Commissioner of the AFP v Kalimuthu (No 3) [207] WASC 108

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Cuckoo-smurfing - Exclusion application granted

On 19 April 2017, Allanson J delivered his decision in *Commissioner of the AFP v Kalimuthu (No 3)* [2017] WASC 108.

This is a landmark decision. It contains the first judicial analysis of a contested application for exclusion from a restraining order concerning cuckoo-smurfing.

What is cuckoo-smurfing?

Cuckoo-smurfing is said to be "*another emerging form of money laundering*". AUSTRAC observes that "*Australia's AML/CTF professionals need to become familiar with this organised, transactional and highly coordinated process*".[1]

The expression "cuckoo smurfing" originated in Europe because of similarities between this topology and the activities of the cuckoo bird, which lays its eggs in the nests of other species of birds which then unwittingly take care of the eggs believing them to be their own.

AUSTRAC observes that "*in a similar manner, the perpetrators of this money laundering topology seek to transfer wealth through the bank accounts of innocent*

[1] http://www.austrac.gov.au/typologies-2008-methodologies

third parties." The four steps involved in cuckoo smurfing are described by AUSTRAC as follows:

Step 1

A legitimate customer deposits funds with an alternative remitter in a foreign country for transfer into another customer's Australian bank account. This is a legitimate activity and is often a cheaper and faster alternative to using a mainstream bank.

Step 2

Unbeknown to the customer, the alternative remitter is part of a wider criminal syndicate involved in laundering illicit funds. This criminal remitter, while remaining in the foreign country, provides details of the transfers, including the amount of funds, to a criminal based in Australia. This includes the account details of the intended recipient in Australia.

Step 3

The Australian criminal deposits illicit cash profits from Australian crime syndicates into the bank account of the customer awaiting the overseas transfer. The cash is usually deposited in small amounts to avoid detection under transaction threshold reporting requirements. After an account balance check, the customer believes that the overseas transfer has been completed as legitimately arranged.

Step 4

The Australian criminal travels overseas and accesses the legitimate money that was initially deposited with the alternative remitter. The illicit funds have now been successfully laundered - the criminal owes nothing but a commission to the money

Allanson J described cuckoo-smurfing as follows at [71]:

> *In short, it relies on identifying a person offshore who wishes to transfer funds to a bank account in Australia using a money remitter. The remitter withholds amounts corresponding to the amount of money he has been told is to be laundered in Australia. The customer's bank account details are provided to people in Australia. A team of depositors in Australia deposits cash into the bank account, generally at a series of bank branches and below the threshold for reporting transactions involving physical currency. The account holder sees deposits that match the amounts they intended to remit. Because the amounts of each deposit are below the threshold, there is generally no record that could enable regulatory agencies to intervene.*

<u>The issue arising under the POCA</u>

Where cuckoo-smurfing occurs, the deposits into the Australian victims' bank accounts are generally made in cash and commonly below the $10,000 reporting limit. Depositing funds in such manner with the intention to avoid the reporting obligations constitutes a contravention of section 142 of the *Anti-Money Laundering and Counter-Terrorism Financing Act* 2006 (Cth) (**AML/CTF Act**). That offence is commonly known as "structuring".

The Commissioner of the Australian Federal Police (**Commissioner**) has obtained numerous restraining orders under section 19 of the *Proceeds of Crime Act* 2002 (**POCA**) throughout Australia, relying upon the fact that structured deposits were made into Australian bank accounts. In such cases, the Commissioner contends that the assets constitute "proceeds" and/or an "instrument" of structuring and are thereby liable to restrained and, subsequently, forfeiture.

<u>The crux of the decision</u>

In *Kalimuthu*, the Commissioner had obtained a restraining order under section 19 of the POCA over various bank accounts. The restraining order had been obtained on the basis that structured deposits were made into Australian bank accounts in contravention of section 142 of the AML/CTF Act. There was little dispute that the applicants for exclusion were victims of cuckoo-smurfing.

The critical issue for determination was whether, by operation of section 330(4)(a) of the POCA, the money placed into the Australian bank accounts had <u>ceased</u> to be proceeds and an instrument of structuring.

That section relevantly provides as follows:

> *(4) Property only ceases to be *proceeds of an offence or an *instrument of an offence:*

> (a) *if it is 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);*

Hence, the issues to be determined were whether:

1. the victim of cuckoo smurfing was a "third party" within the meaning of that section;
2. the victim of cuckoo smurfing had given "sufficient consideration"; and
3. the victim of cuckoo smurfing acquired the relevant property (being the chose in action against the bank) without 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.

Allanson J determined (at [117]-[121]) that the applicants for exclusion were third parties because:

- they were not in any legal relationship with anyone involved in the money remitting transaction that would make the money remitting transaction one between related parties;
- the applicants for exclusion had no interest in the Australian physical currency, or any property derived from it, before the cash was deposited into their accounts; and
- the applicants for exclusion were in no different position from that of a person who sells property to a stranger and is paid by direct debit into his bank account.

Allanson J also determined (at [124]) that the property (the chose in action) was acquired for sufficient consideration. Firstly, the bank was paid an amount equal to the credit balance of the account and, secondly, the applicants for exclusion had provided funds in foreign currency of equivalent value to a money remitter.

Lastly, Allanson J addressed the question whether the applicants for exclusion had acquired their interests in circumstances that would not arouse a reasonable suspicion that the funds deposited in their bank accounts were the proceeds of an offence or an instrument of an offence.

His Honour observed that:

> *The question posed by the section is objective: would the circumstances arouse that reasonable suspicion in a person in the position of the respondents, knowing what they knew: see Director of Public Prosecutions v Le [2007] VSCA 18; (2007) 15 VR 352 [24]. The decision was overturned in the High Court, but the approach of the Court of Appeal to 'reasonable suspicion' was approved: see Director of Public Prosecutions (Vic) v Le [2007] HCA 52; (2007) 232 CLR 562 [1] (Gleeson CJ), [127] (Kirby and Crennan JJ).*

Allanson J concluded that he was satisfied that no reasonable suspicion would be aroused in the circumstances known to the exclusion applicants. His Honour pointed to the following matters in reaching that conclusion:

- that it was not alleged that any applicant for exclusion was involved in the offending;
- that the applicants for exclusion had lived their lives in Malaysia;
- that the applicants for exclusion believed that they could send money offshore through a money remitter;
- that the amounts remitted matched the amounts which the applicants for exclusion believed ought to be deposited into their accounts based on what was provided to the money remitter in Malaysia;
- that not all of the deposits into the accounts were below the reporting threshold;
- that the period of time over which the transactions took place was relatively short;
- that at the time of the deposits, the applicants for exclusion were not aware of the multiple

locations at which the transactions took place or that the deposits were made in different States;

- that there was no evidence to support a finding that the applicants for exclusion were aware that structuring deposits in this way was linked to criminal activity, either in Australia or Malaysia.

Accordingly, Allanson J allowed the application for exclusion.

The case is of particular importance, having regard to the large number of cases presently before courts throughout Australia involving similar facts.

About the author

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