IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-2622
[2021] NZHC 1531

UNDER	the Criminal Proceeds (Recovery) Act 2009
BETWEEN	COMMISSIONER OF POLICE Applicant
AND	RONALD THOMAS SALTER First respondent
	NATALIE MITCHELL SALTER Second respondent
	Continued overleaf

Hearing:	27 to 29 October 2020 with further submissions on 17 and 27 November and 9 December 2020
Appearances:	M R Harborow, D M A Wiseman and A R Masters for the applicant R M Mansfield and S L Cogan for the respondents
Judgment:	25 June 2021

JUDGMENT OF PALMER J (Redacted)

This judgment was delivered by me on Friday 25 June 2021 at 4.00 pm.
Pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

Counsel/Solicitors:
R M Mansfield, Barrister, Auckland
Lee Salmon Long, Auckland
Meredith Connell, Crown Solicitor, Auckland

SALTERS CARTAGE LIMITED
Third respondent

RONALD THOMAS SALTER and AKL TRUSTEE LIMITED as trustees of the Bolderwood Trust
Fourth respondent

RONALD THOMAS SALTER, NATALIE MITCHELL SALTER and AKL TRUSTEE LIMITED as trustees of the Salter Family Trust
Fifth respondent

Summary

[1] In September 2015, a young man died while welding a tank containing highly hazardous substances at the premises of Salters Cartage Ltd (SCL) in Wiri, South Auckland. SCL and its shareholder, director, and chief executive, Mr Ron Salter, were convicted of health and safety and hazardous substances offences. The Commissioner of Police (the Commissioner) has applied under the Criminal Proceeds (Recovery) Act 2009 (the Act) for restraining orders over properties belonging to SCL and to Mr and Mrs Salter. The Commissioner alleges that SCL was systemically non-compliant with health and safety and hazardous substances law, operating blatantly and dangerously for at least seven years. He submits SCL's revenue is unlawfully derived and he will apply for forfeiture orders to recover the unlawful benefits. SCL and the other respondents do not oppose the restraining orders as long as the Commissioner gives an undertaking to pay any consequential damages and costs. The Commissioner opposes having to provide an undertaking.

[2] I accept the nature of the proceedings is novel. It is difficult to assess the strength of the Commissioner's application for forfeiture orders at this point. But I accept that the Commissioner has an arguable case that could result in some sort of forfeiture orders. There are no presumptions about whether an undertaking should be ordered. The day to day operations of the SCL Group appear to have been satisfactorily undertaken under the without notice restraining orders to date. But I consider it is reasonably clear that the restraining orders could have a negative effect on the ability of the SCL Group to undertake significant borrowing for the purposes of investment. I am satisfied some discount on a sale price for the business is likely as a result of commercial perception of the restraining orders complicating a sales transaction, particularly for potential overseas purchasers. The longer the period of restraint, the more likely it is that there will be a negative impact. The period of restraint is likely to be at least three years. I accept that an undertaking as to damages is likely to act as an additional incentive on the Commissioner to respond to reasonable requests for variations to the orders in a reasonable, and reasonably timely, way. I do not consider the Commissioner's administration of the restraining orders in this case will be unduly "chilled" by an undertaking. I order the Commissioner to provide an undertaking and, on that basis, grant the application on notice for restraining orders.

What happened?

Salters Cartage Ltd

[3] Around 40 years ago, Mr Salter, a truck driver, started a business with one truck, collecting, transporting, and recycling waste oil and other hazardous substances. The business, SCL, processes used or waste oil into fuel oil. It collects and fills ISO tank containers with fuel. It provides a 24/7 response service to major spills or environmental disasters and is a specialised transporter of hazardous substances for the timber industry. It now has a fleet of vehicles, employs 25 staff, has over 3,000 customers, and has an annual turnover of approximately [redacted]. It operates from a purpose-built plant on Bolderwood Place in Wiri, South Auckland.

[4] The land at Bolderwood Place is owned by the Bolderwood Trust. The plant and equipment is owned by Salters Investment Group Ltd (SIGL) which is wholly owned by the Bolderwood Trust. SIGL leases the plant and processing facilities informally to SCL. Mr Salter and his wife, Mrs Natalie Salter, are the directors and shareholders of SCL. Mr Salter is the chief executive. The respondents say the SCL Group, comprising the Bolderwood Trust, SIGL, and SCL, is operated holistically.[1]

[5] The respondents, including the components of the SCL Group, the Family Trust, and the Salters, cross-guarantee each other's indebtedness to the BNZ, supported by security interests in the property of SCL, SIGL, and the restrained property.[2] SCL has an overdraft facility with a current overdraft limit of [redacted]. The respondents submit that an immediate adjustment to that would be required if payments were delayed, significant plant or machinery had to be replaced, or further investment was required. SIGL has a CreditPlus facility with a maximum limit of [redacted] which is presently drawn up to around [redacted].[3] The respondents submit

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1 Notes of Evidence (NOE) 81/18–23 and 222/7–22.

2 Affidavit of Bruce Sheppard In Reply, 24 September 2020 [Sheppard Reply] at [28]–[34]; and Affidavit of Wendy Morrison, 3 September 2020 [Second Morrison Affidavit] at [3.3] and Exhibit 12. See also Respondents' Exhibit A (BNZ Credit Approved Letter of Offer for Salters Cartage Ltd and Salters Investment Group, 15 July 2015).

3 NOE 35/5–10.

it is a loan facility for trucks and other plant.[4] They also submit only a limited sum is pre-approved for any purchase, and drawdowns must be supported by security.[5]

[6] Mr Salter says he and Mrs Salter, in their mid-60s, are contemplating retiring and selling the business.[6] In 2015, the Salters entered into a sale and purchase agreement with [redacted] for [redacted], subject to due diligence.[7] But [redacted] cancelled the agreement in March 2015 on the basis they were not satisfied with the contamination status of the land or with other issues including certification and compliance and HSNO-related issues.[8] In 2018 and 2019, Mr Salter declined to provide detailed financial information to potential purchasers.[9] But in March 2019, Mr Salter instructed SCL's accountant, Mr Mark Richards, that he wanted to have the business ready for sale in the first quarter of 2020.[10] Around the same time, Mr Richards retained a consultant to work nearly full-time on preparation for sale.[11] In December 2019, Mr Salter advised Mr Dean Stuart of Trenchmate that he was going to hold off selling in the short-term because two of his competitors might be prosecuted and shut down.[12] Under cross-examination, Mr Salter acknowledged that while enforcement action had commenced, this strategy had not yet come to fruition.[13]

Tank 20 and the explosion

[7] Tank 20 on the SCL premises at Bolderwood Place, was a 96,000 litre vertical tank. In September 2015, it contained a high hazard classified substance, a mixture of diesel, petrol, kerosene, and oil which was distillate from SCL's waste oil recycling process.[14] Mr Salter knew that.[15] He also knew the surrounding area was a zone in which an explosive gas atmosphere was likely to occur in normal operation

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4 Respondent Submissions, 17 November 2020 at [6.11].
5 Second Morrison Affidavit, Exhibit 36.
6 NOE 27/17.
7 Affidavit of Ronald Salter, 29 June 2020 [Salter Affidavit] at [6.3]–[6.10].
8 Salter Affidavit at [6.7]; NOE 20/32–21/33; and Affidavit of Daryl Gera, 3 September 2020, Exhibit 29.
9 NOE 23/3–33.
10 Affidavit of Mark Richards, 26 June 2020 [Richards Affidavit] at [19]–[20].
11 NOE 136/24–30.
12 NOE 24/8–25/29.
13 NOE 27/19–22.
14 Affidavit of Alistair Hill, 26 November 2019 [Hill Affidavit] at [8.13].
15 Exhibit 29 (WorkSafe New Zealand *WorkSafe Investigation Report – Salters Cartage*).

occasionally.[16] The Hazardous Substances (Identification) Regulations 2001 required the tank to be properly labelled to accurately identify its contents and the hazard posed, to prevent unintentional explosion.[17] But the tank was labelled as containing only diesel, a low hazard classified substance.[18]

[8] Tank 20 was also legally required to have a stationary container system test certificate.[19] In 2011 and 2015, Mr Salter had been put on notice about the need for that by Hazardous Substances and New Organisms (HSNO) test certifiers.[20] A certificate was never obtained for Tank 20. Nor could it have been, due to non-compliant venting, anchorage and earth connections.[21] In September 2015, none of SCL's tanks at the site had certificates.[22]

[9] SCL also failed to obtain legally required hazardous substance location test certificates (LTCs), to ensure flammable substances are safely managed, for a number of locations where hazardous substances were held at the site.[23] Mr Salter was likely aware of these deficiencies.[24] In 2015, the last known LTC had expired on 4 December 2014.[25] On 15 September 2015, 4,725 kilograms of LPG was stored at the site.[26] Between 24 and 29 August 2015, 241,000 litres of petrol was stored at the site.[27] Between 9 and 14 July 2015, 92,000 litres of jet fuel was stored at the site.[28]

[10] In 2015, SCL contracted Race Works Ltd to install a catwalk next to Tank 20.[29] SCL was required to ensure any "hot work" was performed in such a way as to minimise the likelihood of ignition of flammable vapours.[30] It knew that not doing so was reasonably likely to cause serious harm and, specifically, that welding would

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16 At [8.28].
17 Hazardous Substances (Identification) Regulations 2001, regs 10, 11, 18, 21 and 22.
18 Hill Affidavit at [8.13].
19 Hazardous Substances (Dangerous Goods and Scheduled Toxic Substances) Transfer Notice 2004 Pursuant to the Hazardous Substances and New Organisms Act 1996, cl 6 and sch 8.
20 Hill Affidavit at [8.19].
21 At [8.21].
22 At [8.22].
23 At [8.23]–[8.26].
24 At [8.27] and Exhibit 29.
25 At [8.24] and Exhibit 30.
26 At [8.26].
27 At [8.26].
28 At [8.26].
29 *Worksafe New Zealand v Salters Cartage Ltd* [2017] NZDC 26277 [Sentencing Decision] at [15].
30 At [17].

cause a fire.[31] But SCL permitted employees to undertake hot work on the site, usually welding, without any authorisation or oversight.[32] It provided no health and safety induction for Race Works personnel and failed to implement its own health and safety procedures.[33]

[11] In September 2015, Mr Jamey Bowring, a young man and son of one of the managers of Race Works, did some contracting for Race Works. He undertook welding, grinding and sanding on top of Tank 20 at the direction of Race Works.[34] He did not have any experience in the use of hot work permits or explosive atmospheres.[35] At the time, Tank 20 contained approximately 2,500 to 3,000 litres of diesel, petrol, kerosene and oil, with a flashpoint of 17.5 degrees Celsius.[36] Mr Salter did not know Race Works was carrying out hot works or that welding work was to be carried out on Tank 20.[37] At approximately 1.36 pm on 15 September 2015, there was an explosion in Tank 20.[38] Mr Bowring was blown off the tank into a neighbouring car yard. He died. The explosion also caused significant property damage to neighbouring businesses. The 450 kilogram lid of Tank 20 was propelled some 100 metres.

After the explosion

[12] After the death and subsequent investigation, SCL was prohibited from operating its recycled oil plant from 16 September 2015 to 15 March 2016.[39] Between 16 and 22 February 2016 WorkSafe repeatedly advised Mr Salter and SCL of the prohibition notice remaining in force.[40]

[13] But, between 4 February 2016 and 4 March 2016, SCL operated the plant and processed recycled oil in breach of that prohibition on numerous occasions.[41] Mr Salter had full knowledge of this. Visits to the site by Worksafe on 16 February

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31 At [18].
32 At [18].
33 At [20].
34 At [26]
35 At [23].
36 At [12].
37 At [29] and [30].
38 Hill Affidavit at [2.5]; and Sentencing Decision at [27].
39 Hill Affidavit at [8.30].
40 At [8.32].
41 Sentencing Decision at [35].

2016 and 3 March 2016 revealed potential ignition sources being used in the vicinity of warm process vessels.[42] After a further inspection on 14 March 2016 and discussion with Mr Salter, the prohibition notice was removed.[43]

Charges and sentencing

[14] SCL and Mr Salter were prosecuted for breaches of the Hazardous Substances and New Organisms Act 1996 (HSNO) and the Health and Safety in Employment Act 1992 (HSE). They pleaded guilty to the following six criminal charges:[44]

(a) failing to take all practicable steps to ensure no hazard (the ignition of flammable vapours in Tank 20) was present or arose in a place that harmed people, knowing that failure to take action was reasonably likely to cause serious harm to any person, under ss 16(1)(a), 16(1)(b), and 49(2) of the HSE;

(b) failing to take all practicable steps to ensure that no employee of a contractor was harmed while doing any work the contractor was engaged to do, knowing that failure to take action was reasonably likely to cause serious harm to any person, under ss 18(1) and 49(2) of the HSE;

(c) being a person in charge of a stationary container system with a capacity greater than 2,500 litres and failing to ensure it was certified, under s 109(1)(e)(vi) of the HSNO;

(d) being a person in charge of a class 3.1B hazardous substance (the contents of Tank 20) and failing to ensure there was not, on the packaging, information that suggests it belongs to a class that it does not in fact belong to, under s 109(1)(e)(ii) of the HSNO;

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42 At [38] and [40].
43 At [41].
44 The Sentencing Decision, Mr Hill's Affidavit at [8.39], and the respondents' submissions, refer to ss 109(1)(e)(i) and 109(1)(e)(iii), which refer to new organisms rather than hazardous substances, rather than ss 109(1)(e)(vi). I assume these originated from typographical errors.

(e) a representative charge of being a person in charge of in excess of 100 kilograms of LPG, a class 2.1.1A hazardous substance, who failed to comply with the requirement to obtain a hazardous substance LTC, under s 109(1)(e)(vi) of the HSNO; and

(f) a representative charge of, being a person to whom a prohibition notice was given, failing to ensure that no action was taken in contravention of the notice, under ss 43 and 50 of the HSE.

[15] In addition, Race Works Ltd pleaded guilty to one charge of, being a principal, failing to take all practicable steps to ensure Mr Bowring, a contractor or subcontractor, was not harmed while doing work he was engaged to do, under ss 18(1)(b) and 50 of the HSE.

[16] On 23 November 2017, Judge R McIlraith sentenced Mr Salter and SCL in the Manukau District Court.[45] He followed the methodology set out in *Department of Labour v Hanham & Philp Contractors Ltd*, first assessing reparations, second fixing fines, and third assessing the overall proportionality and totality of the reparation and fines.[46]

[17] Mr Salter and SCL were ordered to pay reparations of $111,000 for emotional harm to Mr Bowring's family and another and $17,074.21 in respect of consequential financial loss not covered by insurance.[47] In relation to the lead charge, the first listed above, the Judge accepted Worksafe's submission that the level of SCL's culpability was in the extremely high range, but only just.[48] In setting a starting point for a fine at $360,000, he said:

> [103] While I accept Salters Cartage['s] submission that this category of culpability ought to be reserved for the worst possible cases, including those involving wilful blindness, I consider that the overall culpability of Salters Cartage in this case is equivalent to that assessment. The extent of Salters Cartage['s] failings given the high likelihood of hot work being undertaken on tank 20 cannot be overstated. While I accept that this was not a situation in which Salters Cartage was requiring Mr Bowring to continue to work in a

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45 Sentencing Decision.
46 *Department of Labour v Hanham & Philp Contractors Ltd* (2008) 6 NZELR 79 at [80].
47 Sentencing Decision at [74].
48 At [102].

> highly hazardous environment, it is a situation in which Salters Cartage was aware of broad failures on its part to comply with HSE and HSNO obligations, in circumstances where if hot work was undertaken, there was an extremely high risk of a very serious accident occurring. It is the combination of the numerous practicable steps which Salters Cartage failed to take, many of which could be regarded as basic in terms of health and safety compliance, its blatant failure to comply with its HSNO obligations and the degree of departure from standards prevailing in its industry that stand out.

[18] Judge McIlraith discounted that, consistent with case law, by 15 per cent for the payment of the reparation. He also discounted the sentence by 10 per cent for remorse, lack of previous history of offending, and expenditure of $1.5 million to ensure future compliance with SCL's obligations.[49] He further discounted it by 25 per cent for guilty pleas being entered at the first available opportunity.[50] That resulted in a fine for SCL of $202,500 in relation to the offending before the explosion.

[19] For contravening the prohibition notice after the explosion, the Judge set a starting point for a fine at $100,000, saying:

> [119] There is no doubt in this case that the breach of prohibition notice was belligerent. Indeed, in submissions while Mr Bonnar stressed that some operation had been considered necessary by Mr Salter for testing purposes and that the shut down had been lengthy, I put to him that the offending could be categorised as egregious. Mr Bonnar could not disagree with that assessment. It is hard to imagine a more flagrant breach of prohibition notice than has occurred in this case. That it occurred in the context of a fatal accident is what lifts the assessment of culpability of this offending beyond that identified in other cases. It is indeed a case of high culpability. This was not only because of the context but because of the reminders by WorkSafe, the public comments by Mr Salter as to why the notice was not complied with, and the apparent willingness to put profit ahead of safety.

[20] With discounts, the fine on SCL was reduced to $56,250.

[21] In relation to Mr Salter's offending, the Judge sentenced him to four and a half months' home detention in relation to the offending before the explosion and to pay a fine of $25,000 for the offending after the explosion.

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49 At [108]–[109].
50 At [111].

[22] The Judge was satisfied that those involved in Race Works were victims of the tragedy and did not require it to make reparation.[51] Race Works Ltd was convicted and discharged.

Restraining orders

[23] The Commissioner alleges that SCL's business was systemically and blatantly non-compliant with both the HSE and HSNO for at least seven years. Accordingly, the Commissioner submits SCL's business was carried out unlawfully and is subject to the Criminal Proceeds (Recovery) Act 2009 (the Act). The Commissioner's focus is on revenue streams generated from the production and consequent sale of recycled oil and the storage of hazardous substances, both of which used SCL's plant.

[24] On 28 November 2019, the Commissioner applied without notice for restraining orders under the Act that the following four properties not be disposed of, or dealt with, by any person other than as provided for in the orders:

(a) 5 Bolderwood Place, Wiri, the business premises of SCL, owned by Mr Salter and Akl Trustee Ltd;

(b) 77B Burtt Road, Paerata, Auckland, the Salters' family home, owned by Mr Salter, Mrs Salter, and Akl Trustee Ltd;

(c) 269 Burtt Road, Paerata, Auckland, a property owned by Mr Salter, Mrs Salter, and Akl Trustee Ltd and rented to their daughter and son-in-law who are both employees of SCL; and

(d) Unit 27, 141 The Strand, Onetangi, Waiheke Island, a holiday home owned by Mr Salter, Mrs Salter, and Akl Trustee Ltd.

[25] The total approximate value of all four properties is $9,675,000, according to the Commissioner's submissions. As at 26 November 2020, the debt secured against

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[51] At [80] and [142].

them with the BNZ was approximately [redacted]. So the equity in the properties was approximately [redacted].

[26] To preserve value in the properties, the orders require any loan secured by any mortgage against the properties not to be increased from the date of the order. They also require that the overdraft facility for SCL not be drawn down beyond a debit balance of [redacted]. The Commissioner intends to apply for forfeiture orders, in an expected timeframe that must now be fast approaching.[52]

[27] On 29 November 2019, Lang J granted the application without notice.[53] When the orders were served on the BNZ, SCL's bank, it immediately cancelled SCL's overdraft.[54] Urgent discussions between the parties led to a variation of the orders by consent. Another variation was subsequently agreed in ensuring there were sufficient operating funds to cope with the impact of COVID-19.

[28] On 5 December 2019, the Commissioner filed an application on notice for restraining orders over the four properties. The respondents oppose the application only on the basis the Commissioner has not given an undertaking as to damages and costs.

The application for an undertaking

[29] On 24 March 2020, the respondents applied under s 29 of the Act for an order that the Commissioner give an undertaking as to damages and costs prior to any restraint. They seek an order that:

> The Commissioner will comply with any order for the payment of damages and costs to compensate the respondents for any damage and costs sustained as a consequence of the restraining orders.

[30] For three days from 27 October 2020, I heard submissions and evidence regarding the application, including cross-examination and re-examination of:

(a) the respondents' witnesses:

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52 NOE 174/25–26.
53 Minute of Lang J, 29 November 2019.
54 Salter Affidavit at [8.6] and Exhibit RTS 316.

(i) Mr Salter;

(ii) Mr Alistair Ward of Campbell MacPherson Ltd, an expert corporate adviser;

(iii) Mr Mark Richards of Causeway Accounting Ltd, the respondents' long-time accountant;

(iv) Mr Peter Wilson, an expert consulting economist;

(v) Mr Bruce Sheppard, an expert accountant and director, and partner at Gilligan Sheppard Certified Public Accountants; and

(b) the Commissioner's witnesses:

(i) Detective Daryl Gera, the current officer-in-charge of the Commissioner's investigation, of the Waikato Asset Recovery Unit of the Police; and

(ii) Ms Wendy Morrison, a forensic accountant in the Waikato Asset Recovery Unit of the Police.

[31] I received further written submissions in November and December 2020. I regret the time it has taken me to issue this judgment, which has been caused by pressure of other cases.

[32] [Redacted]. [There are suppression orders in place over certain information on the court file.[55] A few references to that information in this judgment have been redacted with the consent of the parties.]

Relevant law

[33] Section 3 states the purpose of the Act to be:

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[55] *Commissioner of Police v Salter* [2020] NZHC 425 at [49], extended at the hearing on 27 October 2020.

3 Purpose

(1) The primary purpose of this Act is to establish a regime for the forfeiture of property—

(a) that has been derived directly or indirectly from significant criminal activity; or

(b) that represents the value of a person's unlawfully derived income.

(2) The criminal proceeds and instruments forfeiture regime established under this Act proposes to—

(a) eliminate the chance for persons to profit from undertaking or being associated with significant criminal activity; and

(b) deter significant criminal activity; and

(c) reduce the ability of criminals and persons associated with crime or significant criminal activity to continue or expand criminal enterprise; and

(d) deal with matters associated with foreign restraining orders and foreign forfeiture orders that arise in New Zealand.

[34] Section 6 defines "significant criminal activity":

(1) In this Act, unless the context otherwise requires, **significant criminal activity** means an activity engaged in by a person that if proceeded against as a criminal offence would amount to offending—

(a) that consists of, or includes, 1 or more offences punishable by a maximum term of imprisonment of 5 years or more; or

(b) from which property, proceeds, or benefits of a value of $30,000 or more have, directly or indirectly, been acquired or derived.

(2) A person is undertaking an activity of the kind described in subsection (1) whether or not—

(a) the person has been charged with or convicted of an offence in connection with the activity; or

(b) the person has been acquitted of an offence in connection with the activity; or

(c) the person's conviction for an offence in connection with the activity has been quashed or set aside.

(3) Any expenses or outgoings used in connection with an activity of the kind described in subsection (1) must be disregarded for the purposes

> of calculating the value of any property, proceeds, or benefits under subsection (1)(b).

[35] Section 18 of the Act empowers the Commissioner to apply for restraining orders. Under s 24, a court may order specific property to be restrained if satisfied it has reasonable grounds to believe it is "tainted property". Under s 25, a court may order all of a respondent's property to be restrained if it has reasonable grounds to believe that the respondent has "unlawfully benefited from significant criminal activity".

[36] Once restrained, property is not to be disposed of or dealt with other than is provided for in the order and is to be under the custody and control of the Official Assignee. Under s 80, the Assignee has statutory powers to "do anything reasonably necessary" to preserve the value of restrained property. Restraining orders have a term of one year though they can be extended. Restraining orders can be "a holding measure", preventing people dealing with property while Police prepare applications for forfeiture orders under the Act.[56] Under s 28, restraining orders can be made subject to conditions, including conditions that provision for the reasonable living costs of the respondent and their dependents, business expenses, and payment of any specified debt and other expenses may be met out of the restrained property. Restraining orders can be varied under s 35.

[37] Section 29 of the Act states:

> **29 Undertakings as to damages or costs in relation to restraining orders**
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> (1) A court may require an applicant for a restraining order, or an applicant for an extension of the duration of a restraining order under section 41, to give satisfactory undertakings with respect to the payment of damages or costs, or both, in relation to the making, operation, or extension of the duration of the restraining order.
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> (2) A court may decline to make a restraining order or extend the duration of a restraining order if the applicant for the order or extension fails to give the court the undertakings with respect to the payment of damages or costs, or both, that the court requires.

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[56] *Yan v Commissioner of Police* [2015] NZCA 576, [2016] 2 NZLR 593 (French and France JJ) at [7].

> (3) Any expense incurred by the Crown in satisfaction of an undertaking given on behalf of the Crown under subsection (1) may be incurred without further appropriation than this section.

[38] The equivalent provision in the predecessor Act, s 45 of the Proceeds of Crime Act 1991, conferred no explicit power on the Court to require an undertaking. Rather, it empowered the Court to decline to make a restraining order if the Crown failed to give such undertakings as the Court considered appropriate.

[39] The legislative history of the Act indicates that the power to require an undertaking was seen as a protection for those subject to orders under the Act.[57] An undertaking as to damages and costs is effectively an undertaking to the Court to be liable for damages and loss occasioned by the restraining orders, if the subsequent forfeiture claim fails. The enforcement of an undertaking "should be a relatively straightforward exercise", but the Court retains a discretion not to enforce an undertaking.[58] An undertaking by the Commissioner of Police is met by the Crown.

[40] Undertakings have seldom been ordered by the Court, under the Act or under its predecessor, the Proceeds of Crime Act 1991. In 2012, the Commissioner gave an undertaking voluntarily in the *Kim Dotcom* litigation in the face of an allegation that the search and seizure of Mr Dotcom's property was unlawful.[59]

[41] In 2006, the High Court of Australia ordered the Director of Public Prosecutions in Western Australia to give an undertaking under that state's Criminal Property Confiscation Act 2000.[60] There, four years had passed since the entirety of a person's property had been frozen and he had been made bankrupt. The High Court found that, "the traditional concern with avoidance of unfairness and injustice in the administration of powers such as … with respect to freezing orders" supported an implied power to refuse a freezing order unless an undertaking was given. [61]

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57 (20 March 2007) 638 NZPD 8120; and (31 March 2009) 653 NZPD 2214.
58 *Yan v Commissioner of Police*, above n 56, at [37].
59 *Commissioner of Police v Dotcom* [2012] NZHC 634 at [25].
60 *Mansfield v Department of Public Prosecutions for Western Australia* [2006] HCA 38, (2006) CLR 486.
61 At [34].

[42] In 2013, in *Police v Reed*, Woolford J emphasised the discretionary nature of undertakings under the Act and considered they were "quite different" than undertakings in support of applications for interim injunctions.[62] He noted that Section 29 is not mandatory. If a person holding restrained property is negligent in maintaining its value, "there is clear authority that such a person is liable in damages for that loss. No undertaking is required".[63]

[43] In *Yan v Police*, a majority of the Court of Appeal rejected the existence of a presumption in favour of undertakings being ordered in cases involving business or dynamic assets.[64] Instead, it described the discretion to require an undertaking as "broad and untrammelled".[65] It characterised the public policy considerations at play under the Act in this way:[66]

> The Commissioner is not an ordinary civil litigant. He or she is acting in the public good with a law enforcement purpose designed to combat significant criminal activity, in particular organised crime. In the digital age and in a global economy, those imperatives are arguably more pressing than ever.

[44] Because of that, the Court distinguished proceedings under the Act from interim injunctions and freezing order applications in ordinary civil litigation.[67] It considered "it is a realistic possibility the Commissioner would become excessively cautious and be inhibited from seeking restraining orders because of the spectre of having to face a damages claim", which would not be in the public interest.[68] It said (with footnotes omitted):

> [39] There is a strong public interest in preventing criminals from benefiting as a result of significant criminal activity and, accordingly, a strong public interest in preserving tainted property prior to forfeiture being reasonably obtainable and preventing dissipation of those assets. On the other hand, a restraining order represents a significant infringement of property rights and has the potential to cause considerable injustice should it transpire the order was not justified. Section 29 provides a potential safeguard against the latter injustice.
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> [40] Having regard to the breadth of the wording of s 29, it is unhelpful to go beyond the general statement of principle endorsed by Lang J in this case,

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62 *Commissioner of Police v Reed* [2013] NZHC 802 at [48].
63 At [48].
64 *Yan v Commissioner of Police*, above n 56, at [27].
65 At [27].
66 At [33].
67 At [34].
68 At [37].

> namely that the discretion "should be exercised according to considerations of justice and fairness and to diminish the possibility of oppression and injustice". The inquiry is essentially fact-dependent and the weight to be afforded any particular factor, for example the fact business assets are involved, will necessarily vary from case to case. There are no presumptions either way.
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> [41] Relevant factors to be taken into account include:
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> (a) the personal circumstances of the respondent;
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> (b) delay;
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> (c) the nature of the asset;
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> (d) the likelihood of loss being suffered as a result of the restraint;
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> (e) the extent of any likely loss;
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> (f) the conduct of the Commissioner;
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> (g) the strength of the Commissioner's case; and
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> (h) the existence of a meaningful alternative avenue of redress.
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> [42] We emphasise that this list is not intended to be exhaustive.

[45] The Court of Appeal accepted that an applicant is not required to prove actual loss, nor that future loss is certain, but "simply that the likelihood of loss and the extent of that loss are relevant factors and the more likely the loss is to occur, the stronger the argument for an undertaking".[69] The Court of Appeal's approach to undertakings under s 29 is quite different to that taken to undertakings as to damages for interim injunctions.

Submissions

[46] Mr Mansfield, for the respondents, submits:

(a) The Commissioner's case is an unprecedented test case because it is the first case in which the Commissioner has sought to apply the Act to a legitimate business, restrain an integral asset of a legitimate business, and apply it to offending under the HSE and HSNO. On the Commissioner's case, the entirety of the business assets and the

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69 At [71].

personal assets of the owners would be tainted and vulnerable to forfeiture. But the statutory threshold for restraining orders is acknowledged to be low so they cannot reasonably be opposed at this stage, except for lack of an undertaking.

(b) There is no requirement to particularise loss in advance of seeking an undertaking. However, loss is both likely and significant in extent. The orders significantly impact on the SCL Group's market value and restrain its operation. It is commercially naïve to maintain that only the property is restrained. The orders restrict the Group's ability to respond to market changes and/or grow through further investment in its plant or acquisition of competitors.[70] Expanding the plant by only one tank will cost approximately [redacted].[71] It could not be done using the Credit Plus facility and should not have to be done out of the Salters' own pocket to preserve assets for the Commissioner. The business cannot be sold for its true market value and would suffer a [redacted] per cent discount, from [redacted] million to around [redacted] million, based on Mr Ward's expert evidence, which is the only valuation evidence before the Court.[72] It is not feasible to enter into an arms' length lease arrangement over the property. The Salters can either sell significantly below market value or continue to operate the SCL Group with one hand tied behind its back.

(c) The Commissioner is irresponsible and inappropriate in criticising the evidence of Mr Salter, Mr Ward, Mr Richards, and Mr Sheppard. Mr Salter made concessions in his evidence where that was appropriate. The financial "discrepancies" the Commissioner criticises in Mr Richards' evidence about SCL were conjectural, immaterial, and the result of comparing management and tax accounts. The witnesses' "misunderstanding" of the orders criticised by the Commissioner

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70 NOE 74/23 and 142/30–143/3; and Sheppard Reply at [100]–[102].
71 Salter Affidavit at [9.4].
72 Affidavit of Alistair Ward [Ward Affidavit] at [5.5], [5.7], [16.2] and [16.5]; and NOE 65/19–34, 66/1–14 and 81/6–23.

reflects the Commissioner's commercial naivety about the holistic operation of the Group.

(d) The respondents are further impacted by delay. The Commissioner does not appear to have started investigating until January 2018, after the November 2018 sentencing, and did not uplift the full file from Work Safe until June 2020. It could easily be three years before a forfeiture application is determined.

(e) It was entirely foreseeable that the service of the restraining orders on the respondents' bank would lead to the reaction it did. The Commissioner's witnesses were non-committal about his willingness to consent to variations. It seems inherently unlikely the Commissioner would consent to a further [redacted] of borrowing. Even if he did, the Salters would have to think very carefully about personally guaranteeing more debt where the business could be forfeited to the Commissioner.

(f) If losses are suffered, the Commissioner should be accountable, if he is unsuccessful. If losses are not suffered or the Commissioner's case is as strong as he claims, then he has nothing to fear. An undertaking is a powerful incentive on the Commissioner to act reasonably in respect of requests for variations. An undertaking is the only means available to SCL to protect its market value and avoid losses as a result of the orders. None of the Commissioner's proposed alternatives to an undertaking provide redress to the respondents or require reasonableness of the Commissioner. An undertaking is unlikely to have any chilling effect, since s 29(3) requires the Crown, not the Commissioner, to satisfy an undertaking. If the Commissioner's proceeding is ultimately unsuccessful, it is only just that he make good any loss caused.

[47] Mr Harborow and Mr Wiseman, for the Commissioner, submit this is not an appropriate case for an undertaking to be ordered because:

(a) The Commissioner's case is not a test case. The Act does not distinguish between criminal offending involving drug dealing and breach of health and safety requirements. It is a straightforward application of the Act to serious offending that generated significant financial reward with full knowledge of the numerous illegalities. SCL was systemically non-compliant with the HSNO and HSE, operating blatantly and dangerously for at least seven years. It is profit-motivated criminal offending. Revenue resulting from the production and sale of recycled oil and from the storage of hazardous substances is unlawfully derived and the Commissioner seeks to recover those unlawful benefits. While there may be some unusual arguments regarding the calculation of the unlawful benefit, it is not sufficiently novel to require an undertaking.

(b) The Commissioner accepts the Salters Group entities are interlinked and currently operate holistically. But the restraining orders are on the properties of SCL and do not restrain its business. The entities and assets are discrete. There is no readily foreseeable risk of damage or loss arising from the restraining orders. The restraining orders have not caused loss in revenue, which has been higher from December 2019 to February 2020 than in the preceding two years.[73] SCL's business has continued to grow and SCL has not lost any clients due to the orders. They do not constrain access to working capital, which is more than adequate due to the variation to the loan consented to, the government wage subsidy, and high sales.[74] The Salters' withdrawal of free cashflow from SCL for personal expenditure, rather than retaining it as working capital, should not cause an undertaking to be ordered. Similarly, the Salters owe SCL at least [redacted] which could be used to expand the business.[75] The CreditPlus facility can be used for more than vehicles. The orders do not necessarily prevent sale of SCL by Mr Salter or cause loss of market value of the business, lost

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73 Second Morrison Affidavit at [12.1]–[12.2].
74 At [8.32]–[8.42].
75 At [4.37].

opportunities, or stigma. Two potential purchasers remain interested in SCL despite the restraining orders.[76] Any liabilities of the Salters for further borrowings is dependent on how they have structured their business through guarantees. The respondents are equivocal at best in their desire to sell the business.

(c) Mr Salter's evidence should be treated with caution because he resiled from statements in his affidavit when confronted with irrefutable facts under cross-examination.[77] Mr Richards was not able to explain discrepancies in SCL's financial information.[78] Mr Ward and Mr Sheppard were insufficiently impartial as expert witnesses and misunderstood the effect of the restraining orders as applying to SCL's business.[79] Mr Ward's valuations are unreliable because the financial information on which they are based was unreliable. The estimate of discount on sale was outside his brief and based on a misunderstanding of the orders. Mr Ward's evidence under cross-examination contradicted his affidavit regarding the effect of COVID-19 on the business.[80] Mr Sheppard's evidence was biased, speculative and unsupported by evidence. Mr Wilson also misunderstood the effect of the orders and was unaware of SCL's financial resources so his evidence was of limited assistance.[81] The Commissioner's analysis demonstrates the restraining orders have not caused loss in revenue.

(d) There are alternatives to an undertaking: the respondents could seek to lift them, to place conditions on them, to oppose the application on its merits, or to vary the orders currently in place. The Commissioner acted quickly and reasonably in agreeing to two consent variations to allow access by SCL to a bank overdraft and to further borrowing by SCL. The submission that the Commissioner would not consent to a

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76 Stuart Affidavit at [3]; and Affidavit of Alan Hill, 2 September 2020 at [2] and [10].
77 Salter Affidavit at [8.12]–[8.15]; NOE 14/18–21, 4/3, and 10/20–26; Salter Affidavit at [9.10]; and NOE 35/18–39/3.
78 NOE 106/13–108/22 and 124/16–126/11.
79 NOE 62/11–15.
80 Ward Affidavit at [15.2] and [16.2]; and NOE 59/13–15 – 61/3.
81 NOE 139/22–30 and 143/20–26.

variation allowing [redacted] of increased borrowing is speculative and unsupported by the evidence. No approach has been made to the Commissioner about sale of SCL or access to working or investment capital, so he should not be required to give an undertaking, consistent with *Yan*.[82] The respondents also continue to have recourse to common law actions for negligence and misfeasance.

(e) Two years between sentencing and filing the proceeding cannot be considered undue delay in the circumstances of this case. The Commissioner had requested the Work Safe file much earlier than it was provided. The time taken by the Commissioner is entirely reasonable, given the extensive investigation and financial analysis required. The November 2019 application was properly made on a without notice basis, given the risk of dissipation and the conduct of Mr Salter and SCL.

(f) If the Court orders an undertaking here, it would set a precedent effectively requiring the Court to order one where the Commissioner seeks to restrain real estate which secures business lending. This would result in a dramatic increase in the number of undertakings ordered by the Court under the Act. That would be inconsistent with the Act and with the principles in *Yan.*

Should the Commissioner be required to give an undertaking as to damages?

[48] I accept the nature of these proceedings is novel. The proceeds of crime regime has not before been applied to an ordinary commercial business that has committed health and safety or hazardous substances offences. The respondents reserve their position about whether the purpose of the Act extends to this situation until any forfeiture application is considered. I find it difficult to assess the strength of the Commissioner's case for forfeiture of particular assets at this point. That is particularly so given the novel circumstances in which the Act is sought to be applied, the issues still at large in determining what the proceeds of crime are here, and

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82 *Yan v Commissioner of Police*, above n 56, at [134]–[135].

uncertainty about whether a forfeiture application will apply to assets or income. But I accept the Commissioner has an arguable case that could result in some sort of forfeiture orders.

[49] The novelty of the proceedings appears to have generated evidence and arguments that risk complicating the otherwise straightforward issue here: whether to order the Commissioner to give an undertaking as to damages and costs or not. Section 29 of the Act provides a clear discretion for the Court to order the Commissioner to provide an undertaking. The Court's exercise of discretion must reflect the purposes of the Act. I do not accept the Commissioner's submission that the Court of Appeal held in *Yan v Police* that lack of engagement by the respondents about an issue to date means he should not be required to give an undertaking. As the Court of Appeal held in *Yan*, there are no presumptions either way. There is a public interest in ensuring the proceeds of crime regime operates effectively and a public interest in protecting those subject to it from potential injustice. Those considerations need to be balanced, in the context of the facts of the case.

[50] Here, the relevant facts include the circumstances of the Salters and the SCL Group and the assets involved. This is a reasonably substantial and complex commercial business. It is operated holistically, as the Commissioner accepts. The owners are getting towards the end of their likely period of ownership. The restraining orders do not prevent the day-to-day operation of the business and there appears to be sufficient access to working capital for present purposes. But the orders do prevent the property underlying the business from being sold and they prevent debt being increased.

[51] Not all of the evidence led by the respondents has been convincing about the prospect of the restraining orders causing loss to the respondents. And the extent of any particular loss is inherently speculative. That is particularly so in terms of the impact on day to day operations, which appear to have been satisfactorily undertaken under the restraining orders to date. But I consider it is reasonably clear that the restraining orders could have a negative effect on the ability of the SCL Group to undertake significant borrowing for the purposes of investment. I am not confident that the extent of discount on a sale price is as much as that estimated by Mr Ward. As

he said under cross-examination, there is no "science" to his assessment.[83] But I am satisfied some discount is likely as a result of commercial perception of the restraining orders complicating a sales transaction, particularly for potential overseas purchasers. There is no evidence to the contrary.

[52] If there is a negative impact on the business in relation to major transactions such as significant borrowing or sale, the impact is likely to be significant. The longer the period of restraint, the more likely it is that there will be a negative impact. I accept that the period of restraint is likely to be at least three years. I also accept that an undertaking as to damages is the most effective means of redress.

[53] I do not consider there is anything in the nature of delay or the Commissioner's conduct to date which affects the need for an undertaking, either way. The period of time between sentencing and applying for restraining orders is reasonable, given the complexity and novelty of the issues to be investigated. The Commissioner's conduct so far in applying for the restraining orders and agreeing to vary them has been responsible.

[54] There is no particular reason to think the Commissioner will delay or unreasonably oppose requests for variations in the restraining orders for good commercial reasons. But that cuts both ways: it makes an undertaking less necessary but opposition to an undertaking less justified. I accept that an undertaking as to damages is likely to act as an additional incentive on the Commissioner to respond to reasonable requests for variations to the orders in a reasonable, and reasonably timely, way. The relative ease of enforcing the undertaking is likely to be more efficient than pursuing a negligence action. Payment on the basis of the undertaking is by way of permanent legislative authority, under s 29(3), rather than by the Commissioner directly. But the system of public financial management and accountability encourages the Commissioner to manage that contingent liability. That incentive effect is likely to be of value when the assets restrained directly impinge on a substantial commercial business, the operation of which is not predicated on criminal offending. I consider it is valuable here.

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[83] NOE 81/6–13.

[55] I do not consider the Commissioner's actions in pursuing and administering the restraining orders in this particular case will be unduly "chilled" by an undertaking. The New Zealand Police are made of sterner and more reasonable stuff. Nor do I consider this judgment sets an undesirable precedent. If another case has materially similar facts, the precedent would be desirable. If it does not, it is not a precedent. Each case turns on its own facts.

[56] Accordingly, on the basis of the particular facts here, I consider it is in the interests of justice and fairness to order the Commissioner to provide an undertaking. On that basis, by consent, I grant the application on notice for restraining orders.

Result

[57] I order that the Commissioner of Police grant an undertaking that he will comply with any order for the payment of damages and costs to compensate the respondents for any damage and costs sustained as a consequence of the restraining orders. On that basis, I grant the Commissioner's application on notice for restraining orders.

[58] If the parties cannot work out costs between themselves, I reserve leave for the respondents to file and serve submissions of no more than 10 pages within 10 working days of the date of this judgment, and the Commissioner to file and serve submissions of the same length within 10 working days of that.

Palmer J