State of Queensland v Deadman; Thompson v State of Queensland [2016] QCA 218

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Not in public interest to order forfeiture

On 1 September 2016, the Queensland Court of Appeal (Philippides JA and Boddice and Burns JJ) delivered its decision in *State of Queensland v Deadman; Thompson v State of Queensland* [2016] QCA 218.

The issue

The primary judge had refused to order forfeiture of a family home under the *Criminal Proceeds Confiscation Act* 2002 (Qld) on the basis that she was satisfied that it was not in the *public interest* to make the forfeiture order.

The State of Queensland appealed and contended that the trial judge had erred in having regard to the personal circumstances of the offender in considering the public interest ground.

The Court of Appeal dismissed the appeal and found that, in considering the public interest ground, it was permissible to have regard to the personal circumstances of the person opposing forfeiture. Phillipides JA (with whom Boddice and Burns JJ agreed) stated (at [63]):

> *Coming to the crux of the appellant's case, I cannot accept the narrow construction advanced by the appellant that the term "public interest" excludes consideration of personal circumstances. As the primary judge stated, and the appellant conceded, the narrow approach advocated by the appellant would strip the s 93ZZB(2) discretion of any utility. That is evident in the very limited examples which were offered as enlivening the discretion*

Relevance of decision

The decision is of particular relevance to litigation under the *Proceeds of Crime Act* 2002 (**Act**), especially to applications for forfeiture orders sought by the Commissioner of the Australian Federal Police under sections 47 and/or 49 of the Act.

Section 47(4) and section 49(4) of the Act expressly provide that a court may refuse to make a forfeiture order in respect of property which:

- **is** an instrument of a serious offence (other than a terrorism offence);
- **is not** proceeds of an offence,

if the court is satisfied that it is not in the public interest to make the order.

Therefore, where forfeiture would occur only by reason of the property being an instrument (i.e. such property having been used in or in connection with the commission of an offence), the Court has a discretion to refuse the making of a forfeiture order where it is in the public interest not to make such order.

It is clear from the decision in *Deadman & Thompson* that, in considering that public interest test, the Court can have regard to the personal circumstances of the individual opposing forfeiture. In other words, the fact that proceed of crime legislation is directed to forfeiture of crime used property does not deprive a Court of considering broader circumstances relevant to a particular case in deciding whether the public interest may not be served by forfeiture.

Having regard to the breadth of the expression "public interest" (as explained in *Deadman & Thompson*), the provision permitting a Court to refuse to make a forfeiture order in respect of property which amounts to an instrument is of significant assistance to those wishing to oppose forfeiture orders.

To date, there are no reported decisions concerning the construction of that test under the Act.

Particular application in cuckoo smurfing cases

In the author's view, the public interest provision may be of particular benefit in acting for victims of cuckoo smurfing.

Cuckoo smurfing involves innocent persons in foreign jurisdictions providing lawfully earned funds to money remitting businesses in foreign countries for exchange and remittance to Australia. The money remitters, who are involved in unlawful business practices, make arrangements with criminal elements to place money in Australian currency in nominated bank accounts of the innocent victims in Australia. No money is electronically transferred. The remittance occurs by contra transaction. The deposits placed in the Australian accounts are commonly made through structured (non-threshold) cash deposits at various banks within a short space of time. For further information in relation to cuckoo smurfing, see the description of that practice by AUSTRAC: http://www.austrac.gov.au/typologies-2008-methodologies.

The Commissioner has obtained numerous restraining orders over assets in Australia, either cash or property, which has been remitted from foreign countries (Vietnam, Malaysia, China, Iran and other countries) through the use of money remitters which appear to be engaging in cuckoo smurfing. There are numerous exclusion and compensation applications pending in various jurisdictions in Australia where the victims of such cuckoo smurfing activities are seeking to avoid forfeiture of their assets.

Restraining orders are made over assets on the basis that there are reasonable grounds to suspect that the funds standing to the credit of bank accounts arising from cuckoo smurfing (or assets acquired with such funds) are an instrument of:

- the offence of dealing with money or property reasonably suspected to be proceeds of crime contrary to section 400.9(1) of the *Criminal Code* 1995; and/or

- the offence of depositing of money into bank accounts for the sole or dominant purpose of insuring, or attempting to ensure, that the money involved in the transaction was deposited in a manner and form that would not give rise to a threshold transaction that would have been required to have been reported under section 43 of the *Anti-Money Laundering and Counter Terrorism Financing Act* 2006 (**AML Act**), contrary to section 142 of the AML Act.

Obviously, the consequences of such restraining orders and the liability of forfeiture to innocent victims is most concerning. .

Therefore, in addition to any other arguments that may be available to such victims, it would appear that there are strong grounds to argue that victims of such cuckoo smurfing activities ought not lose their interest in restrained property on public interest grounds and Courts ought to decline to order forfeiture on that basis.

About the author

Christian Juebner is a barrister at the Victorian Bar and practices extensively in confiscation and proceeds of crime litigation in various Australian jurisdictions.

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).

He can be contacted as follows:

- by email on juebner@vicbar.com.au
- by phone on (03) 9225 8203 or 0410 657 177.

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