IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-3146
[2020] NZHC 2036

BETWEEN	COMMISSIONER OF POLICE Applicant
AND	PAUL ANDREW SNOWDEN Respondent

Hearing:	16, 17, 18, 19 and 20 March 2020 (written submissions filed on 3, 24 April and 5 May 2020)
Appearances:	M R Harborow and R S Ching for the Applicant A Speed for the Respondent
Judgment:	12 August 2020

JUDGMENT OF GAULT J

This judgment was delivered by me on 12 August 2020 at 11:30 am pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Solicitors / Counsel:
Mr M R Harborow and Ms R S Ching, Meredith Connell, Office of the Crown Solicitor, Auckland
Mr A Speed, Barrister, Auckland
Mr R Keam (respondent's instructing solicitor), Keam law, Auckland

[1] The Commissioner of Police (Commissioner) seeks civil forfeiture orders against Mr Snowden under the Criminal Proceeds (Recovery) Act 2009 (CPRA).

[2] The Commissioner seeks assets forfeiture orders pursuant to s 50 of the CPRA in respect of three items of the property:

(a) a 1.6158 hectare property at 383 Karaka Road, Karaka, Auckland (the Karaka property);[1]

(b) a 2001 Aprilia RSV 1000 Mille motorcycle (the Aprilia);[2] and

(c) $2,725 cash seized on 12 April 2013.

[3] The Commissioner claims that these items of property are "tainted" because they were wholly or in part acquired as a result of significant criminal activity and/or directly or indirectly derived from significant criminal activity. The alleged criminal activity was possession and sale of drugs and benefit fraud.

[4] Alternatively, the Commissioner seeks a profit forfeiture order against Mr Snowden under s 55 of the CPRA on the basis that Mr Snowden has unlawfully benefited from significant criminal activity to the extent of $754,533, and he has interests in, or effective control over, the items of property.

[5] Mr Snowden opposes the orders except in relation to the Aprilia. He denies that the other property is tainted and opposes profit forfeiture on the basis that he has not unlawfully benefited from significant criminal activity and does not have interests in, or effective control over, the other property. Mr Snowden also raises a limitation defence under the Limitation Act 1950 in relation to the assets forfeiture claim to the extent that the significant criminal activity occurred prior to 1 January 2011.

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1 Described in certificate of title NA39C/1072. The application does not extend to the mortgagee's interest.

2 Registration number 38UWF. This motorcycle has been sold by consent, so the application now relates to the proceeds of sale.

[6] In the alternative, Mr Snowden applies for relief from forfeiture on that basis that he and/or a family trust are likely to suffer undue hardship.

Factual background

[7] In 2001/2002 Mr Snowden arranged the purchase of the Karaka property from Mr Kimball Johnson or a related entity:

(a) On 22 February 2001 Mr Johnson incorporated Karaka Farmlets Ltd (KFL). Mr Johnson was the director of KFL and Johnson Family Foundation Ltd was the sole shareholder.

(b) On 28 February 2001 KFL purchased the Karaka property for $460,000.

(c) On 5 March 2001 Wadsworth Ray Solicitors Nominee Company Ltd registered a mortgage over the Karaka property securing a loan of $320,000 to KFL to effect the purchase of the Karaka property.

(d) On 14 December 2001 Mr Snowden settled the Paul Andrew Snowden Family Trust (the Trust). Mr Snowden and his parents were named as the trustees. Mr Snowden's children were the primary beneficiaries and Mr Snowden, his children, spouse and a broad range of relatives (including the trustees) were named as eligible beneficiaries.

(e) In March 2002 the trustees of the Trust purchased the shares in KFL from the Johnson Family Foundation Ltd for $100,000 and guaranteed the $320,000 mortgage secured over the Karaka property. Mr Snowden subsequently became the sole director of KFL.

[8] On 11 November 2002 KFL refinanced the mortgage. The existing mortgage was repaid and a new $320,000 loan from Mortgage Holding Trust Company Ltd was secured over the Karaka property.

[9] Mr Snowden has lived in a house on the Karaka property. He/KFL has made regular mortgage repayments. There are other dwellings on the Karaka property which have been rented out to Mr Snowden's family members or others.

[10] Between 2 December 2002 and 22 May 2006 Mr Snowden received payments totalling $61,050.21 from the Ministry of Social Development (MSD). An investigation undertaken by MSD in 2006/2007 determined that Mr Snowden was not entitled to receive these payments as he was receiving cash income. MSD decided not to prosecute but still required Mr Snowden to reimburse MSD for the overpayment. Mr Snowden repaid only $1,500.

[11] On 3 March 2010 police searched the Karaka property and located 28 sealable plastic bags, each containing one ounce of cannabis, approximately 1.5 kilograms of loose cannabis plant material, and 0.2 grams of methamphetamine. On 29 June 2010 Mr Snowden was convicted of one charge of possession of cannabis for supply and one charge of possession of methamphetamine. He was sentenced to four months' home detention.

[12] On 25 January 2013 Mr Snowden or his associate, Mr Carr, purchased the Aprilia for $8,500 cash. Mr Snowden disputes that he purchased it rather than Mr Carr, but Mr Snowden accepts Mr Carr left it with him, that it is tainted and he does not oppose its asset forfeiture.

[13] In 2013 the Christchurch Organised Crime Unit launched an investigation (known as Operation Smart) into Mr Carr, who lived in Christchurch. Mr Snowden became a person of interest in the investigation. Police intercepted communications between Mr Snowden and Mr Carr. Mr Snowden made multiple return flights between Auckland and Christchurch. So did Mr Carr.

[14] On 10 April 2013 Mr Carr flew to Auckland and caught a taxi to Mr Snowden's address. On 11 April 2013 they both flew from Auckland to Christchurch and on arrival they were arrested and searched by police. Mr Snowden had 93 grams of methamphetamine concealed between his buttocks. The value of this methamphetamine was approximately $42,000. Mr Snowden subsequently pleaded

guilty to possessing methamphetamine for supply and conspiring to deal methamphetamine.

[15] On 12 April 2013 Police searched the Karaka property and located the $2,725 cash underneath a fridge/freezer, the Aprilia, a container of cannabis heads and a point bag of cannabis.

[16] On 22 January 2014 Mr Snowden was sentenced to four years and 10 months' imprisonment on the charge of possessing methamphetamine for supply. The Department of Corrections' Provision of Advice to Court (PAC) report recorded that he had stated he was using methamphetamine almost daily, his use had increased since his father's death (12 December 2008) and he was spending about $500 per week on methamphetamine.[3]

[17] On 13 February 2015 Mr Snowden was sentenced to one year and five months' imprisonment on the charge of conspiring to supply methamphetamine, cumulative on his previous sentence.

Issues

[18] The issues to be determined are:

(a) whether the Karaka property is tainted;

(b) whether the $2,725 cash is tainted;

(c) whether Mr Snowden unlawfully benefited from the possession and sale of methamphetamine and cannabis;

(d) whether Mr Snowden has interests in the Karaka property and the $2,725 cash;

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[3] I deal with an admissibility objection to this report below at [136].

(e) whether the Limitation Act 1950 operates to exclude consideration of Mr Snowden's criminal activities prior to 1 January 2011; and

(f) whether Mr Snowden and/or the beneficiaries of the Trust are likely to suffer undue hardship.

[19] I will deal with the limitation issue first.

Limitation

[20] As indicated, Mr Snowden has raised a limitation defence under the Limitation Act 1950 in relation to the assets forfeiture claim to the extent that the significant criminal activity occurred prior to 1 January 2011.[4] The issue therefore particularly relates to the Karaka Road property and the alleged criminal offending by way of benefit fraud and that part of the drug offending that occurred prior to 1 January 2011. No limitation issue arises in relation to the profit forfeiture claim.

[21] It is common ground that the Limitation Act 1950 applies in respect of civil proceedings and that an application for an assets forfeiture order is a civil proceeding. It is also common ground that the Limitation Act 1950 generally applies to the Crown.

[22] In addition, it is common ground that the alleged benefit fraud and the cannabis offending for which Mr Snowden was convicted both occurred prior to 1 January 2011, when the Limitation Act 2010 came into force replacing the Limitation Act 1950. It is also common ground that the Limitation Act 2010 provides that the Limitation Act 1950 continues to apply to actions based on acts or omissions before 1 January 2011 to which the Limitation Act 1950 applied immediately before its repeal.[5]

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4 This was not included in the notice of opposition, but the Commissioner did not take the pleading point. Notwithstanding the words in s 4 that action(s) "shall not be brought", the effect of the Limitation Act 1950 is to provide an affirmative defence: *Davys Burton v Thom* [2007] NZCA 215, [2008] 1 NZLR 193 at [79].

5 Limitation Act 2010, s 59 and s 61 (inserting a new s 2A into the Limitation Act 1950).

[23] Unlike the Limitation Act 1950, the Limitation Act 2010 contains an express provision excluding claims under the CPRA from the money claim provisions in Part 2 of that Act.[6]

[24] Mr Speed, for Mr Snowden, submitted that s 4(5) of the Limitation Act 1950 applies and its effect is that the Commissioner needed to file proceedings within two years from when the police discovered the offending, being the date on which the cause of action accrued. Section 4(5) provided:

> An action to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any enactment shall not be brought after the expiration of 2 years from the date on which the cause of action accrued: Provided that for the purposes of this subsection the expression "penalty" shall not include a fine to which any person is liable on conviction of a criminal offence.

[25] Mr Speed relied on *Securities Commission v Midavia Rail Investments BVBA* and *Commissioner of Police v Marwood*.[7] In *Midavia*, the two year limitation period in s 4(5) was applied to an action for pecuniary penalties under the Securities Markets Act 1988. This Court and the Court of Appeal held that determining when the cause of action accrued involved a consideration of the elements of the cause of action.[8] In that case, the cause of action was complete when the insider trading sale or purchase was made. There was no reasonable discoverability test.[9]

[26] *Commissioner of Police v Marwood* involved an action for a profit forfeiture order under the CPRA. On an application to strike out on limitation grounds, Lang J concluded that the seven year period applicable to profit forfeiture orders in s 55 of the CPRA was a limitation provision and therefore the Limitation Act 1950 does not apply by virtue of s 33 of that Act, which provides that that Act does not apply where a "period of limitation is prescribed by any other enactment".[10]

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6 Limitation Act 2010, s 12(3)(e).

7 *Securities Commission v Midavia Rail Investments BVBA* [2006] 2 NZLR 207 (HC) and [2007] 2 NZLR 454 (CA); and *Commissioner of Police v Marwood* [2019] NZHC 743.

8 *Securities Commission v Midavia Rail Investments BVBA* [2006] 2 NZLR 207 (HC) at [105]-[108]; and *Securities Commission v Midavia Rail Investments BVBA* [2007] 2 NZLR 454 (CA) at [9].

9 *Securities Commission v Midavia Rail Investments BVBA* [2007] 2 NZLR 454 (CA) at [45]-[57].

10 *Commissioner of Police v Marwood* [2019] NZHC 743 at [18]-[21].

[27] Mr Harborow, for the Commissioner, submitted that s 4(5) also does not apply in relation to assets forfeiture orders under the CPRA. It is necessary to separate the two issues that arise. First, whether s 4(5) applies to claims for assets forfeiture orders. Secondly, if so, when the cause of action accrues.

Whether s 4(5) applies to claims for assets forfeiture orders

[28] On its face, a claim for assets forfeiture orders would appear to come within the qualifying words of s 4(5), that is an "action to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any enactment". The issue is whether the application of s 4(5) is excluded in relation to assets forfeiture orders under the CPRA as *Marwood* has decided it is in relation to profit forfeiture orders. *Midavia* was not of assistance in *Marwood* because, as Lang J said, the Securities Markets Act 1988 did not contain an equivalent section to s 55(1) of the CPRA.

[29] Mr Speed contrasted the requirement to prescribe the "relevant period of criminal activity" in relation to profit forfeiture orders under s 55(1) of the CPRA with the lack of any such requirement in relation to assets forfeiture orders under s 50. The "relevant period of criminal activity" is defined in s 5(1), in relation to an application for a profit forfeiture order, as "the period that ends on the date the application is made and starts 7 years before". The Commissioner claims that the relevant period of criminal activity for the profit forfeiture order is from 13 December 2009 to 19 July 2018. Mr Speed accepted this period for the profit forfeiture. The application for profit forfeiture was made on 19 July 2018. However, where an application for a profit forfeiture order relates wholly or in part to restrained property, it must be based on significant criminal activity that occurs within seven years prior to the date on which the application for a restraining order is filed.[11] Here, the application for a restraining order was filed on 12 December 2016 so the period seen years before would start on 13 December 2009.

[30] However, as Mr Speed submitted, there is no equivalent seven year (or other) period in relation to assets forfeiture orders. Therefore, unlike in *Marwood*, s 33 of

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[11] Section 55(1)(a). "Relevant period of criminal activity" is defined in s 5.

the Limitation Act 1950 does not operate to exclude the application of the Limitation Act 1950.

[31] Nevertheless, as indicated, Mr Harborow submitted that s 4(5) does not apply to assets forfeiture orders under the CPRA. He submitted that Parliament never intended that the CPRA would be subject to any external limitation statute – and that the exclusion in the Limitation Act 2010 was solely for the avoidance of doubt (noting the Limitation Act 1950 was not fit for purpose). He submitted that the CPRA either expressly articulates its own temporal limits (in the case of profit forfeiture orders) or otherwise expressly provides that an application for a civil forfeiture order is not subject to any time constraints (in the case of assets forfeiture orders).

[32] Mr Harborow acknowledged that *Marwood* is not of direct relevance as explained. However, he submitted that the lack of an equivalent temporal limit in the case of assets forfeiture orders was explained by the difference between the types of order. While a respondent retains tainted property, there is no reason why it should not be subject to asset forfeiture. However, in respect of the proceeds of criminal activity that have not attached to property, the limiting of profit forfeiture orders to the unlawful benefits accumulated within the prior seven years is statutory recognition that those benefits may be dissipated over time, without a corresponding increase in the material wealth of the respondent.

[33] In support of his submission that s 4(5) does not apply to assets forfeiture orders, Mr Harborow relied primarily on the policy or purpose of the CPRA.

[34] The purpose of the CPRA is stated in s 3:

> **3 Purpose**
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> (1) The primary purpose of this Act is to establish a regime for the forfeiture of property—
>
> (a) that has been derived directly or indirectly from significant criminal activity; or
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> (b) that represents the value of a person's unlawfully derived income.

> (2) The criminal proceeds and instruments forfeiture regime established under this Act proposes to—
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> (a) eliminate the chance for persons to profit from undertaking or being associated with significant criminal activity; and
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> (b) deter significant criminal activity; and
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> (c) reduce the ability of criminals and persons associated with crime or significant criminal activity to continue or expand criminal enterprise; and
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> (d) deal with matters associated with foreign restraining orders and foreign forfeiture orders that arise in New Zealand.

[35] As the Court of Appeal confirmed in *Hayward v Commissioner of Police*, the CPRA has a "strongly expressed statutory purpose".[12] More recently, in *Marwood v Commissioner of Police* the Supreme Court said the language of s 3(2)(a) was "aspirational" and gave a "clear and emphatic signal as to the legislative purpose".[13] In *Commissioner of Police v Tang*, in the context of determining the correct approach to assessing the benefit derived from significant criminal activity under the CPRA, Katz J said:[14]

> I note the observations of Cooke P in *Pedersen* that [the Proceeds of Crime Act 1991] was intended to deter serious crime by demonstrating emphatically that it does not pay. "It should therefore be judicially administered in that spirit".[15] The general tenor of the Explanatory Note and the Parliamentary debates which preceded the passage of the CPRA suggests that Cooke P's observations apply equally to the interpretation of the CPRA, arguably even more so.

[36] As Mr Harborow submitted, in colloquial terms the CPRA's message is that crime does not pay, and it operates by hitting serious criminals where it hurts most. The CPRA aims to eliminate the financial incentive of engaging in criminal activity and to weaken criminal enterprises by removing the funds on which they feed and grow.

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12 *Hayward v Commissioner of Police* [2014] NZCA 625 at [29(c)].
13 *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260 at [12]. See also *Cheah v Commissioner of Police* [2020] NZCA 253 at [30].
14 *Commissioner of Police v Tang* [2013] NZHC 1750 at [22].
15 *R v Pedersen* [1995] 2 NZLR 386 (CA) at 391.

[37] Mr Harborow submitted that this statutory purpose contrasts starkly with a limitation regime that severely curtails the ability of the Commissioner to pursue those who have engaged in significant criminal activity, from which they have derived unlawful benefits, by restricting the time in which an assets forfeiture application must be brought. He submitted the clear legislative intent to grant the Commissioner a lengthy jurisdiction is evident from the CPRA's treatment of profit forfeiture orders and restraining orders. Not only is there a seven period for profit forfeiture orders but that is extended where a restraining order has previously been filed. He submitted there is no restriction in relation to restraining orders, which do not fall within the scope of s 4(5), indicating the CPRA contemplates an approach to civil forfeiture which is incompatible with a conventional limitation regime. He also noted that restraining orders can, if necessary, be extended year after year prior to the filing of an application for civil forfeiture, which would have no purpose if the forfeiture proceeding is limited by time. The intention behind allowing restraining orders to be filed at any time and to be extended is to give the Commissioner the necessary time to investigate and refine his forfeiture application. A requirement to file in two years is manifestly inconsistent with this regime.

[38] In this regard, Mr Harborow also submitted that the purpose of limitation statutes, in essence that lawsuits should be brought within a reasonable time, is not engaged where the proceeding is for the forfeiture of proceeds of criminal activity.

[39] Mr Harborow also relied on the Explanatory Note for the Criminal Proceeds (Recovery) Bill. In particular, he referred to the opening statement that the Bill seeks to make "more effective provision for the confiscation of property that either represents the profits of criminal offending or was used to facilitate the commission of crime".[16] In relation to profit forfeiture orders, the seven year period was explained:[17]

> For a profit forfeiture order to be made, the Crown will have to prove on the balance of probabilities that the profit derived from relevant criminal activity was received not more than 7 years prior to an application for a restraining order (or, if no restraining order was applied for, the application of a forfeiture order).

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16 Criminal Proceeds (Recovery) Bill (81–1) (explanatory note) at 1.
17 At 3.

> The 7-year period is set to allow for confiscation of wealth derived from unlawful activity over a significant period, without going so far back in time as to give rise to a high risk of unreliable assessments being made.

[40] Mr Harborow submitted this indicated that the limitation for profit forfeiture orders was because of the draconian effect of the reverse onus, and it follows that no such limitation is required in relation to assets forfeiture orders where there is no reverse onus.

[41] Mr Harborow also submitted that the mandatory nature of s 50(1) of the CPRA was a further indicator against a two year limitation period, and that the Commissioner could apply for an assets forfeiture order at any time. Section 50(1) provides:

> If, on an application for an assets forfeiture order, the High Court is satisfied on the balance of probabilities that specific property is tainted property, the Court must make an assets forfeiture order in respect of that specific property.

[42] Section 50(1) is subject to s 51, which permits the Court to exclude certain property from an assets forfeiture order if it considers that, having regard to all of the circumstances, undue hardship is reasonably likely to be caused to the respondent.

[43] Mr Harborow also relied on s 9 of the CPRA, which provides that the CPRA applies to significant criminal activity before the commencement of the section. He submitted that this retrospective effect was also an indicator that s 4(5) does not apply. The CPRA was enacted to make more effective provision for the confiscation of property than was available under its predecessor, the Proceeds of Crime Act 1991, which was a conviction-based regime. Applying s 4(5) would defeat Parliament's intent. Also, Mr Harborow submitted that the inconsistency between the position if s 4(5) of the Limitation Act 1950 applies and the position under the Limitation Act 2010 borders on the absurd.

[44] Finally, Mr Harborow referred to the relief against forfeiture provisions, which he submitted meant that excluding s 4(5) was not unjust. He submitted that a two year limitation period for assets forfeiture orders seems absurd when there is a seven year period for profit forfeiture orders and no limitation for instrument forfeiture orders, which are based in the criminal jurisdiction.

[45] Having already concluded that s 33 of the Limitation Act 1950 does not apply in relation to asset forfeiture, I turn to Mr Harborow's submission that the CPRA otherwise expressly excludes the limitation period in s 4(5) of the Limitation Act 1950. The only express provision relied on in the CPRA relating to timing is s 9. As indicated, s 9 expressly provides that the CPRA applies to significant criminal activity before the commencement of the section. It does not refer to the timing of the tainting of property. Moreover, it does not expressly exclude any limitation period that exists, in particular under s 4(5). It is therefore necessary to consider the Commissioner's argument by applying orthodox principles of statutory interpretation to determine whether s 4(5) is excluded by necessary implication.

[46] In relation to statutory interpretation, the majority of the Court of Appeal has recently said in *Fitzgerald v R*:[18]

> Legislation must be interpreted having regard to its text and purpose. These are the twin drivers of interpretation.[19] The text of a provision is often capable of being read in more than one way. The purpose of a provision – ascertained from its immediate and general legislative context and its wider social, commercial or other objectives – may help the court to choose between competing readings of the text, or may suggest a different reading that was not immediately apparent on the face of the text. The task of a court interpreting a provision is usually to identify the reading of the provision that represents the best fit with that provision's text and purpose.

[47] Here we are dealing with an issue of inconsistency between different statutes. Two principles of statutory interpretation relevant in that context were recognised by the Court of Appeal in *Hayward.*[20] First, the desirability of finding an interpretation that reconciles any apparent inconsistency and enables the provisions to stand together.[21] Secondly, the need, if necessary, to read the earlier statute as being subject to the later statute.[22] Implied repeal is a last resort. The alternative of implied repeal *pro tanto*, where an earlier general provision is followed by a later special one,

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18 *Fitzgerald v R* [2020] NZCA 292 at [26].

19 Interpretation Act 1999, s 5; and *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

20 *Hayward v Commissioner of Police* [2014] NZCA 625 at [28].

21 JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 449. Now see RI Carter *Burrows and Carter: Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 467.

22 JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 453. Now see RI Carter *Burrows and Carter: Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 471.

involves engrafting an exception onto the general one.[23] In effect, this is what the Commissioner submits here.

[48] If the two statutes could not be read together, their relative timing may be significant. In *Hayward*, the Court of Appeal considered the apparent inconsistency between the CPRA and the Property (Relationships) Act 1976 (PRA). The Court concluded that the PRA does not override s 66 of the CPRA and require the discretion to be exercised as if the claim were brought under the PRA. One of the reasons was that the CPRA was a subsequent enactment with a strongly expressed statutory purpose.[24]

[49] Here, the CPRA was of course enacted after the Limitation Act 1950. But the prior question is whether there is an inconsistency between the two statutes or provisions. There was no inconsistency in relation to profit forfeiture by virtue of s 33 which Lang J applied in *Marwood*. Indeed, that analysis suggests that, but for s 33, the limitation periods in the Limitation Act 1950 would apply. However, Lang J was not directly considering that wider question. In relation to asset forfeiture, the specific question is whether there is an inconsistency between s 50 of the CPRA and s 4(5) of the Limitation Act 1950 that cannot be reconciled. That involves an assessment of the respective purposes of the provisions.[25]

[50] As indicated, s 3(2)(a) gives a clear and emphatic signal as to the legislative purpose of the CPRA – to eliminate the chance for persons to profit from undertaking or being associated with significant criminal activity. I am conscious this purpose may be curtailed if there is a limitation period applicable to actions for assets forfeiture orders.

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23 RI Carter *Burrows and Carter: Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 478-480. For example, see *Stewart v Grey County Council* [1978] 2 NZLR 577 (CA); *Auckland Gas Co v Auckland City Council* [1990] 2 NZLR 420 (CA); and *Chief Executive of Land Information New Zealand v Luke* [2008] NZCA 43.

24 *Hayward v Commissioner of Police* [2014] NZCA 625 at [29(c)].

25 *R v Allison* [2002] 1 NZLR 679 (CA).

[51] On the other hand, the purpose of limitation statutes is also relevant. As the Court of Appeal said in *Amaltal Corporation Ltd v Maruha Corporation*, limitation principles embody a tension between competing policies of:[26]

> - finality in civil litigation and that defendants should have the opportunity to avoid meeting stale claims as secured by the imposition of limitation periods; and
>
> - justice being done in the individual case, which is secured by the facility for extension or postponement of the limitations periods.

[52] As Lord Millett said in *Cave v Robinson Jarvis & Rolf (A Firm)*:[27]

> With the passage of time cases become more difficult to try and the evidence which might have enabled the defendant to rebut the claim may no longer be available. It is in the public interest that a person with a good cause of action should pursue it within a reasonable period.

[53] While I accept that the proceeds of crime context weighs against finality, such evidential difficulties in adjudicating stale claims may also apply in that context, especially those that do not rely on criminal convictions. In the case of profit forfeiture, the seven year limit was enacted to avoid unreliable assessments.

[54] More generally, the facility to extend or postpone limitation periods addresses, at least in part, the Commissioner's concerns about the application of the Limitation Act 1950.

[55] I acknowledge the mandatory rather than discretionary nature of s 50 (subject to s 51). This also reflects the strong statutory purpose of the regime. Section 55 is similarly mandatory. But I do not consider that the mandatory nature of s 50(1) is an indicator in relation to limitation beyond what the strong statutory purpose already implies. Unlike s 55, s 50 is silent as to limitation.

[56] However, s 50 is worded so as to capture property that *is* tainted property. That present tense indicates that s 50 is not concerned with when the property became tainted but whether it is tainted at the time of the application or order. This aligns with Mr Harborow's submission that while a respondent retains tainted property, there is

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[26] *Amaltal Corporation Ltd v Maruha Corporation* [2007] 1 NZLR 608 (CA) at [147].
[27] *Cave v Robinson Jarvis & Rolf (A Firm)* [2002] UKHL 18, [2003] 1 AC 384 at [6].

no reason why it should not be subject to asset forfeiture. Having said that, the definition of "tainted property" refers to "property that has, wholly or in part, been" acquired as a result of, or directly or indirectly derived from, significant criminal activity.[28] Reference to tainting occurring when property is acquired or derived is not necessarily inconsistent with a limitation period. Of course, property can be tainted on multiple occasions such as when making mortgage repayments.

[57] Taking these various considerations into account, I do not consider that the clear statutory purpose of the CPRA, the ability to extend restraining orders, the retrospective effect of s 9, the mandatory nature of s 50 or its present tense necessarily imply that s 4(5) of the Limitation Act 1950 is excluded from applying to claims for assets forfeiture orders. I consider the CPRA and s 4(5) of the Limitation Act 1950 are not irreconcilable – they can stand together. Parliament may be taken to have been aware of the s 4(5) time bar when it enacted the CPRA in 2009. Parliament could easily have expressly excluded s 4(5) when it enacted the CPRA if it intended to do so, and more particularly could have done so a year later when it enacted the Limitation Act 2010, with its transitional provisions and express exclusion of the CPRA from the new Limitation Act. I was not referred to any material in the Parliamentary history that indicated that that express exclusion was merely for the avoidance of doubt. As Mr Speed submitted, Parliament must be taken to have been aware of the existing s 4(5) time bar when it enacted the Limitation Act 2010 with a specific exception for CPRA claims going forward. Parliament did not address s 4(5) and there is not a clear basis to conclude it intended to do so.

When the cause of action accrues

[58] If s 4(5) of the Limitation Act 1950 applies, Mr Speed submitted that here the elements of the action are the criminal offending and the tainting, so the time bar must apply to the effect that criminal activities prior to 1 January 2011 cannot be considered in respect of any forfeiture under the assets forfeiture orders sought.

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[28] Section 5(1).

[59] Mr Harborow sought to distinguish *Midavia* on the basis that here the criminal offending may lie hidden.[29] But he did not pursue a reasonable discoverability argument and accepted that the cause of action accrues as soon as payments of 'dirty' money are applied to property. He accepted that it follows from the definition of tainting that the Commissioner's knowledge is irrelevant to accrual of the cause of action.

[60] In written submissions Mr Harborow characterised the application for assets forfeiture orders as relying on a continuing cause of action – because the tainted quality of the property continues – and so falling under the Limitation Act 2010. But he refined this orally to submit that a fresh cause of action accrues with each payment.

[61] I consider that, in relation to an assets forfeiture order, the cause of action accrues when the specific property in question has been wholly or in part, either acquired as a result of significant criminal activity, or directly or indirectly derived from significant criminal activity.[30] As indicated, property can be tainted on multiple occasions. If the same property is tainted more than once, it does not matter whether a cause of action based on the first tainting is out of time under the Limitation Act 1950 if subsequent tainting is not out of time.

[62] As indicated, the Limitation Act 1950 continues to apply to actions based on acts or omissions before 1 January 2011 to which the Limitation Act 1950 applied immediately before its repeal. The words "to which the Limitation Act 1950 applied" mean that Act continues to apply to actions that were time barred under that Act, not that all actions based on acts or omissions before 1 January 2011 continue to be subject to the Limitation Act 1950. Therefore, under the Limitation Act 1950, an action for an assets forfeiture order would only be time barred if the tainting occurred two years before 1 January 2011 (applying s 4(5)) and no limitation extension applied. For example, any tainting resulting from the cannabis offending in March 2010 would not have been time barred when the Limitation Act 2010 came into force.

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29 Compare *Securities Commission v Midavia Rail Investments BVBA* [2006] 2 NZLR 207 (HC) at [85] and [110].

30 Criminal Proceeds (Recovery) Act 2009, s 5(1).

[63] A further issue arises in relation to the extent of the retrospective effect of the CPRA, which commenced on 1 December 2009. For example, Mr Snowden's alleged benefit fraud, and any related tainting, occurred prior to the commencement of the CPRA. The Commissioner relies on the CPRA's retrospective effect. As indicated, s 9 expressly provides that the CPRA applies to significant criminal activity before the commencement of the section, but s 9 does not refer to the timing of the tainting of property. Assuming that the CPRA was intended to create a retrospective assets forfeiture right of action in respect of tainting of property before 1 December 2009, would the new cause of action only accrue when the CPRA came into force? Otherwise, tainting that occurred two years before 1 January 2011 – that is, on or before 1 January 2009 – would, as indicated, be time barred under the Limitation Act 1950 subject to a limitation extension. Despite the retrospective effect of s 9, I do not consider it goes so far as to provide that for limitation purposes an action for an assets forfeiture order accrues upon the commencement of the CPRA rather than upon tainting.

[64] Mr Harborow relied on the limitation extension in s 28 of the Limitation Act 1950 which applies to cases of fraudulent concealment. Section 28 relevantly provides:

> **28 Postponement of limitation period in case of fraud or mistake**
>
> Where, in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) The action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) The right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) The action is for relief from the consequences of a mistake,—
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:
>
> …

[65] In relation to s 28(b), "fraud" covers deliberate or reckless concealment of a cause of action.[31] I consider that s 28(b) can apply in the context of an action under the CPRA.

[66] In relation to the alleged benefit fraud, assuming the Commissioner can rely on tainting of property prior to the commencement of the CPRA, the Commissioner or his agents were not aware of this offending until March/April 2018 notwithstanding that MSD became aware of it much earlier. I do not consider that MSD's knowledge should be imputed to the Commissioner. The question is whether Mr Snowden can be said to have deliberately or recklessly concealed the cause of action. Even assuming a retrospective right of action, I do not consider such concealment can have occurred before the cause of action was enacted in the CPRA on 1 December 2009. After that, in these unusual circumstances, I am reluctant to conclude there was such concealment in relation to the alleged benefit fraud. MSD had decided not to pursue the matter. Mr Snowden had no dealings with the police about it. He had no reason to do so. This is not a case where he was asked by the police about it and deflected them.[32] The action for an assets forfeiture order based on tainting due to the alleged benefit fraud in 2002 to 2006 is time barred.

[67] In relation to the alleged drug offending, there is no such difficulty. I accept that insofar as Mr Snowden was engaged in drug offending, he concealed it from the Commissioner until it was discovered by police. There was no suggestion it could with reasonable diligence have been discovered earlier. The action for an assets forfeiture order based on tainting due to the alleged drug offending is not time barred.

Whether the Karaka property is tainted

[68] As mentioned, for an assets forfeiture order to be made under s 50(1), the Court must be satisfied on the balance of probabilities that specific property is "tainted property", which is defined:[33]

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31 *Cave v Robinson Jarvis & Rolf (A Firm)* [2002] UKHL 18, [2003] 1 AC 384.

32 Compare *Amaltal Corporation Ltd v Maruha Corporation* [2007] 1 NZLR 608 (CA) at [169]-[170].

33 Section 5(1).

tainted property–

(a) means any property that has, wholly or in part, been—

(i) acquired as a result of significant criminal activity; or

(ii) directly or indirectly derived from significant criminal activity; and

(b) includes any property that has been acquired as a result of, or directly or indirectly derived from, more than 1 activity if at least 1 of those activities is a significant criminal activity

[69] Mr Snowden cannot dispute that his drug convictions involve significant criminal activity. The dispute is as to the extent of his drug offending. Mr Snowden also disputes the alleged benefit fraud.

Extent of drug offending

[70] As indicated, on 29 June 2010 Mr Snowden was convicted of one charge of possession of cannabis for supply and one charge of possession of methamphetamine following a police search of the Karaka property on 3 March 2010 which located 28 sealable plastic bags, each containing one ounce of cannabis, approximately 1.5 kilograms of loose cannabis plant material, and 0.2 grams of methamphetamine.

[71] Mr Snowden claimed the 28 sealable plastic bags of cannabis were all for his personal use – one year's usage. He indicated he packaged it into bags in order to ration it and because it is better to keep cannabis in small amounts to avoid comment and theft. The latter reason is inconsistent with keeping all 28 bags together, but in cross-examination Mr Snowden said he had only just plucked it that morning. That seems unlikely. A further approximately 1.5 kilograms of loose cannabis plant material was located in the freezer. Mr Snowden denied ever selling cannabis but acknowledged giving some away to friends. There is no other direct evidence of cannabis dealing up to this period, but the level of Mr Snowden's cash receipts is relevant to the extent of his drug dealing. I will return to this below.

[72] As also indicated, Mr Snowden pleaded guilty to possessing methamphetamine for supply following his arrest on 11 April 2013 after arriving in Christchurch with

93 grams of methamphetamine. He also pleaded guilty to conspiring to deal methamphetamine.

[73] Between 20 December 2012 and 11 April 2013 Mr Snowden made approximately 11 or 12 return flights between Auckland and Christchurch. Mr Snowden also drove down to Christchurch a couple of times around then. Mr Carr also made approximately six return trips during the same period. Some of Mr Snowden's trips were only for the day, and others were for one or two nights. Some of Mr Snowden's trips were booked using Mr Carr's email address or Mr Carr's partner's credit card. Mr Carr paid for Mr Snowden's flights and motels in Christchurch quite regularly.

[74] The Commissioner's case is that Mr Snowden was suppling Mr Carr. Mr Snowden denies ever supplying Mr Carr. Mr Snowden said it was the opposite. He said Mr Carr used him to provide "protection" when he flew down to Christchurch on one occasion. Mr Carr offered to supply him with methamphetamine if he carried the methamphetamine, and stupidly he agreed. Mr Carr provided a letter to that effect to the Court for Mr Snowden's sentencing (which the Court did not place any weight on). Mr Snowden said that was the only occasion he was involved with methamphetamine. Mr Snowden said he also travelled to Christchurch to visit his girlfriend, Ms Jiang, and for other reasons.

[75] In cross-examination, Mr Snowden said Mr Carr would pay for his flights and accommodation because he would help Mr Carr collect money by providing protection. Mr Snowden said he asked for the money or most of the time just stayed in the car. Mr Snowden also said that Mr Carr regularly bought things for him for helping Mr Carr out.

[76] Mr Snowden said he was taking packages, which he thought contained money, from Mr Carr back to Auckland for someone to pick up. The Commissioner's case is this cash was payment for supply of methamphetamine by Mr Snowden. Mr Carr's text to Mr Snowden on 19 March 2013, the day Mr Snowden returned to Auckland, said: "I just woke up I see ya on the flip side bruv ill fill up the toy box and see ya

then". Mr Snowden said he had no idea what that meant. He said Mr Carr "talks in riddles and rhymes".

[77] Mr Carr's text messages over the following period, before Mr Snowden's next trip to Christchurch on 31 March 2013, indicate that Mr Carr was collecting "coin" from people who owed him money. The Commissioner's case is that Mr Carr was collecting drug debts to pay Mr Snowden, who was his supplier of methamphetamine, and that Mr Carr passed cash to Mr Snowden when they met again on 1 April 2013.

[78] Late on 2 April 2013, Mr Snowden sent a text to Mr Carr saying: "am I catching up with u before 10 tomorrow". Mr Carr replied: "Yup I just trying get maxi I can before ya depart ill be there bright and early bruv". The Commissioner's case is that this is clear illustration of Mr Carr collecting drug debts to pay Mr Snowden before he flew back to Auckland on 3 April 2013.

[79] On 3 April 2013 Mr Snowden texted Mr Carr stating: "ive come a long way to do a few things be good ivf u could realise this". Mr Carr replied:

> Just got out of court and to shed bruv I've had the day from hell I tryin bruv believe me bout to go postal on cunts fucking me round and got the Honda impounded this morning didn't help I trying to sort it bruv on my word it be good I make sure.

[80] Mr Snowden texted: "back home now bit of a waste of trip for me when u said u had it sorted i believed u". Mr Carr replied: "I sorry bro I will make it good".

[81] On 8 April 2013 Mr Carr texted Mr Snowden: "Just got into town bro chch full of tire kickers but if we could carry on as usual I make those hours up in no time …". Mr Snowden replied: "cum up". Mr Carr replied: "K tomorro sweet?" Mr Snowden said: "yea". Mr Carr said: "See ya then". Mr Carr deferred for a day but travelled to Auckland on 10 April 2013, the day before they flew to Christchurch and were arrested.

[82] Mr Harborow submitted that the text messages leading up to their arrest make it clear that Mr Snowden was in a position akin to a boss to Mr Carr and that Mr Carr was subordinate to him. Mr Carr frequently provided explanations and excuses to

Mr Snowden when he appeared frustrated with Mr Carr. Mr Carr arranged and paid for Mr Snowden's flights and accommodation. Mr Carr was hastily chasing people who owed him "coin" before and upon Mr Snowden's arrival in Christchurch. The various references to Mr Carr having to pay his "bill", get the "maxi" and "make up hours" make it clear that Mr Carr was indebted to Mr Snowden. This is consistent with Mr Snowden being Mr Carr's methamphetamine supplier but plainly inconsistent with the reverse relationship, as asserted by Mr Snowden.

[83] Their text messages sometimes used coded language. Mr Snowden acknowledged that 'noodles' was referring to methamphetamine. He initially said "paper" was referring to Zig-Zag cigarette papers but then acknowledged it might be referring to money.

[84] I consider this evidence indicates that Mr Snowden was likely supplying methamphetamine to Mr Carr or conspiring with Mr Carr to supply others in Christchurch during the period before their arrest in April 2013. The evidence is much less consistent with Mr Snowden's claim that Mr Carr was supplying him. I do not consider the summary of facts indicates the police accepted that Mr Carr's letter was true. If it were true, Mr Snowden would have had no reason to conceal the package in his buttocks. That Mr Carr wrote the letter is consistent with his subservient role. There are additional reasons for concluding that Mr Snowden was likely supplying methamphetamine to Mr Carr or conspiring with Mr Carr to supply others.

[85] First, the police evidence that methamphetamine in the Christchurch market is generally sourced from Auckland (which I consider was admissible but not of much weight), and that Mr Snowden was consuming methamphetamine well before his series of trips to Christchurch from December 2012.

[86] Secondly, the evidence indicates that Mr Snowden had an association with another drug offender, Dave O'Carroll. Mr Snowden has known Mr O'Carroll for a long time. He has been to Mr O'Carroll's house, Mr O'Carroll would come over to the Karaka property now and again, and they went on a trip together to motorcycle races in Invercargill in 2012. The Commissioner's case is that Mr Snowden and Mr O'Carroll were involved in drug offending together. Mr O'Carroll is a senior

patched member of the Head Hunters motorcycle gang and is currently serving a sentence of 16 years and five months' imprisonment for manufacturing methamphetamine. I accept that Mr O'Carroll was sentenced in 2015 on the basis that there was no suggestion he was engaged in criminal offending between 2008 and 2014. However, police located over $1,000,000 in cash hidden in the bed frame of his bed. The Commissioner took assets forfeiture action against him – a settlement was reached and that cash was forfeited. A telephone conversation between Mr Snowden and another associate suggests that Mr Snowden was aware of Mr O'Carroll's drug offending. As indicated below,[34] Mr Snowden obtained money from Mr O'Carroll when Mr Snowden was in prison.

[87] I also consider it likely the cash Mr Snowden was taking back to Auckland was payment for his supply of methamphetamine and that at least some of this went towards the cash deposits into his bank accounts and his living expenses.

[88] The level of Mr Snowden's cash receipts is also relevant to the extent of his drug dealing. The was a good deal of evidence about Mr Snowden's cash receipts. The Commissioner's case is that financial analysis identified that between 1 March 2002 and 31 March 2016 income from known sources of $213,235.10 was received into Mr Snowden's bank accounts. This included rental income of $99,108 received from November 2010 (even though Mr Snowden and KFL did not declare any income to Inland Revenue in the seven years from 2010).[35] In addition, there were cash deposits into the bank accounts totalling $225,595.17. $66,087.97 of this was in the latter period from 13 December 2009.

[89] Mr Snowden claimed that these cash deposits were also rental income for the Karaka property. Mr Snowden's accountant, Mr Clive Johnson, calculated that the rental income during the period totalled $488,770, of which $391,177 was paid in cash. That evidence was not accepted by the Commissioner. The Commissioner's case is that Mr Snowden's explanation is consistent with a common money laundering typology of mixing a legitimate cash source or income stream with cash derived from

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34 At [101].
35 KFL has recently declared rental income to Inland Revenue.

criminal activity to conceal its true source and provide a bona fide explanation as to the source of funds.

[90] Mr Johnson's calculation is entirely dependent on Mr Snowden's instructions as to the tenants. There were no contemporaneous records (tenancy agreements, bonds, receipts etc). Mr Snowden's input was inconsistent in some cases with other evidence. Examples of such inconsistency include:

(a) Mr Snowden claims that during 2006 the rent came from multiple tenants even though he only told the MSD investigator in 2006 that Ms Debbrah Repia was living at the Karaka property with her children. The others claimed for were Mr Tebbutt (January-September), Mr Bennett (August-December) and Mr Elliott (January-August). I refer to Mr Tebbutt and Mr Elliott further below.

(b) The claimed rent during 2015 was $800 to $850 per week even though Mr Snowden's mother advised him in a telephone conversation on 22 May 2015 that two tenants were paying a total of $500 rent which was $50 short of satisfying the mortgage repayments.

(c) Mr Michael Repia is recorded as paying $300 between January and September 2015 even though Mr Snowden's mother advised Mr Snowden in the telephone conversation in May 2015 that Michael Repia was paying "nothing" as he has "always got some excuse" and that he was "moving out next week". I refer to him further below.

(d) Mr Oldham was recorded as paying $250 per week in 2015 even though the automatic payment records indicated weekly payments of $200 per week for all but two weeks (when $250 and $300 were paid).

[91] Mr Johnson's calculation is also inconsistent with his understanding in 2007 when he assisted Mr Snowden with the MSD investigation, referring to the only income from rent being $300 per week. More generally, the level of detail in the calculation for rent paid weekly going back to 2002 was inconsistent with the lack of

records. Whenever an automatic payment was less than the total rent figure provided by Mr Snowden, Mr Johnson appears simply to have attributed the difference to a cash payment.

[92] As the Commissioner notes, there are no patterns of cash deposits such as consistent amounts at regular intervals that would be expected if the deposits were for rent (even allowing for Mr Snowden's cash lifestyle at least in later years). Also, Mr Snowden was regularly behind with his mortgage payments in the early years 2002 to 2004, which does not appear consistent with the rental income claimed.

[93] As Mr Johnson's calculation of rent totalling $488,770 is not based on reliable factual evidence, it is necessary to work from the other available evidence. The evidence indicates there were several buildings on the Karaka property. Some were rented at various times. As indicated, Mr Snowden had no records, but he said that the buildings had people in them. A number of persons signed statements (which were witnessed) claiming to have paid rent, but only three of those available gave evidence:

(a) Ms Lambert said she paid rent of $300 per week from March to November 2002 by cash or cheque. That totals $11,100. She said her family rented building 1 (the main house) and Mr Snowden moved to another dwelling on the Karaka property. She said no one else was living there at the time apart from Mr Snowden. I accept her evidence even though Mr Snowden did not disclose this to MSD.

(b) Mr Elliott said he paid rent of $300 per week from July 2004 to August 2005 (not 2006 as claimed by Mr Snowden). That totals approximately $18,300. He rented a unit (building 3). His credibility was challenged, and $300 per week for a unit (as opposed to the main house) seems high, but on balance I accept his evidence. He also said his brother lived at the Karaka property at some stage after he left but there was no evidence as to the amount of rent paid by him beyond Mr Snowden's claim.

(c) Mr Walker paid by direct credit and so is already included by the Commissioner for the relevant period. He recalled that Chloe also lived there. Chloe Repia paid rent by automatic payment from March 2016, which is also included by the Commissioner for the relevant period.

[94] Four provided signed and witnessed statements from overseas. I accept they were unavailable to give evidence:

(a) Mr Tebbutt's statement said he paid $250 per week from 9 May 2004 to 1 September 2006 for building 6. On balance, I accept he paid rent. The total is $30,250 (deducting $1,000 from the amount claimed by Mr Snowden, which was based on payment through to 28 September 2006).

(b) Mr Michael Repia's statement said he paid $300 per week from August 2011 to September 2015 for building 1 (the main house). Mr Snowden only claimed payments from Mr Repia from November 2011. Many of Mr Repia's payments were by bank transfer and are already included by the Commissioner. Given Ms Snowden's comment to Mr Snowden referred to above,[36] there is insufficient evidence to accept that Mr Repia made regular payments in cash to increase the total paid.

(c) Ms Deann Repia's statement said she paid $300 per week from January to June 2012 (in building 3), $150 per week in July to August 2012 (in building 5) and $300 per week from February to November 2013 (in building 7). Some of these payments were by bank transfer and so are already included by the Commissioner. In the weeks without a bank transfer, it is not clear whether she paid cash, but on balance I accept her statement. The total is $21,000.

(d) Mr Bushett's statement said he paid $300 per week from 15 October 2014 to 26 August 2015. He paid by bank transfer from November

[36] At [90](c)].

2014. Those payments are already included by the Commissioner. Mr Snowden did not claim in respect of any earlier cash payments.

[95] I also accept it is likely that Mr Snowden's sister in law, Ms Debbrah Repia, lived at the Karaka property and paid rent in cash for some period, given Mr Snowden's statement to MSD in 2006. He told MSD she was paying board of $300 cash per week. Her signed statement said she paid $300 per week from January 2004 until May 2010 for building 1 (the main house). This would total $105,900. However, she was not called to give evidence. Deann Repia's signed statement did corroborate the 2004 to 2010 timeframe saying she lived in building 1 on and off during that period with her mum, who I understand is Debbrah Repia. Deann Repia said she contributed $80 per week. Even with that contribution at times, it is unlikely Debbrah Repia was able to pay $300 per week for a long period. The evidence indicated she was on a single parent benefit receiving total benefit payments averaging $536.89 per week. This would mean that, if paying rent of $300 per week, Ms Repia had only $236.89 per week to meet living costs for herself and her three children. The evidence based on the Statistics New Zealand Housing Economic Survey for 2007 indicated that such living costs would be more than $360 per week. In the absence of further explanation and given the family connection, I consider on balance it unlikely that she paid $300 per week for the full period. Having accepted she lived on the Karaka property and likely paid rent in cash for some period, I consider it more likely that Mr Snowden was acknowledging to MSD rental income of $300 per week in 2006 by reference to her rather than the other tenants who I have also accepted were paying rent in that period. That is not to say that the total rent was only $300 per week – that was all Mr Snowden acknowledged to MSD (and Mr Johnson). But having already accepted that Mr Elliott was paying $300 per week in 2004 to 2005 and Mr Tebbutt was paying $250 per week in 2004 to 2006, there is insufficient evidence to conclude that Debbrah Repia was also paying $300 per week or indeed to make any specific allowance for rent paid by her during that period or later.

[96] In aggregating this evidence of rental payments, I deal separately with the periods from 2002 to 2009 and from 2010 to 2016 because none of the $99,108 rent transferred into the bank accounts was in the period before 2010 and because the majority of the cash deposits were in that first period (as indicated at [88] above).

I acknowledge that, in the earlier period, the full amount of rent said to be paid in cash (even by the tenants who I accept paid some rent in cash) exceeds the total cash deposits. That of itself is not inconsistent with the payment of rent in cash. Some cash may have been used to pay other expenses rather than deposited into the bank. But, on the other hand, in some years – particularly 2007 and 2008 – even the full amount of rent said to be paid in cash was insufficient to explain the cash deposits.

[97] In the first period from 2002 to 2009, I have accepted the evidence of Ms Lambert and Mr Elliott, and the signed statement of Mr Tebbutt, that they paid rent other than by recorded bank transfer, totalling $59,650.

[98] In the period from 2010, rent began being transferred into the bank accounts – totalling $99,108 accepted by the Commissioner, as mentioned. In addition, I have accepted the claim of Deann Repia that she paid rent other than by recorded bank transfer, totalling $21,000. Otherwise, the fact that rent was being paid by automatic payment makes it less likely that it was also being paid in cash by the same tenants on a regular basis. Also, the fact that the cash deposits reduced substantially after Mr Snowden was arrested in 2013 suggests they were not derived from rental payments.

[99] Accordingly, I accept that the rental income for the Karaka property was higher than the $99,108 accepted by the Commissioner because some rent was paid in cash. The evidence indicates the rental income was $80,650 higher,[37] totalling $179,758, but not the $488,770 claimed by Mr Snowden.

[100] Cash rental receipts of $80,650 (and any cash Mr Snowden may have received more recently from selling palm trees from the Karaka property that he raised only in cross-examination) do not explain the extent of Mr Snowden's cash deposits into the bank accounts totalling $225,595.17 during the same period, nor the other cash he must have used to fund his living expenses. Mr Snowden acknowledged that he has not operated a transactional bank account in his name since 2006 and most of his living expenses were paid for using cash outside of the banking system. His bank records indicate only $9,392 of living expenses over the 14 year period.

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[37] $59,650 + $21,000.

The Commissioner's case is that Mr Snowden would have been expected to incur living costs in excess of $150,000 during that period (excluding his acknowledged methamphetamine use), and that he had access to large sums of cash which is consistent with involvement in drug offending over a much longer period than the timeframes covered by his convictions.

[101] The evidence also indicated that Mr Snowden had access to money from associates. Four telephone conversations between Mr Snowden and his mother referred to obtaining money from Mr O'Carroll, to be used to pay the mortgage. Two of the conversations indicated amounts of $10,000. The amount was not specified in the other conversations, but Mr Snowden indicated there was money available when needed. As indicated, the Commissioner's case is that Mr Snowden and Mr O'Carroll were involved in drug offending together. It is also the Commissioner's case that that is the source of the cash Mr O'Carroll provided to Mr Snowden. Mr Snowden said these receipts were loans, but that was not suggested in the conversations. I consider it likely these payments were directly or indirectly derived from significant drug offending.

[102] Mr Snowden's need to access cash from Mr O'Carroll to meet mortgage payments when he was in prison is also consistent with my conclusion that the rental income claim is inflated.

[103] There was also evidence that Mr Snowden stored a large amount of cash with his girlfriend, Ms Jiang, in Christchurch. Telephone conversations indicated that she received $123,000 from Mr Snowden and returned $20,000 to Mr Snowden's mother, the majority of which was used to pay her mortgage. Ms Snowden said this was a gift from Ms Jiang, but it is more likely this was a partial repayment of Mr Snowden's money. Mr Snowden wanted to recover the rest. Police had seized a large amount of cash on 4 April 2014 from a brothel run by Ms Jiang in Christchurch, $42,800 of which was found wrapped in an Auckland newspaper in a wardrobe beside a bag containing a glass pipe (consistent with pipes used to smoke methamphetamine). Letters to Ms Jiang from Mr Snowden were also in the wardrobe. The Commissioner's case is this was Mr Snowden's cash derived from drug dealing. While I accept that Ms Jiang

had access to large sums of cash from her own activities, in the circumstances outlined I consider it likely this $42,800 was Mr Snowden's.

[104] Taking the evidence together, I consider that Mr Snowden's drug offending extends well beyond the instances for which he has convictions. The quantity of cannabis seized in 2010 and methamphetamine seized in 2013 (over three and a half years' usage according to Mr Snowden's admitted use)[38] indicate drug dealing during those periods. This, and his unexplained cash receipts during the period, indicate that Mr Snowden was likely receiving income from drug dealing over a longer period.

[105] I accept that Mr Snowden's known assets do not suggest he has accumulated wealth from drug offending beyond the contribution to his mortgage payments. As indicated, in the early years 2002 to 2004, Mr Snowden was regularly behind with his mortgage payments. I also accept that his known expenditure does not indicate a particularly extravagant lifestyle. Nevertheless, the combination of the cash deposits, the cash seized from Ms Jiang, and Mr Snowden's estimated living expenditure suggest cash receipts in broad terms of over $400,000 of which only $80,650 is explained by rental income. Mr Snowden's unexplained cash receipts over the 14 year period seem to exceed $300,000.

Alleged benefit fraud

[106] I have found the action for an assets forfeiture order based on tainting due to the alleged benefit fraud in 2002 to 2006 is time barred. It may be helpful to address it nevertheless.

[107] Although MSD decided not to prosecute, the Commissioner's case is that Mr Snowden committed the offences of making false statements and misleading to receive benefits under s 127 of the Social Security Act 1964 and dishonestly using a document under s 226 of the Crimes Act 1961.

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[38] $500 per week equates to 0.5 g per week according to the prevailing prices in the summary of facts.

[108] Mr Snowden did not contest MSD's determination that he was not entitled to receive these payments as he was receiving cash income. He repaid $1,500 in 2012. The Commissioner's case is that this confirms Mr Snowden accepted (at least at the time) that he was not entitled to these benefit payments. In any event, I consider the evidence indicates that Mr Snowden was receiving income (whether characterised as salary from KFL or rent paid to Mr Snowden directly) and therefore was not entitled to the benefit payments. After the payments were cancelled in 2006, it is not clear why Mr Snowden's repayments only started in 2012 and what, if anything, happened after they stopped that same year.

[109] In written submissions after the hearing, Mr Speed objected to the admissibility of the MSD evidence. The objections were addressed by Mr Harborow in reply submissions. Ms Godinet from MSD was called to give evidence. She essentially adopted the evidence of Mr Atkins who had filed an affidavit but had since retired from MSD and moved to Australia. His affidavit had annexed correspondence to Mr Snowden from Ms Haru, who conducted the MSD investigation, and Ms Haru's investigation notes. Ms Haru had ceased working for MSD in 2009. Ms Godinet was Ms Haru's manager.

[110] I consider that Mr Atkins' affidavit is admissible. He had not been required for cross-examination. His affidavit did little more than annex Ms Haru's notes and summarise the investigation. Ms Godinet was well placed to adopt it given her role as Ms Haru's manager. Ms Godinet did not claim personal involvement in the discussions between Ms Haru and Mr Snowden. I also consider Ms Haru's notes are admissible business records under the Evidence Act 2006 (although s 20 and r 7.30 of the High Court Rules do not assist). As Mr Speed seemed to acknowledge, the issue is the weight to be given to the investigation notes, which he also relied on in some respects.

[111] Even admitting the MSD evidence including the investigation notes, there was little evidence to support the alleged criminal offending. There was no direct evidence of false statements made to receive benefits or of documents used. Ms Haru's letter to Mr Snowden referring to s 127 indicated MSD considered that Mr Snowden had failed to notify MSD when he received other income. I accept MSD considered that

Mr Snowden had failed to do so, and I also accept that Ms Haru's notes indicate that Mr Snowden acknowledged he should have done so. Ms Haru's notes in July 2007 indicate that s 128 (the 12 month limitation period) had expired and there were "no false documents" so the matter was not to be referred for prosecution. But I note Mr Atkins' affidavit stated that MSD determined that there was insufficient evidence to show that Mr Snowden and Ms Stoddart were living together in a de-facto relationship, a separate issue. While an offence under s 127 was only punishable by imprisonment for a term not exceeding 12 months, such offending qualifies as significant criminal activity under the CPRA where the proceeds are $30,000 or more – whether or not the activity is treated as a single offence. But in the circumstances, I do not consider that Ms Haru's letter is sufficient to establish that Mr Snowden committed an offence under s 127. Also, there was no reference by MSD to the Crimes Act offence of dishonestly using a document. I consider there was insufficient evidence to conclude that Mr Snowden's initial applications for benefits in December 2002 and February 2003 were dishonest, even accepting that in 2002 there were cash deposits (including rent properly attributable to KFL). Therefore, even if the alleged benefit fraud were not time barred, I am not satisfied, on the balance of probabilities, that Mr Snowden committed the offences claimed.

Acquisition of the Karaka property

[112] The Commissioner's case is that the Trust acquired the Karaka property for $420,000 in March 2002, leaving a deficit of $40,000 not accounted for in the purchase given KFL's purchase for $460,000. It is accepted that $23,355.83 was refunded as GST on the purchase. I do not consider the discrepancy is significant. Mr Snowden's accountant, Mr Clive Johnson, had been Mr Kimball Johnson's accountant, and Mr Clive Johnson had advised Mr Kimball Johnson on the sale. I accept Mr Clive Johnson's evidence that the Johnson Family Foundation Limited had taken the GST refund belonging to KFL as part repayment of its shareholder loan account. The liability for repayment of the GST on sale of the property (or change of use) then fell on the new shareholder of KFL. This offset the equity deficit. $40,000 was a high estimate and Mr Clive Johnson was involved in the decision not to pursue a larger refund.

[113] The Commissioner also questioned the Trust's $100,000 payment for the shares in KFL. No such transaction was identified in any of Mr Snowden's known bank accounts. Mr Snowden said that Mr Kimball Johnson accepted a Harley Davidson worth $70,000 as part payment and the remaining $30,000 was paid from proceeds of sale of three vehicles. The Commissioner's case is that the Harley Davidson was only worth $20,000 as Kimball Johnson sold it for that price in February 2002. Also, there were no records in relation to the sale or value of the three vehicles.

[114] The discrepancy as to the value of the Harley Davidson was not fully explained. It is not clear why Mr Kimball Johnson would accept a motorcycle as payment of $70,000 if it was only worth $20,000. However, Mr Clive Johnson corroborated Mr Snowden's evidence in relation to the ascribed value of $70,000 on the basis that Mr Kimball Johnson had a larger profit in the overall deal and over-valued the Harley Davidson to induce Mr Snowden to do a deal. As Mr Kimball Johnson was a trader, that explanation may be correct but, as Mr Clive Johnson acknowledged, it was based on his general knowledge of Mr Kimball Johnson, memory of an expensive motorbike and what Mr Snowden said, rather than an independent recollection of the $70,000.

[115] Even so, I am not satisfied that the Karaka property was, wholly or in part, acquired in 2001/2002 as a result of significant criminal activity. The alleged benefit fraud began after the acquisition and there is no real evidence of significant drug offending or even of unexplained cash going back that far prior to the purchase. The lack of records relating to payment of the $100,000 is not necessarily surprising so long after the event, especially given those involved. Mr Kimball Johnson died about 15 years ago.

[116] It follows that I also do not consider the rental income derived from the Karaka property is tainted by reason of the initial acquisition being tainted. I accept it would be different if the Karaka property was tainted at acquisition.

Mortgage refinance and repayments

[117] It is clear that where money from significant criminal activity is used to meet mortgage payments and thus increase the respondent's interest in a property, that will qualify the property as tainted.[39]

[118] As indicated, the mortgage was refinanced in November 2002. The mortgage was made up of two separate revolving credit home loan accounts totalling $320,000. From November 2002 to August 2006 fortnightly transfers were made from one of Mr Snowden's bank accounts (the 59 account) to these two revolving credit accounts. The 59 account was funded by the MSD payments, cash deposits and $7,096.80 in wages (the only wages identified in the 2002 to 2016 period). The 59 account was closed on 28 November 2006 following the MSD investigation.

[119] From September 2006 to July 2009 fortnightly transfers to the two revolving credit accounts were made from a new account opened by Mr Snowden's mother in the name of KFL (the 02 account). During this period, $84,531.16 was transferred to the revolving credit accounts. The Commissioner's case is that during approximately the same period Mr Snowden received likely cash deposits of $83,680. Mr Snowden's mother said she was not involved in managing the finances for the Karaka property before Mr Snowden went to prison in 2013. I accept that Mr Snowden was likely in control of this account and that it was opened following the MSD investigation into cash being deposited into his account.

[120] After the fortnightly transfers to the two revolving credit accounts from the 02 account ceased in July 2009, mortgage repayments were funded by large irregular cash deposits made directly into the revolving credit accounts. The Commissioner's case is these were all the proceeds of Mr Snowden's drug offending.

[121] Over the full period from 2002 to 2016, the Commissioner's case is that mortgage repayments totalled $333,615.14 and only $32,158.40 came from legitimate, explained sources. The Commissioner's case is that the capital gain on the Karaka property is also tainted. I have addressed the alleged benefit fraud and accepted cash

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39 *Doorman v Commissioner of New Zealand Police* [2013] NZCA 476, [2014] 2 NZLR 173 at [32].

rental income of $80,650 in addition to the rental income accepted by the Commissioner ($83,626.12 of which was used to meet mortgage repayments). Otherwise, for the reasons already given, I consider on the balance of probabilities that the mortgage repayments were funded by significant criminal activity. Therefore, the Karaka property is tainted property.

Whether the $2,725 cash is tainted

[122] As mentioned, the $2,725 cash was seized from the Karaka property, located underneath a fridge/freezer. Although Mr Snowden said in his affidavit the cash belonged to Mr Huband and provided a statement from him, I consider it likely the cash belonged to Mr Snowden. In cross-examination Mr Snowden acknowledged that Mr Huband is an old family friend whose name Mr Snowden had previously referred to when stopped by police in Christchurch, that the statement was written for Mr Huband to sign, and that Mr Huband was going to give the money to him for a van he had given to Mr Huband. Mr Huband told police the cash was in an envelope, but police photographs indicate it was not in an envelope when found. Mr Huband has made no formal claim to the $2,725 cash in the proceeding.

[123] I also consider on the balance of probabilities the $2,725 cash was derived from Mr Snowden's drug offending. It was seized the day after he was arrested with 93 grams of methamphetamine. Having denied it was his cash, he provided no other explanation for it. It is tainted.

Whether Mr Snowden unlawfully benefited from the possession and sale of methamphetamine and cannabis

[124] To the extent that assets forfeiture orders are not made in relation to all the property sought, the Commissioner seeks a profit forfeiture order against Mr Snowden for $754,533.

[125] Section 55(1) of the CPRA provides:

> The High Court must make a profit forfeiture order if it is satisfied on the balance of probabilities that—

(a) the respondent has unlawfully benefited from significant criminal activity within the relevant period of criminal activity; and

(b) the respondent has interests in property.

[126] As mentioned, the relevant period of criminal activity is from 13 December 2009 to 19 July 2018. However, the Commissioner's financial analysis calculates Mr Snowden's unlawful benefit over the shorter period from 13 December 2009 to 31 March 2016.

[127] A person has unlawfully benefited from significant criminal activity "if the person has knowingly, directly or indirectly, derived a benefit from significant criminal activity (whether or not that person undertook or was involved in the significant criminal activity)".[40]

[128] The Commissioner's case is that the evidence supports a finding that Mr Snowden derived an unlawful benefit from drug offending over a number of years, reflected in the large sums of cash deposited into his bank accounts and available to him between 13 December 2009 to 31 March 2016, which the Commissioner says were more likely than not the proceeds of Mr Snowden's drug offending. During the relevant period, Mr Snowden received $66,087.97 in cash deposits. As indicated, these reduced substantially from 2013 when he was arrested as part of Operation Smart.

[129] Except for the $21,000 paid by Deann Repia during this period, I do not consider these cash deposits are additional rental income as claimed by Mr Snowden, for the reasons already given. Also, since August 2009, Mr Snowden conducted his financial affairs outside of the banking system. His mortgage payments and living expenses until he went to prison (even excluding his methamphetamine use of at least $100 per week and maybe as much as $500 per week) exceeded his identifiable rental income. It is likely he was receiving substantial undeclared income to meet these expenses, including the payments from Mr O'Carroll. Given the disparity between Mr Snowden's identifiable rental income and his access to large sums of cash,

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[40] Section 7.

I consider on the balance of probabilities that he has unlawfully benefited from significant criminal activity in a substantial way.

Extent of unlawful benefit

[130] Section 53 provides:

> **Value of benefit presumed to be value in application**
>
> (1) If the Commissioner proves, on the balance of probabilities, that the respondent has, in the relevant period of criminal activity, unlawfully benefited from significant criminal activity, the value of that benefit is presumed to be the value stated in—
>
> (a) the application under section 52(c); or
>
> (b) if the case requires, the amended application.
>
> (2) The presumption stated in subsection (1) may be rebutted by the respondent on the balance of probabilities.

[131] Thus, once the Commissioner has discharged the initial burden of proving on the balance of probabilities that Mr Snowden unlawfully benefitted from significant criminal activity, as he has done here, it is then for Mr Snowden to rebut the statutory presumption that he benefitted to the value claimed by the Commissioner.

[132] As the Court of Appeal said recently in *Cheah v Commissioner of Police*,[41] under s 53 there are only two possible outcomes. The first is that the Commissioner enjoys the benefit of the presumption and the respondent fails to rebut the presumption. In that case the presumed value stands. The second is where the respondent succeeds in rebutting the presumption. As for the latter, by necessary construction, it follows that the respondent must prove a different value. Under s 53 the Court's role is limited to deciding on the balance of probabilities whether the Commissioner has proved that the respondent unlawfully benefitted, during the relevant period of criminal activity, from significant criminal activity, and whether the respondent has rebutted the presumption that the value of that benefit is correctly stated in the application.

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[41] *Cheah v Commissioner of Police* [2020] NZCA 253 at [47].

[133] The Commissioner's specified amount of $754,533 in the application is made up of:

(a)	cash deposits	$66,087
(b)	cash seized	$2,725
(c)	cash expenditure[42]	$32,613
(d)	Karaka property capital gain and rental income	$189,108
(e)	methamphetamine use[43]	$86,000
(f)	approximate value of methamphetamine supply[44]	$378,000

[134] Mr Harborow submitted that Mr Snowden has not provided any cogent evidence to show the actual benefit he received and accordingly the Commissioner's figure is the only figure that has been proposed.

[135] Mr Snowden's position is based on his more fundamental denial that the only occasion he was involved with methamphetamine (for supply) was on 11 April 2013 when he was arrested after the flight to Christchurch. I have not accepted that.

[136] Nor do I accept Mr Snowden's evidence that his methamphetamine use was much lower than he stated to the probation officer for his PAC report. In written submissions after the hearing, Mr Speed objected to the admissibility of this report. I consider it is admissible as a business record and in any event Mr Snowden's evidence acknowledged that his methamphetamine use increased following his father's death. At sentencing the judge noted that Mr Snowden's counsel had reminded him that Mr Snowdon had used drugs for many years.[45] In any event, Mr Snowden has not proved a different value.

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42 Rates and electricity payments, a car rental payment and purchase of the Aprilia.
43 Based on $500 per week from one year after Mr Snowden's father died.
44 Based on nine trips to Christchurch at $42,000 per trip, said on behalf of the Commissioner to be conservative.
45 *R v Snowden* HC Christchurch CRI-2013-009-004039 22 January 2014 at [11].

[137] I have dealt with the cash deposits and the $2,725 cash seized. In relation to the cash expenditure, there was some evidence that Mr Snowden's mother paid rates while he was in prison, but it was not clear whether this was ultimately paid out of his funds.

[138] In the absence of cogent evidence as to the actual benefit received, given the reverse onus here I do not consider the Commissioner's presumed value has been rebutted except possibly in one respect.

[139] That exception is in relation to the Karaka property capital gain and rental income benefit, which is made up of a prescribed capital gain of $90,000 plus $99,108 rental income. Having not found that the Karaka property was acquired in 2001/2002 as a result of significant criminal activity nor that the rental income derived from the Karaka property is tainted by reason of the initial acquisition being tainted, the prescribed benefit has been partly rebutted. But, as the Court of Appeal said in *Cheah v Commissioner of Police*, the respondent must prove a different value.[46] Mr Snowden has not done so. If the Court were required to assess that part of the benefit, I would need to assess the capital gain on the equity represented by the unexplained mortgage repayments during the relevant period. I would also need to consider whether some or all of the rental income could still be included on the separate basis that, even though the initial acquisition was not tainted, the property was tainted by the unexplained mortgage repayments, which might also require an apportionment. Those amounts were not clear from the evidence. But, following *Cheah*, I must conclude that, having not proved a different value, Mr Snowden has not rebutted the presumption. I have also considered whether this case is distinguishable from *Cheah* on the basis that I have made factual findings about the original acquisition of the property which are inconsistent with the factual position upon which the Commissioner's calculation is premised. However, I consider the effect of the Court of Appeal's decision is clear and it is applicable in this case where a different value has not been shown.

[140] Accordingly, the value of the benefit is $754,533.

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[46] *Cheah v Commissioner of Police* [2020] NZCA 253 at [47].

Whether Mr Snowden has interests in the Karaka property and the $2,725 cash

[141] Section 55(2)(c) requires that a profit forfeiture order specify the property that is to be disposed of, being "property in which the respondent has, or is treated as having, interests". An interest, in relation to property, means—[47]

(a) a legal or equitable estate or interest in the property; or

(b) a right, power, or privilege in connection with the property.

[142] Further, s 58 provides that:

> **58 Court may treat effective control over property as interest in property**
>
> (1) If the High Court is satisfied that a respondent has effective control over property, the Court may, on an application made by the Commissioner, order that the property is to be treated as though the respondent had an interest in the property specified by the Court.
>
> (2) An order under subsection (1) may—
>
> (a) be made even if the respondent has no interest in the property; and
>
> (b) specify an interest that differs from the interest that the respondent has in the property.
>
> (3) Without limiting the generality of subsections (1) and (2), the Court may have regard to—
>
> (a) shareholdings in, debentures over, or directorships of, any company that has an interest (whether direct or indirect) in the property; and
>
> (b) any trust that has a relationship to the property; and
>
> (c) family, domestic, and business relationships between persons having an interest in the property or in companies of the kind referred to in paragraph (a) or in trusts of the kind referred to in paragraph (b), and any other persons.
>
> (4) Property that is subject to an order under subsection (1) may be included in any profit forfeiture order and in any restraining order that is made against the respondent.
>
> (5) If the Commissioner applies for an order under subsection (1),—

[47] Section 5.

(a) the Commissioner must, so far as it is practicable to do so, serve notice of the application on the respondent and on any person who, to the knowledge of the Commissioner, has an interest in the property; and

(b) the respondent and any other person who claims an interest in the property are entitled to appear and to adduce evidence at the hearing of the application.

[143] As Moore J said in *Commissioner of Police v Read*:[48]

> This section enables the Court to go behind any corporate structure or trust which disguises the true and effective control of property and determine the actual factual position of the respondent in relation to that property. It allows the Court to consider the practical reality of ownership, rather than being limited by legal forms. In particular, it has been used to set aside corporate structures and trusts to identify the person exercising control over the property. The fundamental question is whether, in fact, the respondent has the capacity to control, use, dispose of, or otherwise treat the property as their own.

[144] I need to determine whether Mr Snowden has an interest in, or effective control over, the Karaka property and the $2,725 cash. As Mr Snowden is not opposing asset forfeiture of the Aprilia, it is unnecessary to determine that he has an interest in it or effective control over it.

Karaka property

[145] The Commissioner's case is that Mr Snowden had interests in, and effective control over, the Karaka property. Mr Snowden disputes that he has interests or effective control.

[146] Mr Snowden does not have an interest in the Karaka property. It is owned by KFL. His status as its sole director, sole shareholder in his capacity as trustee, and as an eligible (discretionary) beneficiary of the Trust do not change that. The Commissioner does not claim the Trust is a sham.

[147] I am satisfied that Mr Snowden had effective control of the Karaka property at the relevant time, being the date of hearing,[49] for the following reasons. Apart from being the sole director and legal shareholder of KFL, he is a trustee of the Trust.

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[48] *Commissioner of Police v Read* [2015] NZHC 2055 at [60] (footnotes omitted). See also *Commissioner of Police v Jiang* [2020] NZHC 695 at [29].

[49] *Commissioner of Police v Jiang* [2020] NZHC 695 at [49]-[51].

Although his mother is also a trustee, he is the settlor of the Trust and, importantly, has the power of appointment to remove and replace trustees. Apart from the establishment documents in 2001/2002, there is no real evidence the Trust or KFL have been properly administered. The bank account Ms Snowden opened in 2006 was in the name of KFL rather than for the Trust and coincided with the conclusion of the MSD investigation. No Trust or company administration records were produced, such as ongoing trustee resolutions, nor evidence of trustee consultation other than when Ms Snowden became involved after Mr Snowden was in prison. Ms Snowden's role then appears essentially to be acting on Mr Snowden's behalf as an agent for KFL rather than as trustee. While the property was legally owned by KFL and the legitimate rental income was paid to KFL, Mr Snowden has effectively treated the Karaka property as his own, including living in it and not properly accounting for any rent paid, rather than treating it as an asset owned by KFL whose shares he held on trust for all the beneficiaries of the Trust.

The $2,725 cash

[148] For the reasons already given in relation to tainting, I also consider that Mr Snowden had an interest in, and effective control over, the $2,725 cash.

Application for relief

[149] Mr Snowden seeks relief by way of exclusion of property from any forfeiture order because of undue hardship, under s 51 in respect of an assets forfeiture order and s 56 in respect of a profit forfeiture order. The circumstances the Court may have regard to include, without limitation—[50]

(a) the use that is ordinarily made, or was intended to be made, of the property that is, or is proposed to be, the subject of the forfeiture order;

(b) the nature and extent of the respondent's interest in the property; and

(c) the circumstances of the significant criminal activity to which the order relates.

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50 Sections 51(2) and (56(2).

[150] "Undue hardship" must be more than ought properly to be due in giving effect to the relevant purposes of the CPRA. As the Court of Appeal said in *Nicholas v Commissioner of Police*:[51]

> In such a regime, as the cases consistently show, those who have profited from significant criminal activity will expect to lose their major assets, including land and home, even where these have enormous economic and emotional value for the owner. The level of disproportion required to be "undue" must be greater than that. As the authorities have consistently said … the level of hardship must be so disproportionate as to require the objectives of recovery and deterrence to be subordinated to the particular needs of the wrongdoer (s 56) or other interested parties (ss 61 and 62).

[151] Mr Snowden's hardship focused on the fact that he has no other place to live and no other property. He said he has put his whole life savings into this home. He also referred to the fact that his mother would suffer undue hardship as she would lose her "retirement home" that she and Mr Snowden senior "both put considerable money and time and trouble into". Apart from Mr Snowden's reliance on undue hardship in his notice of opposition, there is no application for relief by beneficiaries of the Trust.

[152] It is appropriate to consider undue hardship separately in relation to assets and profit forfeiture.

Relief from assets forfeiture

[153] In relation to assets forfeiture, I deal first with the Karaka property. I have concluded it is tainted property as the mortgage repayments were funded, at least in part, by significant criminal activity. In effect, I consider the extent of the taint is limited to that contribution to the mortgage repayments and that part of the capital gain.

[154] I have also concluded that Mr Snowden has effective control over the Karaka property. But, as indicated, he personally does not have a legal or equitable interest in it. It is owned by KFL of which he is the sole shareholder, holding the shares on trust for the Trust. He is merely one of the eligible (discretionary) beneficiaries of the Trust. It is not suggested the Trust is a sham.

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[51] *Nicholas v Commissioner of Police* [2017] NZCA 473, [2018] NZAR 172 at [57].

[155] Mr Snowden met the cash component of the purchase price for the Karaka property and met the mortgage repayments (except for the rent paid). Once the Trust was established and purchased the shares in KFL, it is not clear whether Mr Snowden's contribution towards the purchase price of the Karaka property by KFL was recorded as a loan to the Trust or treated as a gift.

[156] Mr Snowden lives at the Karaka property, as have members of his extended family from time to time – some paying rent. The evidence did not indicate out of the ordinary contributions by others towards improvements. Mr Snowden said that improvements to the Karaka property were funded by the sale of vehicles he had worked on and his father had paid $1,500 for a garage/carport. He suggested only in re-examination that his parents had contributed $100,000 over time. Police enquiries of the New Zealand Transport Agency cast doubt on Mr Snowden's claims in relation to the three vehicles he referred to selling for a total of $30,000. In any event, the transactions referred to date back to 2001/2002 – that is, before or around the time the Karaka property was purchased. They may have contributed to the purchase price but there is inadequate evidence of substantial expense incurred on improvements.

[157] Nor did the evidence indicate that Ms Snowden was looking to move to the property as her retirement home. She owns and lives in a freehold property and said she has not moved to the Karaka property because she has an illness and needs to live near her doctor and the hospital.

[158] Having regard to these circumstances, particularly the ownership of the Karaka property and the limited extent of the tainting, I consider that relief from assets forfeiture is appropriate. The beneficiaries of the Trust – particularly the primary beneficiaries, Mr Snowden's children – would suffer undue hardship if the Karaka property was asset forfeited.

[159] Relief is not sought in relation to the Aprilia and I do not consider there would be undue hardship if the $2,725 cash is forfeited.

Relief from profit forfeiture

[160] Given my conclusions in relation to asset forfeiture of the Aprilia and the $2,725 cash, relief from profit forfeiture arises only in relation to the Karaka property. The remaining issue is whether the factors raised by Mr Snowden already considered in relation to relief from assets forfeiture also justify relief from profit forfeiture.

[161] I do not consider that the beneficiaries of the Trust – including Mr Snowden but particularly the primary beneficiaries, Mr Snowden's children – would suffer undue hardship if the Karaka property is sold and part of the proceeds forfeited to meet a profit forfeiture order. They will suffer hardship, but it would not be not out of the ordinary. It is not out of the ordinary for offenders who have gained substantially from significant criminal activity to lose their residence. Although Mr Snowden claimed he has nowhere else to stay, he acknowledged he has previously lived with his mother and could return there. Only one of Mr Snowden's children has been living at the Karaka property. He is an adult and has been paying rent. I have addressed Ms Snowden's position. The loss of trust equity due to a profit forfeiture order reflects the prescribed unlawful benefit and is not out of the ordinary, particularly when it appears the Karaka property has not really been treated as a trust asset to date.

Conclusion and form of orders

[162] In relation to assets forfeiture, I have concluded that the Aprilia and the $2,725 cash are to be forfeited, and in relation to the Karaka property that – while it is tainted – there should be relief from forfeiture.

[163] In relation to profit forfeiture, s 55(2) provides:

> The order must specify—
>
> (a) the value of the benefit determined in accordance with section 53; and
>
> (b) the maximum recoverable amount determined in accordance with section 54; and
>
> (c) the property that is to be disposed of in accordance with section 83(1), being property in which the respondent has, or is treated as having, interests.

[164] I have concluded the value of the benefit is $754,533.

Maximum recoverable amount

[165] Section 54(1) provides:

> Before the High Court makes a profit forfeiture order, the Court must determine the maximum recoverable amount by—
>
> (a) taking the value of the benefit determined in accordance with section 53; and
>
> (b) deducting from that the value of any property forfeited to the Crown as a result of an assets forfeiture order made in relation to the same significant criminal activity to which the profit forfeiture order relates.

[166] Having concluded that the Aprilia and the $2,725 cash are subject to asset forfeiture, they are to be deducted from the value of the benefit.[52] The maximum recoverable amount is therefore $743,308.

[167] The property to be disposed of for the purpose of the profit forfeiture order is the Karaka property.

Costs

[168] Having largely succeeded, the Commissioner is entitled to costs. If costs cannot be agreed, I will receive memoranda (not exceeding three pages) on behalf of the Commissioner within 20 working days and on behalf of Mr Snowden within a further 10 working days. I will determine costs on the papers unless I need further assistance from counsel.

Gault J

[52] The Commissioner's benefit calculation included the purchase of the Aprilia at $8,500.