**NOTE: PURSUANT TO CONSENT ORDERS MADE IN THE HIGH COURT ON 24 NOVEMBER 2014, PUBLICATION OF DETAILS OF RESTRAINING AND ANCILLARY ORDERS CONTAINED IN [114]–[121] OF YAN V COMMISSIONER OF POLICE [2015] NZCA 576 PROHIBITED**

**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 3/2016**
**[2016] NZSC 41**

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| BETWEEN | WILLIAM YAN<br>First Applicant |
| | WEI YOU<br>Second Applicant |
| AND | COMMISSIONER OF POLICE<br>Respondent |

**SC 4/2016**

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| BETWEEN | ZHIHONG XU<br>First Applicant |
| | LIJING ZENG<br>Second Applicant |
| AND | COMMISSIONER OF POLICE<br>Respondent |

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| Court: | William Young, Arnold and O'Regan JJ |
| Counsel: | D P H Jones QC and J K Goodall for Applicants in SC 3/2016<br>P F Wicks QC and S J Lance for Applicants in SC 4/2016<br>M D Downs for Respondent |
| Judgment: | 26 April 2016 |

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**JUDGMENT OF THE COURT**

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**The applications for leave to appeal are dismissed.**

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## REASONS

[1] These two applications for leave to appeal relate to s 29 of the Criminal Proceeds (Recovery) Act 2009 (CPRA), which provides that a Court may require the Commissioner of Police to give an undertaking as to damages in relation to an application for a restraining order over assets of an alleged offender.

[2] In this case, the Commissioner obtained on a without notice basis restraining orders in respect of property believed to be under the effective ownership and control of Mr Yan and Ms You, including a bank account in the name of Mr Xu and Ms Zeng. The Commissioner then applied for on notice orders under ss 24 and 25 of the CPRA to extend the period within which the restraining orders are to remain in force. We are told that the hearing of this application is to take place in June this year.

[3] After the without notice order was made, the applicants applied for an order under s 29 of the CPRA requiring the Commissioner to provide undertakings that he would meet any damages or loss that the applicants might suffer as a result of the continuing operation of the restraining orders in relation to some items of restrained property. Lang J refused to make any order under s 29.[1]

[4] The applicants then appealed to the Court of Appeal, which dismissed their appeals.[2]

[5] The applicants wish to argue that the Court of Appeal erred because it did not recognise a presumption that an undertaking should be required when a restraining order relates to dynamic or business assets. They say the Court also erred in principle in a number of other respects, particularly in the matters which it identified as being relevant as to whether an undertaking should be required.[3] They say that the matter is of public or general importance, given the draconian nature of the CPRA, the increase in number and scope of restraining orders sought and obtained by the Commissioner under the CPRA and the need for a safeguard against state

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1 *Commissioner of Police v Yan* [2014] NZHC 2688 (Lang J).

2 *Yan v Commissioner of Police* [2015] NZCA 576 (French, Simon France and Asher JJ). Asher J dissented in relation to the application made on behalf of Mr Xu and Ms Zeng.

3 At [41].

power. Mr Xu and Ms Zeng also wish to argue that Asher J's dissent in the Court of Appeal was correct in relation to their application.

[6] The Commissioner accepts that the interpretation of s 29 may be of public importance, but argues that the present case is not a good vehicle for addressing that issue given that the facts remain unsettled and continue to evolve.

[7] We accept that s 29 may give rise to issues that ought to be addressed by this Court. But we do not see this case as an appropriate case for us to do so. We are told that the Commissioner's on notice application for restraining orders will be heard by the High Court in June. The without notice decision of the High Court can, therefore, be seen as an interlocutory decision for the purposes of s 13(4) Supreme Court Act 2003 or, at least, as being similar in nature to an interlocutory decision.

[8] The on notice application will provide an opportunity for the High Court to consider all issues relating to the restraining orders, including the appropriateness of an undertaking, after full argument and in light of the facts as now known. A hearing in this Court of the appeal for which leave is sought could not take place before the High Court hears the on notice application.

[9] Applying s 13(4), either directly or by analogy, we are of the view that it is not necessary in the interests of justice for us to deal with the s 29 issue now, given the imminence of the hearing of the on notice application.

[10] In these circumstances we do not consider that the requirements of s 13 of the Supreme Court Act are met. We therefore dismiss the applications for leave.

Solicitors:
Kirkland Morrison O'Callaghan & Co, Auckland for Applicants in SC 3/2016
Jesse & Associates, Auckland for Applicants in SC 4/2016
Crown Law Office, Wellington for Respondent