IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M92 of 2014

BETWEEN **COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE**

Appellant

AND

QING ZHAO

First Respondent

XING JIN

Second Respondent

APPELLANT'S ANNOTATED REPLY

Filed on behalf of the appellant
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PART I INTERNET PUBLICATION

1. These reply submissions are in a form suitable for publication on the Internet.

PART II REPLY

General

2. The respondents say that they accept that their ultimate burden before the trial judge was to establish that there was a real risk that the second respondent's right to a fair trial would be compromised if the Court did not stay the forfeiture proceedings against each of them: respondents' submissions (**RS**) [3].

3. However, the balance of their submissions proceeds to narrow the scope of that inquiry by three steps:

   a. a factual assertion that the evidence before the court established that they were placed in the dilemma of having to elect between losing either proprietary or accusatorial rights; and a related legal assertion, that no relevant distinction should be drawn under the *Proceeds of Crime Act 2002* (Cth) (**Act**) between the *voluntary* giving of evidence in a civil forfeiture trial and legal *compulsion* of an accused to give evidence on matters concerning the criminal trial;

   b. a legal assertion that there were no powers available to the judge presiding over either the civil forfeiture trial or the second respondent's criminal trial which could alleviate any real risk of prejudice to the second respondent's criminal trial short of the grant of a stay; and

   c. a legal assertion that, because s 319 of the Act does not abrogate the privilege against self-incrimination, it has nothing to say on the question whether the stay should have been granted.

4. These three points will be dealt with in turn. These reply submissions will then identify matters that the respondents have not addressed.

Unpacking the concept of "practical" compulsion

5. The respondents' first point is to assert, a number of times, that they are under a "practical compulsion" to give evidence in the civil trial to protect their family home: RS [8]-[11]. The "invidious" choice is between the "family home" and the second respondent's "accusatorial rights". They maintain that the Commissioner "ignores what is at stake" for the respondents and "ignores" that s 24(2)(ca) of the Act prevents the respondents from having recourse to restrained property for the purposes of paying legal expenses: RS [10]. Practical compulsion is the same as legal compulsion and the authorities on compelled examinations should be carried over to the present case: RS [14]-[15]. It is irrelevant that the proceedings are *in rem*, as the evidence to be given is "personal": RS [12]. Most of all, the respondents contend that the Commissioner's elaboration of the history of civil forfeiture proceedings is "revisionist" (although the respondents never say why that is so or how it may be wrong) and "pernicious": RS [14].

6. *In response*: *First*, at the level of fact, the respondents have failed (RS [19]-[22]) to demonstrate that they were under "practical compulsion". The only attempt is in the second respondent's affidavit at para 21: Appeal Book (**AB**) 27. He there references evidence put on for the Commissioner in the forfeiture proceedings, concerning

payments in 2011 in relation to the Southbank property which he then acquired. Apart from the timing disconnect – the charges against the second respondent concern events that took place in a period of several months in 2013 – he offered the court no detail as to what it was, if anything, that he proposed to say about the Southbank property in defence of the forfeiture proceedings that would compromise his criminal trial. Certainly, nothing like the obvious overlap demonstrated in *Lee (No 1)* is apparent.

7. Further, nowhere did the second respondent give any evidence of what he would say in response to the forfeiture proceedings about the Donvale property, the one in his wife's (the first respondent's) name, or how the giving of it could compromise his criminal trial. Even if such evidence were given, there is no readily identifiable reason why a person in the position of the first respondent, responding to an application in a civil trial, should receive some special treatment because she cannot secure the evidence of a third party, spouse or not, who is unwilling to give evidence because that evidence may expose that third party to revealing a crime. That is a well-known feature of civil trials and the protections in the *Evidence Act 2008* (Vic) deal with that event.

8. The above explains the point being made by the trial judge at [8] and [17] of his judgment (AB 4 and 7): the second respondent had not provided evidence about what he was proposing to lead in defence of the civil proceedings. Thus the court was left with an insufficient basis to conclude that there was a real risk to the administration of justice in the criminal trial, or that a stay was the only means to alleviate it. A court cannot know whether a real risk of prejudice exists unless it has the relevant facts before it. As for whether protective orders are needed, again, a court cannot begin to fashion those orders until it knows what is in need of protection.

9. *Secondly*, as a matter of law, the proper construction of the Act stands opposed to the propositions advanced by the respondents. Reflecting the long-standing approach of the law in this area, the Act clearly contemplates the parallel conduct of civil forfeiture proceedings and related criminal proceedings. The respondents fail to deal with the detailed arguments of the Commissioner on the structure and operation of the Act. Their position fails to leave any room for the operation of an Act that clearly intends to permit the property of a person to be placed in jeopardy in a civil forfeiture proceeding prior to any criminal conviction.

10. Thus, it is neither "revisionist" nor "pernicious" for the Commissioner to highlight historically established legal principles underpinning the Act's proper construction. To say that the *in rem* character of the proceedings is irrelevant sweeps aside history and ignores the particular approach the law has taken to this category of action. Further, to characterise a proceeding as *in rem* does not, as the respondents argue, exclude consideration of "personal evidence". Rather, those matters are protected by the power of the trial judge to (i) examine exactly what it is that the accused/respondent proposes to say in the forfeiture trial in that "personal evidence"; and then (ii) make a considered judgment as to whether and how the forfeiture trial can proceed without threat to the administration of justice in the criminal trial. The respondents' approach would replace that ability of a trial judge to "tailor" protections with a requirement for a stay in all proceedings in which any overlap between the civil and criminal trials could be shown.

11. *Thirdly*, and relatedly, established practice supports that approach. It is accepted that a trial judge in forfeiture proceedings could (and often does) require the Commissioner to put on his evidence in the forfeiture application in advance. Once that has occurred, the trial judge and the defendant will more fully understand the case put against a defendant. The judge could then afford the defendant the necessary time to consider the

evidence of the Commissioner and come back to the Court to convey his or her decision about what is submitted should next occur. The defendant may elect to put the Commissioner to proof and say nothing in the civil case; put on evidence in response; or make an application, with proper evidence, for a stay or some lesser but efficacious protective order. The Commissioner could respond with his own proposal. But in any case, an application for a stay at that stage, based on concern about the impact on the criminal trial, would need to identify clearly how responding to the Commissioner's case would prejudice the criminal trial.

12. *Fourthly*, the concern of the law, in light of the clear objectives of the Act, is to do what is *necessary* to protect the accusatorial system of justice in the criminal trial, *but not more*. The accused will be entitled to maintain any relevant privileges, rights or immunities that have not been abrogated or waived. By way of example, a defendant could not generally be compelled to give discovery in the civil proceedings if that discovery could expose him to the forfeiture the subject of the proceedings: *Rich v ASIC* (2004) 220 CLR 129.

13. The Commissioner bears the onus in the forfeiture application and the Court must be satisfied on the relevant standard (s 317 of the Act). The question of any stay must be viewed from the proper perspective that all the relevant privileges of the second respondent may be maintained at his election. The position in the United States, where the privilege against self-incrimination is constitutionally entrenched, is instructive. In civil proceedings, when a party exercises the privilege and chooses not to testify in response to probative evidence offered against them, the Fifth Amendment does not forbid adverse inferences being drawn against that party, so long as those proceedings do not result in an automatic penalty as punishment for exercising the right: *Baxter v Palmigiano* 425 US 308 (1976) at 318. That goes significantly further than simply leaving a defendant with no evidence in response to the plaintiff's case, as the respondents hint at being their position here.

The civil court's other powers short of a stay

14. The second point sought to be made by the respondents is to suggest that the Court below *did* consider the range of protections that might be available to alleviate the risk of prejudice in this case, but found them all insufficient: RS [24], [30]-[32]. Further, it is said that those issues should be excluded from this appeal because the Commissioner does not challenge "the exercise of discretion" below: RS [23].

15. *In response: First*, the Court below viewed itself as precluded by *Lee (No 2)* from investigating the possibility of any judicial protection against the risk of prejudice short of a stay once it had satisfied itself that there was an overlap in subject matter between the civil and criminal proceedings. For the reasons expressed in chief, that is an error of law.

16. *Secondly*, there is no substance to the contention of the respondents that the Notice of Appeal should have challenged the exercise of the "discretion" below. The Commissioner's challenge is to the errors of law in the decision of the Court of Appeal which led it wrongly to find error in the trial judge's exercise of discretion and wrongly to prevent the judge in the forfeiture proceedings from exercising the *future* discretion as to the protections, if any, to require in the civil trial (or to impose a stay on proper evidence). It is not a challenge to any "discretion" below.

The role of section 319 of the Act

17. *Finally*, the respondents contend that s 319 of the Act has a "narrow operation" and is fully explained as "... a clear statutory abrogation of the rule in *Smith v Selwyn*": RS [35].

18. *In response: First*, the respondents have not dealt with the substance of the Commissioner's point regarding s 319. Namely, that s 319 does not need to abrogate any privilege when there is *no compulsion to speak*. No answer is given to the Commissioner's case about the position of s 319 given the history of civil forfeiture proceedings. As far as the civil trial is concerned, the respondents are perfectly at liberty to maintain any privilege that the law affords. Their own characterisation of the process as involving a "choice", invidious or otherwise, proves the point.

19. *Secondly*, the respondents do not answer the Commissioner's submission that *Smith v Selwyn* and like cases were only concerned with preventing the continuation of a common law civil case of an ordinary litigant that was instituted and would compete with the *deodand* or the criminal trial because the litigant would need to prove the felony. They never applied to civil cases commenced by the Crown pursuant to a statutory right of forfeiture.

20. That is the point of engaging properly in the historical analysis – the drafters of s 319 of the Act cannot be criticised for not going far enough to respond to a red herring. Section 319 does the work that the law has always done in this area; namely, recognising and maintaining the possibility for civil forfeiture proceedings to be conducted in parallel with related criminal proceedings. The law was never ignorant of the type of evidence that might need to be given to defend proprietary interests, nor was it ignorant of the fact that it may place persons in a difficult position. But the statutory right must be respected. There was recognition that there was a distinct difference between *choosing* to give evidence in those civil proceedings to protect property interests and being *compelled* to answer questions about criminal charges. Even in the latter case, *Lee (No 1)* requires an inquiry to be undertaken about what can be done to prevent prejudice when the compulsory examination takes place before a judicial officer of a superior court.

21. *Thirdly*, the respondents' argument that a stay would not frustrate the Act because there is "no real prejudice" to the Commissioner if he is forced to wait, as opposed to the prejudice to the respondents (RS [40]), ignores the scheme in the Act. That scheme permits the civil trial to be conducted in advance of any criminal trial with an objective of expeditious completion. Furthermore, to say that the Act is not frustrated because there are other statutory avenues of forfeiture available to the Commissioner (cf RS [47]) is not an answer to why the Commissioner is not entitled to rely on *this* statutory provision. The Act may make life more difficult for the respondents. But the respondents have not identified how that difficulty specifically infringes any legal rights they enjoy, such that the civil trial must be peremptorily stayed.

Matters not addressed by the respondents

22. The respondents do not address how the decision below can sit conformably with the decision of this Court in *Lee (No 1)*. That case dealt with circumstances of unmistakeably greater risk to the accusatorial system of justice, by compelling the accused to answer questions on oath. However, even in those circumstances, this Court made plain that there were protections available to alleviate the risk of that injustice and the implementation of those protections are a matter for the civil trial judge.

23. The respondents also do not address the error of the Court below, in viewing the decision of this Court in *Lee (No 2)* as somehow questioning the utility of judicial protection against any risk, when that case was dealing with a situation where the protections that had been crafted to alleviate the risk of prejudice had been breached. That is how the risk in *Lee (No 2)* crystallised – there was no challenge in *Lee (No 2)* to the fact that the protections would have been adequate if they had been observed.

24. Finally, the respondents to do not deal with the separate position of the first respondent other than to reiterate baldly the conclusion of the Court below (RS [41]-[42]). There is no response to the Commissioners' submissions in chief on this issue.

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