SUPREME COURT OF QUEENSLAND

CITATION:	*Commissioner of The Australian Federal Police v Nguyen & Anor* [2015] QSC 246
PARTIES:	**COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE** (applicant) **v** **MAU VAN LONG NGUYEN** (first respondent) **MAU DUNG NGUYEN** (second respondent)
FILE NO:	SC No 2518 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 August 2015
DELIVERED AT:	Brisbane
HEARING DATE:	25 May 2015
JUDGE:	Philip McMurdo J
ORDER:	**The application filed by the respondents on 20 May 2015 be refused.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – CONFISCATION OF PROCEEDS OF CRIME AND RELATED MATTERS – RESTRAINING OR FREEZING ORDER – OTHER MATTERS – where the respondents argued that a restraining order made pursuant to s 19 of the *Proceeds of Crime Act* 2002 (Cth) related to the two of them as suspects and was therefore made in terms precluded by s 22(1) of that Act which provided that a restraining order must only relate to one suspect PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIIVL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the respondents applied for an order that the originating process be set aside under r 16(e) of the *UCPR* – where the respondents argued that a restraining order sought and made pursuant to s 19 of the *Proceeds of Crime Act* 2002 (Cth) related to the two of them as suspects and was therefore made in terms precluded by s 22(1) of that Act which provided that a restraining order must only relate to one suspect – whether the entire proceeding must

be set aside because the originating process sought a restraining order in terms precluded by s 22 – where the application was refused – s 22(1) qualifies a court's power to make a restraining order but does not require a court to dismiss a proceeding commenced by filing an originating process which claims relief inconsistently with s 22 – where the restraining order was sought and made without the identification of any suspect and thus not made inconsistently with s 22

Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth), s 142
Criminal Code Act 1995 (Cth), s 400.9
Proceeds of Crime Act 2002 (Cth), s 22(1), s 17, s 19, s 329, s 335(2)
Uniform Civil Procedure Rules 1999 (Qld), s 16(e)

Berowra Holdings Pty Ltd v Gordon (2006) 225 CLR 364, cited
Cameron v Cole (1944) 68 CLR 571, cited
Nguyen & Anor v Commissioner of the Australian Federal Police [2014] QCA 293, cited
Re Macks; ex parte Saint (2000) 204 CLR 158, cited

COUNSEL:	A S McDougall for the applicant B J Peters for the first and second respondents
SOLICITORS:	Australian Federal Police Legal for the applicant Brisbane Criminal Lawyers for the first and second respondents

[1] This proceeding was commenced in the Supreme Court of New South Wales in December 2012. The summons sought restraining orders pursuant to s 19 of the *Proceeds of Crime Act* 2002 (Cth) ("*POCA*"), ancillary orders for the property to be placed under the custody and control of the Official Trustee in Bankruptcy and orders for the forfeiture of property under s 49 of the *POCA*. The property consisted of the credit balances in four Australian bank accounts: three in the name of the first respondent and the fourth in the name of the second respondent.

[2] On the filing of the summons, the Commissioner made an *ex parte* application under s 19 and McCallum J made a restraining order as follows:

> "Pursuant to section 19 of the *Proceeds of Crime Act* 2002 (Cth) (the Act) the property identified in Schedule 1 must not be disposed of or dealt with by any person, except in the manner and circumstances specified in these orders.
>
> Pursuant to section 38 of the Act, the Official Trustee in Bankruptcy (Official Trustee) is to take custody and control of the property identified in Schedule 1."

Schedule 1 identified the property as the funds standing to the credit of the four bank accounts.

[3] McCallum J adjourned the balance of the hearing of the summons to 27 February 2013. On that day, the defendants, by their solicitor, applied to have the proceeding transferred to this court under s 5(2)(b)(iii) of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (NSW). No challenge was then made to the restraining order. Over the objection of the Commissioner, McCallum J ordered that the proceeding be transferred to this court. In this court, the case has been the subject of several applications and orders, including an unsuccessful appeal by the present respondents against orders under s 180(1) of *POCA* for the examination of them and other persons.[1]

[4] The present application is by the respondents for an order that the originating process be set aside, under *Uniform Civil Procedure Rules* r 16(e). The application is based upon an argument that by this proceeding, a restraining order was sought and made in terms which were precluded by s 22(1) of *POCA* which provides:

> "(1) A restraining order must only relate to one suspect."

The respondents argue that the restraining order related to the two of them as suspects. As the order which was made was that which had been sought by the originating process, it is argued that the originating process and thereby the entire proceeding must be set aside.

[5] In my conclusion that argument should be rejected for two reasons. The first is that s 22(1) provides a limitation on the power of a court to make a restraining order. It does not require a court to dismiss a proceeding commenced by the filing of a document which claims (amongst other orders) a restraining order in terms which would be precluded by s 22. The second is that this restraining order was not made inconsistently with s 22.

[6] Sections 17 through 20A of *POCA* provide that in various circumstances, a relevant court must make a restraining order. In some sections, the circumstances are defined by reference to a person suspected of committing an offence: s 18, 20 and s 28A. But the present order was made under s 19 which relevantly provides as follows:

> "**19 Restraining orders – property suspected of being proceeds of indictable offences etc.**
>
> *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

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1 *Nguyen & Anor v Commissioner of the Australian Federal Police* [2014] QCA 293.

(d) there are reasonable grounds to suspect that the property is:

(i) the proceeds of a terrorism offence or any other indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concern (whether or not the identity of the person who committed the offence is known); or

(ii) an instrument of a serious offence; and

(e) the application for the order is supported by an affidavit of an authorised officer stating that the authorised officer suspects that:

(i) in any case – the property is proceeds of the offence; or

(ii) if the offence to which the order relates is a serious offence – the property is an instrument of the offence;

and including the grounds on which the authorised officer holds the suspicion; and

(f) the court is satisfied that the authorised officer who made the affidavit holds the suspicion 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:

(a) in any case – proceeds of the offence; or

(b) if the offence to which the order relates is a serious offence – an instrument of the offence.

...

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 offence.

…"

[7] Section 22 provides as follows:

"**22 Restraining orders must only relate to one suspect**

(1) A restraining order must only relate to one suspect.

Note: A restraining order might not relate to any suspect if the person who is suspected of committing the offence is not known and the restraining order only restrains proceeds of the offence. The restraining order may also cover the property of one or more other persons who are not the suspect.

(2) A restraining order may relate to more than one offence in relation to that suspect."

[8] Section 22 restricts the jurisdiction of a court to make a restraining order. If a restraining order is made inconsistently with s 22 by a superior court record of general jurisdiction, the order is nevertheless effective until quashed or set aside on appeal.[2] Such an order would be susceptible to revocation under s 42 of *POCA* which provides that the restraining order may be revoked if the court is satisfied that there were no grounds for the making of the order or that it is otherwise in the interests of justice to do so.[3] An application for revocation of a restraining order must be made within 28 days of the notification of the order or within such further period, not exceeding three months, as the court allows by an application within that period of 28 days.[4] Whether s 42 excludes a court's power to set aside an order made *ex parte* need not be considered here. Section 22 does not expressly provide that an order which is made inconsistently with s 22(1) will be of no effect. Nor is there a basis for implying that consequence. Section 41, which provides that a restraining order is in force from the time at which it is made, together with the power of revocation within s 42, strongly indicate otherwise.

[9] The express power under s 42 to remedy a non-compliance with s 22 is relevant to whether, by necessary implication, an originating process which claimed relief inconsistently with s 22 must be considered to invalidate the entire proceeding.

[10] Section 22 does not refer to the validity of a proceeding. It qualifies a court's power to make a restraining order. Again there is no basis for an implication that where a proceeding is commenced by a document which seeks relief which the court, whether by reason of s 22 or otherwise, cannot grant, the proceeding itself is incurably defective. In particular, there is no indication within s 22 or otherwise that a court's procedural power to cure an irregularity expressed originating process by an amendment, has been removed in this context.

[11] Therefore, if this restraining order was made inconsistently with s 22, there is no basis for setting aside the originating process. The irregularity in seeking such an order is the originating process would be curable by an amendment. No argument was developed for the present respondents as to why the defect in this summons, as they contend existed, could not be cured by an amendment without any relevant prejudice to them.

[12] Secondly, in this case no restraining order was sought or made inconsistently with s 22. This was an order which was sought and made without the identification of any suspect, as s 19 permitted. It was not an order relating to more than one suspect.

[13] It was a case of the kind referred to in the first sentence of the note to s 22(1). That note could be used as an aid to the interpretation of s 22(1) in a way described in s 15AB of the *Acts Interpretation Act* 1901 (Cth). However, recourse to the note is unnecessary, because the submissions for the respondents accept that there may be a restraining order

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2 *Cameron v Cole* (1944) 68 CLR 571, 590-591 (Rich J), 598-599 (McTiernan J), 607 (Williams J); *Re Macks; ex parte Saint* (2000) 204 CLR 158, 184 [49] (Gaudron J), 235-236 [216] (Gummow J), 249 [257] (Kirby J), 274-275 [328] (Hayne and Callinan JJ); *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364, 370 [11] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

3 s 42(5).

4 s 42(1A).

under s 19 without the identification of a suspect. Their argument is that they were identified as suspects and that the restraining order related to the two of them.

[14] The evidence upon which the restraining order was sought was an affidavit by Mr Rositano, an "authorised officer" within the meaning of paragraph (a) of the definition of that term in s 338 of *POCA*. He identified the four bank accounts and stated that he suspected that the funds standing to the credit of these four accounts was property within the meaning of s 19, being "the proceeds of an indictable offence and/or an instrument of a serious offence or offences". The offence or offences were identified as contraventions of s 142 of the *Anti-Money Laundering and Counter-Terrorism Financing Act* 2006 (Cth) ("*AML Act*") and s 400.9(1) of the *Criminal Code Act* 1995 (Cth) ("the Code").

[15] Section 142 of the *AML Act* relevantly provides:

> "**Conducting transactions so as to avoid reporting requirements relating to threshold transactions**
>
> (1) A person (the *first person*) commits an offence if:
>
> (a) the first person is, or causes another person to become, a party to 2 or more non-reportable transactions; and
>
> (b) having regard to:
>
> (i) the manner and form in which the transactions were conducted, including the matters to which subsection (3) applies; and
>
> (ii) any explanation made by the first person as to the manner or form in which the transactions were conducted;
>
> it would be reasonable to conclude that the first person conducted, or caused the transactions to be conducted, in that manner or form for the sole or dominant purpose of ensuring, or attempting to ensure, that the money or property involved in the transactions was transferred in a manner and form that would not give rise to a threshold transaction that would have been required to have been reported under section 43.
>
> …
>
> (3) This subsection applies to the following matters:
>
> (a) the value of the money or property involved in each transaction;
>
> (b) the total value of the transactions;
>
> (c) the period of time over which the transactions took place;
>
> (d) the interval of time between any of the transactions;
>
> (e) the locations at which the transactions took place."

The term "threshold transaction" is defined by s 5 of that Act to mean, in effect, a transfer of money in an amount of not less than $10,000. By s 43 of that Act, a threshold transaction must be reported by a "reporting entity" to the relevant statutory authority.

[16] Mr Rositano's affidavit detailed the large number of cash deposits, each of under $10,000, which was made within relatively short periods to an account in the name of one respondent or the other. For example, over a four month period in 2012, there were some 102 cash deposits totalling $732,250 to an account in the name of the first respondent, many of which were deposits in the amount of $9,000. That account was opened in February 2012. The first respondent was then aged 16 and living in Brisbane. But the deposits were made at branches of the bank in New South Wales and Victoria. The 102 cash deposits were described by him as "structured cash deposits". The amounts deposited to this account were subsequently transferred to another account in the name of the first respondent, for which there was a credit balance at the time of Mr Rositano's affidavit of $861,485.12.

[17] Again according to the affidavit, the second respondent had an account which was opened in February 2012 into which there were 17 "structured cash deposits" of less than $10,000 each, totalling $135,000, which were made at branches in New South Wales and Victoria. The second respondent, who is the father of the first respondent, was recorded as living at the same address in Brisbane. The moneys deposited to this account were later transferred to another account in the name of the second respondent which was opened in July 2012.

[18] The accounts mentioned so far were with the Commonwealth Bank of Australia. But there were other relevant accounts with other banks. An account was opened in the name of the first respondent with ANZ Banking Group Limited in July 2012, into which there were deposited, at different branches in New South Wales and Victoria, some 58 "structured cash deposits" of less than $10,000 each, totalling $398,000. These moneys were later transferred to another account of the first respondent with the same bank.

[19] An account in the name of the first respondent was opened with Westpac Banking Corporation in August 2012, to which there were some 63 "structured cash deposits" totalling $460,750, (again) made at different branches in New South Wales and Victoria.

[20] The affidavit thereby specified four accounts into which there were deposited "structured cash deposits". Mr Rositano expressed his suspicion that these deposits were conducted in a manner and form so as not to give rise to a threshold transaction. He referred to the high number of individual deposits near to but beneath the threshold of $10,000, often occurring on the same day at a number of branches. He stated his suspicion that the structured deposits were made "in this form so as to avoid law enforcement and revenue authority scrutiny" and that the money was deposited in contravention of s 142 of the *AML Act*.

[21] At no point did Mr Rositano's affidavit refer to any person as a suspect for any of those offences. His evidence identified the suspected offences without identifying a suspected offender. The relevant transactions for the purposes of s 142 were the structured cash deposits. There was no express or implied suggestion in this evidence that all or some of these deposits were made or caused to be made by one or other of the respondents.

[22] The funds were suspected by him as being proceeds of an indictable offence, namely a contravention of s 142 of the *AML Act* having regard to the definition of "proceeds of an offence" in s 329 of the *POCA*. They were also suspected as constituting an "instrument" of such an offence having regard to the definition of that term in s 329(2). Section 329 is as follows:

"**329 Meaning of *proceeds* and *instrument***

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

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

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

whether the property is situated within or outside Australia.

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

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

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

whether the property is situated within or outside Australia.

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

(4) *Proceeds* or an *instrument* of an unlawful activity means proceeds or an instrument of the offence constituted by the act or omission that constitutes the unlawful activity."

[23] Mr Rositano expressed his suspicion of contraventions of s 400.9(1) of the Code, which relevantly provides as follows:

"(1) A person commits an offence of:

(a) the person deals with money or other property; and

(b) it is reasonable to suspect that the money or property is proceeds of crime; and

(c) at the time of the dealing, the value of the money and other property is $100,000 or more.

…

(1A) A person commits an offence if:

(a) the person deals with money or other property; and

(b) it is reasonable to suspect that the money or property is proceeds of crime; and

(c) at the time of the dealing, the value of the money and other property is less than $100,000.

…

(2) Without limiting paragraph (1)(b) or (1A)(b), that paragraph is taken to be satisfied if:

…

> (aa) the conduct involves a number of transactions that are structured or arranged to avoid the reporting requirements of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* that would otherwise apply to the transactions.
>
> …
>
> (4) Absolute liability applies to paragraphs (1)(b) and (c) and (1A)(b) and (c).
>
> (5) This section does not apply if the defendant proves that he or she had no reasonable grounds for suspecting that the money or property was derived or realised, directly or indirectly, from some form of unlawful activity."

[24] The conduct which was the subject of Mr Rositano's suspicion again were the transactions structured or arranged to avoid the reporting requirements of the *AML Act*. It is that conduct which he suspected involved contraventions of s 400.9. Again, no suspected offender was identified.

[25] In his affidavit, he explained that the application was to be made ex parte because he was concerned that if notice was given to the respondents, they might take steps to dissipate or conceal assets potentially which were liable for confiscation under the *POCA*. He said that "[i]n particular I suspect the defendants may have direct or indirect access to the funds in the Four Accounts sought to be restrained via the internet". But that was not a statement of his suspicion that they were persons who had committed the suspected offences.

[26] A submission is made for the respondents that the reliance upon s 400.9(1) of the Code placed them in the position of suspects, having regard to s 400.9(4). That submission cannot be accepted. Again, the conduct which was suspected of being an offence under s 400.9 was constituted by the so-called structured cash deposits. Sub-sections 400.9(4) and (5) would affect the burden of proof on the prosecution of a person whose conduct was the making of those deposits. They would not affect the question of the identity of that person.

[27] In summary, the evidence on which the restraining order was made did not identify the respondents as suspects.

[28] The restraining order which was made has been set out above. It did not identify a suspect or suspects.

[29] I was not referred to any reasons given by McCallum J when making the restraining order. However, her Honour's reasons for ordering the transfer of the case to this court are relevant also to the present question. The respondents argue that her Honour must have thought that they were suspects from this passage in the judgment:

> "13. It was common ground that the relevant accounts were opened in Queensland. Contrary to the submissions put on behalf of the Commissioner, I do not have any difficulty accepting that *the opening of the accounts is part of the conduct constituting the offence to which the order would relate*. The Commissioner noted that opening an account is not an element of an offence under s 142 but that is not the

> test. Nothing in the text of the Act suggests that proceeds jurisdiction should be so narrowly construed as to require that one of the elements of the offence occurred in the relevant State before the courts of that State could have proceeds jurisdiction."

(emphasis added)

The respondents argue that this was effectively a statement that they were suspects because as the account holders they must have been involved in the opening of the accounts.

The passage which I have set out was relevant to her Honour's conclusion that this court would have jurisdiction by the operation of s 335(2) of *POCA* which provides as follows:

> "(2) If all or part of the conduct constituting an offence to which the order would relate:
>
> (a) occurred in a particular State or Territory; or
>
> (b) is reasonably suspected of having occurred in that State or Territory;
>
> the courts that have *proceeds jurisdiction* for the order are those with jurisdiction to deal with criminal matters on indictment in that State or Territory."

[30] But other parts of the judgment make it clear that her Honour had not identified the respondents as suspects. In particular, there were these passages:

> "3. … The Commissioner's application arose from the detection by AUSTRAC of numerous deposits of less than $10,000 into four bank accounts held in the names of one or other of the defendants. The structure of the deposits gave rise to a suspicion on the part of an authorised officer within the meaning of the *Proceeds of Crime Act* (Special Member Dominico Rositano) that there may have been committed *by some person unknown* an offence or offences against [the *AML Act*] …
>
> 4. Special Member Rositano swore an affidavit in support of the application deposing to the grounds for his suspicion as to the commission of offences against that section or alternatively against s 400.9(1) of the Criminal Code. The Court evidently being satisfied in the terms of s 19 of the Act, the making of a restraining order in respect of the funds held in the four accounts was mandated by the Act. Significantly for present purposes, the Act has been construed as enabling such an order to be made without identifying any particular offender (see s 19(4) of the Act) *and that was the position in the present case*."

(emphasis added)

Therefore, rather than supporting the respondents' argument that this order was made upon the basis that they were suspects, the reasons for judgment for the order which was made in February 2013 confirm that they had not been so identified.

[31] For these reasons, the restraining order did not relate to a certain suspect or suspects and it cannot be concluded that it was made inconsistently with s 22.

[32] The application filed by the present respondents on 20 May 2015 must be refused.