DISTRICT COURT OF QUEENSLAND

CITATION:	*Commissioner of the Australian Federal Police v Kanjo & others* [2018] QDC 112
PARTIES:	**COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE** (applicant) v **NICOLE ANNE KANJO** (first respondent) and **FAIRGRANGE HEALTH SERVICES** **ACN 162 296 380** (second respondent) and **SAM KANJO** (third respondent)
FILE NO.:	937 of 2018
DIVISION:	Civil
PROCEEDING:	Application
DELIVERED ON:	15 June 2018, *ex tempore*
DELIVERED AT:	Brisbane
HEARING DATE:	8 June 2018
JUDGE:	Rosengren DCJ
ORDER:	**1. Pursuant to s 316 of the *Proceeds of Crime Act* 2002 (Cth) ("the Act"), the order made by the Court on 14 March 2018 ("the Order") be varied by inserting an order in these terms after order 14:** **14A. To avoid doubt, this Order does not apply to monies deposited into the accounts listed at schedule 1 (items 3 and 4) and schedule 2 (items 2-5) after the date that the Order was made.**

2. **The property covered by the order is varied under section 39(1)(a) of the Act 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 that restraint, and the Official Trustee is directed under s 39(1)(f) of the Act to pay to the first respondent that amount.**

3. **The costs of the Application are reserved.**

4. **These Orders be entered forthwith.**

CATCHWORDS: CRIMINAL LAW – PROCEDURE – CONFISCATION OF PROCEEDS OF CRIME AND RELATED MATTERS – RESTRAINING OR FREEZING ORDER – VARIATION GENERALLY - where the first respondent in the proceedings applied pursuant to 39(1)(a) of the *Proceeds of Crime Act* 2002 (Cth) for a variation of an order made pursuant to sections 18 and 19 of that Act – whether the court has the power under s 39 of the *Proceeds of Crime Act* 2002 (Cth) to make the order in the terms sought – whether, if the power is found, the Court should exercise its discretion to make the order

Proceeds of Crime Act 2002 (Cth), ss 19, 24, 28, 29, 31, 38, 39
Plaintiff S4-2014 v Minister for Immigration and Border Protection (2014) 253 CLR 219
Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355
Commonwealth Director of Public Prosecutions v Bowerman [2006] NSWSC 1309
New South Wales Crime Commission v Ollis (2006) NSWLR 478
Mansfield v Director of Public Prosecutions for WA [2006] HCA 38

COUNSEL: A Scott for the applicant
G del Villar for the respondent

SOLICITORS: Jacobson Mahoney Lawyers for the applicant
Australian Federal Police for the respondent

[1] These reasons and decision are read into the record.

[2] The first respondent, Ms Kanjo, was suspected of having engaged in money laundering in breach of the *Criminal Code* 1995 (Cth). She was also suspected of

breaching provisions of the A*nti-Money Laundering and Counter-Terrorism Financing Act* 2006 (Cth), and the *Crimes Act* 1958 (Vic).

[3] The Commissioner of the Australian Federal Police, who I will refer to as the Commissioner, applied ex parte for restraining orders under sections 18 and 19 of the *Proceeds of Crimes Act* 2002 (Cth), which I will refer to as the Act. Those restraining orders were obtained over certain property of Ms Kanjo, together with certain property of the second respondent, Fairgrange Health Services, that was under Ms Kanjo's effective control.

[4] The circumstances leading to the making of those orders are set out in the affidavit of Mr Reynold Smith, which was relied upon by the Commissioner in the ex parte application for the restraining orders. In short, those circumstances involved suspected offences committed by the first respondent, whose birth name is Nicole Julie Lawrence, using various aliases in applications for loans and other financial transactions.

[5] On the 14th of March 2018, his Honour Judge Smith made the restraining orders sought.

[6] One of Ms Kanjo's properties that was restrained was real property located in Etna Street, Surfers Paradise, which I will refer to as the Etna Street property. In relation to this particular property, it was restrained on the basis that the first respondent, Ms Kanjo was reasonably suspected of having provided false income and employment details in her applications for a home loan, which was used to acquire the Etna Street property.

[7] At the time the restraining orders were sought, the Etna Street property was in the process of being sold, and was the subject of two registered mortgages. Paragraph 9(b)(ii) of the restraining orders made by his Honour Judge Smith, provided for the proceeds of sale to be dispersed by the Official Trustee to pay off those mortgages. Paragraph 9(b)(iii) obliged the Official Trustee to take custody and control of the balance of the proceeds of sale, which were to be restrained under sections 18 and 19 of the Act.

[8] One of the registered mortgages referred to in paragraph 9(b)(ii) of the orders, was a mortgage in favour of Brian Mullins and Donna Keegan, which I will refer to as the Mullins and Keegan mortgage. That mortgage required repayment of the principal of $400,000, together with any interest then owing, which was $4000, on the sale of the Etna Street property.

[9] At the time the restraining orders were made on the 18th of March 2018, they provided for the amount due under the Mullins and Keegan mortgage to be paid out of the proceeds of sale, under the Etna Street contract. However, that is not what eventuated.

[10] It was in fact paid out on the 26th of March 2018, which was about five weeks prior to the settlement of the Etna Street property, which occurred on the 3rd of May 2018. It was paid out in the context of the settlement of two contracts of sale of businesses owned by the second respondent, to WH Smith Australia Pty Ltd. In other words, the Mullins and Keegan mortgage was paid out using

different funds than those which had been contemplated in the order. The Commissioner was not informed of this.

[11] The settlement statement in relation to the Etna Street property discloses 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 as provided by the restraining orders, namely out of the proceeds of the sale of the Etna Street property, the amount paid to the Official Trustee would have been $102,048.04.

[12] By an application filed on 29th of May 2018, Ms Kanjo seeks, amongst other things, an order that the restraining orders made by his Honour Judge Smith on the 14th of March 2018, be varied under s 39(1)(a) of the Act, such that an amount of $404,000 out of the proceeds of sale of that property, which is currently held by the Official Trustee under paragraph 9(b)(iii) of the restraining orders, is no longer subject to the restraint and that the Official Trustee be directed under s 39(1)(f) of the Act to pay the first respondent that amount.

[13] I have been provided with a draft order by the respondents. Paragraph 2 of this draft order sets out the order which is sought and which I have just summarised. It is perhaps convenient to say at this stage that there is no dispute between the parties in relation to the other orders in the draft order, being paragraphs 1, 3 and 4. They are orders by consent.

[14] Given that the application is made under s 39 of the Act, it is perhaps a convenient place to start in considering the various legislative provisions. It is titled Ancillary Orders and it is expressed in broad language.

[15] It relevantly authorises this Court, in circumstances where the restraining orders were made in this Court, to make any ancillary orders that the Court considers appropriate. It gives several examples which are not intended to be exhaustive, of the sorts of ancillary orders which may be made. Relevantly to this application, these include:

(a) an order varying the property covered by a restraining order;[1] and

(b) if the Official Trustee has been ordered under s 38 to take custody and control of property, an ancillary order regulating the manner in which the Official Trustee may exercise its powers to perform its duties under the restraining order.[2]

[16] The Commissioner opposes the order sought on two grounds. The first is that the Court does not have the power under s 39 to make the order in the terms sought. The second ground on which the order is opposed by the Commissioner, is that even if the Court does have the power, the application should be refused as a matter of discretion.

[17] Turning first to the issue of whether the Court has the power to make the order under s 39 of the Act.

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[1] Section 39(1)(a) of the Act.
[2] Section 39(1)(e)(ii) of the Act.

[18] The Commissioner's challenge to the orders sought by the first respondent is essentially this: that s 39 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.

[19] 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 the first respondent, has the consequence that it sits uncomfortably with the 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.

[20] 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.

[21] I do not accept the Commissioner's submissions in this regard. In short, this is because I am not satisfied that the power to vary the restraining order made by his Honour Judge Smith on the 18th of March 2018, in the way contended for by the first respondent, is found in either s 24 or s 29 of the Act. I will elaborate on the reasons for this now.

[22] Before turning to the specific provisions, I make the following observations. It is a well-established principle of law and of statutory construction that sections such as s 39 cannot be used to circumvent limitations which are imposed elsewhere in a statute, and here the relevant statute is the Act.

[23] The High Court has made it clear that it is a fundamental principle of statutory construction that an Act must be read as a whole, and 'on the prima facie basis that its provisions are intended to give effect to harmonious goals'. This fundamental principle can be found in the High Court decision of P*roject Blue Sky v Australian Broadcasting Authority* [1998] 194 CLR 355 At 381-382 (McHugh, Gummow, Kirby and Hayne JJ).

[24] Turning to s 24 of the Act, s (1) reads as follows:

> (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 a 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.

[25] So, it provides for the Court to allow certain kinds of reasonable expenses and specified debts incurred in good faith to be met out of property covered by a restraining order. Sections 24(2) and (3) set out certain conditions that need to be satisfied before such an order can be made. One such condition is that the Court needs to be satisfied that the expense or debt will not relate to legal costs that the person has incurred in relation to the proceeding or proceedings for an offence (s24(2)(ca)). Another, is that the Court must be satisfied that the person cannot meet the expense or debt out of property that is not covered by a restraining order (s 24(2)(d)). Further, looking at other sub-sections, under 24(2)(c) an applicant would, amongst other things, be required to disclose all of their interests in property, and their liabilities and a statement on oath that has to be filed in a Court. An applicant might find themselves subjected to an examination on oath or affirmation in relation to the application.

[26] During the course of submissions, the Commissioner referred to the decision of the *Commonwealth Director of Public Prosecutions v Bowerman* [2006] NSWSC 1309. In this case, Justice Hidden of the New South Wales Supreme Court rejected an argument that s 39 of the Act authorised an order that legal expenses be paid out of restrained property. His Honour instead held that s 24 of the Act provided exhaustively for the provision of such expenses out of restrained property. This is perhaps not surprising, given that the issue of legal expenses is expressly referred to in s 24(2)(ca).

[27] I consider the facts here to be clearly distinguishable. I am not satisfied that an amount paid to discharge a mortgage is an expense covered within any of the sub-sections within s 24(1). There is clearly a difference between seeking to recover an amount paid to discharge a mortgage on the one hand and allowing for the sorts of expenses referred to in s 24 to be paid out of the property the subject of the restraining orders, which orders have often been made without the knowledge of the person whose property is the subject of the order. So, in short, I am not satisfied that the first respondent could have applied for an order under s 24 to the effect that $404,000 of the restrained property be applied to reimburse her for the amount paid to discharge the registered mortgage to Mullins and Keegan.

[28] Turning to s 29, I should start by saying that sections 29 to 32 deal with excluding property from a restraining order. Section 31 allows a person to apply to have a specified interest excluded from a restraining order. Under s 29, before making such an order, the Court needs to be satisfied that relevant reasons for exclusion exist. In the case of restraining orders made under s 18, the person seeking exclusion must demonstrate that the interest is neither the proceeds of unlawful activity nor an instrument of any serious offence. In the case of restraining orders under s 19, s 29(2)(d) provides that the person must demonstrate that the interest is neither proceeds of an indictable offence, or an instrument of any serious offence. In addition, under s 32, an application to exclude an interest from a restraining order cannot be heard unless the responsible authority – in this case

the Commissioner – has been given a reasonable opportunity to conduct examinations in relation to the application.

[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 partes. 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 Act, 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 Act. 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 Act.

[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.

[32] Therefore, I do not accept that the first respondent by bringing the application under s 39, has avoided the conditions and restrictions, or circumvented the limitations that are provided for in sections 24 or 29 of the Act. This is because I am not satisfied that either of these sections are applicable to the circumstances in which the first respondents finds herself. When regard is had to the grounds upon which this application is made and the circumstances in which it is made, it is outside the subject matter covered by the specific grants of power in either of those provisions.

[33] Given that I am satisfied in this particular case and the context of the particular application sought, that there is no inconsistency with sections 24 or 29 or, indeed, any other provision in the statutory scheme, I consider that the statutory grant of power in s 39 should not be read down. The language of s 39 is not confined. The power in a Court to make ancillary orders, including an order varying the property covered by the restraining order, is expressed in broad language.

[34] In *Mansfield v the Director of Public Prosecutions for Western Australia* [2006] HCA 38, the plurality adopted the following remarks of Justice Gaudron in

Knight v FP Special Assets Limited [1992] 174 CLR 178, and the remarks are these:

> "It is contrary to long-established principle and wholly inappropriate that the grant of power to a Court (including the conferral of jurisdiction) should be construed as subject to a limitation not appearing in the words of that grant. Save for a qualification which I shall later mention, a grant of power should be construed in accordance with ordinary principles and, thus, the words used should be given their full meaning unless there is something to indicate to the contrary. Powers conferred on a Court are powers which must be exercised judicially and in accordance with legal principle. This consideration leads to the qualification to which I earlier referred. The necessity for the power to be exercised judicially tends in favour of the most liberal construction, for it denies the validity of considerations which might limit a grant of power to some different body, including, for example, that the power might be exercised arbitrarily or capriciously or to work oppression or abuse."

[35] In my opinion, the Court is empowered to make an order of the type that the first respondent is seeking under s 39 of the Act. The section should be at least read to permit such a thing. The language is very wide. Not only is such a reading compatible with the pertinent provisions and scheme of the Act when viewed as a whole, it does not seem to lack utility. Neither by express language, nor by necessary implication do the other provisions of the Act require s 39 to be read to deny the Court the power to make an order of the type sought by the first respondent in paragraph 2 of the draft order.

[36] The mere fact that sections 24 and 29 exist does not qualify the power under s 39. Rather, those sections are applicable if an application relates to an order that is being sought, which is relevant to either of those sections.

[37] Turning to the discretionary powers under s 39, the section does not impose any express limits on the discretionary powers of the Court to make the orders that may be made under the section. Of course they must be exercised judicially and in accordance with legal principle. It is the Commissioner's position that the Official Trustee should retain custody and control of the $404,000, given that it, along with the other $102,048.04, are related to proceeds of crime.

[38] In other words, the reason that the Etna Street property was part of the restraining order was on the basis that the first respondent 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.

[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 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.

[42] I should also say the fact that neither Ms Kanjo, nor the second respondent, approached the Commissioner prior to paying out the Mullins and Keegan mortgage, is not persuasive to alter the exercise of my discretion. Neither is the fact that the applications were not made under sections 24 or 29 of the Act. As I have already explained, I do not consider either of these sections are relevant to this application. I also do not consider it relevant to the exercise of my discretion, the fact that the $404,000 was paid out in discharge of the mortgage in a way and at a time that was different to that which had been anticipated by paragraph 9 of the order.

[43] Accordingly, I grant the application to vary the order in accordance with paragraph 2 of the draft order.