IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-2622
[2021] NZHC 3252

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

Continued …

Hearing:	12 November 2021 (by VMR)
Counsel:	M R Harborow and K O'Halloran for the applicant R M Mansfield QC and S L Cogan for the respondents
Judgment:	1 December 2021

JUDGMENT NO 3 OF PALMER J
(Stay)

This judgment was delivered by me on Wednesday 1 December 2021 at 12.00 pm.
Pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

Solicitors:
Lee Salmon Long, Auckland
Meredith Connell, Crown Solicitor, Auckland

… Continued

AND

SALTERS CARTAGE LIMITED
Third respondent

RONALD THOMAS SALTER AND AKL TRUSTEE LTD as trustees of the Bolderwood Trust
Fourth respondent

RONALD THOMAS SALTER, NATALIE MITCHELL SALTER AND AKL TRUSTEE LTD as trustees of the Salter Family Trust

What happened?

[1] On 29 November 2019, the High Court granted a without notice application by the Commissioner of Police for restraining orders over four properties of the respondents. On 25 June 2021, I issued judgment in relation to an application by the Commissioner of Police (the Commissioner) for restraining orders and an application by the respondents for an undertaking as to damages from the Commissioner.[1] In summary, I said:

> [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.
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> [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.

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1 *Commissioner of Police v Salter (No 1)* [2021] NZHC 1531.

[2] The Commissioner seeks to appeal the judgment to the Court of Appeal. He filed a notice of appeal on 23 July 2021 and the case on appeal on 27 September 2021. Counsel for the Commissioner are hoping for a fixture in the first quarter of 2022. There is a dispute about whether leave to appeal is required but that is for the Court of Appeal to consider.

[3] There is also a question between the parties as to the status of the restraining orders. Mr Harborow says the Commissioner takes the view that the status of the restraining orders is uncertain without the undertaking. In his affidavit supporting the stay application, the National Manager of the Asset Recovery Units in the Police says it is unclear to him "whether the restraining orders (either without notice, or on notice) remain in effect without the provision of the undertaking". The restraining orders have not been sealed. The respondents' understanding is that the restraining orders are in place because the previous interim orders lapsed on delivery of the judgment.

[4] And there is an issue about whether the undertaking, if given, would be retrospective. The respondents sought an undertaking from the Commissioner that, if the appeal is unsuccessful, he would give an undertaking with retrospective effect as ordered. The Commissioner declined to give that undertaking. Mr Harborow, for the Commissioner, accepts that if the appeal fails and the Commissioner gives an undertaking, it would have to be regarded as in place from the time it was ordered, on 25 June 2021. He says he accepts the undertaking would be retrospective and that it is "not going to be an issue". He gives that assurance as counsel, but he declines to give that as an undertaking by the Commissioner. Mr Mansfield QC, for the respondents, submits that leaves open the possibility that the Commissioner will not give an undertaking at all.

[5] The Commissioner has not provided an undertaking. On 9 August 2021, he applied for a stay of execution of the judgment that requires the undertaking to be given, pending determination of the appeal.

Submissions

[6] Mr Harborow says the Commissioner wishes to have the question of whether he is required to give the undertaking tested at the Court of Appeal, before he considers

whether to provide it or to end the proceedings. The Commissioner wants the requirement to do so stayed, and the applicability of the restraining orders confirmed, pending the appeal. Mr Harborow submits the Commissioner is entitled to make an informed choice as to whether to proceed. He submits the judgment contained several serious errors, including whether the undertaking should have been granted and in what form, and submits the Commissioner's case on appeal is strong. In his submission, the present form of the undertaking is so broad that it exposes the Commissioner to "contingent liability which cannot even be estimated". He submits the respondents would not be prejudiced by the stay because the restraining orders do not impede the business of Salters Cartage Ltd, the Commissioner is responsive to requests for variations, and neither of the issues which led to the undertaking (borrowing or sale of the business) are live issues. He submits, if there is no stay, the Commissioner will be compelled either to give the undertaking or decline to do so with the result the restraining orders fall away. He submits the undertaking raises acute issues of public interest and public policy.

[7] Mr Mansfield QC, for the respondents, submits the Commissioner wants to have his cake, or restraining orders, and to eat it too, by not providing the undertaking. He contrasts the Commissioner's concern about the effects of the orders with the Commissioner's submissions that an undertaking is not required because the orders have little effect. He submits it is not in the interests of justice for the respondents to bear the risk that they will have an effect, especially where it is not clear whether an undertaking, once given, would be retrospective. He submits the appeal lacks merit and disputes the Commissioner's substantive arguments. He submits the Commissioner has unduly delayed bringing the application, by six weeks, and his arrogation of a stay by not giving the undertaking is a disentitling factor. He submits the Commissioner's appeal would not be rendered nugatory by lack of a stay because he can simply be released from the undertaking if he succeeds. He submits there is no public interest in the Commissioner being able to act with impunity.

Should the judgment be stayed?

[8] Rules 12(1) and 12(2) of the Court of Appeal (Civil) Rules 2005 (CA Rules) provide that an appeal does not operate as a stay of the proceedings in which a decision

was given or a stay of execution of that decision. Under r 12(3)(a), the High Court may order a stay of proceeding in which the decision was given or a stay of the execution of that decision.

[9] The Court determines an application for a stay on the balance of convenience between the parties in a manner which serves the overall interests of justice.[2] The Court weighs the balance of factors between a successful litigant having the fruits of a judgment and the need to preserve the position in case the appeal is successful.[3] It takes into account, relevantly, whether the absence of a stay would render the appeal nugatory, the bona fides of the applicant, whether the successful party will be injuriously affected, the effect on third parties, the novelty and importance of the questions involved, the public interest in the proceeding, the overall balance of convenience and the apparent strength of the appeal.[4]

[10] I do not assess the merits of the Commissioner's appeal in detail. It is apparent from my judgment that I did not find the Commissioner's submissions against an undertaking to be persuasive. Whether they are successful on appeal is for the Court of Appeal. Mr Mansfield says a decision to require an undertaking has been said to be an exercise of judicial discretion and therefore harder to challenge. I am not sure whether that is correct, since it involves an evaluative conclusion reached with reference to identified legal considerations. But, in any case, there is a distinct lack of precedent cases in relation to this issue in New Zealand. For the purposes of this application, without accepting the merits of the appeal are either weak or strong, I accept there are arguable points to made about novel and important questions. And, of course, the Commissioner's bona fides in pursuing the appeal are unquestionable.

[11] I accept the Commissioner would face a contingent liability if he gives the undertaking. The affidavit of the National Manager of the Asset Recovery Units affidavit says the liability will be significant and "cannot at this stage even be estimated, let alone calculated with any precision". That contrasts with the Commissioner's original submission regarding the undertaking that there is no readily

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2 *Philip Morris v Ligget & Myers Tobacco Co* [1977] 2 NZLR 41 (CA) at 43 (per Cooke J).
3 *Duncan v Osborne Building Ltd* (1992) 6 PRNZ 85 (CA) at 87.
4 *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Limited* (1999) 13 PRNZ 48 (HC) at [9]; and *Keung v GBR Investments Ltd* [2010] NZCA 396 at [11].

foreseeable risk of damage or loss arising from the restraining orders.[5] It also contrasts with the Commissioner's submission now that the respondents would not be prejudiced by the stay because the restraining orders do not impede their business. There is no suggestion of any loss to date that would call on the undertaking.

[12] Mr Harborow accepts that the risk to the respondents of loss from impediments to selling the business or borrowing are theoretically present but are yet to materialise. He could not satisfactorily reconcile the Commissioner's different positions on whether there is a significant risk that the restraining orders will cause loss to the respondents, and hence a call on an undertaking, or not.

[13] The question at issue here is whether the Commissioner or the respondents should bear any loss caused by the restraining orders from now until determination of the Commissioner's appeal. That is the same question that I considered in the judgment that required the Commissioner to give the undertaking, but for a lesser period of time. The reasoning in that judgment is relevant:

(a) The extent of any loss caused by the restraining orders is inherently speculative, particularly in terms of the impact on day to day operations.[6] The Commissioner's argument, then and now, that the orders only affect the underlying real estate has force in suggesting that day to day operations will not be affected.

(b) I consider it is reasonably clear that the orders could have a negative effect on the ability of the SCL Group to undertake significant borrowing and that some discount to any sale price of the business is likely.[7] The Commissioner accepts that. It seems that neither event has occurred in the five months since the order for the undertaking was given. The longer the period of restraint, the more likely it is that one or the other factor will have a negative impact.[8] The length of time until determination of the Commissioner's appeal is not certain, but

5 *Commissioner of Police v Salter (No 1)*, above n 1, at [47](b).
6 At [51].
7 At [51].
8 At [52].

seems likely to be in the region of six months, if the Court of Appeal hears the appeal in the first quarter of 2022.

(c) There is no reason to think the Commissioner will unreasonably oppose requests for variations in the restraining orders for good commercial reasons.[9] The undertaking is likely to act as an additional incentive on the Commissioner to respond to reasonable requests for variations in a reasonable, and reasonably timely, way.[10] That has value when, as here, the assets restrained impinge directly on a substantial commercial business, the operation of which is not predicated on criminal offending.[11]

(d) The New Zealand Police are made of sterner and more reasonable stuff than to be unduly "chilled" by an undertaking.[12] I do not regard an incentive to respond to reasonable requests from a substantial commercial business for variations to restraining orders which are likely to affect only major business transactions over a long period of time in a reasonable, and reasonably timely, way to be "unduly" chilling.

[14] It follows from that reasoning that I consider it is in the interests of justice and fairness that the Commissioner provides the undertaking ordered.[13] The fact that the period of time at issue is much shorter than the three years potentially at issue in relation to the original judgment means the likelihood of the undertaking being called upon is correspondingly less. That strengthens the case for the Commissioner bearing the risk. Of course, if the Court of Appeal takes a different view even at this preliminary stage, it may order a stay under rr 12(3)(a) and 12(5) of the Rules.

[15] Two other matters canvassed in argument do not change my view:

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9 At [54].
10 At [54].
11 At [54].
12 At [55]
13 At [56].

(a) I am not asked to rule on the Commissioner's doubts about the validity of the restraining orders in the light of the undertaking not being given. In any case, the answer to that lies in the Commissioner's hands. The Commissioner can give the undertaking, which will remove his doubts about the restraining orders, or abandon the proceeding if he does not consider the benefit of the restraining orders worth the price of the undertaking. This is the choice of which Mr Harborow submits the judgment deprived the Commissioner. I note that the Commissioner has not yet filed an application for forfeiture orders, which the restraining orders were supposed to support and which I was told in October 2020 was likely to be filed in the following six months.[14]

(b) The Commissioner expresses concerns about the form of the undertaking. But Mr Harborow cannot identify any specific loss the restraining orders are likely to cause other than that related to the significant borrowing or sale of the business, which is the basis of the reasoning above. As Mr Mansfield submits, the orders need to cause loss for the undertaking to be called upon.

Result

[16] I decline the application for a stay.

Palmer J

[14] At [26] (citing NOE 174/25-26).