of the second respondent's response in seeking to explain those inaccurate statements about his misstated assets was to attempt to shift blame to his mortgage broker at the time for wrongly recording that information. In effect, the second respondent was saying that he had left everything to the mortgage broker, after a brief discussion. Later, he had simply signed the application the mortgage broker had prepared for him to sign without any care or attention to the content in the forms which had been filled in for him. That evidence demonstrates a cavalier attitude at best in those earlier times. The attitude has carried through to now, based on his evidence.*
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> *Nevertheless, despite the unsatisfactory nature of the second respondent's evidence, I am not left satisfied (even at the lower standard of the balance of probabilities) that it has been shown that the second respondent, by his actions in 2005, 2006 and 2007 in listing his assets when applying for loans from Westpac in respect of the Girrawheen and Ellenbrook properties, has acted with a sufficiently dishonest, recklessly indifferent or fraudulent intent, in a calculated way by seeking to deceive or mislead Westpac about an artificially inflated level of his assets at the times he (with his sister in respect of Ellenbrook) sought the loans between 2005–2007.*
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> *In short, I am not satisfied, as the Commissioner has submitted, that (even at the civil standard) the*

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[1] A defined term in the Dictionary.

[2] Is not necessary for the Commissioner to obtain a conviction to achieve forfeiture pursuant to a section 19 restraining order. It is part of the civil forfeiture regime.

second respondent in 2005 and 2006 committed a criminal offence, by breaching s 409 of the Criminal Code (WA), by acting fraudulently in respect of his securing of the secured loans which enabled him to fund the acquisitions of the Girrawheen and Ellenbrook properties. The second respondent may have been lax and careless in signing what he said was put before him by his 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

- in *CDPP v Hart & Ors* [2013] QDC 60, Andrews SC DCJ observed (at 781):

> *The simplified question is whether assets derived with money borrowed from Perpetual after such (arguably) dishonest representations are derived from unlawful activity There was no submission from either side about the degree of connection between the unlawful activity and the derivation of property with funds borrowed from Perpetual. I assume that the Commonwealth's best argument would have been that without the representations, there would have been no advance by Perpetual and that fact makes the connection substantial. I regard the connection as too tenuous on the present facts. The representations were not the sole cause for Perpetual's advances of money. Consider firstly, Perpetual's agreement to lend. I infer that other causes of Perpetual's agreement were Perpetual's opinion of the capacity of the borrowers to repay, its opinion of the potential for profit from interest, its satisfaction with the security offered by way of mortgage and guarantee. Consider secondly, Perpetual's advances of funds pursuant to the agreement. I infer that Perpetual continued to advance funds and refrained from demanding repayment because of Perpetual's satisfaction that the borrower was adequately continuing to comply with the terms of the agreement. I regard the degree of connection between the allegedly fraudulent representations to Perpetual and derivation of property with money lent by Perpetual as less substantial than the connection in Jeffery[637] where two properties were substantially acquired with borrowed moneys, but funds from years of undeclared taxation income had allowed the appellant to repay the borrowings with funds that should otherwise have been paid to the commissioner of taxation. The borrowings were repaid by Mr Jeffrey with proceeds of his crimes. That hypothesis differs from one where money borrowed from Perpetual is repaid with proceeds of lawful activity. Ferguson[638] is also distinguishable on its facts. Mr Ferguson's ability to buy a property with $353,000 borrowed from the CBA was indirectly as a result of $200,000 he derived from conspiracy to traffic heroin and paid to increase his equity in another property which he used as security for the loan of $353,000*

See also *Isherwood v Commonwealth Director of Public Prosecutions* [2003] QSC 109, [13]; *New South Wales Crime Commission v Sun* [2015] NSWSC 1178.

In short, where a loan application contains false representations designed to obtain a loan, a heavy onus will fall on any applicant seeking exclusion or compensation orders in respect of property acquired with such loan.

About the author

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He was admitted to practice in 1996 and, prior to coming to the Bar in 2004, was a partner with Deacons (now Norton Rose Fulbright).

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