IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA347/2024
[2026] NZCA 36

BETWEEN	ROBERT WILLIAM (AKA CHIN KOK SOON) First Appellant	
	HELEN ENG (AKA KWE YONG ENG) Second Appellant	
AND	COMMISSIONER OF POLICE Respondent	

Hearing:	23 September 2025
Court:	Ellis, Palmer and Whata JJ
Counsel:	M T Lennard for Appellants B M Finn and K T O'Halloran for Respondent
Judgment:	27 February 2026 at 11.30 am

JUDGMENT OF THE COURT

A The applications to adduce further evidence are granted.

B The appeal is dismissed.

C As the appellants are legally aided, we make no order as to costs.

REASONS OF THE COURT

(Given by Whata J)

[1] This is an appeal against a judgment of the High Court ordering the continuance of restraining orders over the properties at 8A/126 The Terrace, Wellington (the Terrace property) and 357 Main Road, Tawa (the Main Road property)

under the Criminal Proceeds (Recovery) Act 2009 (CPRA).[1] It raises the following key questions:

(a) Were there reasonable grounds to believe the properties were sufficiently tainted to justify restraint?

(b) Is the disproportion between the value of the restrained property and the extent of the likely unlawful benefit such that the property should be released from restraint?

(c) Should the Commissioner be required to give an undertaking as to damages under s 29 of the CPRA?

Key facts and evidence

[2] In February 2022, the police commenced an investigation called "Operation Trump Card". This uncovered a commercial-scale stolen property and money laundering ring run by the first appellant, Mr William. Police searches on 5 and 6 October 2022 were conducted at addresses connected to Mr William and his wife, Ms Eng (the second appellant). Over $2.97 million in stolen property was recovered.

[3] On 24 November 2022, the Commissioner moved quickly to obtain a without notice restraining order under ss 22, 24 and 25 of the CPRA over six properties owned by Mr William and Ms Eng, and nine properties owned by their company, Synergy Investments Ltd (Synergy).[2] Section 24 permits the making of a restraining order over specific property where the court is satisfied it has reasonable grounds to believe that the property is tainted property, namely property that has, wholly or in part, been either acquired as a result of significant criminal activity or directly or indirectly derived from significant criminal activity. Section 25 permits the making of a restraining order over specified property if the court is satisfied it has reasonable grounds to believe that the respondent has unlawfully benefitted from significant criminal activity.

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1 *Commissioner of Police v William* [2024] NZHC 1140 [judgment under appeal].

2 Ms Eng is the sole director and shareholder of Synergy since its incorporation. Cooke J made the without notice orders on 25 November 2022.

[4] The restrained properties, valued at about $18 million at the time of the application, are listed in Schedule 1 to this judgment. One reason for the Commissioner's application was that the appellants had placed 12 of the properties owned by them or Synergy on the market immediately following the October searches.

[5] An affidavit was filed in support of the application by specialist investigator for the police, Monique McIntyre. She observed:

> A preliminary analysis of bank accounts for the respondents (William and Eng) and entities operated by them identified an estimated $1,530,849.20 in COVID-19 Wage Subsidy payments to them from the Ministry of Social Development (the **MSD**). The respondents (William and Eng) also received payments from MSD as private accommodation suppliers, with the value of these payments yet to be assessed. I believe some of these payments have been obtained by deception and represent an unlawful benefit to the respondents.

[6] She also noted:

(a) The COVID-19 wage subsidy payments were received by Synergy and another of the appellants' entities, Evergreens Group Ltd (Evergreens) in the period between 2020–2022 and correspond to a marked increase in gross employee tax deductions in the same period, as shown in the following table:[3]

Tax year	Gross employee deductions	
	Synergy	Evergreens
2016	$148,371.00	$837,210.56
2017	$287,807.00	$734,532.00
2018	$108,067.00	$639,240.00
2019	$231,104.00	$719,386.00
2020	$144,320.00	$568,610.00
2021	$1,255,013.28	$1,355,060.00
2022	$709,553.50	$743,863.00

[3] Ms Alwis for the Commissioner subsequently corrected these figures to take into account information provided by the Inland Revenue Department. The differences are not material for present purposes.

(b) COVID-19 wage subsidies were claimed for 11 existing or previous tenants in properties owned by Ms Eng or Synergy. Forensic accounting also showed that some transaction descriptions recorded the names of the tenants even though the monies were in fact paid into accounts held by Mr William and Ms Eng, Synergy, or Evergreens.

(c) Banking data for the period between 17 February 2015 and 15 September 2022[4] showed Mr William and Ms Eng in receipt of MSD accommodation payments totalling $761,481.83 which refer to tenants in their properties. A common trend in the banking data where these MSD payments were received was that receipt was often followed by a payment of a portion of the funds received by the appellants into that tenant's account, referencing either "rent refund" or "bond refund". Some of these were alleged to be deliberate attempts to obtain funds they were not entitled to. Text messaging and other information supports this conclusion.

(d) There was a large amount of cash deposits into bank accounts operated by Mr William and Ms Eng, as demonstrated in the following table:

Year	Cash deposits
2015	$59,596.00
2016	$369,274.00
2017	$302,495.00
2018	$332,045.66
2019	$411,611.00
2020	$345,003.74
2021	$146,900.28
2022	$103,848.00

[4] This being the seven year "relevant period" for the purposes of the CPRA inquiry: see Criminal Proceeds (Recovery) Act 2009, s 5(1) definition of "relevant period of criminal activity".

(e) Yumantha Alwis, a forensic accountant for the police, had calculated the unlawful benefit received by Mr William and Ms Eng to be $2,526,252.59, with a summary as follows:

Preliminary total unlawful benefit		
Description	Total value	Actual value
COVID-19 wage subsidy payments received	$1,530,849.20	
Less average wage subsidy payments	$641,492.50	
COVID-19 wage subsidy payments obtained by deception		$889,356.70
Unexplained cash deposits	$2,070,773.40	
Less cash withdrawals	$934,728.00	
Total cash deposits less withdrawals		$1,136,045.40
Unknown third party payments		$250,390.31
Estimated MSD supplier payment fraud		$250,460.18
Preliminary total unlawful benefit		$2,526,252.59

[7] Ms McIntyre also identified what she described as significant inconsistencies between declared income and expenditure, and the accumulation of identified assets, including the Terrace and Main Road properties. Ms McIntyre however acknowledged that the amount of tainted cash paid directly towards the Terrace and Main Road properties was small — in the sums of $515 and $1,132 respectively.

[8] An on notice application was subsequently filed on 1 December 2022. Further ancillary orders were also sought by consent to preserve the value of the properties. The orders enabled Mr William and Ms Eng to continue to sell 12 of the properties in conjunction with the Official Assignee, with the Commissioner holding the residual equity until the restraining order application was determined. The parties agreed that the proceeds of any sale would either be:

(a) applied to the debt facilities related to any of the 15 properties under restraint; or

(b) held by the Official Assignee until the determination of any forfeiture order.

[9] The ancillary orders were made accordingly.[5] The balance of the on notice restraint application was adjourned several times in the hope that agreement might be reached, but that did not happen.

[10] From about January 2023 the Official Assignee set about dealing with the properties together with the appellants' property manager, Mr Aashish Suri. It appears this process did not go smoothly, complicated by tenancy difficulties, mortgagee sales and Synergy's liquidation in late June 2023.

[11] In September 2023 Mr William and Ms Eng filed a notice of opposition opposing the making of restraining orders inasmuch as the order (relevantly):

(a) applies to properties located at the Terrace and Main Road; and

(b) does not include an undertaking as to damages.

[12] Mr William and Ms Eng claimed among other things that the Official Assignee owed a duty of care to the appellants and had been negligent in the exercise of their powers, including by failing to avoid actions which would cause diminution of the value of the properties. Losses claimed included loss in the value of properties sold or advertised for sale at under value, loss of value due to damage and neglect, losses due to forced sale, losses due to the liquidation of Synergy and loss of rental income.

[13] The Commissioner subsequently filed an affidavit of Ms Alwis in October 2023 in support of the on notice application. Ms Alwis specifically addressed the alleged tainting of the Terrace and Main Road properties. Overall, she noted:

(a) Ms Eng contributed $43,400 towards the purchase of the Terrace property, with the balance funded from a mortgage of $110,500.

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5 *Commissioner of Police v William* HC Wellington CIV-2022-485-771, 20 December 2022 (Minute of Cooke J).

(b) Three cash deposits were used to facilitate loan repayments on the Terrace property totalling $793.

(c) The Terrace property mortgage account received internal transfers amounting $55,542.14 between 14 April 2015 and 15 September 2022.

(d) A COVID-19 wage subsidy payment of $51,600 was received on 28 October 2021 in Synergy's account. Subsequent transfers totalling around $34,000 purportedly to Synergy employees were transferred through a number of accounts and in fact ended up in accounts associated with Mr William and Ms Eng.

(e) A COVID-19 wage subsidy payment of $63,266.40 was paid to Evergreens on 27 March 2020 and on the same date $64,000 was transferred to Synergy. On 3 April 2020, $9,773 was transferred back to Evergreens, with $400 from the Evergreens account going to Mr William and Ms Eng. The sum of $267 was then paid toward the Terrace property mortgage.

(f) In the period 17 February 2015 to 15 September 2022 a total of $761,481.83 in MSD payments were made to the appellants as accommodation supplements or one-off rent arrears and bond assistance. A common trend is that where MSD payments were received, there followed a rent refund or bond refund to the tenants. These totalled $101,578.25.

(g) The Main Road property was transferred to Ms Eng on 26 April 2013. She contributed $42,840.81 to the purchase price, with the balance funded from a mortgage of $224,000. This mortgage was refinanced for $252,000.

(h) Three cash deposits into the Main Road mortgage account were identified in the sum of $1,695, the source of which could not be ascertained.

(i) During the period April 2015 to September 2022, the accounts that had transferred funds into the Main Road property mortgage account had all received tainted funds from COVID wage subsidy payments and cash deposits believed to be from stolen goods. The sums transferred total $108,809.14 in internal transfers and $79,651.74 cash deposits.

(j) Various maintenance works have been carried out at the Main Road property, funded by cash deposits.

(k) Mr William used complex layering to hide the COVID-19 funds.[6]

Guilty pleas and fresh charges

[14] Mr William pleaded guilty to a variety of charges relating to the stolen property.[7] On 14 November 2024 Mr William was sentenced to three years and ten months' imprisonment.[8] At sentencing, Radich J described the offending as a "large-scale receiving operation".[9] Later, Ms Eng pleaded guilty to a representative charge of receiving property and was sentenced to six months' community detention on 16 December 2024.[10] Her offending was described in the following terms at sentencing:

> [6] The summary tells me that Police recovered around 851 items from every part of the house, including bedrooms that were rented to other people, two of whom were co-offenders, and in the bedroom that you and Mr Soon shared. In your bedroom, there were a number of designer handbags that appeared to be unused, two Macpac jackets that had been stolen from a store in Petone, and six bottles of wine that had been taken in a burglary at Dockside Bar and Restaurant in early March 2022. The replacement value of the property found at your home was $594,328.30. The summary records it took three days for a team of up to 10 police officers to catalogue and seize this volume of property from your address.

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6 "Layering" is a common money laundering typology that involves conducting complex transactions or moving money to camouflage the source of the funds.

7 Mr William pleaded guilty to 20 representative charges of receiving property, one non-representative charge of receiving property and one charge of failing to carry out obligations in relation to a computer search. Ms Eng pleaded guilty to one representative charge of receiving property.

8 *R v Soon* [2024] NZHC 3393.

9 At [2].

10 *R v Eng* [2024] NZHC 890.

[15] Mr William was also recently charged with 27 charges of dishonest use of a document in relation to fraudulent MSD and COVID-19 wage subsidy applications in the period of 2020–2022. The Commissioner says it is alleged Mr William received over $1.1 million from these applications.

The High Court judgment

[16] Four issues came before Grau J in March 2024:

(a) Whether the two unsold properties should continue to be subject to restraining orders.[11]

(b) Whether any sale order should include a condition under s 28(1) of the CPRA that would enable proceeds from any property to pay debts in relation to restrained properties.[12]

(c) Whether any sale order should include a condition under s 28 of the CPRA to allow payment of Synergy's liquidator costs and expenses, including legal expenses.[13]

(d) Whether the Commissioner should be required to give an undertaking as to damages.[14]

[17] The Judge determined that the Terrace and Main Road properties should continue to be subject to restraining orders. The remaining three issues were resolved by the Judge in the negative. The first and fourth issues are in focus on this appeal.

[18] The Judge concluded that the restraint of the Terrace and Main Road properties should continue:

(a) First, the Judge rejected the idea that there must be a substantial and actual connection between the offending and the property said to be

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11 Judgment under appeal, above n 1, at [3].
12 At [4].
13 At [5].
14 At [6].

tainted. The Judge found instead that property is either tainted or it is not. If it is, then it may be restrained.[15]

(b) Second, the Judge found the connection between some cash deposits and mortgage repayments, a "money-go-round" being funnelled around accounts, and considerable unexplained cash deposits meant there were reasonable grounds to believe the properties were tainted.[16]

(c) Third, no question of disproportionality arises as a matter of law at the restraint and forfeiture stages in relation to asset forfeiture orders.[17]

(d) Fourth, the sale prices of the properties are rendered uncertain by the market.[18]

[19] The Judge did not consider that an undertaking as to damages was necessary or appropriate. The Judge emphasised the following matters:

(a) Money laundering is not a novel or unusual context for making a restraining order.[19]

(b) While a significant amount of time has passed since the initial order, this is a complex case and the investigation is ongoing.[20]

(c) The extent and cause of likely loss on the value of the properties is difficult to determine. It cannot be laid at the door of the Official Assignee or the Commissioner and is likely to reflect market factors.[21]

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15 At [31].
16 At [32]–[33].
17 At [34].
18 At [36].
19 At [75].
20 At [76].
21 At [77], [78] and [80].

(d) An undertaking is not necessary to incentivise the Commissioner to respond to requests for variation or to ensure improvement in future dealings with the properties.[22]

(e) The strength of the Commissioner's case is difficult to assess but there is evidence of a high level of fraud and dishonesty and criminal offending involving stolen property with proceeds finding their way to the restrained properties.[23]

(f) An undertaking would not have a chilling effect on the Commissioner, but that risk must be weighed.[24]

(g) While the extent of potential loss is a concern, the Official Assignee and Commissioner's conduct had not reached a sufficient level of concern and it is very difficult to assess potential loss.[25]

Current position

[20] Mr Lennard sought leave to file updating evidence as to the current position of the properties formerly or presently under restraint. In response, the Commissioner sought leave to file evidence from the Official Assignee. Given their updating nature, we were satisfied leave should be granted to the parties to produce this evidence. Thirteen of the restrained properties have been sold for a total of about $9.3 million. Mr Lennard, for the appellants, says that these properties were worth significantly more than that as at the date of the imposition of the without notice restraining order in November 2022. A summary of the value of the properties prior to the restraint and on sale was produced by Mr Lennard and is included in Schedule 1.

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22 At [79].
23 At [81].
24 At [82].
25 At [83].

Grounds of appeal

[21] Mr Lennard for the appellants contends, in short, that the Judge was wrong to find:

(a) there were reasonable grounds to believe that the Terrace and Main Road properties were sufficiently tainted to justify restraint;

(b) the lack of proportionality between the value of the restrained properties and the likely extent of the unlawful benefit was not a relevant or determinative factor;

(c) the discretion to continue the restraining orders was justified; and

(d) an undertaking was not justified.

[22] We address these claims in the above order. The answer to the taint and proportionality questions will, as a minimum, inform whether a restraining order is justified in this case. But first it is helpful to briefly describe the applicable statutory scheme and associated principles.

The CPRA scheme

[23] This Court in *Yan v Commissioner of Police* explained the scheme of the CPRA as follows:[26]

> [4] The Act provides for the restraint and forfeiture of property derived as a result of significant criminal activity without the need for a conviction.
>
> [5] The purpose of the Act is set out in s 3:
>
> **3 Purpose**
>
> (1) The primary purpose of this Act is to establish a regime for the forfeiture of property—
>
> (a) that has been derived directly or indirectly from significant criminal activity; or

[26] *Yan v Commissioner of Police* [2015] NZCA 576, [2016] 2 NZLR 593 (footnotes omitted).

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

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

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

(b) deter significant criminal activity; and

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

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

[6] Under the Act, there are three types of forfeiture orders: instrument of crime forfeiture orders, assets forfeiture orders and profit forfeiture orders. Of the three types, only the latter two are relevant for present purposes. An assets forfeiture order is obtained over property that is "tainted", tainted property being defined as property acquired as a result of, or directly or indirectly from, significant criminal activity. A profit forfeiture order operates to forfeit any property (not just tainted property) belonging to a person who has received an unlawful benefit from significant criminal activity.

[7] In order to preserve the property pending a hearing as to whether the property should be forfeited, the Commissioner may apply to the court for a restraining order. Restraining orders have been described by this Court as temporary orders that give the police time to gather further evidence. They may lead to forfeiture but only on the completion of further processes. In effect, restraining orders are a holding measure. They place the property in question under the control of the Official Assignee and prevent any person dealing with it, except with the approval of the court. It is not necessary for the police to apply for restraining orders before applying for forfeiture but it is common practice to do so.

[8] Subpart 2 of Part 2 of the Act regulates the granting of restraining orders. Sections 24 to 26 confer power on the courts to grant a restraining order in respect of either specific property, all or part of a respondent's property, or an instrument of crime. The court may only grant a restraining order if satisfied there are reasonable grounds to believe the property in question is tainted, or the respondent has unlawfully benefited from significant criminal activity and owns or effectively controls the property in question.

[9] Once an on notice restraining order is made, it remains in force for a period of one year unless the forfeiture proceedings associated with the relevant property are resolved in the meantime, in which case the restraining orders automatically expire. In the event the forfeiture proceedings are not resolved in the 12-month period, the Commissioner can apply to the court for an extension of the duration of the restraining order. Any extension can only

be for a period not exceeding 12 months. There can be more than one extension.

Tainted property

[24] The threshold requirements for a tainted property restraining order are set out at s 24 of the CPRA. Section 24 states:

> **24 Making restraining order relating to specific property that is potentially tainted**
>
> (1) A court hearing an application for a restraining order relating to specific property may, if the court is satisfied it has reasonable grounds to believe that any property is tainted property, make an order that the property (**restrained property**)—
>
> (a) is not to be disposed of, or dealt with, other than is provided for in the restraining order; and
>
> (b) is to be under the Official Assignee's custody and control.
>
> (2) A restraining order may be made under subsection (1) whether or not there is a respondent in relation to whom the restraining order relates.

[25] As noted, tainted property is defined:[27]

> **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

[26] As this Court in *Duncan v Commissioner of Police* explained:[28]

> [28] … the definition is intended to catch property that (whether in whole or in part) has been acquired by the application of funds lawfully derived if money produced by a significant criminal activity is also used to acquire the property. …

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27 Criminal Proceeds (Recovery) Act, s 5(1) definition of "tainted property".

28 *Duncan v Commissioner of Police* [2013] NZCA 477, (2013) 26 CRNZ 796.

Profit

[27] The operation of s 25, dealing with "profit" restraining orders is also in focus. That section provides:

> **25 Making restraining order relating to all or part of respondent's property**
>
> (1) A court hearing an application for a restraining order relating to all or part of a respondent's property may, if the court is satisfied it has reasonable grounds to believe that the respondent has unlawfully benefited from significant criminal activity, make an order that the property it specifies in the order (**restrained property**)—
>
> (a) is not to be disposed of, or dealt with, other than is provided for in the restraining order; and
>
> (b) is to be under the Official Assignee's custody and control.
>
> (2) A restraining order made under subsection (1) may relate to any of the following:
>
> (a) all of a respondent's property (including property acquired after the making of the order):
>
> (b) specified parts of a respondent's property:
>
> (c) all of a respondent's property (including property acquired after the making of the order) other than specifically excluded property.

Were there reasonable grounds to believe that the two properties were tainted?

[28] Mr Lennard accepts that payment of mortgage debts on a property means that that property has been indirectly derived from the source of that payment. In addition, that money is fungible so it is generally not possible to say that a payment into a bank account goes out as any particular payment out. However, Mr Lennard submits that:

(a) there is insufficient evidence to support a finding that the Terrace and Main Street properties are tainted; and

(b) even if the evidence is sufficient, the taint is *de minimis*.

[29] On the sufficiency issue, he makes two key points. First, drawing on the approach taken with equitable tracing, he contends that payment from a mixed fund

which includes the alleged proceeds of criminal activity is not enough. There must be at least a substantial and actual, not *de minimis* or theoretical, connection between the significant criminal offending and the property said to be tainted. He further submits that insofar as mixed funds may lead to a benefit, that is properly dealt with under the alternative route laid down at s 25 dealing with restraint of property "if the court is satisfied it has reasonable grounds to believe that the respondent has unlawfully benefited from significant criminal activity".[29] This is commonly referred to as a "profit" restraining order. Second, he says there is no evidence of any correspondence between the COVID-19 wage subsidy payments and the properties.

[30] Mr Lennard contends the evidence of taint of the Terrace and Main Road properties is limited to:

(a) three modest cash deposits in the range of $840 to $1,960 into the appellants' accounts in 2019/2020 corresponding to three mortgage payments to the restrained properties; and

(b) a COVID-19 wage subsidy payment of $63,266.40 into the Evergreens account and the transfer of that amount to Mr William's account, an advance back of $9,733, a $400 payment to the appellants' personal account and only $267 towards the mortgage over the Terrace property.

[31] He further contends that the payments are so small as to be *de minimis*.

Analysis

[32] We consider that the evidence of taint is sufficient to meet the threshold test for the imposition of a restraining order; the concept of "*de minimis*" in this context is not relevant. As this Court said in *Commissioner of Police v Harrison*, the aim of the CPRA is "to make sure that crime does not pay".[30] It seeks to "eliminate the chance for persons to profit from undertaking or being associated with significant criminal activity".[31] As William Young J put it in *Marwood v Commissioner of Police*, "[t]he

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29 Criminal Proceeds (Recovery) Act, s 25(1).
30 *Commissioner of Police v Harrison* [2021] NZCA 540, [2022] 2 NZLR 339 at [7].
31 Criminal Proceeds (Recovery) Act, s 3(2)(a).

aspirational language of s 3(2)(a) gives a clear and emphatic signal as to the legislative purpose".[32]

[33] Consistent with this basic aim and emphatic signal, the scheme of the CPRA mandates a broad and robust power to restrain.[33] In this regard, the heading to s 24 refers to "[m]aking restraining order relating to specific property that is potentially tainted". The reference here to "potentially" tainted emphasises the precautionary intent of the power to restrain.[34] Tainted property is then defined to capture property that has "wholly or in part" been acquired as a result of, or derived "directly or indirectly" from significant criminal activity.[35] The use of these words casts a wide net in furtherance of the CPRA's purpose.[36] The evidence therefore does not need to show that the taint is co-extensive with or directly linked to the restrained property.

[34] Finally, Mr Lennard accepts that s 24 sets a relatively low standard for the restraining of property. There need only be "reasonable grounds to believe" that any property is tainted property.[37] While this is a higher standard than reasonable grounds to suspect,[38] it does not require proof on the balance of probabilities or even a prima facie case that the property is tainted property. As Mr Lennard submits, there will be reasonable grounds to believe if there is an objective and credible basis for thinking that the subject property is tainted.[39]

[35] On that basis, the Court is engaged, at s 24, in a factual evaluation of whether there is an objective and credible basis for thinking that the property was acquired in whole or in part, as a result of, or derived directly or indirectly from, significant criminal activity. If so, then property is deemed to be tainted property and may be

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32 *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260 at [12].

33 See also s 25 dealing with power to restrain unlawful benefits from significant criminal activity. See *Rodriguez v Commissioner of Police* [2020] NZCA 589 at [49].

34 The relevance of headings as indicia of intent is affirmed by the Legislation Act 2019, s 10(4).

35 Criminal Proceeds (Recovery) Act, s 5(1) definition of "tainted property", para (a).

36 For similar reasoning in relation to the sister restraining provision, s 25, see *Rodriguez v Commissioner of Police*, above n 33, at [49].

37 Criminal Proceeds (Recovery) Act, s 24(1). See also *Commissioner of Police v Smith* [2017] NZHC 10 at [10].

38 See *R v McManamy* (2002) 19 CRNZ 669 (CA) at [25] in relation to s 198 of the Summary Proceedings Act 1957.

39 Mr Lennard helpfully referred to Asher J's statement in *Campbell v Police* HC Rotorua CRI-2006-463-87, 7 June 2007 at [21] with which we agree.

restrained. As with any other assessment of fact, the Court may use circumstantial evidence to infer that a fact exists.[40]

[36] Turning then to the evidence in this case, Mr Lennard accepts that there is some evidence of a direct contribution to the properties out of tainted funds. We consider that while small, those sums provide a sufficient basis for the restraining orders. As this Court said in *Drake v Commissioner of Police*:[41]

> [73] … The statutory definition of "tainted property" did not require the Judge to confine the property forfeited to an interest corresponding to the extent the property was tainted. The introduction of any funds derived from significant criminal activity into a bank account taints the entire account, just as an entire house may be tainted even although it was only partially acquired from significant criminal activity.

[37] Furthermore, we are satisfied that even though the direct contributions are small, they provide a clear direct link to Mr William and Ms Eng's broader scheme involving the accumulation of assets via the integrated management of lawfully derived funds and allegedly ill-gotten gains and the alleged criminal activity.[42] And to repeat, the CPRA is emphatic. Even very minor contributions trigger the restraining power in order to ensure that crime does not pay.

[38] Lastly, for the reasons largely set out by the Commissioner, we see nothing in the case law cited by Mr Lennard that would cause us to change our conclusion.[43] Each of those cases involve assessment of the evidence peculiar to those cases, and in different legal contexts. In *Commissioner of Police v Keen*, Ellis J described cash deposits totalling $4,055 as *de minimis* in considering proof one way or another of the benefit from cannabis dealing, but the context was profit forfeiture.[44] In *R v Corless*, the same Judge found that the value of a mere expectation of beneficiaries of a trust "would, in any event, be *de minimis* at best", but the issue under consideration was undue hardship.[45] In *Solicitor-General v Fitzgerald*, Chisholm J found that evidence indicating that the ceiling of a residential property had been used for drying cannabis

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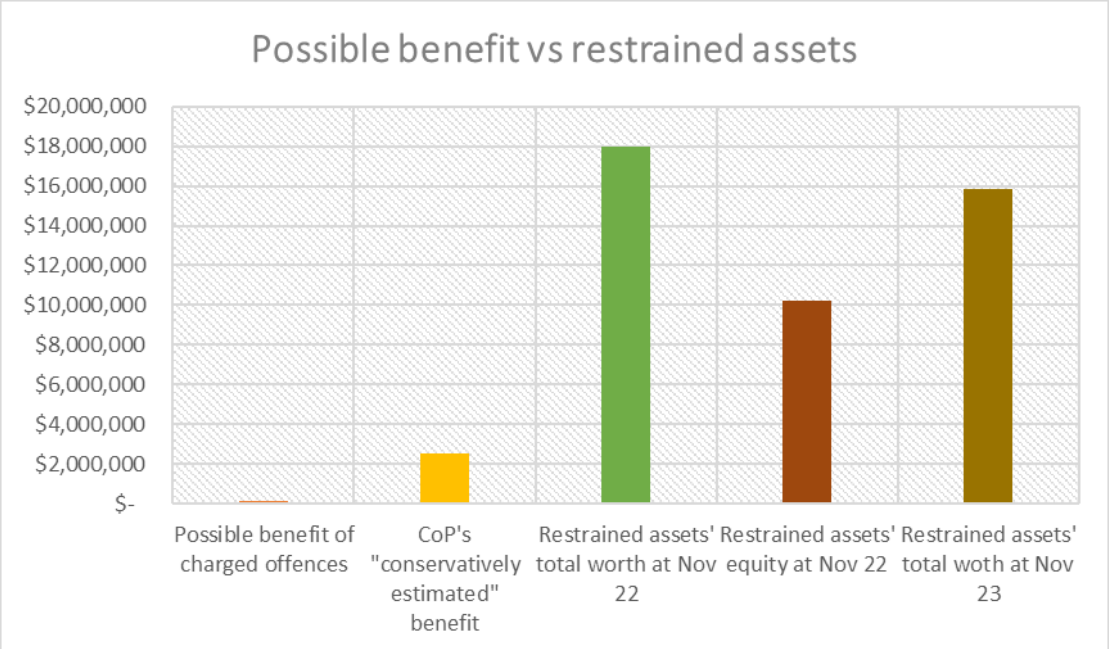
40 *Commissioner of Police v de Wys* [2016] NZCA 634 at [9] and [71].
41 *Drake v Commissioner of Police* [2020] NZCA 494 (footnote omitted).
42 See summary of the evidence above at [6]–[7] and [13].
43 *R v Corless* [2013] NZHC 2735; *Commissioner of Police v Keen* [2020] NZHC 3365; and *Solicitor-General v Fitzgerald* HC Christchurch M329/92, 4 April 2003.
44 *Commissioner of Police v Keen*, above n 43, at [49]–[50].
45 *R v Corless*, above n 43, at [83].

"falls well short of establishing the necessary link between the current offending and the ceiling".[46] That case arose under the (quite different) Proceeds of Crime Act 1991.

[39] Accordingly, like Grau J, we are satisfied that there were reasonable grounds for a belief that the Terrace and Main Road properties are tainted properties. A restraining order under s 24 was therefore justified.

Proportionality

[40] Even if, contrary to the conclusion we have just reached, continued restraint under s 24 was not warranted here, Mr William would still need to demonstrate that the Terrace and Main Road properties should no longer be restrained on a profits basis under s 25. Mr Lennard also therefore submits that restraint should be removed on disproportionality grounds. He provided the following graphic to illustrate the extent of the disparity between the Commissioner's assessment of unlawful benefit and the value of the restrained assets at the time the restraining order was first imposed:



[41] On this analysis, the total assets were valued at about $18 million, with net equity of about $10 million. The Commissioner's "conservative" estimate of

46 *Solicitor-General v Fitzgerald*, above n 43, at [20].

benefit was about $2.5 million. He notes that Mr William is also now facing charges in relation to MSD fraud in the sum of only about $1.1 million.

[42] However, since the order was first imposed, 13 of the appellants' properties have been sold for a total of around $9.3 million. Mr Lennard submits this has effectively wiped out Mr William and Ms Eng's equity. He also contends that the forensic evidence shows that during the period of property offending, there was only $103,848 in cash deposits into their accounts, and other "unexplained" cash deposits of about $300,000 outside the period of offending could be attributable to the appellants' legitimate business interests. The upshot of all of this is that, on Mr Lennard's account, the extent of the restraining order was and remains grossly disproportionate to the likely benefits received by Mr William and Ms Eng. It is also a reason, he says, for the Court to exercise its discretion in favour of removing the Terrace and Main Road properties from the restraining order.

[43] Ms O'Halloran for the Commissioner submits that proportionality is not a relevant consideration in relation to tainted property and asset forfeiture orders, citing this Court's decision in *Hunt v Commissioner of Police*.[47] She further contends that the value of benefit derived from the relevant criminal activity exceeds $4 million and there is a risk that the residual net value of the restrained assets (totalling about $1.8 million) will not be sufficient to meet a corresponding profit forfeiture order. On that basis the restraining orders are not excessive, let alone disproportionate.

Analysis

[44] In *Hunt*, this Court observed:

> [58] Once found to be tainted, specific property — assets acquired from significant criminal activity — must be forfeited under an assets forfeiture order. As tainted property is property acquired or derived "wholly or in part" from significant criminal activity at the point of forfeiture, no question of proportionality arises. Neither does it at the restraint phase. …
>
> [59] The position is different when a respondent's property is forfeited pursuant to a profit forfeiture order.

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47 *Hunt v Commissioner of Police* [2021] NZCA 644, [2023] 2 NZLR 1.

[45] The Court went on to observe that when making a profit forfeiture order, the High Court must determine a maximum recoverable amount, being the value of the benefit of the criminal activity less the value of any property already forfeited in respect of the same criminal activity.[48] This caps the amount enforceable as a debt due to the Crown. The Court said:[49]

> That mechanism ensures the seizure of the person's property constituted by the forfeiture is, in terms of s 27 of the New Zealand Bill of Rights Act 1990, a reasonable one.

[46] The Court then observed that in respect of profit forfeiture, proportionality might be relevant at the restraint stage. It stated:

> [63] At the restraint stage, no estimate of the unlawful benefit is required. Nor, on many occasions, would making such an estimate be practicable. In that situation there will be less scope for a complaint of disproportionality. But where the significant criminal activity and/or the estimated unlawful benefit alleged is towards the lower end of seriousness and scale, and a respondent's property considerable, such an argument could well be made.

[47] In *Hunt* the restrained property was worth approximately $874,000, while the unlawful benefit was estimated at $59,000.[50] The Court found that continued restraint was disproportionate in those circumstances.[51] The Court also expressed concern at the delay of four years in that case.[52]

[48] At the time of the making of the restraining order, the estimated benefits of the alleged criminal activity were quantified at about $2.5 million, while the net value of the restrained assets was about $10 million. The potential for some disproportionality is therefore in view. But as this case amply illustrates, the real value of both benefits and the assets may be very difficult to quantify at the restraining stage. It is not a simple exercise in arithmetic. Some latitude is to be expected, especially in uncertain market conditions. We are therefore not satisfied that the Court acted in a clearly disproportionate way at the time by continuing restraint over the properties. Moreover, given the present net value of the available assets at under $1.8 million (if that), and the current estimated value of the benefits of the alleged criminal activity of about

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48 At [60], referring to Criminal Proceeds (Recovery) Act, ss 54 and 55.
49 At [61].
50 At [67].
51 At [68].
52 At [75].

$4 million, we see no basis for setting aside the restraining order now for disproportionality.

Discretion

[49] Given where we have got to, it is not necessary for us to examine whether the Judge enjoyed a discretion not to make an order once the relevant criteria are met, and if so whether she should have refused to make the restraining orders. In short, for the reasons expressed above, we are satisfied that the orders are justified.

Undertaking as to damages

[50] Mr Lennard submits that an undertaking as to damages is a useful mechanism for mitigating the potentially draconian effects of a restraining order. He contends that the High Court Judge erred in principle when factoring difficulties in assessing causation and quantum of losses likely to arise from the restraining order.[53] Rather the threshold issue is whether fairness requires protection.

[51] As to the discretionary factors, Mr Lennard contends:

(a) The appellants' wealth has vanished since the restraint.

(b) There has been a delay of three years and still no forfeiture application made.

(c) The Commissioner has restrained all profit-making assets. The assets continue to be "run into the ground", impacting their profitability, and all of this is illustrated by the fact that 11 of the properties have been sold at 57 per cent of their values in 2022, representing a loss of over $6 million.

(d) The restraint was excessive from the outset, and remains grossly disproportionate, encumbering $18 million of assets on criminal proceeds of no more than $2.5 million.

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53 Judgment under appeal, above n 1, at [77].

(e) While the Commissioner has an arguable case for forfeiture, no forfeiture order has been made, the asserted benefit is excessive, and any tainting is challengeable.

(f) There is no other meaningful recourse for Mr William and Ms Eng if no undertaking is made but nevertheless it turns out that an unjustified restraint has foreseeably caused them loss.

(g) As the High Court Judge found, an undertaking is unlikely to have a chilling effect on the Commissioner.

[52] In oral argument, Mr Lennard also advanced the proposition that the undertaking for damages could and should be applied retrospectively, that is to cover the full period of the restraining orders. No authority was provided for such an order and it is impossible to see how such an order could fairly be imposed. In any event for reasons we will shortly give, no such order (either prospective or retrospective) is justified.

Analysis

[53] Section 29 of the CPRA states:

> **29 Undertakings as to damages or costs in relation to restraining orders**
>
> (1) A court may require an applicant for a restraining order, or an applicant for an extension of the duration of a restraining order under section 41, to give satisfactory undertakings with respect to the payment of damages or costs, or both, in relation to the making, operation, or extension of the duration of the restraining order.
>
> (2) A court may decline to make a restraining order or extend the duration of a restraining order if the applicant for the order or extension fails to give the court the undertakings with respect to the payment of damages or costs, or both, that the court requires.
>
> (3) Any expense incurred by the Crown in satisfaction of an undertaking given on behalf of the Crown under subsection (1) may be incurred without further appropriation than this section.

[54] As this Court said in *Commissioner of Police v Salter*:[54]

> [58] Ultimately, this Court in *Yan* affirmed the general statement of principle set out by Lang J in the Court below, namely, that the discretion "should be exercised according to considerations of justice and fairness and to diminish the possibility of oppression and injustice". Relevant but non-exhaustive considerations include:
>
> (a) the personal circumstances of the respondent;
>
> (b) delay;
>
> (c) the nature of the asset;
>
> (d) the likelihood of loss being suffered as a result of the restraint;
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> (e) the extent of any likely loss;
>
> (f) the conduct of the Commissioner;
>
> (g) the strength of the Commissioner's case; and
>
> (h) the existence of a meaningful alternative avenue of redress.
>
> [59] The Court regarded the inquiry as essentially fact-specific, noting that the weight to be accorded to different facts would vary from case to case. We now turn to the considerations relevant to this case.

[55] The Court also noted relevantly to this proceeding:[55]

> [79] We accept the Commissioner's submission that every restraining order over land has the potential to impact borrowing (in the sense of restricting the amount of debt which can be secured against the property) and may impact sale price. In such cases, something more is needed to justify an undertaking being required — to hold otherwise would be to prescribe a presumptive approach similar to that rejected in *Yan*. But an applicant is not required to establish that future loss is certain. Rather, the court's task is to critically assess the theories of loss advanced by the applicant for an undertaking, with a view to assessing the likelihood and extent of possible loss.
>
> [80] As this Court observed in *Yan*, assessing the extent and likelihood of loss consequent on restraining orders "inherently engages issues of causation". The question to be addressed is whether, assuming a future forfeiture application is unsuccessful, the restraining orders are likely to cause loss and, if so, at what level. We see this inquiry as analytically distinct from assessing the strength of the Commissioner's case. If the Commissioner's case appears to be strong, loss that appears very likely to eventuate may still justify an undertaking. In such a case, the two factors will pull in different directions and must be balanced according to the needs of justice and fairness.

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54 *Commissioner of Police v Salter* [2024] NZCA 6, citing *Yan v Commissioner of Police*, above n 26, at [40]–[42] (footnotes omitted).

55 Footnotes omitted.

> Accordingly, we reject the Commissioner's submission that the Judge failed to properly bring to account the strength of the Commissioner's case when assessing the likelihood of loss.

[56] We now turn to the questions of causation, justice and fairness.

Personal circumstances and delay

[57] We acknowledge that Mr William and Ms Eng found and continue to find themselves in difficult circumstances. There has also been a considerable delay and whatever the cause, the loss on the value of their asset portfolio since the imposition of the restraining orders is significant, and well in excess of any estimate of the benefit of criminal activity. What is left in the asset portfolio undoubtedly has significance to them. They naturally want to be protected as much as possible against still further loss.

[58] But we make two further important observations. Mr William and Ms Eng had already placed 12 of the 15 restrained properties on the market prior to the making of the restraining orders.[56] So a decision to sell the majority of the properties had already been made. The amended orders then provided, with their consent, for sale orders in relation to liquidated assets. That is the starting point. Mr William and Ms Eng wanted or agreed to the sale of those properties in late 2022 notwithstanding the market conditions. We consider this to be a death knell for the idea of an undertaking as to damages at the time in relation to properties that were either already up for sale or approved by them for sale. The Commissioner could not have been expected to provide an undertaking against losses incurred on the sale of properties that Mr William and Ms Eng, in fact, wanted or agreed could be sold.

[59] Furthermore, there is evidence supporting an inference that Synergy's position was already precarious at the time of the restraining orders. Illustrative of the difficult economic conditions at the time, as noted by the Commissioner, within a month of the of the restraining orders being in place, mortgagee sale action was being taken. We consider it is improbable that Mr William and Ms Eng will be able to show that

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[56] Mr Suri says that he was told this was done to raise money to defend the charges.

the losses arising from the sale of Synergy's properties and subsequent liquidation were attributable to the restraining orders.

The nature of the assets, likelihood of loss and the Commissioner's conduct

[60] We accept that the restraining orders restrained the profit generating assets of legitimate residential leasing and property businesses, and that putting them under Official Assignee control may have impacted their profitability and saleability. But the scale of that impact is difficult to quantify and we think likely to be small. Unlike the Court in *Salter*, there is no independent expert valuation evidence to support a finding that the restraining order had or will have a material impact, let alone significant impact on the value of the assets under the Official Assignee's control.[57] At most, for Mr William and Ms Eng, we have evidence from Mr Suri, their property manager and Mr Lynskey, their solicitor.

[61] Dealing first with Mr Suri's evidence. His concerns are in summary:

(a) The Official Assignee has mismanaged the sale of the properties and allowed the properties to be run down, affecting both rentability and sale price.

(b) Sale proceeds have not been allocated to the appellants' debt, contributing unnecessarily to Synergy's liquidation.

(c) The uncertainty of the sale process has meant renting vacant properties has proven difficult.

[62] Mr Lynskey provided a table purporting to record the 2022 value of the properties and comparing this to the value at sale. The information in this table is reproduced in Schedule 1. On his calculations, the difference in value is about $6.2 million.[58]

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57 See *Commissioner of Police v Salter*, above n 54, at [64]–[68].

58 Mr Lynskey's calculations did not account for the more recent sales of the Terrace and Main Road properties.

[63] Ms Cook, case coordinator for the Criminal Proceeds Management Unit, provided a comprehensive response to Mr Suri's evidence. She provided a plausible and reasonable explanation for the steps taken by the Official Assignee. On that evidence, Mr Suri's claims of mismanagement are disputable; the properties have not been allowed to be run down; reasonable steps have been taken to market the properties; the properties were listed in a declining market; the Official Assignee was acting within their powers insofar as concerns distribution of sale proceeds; and all marketing was accessible to Mr Suri, Mr William and Ms Eng. She also provides a detailed account of the sale of the properties. Her evidence suggests that appropriate diligence and care was taken by the Official Assignee in relation to the sale of the properties.

[64] Based on our review of the available evidence, we are not satisfied that Mr Suri's or Mr Lynskey's evidence supports a finding that the restraining orders caused the loss in the value of the restrained assets. In reality, as Mr Suri conceded under cross-examination in the High Court, the Wellington property market was a declining market in the 12 months following the making of the restraining orders. In addition, Mr Suri's evidence criticising the Official Assignee's conduct was largely rejected by the trial Judge, and we have no reason to depart from her assessment of it.[59] We therefore do not consider the case for past losses being attributable to the restraining orders to be strong. We also consider the prospect of establishing future loss, beyond the normal effect of market conditions, to be small. As Grau J aptly put it, the potential loss arising from the restraint is simply too nebulous.[60]

Strength of the Commissioner's case

[65] Mr William and Ms Eng pleaded guilty to the offending involving receipt of about $3 million in stolen property. We also consider that there is reasonably strong circumstantial evidence of MSD fraud in the order of $1 million over an extended period. We are advised by counsel that the Commissioner is likely to nominate the value of the appellants' unlawful benefit in the realm of $4 million. The estimate of the value of the remaining assets is about $1.8 million.[61] While a matter of impression

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59 See judgment under appeal, above n 1, at [64]–[74].
60 At [83].
61 Based on the property valuations as at November 2022.

only, given this combination of facts, we consider the case for forfeiture to be reasonably strong.

Alternative redress

[66] We accept that there does not appear to be a viable alternative means of protecting Mr William and Ms Eng's interests. We proceed on that basis.

Overall assessment

[67] Given the combination of factors just mentioned, we consider that ongoing imposition of the restraining orders, without an undertaking, remains just and fair. The imposition of the orders is justified, and the likelihood of actionable losses arising from the orders appears small. Finally, we also doubt that an undertaking would have much utility now given that there are presently only two key assets.

Result

[68] The applications to adduce further evidence are granted.

[69] The appeal is dismissed.

[70] As the appellants are legally aided, we make no order as to costs.

Solicitors:
Izard Weston, Wellington for Appellants
Crown Solicitor, Wellington for Respondent

SCHEDULE 1

Street address	Date purchased	November 2022 value	Sold for	Difference from 2022 value
1 and 1A Allenby Terrace	Feb-19	$2,040,000	$358,000	$1,682,000
1 Sheridan Terrace	Apr-16	$1,590,000	$815,000	$775,000
10 St Michaels Crescent	Jun-17	$600,000		
119 Newlands Road	Dec-20	$380,000	$155,500	$224,500
128 Trelissick Crescent	Apr-17	$1,510,000	$1,100,000	$410,000
160 Newlands Road	Oct-21	$1,230,000	$1,000,000	$230,000
162 Newlands Road	Jan-15	$1,440,000	$1,000,000	$440,000
357 Main Road	Apr-13	$970,000	$870,000	$100,000
58C Raroa Terrace	Jan-14	$620,000	$420,000	$200,000
71 Tamworth Crescent	Dec-14	$1,530,000		
82 Kanpur Road	Jul-17	$795,000	$820,000	$25,000
83 Hatton Street	Sep-16	$2,910,000	$1,210,000	$1,700,000
8A/126 The Terrace	Jan-14	$345,000	$101,111	$243,889
9 Kilmister Avenue	Jul-20	$410,000	$148,000	$262,000
90A Khandallah Road	Feb-15	$1,610,000	$1,300,000	$310,000
		$17,980,000	**$9,297,611**	**$6,602,389**