



Cini v Commissioner of AFP [2016] VSCA 227

ASSET CONFISCATION UPDATE – EDITION 12 / 2016

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Used in or in connection with

Cini v Commissioner of the Australian Federal Police

On 21 September 2016, the Victorian Court of Appeal (Priest, Santamaria and Kaye JJA) delivered its decision in *Cini v Commissioner of the Australian Federal Police* [2016] VSCA 227.

The facts

Mr Cini was the sole registered proprietor of a property at Altona Meadows, which he had purchased approximately 30 years ago. It was accepted that this property had been “lawfully acquired” and that it did not constitute “proceeds” of any unlawful activity.

The only issue was whether Mr Cini had proved that his interest in the Altona Meadows property was not an “instrument” of “unlawful activity”. Relevantly, Mr Cini was required to demonstrate that his interest in the property had not been used in or in connection with any unlawful activity.

Mr Cini had been convicted of attempting to import a large quantity of methamphetamine from China. Unbeknownst to Mr Cini, the Australian Federal Police had intercepted the shipment and substituted the drugs with an inert substance.

Initially, Mr Cini and his son brought the substituted product to a factory in Brooklyn. At the factory, the substituted product was placed in six plastic tubs and then driven to Mr Cini’s Altona Meadows property. There, the tubs were unloaded and placed in the garage for a period of 4.5 days, after which the six tubs were loaded back into the vehicle and driven away, save for a small proportion of the substituted product, which was later located in an esky in the garage.

The question at the trial in the County Court, and in the application for leave to appeal, was whether Mr Cini was able to demonstrate on the balance of probabilities that his interest in his property had not been used in or in connection with unlawful activity. The unlawful activity relied upon by the Commissioner (and in respect of which

Mr Cini had not been convicted) was the attempted possession of the substituted product and the attempted trafficking of the substituted product in contravention of the Criminal Code (Cth).

Relevantly, when Mr Cini was cross-examined at the trial in the County Court about the reason for moving the substituted product from the Brooklyn factory to his home, he said that he did so because he had been told by his son that the factory might be robbed. Further, Mr Cini conceded that his home had an alarm and CCTV system, a high fence and that he kept (lawfully) firearms at that property. There was no suggestion that the property had been deliberately modified to make it a more secure premises at which to store drugs.

It was contended on behalf of Mr Cini that, inter alia, the connection between his property and the unlawful activity was insufficiently direct to render the property an instrument of the offending because:

- Mr Cini had lived in the property for approximately 30 years, but the substituted product had only been located there for 4.5 days;
- the property had been in no way modified to accommodate the substituted product, unlike a property that is dedicated to the cultivation of hydroponic cannabis or a laboratory for the manufacture of drugs;
- the area of the six tubs occupied within the property was very small, when compared with the total dimension of the land;
- there was nothing unusual about placing one's possessions in a garage.

It was contended that a significant connection was required between the unlawful activity and the use of the property before such property could be rendered an "instrument" of unlawful activity.

The Court rejected that argument. The Court observed (at 53]) that

"...it is clear that it is not necessary that there be a "substantial" connection, or that it be established that the crime could not have been committed without using the property. The applicant suggested that a number of the authorities might be distinguished on the basis that the particular legislation under consideration gave a court a discretion to give relief against forfeiture, whereas ss 92 and 94 of the POCA were not attended by any discretion. In our opinion, however, the absence of any discretion to give relief from forfeiture cannot

affect the plain meaning of the words. We are mindful of the fact that the principle of legality favours a construction of the POCA - if one is available - which avoids or minimises its encroachment upon fundamental property rights. In our opinion, however, there simply is no justification for notionally reading s.329(2)(a) as if the word "substantially" occurred before the word "used" in the phrase "the property is used in, or in connection with, the commission of an offence".

Comment

The decision reinforces the breadth of the definition of "instrument" under the POCA. That said, there must still be a "use" of the relevant interest in property. The word "use" connotes the doing of a particular act. Therefore, it denotes the particular interest in property having been deployed for a particular purpose.

In the present case, the property had been deliberately selected as a safer location for storage of the substituted product, having regard to the expectation that the Brooklyn factory might be robbed. If the drugs had merely been placed at a particular location without such underlying purpose, there would appear to be a good argument to assert that the relevant property was not used in or in connection with the possession of the relevant substance. That conclusion was reached in *Rintel v R* (1991) 52 A Crim R 209.

About the author

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