
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : COMMISSIONER OF THE AUSTRALIAN
FEDERAL POLICE -v- KALIMUTHU
[No 3] [2017] WASC 108

CORAM : ALLANSON J

HEARD : 27-30 MARCH 2017

DELIVERED : 19 APRIL 2017

FILE NO/S : CIV 2440 of 2014

MATTER : An Application pursuant to section 19 of the *Proceeds
of Crime Act 2002* (Cth)

AUD 1,492,416.26 held in Australian and New
Zealand Banking Group Limited account numbers
016318392765167 in the name of MICHAEL DASS
Macquelene Patricia and 016318289838452 in the
name of KALIMUTHU Ganesh and AUD 974,520.21
held in Commonwealth Bank of Australia account
number 06616510338576 in the name of
KALIMUTHU Ganesh

BETWEEN : COMMISSIONER OF THE AUSTRALIAN
FEDERAL POLICE
Applicant

AND

GANESH KALIMUTHU
First Respondent

MACQUELENE PATRICIA MICHAEL DASS
Second Respondent

Catchwords:

Proceeds of Crime Act 2002 (Cth) - Where property frozen under s 19 - Exclusion application under s 31 - Whether respondent's interest in bank accounts is proceeds or instrument of an offence - When property ceases to be proceeds or an instrument of an offence - Whether interest 'acquired by a third party' - Whether circumstances 'arouse a reasonable suspicion' - Turns on own facts

Proceeds of Crime Act 2002 (Cth) - Words and phrases - Third party - Acquired by - Reasonable suspicion

Legislation:

Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth), s 142

Proceeds of Crime Act 2002 (Cth), s 5, s 19, s 29, s 31, s 49, s 329, s 330, s 330(4), s 338

Result:

The respondents' exclusion application under s 31 allowed

Category: B

Representation:

Counsel:

Applicant : Mr P N Bevilacqua
First Respondent : Mr E W L Greaves
Second Respondent : Mr E W L Greaves

Solicitors:

Applicant : Australian Federal Police - Proceeds of Crime
Litigation
First Respondent : Putt Legal
Second Respondent : Putt Legal

Case(s) referred to in judgment(s):

Citigroup Pty Limited v National Australia Bank Limited [2012] NSWCA 381
Commissioner of the Australian Federal Police v Fitzroy All Pty Ltd [2015]
WASC 320
Director of Public Prosecutions (Vic) v Le [2007] HCA 52; (2007) 232 CLR
562
Director of Public Prosecutions v Le [2007] VSCA 18; (2007) 15 VR 352
N Joachimson (A Firm Name) v Swiss Bank Corporation [1921] 3 KB 110
Re French Caledonia Travel [2003] NSWSC 1008; (2003) 59 NSWLR 361

1 **ALLANSON J:** Under the *Proceeds of Crime Act 2002* (Cth), the court may order that the proceeds or instruments of certain types of offence be forfeited to the Commonwealth. The Commissioner of the Australian Federal Police has applied for the forfeiture of the property in three bank accounts. In October 2014, this court made a restraining order under the Act in relation to the three accounts. The account holders, respondents to the forfeiture application, apply under s 31 of the Act to exclude their interest in the property from the restraining order.

2 It is not disputed that money was paid into the accounts in a manner likely to amount to an offence under s 142 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth). But the Commissioner does not allege that either of the respondents committed, or is suspected of, that offence or any other offence which would make the accounts liable to be forfeited. The exclusion application turns on whether each respondent has shown that their interest in the accounts was acquired by them as a 'third party' for sufficient consideration, and in circumstances that would not arouse a reasonable suspicion that the property was proceeds of an offence or an instrument of an offence.

3 The respondents, Ganesh Kalimuthu and his wife Macqueline Patricia Michael Dass, live in Malaysia. In the following reasons I refer to parties and witnesses in the manner that counsel informed me is correct, for example by referring to the respondents as Mr Ganesh and Mrs Ganesh when referring to either of them individually.

4 References to sections of the Act are to the *Proceeds of Crime Act* unless otherwise indicated.

Background

5 On 24 October 2014, the court made a restraining order under s 19 restraining the following property:

- (a) Australia and New Zealand Banking Group Limited (ANZ) account number ***5167 in the name of Michael Dass Macqueline Patricia or Macqueline Patricia Michael Dass, including all funds standing to the credit of the aforesaid account together with any interest accruing to that account
- (b) ANZ account number ***8452 in the name of Ganesh Kalimuthu, including all funds standing to the credit of the aforesaid account together with any interest accruing to that account
- (c) Commonwealth Bank of Australia (CBA) account number ***8576 in the name of Ganesh Kalimuthu, including all funds standing to

the credit of the aforesaid account together with any interest accruing to that account

6 The restraining order was made under s 19(1) on the basis that there were reasonable grounds to believe that the property so described was the proceeds of an indictable offence, an instrument of a serious offence, or both.

7 The Commissioner relied on two offences in the application: under s 400.9(1) of the *Criminal Code* (Cth) and s 142 of the *Anti-Money Laundering and Counter-Terrorism Financing Act*. Each of those offences is an indictable offence and a serious offence as defined in s 338 of the Act. In the exclusion application, the Commissioner relies solely on the offence under s 142 of the *Anti-Money Laundering and Counter-Terrorism Financing Act*:

- (1) A person (the first person) commits an offence if:
 - (a) the first person is, or causes another person to become, a party to 2 or more non-reportable transactions; and
 - (b) having regard to:
 - (i) the manner and form in which the transactions were conducted, including the matters to which subsection (3) applies; and
 - (ii) any explanation made by the first person as to the manner or form in which the transactions were conducted;

it would be reasonable to conclude that the first person conducted, or caused the transactions to be conducted, in that manner or form for the sole or dominant purpose of ensuring, or attempting to ensure, that the money or property involved in the transactions was transferred 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.

...

- (3) This subsection applies to the following matters:
 - (a) the value of the money or property involved in each transaction;
 - (b) the total value of the transactions;

- (c) the period of time over which the transactions took place;
- (d) the interval of time between any of the transactions;
- (e) the locations at which the transactions took place.

8 Under s 43 of the *Anti-Money Laundering and Counter-Terrorism Financing Act*, a reporting entity, such as a bank, must report the provision of a designated service to a customer if the provision of that service involves a threshold transaction. Under s 6, allowing a transaction to be conducted in relation to an account at a bank is a designated service. Relevantly, a threshold transaction means a transaction involving the transfer of physical currency, where the total amount of physical currency transferred is not less than \$10,000: s 5.

The exclusion application

9 Under s 31, a person may apply to the court that made the restraining order for an order under s 29 excluding a specified interest in property from the restraining order. By s 29(2):

- (2) The reasons for excluding a specified interest in property from a restraining order are:

...

- (d) for a restraining order under section 19-the interest is neither:
 - (i) in any case-proceeds of an indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concern; nor
 - (ii) if an offence to which the order relates is a serious offence-an instrument of any serious offence.

- (3) If the offence, or each offence, to which a restraining order relates is a serious offence that is an offence against section ... 142 ... of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, a further reason for excluding a specified interest in property from the order is that each of the following requirements is met:

- (a) there are no reasonable grounds to suspect that the interest is proceeds of the offence, or any of the offences;
- (b) there is a suspect in relation to the order, but he or she has not been convicted of, or charged with, the offence, or any of the offences;

- (c) the conduct in question was not for the purpose of, in preparation for, or in contemplation of, any other indictable offence, any State indictable offence or any foreign indictable offence;
- (d) the interest could not have been covered by a restraining order if none of the offences had been serious offences.

10 The respondents were required to give reasonable notice to the Commissioner, of the application and the grounds on which exclusion is sought. The Commissioner was required to give the respondents notice of any grounds on which he proposes to contest the application.

The application and the Commissioner's grounds in opposition

11 The respondents rely on the following grounds:

1. The property interests the subject of the application (ie the bank accounts described in the title of the action, which accounts are choses in action) are neither 'proceeds' nor an 'instrument' as defined in the Act.
 - a. The respondents acquired their interests in the property for sufficient consideration, without knowing, and in circumstances that would not arouse a reasonable suspicion, that the money was the proceeds or an instrument of 'structuring offences'; so as to invoke s 330(4)(a) of the Act. Specifically, the respondents contend that on each relevant occasion:
 - i. They paid Malaysian Ringgit to a money remitter in Penang (Zamri);
 - ii. Zamri agreed to remit an Australian dollar equivalent to the relevant Australian bank account;
 - iii. on each relevant occasion, such an Australian dollar equivalent was remitted to the relevant account, albeit in a structured fashion;
 - iv. the respondents had no knowledge or control over how Zamri remitted funds to them, nor any intermediaries that Zamri may have used to do so,
 - v. The properties, by virtue of s 330(4)(a), are not proceeds nor an instrument in the respondents' hands.

12 The Commissioner opposed the application on these grounds:

1. The property standing to the credit of [the specified bank accounts] is proceeds and an instrument of an offence contrary to s 142 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.
2. The offence in paragraph 1 above is both a serious and indictable offence as defined by the Act.
3. The property did not, pursuant to s 330(4)(a) of the Act, cease to be proceeds of an offence or an instrument of an offence by virtue of the matters set out in the respondents' notice of grounds of their exclusion application dated 15 June 2016 as:
 - (a) the Property was not acquired by a third person for sufficient consideration; and
 - (b) the circumstances would arouse a reasonable suspicion, that the property is proceeds of an offence or an instrument of an offence.
4. The [Commissioner] puts in issue in the Respondents, contention that the Malaysian Ringgit were lawfully derived.

13 Ground 4 of the Commissioner's grounds is responsive to a ground which the respondents abandoned at trial. While the Commissioner's notice was not amended, both parties recognised that whether the respondents had breached Malaysian law in deriving or reporting income would not affect the questions to be determined in this application. The Commissioner did not allege that either respondent had committed a foreign indictable offence.

The three bank accounts

ANZ account number *8452**

14 Mr Ganesh opened the account on 11 August 2014 at the Canning Vale branch of the ANZ bank, using his Malaysian passport as identification. The account was opened with a deposit of \$5,000.

15 Six deposits for a total of \$50,000 were made on 13 August 2014.

16 Between 13 August 2014 and 30 September 2014 the balance increased to \$737,413.73. There was a small credit for interest. Otherwise, the balance was increased by 96 deposits to the account in sums of between \$1,000 and \$9,500.

17 On more than one occasion, there were multiple deposits on the same day.

18 There were no withdrawals from the account, other than small amounts relating to withholding tax, before the transfer of the balance of the account to the Australian Financial Security Authority as a result of the court's orders.

CBA account number *8576**

19 Mr Ganesh opened the account on 11 August 2014 at the Canning Vale branch of the CBA, using his Malaysian passport as identification. The account was opened with a deposit of \$5,000.

20 Between 11 August 2014 and 9 October 2014 the balance increased to \$974,520.21. After the initial deposit, the first deposits were made on 13 August, with eight deposits for a total of \$150,000. There were three reportable transactions on that day.

21 During the whole period to 9 October 2014 there were nine deposits above the reporting threshold and 94 deposits below the reporting threshold. The majority of the transactions were in New South Wales and by cash deposits, although there were also deposits in Victoria and Western Australia.

22 There were multiple deposits on the same day.

23 There were no withdrawals from the account, other than small amounts relating to withholding tax, before the transfer of the balance to the Australian Financial Security Authority.

ANZ account number *5167**

24 Mrs Ganesh opened the account on 25 September 2014, using her Malaysian passport as identification. The account was opened with a deposit of \$5,000 at the branch that was used by her husband.

25 Between 25 September 2014 and 13 October 2014 the balance increased to \$755,002.53. The \$2.53 is interest; otherwise, the balance was increased by 90 deposits of between \$1,000 and of \$9,950, with many for amounts over \$9,000. Many deposits were made on the same day. On 30 September 2014, \$93,250 was deposited in 11 transactions, all below \$9,300. Over \$100,000 was deposited the following day in 11 deposits of \$9,000 or more.

26 There were no withdrawals made from the account before the transfer of the account balance to the Australian Financial Security Authority.

27 Mr and Mrs Ganesh used the address of Mr Ramesh, Mr Ganesh's brother, for the purposes of the accounts.

The evidence

28 Although many affidavits were tendered, the areas of factual dispute were quite limited. The primary factual issue was whether the respondents had proved that the circumstances in which they acquired their interest in the bank accounts 'would not arouse a reasonable suspicion, that the property was proceeds of an offence or an instrument of an offence': see s 330(4)(a).

The respondents' evidence

Mr Ganesh and Mr Zamri

29 Mr Ganesh is a citizen of Malaysia. He is married to the second respondent. They live in Penang. He made an affidavit dated 27 August 2016, and was cross-examined.

30 Mr Ganesh has two siblings who live in Western Australia, including his brother Ramesh Kalimuthu. Mr Ramesh also gave evidence.

31 Mr Ganesh owns and runs a scrap metal business in Malaysia, known as MGE Ramesh Metal. The business is registered in the name of Mr Ramesh, and Mr Ramesh also holds the licence under which it operates. The business was originally set up that way because Mr Ganesh was an undischarged bankrupt. Counsel for the Commissioner cross-examined Mr Ganesh at length on whether that arrangement was for the purpose of avoiding the effect of Malaysian insolvency laws. There was, however, no evidence regarding those aspects of Malaysian law, and I can make no finding about whether what Mr Ganesh did was wrong and, if so, the nature of the wrong (that is, an offence or something rendering him liable to civil action).

32 Mr Ganesh said that his business specialised in buying and selling various forms of scrap, and provided services related to the disposal of used machinery and equipment. It carried on most of its business in cash.

33 He said that the year 2014 was particularly profitable for MGE Ramesh Metal. The business purchased and sold a turbine from the upgrade of a power plant, and made a profit of about RM7,000,000. The purchaser paid in cash, over a period of several months.

34 The Commissioner challenged this evidence for inconsistencies with other evidence about who was the purchaser of the scrap. The fact that MGE Ramesh Metal sold scrap in 2014 was proved, and the invoices put in evidence by another witness, Mr Kanesan, show what was paid and when. I am satisfied that the respondents have proved that, at the relevant time, they earned money sufficient for them to transfer the amounts to Australia which they claimed.

35 Mr Ganesh gave inconsistent evidence about his plans to migrate to Australia. Initially, he said that he was not keen to move to Australia, but wanted his children to be educated here. Later, he spoke of further developing his plans to migrate. He did not suggest that he had made any formal inquiries about migration and had not applied for a visa for himself or his family, other than the tourist visas used to travel here in August and September 2014. He said that he acted on the advice of a friend by transferring funds to Australia, with the aim of investing about \$5 million here to facilitate a later visa application.

36 By mid-2014, Mr Ganesh assessed that he could start transferring money here. He said that he decided to use a local money changer rather than a bank, for the better exchange rates. He went to an acquaintance, Mr Zamri, whose parents ran a money changing business, and whose services he had used before. He asked Mr Zamri to help him. Mr Zamri advised him to use a bank, but told Mr Ganesh he could arrange the transfer of money to Australia over several months.

37 On 11 August 2014, Mr Ganesh travelled to Australia for the sole purpose of opening an Australian bank account. He said that he first gave Mr Zamri between RM200,000 and RM300,000 and instructed him that he wanted the money transferred as soon as he opened the account.

38 On 11 August 2014, Mr Ganesh opened two accounts, one with the ANZ Bank and one with the Commonwealth Bank. He used his brother's address. Each account had an opening deposit of \$5,000. Mr Ganesh obtained 'view only' internet banking enabling him to check the accounts from Malaysia, but not make transactions. Mr Ganesh said that, in this way, he checked to make sure the amounts he gave to Mr Zamri were being received in the accounts in Australia in the correct amounts.

39 Mr and Mrs Ganesh came to Australia together between 25 and 28 September 2014 to open an account in her name, again with a \$5,000 opening deposit. He said that on this occasion also he gave money to Mr Zamri to transfer into the account.

40 Mr Ganesh said that he met Mr Zamri 'maybe 7 or 8 times between August and October 2014, to give him the money to transfer to Australia'. Each time he would ring Mr Zamri, who would come to his apartment to collect the money. The cash amounts varied between about RM200,000 and RM1.5 million (approximately \$AUD65,000 to \$AUD500,000 on the exchange rate he was being given). The amounts were linked to when he received cash from the sale of the turbine.

41 Mr Ganesh described his understanding of what was happening in this way:

109. Zamri had told me at some stage that the transfers would take 2 or 3 days from the time the money was collected to the time it would be transferred to Australia.

110. It was common sense that Zamri was not flying to Australia to put money in my account. I understood that he would need to use someone else to put money into my account. But I had no knowledge about who that was or how they would do it. I did not have any interest in it either, as long as the money arrived safely.

111. I did not tell Zamri to put the money into the different accounts in equal amounts. But that is what I wanted. And I saw from the internet banking that that was what was happening.

112. Mostly when I checked the accounts I looked at the balance. But I remember checking the accounts on the internet once noticing a lot of deposits were being made, in amounts of less than AUD 10,000. In fact, I don't remember seeing any deposits for more than AUD 10,000.

113. I specifically asked Zamri why the money was not simply being deposited in one go on each occasion. Zamri told me that this was how you transfer money to Australia. I accepted his explanation and was not otherwise concerned, as long as the total sum of money was being received. I trusted him.

114. I never saw any printed bank statements relating to any of the Australian bank accounts. I was not concerned with receiving printed statements, given that I had internet access to the accounts and was able to check the account balance at any time.

42 In his oral evidence, Mr Ganesh said that he was not aware where the deposits were being made. He later became aware that the deposits were being made in cash in Sydney when he was shown the Commonwealth Bank statements: affidavit of Mr Ganesh sworn 27 August 2016, par 120. He does not know who was making the deposits.

43 Mr Zamri made an affidavit dated 25 August 2016. He gave oral evidence and was cross-examined by video link to Malaysia. Mr Zamri's account of what happened differs in some significant details from the evidence of Mr Ganesh.

44 Mr Zamri lives in the same apartment building as Mr Ganesh. He runs a 'mini-mart' in a shopping complex over the road from the apartments. Mr Zamri also works in his parents' licensed money services business, which he also described as a money changer business.

45 Before 2014, Mr Zamri had assisted Mr Ganesh on occasions by changing money for him through his parents' business. In the second half of 2014, Mr Ganesh told him that he wanted to move to Australia, and asked if there was a good way to send money to Australia. Mr Zamri told him he would find a good company - it was not something his parents' business could do. He suggested to Mr Ganesh that he use a bank, but Mr Ganesh said the rates and commissions were too high.

46 Mr Zamri remembered one of his customers, a man he knew only as Hameed. Hameed had told Mr Zamri that he was a money remitter, and could lawfully remit money overseas. In 2012 or 2013, Mr Zamri had used Hameed to assist two customers to remit money to Indonesia. Mr Ganesh did not, on the evidence, know the limited nature of Mr Zamri's association with Hameed.

47 Hameed told Mr Zamri that he could help and said that Mr Ganesh would need a bank account in Australia. Hameed recommended the Commonwealth and ANZ banks. He also gave a copy of a passport page to Mr Zamri, showing his passport was in the name Shahul Hamid Basha. There is no evidence about whether the passport is genuine.

48 Mr Ganesh told Mr Zamri he would go to Australia and open accounts. At this point, the evidence of Mr Zamri and Mr Ganesh is not consistent. Mr Zamri said that Mr Ganesh only gave him the account details after Mr Ganesh returned to Penang. Mr Zamri does not agree that he was given money to deposit before Mr Ganesh left Malaysia. It was only after Mr Ganesh returned that he asked Hameed for his rate, advised Mr Ganesh of the rate, and collected cash from Mr Ganesh to give to Hameed, together with documents showing the bank account details. That process was repeated several times over the following months.

49 Mr Zamri kept no record of the amount of money he took from Mr Ganesh. Hameed gave him no receipts.

50 Mr Zamri did not recall Mr Ganesh's second visit to Australia in 2014, when Mr Ganesh went with his wife to open another account. He did recall being given the details of a third account, and cash to be transferred to it.

51 Mr Zamri estimated that he collected cash between seven and eight times between August and October 2014. He recalled Mr Ganesh asking why the deposits were in multiple amounts of \$9,000 or less, but told Mr Ganesh that he did not know. He told Mr Ganesh not to worry.

52 Since these proceedings began, Mr Zamri has returned to the mall where Hameed had his business, but it is no longer there.

Other evidence led by the respondent

53 The respondents also relied on the affidavit of Ravindran A/L Valloo sworn 26 August 2016. Mr Ravindran is an Advocate and Solicitor on the Roll of the High Court of Malaysia. He acts for the respondents as their Malaysian lawyer in connection with these proceedings.

54 Mr Ravindran gave evidence (consistent with expert evidence called on behalf of the Commissioner) that:

- (1) the services carried on by Hameed, as described by Mr Zamri, are remittance business under the *Money Services Business Act 2011* (Malaysia); and
- (2) a person required a licence to carry on that business;
- (3) only a company may apply for a licence.

55 Mr Ravindran has conducted a search on the Malaysian Central Bank (Bank Negara) website, which records that the business conducted by Hameed was raided on 29 April 2015 and 'suspected of conducting illegal money services business'.

56 Mrs Ganesh made an affidavit dated 26 August 2016. She was not cross-examined.

57 Mrs Ganesh testified that, while she is paid by MGE Ramesh Metal as a human resources executive, she does not perform any work for the company. She is not involved in running the business and has no knowledge of its finances.

58 Mrs Ganesh said she and her husband discussed the possibility of the family moving to Australia to enable her eldest son to do his secondary schooling here. She relied on Mr Ganesh to arrange everything.

59 Mrs Ganesh recalled her husband travelling to Australia in August 2014 to open a bank account and told her he would send money to it from Penang. After Mr Ganesh returned, he started bringing home more money than normal from the business, and spoke about sending it to Australia.

60 Mrs Ganesh knew Mr Zamri and knew his parents had a money changing business where he worked during the day. She could recall Mr Zamri coming to the apartment after her husband returned in August 2014, and collecting money which, she understood, was to be sent to Australia.

61 In September 2014, her husband told her that she should open a bank account in Australia. The two of them travelled to Perth between 25 and 28 September 2014.

62 Mrs Ganesh first saw a statement of the savings account she opened in Australia in August 2016.

63 Ramesh Kalimuthu made two affidavits, dated 14 September 2016 and 24 March 2017. He was only briefly cross examined. Mr Ramesh is the brother of Mr Ganesh. He has lived in Australia since 2006. Mr Ramesh gave evidence about the setting up of MGE Ramesh Metal, and his role in it. He played no role in the business in 2013 and 2014 and knew nothing about the purchase and sale of the turbine.

64 Mr Ramesh's wife assisted Mr Ganesh when he first opened an account in Australia. The account was at the ANZ Bank on Mr Ramesh's recommendation.

65 Vijayamurally Kanesan is the operations manager of MGE Ramesh Metal. He lives in Penang. He testified that the scrap metal and recycling business was based in trust and based in cash. Cheques are not used. Mr Ganesh in particular had a policy of doing business in cash.

66 Mr Kanesan described the deal relating to the turbine as 'particularly profitable'. He attached invoices and, usefully, a summary of the amounts received from the turbine sale.

67 Boon Khee Tang is a tax consultant. He has been the tax adviser to Mr Ganesh for about five years. Relevantly, Mr Tang testified that in

2014, MGE Ramesh Metal distributed RM7,745,229 to Mr Ganesh. The entire profit distribution was in cash.

68 In 2015, the Malaysian tax office conducted an audit of Mr Ganesh's tax affairs. The details of that audit are of no relevance to the present matter.

Murray James Smith

69 The respondents relied upon expert evidence of a former Australian Federal Police Officer, Murray James Smith. Mr Smith is now retired, but was a member of the AFP for 33 years, with experience in serious and organised crime including drug trafficking and money laundering activities.

70 Mr Smith was asked to address a series of questions. The Commissioner did not object, in this application, to his general observations from his experience on money transfer and remittance services, and their prevalence in Malaysia.

71 Mr Smith was also asked to describe a particular way of laundering money that has been used in Australia and elsewhere and has the colourful if not particularly descriptive name of 'cuckoo smurfing'. 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.

72 Mr Smith also gave evidence, from his experience, of the use of remittance agencies in countries including Malaysia. He also discussed, in general terms, features of 'cuckoo smurfing' which make it a popular form of money laundering. Again, this evidence was received without objection.

73 The Commissioner did, however, object to Mr Smith expressing his opinion on the following matters, questions H, I, J and L in his letter of instructions and report:

- (1) whether, from the banking records in this case, the transactions are indicative of money laundering activity;
- (2) the frequency with which the person who provide money to money services businesses, such as remittance services, were criminally involved in money laundering;
- (3) the matters that would cause him to believe that a person remitting money to Australia through a money laundering business was himself or herself involved in money laundering activity;
- (4) whether there are any particular matters which suggest that the respondents were or were not involved in money laundering activity.

74 None of his evidence on those matters is admissible.

75 The Commissioner does not allege that either respondent was a knowing party to money laundering. The question that the court must determine is whether the respondents have established that the circumstances would not arouse a reasonable suspicion that the property was proceeds of an offence or an instrument of an offence. Mr Smith's opinion is of no probative value to that question. If anything, because of his experience, training and expertise, he would see or suspect the indicia of money laundering from circumstances that would not arouse any suspicion from someone less knowledgeable. These respondents cannot have attributed to them the knowledge of how money laundering has operated in other cases.

76 The matters that were known to the respondents must be proved by other evidence. Mr Smith's opinion is of no relevance to the question, for the court, whether those circumstances would arouse a reasonable suspicion that the respondents' property in the bank accounts was the proceeds or an instrument of an offence.

77 I uphold the objection to the report of Mr Smith after par 62.

78 The respondents put forward an amended report, removing some of the material to which objection was taken. The amendments do not alter my view. All of the report responding to questions H to J, and L is not relevant. The respondents did not press matters relating to question K and deleted that part of the report. Question M did not arise.

The witnesses for the Commissioner

79 The Commissioner put into evidence the bank records of the CBA account through the affidavit of Channpreet Kaur, a compliance officer with the Commonwealth Bank of Australia. Ms Kaur was not cross-examined.

80 The records for the account ***8576 for the period 11 August 2014 to 22 October 2014 (when the account was restrained under s 19) show, in short, 103 deposits including the opening transaction before the final transfer to the Australian Financial Security Authority. Of those, five deposits used a card in the name Shain Parvej, and two used a card in the name Mohammad Sirazul. Otherwise, deposits were in cash and there are no vouchers for the deposits. Most were made in New South Wales, with a small number in Victoria and Western Australia.

81 The records for the two ANZ accounts were put into evidence by the affidavit of Rachel Finlay, a consultant in the Statutory Compliance Section of the Australia and New Zealand Banking Group Limited. She attached records of the bank relating to the account ***5167 in the name of Mrs Ganesh, for the period 25 September 2014 to 13 October 2014; and records relating to the account ***8452 in the name of Mr Ganesh, for the period 11 August 2014 to 30 September 2014.

82 The records show the identification documents for each of Mr and Mrs Ganesh on opening the account, the signature card for each account, and statements for each account.

83 The Commissioner also relied on two affidavits of Rebecca Buscombe. Ms Buscombe is employed by the Australian Border Force. On 29 October 2014, while on duty at Perth International Airport, Ms Buscombe conducted the baggage examination for Mr Ganesh on his arrival. She photocopied the contents of two lever arch folders full of documents from Mr Ganesh's baggage. Ms Buscombe attached 'some of the documents' which she copied to her affidavit. The documents attached are profit and loss statements and balance sheets for MGE Ramesh Metal for the calendar years 2011, 2012 and 2013.

84 The Commissioner relied on this as evidence that Mr Ganesh kept two sets of financial statements for his business. Without knowing all of the documents that Mr Ganesh had with him, I can draw no inference from the limited documents that were attached to Ms Buscombe's affidavit.

85 The Commissioner also relied on the affidavit of Corey Wiggett, a member of the Australian Federal Police. Between January 2012 and January 2016, Mr Wiggett was stationed in Bangkok, Thailand. On 15 January 2015 he visited Junya Cycle Trend Ltd, a business in Thailand. There he spoke to Meng Chee Loh, the owner of the business. The invoices Mr Ganesh produced for the sale of scrap in 2014 - the scrap from the turbine - were to Mr Loh's business.

86 Mr Loh said that the sale was not to him but to a Chinese purchaser. The sale was through Mr Loh's brother, who uses the Junya Cycle Trend business name in Malaysia because he does not have a scrap metal licence. The evidence is clearly hearsay, save for the business records, but was received without objection. It confirms, at least in part, Mr Ganesh's evidence about the sale of scrap in 2014.

87 The Commissioner put in evidence, through Michael Sams, a Federal Agent, the recording of a conversation between Mr Sams and another Federal Agent, Mr and Mrs Ganesh and Mr Ramesh. The conversation was on 3 November 2014, when Mr and Mrs Ganesh returned to Australia for the purpose of speaking to authorities following the freezing of their accounts.

88 Mr Ganesh also spoke to members of the Australian Federal Police on 12 December 2014, including Graeme Marshall. That conversation was not recorded. Mr Marshall made notes, which he attached, but he gave no oral evidence. The notes do not add to the evidence relevant to the issues in this application.

89 Finally the Commissioner led expert evidence about Malaysian law from two Malaysian practitioners, Kherk Ying Chew and Esther Chik. It is unnecessary to consider the expert report in detail, the Commissioner not relying on any breach of Malaysian law as a foreign indictable offence.

The statutory scheme

90 The principal objects of the *Proceeds of Crime Act* are set out in s 5:

- (a) to deprive persons of the proceeds of offences, the instruments of offences, and benefits derived from offences, against the laws of the Commonwealth or the non-governing Territories; and
- (b) to deprive persons of literary proceeds derived from the commercial exploitation of their notoriety from having committed offences; and

- (ba) to deprive persons of unexplained wealth amounts that the person cannot satisfy a court were not derived from certain offences; and
- (c) to punish and deter persons from breaching laws of the Commonwealth or the non-governing Territories; and
- (d) to prevent the reinvestment of proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts in further criminal activities; and
- (da) to undermine the profitability of criminal enterprises; and
- (e) to enable law enforcement authorities effectively to trace proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts; and
- (f) to give effect to Australia's obligations under the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, and other international agreements relating to proceeds of crime; and
- (g) to provide for confiscation orders and restraining orders made in respect of offences against the laws of the States or the self-governing Territories to be enforced in the other Territories.

91 The Commissioner relied particularly on pars (a), (d), and (da). Section 5(da) was only inserted after this action commenced, but does not affect my construction of the provisions critical to this decision.

92 The provisions relating to the making of restraining orders are found in ch 2 pt 2-1 div 1. Sections 17 to 20A set out the criteria for making restraining orders in different circumstances, including the requirements to be met by a supporting affidavit. The present restraining order was made under s 19. Section 19 differs from those around it because it operates solely on the relationship of the property sought to be restrained to specified offences, and does not require proof of any connection between the property and a person charged, convicted or suspected of a relevant offence. Sections 17, 18, 20 and 20A all operate upon the property of a person who has committed an offence, or is reasonably suspected of having committed an offence.

93 Section 19 correlates with s 49, by which:

- (1) A court with proceeds jurisdiction must make an order that property specified in the order is forfeited to the Commonwealth if:

- (a) the responsible authority for a restraining order under section 19 that covers the property applies for an order under this subsection; and
 - (b) the restraining order has been in force for at least 6 months; and
 - (c) the court is satisfied that one or more of the following applies:
 - (i) the property is proceeds of one or more indictable offences;
 - (ii) the property is proceeds of one or more foreign indictable offences;
 - (iii) the property is proceeds of one or more indictable offences of Commonwealth concern;
 - (iv) the property is an instrument of one or more serious offences; and
 - (e) the court is satisfied that the authority has taken reasonable steps to identify and notify persons with an interest in the property.
- (2) A finding of the court for the purposes of paragraph (1)(c):
- (a) need not be based on a finding that a particular person committed any offence; and
 - (b) need not be based on a finding as to the commission of a particular offence, and can be based on a finding that some offence or other of a kind referred to in paragraph (1)(c) was committed.
- (3) Paragraph (1)(c) does not apply if the court is satisfied that:
- (a) no application has been made under Division 3 of Part 2 1 for the property to be excluded from the restraining order; or
 - (b) any such application that has been made has been withdrawn.

Refusal to make a forfeiture order

- (4) Despite subsection (1), the court may refuse to make an order under that subsection relating to property that the court is satisfied:

(a) is an instrument of a serious offence other than a terrorism offence; and

(b) is not proceeds of an offence;

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

94 Property can be the proceeds of an offence or an instrument of an offence even if no person has been convicted of the offence: s 329(3).

95 Section 338 defines both 'interest' and 'property':

interest, in relation to property or a thing, means:

(a) a legal or equitable estate or interest in the property or thing; or

(b) a right, power or privilege in connection with the property or thing;

whether present or future and whether vested or contingent.

property means real or personal property of every description, whether situated in Australia or elsewhere and whether tangible or intangible, and includes an interest in any such real or personal property.

96 Where it is not necessary to distinguish between proceeds and an instrument, it is convenient to refer to tainted property.

97 Chapter 6, pt 6-1, div 1 contains detailed provisions about when property is proceeds and an instrument of an offence. Section 329 prescribes when property is proceeds or an instrument of an offence:

(1) Property is *proceeds* of an offence if:

(a) it is wholly derived or realised, whether directly or indirectly, from the commission of the offence; or

(b) it is partly derived or realised, whether directly or indirectly, from the commission of the offence;

whether the property is situated within or outside Australia.

(2) Property is an *instrument* of an offence if:

(a) the property is used in, or in connection with, the commission of an offence; or

(b) the property is intended to be used in, or in connection with, the commission of an offence;

whether the property is situated within or outside Australia.

- (3) Property can be proceeds of an offence or an instrument of an offence even if no person has been convicted of the offence.
- (4) *Proceeds* or an *instrument* of an unlawful activity means proceeds or an instrument of the offence constituted by the act or omission that constitutes the unlawful activity.

98 Section 329 looks to the relationship between the property and the commission of the offence. For both proceeds and instruments, the required connection is of wide reach. The terms 'derived' and 'realised' are not defined. But, having regard to the ordinary meaning of those words, the composite 'derived or realised' would include any property that comes from or has its source or origin in the commission of the offence, property obtained by the conversion of other property into cash or money, and any profit made from the commission of the offence. The scope of the property included is widened further by including property wholly or partly derived or realised, and whether directly or indirectly.

99 For instruments, the required relationship is equally wide, particularly in including property used, or intended to be used, 'in or in connection with' the commission of an offence. On a literal interpretation, property can be the instrument of an offence even if it is not used, and even if no offence is committed. In this application, I do not need to consider whether it would then be liable for forfeiture under s 47, s 48, or s 49.

100 Section 330 prescribes when property *becomes, remains and ceases to be* proceeds or an instrument:

- (1) Property becomes proceeds of an offence if it is:
 - (a) wholly or partly derived or realised from a disposal or other dealing with proceeds of the offence; or
 - (b) wholly or partly acquired using proceeds of the offence;
including because of a previous application of this section.
- (2) Property becomes an instrument of an offence if it is:
 - (a) wholly or partly derived or realised from the disposal or other dealing with an instrument of the offence; or
 - (b) wholly or partly acquired using an instrument of the offence;

including because of a previous application of this section.

- (3) Property remains proceeds of an offence or an instrument of an offence even if:
 - (a) it is credited to an account; or
 - (b) it is disposed of or otherwise dealt with.
- (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); ...

...

101 Sections 330(1) and (2) look to the relationship between the subject property and dealings with other property which, at the time of the dealings, was the proceeds or an instrument of an offence.

102 The parties concentrated on the effect of s 330(4)(a), and what is required for property to cease to have the character of proceeds or an instrument of an offence. It will be necessary to return to the effect of that section.

103 Although s 329 and s 330 refer simply to 'offences', provisions for forfeiture apply only to the proceeds or instruments of indictable offences, foreign indictable offences, indictable offences of Commonwealth concern, and serious offences (all defined terms). Sections 329 and 330 should be read as confined to those kinds of offences.

The respondents' interest in the bank accounts

104 The relevant interest held by the respondents is as the account holders of saving accounts, with credit balances, in two Australian banks. Neither party sought to prove terms of the contract between the bank and its customers which might modify the normal relationship between customer and bank. The nature of that relationship was summarised by Barrett JA in *Citigroup Pty Limited v National Australia Bank Limited* [2012] NSWCA 381:

The accepted analysis of the banker-customer relationship where the account is in credit casts the bank in the role of the customer's debtor. Money notionally 'in' the customer's account is in truth money owned by

the bank which is owed by it to the customer and payable on demand made by the customer by way of 'withdrawal': see, for example, *Carr v Carr* [1811] EngR 606; (1811) 1 Mer 541; 35 ER 799; *Devaynes v Noble* (1816) 1 Mer 529; 35 ER 767; *Foley v Hill* [1848] EngR 837; (1848) 2 HL Cas 28; 9 ER 1002. [41]

105 The contract giving rise to the debt is a single continuing contract, as opposed to a series of contracts made on each deposit: *N Joachimson (A Firm Name) v Swiss Bank Corporation* [1921] 3 KB 110, 127; *Re French Caledonia Travel* [2003] NSWSC 1008; (2003) 59 NSWLR 361 [32]. That is, the debt owed by the Commonwealth Bank to Mr Ganesh is a single obligation to pay the amount standing to the credit of his account from time to time. It is not a series of debts relating to each deposit credited to the account: *Commissioner of the Australian Federal Police v Fitzroy All Pty Ltd* [2015] WASC 320 [26]. The same position applies to the two ANZ Bank accounts.

106 The interest held by the respondents is property, within the definition in s 338, either as a chose in action against the bank or as a right, power or privilege in connection with that property.

107 The effect of s 330(3) is that the cash that was deposited into the respondents' accounts - and anything derived or realised from a disposal or other dealing with it - remains proceeds of or an instrument of an offence unless it ceases to have that character by operation of s 330(4). The respondents' interest is derived from a dealing with the cash, and, subject to s 330(4), takes its character as proceeds or an instrument of the offence.

108 The respondents' interest is also derived from the commission of the structuring offence, and is proceeds of that offence.

The issues

109 Subject to s 330(4)(a), if the additional deposits were made in the commission of an offence under s 142, Mr Ganesh's rights in relation to the additional balance are derived from the commission of that offence and are proceeds of that offence. Those rights would also be properly characterised as rights derived from a dealing with an instrument of the offence (the deposited cash), or acquired using an instrument. Under s 330(2) the newly acquired rights would be an instrument of the offence.

Acquired for sufficient consideration

110 The first question is whether the respondents have shown that they are a third party and acquired their interest for sufficient consideration. This requires consideration of the proper construction of s 330(4)(a). In construing the words of the section, there is a principle that that common law rights, including rights of property, will not be taken by a court to have been displaced by legislation save where the intention to do so is 'expressed with irresistible clearness'. On the other hand, the *Proceeds of Crimes Act* does clearly intend to interfere with rights of property.

111 There are two preliminary matters.

112 First, no distinction was drawn between Mr and Mrs Ganesh in these proceedings. In particular, it was not submitted that some distinction should be drawn because the relevant funds were provided by her husband's drawing on his business.

113 Second, the Commissioner does not allege that cash deposited into the respondents' accounts was the proceeds or an instrument of a prior offence - for example, that it was proceeds of drug trafficking. The Commissioner relies on the offence under s 142 of the *Anti-Money Laundering and Counter-Terrorism Financing Act*. The offence has two elements: the transactions by which the funds were deposited into an existing account held by the respondents; and the purpose of the persons who made or caused them to be made.

114 Section 330(4) is directed to when property ceases to be proceeds or an instrument of an offence. It operates where there is an acquisition of 'tainted' property (that is, property that was proceeds or an instrument of an offence) by a third party, so the first step is to identify whether there has been an acquisition of property.

115 For clarity, I will consider the position by reference to one account in the name of Mr Ganesh - it does not matter which.

116 Property includes rights in connection with property: s 338. Mr Ganesh held existing contractual rights against the bank with regard to the current balance of his account. When a deposit was made into his account, his interest then included rights in relation to the additional credit balance, or to the new total credit balance. That is an acquisition of property.

117 The term 'third party' is not defined. The Commissioner submitted
that Mr Ganesh cannot be regarded as a third party, when an element of
the offence is a transaction into his bank account.

118 I am satisfied that 'third party' does not simply refer to someone not a
party to the offence. If that was all that was intended, it could have been
clearly stated. In the context of a provision dealing with acquisition of an
interest in property, I believe the following matters are relevant.

119 First, Mr Ganesh was not in a legal relationship (such as a director,
partner, or fiduciary) with anyone involved in the transaction that would
make this a transaction between related parties.

120 Second, Mr Ganesh had no interest in the Australian physical
currency, or any property derived from it, before the cash was deposited
into his account. If he had rights, they were contractual rights against the
remitter who was obliged to perform the agreement and give the agreed
consideration for the Malaysian ringgit he had provided to him.

121 Third, Mr Ganesh's position is relevantly no different from that of a
person who sells property to a stranger and is paid by direct debit into his
bank account. His position is analogous to that of a seller of Malaysian
ringgit who is to be paid by the deposit of a corresponding amount of
Australian currency into his account in Australia. The existing contractual
relationship with the bank does not alter that he is a third party acquiring
property through that transaction.

122 The next issue is the sufficiency of consideration. Section 338
contains the following definition:

sufficient consideration: an acquisition or disposal of property is for
sufficient consideration if it is for a consideration that is sufficient and that
reflects the value of the property, having regard solely to commercial
considerations.

123 The bank received full value for any rights acquired by Mr Ganesh.

124 I am satisfied that Mr Ganesh has proved that the amount he paid,
through Mr Zamri, was sufficient consideration for what he acquired. The
fact that the Malaysian ringgit passed through the hands of one or more
intermediaries does not affect that Mr Ganesh gave consideration to
someone. While the Commissioner did not accept the respondents'
interest had been acquired for sufficient consideration, he did not
challenge that the Malaysian ringgit were exchanged for Australian
dollars at a commercial rate. And the Commissioner did not challenge the

evidence of Mr Ganesh and Mr Zamri that the money remitter was chosen because the rates offered were better than those offered by the banks.

Reasonable suspicion

125 Did the respondents acquire their interest in circumstances that would not arouse a reasonable suspicion that that the funds deposited in their bank accounts were the proceeds of an offence or an instrument of an offence? 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).

126 The Commissioner summarised his position on the evidence in this way:

Mr Ganesh was aware he was using an unofficial means of overseas transfer. He was aware that there was a not insignificant risk involved in using those channels. He chose to accept that risk. He accepted that risk, didn't record the amounts. We say he didn't want a record of the money's existence, so that it may not be traceable to his earnings in Malaysia. We also suggest the finding is open that he noticed - well, the evidence is that he noticed the structuring and, in his words, thought it unusual. We would say that's not surprising in the circumstances, and that when you add the circumstances in Malaysia with the circumstances in Australia, in combination, we say the respondents have not discharged their burden [of establishing] there were circumstances that would not arouse a reasonable suspicion that the property was proceeds of an offence or an instrument of an offence (ts 318).

127 In expanding on that submission, the counsel for the Commissioner submitted that the court should find:

- (1) Mr Ganesh was an astute businessman and generally aware of laws in Malaysia governing the control of businesses and money, but had shown that he was prepared to circumvent legal restrictions and ignore proper commercial practice when it suited his purpose. In particular, he was aware of some currency controls and the potential to breach them, but chose an unofficial method of money transfer to avoid them. This was despite advice from Mr Zamri that he should use a bank.

- (2) Mr Ganesh was prepared to take risks in transferring money in this fashion, including by handing over very large amounts of cash without any adequate record kept of the amounts of money. Counsel submitted that the court might infer that Mr Ganesh was prepared to accept the risk to ensure the money would remain unknown to the Malaysian authorities.
- (3) Mr Ganesh exercised some level of supervision, by checking the accounts over the internet, and as a result was aware that the deposits into his account were being broken up into smaller amounts. That was sufficient to lead him to ask why that was being done and he received no satisfactory answer.
- (4) While Mr Ganesh may have intended to migrate with his family in Australia, he sent the money out of Malaysia before making any visa application or any inquiry about obtaining a visa.

128 Even if I drew the inferences for which the counsel argued, that would not be sufficient to for me to decide this issue favourably to the Commissioner.

129 Property is liable for forfeiture under s 49 only if it is the proceeds of an instrument of an indictable offence, a foreign indictable offence, an indictable offence of Commonwealth concern, or a serious offence (as each is defined). There is no evidence of circumstances that would arouse suspicion of any offence other than that under s 142 of the *Anti-Money Laundering and Counter-Terrorism Financing Act* and the Commissioner did not rely on any other offence. It may not be necessary for Mr Ganesh to be aware of the terms of s 142. But he could not have a reasonable suspicion that his interest in his bank account was tainted unless he knew that the deposits were structured (that is, deposits of physical currency in amounts of less than \$10,000) and there was some material sufficient to induce a suspicion that they were being done in that manner and form for the purpose of avoiding reporting requirements.

130 I am satisfied that no reasonable suspicion would be aroused in the circumstances known to the respondents. In considering the circumstances, I have concentrated on Mr Ganesh. These findings necessarily apply to Mrs Ganesh who knew less than her husband.

131 First, it is not alleged that either respondent was party to any offence in Australia, or knew that the property was the proceeds or the instrument of an offence.

132 Second, both respondents have lived their lives in Penang, Malaysia. Each had travelled to Australia, but only briefly. Neither had a bank account in Australia before the accounts which were opened in 2014.

133 Third, I accept that Mr Ganesh believed he could send money offshore through a remitter. He also gave plausible reasons for using a remitter to send the money instead of a bank. Whether he also believed, or intended, that in that way he would avoid Malaysian currency control is not to the point.

134 Fourth, one of the circumstances to be considered under s 142 (3) of the *Anti-Money Laundering and Counter-Terrorism Financing Act*, is the total value of the transactions. While the total was large, it corresponded to the cash amounts Mr Ganesh gave to Mr Zamri. There was no reason for him to suspect, from the total of the deposits, that the funds going into the bank accounts had any source other than his own funds.

135 Fifth, not all deposits in the CBA account opened in August were below the reportable threshold - two of the early deposits were as large as \$50,000.

136 Sixth, the period of time over which the transactions took place was relatively short, and corresponded to his receipt of funds from the sale of the turbine. I accept his evidence that they also corresponded, with some delay, to when he gave funds to Mr Zamri. There was inconsistency between Mr Ganesh and Mr Zamri about when Mr Ganesh first provided Malaysian ringgit to be given to the remitter - before he went to Australia or only after his return. That inconsistency does not affect my conclusion.

137 Seventh, I am satisfied that, at the time of the deposits, Mr Ganesh was not aware of the multiple locations at which the transactions took place, or that deposits were made in different states.

138 Finally, there is no evidence to support a finding that Mr Ganesh was aware that structuring deposits in this way was linked to criminal activity, either in Australia or Malaysia. He might have inquired further into why the funds were being deposited in small amounts. But I am satisfied that his failure to inquire further was not because he knew that deposits being structured in this way was in some way indicative of money laundering.

Conclusion

139 For these reasons I am satisfied that the respondents' interests in the three specified bank accounts ceased to be proceeds or an instrument of an

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offence when acquired by them. It should be excluded from the forfeiture order.