REDACTED VERSION

NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION IN THE NEWS MEDIA OR ON THE INTERNET OR OTHERWISE PUBLICLY AVAILABLE DATABASE OF SPECIFIED FACTS UNTIL HEARING OF ANY APPLICATION FOR FORFEITURE ORDERS THAT THE COMMISSIONER MAY BRING IN [2020] NZHC 425 REMAINS IN PLACE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA457/2021
[2024] NZCA 6

BETWEEN	COMMISSIONER OF POLICE Appellant
AND	RONALD THOMAS SALTER First Respondent
	NATALIE MITCHELL SALTER Second Respondent
	SALTERS CARTAGE LIMITED Third Respondent
	RONALD THOMAS SALTER AND AKL TRUSTEE LIMITED AS TRUSTEES OF THE BOLDERWOOD TRUST Fourth Respondents
	RONALD THOMAS SALTER, NATALIE MITCHELL SALTER AND AKL TRUSTEE LIMITED AS TRUSTEES OF THE SALTER FAMILY TRUST Fifth Respondents

Hearing:	6 October 2022
Court:	Cooper P, French and Collins JJ
Counsel:	M R Harborow and D M A Wiseman for Appellant R M Mansfield KC and S L Cogan for Respondents
Judgment:	5 February 2024 at 11.00 am

JUDGMENT OF THE COURT

A The application to adduce further evidence is granted.

B The appeal is dismissed.

C The appellant must pay the respondents costs calculated for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

D In the event leave is required, it is granted.

REASONS OF THE COURT

(Given by Cooper P)

Table of Contents

Introduction

[1] This appeal by the Commissioner of Police (the Commissioner) arises out of proceedings under the Criminal Proceeds (Recovery) Act 2009 (the Act). The Commissioner appeals from a High Court judgment requiring him to give an undertaking that he would comply with any order for the payment of damages and

costs sustained in relation to restraining orders made under the Act.[1] The respondents did not oppose the Commissioner's application for restraining orders, provided the undertaking was given. But the Commissioner opposed the respondents' application for an undertaking.

[2] Restraining orders were initially made by Lang J on 29 November 2019 on an application without notice. The orders affected four properties owned variously by Mr Ronald and Mrs Natalie Salter personally and together with AKL Trustee Ltd, as trustees of the Salter Family Trust.[2] One of the properties affected, at 5 Bolderwood Place, Wiri, was occupied by Salters Cartage Ltd (SCL) a company controlled and managed by Mr and Mrs Salter.

[3] When the orders were served on Bank of New Zealand (BNZ), which was SCL's bank, it immediately cancelled the company's overdraft. Following urgent discussions, the orders were varied by consent, and a subsequent variation was also agreed to ensure that the company had sufficient operating funds. The Commissioner's application for restraining orders on notice affecting the same four properties was filed on 5 December 2019.

[4] On 24 March 2020, the respondents expressed an intention to apply for an order under s 29 of the Act that:

> The Commissioner … give an undertaking to pay damages and costs to the Respondents in relation to the making, operation, and/or extension of the duration of the restraining orders dated 29 November 2019 (as subsequently varied) …

[5] In the High Court Palmer J did the following:

(a) granted the Commissioner's application on notice for restraining orders on the basis he would provide an undertaking;[3] and

(b) ordered that the Commissioner:[4]

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1 *Commissioner of Police v Salter* [2021] NZHC 1531 [High Court judgment].
2 With respect to one of the properties, Mr Salter was a registered owner while Mrs Salter was not.
3 High Court judgment, above n 1, at [56].
4 At [57].

> … grant an undertaking that he will comply with any order for the payment of damages and costs to compensate the respondents for any damage[s] and costs sustained as a consequence of the restraining orders.

[6] The Commissioner now appeals against the order to provide the undertaking.

Application to adduce further evidence

[7] Before we set out the background to this proceeding, we must deal with an application, filed shortly before the hearing, for leave to adduce an affidavit sworn by Detective Stuart McIntyre, dated 30 September 2022, as further evidence. The affidavit was sworn to update the Court on the progress of matters before the High Court and to produce three annexed documents, being:

(a) an affidavit by Detective Daryl Gera in support of an application for the restraining orders to be extended, dated 23 May 2022;

(b) a copy of a joint memorandum of counsel seeking a variation to the restraining orders to enable SCL to be able to extend its overdraft facility with BNZ, filed on 20 July 2022; and

(c) the Commissioner's civil forfeiture application, filed on 23 September 2022.

Detective McIntyre explained in relation to (a) and (b) respectively that the restraining orders were extended by Venning J on 17 June 2022 for a period of 12 months, unopposed; and the orders were varied in accordance with the joint memorandum by Moore J on 20 July 2022.

[8] The Commissioner submitted that the evidence contained in Detective McIntyre's affidavit is: material, cogent and credible; it concerns facts which are fresh; and it is in the interests of justice to admit the evidence because it is relevant to the issues on appeal. The application was unopposed by the respondents who nevertheless reserved their position on the documents if relied on by the

Commissioner for any purpose other than the fact that they had been filed in the High Court.

[9] We are satisfied the evidence is admissible. The evidence updates the Court on the progress of an ongoing police investigation which will culminate with the substantive hearing of the Commissioner's civil forfeiture application. Its admission is in the interest of justice. As this Court observed in *Hunt v Commissioner of Police* in relation to applications to adduce fresh evidence under the Act:[5]

> The Act clearly provides an ongoing process whereby following the grant of initial orders issues of restraint and forfeiture are further investigated by the police. Further orders may be sought by the police and, indeed, by respondents and interested persons. Where that occurs, as is the case here, an update of the state of the police investigation is likely to be relevant, and not unfairly prejudicial. Given that ongoing investigative process, which culminates at the substantive hearing of the Commissioner's forfeiture applications, we do not consider a respondent or interested person can oppose the adducing of that evidence just because it was not available at an earlier stage in the process.

Here, it is not just the fact that the documents were filed that is relevant updating evidence but also their content, including, for example, the significant criminal activity alleged by the Commissioner and the value said to have been derived from it.

[10] We grant the Commissioner's application on that basis.[6]

Relevant facts

[11] We base the following account, which was not in dispute, on that given in the judgments of the High Court and District Court.[7]

[12] A core activity of SCL is processing used or waste oil into fuel oil at the Bolderwood Place property.[8] SCL is part of the SCL Group which comprises:[9]

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5 *Hunt v Commissioner of Police* [2021] NZCA 644, [2023] 2 NZLR 1 at [15].
6 Court of Appeal (Civil) Rules 2005, r 45.
7 High Court judgment, above n 1; and *WorkSafe New Zealand v Salters Cartage Ltd* [2017] NZDC 26277 [District Court sentencing notes].
8 High Court judgment, above n 1, at [3].
9 At [4].

(a) The Bolderwood Trust, which owns the Bolderwood Place property and the buildings affixed to it. Mr Salter and a professional trustee are the trustees of the Bolderwood Trust.[10]

(b) Salters Investment Group Ltd (SIGL), which owns the plant and equipment associated with the business, including trucks and tankers, storage tanks and the processing plant. SIGL also owns the intellectual property relating to the business. It is wholly owned by the Bolderwood Trust.[11]

(c) SCL, which operates the business. It leases the Bolderwood Place property from the Bolderwood Trust, and leases the plant and equipment from SIGL, under informal arrangements.[12] Mr and Mrs Salter own SCL in equal shares.[13] At the time of the High Court hearing, SCL employed 25 staff, had over 3,000 customers and had an annual turnover of approximately **[Redacted]**.[14]

[13] The restraining orders affect not only the Bolderwood place property, but also the following three properties owned by the Salter Family Trust (for which Mr and Mrs Salter and a professional trustee are the trustees):[15]

(a) the Salters' family home;

(b) a property rented to the Salters' daughter and son-in-law, both employees of SCL; and

(c) a holiday home.

[14] Palmer J recorded the Commissioner's position that the combined value of the four properties was said to be $9,675,000 at the time the matter was before

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10 At [4].
11 At [4].
12 At [4].
13 District Court sentencing notes, above n 7, at [139].
14 High Court judgment, above n 1, at [3].
15 At [24].

the High Court. As at 26 November 2020, the debt secured against them in respect of facilities provided by BNZ was approximately **[Redacted]**. The equity in the properties was therefore approximately **[Redacted]**.[16]

[15] As well as requiring that the four affected properties not be disposed of, the restraining orders mandated that their value be preserved.[17] The effect of these further orders to preserve value was to prevent any increase in the debt secured against them. An overdraft facility held by SCL could not be drawn down beyond a debit balance of **[Redacted]**.[18]

[16] The Act empowers a court to make a restraining order relating to property if it is satisfied it has reasonable grounds to believe the respondent has unlawfully benefitted from "significant criminal activity".[19] The significant criminal activity on which the Commissioner relied for the purpose of the restraining orders was unusual. It was defined in the application as being:

(a) **[Redacted]**;

(b) failing to comply with hazardous substances controls and regulations, constituting offences under s 109(1)(e)(i)–(iii) of the Hazardous Substances and New Organisms Act 1996 (HSNO) (as the provisions were at the time of the offending); and

(c) failing to take all practicable steps to ensure that no hazards arose, failing to comply with directors' duties, failing to take action when failure would likely cause serious harm and failure by body corporate, being offences under ss 16(1), 18(1), 49(2) and 56 of the Health and Safety in Employment Act 1992 (HSE).[20]

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16 At [25].
17 At [26].
18 The most recent variation of the restraining orders we were referred to was agreed between the parties on 20 July 2022. It contemplated a limit of **[Redacted]** in the period between 20 July 2022 and 20 January 2023, but stated that the limit would be "**[Redacted]** at all other times".
19 Criminal Proceeds (Recovery) Act 2009, s 25(1).
20 The HSE was repealed on 4 April 2016, replaced by the Health and Safety at Work Act 2015, but was in force at all relevant times.

[17] The Commissioner's application for forfeiture orders relied upon further significant criminal activity, namely an allegation that the respondents manufactured hazardous substances otherwise than in accordance with an approval under the HSNO, being an offence under ss 25 and 109(1)(a) of that Act.

[18] The genesis of the Commissioner's claim was a fatal accident that occurred on the SCL premises at Bolderwood Place on 15 September 2015. On that day Mr Jamey Bowring was working on what was referred to as Tank 20.[21] This was a vertical tank with a capacity of 96,000 litres.[22] In September 2015 it contained a substance that was classified as a high hazard flammable liquid: a mixture of diesel, petrol, kerosene and oil which was distillate from SCL's waste oil recycling process.[23] Under the Hazardous Substances (Identification) Regulations 2001, the tank should have been labelled to accurately reflect its contents and the high hazard that they posed as a precaution against unintentional explosions.[24] However, the tank was labelled as containing only diesel which is a low hazard classified substance.[25]

[19] The tank was also legally required to have a stationary container system test certificate.[26] Mr Salter had been put on notice about the need for such certificates in both 2011 and 2015, but a certificate was never obtained for Tank 20. In fact, due to non-compliant venting, anchorage and earth connections a certificate could not have been obtained. In September 2015, none of SCL's tanks at the site had certificates.[27]

[20] SCL had also failed to obtain required hazardous substance location test certificates (LTCs) to ensure the safe management of flammable substances for several locations on the site where hazardous substances were held. Substances held without the necessary LTCs included LPG (4,725 kilograms stored on 15 September 2015);

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21 High Court judgment, above n 1, at [11].
22 At [7].
23 See Hazardous Substances (Classification) Regulations 2001, sch 2 cl 2.
24 High Court judgment, above n 1, at [7], referring to the Hazardous Substances (Identification) Regulations 2001, regs 10–11, 18 and 21–22.
25 At [7]. See the Hazardous Substances (Classification) Regulations, sch 2 cl 2.
26 At [8], referring to the Hazardous Substances (Dangerous Goods and Scheduled Toxic Substances) Transfer Notice 2004.
27 At [8].

petrol (241,000 litres stored between 24 and 29 August 2015) and jet fuel (92,000 litres stored between 9 and 14 July 2015).[28]

[21] Race Works Ltd (Race Works) were contracted by SCL to install a catwalk next to Tank 20. SCL had been required to ensure that any "hot work" performed on the site minimised the likelihood of ignition of flammable vapours. However, employees were permitted to undertake hot work on the site (usually welding) without any authorisation or oversight. SCL provided no health and safety induction for Race Works personnel and failed to implement its own health and safety procedures in respect of the work.[29]

[22] On 15 September 2015 Mr Bowring, a 24-year-old contractor for Race Works was undertaking welding, grinding and sanding on top of Tank 20 at the direction of Race Works. He had no experience in the use of hot work permits or explosive atmospheres. At the time, Tank 20 contained 2,500 to 3,000 litres of diesel, petrol, kerosene and oil with a flash point of 17.5 degrees Celsius. It was accepted that Mr Salter did not know Race Works was carrying out hot works or that welding work was to be carried out on Tank 20. However, during the work the tank exploded. Mr Bowring was fatally injured in the explosion, which threw him into a nearby car yard. Debris was propelled across the site for up to 200 metres. The explosion caused significant damage to properties occupied by neighbouring businesses.[30]

[23] As a result of a subsequent investigation, SCL was prohibited from operating its recycled oil plant from 16 September 2015 to 15 March 2016.[31] Notwithstanding repeated advice to Mr Salter that the prohibition notice remained in force, WorkSafe alleged that between 4 February and 4 March 2016 SCL operated the plant, processing recycled oil in breach of the prohibition on numerous occasions. Inspections on 16 February and 3 March 2016 revealed potential ignition sources being used in the vicinity of warm process vessels.[32] The prohibition notice was removed after a further inspection on 14 March 2016.[33]

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28 At [9].
29 At [10].
30 At [11]; and District Court sentencing notes, above n 7, at [27].
31 At [12].
32 At [12]–[13].
33 District Court sentencing notes, above n 7, at [12]–[13].

[24] WorkSafe's investigation resulted in prosecutions for breaches of the HSNO and the HSE. Guilty pleas were entered by both SCL and Mr Salter to the following six criminal charges:[34]

> (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;
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> (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;
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> (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)([i]) of the HSNO;
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> (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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> (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)([iii]) of the HSNO; and
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> (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.

[25] The sentencing proceeded on the basis of an extensive set of agreed summaries of facts.[35] Judge McIlraith sentenced SCL and Mr Salter to pay reparation payments totalling $128,074.21, including emotional harm reparation in favour of Mr Bowring's family in the sum of $110,000.[36] The Judge imposed fines of $202,500 in relation to what he described as "pre-explosion offending" and $56,250 in relation to "post-explosion offending".[37] Mr Salter was sentenced to home detention for a period of four and a half months in relation to the pre-explosion offending and a fine of $25,000 in relation to the post-explosion offending.[38]

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34 High Court judgment, above n 1, at [14].
35 District Court sentencing notes, above n 7, at [6].
36 At [74] and [143].
37 At [111], [121] and [143].
38 At [136], [141] and [143].

[26] In arriving at the substantial fine imposed on SCL in respect of the pre-explosion offending, the Judge adopted a starting point for the fine of $360,000, accepting WorkSafe's submission that the level of culpability sat in the "extremely high culpability range".[39] The Judge discounted this starting point by 25 per cent to reflect Mr Salter's willingness to pay reparation, remorse, lack of previous offending, and expenditure of $1.5 million to ensure future compliance with SCL's obligations.[40] A further 25 per cent discount was applied for pleading guilty at the first available opportunity.[41]

[27] For contravention of the prohibition notice after the explosion, the Judge set a starting point of $100,000.[42] He considered the breach of the prohibition notice had been "belligerent". Counsel had accepted at sentencing that the conduct was "egregious".[43] The sentencing Judge observed:[44]

> 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.

[28] As far as Mr Salter's pre-explosion offending was concerned, the Judge considered that a fine would not adequately hold Mr Salter accountable for the harm done to Mr Bowring and his family. The Judge considered it was appropriate to look at an outcome of a custodial nature and adopted a starting point of 16 months' imprisonment.[45] After discounts, the Judge arrived at a period of nine months' imprisonment which he commuted to a sentence of four and a half months' home

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39 At [102] and [104]. As discussed in [101], the Judge applied the approach taken in a case also involving a fatality resulting from an explosion caused by hot work and the ignition of flammable vapours: see *Department of Labour v Fulton Hogan Ltd* DC Greymouth CRN1018500058, 3 September 2010.

40 At [106]–[110].

41 At [111]. We note that no issue was raised in argument as to whether this sentencing approach was in accordance with the methodology in *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583.

42 At [120].

43 At [119].

44 At [119].

45 At [131].

detention.[46] For Mr Salter's post-explosion offending, a fine of $25,000 was imposed, discounted from a starting point of $100,000.[47]

[29] It is against this background that the Commissioner alleges that the respondents have unlawfully benefited from the significant criminal activity, referred to above at [16]–[17], to justify the making of forfeiture orders under the Act.

[30] Although the case is novel in the sense that proceedings under the Act have not previously been brought in such a context, the definition of "significant criminal activity" in s 6 of the Act, and that of "tainted property" in s 5, can arguably ground jurisdiction for the purpose of the Act's civil forfeiture regime. **[Redacted]**. But whether or not the offending on which the Crown relies will justify the making of profit forfeiture orders, or assets forfeiture orders, are questions to be resolved in the context of the application for civil forfeiture orders which was not made until 23 September 2022. That application has been set down tentatively for a seven-week hearing in the High Court in October 2024.

[31] The issue in the present appeal is whether the High Court was right to make an order under s 29 of the Act for the Commissioner to give an undertaking as to damages and costs in the context of the restraining orders made unopposed (save for the issue as to the undertaking) some 15 months prior to the filing of the application for the forfeiture orders. That issue needs to be considered on the basis that the question of whether civil forfeiture orders should be made is yet to be addressed.

The High Court judgment

[32] The Judge noted that the proceeds of crime regime had not previously been applied to what he described as an "ordinary commercial business" that has committed hazardous substances, or health and safety offences.[48] He recorded the respondents had reserved their position about whether the purpose of the Act extended to that kind of offending until any future forfeiture application was considered. In these circumstances, it was difficult to assess the strength of the Commissioner's case for

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46 At [133] and [136].
47 At [138]–[141].
48 High Court judgment, above n 1, at [48].

forfeiture of particular assets. That was particularly so because the issues about what the proceeds of crime might be in these circumstances was still at large, and there was uncertainty about whether a forfeiture application would apply to assets or income.[49]

[33] The Judge saw the issue as a relatively straightforward one, as to whether the Commissioner should be required to give an undertaking as to damages and costs. There was a "clear discretion" in s 29 of the Act for the Court to make such an order, and the discretion was to be exercised to reflect the purposes of the Act. He rejected the Commissioner's submission that in *Yan v Commissioner of Police*, this Court had held that a lack of engagement by the respondents about an issue meant he should not be required to give an undertaking. Applying this Court's judgment in *Yan*, there was no presumption either way: there is a public interest ensuring the proceeds of crime regime operates effectively, but also in protecting those subject to the regime from potential injustice. Those considerations were to be balanced in the context of the facts of the case.[50]

[34] The Judge considered that the restraining orders were not preventing the day-to-day operation of the business, and there was apparently sufficient access to working capital for its present purposes. However, the orders would prevent the property underlying the business from being sold, and debt being increased.[51] While not all of the evidence led by the respondents had been convincing about prospective loss from the operation of the restraining orders, the Judge regarded it as "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".[52]

[35] Based on the evidence of Mr Alistair Ward, a corporate adviser called by the respondents, the Judge was also satisfied that some discount on the business's sale would likely result from the commercial perception of the restraining orders complicating a sales transaction, particularly for potential overseas purchasers. He

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49 At [48]. As we note below at [95], the application for forfeiture orders seeks both profit and assets forfeiture orders.

50 At [49], citing *Yan v Commissioner of Police* [2015] NZCA 576, [2016] 2 NZLR 593.

51 At [50].

52 At [51].

noted there was no evidence to the contrary, although he was not convinced the discount would be as great as that estimated by Mr Ward.[53]

[36] In the Judge's view, both of these consequences of the restraining orders would likely have a significant impact. The longer the period of restraint, the more likely that the impact would be negative. The period of restraint would likely be at least three years, and an undertaking as to damages was the most effective means of redress.[54]

[37] The Judge considered that the Commissioner's conduct to date had been responsible and did not bear on the discretion to order an undertaking.[55] He also found that there was no particular reason to expect that the Commissioner would unreasonably oppose the requests for variations of the restraining orders which were commercially sensible.[56] He observed:

> [54] … 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.

[38] The Judge rejected an argument advanced by the Commissioner that ordering an undertaking would have an unsatisfactory chilling effect on the Commissioner's actions in pursuing and administering restraining orders. Nor did he consider that the judgment would set an "undesirable precedent".[57]

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53 At [51].
54 At [52].
55 At [53].
56 At [54].
57 At [55].

[39] Consequently, the Judge found that it was in the interests of justice and fairness to order the undertaking that had been sought, and on that basis, he granted the on notice application for restraining orders.[58]

Preliminary issue

[40] Mr Mansfield KC submitted that the Commissioner's appeal is from an interlocutory decision. Consequently, leave was required in accordance with s 56(3) of the Senior Courts Act 2016.[59] No such leave has been sought or granted.

[41] In advancing this argument, Mr Mansfield noted that s 4 of the Senior Courts Act defines "interlocutory application" as meaning any application to the High Court in any civil proceedings for "some relief ancillary to that claimed in a pleading". This Court considered the meaning of this phrase in *Trotter v Telfer Electrical Nelson Ltd*.[60] The Court observed:[61]

> The definition of "ancillary" in the *Shorter Oxford Dictionary* is subservient or subordinate. In the rules context, the word "ancillary" is used to mean collateral to but flowing out of the relief claimed in the pleadings (for example, r 5.50 – appearance for ancillary matter), or necessary to support or respond to the relief claimed in the pleadings (for example, s 20 of the Senior Courts Act – ancillary powers of Associate Judge).

[42] In that case, the High Court had refused to uphold a protest to its jurisdiction to hear a claim disputed to fall within the exclusive jurisdiction of the Employment Relations Authority, or which had already been finally settled. Applying the approach in the extract above, this Court held that the relief sought in the protest to jurisdiction was ancillary to that sought in the pleading: it responded to it, but was collateral to it, on the basis that "the application for stay (or dismissal) does not engage directly with the relief sought, but rather responds that it is relief which should be pursued in another forum".[62]

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58 At [56].
59 We note that we refer to s 56(3) of the Senior Courts Act 2016 as it is the correct provision for leave, although submissions refer to subs (4).
60 *Trotter v Telfer Electrical Nelson Ltd* [2018] NZCA 231, [2019] NZAR 476 at [18]–[26].
61 At [21] (footnotes omitted).
62 At [22].

[43] Mr Mansfield also referred to *100 Investments Ltd v PVG Securities Trustee Ltd*, in which a similar approach was taken in holding that an appeal from an unsuccessful application to enforce an undertaking as to damages given in support of an application for interim injunction was ancillary, because it was "collateral to but flowing out of the relief".[63] Mr Mansfield argued that if an application to enforce an undertaking is seen as interlocutory, it follows that an application for an undertaking is also interlocutory. However, we do not think that necessarily follows.

[44] It all depends on the context and the procedural steps that have been taken by the parties. Significantly, the present context is governed by r 19.2 of the High Court Rules 2016. Applications under the Act are listed under r 19.2(r) among those requiring an originating application. Statutes listed in r 19.2 generally refer to specific sections of the relevant legislation and, apart from this Act, the only exceptions are the Habeas Corpus Act 2001, the Protection of Personal and Property Rights Act 1988, and the Reciprocal Enforcement of Judgments Act 1934.[64] We think there is a significance in the contrast as did Downs J in *Commissioner of Police v Gong.*[65] In that case, the High Court decided that an application for an order requiring the Commissioner to give an undertaking as to costs was properly regarded as an originating application.[66] In his costs judgment for the present case, Palmer J awarded costs for the respondents' application for an undertaking on the basis that it was an originating application, recording his agreement with the approach taken in *Gong.*[67]

[45] We are satisfied that is the correct approach. It reflects the unqualified language of r 19(2)(r). It follows that the Commissioner did not require leave to appeal and this Court is properly seized of the matter. Even if that conclusion were incorrect, we are satisfied that, at this stage, the importance of the issues raised on the present appeal would justify the panel granting leave as High Court judges to avoid the

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63 *100 Investments Ltd v PVG Securities Trustee Ltd* [2020] NZCA 458 at [18], citing *Trotter*, above n 60, at [21].
64 High Court Rules 2016, r 19.2(h), (t) and (u).
65 *Commissioner of Police v Gong* [2018] NZHC 1686 at [9].
66 At [7]–[17].
67 *Commissioner of Police v Salter* [2021] NZHC 2164 at [5], citing *Gong*, above n 65, at [12]–[13].

procedural delays consequent on requiring an application to the High Court.[68] We grant leave accordingly.

The appeal

[46] The Commissioner submits on appeal that Palmer J erred by failing to follow this Court's judgment in *Yan*, arguing that had he done so an undertaking would not have been required.[69]

[47] Mr Harborow submitted that the overriding "test" in *Yan* is that an undertaking should diminish the possibility of oppression and injustice, but submitted the Judge failed to identify any relevant oppression or injustice. The Judge failed to give sufficient weight to findings he made that the restraining orders had not prevented the day-to-day operations of the business, which had been satisfactorily undertaken notwithstanding the restraining orders, and that SCL had sufficient working capital. The Judge had also failed to give weight to this Court's conclusion in *Yan* that to require an undertaking would have a chilling effect, particularly in the context of trading businesses, because of the spectre of facing a damages claim.

[48] Given the Judge's conclusion that the Commissioner had acted responsibly in applying for the restraining orders and agreeing to vary them, Mr Harborow argued the Judge should have acknowledged the Commissioner's conduct had decreased the chance of any loss and made it unnecessary to incentivise the Commissioner to deal with any variation requests reasonably.

[49] Mr Harborow submitted that the Judge had failed properly to consider the likelihood and extent of the loss that could result from the restraining orders. These are among the most important of the factors discussed in *Yan*, given that the purpose of an undertaking is to compensate for loss. Mr Harborow complained that the Judge had failed to engage with, and critically analyse, the evidence as to the likelihood and

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68 Although rare, judges of this Court may sit as judges of the High Court where that is the most practicable solution to a jurisdiction problem. See: Senior Courts Act, s 103; *Mediaworks TV Ltd v Staples* [2019] NZCA 133, [2020] 2 NZLR 372; *Harvey v R* [2015] NZCA 420; *Tobin v R* [2022] NZCA 226; and Andrew Beck and others *McGechan on Procedure* (loose leaf ed, Thomson Reuters) at [SC103/02].

69 *Yan v Commissioner of Police*, above n 50.

extent of loss. Instead, he had accepted uncritically the respondents' unfounded assertions that the restraining orders would both prevent access to capital for expansion and discount the sale value of SCL's business. These errors were exacerbated by the fact that the undertaking required was expressed in terms which were "extraordinarily wide", bearing no resemblance to the matters said to justify it. Counsel referred to the chilling effect of a potential damages claim, particularly in the context of trading businesses. This is highly undesirable, given that it is the Commissioner's role to act in the public interest.

[50] Mr Mansfield for the respondents joined issue with the Commissioner's claims that the restraining orders would not adversely affect the SCL Group's ability to borrow and the value of the SCL Group. The key complaint advanced by the respondents is that the restraining orders prevent the business of the SCL Group from borrowing further, and prevent its constituent parts being sold as part of a holistically operating business. Mr Mansfield characterised the Commissioner's argument on appeal as effectively asking this Court to overrule its decision in *Yan* by seeking a de facto presumption against undertakings being ordered under the Act, unless respondents can prove actual loss before such loss has eventuated. Mr Mansfield claimed that this would defeat the purpose of s 29, which is to provide a safeguard against the possibility of oppression and injustice.

[51] Mr Mansfield pointed to what he characterised as an unresolved tension in the Commissioner's position on appeal. If, as the Commissioner contends, his case is strong and the respondents will in any event suffer no loss, the claimed chilling effect of an undertaking would not arise. Similarly, if a loss were suffered, but it was not caused by the restraining orders, again there would be no chilling effect. It would only be on the failure of the Commissioner's forfeiture application and the respondents suffering significant loss, as they contend they would, that the Commissioner would be held to account for it.

[52] Mr Mansfield claimed that if an undertaking is not appropriate in the present case, it is difficult to see when it ever would be.

[53] The arguments of the parties just summarised were extensively elaborated in oral submissions as will be reflected in the discussion below.

Analysis

[54] Section 29 of the Act provides relevantly as follows:

> **29 Undertakings as to damages or costs in relation to restraining orders**
>
> (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.
>
> (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.
>
> …

[55] The purpose of the provision and the proper approach to its application were discussed by this Court in *Yan*.[70] Both parties sought to derive support from the discussion in that case and it is appropriate that we summarise it here.

[56] The underlying criminality alleged in *Yan* was that since arriving in New Zealand, Mr Yan and his partner, Ms You, had engaged in large-scale money laundering of the proceeds of fraud committed in China. The Commissioner was successful, on a without notice basis, in obtaining global restraining orders over all property controlled by Mr Yan and Ms You, as well as specific items the Commissioner believed to be in their effective control. Pending the hearing of an on notice application for orders extending the duration of the restraining orders, Mr Yan and Ms You applied for an order under s 29 of the Act requiring the Commissioner to provide undertakings that he would meet any damages or loss they might suffer, including lost opportunities, as a result of the continued operation of the restraining

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70 *Yan v Commissioner of Police*, above n 50.

orders in relation to some of the restrained property.[71] The High Court declined the application.[72]

[57] The Court began by rejecting an argument made by counsel for the appellants that, in cases involving business or dynamic assets (as opposed to personal and fixed assets), in respect of which there will always be the possibility of loss, there should be a presumption in favour of ordering an undertaking.[73] This argument, the Court held, placed an unwarranted gloss on the wording of s 29, which expressed a broad and untrammelled discretion.[74] The presumption contended for also overlooked other provisions contained within the Act designed to temper the harsh effects of restraining orders, which most importantly included the ability for restraining orders to be varied under s 35(a).[75] Equally, the presumption took insufficient account of the fact that the Commissioner is no ordinary civil litigant, but rather is acting in the public good with a law enforcement purpose designed to combat significant criminal activity.[76] This distinguished undertakings under s 29 from ordinary undertakings as to damages in civil proceedings.[77] Parliament would not have intended for the Commissioner to be required, as a matter of course, to effectively underwrite the risks of a number of speculative transactions.[78]

[58] Ultimately, this Court in *Yan* affirmed the general statement of principle set out by Lang J in the Court below, namely, that the discretion "should be exercised according to considerations of justice and fairness and to diminish the possibility of oppression and injustice".[79] Relevant but non-exhaustive considerations include:[80]

(a) the personal circumstances of the respondent;

(b) delay;

(c) the nature of the asset;

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71 At [10]–[14].
72 *Commissioner of Police v Yan* [2014] NZHC 2688 at [33].
73 *Yan v Commissioner of Police*, above n 50, at [25] and [27]–[35].
74 At [27].
75 At [29]–[31].
76 At [33].
77 At [34].
78 At [35].
79 At [40], citing *Commissioner of Police v Yan*, above n 72, at [5].
80 At [41]–[42].

(d) the likelihood of loss being suffered as a result of the restraint;

(e) the extent of any likely loss;

(f) the conduct of the Commissioner;

(g) the strength of the Commissioner's case; and

(h) the existence of a meaningful alternative avenue of redress.

[59] The Court regarded the inquiry as essentially fact-specific, noting that the weight to be accorded to different facts would vary from case to case.[81] We now turn to the considerations relevant to this case.

Likelihood and extent of loss

[60] In large part, the argument before us focussed on the potential for loss arising from the restraining orders. As we have noted, the Judge identified two possibilities: first, the restraining orders might impact the ability of the SCL Group to undertake significant borrowing for the purposes of investment; and secondly, they would likely result in some discount on a sale price for the business, arising from the commercial perception of the restraining orders.[82] For convenience, we refer to these as the two theories of loss. The Commissioner's contention on appeal that these findings were without proper foundation means we must examine, in some detail, the evidence that was led before the High Court.

The Commissioner's evidence

[61] On this issue, the argument for the purposes of this appeal focused for the most part on the evidence given by Mr Bruce Sheppard and Mr Ward, both of whom were called by the SCL Group. However, it is also necessary to consider the evidence of Ms Wendy Morrison, a forensic accountant employed by the police, who was called by the Commissioner, is relevant to the first theory of loss advanced by the respondents.

[62] Ms Morrison assessed the restraining orders' effect on the respondents by analysing the financial position of the SCL Group. Having reviewed SCL's bank

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81 At [40].

82 High Court judgment, above n 1, at [2] and [51]–[52].

accounts, she concluded that access to working capital had increased following the restraining orders. In the five months prior to the restraining orders, total available funds averaged about **[Redacted]** whereas by 30 June 2020, the end point of Ms Morrison's analysis, the SCL Group had access to **[Redacted]**. Ms Morrison also pointed to the CreditPlus facility, a loan facility for trucks and other equipment which is secured against already purchased trucks and equipment. At the time of the High Court hearing, this facility was drawn to approximately **[Redacted]** (leaving **[Redacted]** in headroom).[83]

[63] Ms Morrison also commented that, both before and after the restraining orders, the Salters had chosen to spend the SCL Group's funds on themselves, with attendant opportunity costs. For example, after the orders were made, Mr Salter used the CreditPlus facility to purchase a Chevrolet Silverado ute worth $163,750 and, as Mr Salter confirmed in his own evidence, an Audi worth approximately $245,000. As at 31 December 2019, the balance of the SCL Group's shareholders' current account, representing the Salters' drawings from the business, totalled at least **[Redacted]**. Ms Morrison's evidence was that the Salters' decision to spend the SCL Group's funds on themselves impacted the SCL Group's ability to, for example, complete necessary infrastructure improvements.

The respondents' evidence

[64] Mr Ward was asked to provide expert evidence of the value of the business of the SCL Group and the impact of the restraining orders on that value. Mr Ward's evidence was that it would be difficult to sell a business like the SCL Group while it was subject to restraining orders and that any potential sale would be attractive only at a "fire sale" price. He stated that the restraining orders create an "environment of uncertainty", and that given ongoing court proceedings, media publicity and "risk of forfeiture of the SCL Group's business", an otherwise prospective buyer would likely not transact through fear of sullying their own brand and reputation. Sophisticated prospective buyers would readily infer, if the business was on sale while subject to restraining orders, that the sellers were under duress and press this to their advantage.

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83 We note that in the High Court judgment, above n 1, at [5], the Judge stated the CreditPlus facility was, at that time, drawn up to "around **[Redacted]**". We adopt the numbers in Ms Morrison's evidence.

[65] Mr Ward also noted the complexities of transacting a business subject to restraining orders, including extensive due diligence, time delays and "additional costs with the need for the transaction to be conditional on formal consent being granted by the Commissioner of Police to allow an arms-length sale to proceed". Also important was the fact that the orders restrained the SCL Group's ability to access working capital necessary for expansions, upgrades and/or acquisitions.

[66] Overall, Mr Ward estimated that the restraining orders together with the impacts of the COVID-19 pandemic would result in a discount of between 50 to 60 per cent from the SCL Group's true market value. That discount, he explained in cross-examination, was due to potential buyers being "sophisticated corporates" probably based or owned outside of New Zealand and who would, in Mr Ward's experience, "run a mile on trying to transact assets that were restrained". Pressed on the fact that the restraining orders only cover real estate whereas in his affidavit he had claimed the "business" was covered, Mr Ward explained that Bolderwood Place is the "centre of the business" where "significant capital investment and improvements … [are] bolted down".

[67] Mr Sheppard provided evidence about the effect of the restraining orders on the SCL Group's working capital. In particular, he was asked to address the evidence of Ms Morrison regarding the Salters' drawings from the SCL Group and the SCL Group's access to working capital following the restraining orders. As to the latter issue, Mr Sheppard noted that, since the orders were made, only one lending increase has been approved by BNZ, which was during the first COVID-19 lockdown. In his opinion, BNZ would subject the Salters to considerably more robust management and scrutiny than that prior to the restraining orders. Further, by providing access to the family capital base as security, the restraining orders prevented smooth access to credit for investment and growth.

[68] As to the former issue, Mr Sheppard said that it was common for owners who were wishing to sell and retire to accelerate drawings, in effect consuming their capital and market value in advance of sale to "provide a bridge" to retirement. In his opinion, the market value of the SCL Group supported the level of accumulated drawings by the Salters as at March 2018. Viewed in context, although he considered that SCL's

accounting arrangements were "arguably untidy and sub-optimal", Mr Sheppard did not see the Salters' drawings as excessive.

The arguments

[69] The Commissioner argued there was insufficient evidence to conclude that the restraining orders might have a negative effect on the ability of the SCL Group to undertake significant borrowing for the purposes of investment and expansion of the business:

(a) First, the respondents' working capital had increased since the restraining orders were made, as confirmed by Mr Salter. The respondents retained access to existing sources of funds, including the CreditPlus facility, which at the time of the High Court hearing had **[Redacted]** available for vehicle and equipment purchases.

(b) Second, Mr and Mrs Salter have drawn extensively from the business's cashflow, both before and after the restraining orders were made, to fund personal expenses. There was a need to recognise the resulting opportunity cost, namely that these funds, totalling at least **[Redacted]**, could no longer be put towards working or investment capital purposes.

(c) Third, the evidence as to the restrictions on working capital following the restraining orders given by Mr Sheppard was limited. In particular:

(i) he did not address the evidence which Ms Morrison's affidavit was responding to;

(ii) he relied only on two sets of SCL's financial statements, from the 2017 and 2018 tax years and did not request updated documentation; and

(iii) his evidence that the orders impacted the respondents' relationship with BNZ and the speed with which the respondents could access capital was speculative.

(d) Fourth, the Commissioner has not been approached regarding further variations to the restraining orders for further borrowing. In *Rodriguez v Commissioner of Police*, Peters J considered that the respondent's failure to engage with the Commissioner about how restrained funds could be invested so as to mitigate loss meant it was not fair to require the Commissioner to provide an undertaking.[84] A similar approach was taken in *Yan*.[85]

[70] The Commissioner also submitted the Judge was wrong to conclude that there would be some discount on the potential sale price as a result of "commercial perception of the restraining orders complicating a sales transaction".[86] The only evidence in support of that proposition came from Mr Ward and was materially unreliable. He had not seen the restraining orders or any of the evidence filed by the Commissioner or the respondents, and was unfamiliar with the Act. He misunderstood the effect of the restraining orders and his valuation was premised on inaccurate financial information. Mr Ward also accepted in cross-examination that providing evidence on the likely discount on sale value resulting from restraining orders was, in fact, "outside his brief". Mr Ward did not have the information required to assess whether the restraining orders had impacted the SCL Group's financial performance and the Commissioner's evidence that they had not done so was not provided to him.

[71] Moreover, the Commissioner argued, the Judge had failed to account for evidence of two prospective purchasers in New Zealand, whose interest in the SCL Group continued despite the restraining orders. Nor did the Judge properly engage with whether the Salters wanted to sell the business: the most recent evidence was that they did not wish to do so, or if they did, they were prepared to consider sale of the business separately from the underlying (restrained) land.

[72] The Commissioner did not accept the respondents' claim that the Commissioner was effectively arguing for a presumptive approach to undertakings under s 29 of the Act that was rejected in *Yan*. Ordering an undertaking would be

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84 *Commissioner of Police v Rodriguez* [2021] NZHC 2223 at [56].
85 *Yan*, above n 50, at [134]–[135].
86 High Court judgment, above n 1, at [2] and [51].

appropriate if one of the factors from *Yan* was engaged in a potent way, for example if the Commissioner's conduct was unreasonable. Here, an undertaking would have been appropriate had the original bases for seeking an undertaking been made out. These included, beyond the two theories of loss relevant to this appeal, claims that the SCL Group had suffered substantial losses as a result of the restraining orders, was unable to continue to trade freely and unhindered, had insufficient working capital, and had lost market share. The Commissioner says these claims fell away before the High Court, leaving the two theories of loss which the Judge assessed generically.

[73] The respondents contended that the fundamental evidential basis for the Judge's findings was not seriously disputed. It was clear that the restraining orders prevented the SCL Group from borrowing further: the maximum headroom was **[Redacted]**, which was insufficient to meet the costs of a new tank, which on Mr Salter's evidence would cost approximately $3 million. The drawings from the business for personal expenses were made before the restraining orders and were viewed as appropriate by Mr Sheppard. In any event, the loss at which the undertaking is directed is prospective loss, not past loss.

[74] As to the impact of the restraining orders on the value of the business, the respondents submitted that the Commissioner did not advance any evidence that was contrary to that of Mr Ward. It would be wrong, in the respondents' submission, to require Mr Ward to come up with a precise and scientifically grounded estimate of the likely discount in the business's value caused by the restraining orders: all that was necessary was for him to establish some loss was likely.

[75] The respondents argued it was not clear why the "irregularities" in the financial information which the Commissioner claimed Mr Ward had relied on, if they even existed, would have had any impact on his valuation of the business before restraining orders were imposed. In terms of the value following the restraining orders, the business could not be sold as an integrated whole without the Commissioner's prior consent. The plant which is affixed to the land at Bolderwood Place is the engine of the business. If that plant is affixed to the land, then so too is the integrated business of the SCL Group for the purposes of any sale. The respondents remarked:

> A sale that does not include the Bolderwood [p]roperty is not a sale of a waste oil collection and recycling business. It is a sale of a fleet of trucks.

[76] Mr Ward's evidence was that it would not be commercially realistic to attempt to sell the business separately from the land. But even if that were not so, any purchaser would demand a long-term lease of the land and fixtures for certainty's sake. The Commissioner would be unlikely to consent to such an arrangement as that would preclude the forfeiture of the property.

[77] Finally, the respondents argued that it would be wrong to rely on the two approaches by domestic companies regarding potential purchase of the business in 2018 and 2019 respectively as evidence of the impact of the restraining orders. Those approaches could be characterised as "tyre kicking". They were made outside the timeline of shareholders working towards sale in early 2020. They did not gel with the more commercially sensible approach of running a competitive and formal sales process attracting interest from large corporates from New Zealand and overseas. And in any event, such interactions are irrelevant, undertakings being forward looking.

[78] Overall, the respondents maintained that the Judge's approach was consistent with the direction in *Yan* that "[i]n most cases, all that will usually be required is for the judge to stand back and undertake a global assessment".[87]

Discussion

[79] We accept the Commissioner's submission that every restraining order over land has the potential to impact borrowing (in the sense of restricting the amount of debt which can be secured against the property) and may impact sale price. In such cases, something more is needed to justify an undertaking being required — to hold otherwise would be to prescribe a presumptive approach similar to that rejected in *Yan*. But an applicant is not required to establish that future loss is certain.[88] Rather, the court's task is to critically assess the theories of loss advanced by the applicant for an undertaking, with a view to assessing the likelihood and extent of possible loss.[89]

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87 *Yan*, above n 50, at [47].
88 At [71].
89 At [71].

[80] As this Court observed in *Yan*, assessing the extent and likelihood of loss consequent on restraining orders "inherently engages issues of causation".[90] The question to be addressed is whether, assuming a future forfeiture application is unsuccessful, the restraining orders are likely to cause loss and, if so, at what level. We see this inquiry as analytically distinct from assessing the strength of the Commissioner's case. If the Commissioner's case appears to be strong, loss that appears very likely to eventuate may still justify an undertaking. In such a case, the two factors will pull in different directions and must be balanced according to the needs of justice and fairness.[91] Accordingly, we reject the Commissioner's submission that the Judge failed to properly bring to account the strength of the Commissioner's case when assessing the likelihood of loss.

[81] As we have noted, the Commissioner accepted that an undertaking would have been appropriate had the theories of loss relied on in the respondents' application for an undertaking been made out.[92] The Commissioner contended that this application involved several theories of loss which have since fallen away, pointing, as an example, to the claim that the SCL Group had suffered substantial losses as a result of the restraining orders. We do not accept this characterisation. As we read the application, the claim that the SCL Group had suffered substantial losses was predicated on lost market value, impact on working capital and ability to attract further capital. These were essentially the same theories of loss which were referred to by the Judge. Although in cross-examination Mr Salter resiled from evidence he had given in his affidavit — including claims that COVID-19 has affected the SCL Group's turnover and that the CreditPlus facility could only be used for the purchase of trucks — the basis of the undertaking application remained largely intact.

[82] We now turn to the first theory of loss, being that the restraining orders might impact the ability of the SCL Group to undertake significant borrowing for the purposes of investment. Although we think it likely there would be some impact on the ability to borrow, we do not consider it would be appropriate to require an undertaking on this basis alone. Granted, the Commissioner presumably will not wish

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90 At [79].
91 At [40].
92 See above at [72].

to allow further debt to be secured against the SCL Group's property in a way that will compromise his application for profit forfeiture orders. That is reflected in the fact that, when the respondents secured a variation to the restraining orders to temporarily increase the limit of the overdraft facility from **[Redacted]** to **[Redacted]**, they were required to "use all reasonable endeavours to reduce as soon as reasonably practicable the overdrawn balance of the Overdraft Facility to a sum below **[Redacted]**". But we consider that requiring an undertaking for that reason would be to pre-empt the potential for constructive engagement between the Commissioner and the respondents. It is unclear to us why engagement to mitigate the chance of loss has not taken place. For example, it would appear possible for the Commissioner to retain an interest in any new tank built, pending determination of the forfeiture application.

[83] However, we agree with the Judge's conclusion regarding the second theory of loss, that the restraining orders would likely result in some discount on a sale price for the business. It would have been helpful for Mr Ward to have been briefed on the precise impacts of the restraining orders, and there is reason to doubt some of the underlying financial information he had used to value the SCL Group. But the Commissioner has not demonstrated that the broad thrust of his evidence, which was that the sophisticated prospective buyers in the market for purchasing the SCL Group would discount its value based on the complexities associated with the restraining orders, was wrong.

[84] First, although there may be reason to doubt the integrity of the financial information Mr Ward relied upon in his valuation, we do not see this as material to his assessment as to the likely discount. Things might have been different had Mr Ward's discount been predicated on an assumption that the SCL Group's financial performance had been affected by the restraining orders. But that was not the case here. His discount — which he expressed as a percentage — did not rely on the information he used for valuing the SCL Group. Rather, it was an opinion based on his "significant business experience" that buyers would be deterred from purchasing a business, the assets of which were restrained.

[85] Second, we do not accept the Commissioner's submission that Mr Ward conceded that assessing the effect of the restraining orders was outside of his brief. In his affidavit, Mr Ward states that he was asked to provide his expert opinion on:

> (a) The value of the SCL business:
>
> (i) Before the restraining orders; and
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> (ii) After the restraining orders; and
>
> (b) The "transactability" of a sale of a business that is subject to restraining orders under the Criminal Proceeds (Recovery) Act 2009 and at risk of forfeiture, including what (if any) impact this might have on prospective purchasers.

The extract from cross-examination relied upon by the Commissioner reads:

> Q. But your brief was to give a valuation or to give a –
>
> A. The brief and scope was to provide a valuation of the Salters Cartage business.
>
> Q. And to give – to be very clear, was it also to give a likely discount on that valuation, as a consequence of the restraining orders?
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> A. No, that wasn't part of the brief. The key part of the brief was to provide my significant business experience as a valuer and businessman and provide, hopefully in the Court, expert opinion or advice, and I guess trying to separate property from the business. I just think it's – from a business point of view, it's not what you do for valuation purposes.

When asked whether the passages in his affidavit, where he estimated the likely discount consequent on the restraining orders, were outside of his brief, Mr Ward replied:

> Well the reason we came, or I came up with the discount, is simply because the potential buyers for the Salter business are sophisticated corporates probably based outside New Zealand or owned outside New Zealand and in my significant business experience those corporates would run a mile on trying to transact assets that were restrained by the Crown or the Court.

This was effectively a concession by Mr Ward that he was not seeking to provide a precise and scientifically-grounded discounted valuation of the SCL Group, but was rather seeking to rely on his business experience to estimate a rough and ready discount. He was clearly aware that this was a speculative exercise. But in our view

that does not render his evidence unreliable: in the circumstances, the exercise could only be speculative.

[86] Third, we do not consider that Mr Salter's failure to engage with two prospective New Zealand-based purchasers in 2018 and 2019 means we should doubt his evidence that Mrs Salter and he wish to sell the business and retire. Mr Salter's evidence in his affidavit was that matters did not progress after restraining orders were served late in 2019. As the Commissioner submits, that appears to be undermined by an email he sent in December 2019, before he became aware of the restraining orders, where he stated that because the "council... [was] moving [in] on two … competitors" the "outlook" for growth in the coming year had changed and the Salters were therefore "holding off selling in the short term". However, in cross-examination, he said that this strategy had not yet come to fruition and was emphatic that he would "love to sell" the business as he was "old" and "tired" but the restraining orders were an impediment to realising the business's true market value.

[87] In the circumstances we consider it is relatively clear that the Salters do want to sell and would be attempting to do so but for the restraining orders. Moreover, as the respondents pointed out, sale and expansion are not mutually exclusive: the latter creates value in the business which is then realised upon sale. As things stand, the forfeiture application is set down tentatively for a seven-week hearing in October 2024. We do not think it would be fair to the Salters to assume, against Mr Salter's evidence to the contrary, that they would not have wished to sell the business before the determination of that application, including any appeals.

[88] Finally, it is important that the restraining orders cover land to which the oil processing plant — described by the respondents as the "engine" of the SCL Group — is affixed. Before the restraining orders were made, Mr Salter clearly contemplated that the land might be sold separately to the business itself: he said as much to a prospective purchaser in August 2019. But while that might be an option, Mr Ward's evidence was that it would not be commercially realistic: since the business is integrated around oil collection, storage and processing, it would be difficult to sell its component parts individually.

[89] Overall, while we differ from the Judge regarding the first theory of loss, we consider the evidence supported his conclusion on the second theory of loss: that some discount on a sale price for the business is a likely result of the commercial perception of the restraining orders complicating a sales transaction.

[90] Having addressed the likelihood and extent of loss, we now turn to address the Commissioner's other arguments.

Chilling effect

[91] It will be recalled that the Judge held that the Commissioner's actions in pursuing and administering the restraining orders would not be "chilled" by an undertaking.[93] The Commissioner argued that in doing so the Judge improperly side-lined the chilling effect of an undertaking. For this submission, the Commissioner relied on a statement by this Court in *Yan*, made in the course of rejecting the argument that public policy considerations were irrelevant to whether an undertaking should be imposed and should only be taken into account at the "second stage", being when the undertaking came to be enforced.[94] This Court stated:[95]

> [37] We disagree. In our view, it would be wrong to relegate public policy considerations to the second stage. To do so ignores the chilling effect of requiring an undertaking in the first place. … [W]e consider 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. That would clearly not be in the public interest.

The Court stated that a more discerning approach is required and went on to set out the list of relevant factors to be considered we have set out above at [58].[96]

[92] We consider it is legitimate to consider potential for a chilling effect under the "broad and untrammelled" discretion conferred by s 29 of the Act.[97] But the potential for a chilling effect was not intended to colour the entire inquiry. If it did, that would again risk creating a presumptive approach to requiring undertakings under s 29,

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93 High Court judgment, above n 1, at [55].
94 *Yan*, above n 50, at [36].
95 Footnote omitted.
96 At [38] and [41].
97 At [27].

something this Court in *Yan* was careful to avoid. Rather, in any given case, the risk that the Commissioner might be chilled must be balanced as part of the broader assessment of the needs of justice and fairness. There may be more or less risk of a chilling effect depending on the circumstances of the particular case.

[93] In the present case, the Judge reasoned that the Commissioner would not be unduly affected. We see no reason to doubt this conclusion. The Commissioner argued that the "spectre" of facing a damages claim is chilling, particularly in the context of trading businesses, but has not otherwise demonstrated why a chilling effect would be particularly potent in this case. Where there is no such evidence, it will be open for the party seeking the undertaking to reason, as the respondents did in this case, that the Commissioner's arguments that his case is strong, and loss is unlikely, undermine any claim to a chilling effect.

[94] It follows we see no grounds for revisiting the Judge's decision on this basis.

Strength of the Commissioner's case

[95] The civil forfeiture application, which we have admitted as further evidence and which was filed by the Commissioner on 23 September 2022, seeks a profit forfeiture order under s 55 of the Act against SCL and Mr and Mrs Salter on a joint and several basis. To the extent this order does not result in the forfeiture of the three properties owned by the Salters, assets forfeiture orders are sought in respect of those properties. The value of the unlawful benefit for the purposes of s 53 of the Act is stated as being $10,927,883.90.

[96] This application was not before the Judge when he stated:[98]

> I find it difficult to assess the strength of the Commissioner's case for forfeiture of particular assets at this point. That is particularl[y] 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 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.

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98 High Court judgment, above n 1, at [48].

The Commissioner criticised the Judge's analysis of this factor as cursory, while submitting it was significant that the Judge concluded the Commissioner's case was arguable: it could not be said the case was "so fragile" as to justify requiring an undertaking, an argument advanced in *Yan*.[99]

[97] We agree with the respondents that this reference to the case's fragility in *Yan* was made in the course of rejecting an argument by the appellants that the Commissioner's dependence on Chinese witnesses to establish the underlying significant criminal activity, who had been found to be unreliable, left the case against Mr Yan so fragile it justified an undertaking. This Court noted that the impugned witnesses comprised only nine out of 38 total witnesses to be called by the Commissioner and that an affidavit from an official of the Chinese Ministry of Public Security stated that witnesses were willing to provide evidence against Mr Yan.[100] The Court's remarks were plainly informed by that particular context.

[98] Here, the context is very different. Most of the underlying criminal activity in respect of which the restraining orders were sought was the subject of guilty pleas. That necessarily bears on the strength of the Commissioner's case: the first hurdle has been cleared. What remains is for the Commissioner to prove:

(a) for the profit forfeiture order, that on the balance of probabilities the respondents have, in the relevant period of criminal activity, unlawfully benefited from significant criminal activity;[101] and

(b) for the assets forfeiture orders, that on the balance of probabilities the property in question was, wholly or in part, acquired as a result of, or directly or indirectly derived from, significant criminal activity.[102]

[99] Accordingly, we agree with the Commissioner that it is significant that some of the underlying criminal activity has been established. But we consider it would be

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99 Citing *Yan*, above n 50, at [66].

100 At [64].

101 Criminal Proceeds (Recovery) Act, s 55.

102 Section 50. See the definition of tainted property at s 5(1), and ss 6 and 7. Under s 7, for the respondents to have unlawfully benefited, they must have knowingly, directly or indirectly, derived a benefit from significant criminal activity.

inappropriate to go any further than the Judge's conclusion that the Commissioner has an arguable case that could result in some sort of forfeiture orders. There are, as the Judge recognised, live issues about the application of the Act to the circumstances of this case. These will, no doubt, be the subjects of argument at the trial. At this juncture, we can say no more than that the Commissioner has an arguable case.

Evaluation

[100] In *Yan,* the Divisional Court did not find it necessary to decide whether the appeal should be regarded as one against the exercise of a discretion or whether it should be approached as a general appeal.[103] However, we consider the position is reasonably clear from the nature of the s 29 power and the statutory context. The power is one that should be exercised where necessary to ensure that persons affected by restraining orders do not suffer loss as a consequence of an order that ought not to have been made. We consider that requires an evaluative exercise both at first instance and on appeal. The considerations set out in *Yan* will be relevant to the evaluation, their weight to be assessed by the High Court at first instance, but again by this Court on appeal in accordance with the Court's duty to form its own opinion. If this Court reaches a different view to that of the High Court then it will substitute its own decision in accordance with *Austin, Nichols & Co Inc v Stichting Lodestar*.[104] That necessarily involves a determination that the decision under appeal is wrong.[105]

[101] Having regard to the extent of the discussion above the evaluative exercise can be comparatively brief. We are satisfied for the reasons we have given that the restraining order would likely have an effect on the sale price that might be able to be achieved on a sale of the business of the SCL Group. We are also satisfied that steps to sell this business were likely to have been taken but for the restraining orders. This is a consideration that favours requiring an undertaking.

[102] While we accept that the prospect of having to give an undertaking might have a chilling effect, we are not satisfied the Commissioner has established that would be so in the present context. The Commissioner is evidently confident of a successful

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103 *Yan*, above n 50, at [136], n 51.
104 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5].
105 At [16].

outcome in relation to the application for forfeiture orders, and we consider that is likely to be a more powerful influence than any chilling effect of having to give an undertaking. We consider that must be so given the resources of the police as an agency of the state, the provision in s 29(3) for payment of any expense incurred on behalf of the Crown in satisfaction of an undertaking and the proven utility of the Act in achieving the forfeiture of property that has been derived directly or indirectly from significant criminal activity. We have not been persuaded that the Judge erred in his evaluation of the claimed chilling effect.

[103] We also see no reason to differ from the Judge's conclusion that the Commissioner has an arguable case that could result in forfeiture orders. As explained above we do not see this case as analogous to *Yan.* There is no doubt about the Commissioner's ability to establish many of the primary facts which will be the foundation of the application or forfeiture orders. There will be issues at the trial about the inferences to be drawn from the primary facts, and legal argument about the application of the statutory tests and the extent to which the respondents may be said to have benefited from significant criminal activity. It is not possible or appropriate to say anything further on these issues. In our view the fact the Commissioner has an arguable case is not a reason an undertaking should be required in the circumstances of this case. Rather, we see it as a neutral factor.

[104] We do not see any of the other *Yan* factors as having a significant impact on the evaluative exercise. Overall, we are satisfied that this was an appropriate case for an undertaking to be required.

Result

[105] The application to adduce further evidence is granted.

[106] The appeal is dismissed.

[107] The appellant must pay the respondents costs calculated for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

[108] In the event leave is required, it is granted.

Solicitors:
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Jack P Cundy, Auckland for Respondents