

SUPREME COURT OF QUEENSLAND

CITATION: *Commissioner of the Australian Federal Police v Kanjo & Ors* [2019] QCA 143

PARTIES: **COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE**
(appellant)
v
NICOLE ANNE KANJO
(first respondent)
FAIRGRANGE HEALTH SERVICES PTY LTD
ACN 162 296 380
(second respondent)
SAM KANJO
(third respondent)

FILE NO/S: Appeal No 7266 of 2018
DC No 937 of 2018

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: District Court at Brisbane – [2018] QDC 112
(Rosengren DCJ)

DELIVERED ON: 26 July 2019

DELIVERED AT: Brisbane

HEARING DATE: 11 October 2018

JUDGES: Gotterson and Philippides and McMurdo JJA

ORDERS: **1. That the appeal be allowed.**
2. That paras 2 and 3 of the orders made on 15 June 2018 be set aside.
3. That the application filed on 29 May 2018 be refused.
4. That the respondents pay the costs of the appeal and of the application filed on 29 May 2018.

CATCHWORDS: CRIMINAL LAW – PROCEDURE – CONFISCATION OF PROCEEDS OF CRIME AND RELATED MATTERS – RESTRAINING OR FREEZING ORDER – VARIATION GENERALLY – where the first respondent successfully applied for the variation of a restraining order made under the *Proceeds of Crime Act* 2002 (Cth) to exclude a specified interest in property from that order – where that variation was made under a general ancillary order power contained in s 39 of that Act, rather than under the specific power of variation found in s 29 – where the terms of s 29 require the

satisfaction of certain conditions for exclusion not contained in s 39 – whether a court’s power to exclude a specified interest in property from a restraining order is exercisable only by the specific power conferred in s 29 – whether, considering the nature of the power under s 39 and s 29, there was no power to make the order which was made as there was no attempt to satisfy the conditions for variation required under s 29

CRIMINAL LAW – PROCEDURE – CONFISCATION OF PROCEEDS OF CRIME AND RELATED MATTERS – RESTRAINING OR FREEZING ORDER – VARIATION GENERALLY – where a restraining order made under the *Proceeds of Crime Act 2002* (Cth) restrained an interest in real property – where that order exempted from restraint the completion of a contract of sale on that real property, subject to several conditions – where those conditions included that the sale proceeds would be used in the discharge of moneys secured by two registered mortgages, with the balance to be held by the Official Trustee and in so doing to be inaccessible to the first respondent – where one of the mortgages was instead discharged by the second respondent after the making of the restraining order, significantly increasing the balance of the proceeds of sale – where the first respondent successfully applied for a variation to the restraining order, exempting from restraint an amount equal to the discharged mortgage – where the judge who varied the restraining order held that that amount was not the subject of that order – whether the increase in the balance was subject to the restraint imposed by the restraining order

Proceeds of Crime Act 2002 (Cth), s 18, s 19, s 29, s 39

Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1; [1932] HCA 9, applied

COUNSEL: N J O’Bryan SC, with G J Del Villar, for the appellant
R A Quirk for the respondents

SOLICITORS: Australian Federal Police for the appellant
Frigo Adamson Legal Group for the respondents

- [1] **GOTTERSON JA:** I have had the advantage of reading the separate draft reasons of Philippides JA and McMurdo JA. I agree with their Honours that this appeal should be allowed. The orders that this Court should make are those proposed by their Honours.
- [2] To my mind, the operative error made at first instance was to mischaracterise some \$404,000 of the moneys held by the Official Trustee as property not held by him under the terms of the orders made by Smith DCJA. I agree with the respective

reasons of their Honours in identifying that as the operative error and in explaining why it is that the primary judge erred in that respect.

PHILIPPIDES JA:

The appeal

- [3] The appellant, the Commissioner of the Australian Federal Police, appeals against orders made on 15 June 2018 by a judge of the District Court (Rosengren DCJ) pursuant to s 39 of the *Proceeds of Crime Act 2002* (Cth) (the POCA) varying restraining orders made on 14 March 2018 pursuant to that Act over certain property of the first respondent, Ms Kanjo, and the second respondent, Fairgrange Health Services Pty Ltd (FHS), that was under Ms Kanjo's effective control.
- [4] The appellant contends before this Court that the primary judge's order should be set aside on two bases:
- (a) firstly, because s 39(1) of the POCA does not authorise the making of an order reimbursing a suspect out of restrained property in circumstances where the order was not made by consent and the respondent has not satisfied the requirements of either s 24 or s 29 of the POCA; and
 - (b) secondly, because in any event, the exercise of the primary judge's discretion to make the order miscarried.

Background

The restraining orders of 14 March 2018

- [5] On 14 March 2018, the Commissioner, as a proceeds of crime authority, brought an ex parte application pursuant to s 25 and s 26(4) of the POCA seeking restraining orders in relation to specified property of Ms Kanjo and FHS. The restraining orders were sought pursuant to s 18(1)(d) of the POCA on the basis that there were *reasonable grounds to suspect* that Ms Kanjo had engaged in money laundering in breach of s 400.9 of the *Criminal Code* (Cth), provisions of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) and the *Crimes Act 1958* (Vic). The suspected offences related to the use of aliases and other misleading information in relation to loans and various other financial transactions.¹ Additionally, orders were sought pursuant to s 19(1)(d) of the POCA, on the basis that there were reasonable grounds to suspect that the property sought to be restrained was the proceeds of an indictable offence or the instrument of a serious offence. The application specified, as property that was sought to be the subject of restraint, real property located in Etna Street, Surfers Paradise (the Etna Street property) owned by Ms Kanjo.
- [6] At the time the orders were sought, the Etna Street property was the subject of a contract of sale dated 15 February 2018, which was yet to be completed. The Etna Street property itself was subject to two registered mortgages. One of those mortgages was in favour of Suncorp Metway Ltd (Suncorp). As mentioned, that property was

¹ *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 136(1) providing false or misleading information to a reporting entity; s 137(1) providing a false or misleading document to a reporting entity; and s 140(1) concerning receiving a designated service using a false customer name. *Crimes Act 1958* (Vic) s 82 concerning obtaining a financial advantage by deception.

restrained on the basis that Ms Kanjo was reasonably suspected of having provided false income and employment details in her application for the Suncorp home loan used to acquire the property. The other mortgage was in favour of Brian Mullins and Donna Keegan, as trustees of the Brian Mullins Superannuation Fund (the Mullins and Keegan mortgage). The mortgage was security for a personal loan obligation owed by Ms Kanjo to them. It was also one of the loans suspected to have been obtained in breach of the legislation mentioned. The loan was guaranteed by FHS. As at the date of the orders, the principal of \$400,000 together with interest of \$4,000 was owing pursuant to it.

[7] Restraining orders in the terms sought were made on 14 March 2018 by Smith DCJ. They provided, *inter alia*, under the heading, “Restraining orders in relation to the First Respondent” as follows:

- By orders 1 and 2, that pursuant to s 18(2)(a) and s 19(1)(b) of the POCA, the specified property of Ms Kanjo (which by Sch 1 item 1 included the Etna street property) and of FHS (including property under the effective control of Ms Kanjo²):

“... must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in these orders”.

- By orders 3 and 5, that, notwithstanding orders 1 and 2, Suncorp and Brian Mullins and Donna Keegan, as trustees “may deal with” the Etna Street property “in accordance with the terms” of the relevant registered mortgages.
- By order 9, that notwithstanding orders 1 and 2, the settlement of the Etna Street property “may be effected pursuant to the contract of sale dated 15 February 2018” provided that:
 - (a) not less than five days before settlement the Official Trustee be provided with amongst other things, a copy of the statement of adjustments and the settlement statement and an itemised schedule of costs;
 - (b) upon completion of any sale of the Etna Street property, the proceeds of the sale be disbursed as follows:
 - (i) firstly, in payment of all costs, charges and expenses properly incurred, incidental to the sale;
 - (ii) secondly, in payment of the monies which “are due or owing” pursuant to the two registered mortgages and any statutory charge holder;
 - (iii) thirdly, that “the Official Trustee take custody of the balance of the proceeds of the sale of the Etna Street property, which is to be paid by bank cheque to the Official Trustee at settlement of the sale, and to be held on trust and restrained pursuant to sections 18 and 19 of the Act until further order of the court”; and

² Schedule 2 specified certain chattels of FHS.

- (c) upon compliance with the conditions in (a) and (b), “but not otherwise” the Etna Street property be discharged from the operation of the restraining orders in order 1 and 2.

- [8] The restraining orders also provided by order 15, under the heading “Custody and control orders”, that pursuant to s 38 of the POCA, that the Official Trustee take custody and control of any deposit monies pursuant to the sale of the Etna Street property (see Sch 1 item 5).

The events following the making of the restraining orders of 14 March 2018

- [9] On 26 March 2018, without notice to the Commissioner, the amount due under the Mullins and Keegan mortgage was paid from the sale of two businesses owned by FHS to WH Smith Australia Pty Ltd for about \$1.8m.³ Those businesses were not specified in Sch 2 of the restraining order. Subsequently, on 26 April 2018, by an originating application filed on 14 March 2018, the Commissioner obtained orders pursuant to s 180 of the POCA for the examination of, amongst others, Ms Kanjo.⁴
- [10] On 3 May 2018,⁵ the sale of the Etna Street property was completed and, thereafter, the debt owed under the Suncorp mortgage was paid from the proceeds of the sale as had been contemplated in the order of 14 March 2018. However, as mentioned, the amount due under the Mullins and Keegan mortgage was not paid from the sale proceeds, having already been paid from other funds.
- [11] Affidavit material filed on behalf of Ms Kanjo stated that WH Smith had refused to complete the contracts for the purchase of the two businesses without the release of charges registered under the *Personal Securities Register 2009* (Cth) in favour of Mullins and Keegan and Suncorp.⁶ The Mullins and Keegan mortgage was discharged out of the proceeds of the sale of the FHS businesses. Suncorp had initially refused to release its charge without payment to it of the sum of \$647,880 for personal loans made by it to Ms Kanjo (in the name of Nicole Lawrence) and also the sum of \$964,658.93 owed to it by Ms Kanjo (in the name of Nicole Lawrence) under a registered mortgage over the Etna Street property. However, as a result of negotiations, Suncorp agreed to release its charge on payment of only the sum of \$647,880, with the payment of the mortgage debt of \$964,658.93 from the proceeds of the Etna Street property.⁷
- [12] As a result, the settlement statement in relation to the Etna Street property recorded that at settlement, an amount of \$506,048.04 was paid to the Official Trustee. Had the amount due under the Mullins and Keegan mortgage been paid out of the proceeds of the sale of the Etna Street property, as contemplated and permitted by the restraining orders, the balance that the Official Trustee would have been paid from the proceeds of sale would have been \$102,048.04.

The variation orders of 15 June 2018

- [13] On 29 May 2018, Ms Kanjo filed an application seeking orders that “out of the proceeds restrained and held by the Official Trustee”, the Official Trustee pay

³ *Commissioner of the Australian Federal Police v Kanjo & Ors* [2018] QDC 112 (Reasons) at [10].

⁴ AB2 at 53.

⁵ Affidavit of Mr Holt, para 19; AB2 at 82.

⁶ Affidavit of Mr Holt, paras 11-16; AB2 at 81-82.

⁷ Affidavit of Mr Holt, para 16; AB2 at 82.

Ms Kanjo an amount of \$404,000 and that the Official Trustee disburse monies paid into accounts in the name of Nicole Lawrence, Ms Kanjo's alias after 14 March 2018.⁸ In short, Ms Kanjo sought a variation to order the Official Trustee to reimburse her in the sum of \$404,000 from the restrained proceeds of the sale of the Etna Street property.

- [14] On 8 June 2018, the primary judge ordered that, "pursuant to s 316 of the POCA", the restraining orders made on 14 March 2018 be varied to include the following two orders:
1. "To avoid doubt", the order did not apply to monies deposited into the accounts listed at schedule 1 (item 3 and 4) after 14 March 2018;
 2. "The property covered by the order is varied under s 39(1)(a) of the [POCA] such that an amount of \$404,000 out of the proceeds restrained and held by the Official Trustee ... no longer be the subject of restraint, and the Official Trustee is directed under s 39(1)(f) of the [POCA] to pay to [Ms Kanjo] that amount".
- [15] On 15 June 2018, formal orders were made in those terms. On 21 June 2018, a stay was granted in respect of that order effective until 13 July 2018, to the extent that it would have released \$350,000 from restraint.⁹ Further orders were made on 9 July 2018 imposing a stay pending determination of this appeal.¹⁰

The primary judge's decision

- [16] While the application did not state that an ancillary order was being sought under s 39, the application was heard on that basis. In opposing the variation of the restraining orders, the Commissioner advanced two arguments: first, that the Court did not, in the circumstances of this case, have power under s 39 of the POCA to make the variation in the terms sought; and second, even if the Court had the power to make the order in the terms sought, the application should be refused as a matter of discretion.
- [17] Her Honour summarised the Commissioner's first argument as follows:¹¹

"The Commissioner's challenge ... is essentially this: s 39 [of the POCA] does not authorise an order requiring restrained property to be used to reimburse expenses voluntarily incurred by the owner of that property, because such an order would be inconsistent with the scheme of the Act

At the heart of the submission by the Commissioner is the proposition that the Act sets up an elaborate statutory scheme with one of its principal objects (as set out in s 5 of the Act), being to deprive persons of the 'proceeds of offences', 'the instruments of offences' and benefits derived from offences against the Commonwealth. The Commissioner contends that to construe s 39 as giving the Court the power to make an order of the type sought by [Ms Kanjo], has the consequence that it sits uncomfortably with the

⁸ AB1 at 16-17.

⁹ AB2 at 61.

¹⁰ AB2 at 62.

¹¹ Reasons at [18]-[20].

fact that the Act provides other provisions, namely sections 24 and 29, under which such applications can and should be made. If an application is made under either of those sections, they provide conditions which must be complied with and they impose restrictions that must be observed.

The Commissioner submits that it would be inconsistent with these features of the Act to treat s 39 as empowering the Court to make orders in disregard of the conditions and restrictions in sections 24 and 29. It is said that this would allow a person to avoid the restrictions imposed by the Act through the simple expedient of applying under s 39 of the Act. It is further submitted that such an outcome could hardly have been intended by Parliament.”

- [18] Her Honour acknowledged,¹² as a well-established principle of statutory construction, that provisions such as s 39 of the POCA could not be used to circumvent the limitations imposed elsewhere in the statute, but rejected the Commissioner’s submissions, on the basis that she was “not satisfied that the power to vary the restraining order ... in the way contended for by [Ms Kanjo] is found in either s 24 or s 29 of the Act”.¹³ Her Honour found that neither s 24 nor s 29 was available to Ms Kanjo in the circumstances of the present case and so neither provision applied or was relevant.
- [19] As to s 24, her Honour noted that s 24(1) of the POCA¹⁴ allowed certain expenses and debts to be paid out of property subject to restraint, subject to a sworn statement of interests in property and liabilities, and the Court being satisfied that the expense or debt could not be met out of property not covered by a restraining order. Her Honour, however, was not satisfied that an amount paid to discharge a mortgage was an expense covered by s 24(1) such that Ms Kanjo could have applied under s 24 for reimbursement of the \$404,000 paid to discharge the Mullins and Keenan mortgage.
- [20] As for s 29 of the POCA and related sections, her Honour held¹⁵ that they were intended to address the situation where an “interest in property was wrongly made the subject of restraint, or should no longer be made the subject of restraint”. In that regard, her Honour observed that, because the restraining order application was made *ex parte*, s 29 enabled a respondent to such an order to put forward material which could have been put forward if the initial proceeding had been *inter partes*. Her Honour referred¹⁶ to *New South Wales Crime Commission v Ollis*¹⁷ as a decision where an equivalent of s 39 of the POCA¹⁸ was considered and held not to be available as an alternative to an application for exclusion orders (under the equivalent of s 29 of the Act). However, her Honour distinguished *Ollis* on the basis that Ms Kanjo was not “bringing an application under s 39 when, in fact, the substance of the orders sought was for exclusion of the type provided for under s 29 of the Act”. In that respect, her Honour observed that the application before the

¹² Reasons at [22].

¹³ Reasons at [21].

¹⁴ Reasons at [27].

¹⁵ Reasons at [29].

¹⁶ Reasons at [30].

¹⁷ [2006] 65 NSWLR 478.

¹⁸ *Criminal Assets Recovery Act 1990* (NSW), s 12.

Court was not an application to determine whether there were reasonable grounds for the suspicion in respect of which the restraining order was made¹⁹ and stated:²⁰

“[Ms Kanjo] is not saying that property that is the subject of the restraining order was honestly acquired property, in the sense that it is not related to proceeds of crime ... and therefore there was no basis for the material before his Honour Judge Smith addressing the reasonable grounds for the suspicion. Rather [her] application is on the basis that in the circumstances here, given that the mortgage has been discharged, she should be able to get back from the Official Trustee the \$404,000 that was paid out in discharge of the Mullins and Keegan mortgage.”

[21] Her Honour concluded²¹ that, given neither s 24 nor s 29 applied on the facts, Ms Kanjo had not avoided conditions and restrictions, nor circumvented limitations found in those provisions in bringing the application under s 39. The application was not one to which either s 24 or s 29 applied, being outside the subject matter covered by the specific grants of power in those provisions. Her Honour held²² that the statutory power in s 39 to make ancillary orders, including orders varying the property restrained, was expressed in broad language and should not be read down.

[22] As to the second issue concerning the discretionary nature of the s 39 powers, her Honour observed that the provision imposed no express limits on the Court’s discretionary powers.²³ Her Honour commented that the Commissioner’s submission that the application should be refused and that the Official Trustee should retain custody and control of the \$404,000, was premised on the proposition that it, along with the sum of \$102,048.04, were related to “proceeds of crime”, the argument being:²⁴

“... the reason that the Etna Street property was part of the restraining order was on the basis that [Ms Kanjo] was reasonably suspected of having engaged in illegal conduct, in providing false income and employment details in her applications for a home loan, which was then used to acquire that property. So, in effect, because there is a reasonable suspicion that the Etna Street property was acquired by illegal and fraudulent means, that the *proceeds of the sale* of the property are also the proceeds of crime.” (emphasis added)

[23] Her Honour considered that the issue then became one as to what “the proceeds of crime” were, and concluded:²⁵

“I am not satisfied that [the proceeds of crime] includes the \$404,000. The plan was that the Mullins and Keegan mortgage would be satisfied out of the proceeds of sale from the Etna Street property, but it was in fact satisfied out of unrelated money. There is

¹⁹ Reasons at [29].

²⁰ Reasons at [31].

²¹ Reasons at [32].

²² Reasons at [33] and [35].

²³ Reasons at [37].

²⁴ Reasons at [38].

²⁵ Reasons at [39]-[40].

no evidence before me that those unrelated moneys were unlawfully obtained. So what has occurred here is that the respondents have paid money to discharge the Mullins and Keegan mortgage where there is no suggestion from the evidence that it was unlawfully obtained and it was money from the sale of assets which are not impugned. The consequence of this is that the value in equity of the proceeds of sale have been enhanced by the extent of \$404,000.

So, in essence, of the \$506,048.04, there is \$404,000 which, based on the evidence before me, cannot be characterised as proceeds of crime. If events had unfolded in the way intended by the restraining order, the proceeds of sale that would have been taken into the custody and control of the Official Trustee, would have been the same.”

- [24] In exercising her discretion to make orders under s 39, her Honour held that the fact that neither Ms Kanjo nor FHS approached the Commissioner prior to paying out the Mullins and Keegan mortgage was “not persuasive”. Nor was it relevant that at the time that mortgage was paid, it occurred in a manner different to that anticipated by the terms of the restraining order.²⁶

The relevant provisions of the POCA

Objects and scheme

- [25] The principal objects of the POCA are to deprive persons of the proceeds of offences, the instruments of offences and benefits derived from offences; punishing and deterring persons from breaching Commonwealth laws; preventing the reinvestment of proceeds and instruments in further criminal activities; and giving effect to Australia’s international obligations relating to proceeds of crime.²⁷ To that end, the POCA establishes a scheme to confiscate the proceeds of crime.²⁸ Chapter 2 of the POCA sets out a number of processes relating to confiscation, comprising interlocking parts:

- Pt 2-1 deals with restraining orders;
- Pt 2-2 deals with forfeiture orders;
- Pt 2-3 deals with automatic forfeiture following conviction of a serious offence; and
- Pt 2-4 deals with pecuniary penalty orders.²⁹

Restraining orders

- [26] The existence of a restraining order is a prerequisite for making a forfeiture order with respect to property.³⁰ Only restraining orders under s 18 and s 19 are of present interest.

²⁶ Reasons at [42].

²⁷ See POCA, s 5.

²⁸ POCA, s 6.

²⁹ POCA, s 7. See *Commissioner of the Australian Federal Police v Hart* (2018) 92 ALJR 154 at [56]-[57] and from [273].

³⁰ Except where persons have been convicted of an indictable offence, POCA, s 48.

[27] Section 18, which is concerned with restraining orders against the property of people suspected of committing serious offences, relevantly provides:

“18 Restraining orders—people suspected of committing serious offences

When a restraining order must be made

- (1) A court with *proceeds jurisdiction must order that:
- (a) property must not be disposed of or otherwise dealt with by any person; or
 - (b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;
- if:
- (c) a *proceeds of crime authority applies for the order; and
 - (d) there are reasonable grounds to suspect that a person has committed a *serious offence; and
 - (e) any affidavit requirements in subsection (3) for the application have been met; and
 - (f) the court is satisfied that the *authorised officer who made the affidavit holds the suspicion or suspicions stated in the affidavit on reasonable grounds.

Property that a restraining order may cover

- (2) The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is any one or more of the following:
- (a) all or specified property of the *suspect; ...

...

Restraining order need not be based on commission of a particular offence

- (4) The reasonable grounds referred to in paragraph (1)(d) need not be based on a finding as to the commission of a particular *serious offence.

Risk of property being disposed of etc.

- (5) The court must make a *restraining order even if there is no risk of the property being disposed of or otherwise dealt with.

Later acquisitions of property

- (6) The court may specify that a *restraining order covers property that is acquired by the *suspect after the court makes the order.”

- [28] As summarised in *Commissioner of the Australian Federal Police v Hart*,³¹ s 18 enables a court to make a restraining order where there are reasonable grounds to suspect that a person has committed a serious offence,³² within the six years preceding the application for the restraining order or since the application was made. It is not necessary for the reasonable grounds to be based on a finding as to the commission of a particular serious offence.³³ The restraining order may prohibit specific property from being disposed of, or otherwise dealt with, by any person, or prescribe that the property is only to be disposed of or dealt with in a specified manner or in specified circumstances.³⁴ A restraining order may cover property where the court is satisfied that there are reasonable grounds to suspect that the property is all or specified property of the suspect,³⁵ or specified property of another person (regardless of whether that other person's identity is known) that is subject to the effective control of the suspect or is proceeds of the offence or offences which form the basis of the restraining order. "Effective control" is defined broadly³⁶ to capture aspects of control that might not otherwise be caught. The broad definition of effective control provides that a court may consider property without the Commonwealth Director of Public Prosecutions needing to show that it is in fact under the effective control of the suspect. Property disposed of to another person without sufficient consideration, within six years before or after an application for a restraining order, a forfeiture order or a pecuniary penalty order, is deemed to be under the effective control of the person who disposed of the property.³⁷
- [29] Section 19 of the POCA is in similar terms to s 18, except that it is concerned with restraining property *suspected of being the proceeds of indictable offences*. The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the Court is satisfied that there are reasonable grounds to suspect that that property is "in any case – proceeds of the offence" or "if the offence to which the order relates is a serious offence – an instrument of the offence".³⁸

"Proceeds"

- [30] By s 329(1) of the POCA, property is "proceeds" of an offence, *inter alia*, if "it is wholly or partly derived or realised from the commission of the offence". The circumstances when property becomes, remains and ceases to be proceeds or an instrument is dealt with by s 330 of the POCA, which provides:

³¹ (2018) 92 ALJR 154 at [60]-[63].

³² A "serious offence" is relevantly defined to mean an indictable offence punishable by imprisonment for three or more years involving, among other things, unlawful conduct constituted by or relating to a breach of s 81 of the *Proceeds of Crime Act 1987* (Cth) or Pt 10.2 of the *Criminal Code* (Cth) (money laundering) and unlawful conduct by a person that causes, or is intended to cause, a loss to the Commonwealth or another person of at least \$10,000: para (a)(ii) and (iv) of the definition of "serious offence" in s 338 of the POCA.

³³ POCA, s 18(4).

³⁴ POCA, s 18(1)(a) and (b).

³⁵ POCA, s 18(2)(a) and (b).

³⁶ POCA, s 337.

³⁷ POCA, s 337(4).

³⁸ POCA, s 19 (1)(e)(i) and (ii). Property is an "instrument" of an offence if it is used in or in connection with an offence or was intended to be so used: POCA s 332(a).

- “(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); or
 - ...
 - (f) if the property is otherwise sold or disposed of under this Act; or
 - ...
- (6) Property becomes, remains or ceases to be proceeds of an *unlawful activity, or an instrument of an unlawful activity, if the property becomes, remains or ceases to be proceeds of the offence, or an instrument of the offence, constituted by the act or omission that constitutes the unlawful activity.”

Allowances and exclusions

- [31] The POCA contains procedures for property to be excluded from a restraining order and for a restraining order to be revoked. The two provisions relevant for present purposes and the subject of consideration by the primary judge are s 24 and s 29.

Allowances

- [32] Section 24 of the POCA provides:

“24 Allowance for expenses

- (1) The court may allow any one or more of the following to be met out of property, or a specified part of property, covered by a *restraining order:
 - (a) the reasonable living expenses of the person whose property is restrained;
 - (b) the reasonable living expenses of any of the *dependants of that person;
 - (c) the reasonable business expenses of that person;
 - (d) a specified debt incurred in good faith by that person.
- (2) The court may only make an order under subsection (1) if:
 - (a) the person whose property is restrained has applied for the order; and
 - (b) the person has notified the *responsible authority in writing of the application and the grounds for the application; and
 - (c) the person has disclosed all of his or her *interests in property, and his or her liabilities, in a

statement on oath that has been filed in the court;
and

- (ca) the court is satisfied that the expense or debt does not, or will not, relate to legal costs that the person has incurred, or will incur, in connection with:
 - (i) proceedings under this Act; or
 - (ii) proceedings for an offence against a law of the Commonwealth, a State or a Territory; and
- (d) the court is satisfied that the person cannot meet the expense or debt out of property that is not covered by:
 - (i) a *restraining order; or

...

- (3) Property that is covered by:
 - (a) a *restraining order; or

...;

is taken, for the purposes of paragraph (2)(d), not to be covered by the order if it would not be reasonably practicable for the *Official Trustee to take custody and control of the property.”

- [33] Section 24 of the POCA empowers the Court, on an application by a person whose property is restrained, to allow certain expenses and specified debts incurred in good faith to be met out of that property, provided it is satisfied of preconditions, including that the application is brought with notice to the Commissioner; that the applicant has disclosed in the filed statement all of the applicant’s interests and liabilities in property; that the expense or debt does not relate to legal costs incurred in relation to the proceeding or proceedings for an offence; and that it is not able to be paid out of property not covered by a restraining order.

Exclusions

- [34] An application may be made pursuant to s 30 (before the order is made) or pursuant to s 31 (after the order is made) for the exclusion of a specified interest from a restraining order under s 29 of the POCA, which provides:

“29 Excluding property from certain restraining orders

- (1) The court to which an application for a *restraining order under section 17, 18 or 19 was made must, when the order is made or at a later time, exclude a specified *interest in property from the order if:
 - (a) an application is made under section 30 or 31; and
 - (b) the court is satisfied that the relevant reason under subsection (2) or (3) for excluding the interest from the order exists.

Note: Section 32 may prevent the court from hearing the application until the responsible authority has had a reasonable opportunity to conduct an examination of the applicant.

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

...

- (c) for a restraining order under section 18—the interest is neither:
- (i) in any case—proceeds of unlawful activity; nor
 - (ii) if an offence to which the order relates is a serious offence—an *instrument of any serious offence; or
- (d) for a restraining order under section 19—the interest is neither:
- (i) in any case—proceeds of an *indictable offence, ...; nor
 - (ii) if an offence to which the order relates is a serious offence—an *instrument of any serious offence.

Note: One of the circumstances in which property ceases to be proceeds of an offence or unlawful activity involves acquisition of the property by an innocent third party for sufficient consideration: see paragraph 330(4)(a).

- (3) If the offence, or each offence, to which a *restraining order relates is a *serious offence that is an offence against ... section 53, 59, 136, 137, 139, 140, 141, 142 or 143 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.
- (4) However, the court must not exclude a specified *interest in property from a *restraining order under section 17 or 18 unless it is also satisfied that neither a *pecuniary penalty order nor a *literary proceeds order could be made against:
- (a) the person who has the interest; or
 - (b) if the interest is not held by the *suspect but is under his or her *effective control—the suspect.”

- [35] By virtue of s 32 of the POCA, an application to exclude an interest from a restraining order cannot be heard unless the responsible authority (here the Commissioner) has had a reasonable opportunity to conduct “examinations” in relation to the application. “Examinations” refer to examination orders pursuant to Pt 3.1 entitled “Information Gathering”. By s 180, an examination order made in relation to a restraining order may authorise the examination of a person whose property is restrained, a suspect or a spouse of such a person about the “affairs”³⁹ of those persons. Where a restraining order is revoked, the Court revoking the order may make an examination order under s 180E.
- [36] Failure to comply with an examination order has serious consequences. The POCA makes it an offence to fail to attend an examination;⁴⁰ to refuse or fail to answer a question that the approved examiner asks a person;⁴¹ and to refuse or fail to produce at the examination a document specified in the examination notice POCA.⁴² A person cannot refuse to answer questions on the basis of exposure to a penalty or self-incrimination.⁴³ The information obtained in an examination, moreover, may be admissible against the person in certain proceedings, including applications under s 198 of the POCA.

Ancillary orders

- [37] Division 5 of Pt 2-1, entitled “Further orders”, includes s 38 which permits an order to be made for the Official Trustee to take custody and control of property which is the subject of a restraining order. It also, by s 39, provides for “ancillary orders” as follows:

- “(1) The court that made a *restraining order, or any other court that could have made the restraining order, may make any ancillary orders that the court considers appropriate and, without limiting the generality of this, the court may make any one or more of the following orders:
- (a) an order varying the property covered by the *restraining order ;
 - (b) an order varying a condition to which the restraining order is subject;
 - ...
 - (ca) an order directing the *suspect in relation to the restraining order to give a sworn statement to a specified person, within a specified period, setting out all of his or her *interests in property, and his or her liabilities;
 - (d) an order directing the owner or a previous owner of the property (including, if the owner or previous owner is a body corporate, a specified *director of the body corporate) to give a sworn statement to a specified

³⁹ The term “affairs” is defined in s 338 to include “any activities of the person that are, or may be, relevant to whether or not the person has engaged in unlawful activity of a kind relevant to the making of an order” under the POCA.

⁴⁰ POCA, s 195.

⁴¹ POCA, s 196(1)(b).

⁴² POCA, s 196(1)(c).

⁴³ POCA, s 197(2)(a).

- person, within a specified period, setting out particulars of, or dealings with, the property;
- (da) if the court is satisfied that there are reasonable grounds to suspect that a person (other than the owner or a previous owner) has information relevant to identifying, locating or quantifying the property—an order directing the person to give a sworn statement to a specified person, within a specified period, setting out particulars of, or dealings with, the property;
 - (e) if the *Official Trustee is ordered under section 38 to take custody and control of property:
 - (i) an order regulating the manner in which the Official Trustee may exercise its powers or perform its duties under the restraining order;
 - (ii) an order determining any question relating to the property, including a question relating to the liabilities of the owner or the exercise of powers or the performance of duties of the Official Trustee; or
 - (iii) an order directing any person to do anything necessary or convenient to enable the Official Trustee to take custody and control of the property;
 - (f) an order giving directions about the operation of the restraining order and any one or more of the following:
 - (i) a *forfeiture order that covers the same property as the restraining order;
 - (ii) a *pecuniary penalty order or a *literary proceeds order that relates to the same offence as the restraining order;
 - (g) an order requiring a person whose property is covered by a restraining order, or who has *effective control of property covered by a restraining order, to do anything necessary or convenient to bring the property within the jurisdiction.

Note 1: If there is a pecuniary penalty order that relates to the same offence as a restraining order, the court may also order the Official Trustee to pay an amount equal to the relevant pecuniary penalty out of property covered by the restraining order: see section 282.

Note 2: If there is an unexplained wealth order that relates to a restraining order under section 20A, the court may also order the Official Trustee to pay an amount equal to the unexplained wealth amount out of property covered by the restraining order: see section 282A.

- (2) The court can only make an ancillary order on the application of
 - (a) the *responsible authority; or
 - (b) the owner of the property covered by the order ; or
 - (c) if the *Official Trustee was ordered to take custody and control of the property-the Official Trustee; or
 - (d) any other person who has the leave of the court.

...
- (4) An ancillary order may be made:

- (a) if it is made by the court that made the *restraining order— when making the restraining order; or
 - (b) in any case — at any time after the restraining order is made.
- (5) An order that is ancillary to a *restraining order does not cease to have effect merely because the restraining order, or part of it, ceases to be in force under subsection 45(4) or (5).

...

Note: A restraining order ceases to be in force under those subsections if a confiscation order covering the same property or relating to the same offence is satisfied.”

- [38] An important condition placed on a person seeking an ancillary order is contained in s 39A of the POCA which specifies that a person is not excused from giving a sworn statement under s 39(1)(ca), (d) or (da) on the grounds that to do so would tend to incriminate or expose that person to a penalty.

Notification

- [39] The notification to registration authorities of exclusions from or variations to restraining orders is dealt with by s 35 of POCA which provides:

- “(1) If the *responsible authority for a *restraining order covering particular property has previously applied to a *registration authority under section 34 for the recording in a register of particulars of the order, the responsible authority must notify the registration authority if:
- (a) the property is no longer covered by the order because it is excluded from the order under section 29 or 29A⁴⁴ or because the property covered by the order is varied under section 39; or
 - (b) a condition to which a restraining order is subject is varied under section 39.
- (2) The notice must be given within a reasonable time after the order under section 39 is made.”

Revocation of restraining orders or exclusion of specified property on provision of security

- [40] Division 6 of Pt 2-1 deals with the duration of restraining orders. By s 42 of the POCA, a court is permitted to revoke a restraining order if it is satisfied that there are no grounds on which to make the order at the time of considering the application to revoke the order, or it is otherwise in the interests of justice to do so. In addition, by s 44(1) of the POCA, a court is empowered to revoke a restraining order that covers a suspect’s property or to exclude specified property from such a restraining order on the suspect’s application, made on notice to the responsible authority, and provided the suspect gives security that is satisfactory to the Court to meet any liability that may be imposed on the suspect under the POCA. Likewise, by s 44(2), a court may revoke a restraining order that covers the property of a person who is not a suspect *or exclude specified property from such a restraining order*, on that person’s application, on notice to the responsible authority and provided the person

⁴⁴ Section 29A concerns the exclusion of property from a restraining order made under s 20 of the POCA.

gives an undertaking concerning the person's property that is satisfactory to the Court.

Ground 1 – Was the order authorised by s 39 of the POCA?

The submissions

- [41] The submissions made before this Court largely mirrored those made below. The Commissioner argued that s 39 of the POCA was required to be read in the context of the POCA as a whole⁴⁵ and on the prima facie basis that its provisions “are intended to give effect to harmonious goals”.⁴⁶ In support of that submission, it was argued that the objects of the POCA and its structure, strongly suggested that, despite the general terms of s 39, it could not be used to avoid the restrictions imposed by s 24 and s 29 of the POCA. That construction was supported by s 32 of the POCA. Construing s 39 in that fashion meant that s 24 and s 29 of the POCA ought to be understood as providing exhaustively for the circumstances in which property can be released from restraint and applied for the benefit of a person suspected of having committed offences (the only permitted exception being a consent order under s 316 in respect of a ch 2 proceeding). It followed that the power under s 39(1) was not available to do that which s 24 and s 29 specifically provide for. Such a construction would not render s 39(1)(a) superfluous as it would still be available to vary the property covered by a restraining order where the property has been destroyed or misdescribed, or some other development resulted in the restraining order no longer restraining what was intended. Further, her Honour erred in her construction of s 29 which was not confined to a narrow set of circumstances, as her Honour found. In any event, that s 24 or 29 had no direct application did not render them irrelevant to the construction of s 39.
- [42] The respondent argued that it was in the text of the POCA that the limits of s 39 were to be found.⁴⁷ Section 39 did not, by its terms, limit the ambit of the power to “vary” a restraining order to one of variation by addition or alteration of property. Further, the power granted in s 39 should be construed liberally and not subjected to a limitation not appearing in the grant unless there was something to indicate to the contrary,⁴⁸ which was not the case. The breadth of the power was reflected in the fact that, as opposed to s 24(1) of the POCA that relates to expenses and debts of the person whose property is restrained, an application under s 39 may be made by a wider range of applicants.⁴⁹ Support for a broad interpretation was also to be found in s 35 which recognised that the exclusion of property may arise from an order under s 29 or by a variation of a condition under s 39. A broad construction of s 39 was also supported by the *Proceeds of Crime Bill 2002* Explanatory Memorandum (“Explanatory Memorandum”).

⁴⁵ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 at [69] per McHugh, Gummow, Kirby and Hayne JJ.

⁴⁶ *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1 at [78] per Crennan, Kiefel and Bell JJ, at [98] per Gageler J; *Plaintiff S4-2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at [42].

⁴⁷ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 335; *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39] per French CJ, Hayne, Crennan, Bell and Gageler JJ.

⁴⁸ *Mansfield v Director of Public Prosecutions for Western Australia* (2006) 226 CLR 486 at [10] per Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ; Commissioner's Outline of Argument for Stay Application dated 21 June 2018 at [20], to the same effect; AB2 at 58.

⁴⁹ See POCA, s 39(2).

Consideration

Was the application one which came within s 39 or s 29 of the POCA?

- [43] I agree with the Commissioner’s submission that the respondents’ arguments failed to engage with the central contention advanced by the Commissioner based on the policy, text and structure of the POCA. Applying *Project Blue Sky Inc v Australian Broadcasting Authority*⁵⁰ to the approach to construing the ambit of s 39 of the POCA, it is to be borne in mind that the primary object of statutory construction that governs it is that it is to be construed consistently with the language and purpose of all the provisions of the POCA. The internal operation of the POCA is to be construed in a way which best achieves a harmonious result. That is, the POCA must be read as a whole on “the prima facie basis that its provisions are intended to give effect to its goals”.⁵¹ Those “fundamental” principles underpin the *Anthony Hordern* principle of statutory interpretation⁵² that “an enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course”.⁵³
- [44] In relation to the purpose of the POCA, as stated in *Lee v Director of Public Prosecutions (Cth)*,⁵⁴ the POCA “manifests a plain and clear intention to effect the confiscation of property in the circumstances which it prescribes, regardless of the interests of any person in the property”. The taking of the property in the prescribed circumstance is the primary purpose of the legislation and the “interests of a person in property the subject of a valid restraining order are deliberately and expressly at risk of confiscation, absent affirmative steps to exclude property on the application of the interested person”.⁵⁵
- [45] The importance of restraining orders under Pt 2-1 as a critical part of the confiscation scheme under Ch 2 was emphasised by Gordon J in *Hart*,⁵⁶ who observed that such orders restrain the disposal of, or other dealing with, particular property that is, or might be, the subject of future forfeiture in relation to certain offences and is the mechanism that ensures property is not dissipated before it is able to be confiscated. As Gordon J explained with respect to the wide reach of a restraining order made pursuant to s 18 there under consideration:⁵⁷

“The intended reach of s 18 of the POCA is made clear from the outset: if there are reasonable grounds to suspect that a person has committed a serious offence, a court is able to prohibit the disposal of, and other dealing with, all of that suspect’s property (together with property subject to their effective control) irrespective of its connection with the alleged serious offence. The court must make the restraining order even if there is no risk of the property being

⁵⁰ (1998) 194 CLR 355 at [69] per McHugh, Gummow, Kirby and Hayne JJ.

⁵¹ *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1 at [78] per Crennan, Kiefel and Bell JJ, at [98] per Gageler J; *Plaintiff S4-2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at [42].

⁵² *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 per Gavan Duffy CJ and Dixon J.

⁵³ *Plaintiff S4-2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at [43].

⁵⁴ (2009) 75 NSWLR 581 at [20]-[21].

⁵⁵ *Lee v Director of Public Prosecutions (Cth)* (2009) 75 NSWLR 581 at [21].

⁵⁶ (2018) 92 ALJR 154 at [58].

⁵⁷ (2018) 92 ALJR 154 at [64].

disposed of or otherwise dealt with⁵⁸ and the court may specify that the restraining order covers property that is acquired by the suspect after the court makes the order.⁵⁹ After the order is made, it is up to the suspect to establish that the specified property should not be subject to restraint.⁶⁰

- [46] Consistent with the intended reach of the POCA, Gordon J emphasised that while the POCA contained procedures for property to be excluded from restraint and the revocation of restraining orders, “the circumstances are limited and the conditions strict”.⁶¹ The POCA provides for such circumstances in s 24 (allowance for expenses), s 24A (excluding property when expenses are not allowed), s 29 (excluding property from certain restraining orders), s 42 (application to revoke a restraining order) and s 44 (security to revoke a restraining order or exclude specified property). But, even if the prerequisites for exclusion are met, by virtue of s 29(4), no order excluding property from a restraining order can be made unless the Court is satisfied that a pecuniary penalty order could not be made against the person who owns the property or, if the property is not owned by the suspect but is under the suspect’s effective control, against the suspect. As explained by Gordon J, s 29(4) of the POCA is an example of the strict limitations imposed by the POCA.⁶²
- [47] The approach taken by the primary judge in construing s 39 of the POCA failed to have regard to the purpose and language of the POCA as a whole and to ensure the provisions of the POCA operated harmoniously. In particular, her Honour erred in considering that neither s 24 nor s 29 had any relevance to the construction of s 39 and further in misconstruing the ambit of s 29.
- [48] Her Honour’s approach to the construction of s 39 on the basis that s 24 and s 29 of the POCA did not qualify the power in s 39 ran counter to accepted principles of statutory construction. Section 39 was required to be construed having regard to the fact that the POCA expressly provides for constrained avenues by which a suspect may apply for the exclusion of property from a restraining order. As stated in *Anthony Hordern*:⁶³
- “When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power”.
- [49] In addition, the primary judge’s construction of the s 39 power, on the basis that s 24 and s 29 were irrelevant if not directly applicable, has the consequence that a suspected person whose property was restrained could, by first arranging for a debt to be paid from other sources and thereafter applying under the s 39(1) variation power for reimbursement out of the restrained property, circumvent the s 24(1) disclosure preconditions and the onus imposed for exclusion under s 29. As the Commissioner argued, the scheme of the POCA could easily be undermined if a suspect was able, by the simple expedient of first paying the relevant debt from

⁵⁸ POCA, s 18(5). See also s 17(5) of the POCA.

⁵⁹ POCA, s 18(6). See also s 17(6) of the POCA.

⁶⁰ Div 3 of Pt 2-1 of the POCA.

⁶¹ (2018) 92 ALJR 154 at [66].

⁶² (2018) 92 ALJR 154 at [66].

⁶³ (1932) 47 CLR 1 at 7.

funds unknown to the Commissioner and as to which the suspect had not been examined, to avoid the conditions provided for in s 24 or s 29 of the POCA for removing property from restraint.

- [50] Section 35 of the POCA relied on by the respondents does not assist in the construction of s 39. It simply recognises that the exclusion of property may arise from an order under s 29 or by a variation of a condition under s 39. It does not shed light on how those provisions are to be construed. The following observations in *Ollis* concerning an analogous ancillary power in s 12(1) of the NSW legislation are, however, instructive:⁶⁴

“Any order empowered by s 12(1) of the Act must be an ‘ancillary’ order, although the kinds of orders which can be made do not suggest a narrow notion of what is ancillary. The same notion is found in s 23(4), with less by way of descriptive example. In *Woodcroft v Director of Public Prosecutions* (2000) 174 ALR 60 at 73 [72], I said of the equivalent s 48(1) of the *Proceeds of Crime Act 1987* (Cth) that an ancillary order ‘must be ancillary to something, here to the restraining order, in that it is incidental or supplemental to it’, but that there was no point in attempting an exhaustive description of the situations in which an ancillary order varying the property the subject of a restraining order may be made. There is no point in the present case.”

- [51] As was the case in *Ollis*, it is not necessary for the purposes of the present case to delimitate the parameters of the power under s 39 of the POCA. The ambit of s 39 is constrained by its being an *ancillary* power; that is, ancillary to the power to make a restraining order. Clearly, a variation of a restraining order so as to “include” property is ancillary to a restraining order. That obvious example is given in the explanatory notes but does assist in terms of delimitating the ambit of the power.
- [52] While the power in s 39 of the POCA may, in an appropriate case, extend to an order excluding property from restraint, the ancillary nature of the s 39 power requires close regard to be given to its hierarchy in the provisions of the POCA. Suffice it to say that the s 39 power, being ancillary to the power to make a restraining order, cannot be used so as to circumvent the limited and conditional avenues for exclusion expressly prescribed for in s 24 and s 29. Adopting the reasoning in *Ollis*, there is clearly ample work for s 39 to do, short of providing an alternative avenue for a suspect applicant to apply for an exclusion order under s 24 and s 29.
- [53] Her Honour’s erroneous approach to the construction of s 39 was influenced by her Honour mistakenly holding that s 29 of the POCA was “intended to address situations of misdescription or property wrongly made the subject of restraint, or where the property should no longer be the subject of restraint” mirrored language used by Mason P in *Ollis*. However, Mason P used such language not in respect of the power to make an exclusion order but to explain that an ancillary power to vary a restraining order (under s 12(1) of the *Criminal Assets Recovery Act 1990* (NSW) analogous to s 39 of the POCA) had work to do short of providing an alternative avenue for an exclusion order.⁶⁵

⁶⁴ (2006) 65 NSWLR 478 at [28]-[29].

⁶⁵ *New South Wales Crime Commission v Ollis* (2006) 65 NSWLR 478 at [30].

- [54] The primary judge erred in finding that, on the facts of this case, the application brought by Ms Kanjo did not circumvent s 29 of the POCA. Had Ms Kanjo sought an exclusion order before the mortgage debts were paid, she would have been liable to examination as to other property owned by her and FHS, including the businesses that were sold to fund the payment of the mortgages. Further, as mentioned, as an applicant for exclusion, Ms Kanjo would have borne the onus of satisfying the specified preconditions for an exclusion order imposed by virtue of s 317 of the POCA. As explained in *Lee*,⁶⁶ s 317 of the POCA has the effect that:
- (a) In the case of restraining orders made under s 18, the person seeking exclusion must demonstrate, as required by s 29(2)(c), that the interest is neither the proceeds of unlawful activity nor an instrument of any serious offence.
 - (b) In the case of a restraining order under s 19, the person must demonstrate, as required by s 29(2)(d), that the interest is neither proceeds of an indictable offence nor an instrument of any serious offence.
- [55] By putting forward the application as one for variation on the basis that Ms Kanjo should be able “to get back” that which had been paid to discharge the mortgage debts, Ms Kanjo skirted the onus an application for exclusion under s 29 would have required her to meet (and which the material before the Court was not capable of satisfying).
- [56] The application sought an exclusion order in favour of the applicant suspect that ought to have been brought pursuant to s 29 of the POCA. Making an exclusion order by way of a variation in the circumstances of this case, had the result that it permitted the impediments that would have confronted Ms Kanjo, had a s 29 application been brought prior to the payment of the Mullins and Keegan mortgage, to be circumvented. While the notion of an ancillary power in s 39 may not be as narrow as the Commissioner argued, it clearly does not operate to provide an alternative to an application by a suspect for exclusion under s 29. That, in fact, was the effect of the order made by the primary judge and was beyond the scope of s 39.

Error in the characterisation of “the proceeds of crime”

- [57] I also agree with the Commissioner’s argument that the primary judge acted on a wrong principle in concluding that the \$404,000 of the sale proceeds of the Etna Street property could not be characterised as “the proceeds of crime”. The primary judge’s observation that the \$404,000 mortgage debt was paid from “unrelated funds” which were not proven to have been derived from unlawful activity is beside the point. The issue was not the source of those unrelated funds which were not subject to restraint.
- [58] The restraining orders over the Etna Street Property only provided an exclusion to protect the interests of Mullins and Keegan, a bona fide third party mortgagee. The fact that that interest was discharged by Ms Kanjo by means other than the disbursement of proceeds by the Official Trustee as specified in the 14 March 2018 orders did not mean that Ms Kanjo, a suspect, was entitled to step into the shoes of the mortgagee or to be reimbursed. The restraining orders permitted only specified dealings with the restrained property by third parties and only certain disbursements in respect of

⁶⁶ (2009) 75 NSWLR 581 at [197].

those third party interests. The 14 March order permitted dealing with property by a third party and distribution of proceeds to a third party. That recognised that each third party may separately have applied for exclusion of its interest in the property. The primary judge's observations that the variation order would mean that the proceeds retained by the Official Trustee would be the same as if events had unfolded as envisaged by the order overlooks the different nature of the interests involved in each scenario.

- [59] Further, as the Commissioner argued, the primary judge overlooked that, by virtue of s 330(1)(a) of the POCA, the proceeds of the sale of the Etna Street property that related to value of the encumbrance remained "proceeds of an offence" because the property was wholly or partly derived or realised from a disposal or other dealing with proceeds of the offence. Further, by s 330(3), property remained proceeds of an offence or an instrument of an offence even if credited to an account. As for the argument that none of the funds from the sale of the Etna Street property could be proceeds of the offences because the Etna Street property was sold or disposed of under s 330(4)(a) or s 330(4)(f) of the POCA, as the Commissioner submitted, that argument ignores the fact that the sale proceeds were a form of property and were derived from the Etna Street property before it was released from restraint. Finally, s 18(6) of the POCA does not assist the respondents as the sale of the property did not result in the "suspect" acquiring anything and the 14 March 2018 orders provided for the sale proceeds to be held on trust and restrained.

Conclusion

- [60] Ms Kanjo brought what was, in truth, an application for an exclusion order which could only have been brought under s 29. To exercise the s 39 discretion in favour of the suspect applicant in this case would have the effect of permitting the limitations imposed by s 29 of the POCA to be circumvented at the choosing of the suspect applicant without notice to the Commissioner and without explanation.

Orders

- [61] The orders I would propose are:
1. That the appeal be allowed.
 2. That paras 2 and 3 of the orders made on 15 June 2018 be set aside.
 3. That the application filed on 29 May 2018 be refused.
 4. That the respondents pay the costs of the appeal and of the application filed on 29 May 2018.
- [62] **McMURDO JA:** In March 2018, the Commissioner successfully applied to the District Court for restraining orders under the *Proceeds of Crime Act 2002* (Cth) (the "POCA"). The property which was restrained included real property located at Etna Street, Surfers Paradise, which was owned by the first respondent to this appeal, Ms Kanjo, under an alias.
- [63] The Etna Street property was then subject to an uncompleted contract of sale with an arm's length buyer. The orders made by Smith DCJA exempted the completion of that sale from the restraint which otherwise applied to any dealing with the property. It was ordered that completion of the contract could be effected, subject

to certain conditions prescribed by the order, as to the application of the proceeds of sale. The proceeds were to be paid first towards the costs and expenses of the sale and next in discharge of moneys secured by two registered mortgages over the property, with the balance to be then paid to the Official Trustee. Importantly for this appeal, the moneys were to be held by the Official Trustee “on trust and restrained pursuant to sections 18 and 19 of the [POCA] until further order of the court”.

[64] The first registered mortgage was in favour of Suncorp-Metway Ltd (the Suncorp mortgage). The second mortgage was in favour of Mr BP Mullins and Ms DR Keegan (the Mullins mortgage).

[65] The orders were sought, and expressly granted, under the Court’s powers in ss 18 and 19 of the POCA. In the terms of s 18(1)(d), the Court was satisfied that there were reasonable grounds to suspect that the first respondent had committed a serious offence (as defined). In the terms of s 19(1)(d), the Court was satisfied that there were reasonable grounds to suspect that the Etna Street property was the proceeds of an indictable offence or the instrument of a serious offence.

[66] The sale of the Etna Street property was settled on 3 May 2018. The cost and expenses of sale were paid from the proceeds, as was the secured debt owing under the Suncorp mortgage. However by this time, the Mullins mortgage had been discharged, by the secured debt being paid from the sale of businesses owned by the second respondent to this appeal. Dealings with some of its property were restrained by the orders of Smith DCJA, but these businesses were not included. There was no irregularity in the application of its funds, from the sale of those businesses, to pay out the Mullins mortgage. The second respondent was a guarantor of that debt.

[67] After the Suncorp mortgage was paid out, there remained an amount of \$506,048.04, which was paid to the Official Trustee, to be held under the terms of the order made by Smith DCJA. Had the Mullins mortgage not been discharged earlier, an amount of \$404,000 would have been paid from the proceeds of the sale of the Etna Street property to do so.

[68] The practical consequence of the earlier payout of the Mullins mortgage was that the value of the property which was restrained, specifically the funds held by the Official Trustee, was about five times that which would have been the case had events transpired as the restraining orders had anticipated. This prompted Ms Kanjo to apply to the District Court for an order that an amount of \$404,000 be paid to her by the Official Trustee. Her application was successful and it is against that judgment that the Commissioner appeals.

[69] The order under appeal is as follows:

“The property covered by the order is varied under section 39(1)(a) of the [POCA] such that an amount of \$404,000 out of the proceeds restrained and held by the Official Trustee under paragraph 9(b)(iii) of the order is no longer the subject of the restraint, and the Official Trustee is directed under s 39(1)(f) of the [POCA] to pay to the first respondent that amount.”

[70] Section 39 of the POCA relevantly provides as follows:

“Ancillary orders

- (1) The court that made a restraining order, or any other court that could have made the restraining order, may make any ancillary orders that the court considers appropriate and, without limiting the generality of this, the court may make any one or more of the following orders:
 - (a) an order varying the property covered by the restraining order;
 - ...
 - (4) An ancillary order may be made:
 - (a) if it is made by the court that made the restraining order—when making the restraining order; or
 - (b) in any case—at any time after the restraining order is made.”

[71] Section 39 confers no specific power to affect the operation of a restraining order by excluding from its scope any property or interest in property. It is s 29 of the POCA which confers that specific power.

[72] Section 29(1) provides that the court to which an application for a restraining order under ss 17, 18 or 19 was made must, when the order is made or at a later time, exclude a specified interest in property from the order if an application is made for that exclusion under ss 30 or 31, and the court is satisfied that there are reasons for doing so of the kind prescribed by ss 29(2) or 29(3). In particular, there must be no exclusion from the scope of a restraining order, which was made under s 18, unless the interest in property to be excluded is neither the proceeds of unlawful activity nor an instrument of any serious offence.⁶⁷ Even then, a court is not to exclude an interest in property from such a restraining order unless it is satisfied that a pecuniary penalty order could not be made against the person who has that interest or the suspect,⁶⁸ under whose control the interest is held.⁶⁹ Similarly, there must be no exclusion from a restraining order, which was made under s 19, unless the interest is (relevantly here) neither the proceeds of an indictable offence nor the instrument of a serious offence.⁷⁰

[73] In the present case, Ms Kanjo did not seek to demonstrate that there were any of the reasons for excluding a specified interest in property from the restraining order, as prescribed by s 29. Nor did she seek to establish that she was not a person against whom a pecuniary penalty order could be made. If this was an application to exclude property from a restraining order, the necessary conditions for the exercise of the power under s 29 were not satisfied.

[74] An order excluding property from a restraining order necessarily involves the variation of that restraining order. Consequently, there is an apparent tension between the terms of s 29, which confers a specific power to vary a restraining order in a certain way but only upon satisfaction of certain conditions, and s 39, which

⁶⁷ s 29(2)(c) of the POCA.

⁶⁸ As defined in s 338 of the POCA.

⁶⁹ s 29(4) of the POCA.

⁷⁰ ss 19(1)(d) and 29(2)(d) of the POCA.

confers a power in more general terms and without the same constraints. That tension is resolved by the application of the principle of statutory construction often said to derive from *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia*, where Gavan Duffy CJ and Dixon J said:⁷¹

“When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.”

[75] Similarly, in *Leon Fink Holdings Pty Ltd v Australian Film Commission*, Mason J said:⁷²

“It is accepted that when a statute confers both a general power, not subject to limitations and qualifications, and a special power, subject to limitations and qualifications, the general power cannot be exercised to that which is the subject of the special power.”

[76] The principle was described by Gummow and Hayne JJ in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* as follows:⁷³

“*Anthony Hordern* and the subsequent authorities have employed different terms to identify the relevant general principle of construction. These have included whether the two powers are the “same power”, or are with respect to the same subject matter, or whether the general power encroaches upon the subject matter exhaustively governed by the special power. However, what the cases reveal is that it must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power. In all the cases considered above, the ambit of the restricted power was ostensibly wholly within the ambit of a power which itself was not expressly subject to restrictions.”

[77] Therefore, the power to vary a restraining order, which is conferred by s 39, is not exercisable where the court is asked to exclude a specified interest in property from a restraining order. The court’s power to exclude an interest in property is that which is exercisable, if at all, by the power conferred in s 29.

[78] The reasoning of the judge who made the order in question (Rosengren DCJ) was not inconsistent with that interpretation. Rather, her Honour’s reasoning was that this was not a case for the exclusion of an interest in property from a restraining order, in the terms of s 29(1). If so, then as her Honour reasoned, the *Anthony Hordern* principle did not affect the operation of s 39, which confers a power in general terms and not subject to the qualifications which are prescribed for the exercise of the power under s 29. Exercising that broader discretion under s 39, her Honour said:⁷⁴

“[39] The issue becomes what are the proceeds of crime. I am not satisfied that it includes the \$404,000. The plan was that the

⁷¹ (1932) 47 CLR 1 at 7; [1932] HCA 9.

⁷² (1979) 141 CLR 672 at 678; [1979] HCA 26.

⁷³ (2006) 228 CLR 566 at 589 [59]; [2006] HCA 50 at [59]. Footnotes omitted.

⁷⁴ *Commissioner of the Australian Federal Police v Kanjo & Ors* [2018] QDC 112.

Mullins and Keegan mortgage would be satisfied out of the proceeds of sale from the Etna Street property, but it was in fact satisfied out of unrelated money. There is no evidence before me that those unrelated moneys were unlawfully obtained. So what has occurred here is that the respondents have paid money to discharge the Mullins and Keegan mortgage where there is no suggestion from the evidence that it was unlawfully obtained and it was money from the sale of assets which are not impugned. The consequence of this is that the value in equity of the proceeds of sale have been enhanced by the extent of \$404,000.

[40] So, in essence, of the \$506,048.04, there is \$404,000 which, based on the evidence before me, cannot be characterised as proceeds of crime. If events had unfolded in the way intended by the restraining order, the proceeds of sale that would have been taken into the custody and control of the Official Trustee, would have been the same.

[41] Accordingly, I propose to exercise my discretion to grant the application to vary the order under s 39.”

[79] Where I respectfully disagree with her Honour is in her conclusion that this did not involve the exclusion of a specified interest in property from a restraining order, in the terms of s 29(1). On this point, the essence of her Honour’s reasoning was as follows:⁷⁵

“[29] Section 29 and these related sections are intended to address the situation where there is an interest in property wrongly made the subject of restraint, or where the property should no longer be the subject of the restraint. Because the restraining order application is made ex parte, s 29 enables a respondent to such an order to put forward material which could have been put forward if the initial proceeding had been inter parties. This is not an application in which the Court is being asked to determine on the same material that was before his Honour Judge Smith on the 18th of March 2018 or, indeed, even on additional material, whether there are reasonable grounds for the suspicion.

[30] During the course of the submissions, I was referred to by the Commissioner, the decision of New South Wales Crime Commission v Ollis [2006] 65 NSWLR 478. In that case, the majority of the Court of Appeal held that the equivalent of s 39 of the [POCA], being s 12 of the *Criminal Assets Recovery Act* 1990 (NSW), could not be used as an alternative to an application for exclusion orders and in relation to the equivalent of s 29 of the [POCA]. However, I am not satisfied that the first respondent is bringing the application under s 39 when, in fact, the substance of the orders sought is one for exclusion of the type provided for under s 29 of the [POCA].

⁷⁵

Ibid.

- [31] The first respondent is not saying that property that is the subject of the restraining order was honestly acquired property, in the sense that it is not related to proceeds of crime, if I can refer to that generically, and therefore there was no basis for the material before his Honour Judge Smith addressing the reasonable grounds for the suspicion. Rather the first respondent's application is on the basis that in the circumstances here, given that the mortgage has been discharged, she should be able to get back from the Official Trustee the \$404,000 that was paid out in discharge of the Mullins and Keegan mortgage."
- [80] At the beginning of that passage, her Honour described the purpose of s 29, as being to address a case where an interest in property was wrongly made the subject of restraint, or where it should no longer be the subject of the restraint. I would not disagree with that statement, although, in every case, it will be for the court to apply the exact terms of s 29. Where I disagree is on the question of whether this money, when the application was made to her Honour, was property which was the subject of the restraint.
- [81] The amount of \$404,000 which was paid from the proceeds of sale of the second respondent's businesses, to discharge the Mullins mortgage, was not property which was the subject of the restraint. But that money was not held by the Official Trustee: it had been paid to Mr Mullins and Ms Keegan.
- [82] The financial consequence of that payment was to increase the value of Ms Kanjo's interest in the Etna Street property and, in turn, the amount of the proceeds of sale which was to be paid to and held by the Official Trustee. But it is another thing to say that the Official Trustee was holding property which was not restrained by the orders of Smith DCJA. The whole of the money paid to the Official Trustee, from the sale of the Etna Street property, was subject to the restraint imposed by those orders. All of it was "to be held on trust and restrained pursuant to sections 18 and 19 of the [POCA] until further order ..."
- [83] Consequently, what was sought by Ms Kanjo was an order which excluded \$404,000 from the operation of that order, an order of a kind within the terms of s 29(1). It was because this was property which was the subject of the restraint that any order had to be sought by Ms Kanjo if she was to have the funds.
- [84] The power to make the order which was made in this case existed only, if at all, under s 29. Because there was no attempt to establish the necessary reasons for an order under s 29, there was no power in this case to make the order which was made.
- [85] For completeness, I should mention that her Honour also discussed s 24 of the POCA, by which the court may allow certain expenses to be met out of property covered by a restraining order. Ultimately however, neither side suggested, and her Honour did not consider, that the power under s 24 could have been exercised in the present case.

- [86] The appeal should be allowed and paragraphs 2 and 3 of the orders made on 15 June 2018 should be set aside.⁷⁶ The application filed on 29 May 2018 should be refused. The respondents should be ordered to pay the costs of the appeal and of the application filed on 29 May 2018.

⁷⁶ There was no appeal against the orders in paragraphs 1 and 4 of those orders.