IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA385/2020
[2021] NZCA 540

BETWEEN	THE COMMISSIONER OF THE NEW ZEALAND POLICE First Appellant
	THE OFFICIAL ASSIGNEE Second Appellant
AND	JOANNE HARRISON First Respondent
	PATRICK FREDERICK SHARP Second Respondent

Hearing:	2 June 2021 Further material received on 30 August 2021
Court:	French, Courtney and Goddard JJ
Counsel:	A W M Britton and M A Heslip for Appellants M S Smith and N P Bourke for First Respondent No appearance for Second Respondent
Judgment:	18 October 2021 at 9 am

JUDGMENT OF THE COURT

A **The first appellant's application for leave to adduce further evidence is granted.**

B **The appeal is dismissed.**

C **The first appellant must pay the first respondent costs on a standard appeal on a band A basis together with usual disbursements. We certify for two counsel.**

REASONS OF THE COURT

(Given by French J)

Table of Contents

Introduction

[1] Ms Harrison is a convicted fraudster. In May 2019, she applied for early access to the funds in her KiwiSaver account on grounds of significant financial hardship. The application was approved and the sum of $23,000 transferred to a Public Trust bank account.

[2] Earlier in 2019, the Commissioner of Police had obtained final assets and profit forfeiture orders against Ms Harrison in the High Court under the Criminal Proceeds (Recovery) Act 2009 (the Act). A significant portion of the unlawful benefit obtained by Ms Harrison as a result of her offending is still unpaid.

[3] On becoming aware of the movement of the $23,000, the Commissioner sought an order under the Act to restrain it. The application was declined by Gwyn J for want of jurisdiction.[1] The Judge also held the Court did not have jurisdiction to entertain an alternative application by the Commissioner for a freezing order under the High Court Rules 2016.

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1 *Commissioner of Police v Harrison* [2020] NZHC 1380 [Judgment under appeal].

[4] The Commissioner now appeals that decision. The Official Assignee who has the control and custody of forfeited property has been joined to the proceeding as an interested party.

[5] For reasons we go on to explain, we have reached the following conclusions:

(a) It is not possible under the Act to obtain a restraining order after final forfeiture orders have been made.

(b) A debt owing under a profit forfeiture order may be enforced through the means of a freezing order against property acquired by a respondent even though the property in question was not specified in the forfeiture order. To the extent that the decision of this Court in *Doorman v Commissioner of Police* decided otherwise, we consider it was wrong and should not be followed.[2]

(c) In this case however, a freezing order is not available to the Commissioner, because while the $23,000 remains in the Public Trust account, it is still being held under the terms of the trust deed of the particular KiwiSaver scheme of which Ms Harrison is a member and it still forms part of her member's account. That means s 127 of the KiwiSaver Act 2006 applies to preclude any enforcement action.

[6] We now begin our statement of our reasons with a brief explanation of the legislative regime under the Criminal Proceeds Recovery Act.

A brief explanation of the legislative regime

[7] The Act establishes a regime for the restraint and forfeiture of property that has been derived either directly or indirectly from significant criminal activity. The basic aim of the regime is, in colloquial terms, to make sure that crime does not pay. The express statutory objectives include:

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2 *Doorman v Commissioner of Police* [2013] NZCA 476, [2014] 2 NZLR 173.

(a) eliminating the chance for persons to profit from undertaking or being associated with significant criminal activity;[3]

(b) deterring significant criminal activity;[4] and

(c) reducing the ability of criminals to continue or expand criminal enterprises.[5]

[8] There are two main types of forfeiture orders: assets forfeiture orders and profit forfeiture orders. Section 50 requires the Court to make an assets forfeiture order if satisfied on the balance of probabilities that the items of property in question are tainted.[6] Tainted property is defined to include property that has wholly or in part been acquired or derived from significant criminal activity.[7] Property that is not tainted can only be reached under a profit forfeiture order.

[9] Profit forfeiture orders are governed by s 55. The Court must make such an order if satisfied on the balance of probabilities that a person has unlawfully benefited from significant criminal activity.[8] The maximum recoverable amount under a profit forfeiture order is the value of the unlawful benefit less the value of any property forfeited to the Crown as the result of an assets forfeiture order made in relation to the same criminal activity.[9]

[10] As regards restraint of property, s 25 provides that if the Court is satisfied there are reasonable grounds to believe a person has unlawfully benefited from significant criminal activity, the Court may make an order that property belonging to that person as specified in the order is not to be disposed of or dealt with and is to be under the custody and control of the Official Assignee.[10] There are time limits on the duration of restraining orders.[11]

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3 Criminal Proceeds (Recovery) Act 2009, s 3(2)(a).
4 Section 3(2)(b).
5 Section 3(2)(c).
6 Section 50(1).
7 Section 5(1).
8 Section 55(1).
9 Section 54(1).
10 Section 25(1).
11 Section 37.

Background of this case

[11] Ms Harrison was found to have misappropriated over $700,000 from her former employer, the Ministry of Transport. She was convicted of three representative charges of dishonestly using a document and in February 2017 was sentenced to a term of imprisonment of three years and seven months.[12] The offending qualified as "significant criminal activity" under the Act.

[12] Accordingly, on 30 June 2017, the Commissioner filed applications in the High Court for profit and assets forfeiture orders. Forfeiture was sought of various items of property in respect of which the Commissioner had already sought and obtained restraining orders. The property itemised included "the contents of KiwiSaver account number KWK102501 in the name of [Ms Harrison], with a current balance of approximately $109,211.98".[13]

[13] In a judgment dated 14 December 2017, Ellis J held that because of s 127 of the KiwiSaver Act the Court did not have the power to make a civil forfeiture order under the Act in relation to funds in a KiwiSaver account.[14] The Judge also stated that no doubt it followed there was no power to make a restraining order over such funds either.[15]

[14] Section 127 of the KiwiSaver Act — the section relied on by the Judge — imposes a general prohibition on a member's interest in the KiwiSaver scheme being assigned, charged or transferred to any other person.

[15] There was no appeal against Ellis J's decision.

[16] Subsequently in April 2019 final assets and profit forfeiture orders were made by another High Court judge, Clark J.[16] The Judge determined that the value of the unlawful benefit obtained by Ms Harrison as a result of her offending was $784,172.16

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12 Crimes Act 1961, s 228.
13 *Commissioner of Police v Harrison* [2017] NZHC 3140 at [7(o)].
14 At [69].
15 At [69]. The Judge noted that she had not however heard any argument on this point.
16 *Commissioner of Police v Harrison* HC Wellington CIV-2016-485-543, 18 April 2019. These orders were sealed by the High Court on 8 May 2019.

less the value of two items of property that were the subject of the assets forfeiture order, namely some land and a Rolex watch. The profit forfeiture order listed various items of property that were to be realised. Because of Ellis J's decision, the list did not include the KiwiSaver account.

[17] After realisation of most of the assets, there remained a significant portion of the maximum amount recoverable under the profit forfeiture order still owing.

[18] As mentioned, in May 2019 Ms Harrison, who had been deported to the United Kingdom in January of that year, applied for early access to her KiwiSaver funds on account of significant financial hardship. The particular KiwiSaver scheme in which Ms Harrison is enrolled is the Kiwi Wealth KiwiSaver Scheme (the KW scheme). It is managed by a company called Kiwi Wealth Ltd. The funds of the KW scheme are held by the scheme's supervisor, the Public Trust, on trust as trustee under the terms of a trust deed and the KiwiSaver scheme rules.[17]

[19] The KW scheme is not a unitised KiwiSaver scheme. That is to say, rather than holding units, members have an interest in the assets of the KW scheme proportionate to the value that their investment bears to all the investments of all other members. When a member joins the KW scheme, a member account is opened for that member. The member's account balance will show the individual securities held by the KW scheme attributed to them.

[20] The purpose of the KiwiSaver legislation is to encourage a long-term savings habit and asset accumulation with the aim of increasing people's wellbeing and financial independence, particularly in retirement.[18] Consistent with that purpose, the general rule applying to all KiwiSaver schemes including the KW scheme is that members are not permitted to withdraw amounts before the date on which the member reaches the age of eligibility for National Superannuation, currently 65 years.[19]

[21] There are however a number of exceptions to that general rule, one of which is that a member may apply to withdraw funds early on the grounds of significant

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17 The rules are set out in a sch 1 to the KiwiSaver Act 2006.
18 KiwiSaver Act, s 3(1).
19 Schedule 1, r 4(2)(a).

financial hardship. The amount of withdrawal on those grounds may be up to the value of the member's accumulation less the amount of the Crown contribution, or be limited to a specified amount that is required to alleviate the particular hardship.[20]

[22] Ms Harrison's application for early access was duly forwarded to the Public Trust for consideration.[21] It subsequently approved an early withdrawal amount of $23,000. Ms Harrison was informed of the approval on 17 May 2019 and advised that payment to her UK account would be made within 10 working days.

[23] Once the application to withdraw funds had been approved, Ms Harrison's investment is said to have been "cashed-up" by the manager of the KW scheme selling assets of the scheme equal to the value of the approved withdrawal amount.

[24] On 21 May 2019, funds totalling $23,000 arising from the sale of assets in the KW scheme were credited to a bank account in the name of the Public Trust pending transfer to Ms Harrison. Payment to Ms Harrison's UK account was scheduled to take place overnight (NZ time) on 30 May 2019.

[25] On the eve of the transfer to Ms Harrison's bank account, the Commissioner applied without notice to the High Court for a restraining order over the $23,000.

[26] Following an urgent hearing, Ellis J issued a judgment to the following effect:[22]

(a) Now that the $23,000 had been released from the KiwiSaver account it was no longer protected by the provisions of the KiwiSaver Act.

(b) However, whether the funds could be the subject of restraint strictly so called seemed conceptually problematic given that final forfeiture orders under the Act had already been made.

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20 Schedule 1, r 10.

21 Kiwi Wealth Ltd forwarded Ms Harrison's request to Public Trust and recommended an approval for a partial release on financial hardship grounds.

22 *Commissioner of Police v Harrison* [2019] NZHC 1199 at [5]–[6].

(c) On the other hand, in light of the indisputable debt owed to the Crown by Ms Harrison the funds could equally be made the subject of a without notice freezing order under pt 32 of the High Court Rules.

(d) The Judge was satisfied that grounds for the making of a freezing order existed, at least at this without notice stage.

(e) Given the present form of the application, the Judge nevertheless granted the without notice restraining order sought but suggested that thought be given to converting the proceeding to one brought under the High Court Rules.

[27] The application for a restraining order was then served on Ms Harrison. Taking up Ellis J's suggestion, the Commissioner also filed an alternative application for a freezing order. Both applications were opposed by Ms Harrison and a contested hearing was held before Gwyn J.[23]

[28] As at the date of the hearing before Gwyn J, the balance remaining under the profit forfeiture order was $237,704.50.[24]

[29] In her subsequent judgment, which is the judgment under appeal, Gwyn J identified the issues requiring determination as being:[25]

(a) whether a restraining order under s 25 of the Act is available where final assets and profit forfeiture orders have already been determined by the High Court and sealed (or alternatively whether the order sought by the Commissioner constitutes an abuse of process or is otherwise procedurally inappropriate in this case);

(b) whether the Official Assignee has the power to enforce a profit forfeiture order against property acquired by Ms Harrison that has not

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23 Judgment under appeal, above n 1.
24 At [12].
25 At [22].

been specified in the profit forfeiture order such that grounds exist for the alternative application for a freezing order; and

(c) whether s 127 of the KiwiSaver Act operates as a bar to making the order sought.

[30] For reasons the Judge then traversed, she found against the Commissioner on all three issues.[26]

[31] The Commissioner filed an appeal in this Court on 16 July 2020. In a second judgment,[27] Gwyn J directed that pending the disposition of the appeal, the $23,000 was to remain subject to the without notice restraining order issued by Ellis J on 29 May 2019.[28]

[32] Finally, for completeness in this background section, we note counsel's advice that the Commissioner does not dispute the correctness of Ellis J's judgment of 14 December 2017.[29] That is to say, the Commissioner accepts that as currently worded the KiwiSaver Act does preclude the making of civil forfeiture orders under the Act in respect of funds held in a KiwiSaver account. In his view, that state of affairs is the result of a drafting error which needs correcting by the legislature in order to prevent KiwiSaver accounts becoming a safe haven for money laundering. The possible need for legislative intervention was also raised by Ellis J in her judgment. She stated it was unlikely the relationship between the two Acts was considered at the time the KiwiSaver Act was enacted and that it might well be that an amendment was needed.[30]

[33] We turn now to address the issues raised in this appeal.

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26 It was not necessary for the Judge to make any finding on the abuse of process allegation.
27 *Commissioner of Police v Harrison* [2020] NZHC 1785.
28 *Commissioner of Police v Harrison*, above n 22.
29 *Commissioner of Police v Harrison*, above n 13.
30 At [70].

Analysis

Does the Act permit the making of a restraining order after final civil forfeiture orders have been made?

[34] In contending that restraining orders may be obtained both before and after final forfeiture orders have been made, counsel for the Commissioner emphasised the purpose of the Act as well as the Commissioner's important investigative and enforcement functions. It was pointed out that the section which empowers the court to make restraining orders (s 25) has no temporal limitation on when such an order can be made. In counsel's submission, a plain and purposive interpretation of s 25 permits the making of a restraining order following determination of a profit forfeiture order. Counsel argued that there needed to be flexibility in the way the Act operated in order to achieve its objectives.

[35] We acknowledge that s 25 does not set any temporal limitation on the making of a restraining order. However, the contention advanced by the Commissioner is inconsistent with a number of other provisions which in our view collectively make it clear that restraining orders are intended only to precede, and not follow, a final profit forfeiture order.

[36] The first of these is s 4. It provides an overview of the Act and identifies the subject matter of the various parts and subparts. Restraining orders are dealt with in sub-pt 2 of pt 2. Significantly for present purposes, s 4 describes sub-pt 2 of pt 2 in the following terms:

> deals with the restraint of property that may *later* become the subject of a forfeiture order
>
> (Emphasis added.)

[37] Section 4 obviously renders the Commissioner's interpretation highly problematic. That is compounded by s 11 which states that "property may, but need not, be restrained property or foreign restrained property *before* it becomes forfeited property" (emphasis added). Then there is s 37 which deals with the duration of restraining orders. It states that a restraining order expires either one year after it is made or the date of the making or declining of a forfeiture order associated with the

same property, whichever is the earlier. Similarly, s 38 which provides that if a restraining order is in force at the time a court declines to make a forfeiture order associated with the same property, the restraining order will expire in seven days unless an appeal is lodged against the decision declining to grant the forfeiture order.

[38] For all these reasons we are driven to the conclusion that there is no jurisdiction under the Act to entertain the Commissioner's application for a restraining order in circumstances where a final profit forfeiture order has been made.

Is a freezing order available under the High Court Rules?

[39] A freezing order has the effect of restraining a respondent from removing or disposing or dealing with assets. In cases like this one where the applicant has already obtained a judgment against the respondent, the relevant rule is r 32.5(4). It provides that the Court may make a freezing order if there is a danger a judgment will be wholly or partly unsatisfied because the assets of the respondent might be "disposed of, dealt with, or diminished in value (whether the assets are in or outside New Zealand)".[31]

[40] On the face of it, the Commissioner would appear to meet all those criteria. Ms Harrison is in debt to the Crown, she has chosen not to pursue any hardship argument and without a freezing order the $23,000 will be removed from New Zealand.

[41] In the High Court, Gwyn J held that whether a freezing order was appropriate in this case turned on whether a profit forfeiture order can be enforced against property that is not specified in the order. As mentioned, the $23,000 was not specified in the forfeiture order sealed on 8 May 2019.[32]

[42] The Judge concluded it could not.[33] Her reason for reaching that conclusion was the decision of this Court in *Doorman*[34] and the existence of provisions under the

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31 High Court Rules 2016, r 32.5(4)(b)(ii).
32 Judgment under appeal, above n 1, at [44].
33 At [68].
34 *Doorman v Commissioner of Police*, above n 2.

Act which require a profit forfeiture order (and the application for it) to specify the property to be disposed of.

[43] *Doorman* concerned (amongst other things) an application for a profit forfeiture order. The property identified in the application was the same item of property which had been the subject of an assets forfeiture order. That meant it had already been taken into account when calculating the maximum recoverable amount and therefore could not be specified in any profit forfeiture order. In turn that meant for the purposes of s 55(2)(c) of the Act, if the application were to be granted, no property would be specified in the profit forfeiture order. [35]

[44] In the High Court, Miller J held that notwithstanding the absence of any specified property to be realised, the order could still be made because the primary purpose of s 55 was to establish a sum recoverable as a debt to the Crown.[36]

[45] On appeal, this Court overturned that ruling and quashed the order made by the Judge as being outside the scope of the Act. It held that a profit forfeiture order is not capable of imposing a burden on potential assets acquired at some future time. It acknowledged that an order was intended to be available under the Act where a person has profited from significant criminal activity and concealed those assets but it was still nevertheless essential the Court be satisfied the assets that could not be found were in existence. The Court distinguished the concealed asset scenario from Mr Doorman's case where the profit forfeiture order was simply creating a capacity for future debt.[37]

[46] In coming to that conclusion, the Court in *Doorman* relied on three provisions, namely s 52(d) which requires an application for a profit forfeiture order to identify the property in which the respondent holds interests and the nature of those interests, the pre-requisite under s 55(1)(b) to the making of an order that the respondent has interests in property and the reference in s 55(2)(c) that the order must specify the

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35 At [62].

36 *Commissioner of Police v Doorman* HC Nelson CIV-2010-442-169, 15 December 2011 at [45]–[47].

37 *Doorman v Commissioner of Police*, above n 2, at [62]–[65].

property to be disposed of. The Court said it was difficult to see what the latter requirement meant if not a requirement to specify the property subject to the order.[38]

[47] Gwyn J was bound by *Doorman* and, in our view, she was correct to hold that it precluded the making of a profit forfeiture order in this case despite different factual circumstances. We have however come to the conclusion that the principle enunciated in *Doorman* regarding profit forfeiture orders and after acquired property is wrong and should not be followed.

[48] The effect of *Doorman* is that a profit forfeiture order only creates a debt to the extent of the specified property and that in our view cannot be a result that Parliament should be taken to have intended. It is not consistent with the legislative purpose of confiscating unlawful benefits of any sort and reducing the rewards of crime. It is also not consistent with the text.

[49] The starting point of the textual analysis is s 55(4). It states that:

> A profit forfeiture order is enforceable as an order made as a result of civil proceedings instituted by the Crown against the person to recover a debt due to it, and the maximum recoverable amount is recoverable from the respondent by the Official Assignee on behalf of the Crown as a debt due to the Crown.

[50] The wording is clear. The profit forfeiture order is to be treated as a judgment debt due to the Crown recoverable by the Official Assignee. And in our view, contrary to the reasoning adopted in *Doorman*, the other requirements in s 55 should not be interpreted, particularly in light of the legislative purpose, as qualifying or in any way restricting those words.

[51] Significantly, the property that s 55(2)(c) requires to be specified in the order is "*property that is to be disposed of in accordance with section 83(1), being property in which the respondent has, or is treated as having, interests*" (emphasis added). Section 83 imposes an obligation on the Official Assignee to dispose of the property specified in the order and sets out how the monies resulting from that disposal are to be applied.

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[38] At [62].

[52] Nowhere in the Act does it say that the s 83 process is the only means of enforcing the judgment debt created by virtue of the profit forfeiture order. That is to say, nowhere in the Act does it say that the only means of enforcing the debt is by realising the assets specified in the order. On the contrary, s 83(4) specifically provides that if the Official Assignee's disposal of the specified property results in the Crown being paid less than the maximum recoverable amount, the Official Assignee is not prevented from recovering by any lawful means the balance of the maximum recoverable amount that remains due to the Crown.

[53] Drawing all these strands together, we conclude that under the Act a profit forfeiture order is designed to do two things: first it creates the debt — which is the maximum recoverable amount — and secondly the order identifies any property to be disposed of *if* it is proposed to utilise the enforcement mechanism under s 83. The latter is the context in which the obligation under s 52 to specify property in the application for a profit forfeiture order should be understood. The debt can however also be enforced utilising other available enforcements mechanisms outside the Act, whether the property was in existence at the time the forfeiture order was made and specified in the order or is after acquired property.

[54] It follows, putting to one side for a moment the KiwiSaver dimension of this case, that in principle, there is nothing to preclude the Commissioner from seeking to recover the balance of the debt owing by Ms Harrison by way of other enforcement procedures outside the Act against property that was not specified in the order. In particular, it would be in principle open to the Commissioner to apply for a freezing order in respect of the $23,000 under pt 32 of the High Court Rules.

Does the KiwiSaver Act alter that conclusion?

[55] Section 127 of the KiwiSaver Act provides:

> **127 Member's interest in KiwiSaver scheme not assignable**
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> (1) Except as expressly provided in this Act, a member's interest or any future benefits that will or may become payable to a member under the KiwiSaver scheme must not be assigned or charged or passed to any other person whether by way of security, operation of law, or any other means.

> (2) However, subsection (1) does not prevent a member's interest or any future benefits that will or may become payable to a member under the KiwiSaver scheme from being released, assigned, or charged, or from passing to any other person if it is required by the provisions of any enactment, including a requirement by order of the court under any enactment (including an order made under section 31 of the Property (Relationships) Act 1976).

[56] In 2017, in finding that s 127 prevented the Commissioner from being able to obtain a forfeiture order over Ms Harrison's KiwiSaver account, Ellis J relied heavily on the decision of this Court in *Trustees Executors Ltd v Official Assignee*.[39]

[57] In *Trustees Executors*, this Court held that s 127(1) prevented the vesting of a bankrupt's interest in a KiwiSaver account in the Official Assignee under the Insolvency Act 2006. This Court further held that the exception to s 127(1) created by s127(2) only applied where the other enactment expressly provided for the vesting in a third party of the member's interest. The Insolvency Act did not contain any such express provision and therefore the Official Assignee could not rely on the exception.[40]

[58] Ellis J held that because the Insolvency Act ranked in importance above the Act, the reasoning in the *Trustees Executors* decision applied with even greater force to cases involving civil forfeiture orders. If a member's interest under the KiwiSaver Act could not be used to pay creditors under the Insolvency Act, then, in her view, it was untenable to suggest they could be subject to civil forfeiture absent some express provision in the Act which there is none.[41]

[59] The question now before us is whether the movement of the $23,000 to the Public Trust account takes the money outside the scope of s 127 of the KiwiSaver Act.

[60] Because Gwyn J held that the Act prevented the Commissioner from being able to obtain a freezing order, it was strictly speaking unnecessary for the Judge to go on to consider whether a freezing order was in any event barred by the KiwiSaver Act.

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39 *Trustee Executors Ltd v Official Assignee* [2015] NZCA 118, [2015] 3 NZLR 224.
40 At [51]–[61].
41 *Commissioner of Police v Harrison*, above n 13, at [62] and [69].

[61] However, the Judge did address that issue. In her view, while the $23,000 was held in its present state, that is in the account of the Public Trust, the money retained its character as KiwiSaver funds and thus s 127(1) applied.[42]

[62] In coming to that conclusion, the Judge reasoned as follows. The legal effect of the trust deed was that the Public Trust held a range of choses in action on behalf of Ms Harrison and the other members. The only thing that changed when the $23,000 was realised from investments was the form of the chose of action which the Public Trust held for Ms Harrison. So long as the money remained in the Public Trust's account, Ms Harrison thus had an interest in KiwiSaver assets. That would only change once the $23,000 came into Ms Harrison's possession — that is, once it was transferred to her personal account. Until then the $23,000 (or the chose in action of being able to claim it) qualified as a member's interest or future benefit that will become payable to her under the KW scheme. It was therefore protected by s 127 against being assigned, charged or passed to another person. Any other finding would, in the Judge's view, subvert the earlier finding of Ellis J's 2017 judgment.

Arguments on appeal

The Commissioner's position

[63] On appeal, the Commissioner challenges the Judge's reasoning. He submits that the funds only remain immune from forfeiture under s 127 for so long as they remain vested within the KW scheme. Once divested by way of a permitted withdrawal, they no longer comprise a "member's interest" or "a future benefit… payable under the scheme" for the purposes of s 127 and therefore s 127 no longer applies.

[64] In support of that central contention, counsel Mr Britton pointed to the definitions of "member's interest" and "net value" under s 4 of the KiwiSaver Act.

[65] "Member's interest" is defined as the net value of the total of:

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[42] Judgment under appeal, above n 1, at [94].

(a) the member's accumulation (accumulation comprising the member's own contributions, any vested employer's contribution in respect of the member, any fee subsidies and the Crown contribution paid in respect of the member); and

(b) any unvested employer contributions.

[66] "Net value" is defined in relation to a member's interest as the "value of the member's interest… *once any other appropriate debits and credits have been made to account for things like fees, permitted withdrawals and positive and negative returns*".

[67] Mr Britton emphasised the words we have italicised and submitted it is clear that once withdrawal has been permitted as it was in this case, the divested funds then payable fall outside the KiwiSaver regime and no longer comprise a member's interest. In his submission, it is an interpretation that makes procedural and intuitive sense. The net value of the member's interest is crystallised once permitted withdrawals have been debited, reflecting how funds are realised by divestment and then paid out of the KiwiSaver account.

[68] Mr Britton also referred us to a clause in the KW scheme which relevantly provides under the heading "Decreases to Member Account", that:

> Money leaves a member account and it is reduced by… a withdrawal or Benefit payments made to or at the direction of a Beneficiary.

[69] Finally, Mr Britton submitted that the Commissioner's interpretation was not inconsistent with the purpose of the KiwiSaver legislation — to encourage saving for retirement — because the concept of a release and withdrawal of funds was only allowed in limited circumstances.

Arguments on behalf of Ms Harrison

[70] On behalf of Ms Harrison, Mr Bourke supported the Judge's conclusion. He pointed out that although the term "permitted withdrawal" is defined in the KiwiSaver Act as "a withdrawal that is permitted under the KiwiSaver scheme rules", the word "withdrawal" itself is not defined.

[71] In his submission, an approach to withdrawal that says it only takes place on actual payment as opposed to when it is permitted is consistent with the overall scheme of the KiwiSaver Act, whereas the Commissioner's interpretation is contrary to it. For example, the KiwiSaver scheme rules provide that if a withdrawal is permitted to enable the member to purchase a first home but the purchase does not proceed, the member must repay the withdrawal which is then re-vested. Mr Bourke also relied on s 59D which deals with the situation of a person being enrolled in a KiwiSaver scheme by error. Several sub-sections in s 59D refer to "amounts paid out… to the person as permitted withdrawals."

[72] Mr Bourke found further support for his submission in the same clause of the trust deed cited by Mr Britton regarding decreases in the member's account. He contended the acts of withdrawal and payment were not distinct. The triggering point was payment and this was made clear by the other ways in which a member's account could be decreased, including "by amounts paid in the acquisition of Assets in a Fund".

Analysis

[73] We acknowledge the force of the submissions made by counsel. However, it is important not to lose sight of the express wording of s 127 and in particular the key phrases "a member's interest" and "any future benefits that will or may become payable to a member under the KiwiSaver scheme".

[74] In our view, the question of whether the funds still comprise "a member's interest" or a "future benefit" under s 127 must turn on the exact nature of the Public Trust account in question (described by Ellis J in her 2019 judgment as a holding account).[43] Or to put it another way, it must turn on the basis on which the Public Trust is holding the money for Ms Harrison. Is that money having been withdrawn, no longer held on the terms of the scheme's KiwiSaver trust deed, but now held on a different trust and thus no longer part of the scheme or the member's interest? If for example the money is being held on a bare trust by the Public Trust to be disbursed at Ms Harrison's sole direction, then in our view it is not protected by s 127.

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[43] *Commissioner of Police v Harrison*, above n 22, at [2(d)].

[75] In short, we consider the Judge and the Commissioner respectively took too categorical an approach. If the money is being held on a bare trust, then in our view, that in substance is no different legally to it being transferred to Ms Harrison's own personal account and the Judge erred in holding otherwise. Conversely, if the money is still being held on the terms of the KW scheme trust, then the fact of assets in the KW scheme being realised to effect the early withdrawal will not assist the Commissioner.

[76] Unfortunately, there was insufficient evidence in the case on appeal regarding the nature of the Public Trust account and the state of Ms Harrison's member's account to enable us to reach any firm conclusion one way or the other.

[77] That presented the Court with a dilemma.

[78] The onus of proof was on the Commissioner and it was incumbent on him to provide the necessary information. This Court does not usually allow a party an opportunity to repair gaps in its case. On the other hand, there is a strong public interest in securing the $23,000 if it is not protected by the KiwiSaver Act. Having regard to that fact and the fact we considered the High Court had erred in its analysis together with the delay and cost of remitting the matter to the High Court, we concluded the just course of action was for us to seek further evidence on the exact nature of the Public Trust account.

[79] This was done by way of a minute to the parties following which the Commissioner filed a formal application under r 45 of the Court of Appeal (Civil) Rules 2005 for leave to adduce an affidavit sworn by Mr Ian Mackenzie. Mr MacKenzie, who had already provided an affidavit for the purposes of the High Court hearing, is senior legal counsel for the company that controls Kiwi Wealth Ltd.

[80] The application to adduce Mr MacKenzie's affidavit was opposed by counsel for Ms Harrison on the grounds that we lacked the jurisdiction to receive it. Ms Harrison did not file any affidavit evidence in response.

[81] Contrary to the submission made on behalf of Ms Harrison, we are satisfied we have the necessary jurisdiction derived from r 45 of the Court of Appeal (Civil) Rules.[44] We would also point to this Court's powers under rr 48(4) and 5(1).[45]

[82] The further evidence of Mr MacKenzie is not fresh. But it is credible and most importantly it is cogent and in our view ultimately determinative of the outcome of this appeal, ironically in favour of Ms Harrison.

[83] In his affidavit, Mr MacKenzie explains that the Public Trust account in question is the KW scheme's main account. In addition to receiving monies from the realisation process on withdrawal, the main account is also used for receiving contributions to the scheme from members, their employers and the Crown, receiving transfers into the scheme when members transfer from another superannuation scheme and for receiving rebates, refunds or other amounts that should be credited to a member. Monies are therefore co-mingled in the account.

[84] Critically for present purposes, the affidavit goes on to state that the monies received into the main account from the realisation process on withdrawal form part of the member's account and are held under the terms of the KW scheme's trust deed. A member's account is reduced when a withdrawal is paid to the member.

[85] The fact that the $23,000 is still held under the terms of the KW scheme's trust deed and forms part of Ms Harrison's member's account means in our view that s 127 of the KiwiSaver Act continues to apply and therefore the appellants are precluded from any enforcement action against those funds.

[86] It follows the Commissioner's appeal must be dismissed.

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44 This rule provides that the Court, on application, may grant leave for the admission of further evidence.

45 Rule 48(4) permits the Court, in the context of hearing appeals, to make any order which ought to have been given or made, and make any further or other orders that the case may require. Additionally, r 5(1) specifies that the Court may give any directions that seem necessary for the just and expeditious resolution of any matter that arises in a proceeding, whether on application by a party or on the Court's own initiative.

[87] As regards the costs of the appeal, counsel were agreed these should follow the event and be calculated on the basis of a standard appeal band A for two counsel. We accordingly so order.

Outcome

[88] The first appellant's application to adduce further evidence is granted.

[89] The appeal is dismissed.

[90] The first appellant must pay the first respondent costs on a standard appeal on a band A basis together with usual disbursements. We certify for two counsel.

One final observation

[91] In our view, the issue of the relationship between the Act and the KiwiSaver Act requires urgent legislative attention. Apart from the fact scenario that arose in this case, another crucial matter that needs to be addressed is what happens when KiwiSaver members turn 65. As matters currently stand, we are not persuaded there are compelling reasons to treat KiwiSaver schemes as so sacrosanct as to be beyond the reach of the Crown under the Act. But that is not the case before us and in any event given the competing policy considerations and the importance of avoiding further delay and uncertainty may well be an issue best resolved by Parliament.

Solicitors:
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Bourke Law, New Plymouth for First Respondent