IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA716/2022
[2024] NZCA 16

BETWEEN	TERRENCE MCFARLAND Appellant
AND	COMMISSIONER OF POLICE Respondent

Hearing:	30 October 2023
Court:	French, Thomas and Fitzgerald JJ
Counsel:	S N B Wimsett and M G Whitford for Appellant K South and C C White for Respondent
Judgment:	16 February 2024 at 2.30 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Fitzgerald J)

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Introduction

[1] This appeal concerns a property located in Wigram, Christchurch, used as a gang pad by the Head Hunters motorcycle club (the Property).

[2] Until around late 2015, the Property was owned and used by the Epitaph Riders motorcycle club. The registered owner was a company, Lincoln Property Investments Ltd (LPIL), the shareholders of which were persons associated with that club. As membership of the Epitaph Riders dwindled and some of the remaining members "patched over" to the Head Hunters, ownership of the shares in LPIL transferred to persons associated with the Head Hunters gang, namely the appellant Terrance McFarland, Lyndon Richardson and Simon Turner. It is common ground that the Head Hunters did not pay any money in order to acquire the Property.

[3] By all accounts the Property was very run down when the Head Hunters acquired it, being variously described as "shabby", a "dump site" and "a shambles".

The Head Hunters accordingly went about renovating it.[1] The improvements, largely carried out in 2016 and 2017, are described in more detail later in this judgment, but they were fairly extensive and had commercial rates been paid for them, are estimated to have cost around $182,000. The Property now has secure perimeter fencing, a bar and lounge area, two standalone buildings containing sleeping accommodation, a large steel framed workshop for storing and repairing motorbikes, an outside deck area for socialising and a dedicated gymnasium area. There are multiple CCTV cameras on site for security purposes.

[4] In May 2021, the Commissioner of Police applied for forfeiture of the Property pursuant to the Criminal Proceeds (Recovery) Act 2009 (the Act). The Commissioner said the Property was "tainted property", on the basis that the improvements were in part funded by the proceeds of "significant criminal activity", namely:

(a) profits from the sale of methamphetamine;

(b) proceeds from "taxings" or "standovers" of gang members or other persons;[2] and

(c) profits from running three "pokie" machines at the Property, in contravention of the Gambling Act 2003.

[5] Mr McFarland, Mr Richardson and Mr Turner opposed the Commissioner's application. Their case was that the improvements to the Property in fact cost very little (Mr Richardson estimating no more than about $10,000), given most of the labour was free, and as a result of using cheap, donated and recycled building materials. The respondents further said that any money used to fund the improvements came from legitimate sources, such as club fundraising activities, membership subscriptions and the sale of items left at the Property by the Epitaph Riders. If the Property was found to be tainted property, the respondents applied for an order

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1 Mr Richardson explained that the Christchurch branch of the Head Hunters was controlled by the West Auckland chapter of the gang, but that he "fell" into a supervisory role in relation to the renovations.

2 A process whereby property is forcibly taken from a person in response to a perceived debt, or in response to a "slight" against a gang member or the Head Hunters club more generally.

pursuant to s 51 of the Act that the Property should be excluded from an assets forfeiture order on the basis of "undue hardship". The respondents argued that the value of any unlawful expenditure on the Property was an extremely small proportion of its overall value, and it would therefore be disproportionately harsh and unfair if an assets forfeiture order were to be made.

[6] Following a four day hearing in the High Court, Dunningham J granted the Commissioner's application.[3] While the Judge accepted that the improvements cost nothing like the amount estimated by reference to commercial rates, she was satisfied that they had been funded in part by the proceeds of significant criminal activity (as that term is defined in the Act).[4] The Property was therefore tainted property. The Judge did not consider that any of the respondents would suffer undue hardship as a result of the forfeiture and accordingly declined to grant relief pursuant to s 51.

[7] Mr McFarland now appeals against the Judge's decision.[5] He advances three grounds of appeal:

(a) first, that the Judge erred in admitting hearsay evidence at the hearing, namely a handwritten notebook said to record profits from the three pokie machines, and what those profits had been spent on (the pokies notebook);

(b) second, that the Judge erred in finding that the Property was tainted property for the purposes of s 50 of the Act; and

(c) third, that the Judge erred in determining that Mr McFarland would not suffer undue hardship if the Property were to be forfeited.

The statutory regime

[8] It is helpful to first summarise the statutory scheme pursuant to which the Commissioner's application was made.

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3 *Commissioner of Police v Richardson* [2022] NZHC 3184 [Assets Forfeiture Judgment].
4 See [11] below.
5 Mr Richardson and Mr Turner do not appeal.

[9] As this Court has previously said (in colloquial terms), the aim of the Act is to "make sure that crime does not pay".[6] This is reflected in the Act's purposes, which relevantly provide:

> **3 Purpose**
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> …
>
> (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
>
> (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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> …

[10] Section 50 of the Act confers jurisdiction on the High Court to make assets forfeiture orders.[7] Section 50(1) provides that if 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, subject only to granting relief from forfeiture pursuant to s 51 (discussed below at [15]). "Tainted property" is defined to include any property that has wholly or in part been acquired as a result of significant criminal activity or directly or indirectly derived from significant criminal activity.[8]

[11] "Significant criminal activity" is defined as follows:[9]

> **6 Meaning of significant criminal activity**
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> (1) In this Act, unless the context otherwise requires, **significant criminal activity** means an activity engaged in by a person that if proceeded against as a criminal offence would amount to offending—

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6 *Commissioner of Police v Harrison* [2021] NZCA 540, [2022] 2 NZLR 339 at [7].

7 This and other related sections were amended on 27 July 2023 to refer to "type 1 assets forfeiture order(s)". These amendments are not relevant for the purposes of the appeal.

8 Criminal Proceeds (Recovery) Act 2009, s 5.

9 The definition as at the time of the Commissioner's application and the Assets Forfeiture Judgement. This section was also amended on 27 July 2023 but not in any respects relevant to this appeal.

> (a) that consists of, or includes, 1 or more offences punishable by a maximum term of imprisonment of 5 years or more; or
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> (b) from which property, proceeds, or benefits of a value of $30,000 or more have, directly or indirectly, been acquired or derived.
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> (2) A person is undertaking an activity of the kind described in subsection (1) whether or not—
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> (a) the person has been charged with or convicted of an offence in connection with the activity; or
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> (b) the person has been acquitted of an offence in connection with the activity; or
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> (c) the person's conviction for an offence in connection with the activity has been quashed or set aside.
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> (3) Any expenses or outgoings used in connection with an activity of the kind described in subsection (1) must be disregarded for the purposes of calculating the value of any property, proceeds, or benefits under subsection(1)(b).

[12] It is apparent from the statutory scheme that an assets forfeiture order can have a draconian effect. First, because of the definition of significant criminal activity, no person needs to have been charged with or convicted of an offence in connection with the suggested significant criminal activity before an assets forfeiture order may be made. The significant criminal activity is also to be proved to the civil, not criminal, standard; that is, on the balance of probabilities. Further, s 6(3) provides that any expenses or outgoings used in connection with the activity are to be disregarded for the purposes of calculating the value of any property, proceeds or benefits under s 6(1)(b).

[13] The definition of tainted property also means that if only part of a property has been acquired as a result of significant criminal activity, or indirectly derived from such activity, the whole of the property will nevertheless be tainted. As this Court observed in *Drake v Commissioner of Police*:[10]

> 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.

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[10] *Drake v Commissioner of Police* [2020] NZCA 494 at [73].

[14] Disproportionality is accordingly built into the statutory scheme. As this Court recently observed in *Zhou v Commissioner of Police*:[11]

> … the New Zealand statutory regime has been deliberately cast as a penal scheme designed to reduce the opportunity for a criminal to benefit from significant criminal offending and to deter others from engaging in similar offending.

[15] To ameliorate the potentially harsh consequences of an assets forfeiture order, the statutory directive that the High Court must make such an order in the specified circumstances is subject to s 51 of the Act. It provides:[12]

> **51 Exclusion of respondent's property from assets forfeiture order because of undue hardship**
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> (1) The High Court may, on an application made by the respondent before an assets forfeiture order is made, 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 if the property is included in the assets forfeiture order.
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> (2) The circumstances the Court may have regard to under subsection (1) include, without limitation,—
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> (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 assets forfeiture order; and
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> (b) the nature and extent of the respondent's interest in the property; and
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> (c) the circumstances of the significant criminal activity to which the order relates.

[16] The requirement for "undue" hardship means something more than the ordinary hardship arising from the making of an assets forfeiture order. Whether the suggested hardship is "undue" will be a matter of fact and degree.[13] Further, and of some relevance to the present appeal, the fact that undue hardship is reasonably likely to arise from a forfeiture order "must be addressed by evidence squarely addressing that point".[14]

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11 *Zhou v Commissioner of Police* [2023] NZCA 137 at [60].

12 This section was also amended on 27 July 2023 to refer to "type 1 assets forfeiture orders" in s 51(2)(c).

13 *Duncan v Commissioner of Police* [2013] NZCA 477, (2013) 26 CRNZ 796 at [57].

14 At [58].

[17] We make one final point about the statutory provisions. The definition of tainted property refers to property wholly or in part "acquired" as a result of significant criminal activity or "derived" directly or indirectly from significant criminal activity. It is not suggested that the Head Hunters' initial acquisition of the Property was funded, wholly or in part, by significant criminal activity; as noted, nothing was paid to acquire it. Rather, the focus of the Commissioner's application was the improvements made to the Property in 2016 and 2017.

[18] It was not in dispute in the High Court that improvements to a property funded wholly or in part by significant criminal activity can result in that property being "tainted property". This no doubt reflected the High Court's decisions in *Commissioner of Police v Drake* and *Commissioner of Police v Ranga*, in which it was accepted that the use of proceeds of crime to improve a property tainted that property.[15]

[19] We agree with the approach adopted by the High Court in *Commissioner of Police v Drake* and *Commissioner of Police v Ranga.* In the present case, the subject of the Commissioner's application was "[t]he residential property at Vickerys Road, Wigram, Christchurch", being the Property in its fully renovated state as at the date of the application. To put the point another way, the improvements form part of the Property itself. Assuming for the moment that the improvements had been funded in part by significant criminal activity, then the Property, the subject of the Commissioner's application, was partly derived from that activity. This approach also accords with the Act's purposes, in particular, to eliminate the chance for persons to profit from undertaking or being associated with significant criminal activity.[16] It cannot have been Parliament's intention, for example, that a rundown property acquired with legitimate funds for $100,000, but then significantly improved by the application of $500,000 obtained from significant criminal activity could not be considered "tainted property".

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15 *Commissioner of Police v Drake* [2017] NZHC 2919; *Commissioner of Police v Ranga* [2013] NZHC 745. The High Court's decision in *Drake* was appealed to this Court, though the Judge's finding that the property in question was tainted, including through the improvements made to it, was not challenged.

16 Section 3(2)(a).

Factual background and the Judge's decision

[20] The background to the Head Hunters' acquisition of the Property and the improvements made to it was the subject of extensive evidence in the High Court, about which there is no real dispute on appeal. The Judge helpfully summarised that background in her judgment which we replicate here:[17]

> [10] The Vickerys Road property was originally the clubrooms for another motorcycle gang, the Epitaph Riders. By 2015, there were only a couple of members of that gang left and the clubrooms at Vickerys Road were largely abandoned. One of the last members, Simon Turner, patched over to the Head Hunters, and it was agreed with Mr Turner and another that the Head Hunters would take over running the clubrooms at Vickerys Road. The clubrooms were owned by LPIL, and the transfer was effected by changes to the directors and shareholders of LPIL. Mr Turner explains that the property transfer was not a result of any animosity or "taxing", but was more like a "patch over or a merger" because most of the Epitaph Riders had left that club and moved to the Head Hunters.
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> [11] In January 2016, once ownership of LPIL was effectively transferred to the Head Hunters, that gang set about fixing up the property. The scope of the renovations were extensive. As Lyndon Richardson explains, there was a massive hedge around the property when they took over and it was a major project to remove it. The hedge was taken away to a farm and burnt so no dump fees were incurred. The hedge was replaced with a fence which Mr Richardson says he installed along with Carrick Broadley, who at the time was working as a project manager for Nor West Contracting, undertaking outdoor hard landscaping projects on residential properties and larger civil developments. The site was then scraped and levelled using diggers which were borrowed from Mr Broadley and Nor West Contracting. The fence was largely constructed from panels which are used in cool stores. These comprised metal outer panels with a layer of insulation sandwiched between them. Mr Richardson says the panelling which they used was donated by Lyall Anderson. The same panelling was also used to build the sleepout units.
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> [12] Large metal gates were also constructed for the vehicle entrance to the property. While the pedestrian gate was existing, the vehicle gate was said by Michael Murphy to be constructed by him using scrap metal and using his experience as a metal worker. He then painted the gates and put gang insignia on them.
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> [13] A large timber deck was built using the services of gang members and associates, some of whom were qualified builders. Mr Richardson explains that the pine timber which was used for the external construction was obtained through Kori Loper. Mr Loper worked at Shands Road Sawmills Ltd and had a trade account. Mr Richardson says they paid about $2,000 for the timber used for fence posts, decks, interior framing and french doors, which Mr Loper confirmed in evidence.

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17 Assets Forfeiture Judgment, above n 3.

> [14] A large part of the external area had new concrete laid. Mr Richardson said the outdoor concreting was completed by Mr Broadley and a friend of Benjamin Kney. He says the Head Hunters bought two loads of cement from Concut, a firm which was located across the road from the property, and each load cost about $400. He also says that concrete was obtained from another concrete business close by, and the owner would drop off his leftover loads whenever they needed concrete for fence posts. The owner also got some of his workers to drop them off gravel for mixing concrete. Mr Broadley also confirms that he laid all the outdoor concrete. He says the concrete which came from the company across the road were leftovers which the company had in their mini mixers and that he would box the concrete and put a stop end in it, or they also made their own concrete in a mixer with hardfill and a couple of bags of cement. He also installed the drainage works on the property saying, "I did not use any new pipe or materials. They were all leftover from the contract landscaping jobs I did".
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> [15] Inside the house was fully renovated. Walls were lined with GIB board and plastered. A new kitchen was installed which Mr Richardson says was an ex-display kitchen that was given to him by a former business partner. The tongue and groove laminate in the kitchen was also donated, and the new shower was bought off TradeMe for around $750. He says the red carpet which was installed was bought for $1 from TradeMe and laid by a friend of a friend, who was a carpet layer. The sleepouts were built from scratch with the leftover cool store panelling. The four sets of sliding doors used on the sleepout units were second-hand ones which were either donated or bought off TradeMe.
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> [16] The metal framing for the motorcycle workshop was already there when the Head Hunters took over the property. Mr Richardson says they put corrugated iron on the roof and the walls, using iron donated from a member who was a roofer. He also says there was a lot of materials left at the property, when it was transferred to them including scrap metal and Pink Batts insulation, as well as a caravan and two trailers. Much of this was sold and the money went towards any building materials they had to purchase. The GIB board which was used was either donated or sourced as offcuts through Facebook. Donated windows were used to replace the rotten ones and all the labour was free because the property was worked on by members, friends and family. Mr Richardson estimates they spent no more than $10,000 in total to purchase items such as concrete, timber, paint and paint brushes. …

[21] The Commissioner called evidence from a registered quantity surveyor, Mr Harrison, who estimated that the improvements would have cost just over $180,000 on a commercial basis.[18] The Judge accepted, however, that the Head Hunters were given "a huge amount of materials for free" and were assisted by

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[18] Those estimates did not include works carried out after 20 October 2017, which included replacing the kitchen and putting hot mix down one side of the Property.

people who had experience in various trades. She was accordingly satisfied that the renovation works cost "nothing like" the commercial cost estimated by Mr Harrison.[19]

[22] The Judge then turned to the three categories of significant criminal activity which the Commissioner said had in part funded the improvements. She was satisfied that the evidence demonstrated that the Head Hunters gang, including the Christchurch members and associates, was heavily involved in methamphetamine dealing at the time of the improvements.[20] The Judge was also satisfied that the gang was involved in the practice of "taxing", including in relation to two vehicles belonging to a Mr Strickland — a former patched member of the gang who was being de-patched in November 2016 — as well as a blue Ford Falcon ute. The Judge found that those vehicles were stolen from their owners (most likely under threat), and the proceeds of their sale divided between the Head Hunters in Christchurch and the West Auckland chapter of the gang.[21] The Judge accepted the Commissioner's submission that taking the vehicles in the circumstances described amounted to theft,[22] or demanding property with menaces and intent to steal.[23]

[23] In relation to the pokie machines, it was not in dispute that their operation was not authorised under the Gambling Act and therefore amounted to illegal gambling in breach of s 19 of that Act. The real issue was whether the Commissioner could demonstrate that the profit derived from them exceeded $30,000 such that their operation was "significant criminal activity". The evidence in relation to the pokie machines was largely drawn from the pokies notebook, which had been found and seized from a vehicle driven by a Mr Baylis when it was stopped by police in August 2016. Mr Baylis was then a patched Head Hunters member, and was responsible for managing the accounts in relation to the Christchurch operations, including the Property. Mr Baylis did not respond to his summons to give evidence on behalf of the

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19 Assets Forfeiture Judgment, above n 3, at [19]. Nevertheless, the Judge was also satisfied that not all of the evidence about how the Head Hunters saved on or avoided the cost of the improvements was correct. In particular, she rejected that the concrete hardstand at the Property had been poured in multiple lots using donated "end lots" of concrete, and instead accepted that it had been professionally poured, at [20].

20 At [36].

21 At [54].

22 Crimes Act 1961, s 219.

23 Crimes Act, s 239(2).

Commissioner, and the pokies notebook was admitted by the Judge as hearsay evidence under s 19 of the Evidence Act 2006.[24]

[24] The contents of the pokies notebook is discussed in more detail later in this judgment, in the context of the first ground of appeal. But in short, the Commissioner's case, accepted by the Judge, was that $45,678 in profits had been derived from the pokie machines, meaning that their operation amounted to significant criminal activity.[25]

[25] The Judge then turned to whether any of the improvements to the Property had been funded from any one or more of the three types of significant criminal activity she found to have occurred. This aspect of the Commissioner's case relied in part on records of expenditure in the pokies notebook, and also a second notebook (referred to as "the accounting notebook") which had been seized from Mr Baylis' home address in September 2020.

[26] The accounting notebook covered the period 10 November 2016 to 20 January 2020 and recorded the total income and expenditure in relation to the Property. The main sources of income recorded in the notebook were:

(a) vehicles: $40,650;

(b) entries with no source reference: $20,345;

(c) a single entry of $18,963: with the reference "Mag book";[26]

(d) loan repayments: $11,980;

(e) "donations": $11,300;

(f) drinks: $13,725;[27]

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24 *Commissioner of Police v Richardson* [2022] NZHC 2864 [Pokies Notebook Admissibility Decision].

25 Assets Forfeiture Judgment, above n 3, at [58] and [64].

26 Mr Baylis was known as "Mag" or "Maggot".

27 There were drink vending machines at the Property.

(g) raffles: $3,380; and

(h) club fines: $560.

[27] The Judge accepted that it was a reasonable inference that the entries with either no source reference, or referred to as "donations", were not funds derived from legitimate sources.[28] The Judge also accepted that the accounting notebook showed that at least $24,125.16 of outgoings had funded improvements to the Property, relevant entries including "gravel", "concrete", "sleepouts", "asphalt", "sliding door", "swimming pool", "building supplies", "electrician" and so on.[29]

[28] The following extract from the Judge's decision encapsulates her findings in relation to the accounting notebook and the tainting of the Property:[30]

> [69] I am satisfied that the income was not all legitimate and that improvements to the property were met, at least in part, using the proceeds from significant criminal activity. The starting point is that where income was from rent, repayment of loans, payment from sale of gang clothing or gang subscription fees, it was entered as such in the accounting notebook. For example, on 16 September 2017, there is an entry for "Benji fees" and for "Si rent" and "Si fees". There are also a number of entries for T-shirts which were sold at $40 each and for the sale of goods, such as an entry which records the sale of scrap metal for $380 on 2 November 2017.
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> [70] However, there are also large sums of money which are either related to vehicle taxings, for example, the sale of the Night Rod, or which are recorded as income with no source given or as "donations". I do not consider the description of "donations" was accurate. As Mr Richardson candidly acknowledged, the likelihood of people simply making cash donations to the Head Hunters was "pretty slim but not impossible".
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> [71] These sums are then quickly expended on work on the property. For example, on 26 November 2016, $3,850 is showing as income with no source given and before the next date entry, which is 29 November 2016, a payment of $600 is made for concrete. Similarly, on 1 June 2017, $1,580 is recorded as income followed by expenditure of $1,000, on 4 July 2017, to an electrician. On 7 July 2017, $2,000 is recorded as a donation. It is followed, on 17 July 2017, by payment to an electrician.
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> [72] It is, in my view, implausible that the income which is not coded to a specific source is income generated from one of the legitimate sources identified by witnesses for the respondents. The gang was reasonably careful about record keeping, noting accountability to each other was important, so if

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28 Assets Forfeiture Judgment, above n 3, at [72].
29 At [68].
30 Assets Forfeiture Judgment, above n 3.

> it was income from rent, subscriptions or sale of gang property, I expect they would have recorded it as such. Furthermore, I note that the accounting records cover only the later stages of the renovations. It can be inferred that even more money was expended in the early phase of renovations during 2016 where it can be expected that similar, if not greater expenditure was made on labour and materials.

[29] The Judge noted that a similar pattern was replicated in the pokies notebook, which also recorded outgoings such as concrete, carpet, a plumber, rolls of electrical wire, and thus showed "a clear connection between income earned from the illegal pokie machines and expenditure on improving the [P]roperty."[31] The Judge accordingly concluded that the improvements to the Property were not paid for solely from legitimate sources of income, but were also funded by significant criminal activity.[32]

[30] Turning to whether she ought to grant relief from forfeiture, the Judge had regard to those factors contained in s 51(2), set out at [15] above.[33] She did not consider any of them supported the respondents' submission that undue hardship would result if the Property were to be forfeited. She took into account that the Property was not a family home and that no one resided there on a permanent basis. She observed that there was nothing to suggest that any of the respondents had any particular connection to the Property, and that both Mr Richardson and Mr Turner were no longer members of the Head Hunters gang. The Judge took into account that Mr McFarland remained in the gang but was based in Auckland. She also observed that no other persons had applied for relief from forfeiture, so it was not clear that she could take account of the hardship (undue or otherwise) to any other individual were a forfeiture order to be made. The Judge said that in any event, "no evidence has been adduced which suggests other gang members would lose anything more than the benefit of access to the clubrooms which is only available to them as a result of their predecessors' efforts".[34]

[31] The Judge also noted that while the respondents were the shareholders of LPIL, the company did not fund the acquisition of the Property, the shares having been

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31 At [75].
32 At [76].
33 At [81].
34 At [82].

transferred to the respondents at no cost. The Judge also stated that while the cost of the improvements was nothing like the sum calculated by Mr Harrison, neither had the three respondents provided any evidence of having injected significant, if any, amounts of personal money into the Property.[35] The Judge accepted that the offending under the Gambling Act was not at the most serious end of criminal activity, but said that the methamphetamine offending was serious offending, regardless of the quantities involved.[36] The Judge accordingly declined to grant relief from forfeiture on the basis of undue hardship.[37]

First ground of appeal — did the Judge err in admitting the pokies notebook?

Factual background and the Judge's ruling

[32] It was not in dispute that it was likely Mr Baylis had prepared the pokies notebook, which was seized from a car he was driving when stopped by police in August 2016. Mr Baylis was acknowledged by other witnesses to have undertaken the role of "bookkeeper" for the Head Hunters' activities in Christchurch.

[33] The Commissioner had served a witness summons on Mr Baylis to give evidence about the pokies notebook but he failed to appear. The Commissioner therefore applied to have the pokies notebook admitted as a "business record" pursuant to s 19 of the Evidence Act. The respondents' position was that irrespective of whether the pokies notebook was admissible under s 19, the Court was still required to consider whether it should be excluded pursuant to s 8, on the basis that it was too unreliable — at least when it came to assessing any profits or benefits from the operation of the pokie machines.

[34] The Judge was satisfied that the pokies notebook was a "business record".[38] She also accepted that Mr Baylis was unavailable for the purposes of s 19(1)(a).[39] The

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35 At [83].
36 At [84].
37 At [85].
38 Pokies Notebook Admissibility Decision, above n 24 at [24]. There is no appeal against this finding.
39 At [27].

Judge said that more importantly, she considered that s 19(1)(b) was applicable,[40] and the pokies notebook was thereby admissible unless there was another basis to exclude it.[41]

[35] Turning to what she described as Mr Wimsett's "main objection", namely that the pokies notebook should be excluded pursuant to s 8 of the Evidence Act, the Judge said that while its records were not particularly formal, they were not as opaque as Mr Wimsett suggested.[42] The Judge accepted that the gang required accountability when money was being handled by individuals on the gang's behalf, which was the basis for the pokies notebook being maintained.[43] She considered the notebook followed a logical order and format, such that the calculations from one entry to the next were fairly easily understood.[44] She also took into account evidence given by two Crown witnesses who had been responsible for keeping a record of the cash flowing in and out on the gang's behalf in Christchurch (including from the pokie machines) when Mr Baylis was in prison, to the effect that careful records were kept to ensure no one thought they had "ripped [the gang] off".[45] The Judge said that this evidenced the care with which tallies from the pokie machines were undertaken, and thus the likely reliability of the records in the notebook.[46]

[36] The Judge accordingly ruled the pokies notebook admissible.

The appellant's submissions

[37] As noted, there is no challenge to the Judge's finding that the pokies notebook is a business record and thus admissible on that basis. Rather, as in the High Court, Mr Wimsett, directed his argument to the proposition that the evidence ought to have been excluded pursuant to s 8(1)(a) of the Evidence Act. He submits that Mr Baylis

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40 Namely that "… no useful purpose would be served by requiring [the person who supplied the information used for the composition of the business record] to be a witness as that person cannot reasonably be expected (having regard to the time that has elapsed since he or she supplied the information and to all the other circumstances of the case) to recollect the matters dealt with in the information he or she supplied".

41 At [28].

42 At [30].

43 At [24].

44 At [30]–[31].

45 At [24].

46 At [25].

was the only person able to explain what the entries in the notebook meant, and thus Mr McFarland's inability to cross-examine him prevented Mr McFarland from effectively challenging the Commissioner's case that the pokies notebook shows that at least $45,678.14 was obtained in benefits from the machines.

[38] Mr Wimsett submits that unlike typical business records (such as bank statements), there is no precision about the contents of the pokies notebook such that it can be taken at face value. To demonstrate this, he advances an alternative analysis of the entries, to the effect that the individual entries may represent the amount in the machine when it was cleared, *before* a $400 float was taken into account for each machine.[47] Mr Wimsett suggests that on this analysis, the total benefit or profit from the three machines would only be $2,304 and thus significantly less than the threshold amount required for the operation of the machines to be "significant criminal activity". Mr Wimsett readily accepts that this may not be the definitive answer to what is recorded in the pokies notebook, but says that it highlights just how uncertain its contents are.

The respondent's submissions

[39] Ms South, for the Commissioner, emphasises the evidence of the care taken to keep accurate accounting records when it came to handling gang funds. She submits that an identifiable system can be observed throughout the pokies notebook, with the takings from each machine recorded, together with money taken from a money changer and what is referred to as "the tin". These amounts are then totalled and added to the cumulative total from the day prior. If expenses were paid from those funds, these are then deducted and also recorded. The net balance is then reflected in the next chronological entry, essentially as the opening balance.

[40] Ms South accordingly submits that the pokies notebook is highly probative of the benefits obtained from the pokie machines, such that the inability to cross-examine

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[47] Evidence of one Crown witness, Michael Murphy, who was in charge of clearing and accounting for the pokie machines when Mr Baylis was in prison, was that each pokie machine carried a "float" of around $400, so the machine could pay out on a successful play.

Mr Baylis (who the Judge accepted took deliberate steps to avoid coming to Court))[48] did not give rise to any unfair prejudice to Mr McFarland.

Discussion

[41] Section 19 does not involve a requirement of reliability. This is because business records are a class of documents accepted as being reliable.[49] Nevertheless, evidence admissible pursuant to s 19 must still pass through the admissibility gateway of ss 7 and 8 of the Evidence Act.[50] Thus a Judge may exclude evidence otherwise admissible under s 19 where:

(a) the evidence is so unreliable that the Judge concludes that it is not reasonably open to the fact finder to accept the evidence as tending to prove or disprove a matter in issue. In those circumstances, the evidence will not be relevant for the purposes of s 7 of the Evidence Act.[51] That is a question of law; or

(b) the Judge concludes that the evidence is so unreliable that its probative value is outweighed by its unfairly prejudicial effect, and thus must be excluded under s 8.[52]

[42] Ambiguity in the meaning of any particular statement can reduce the statement's probative value. But like the Judge, we are not persuaded that the contents of the pokies notebook are as ambiguous as Mr Wimsett suggests.

[43] The front page of the pokies notebook reads, "This note Book is for the Pokie Machines Only". Each of the daily entries follows broadly the same format, where an amount is recorded in relation to each of #1, #2 and #3, which are plainly references

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48 At [27].

49 Evidence Bill 2005 (256-2) (select committee report) at 3. *Asgedom v R* [2016] NZCA 334, (2016) 28 CRNZ 70 at [78].

50 *Asgedom v R*, above n 49 at [79].

51 *R v Bain* [2009] NZSC 16, [2010] 1 NZLR 1 at [53]; and *K (CA26/2014) v R* [2014] NZCA 229 at [9].

52 *R v Bain*, above n 51, at [51] and [62]; and *K (CA26/2014) v R*, above n 51, at [11]–[12]. See also *W (SC38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [70]–[73].

to the three pokie machines in operation at the Property.[53] By way of illustration, the entry for 15 July 2016 records the following:

#3	490
#2	350
#1	Coins only
Changer	165
	$1005
—	340 Linda
	$665
+	10360
	$11025
—	500 (Float)
	$10525

[44] The figure of $10,360 is the (rounded) total carried over from the *previous* day's total. The reference to a float of $500 is consistent with Mr Murphy's evidence that a float of around $400 was maintained for each machine, given they could pay out up to $500. There are five references in the pokies notebook to the deduction of a float in that amount. The specific entries for a float are inconsistent with Mr Wimsett's alternative analysis that the float would potentially need to be deducted from each day's entry for each machine. Further, the reference to "coins only", and that they are not included in the total amount, is consistent with Mr Murphy's evidence that coins were "recycle[d]" by putting them into the money changer machine (which changed notes into coins).[54]

[45] The same pattern is seen in the following entry, 17 July 2016:

Bar	100 (coins)
#2	565
#3	835
#1	Coins only
Change	390
	$1790

[53] An early entry in relation to #1, recording the figure "0", has the annotation "not working".

[54] Mr Murphy explained that one of the machine only took coins, while the other two machines took both notes and coins.

10525
12315
— 170 (Linda)
$12145

[46] The figure of $10,525 has been carried over from 15 July. The balance remaining on 17 July is $12,145 after payment out of $170 to "Linda". That is a reference to Linda Richardson, Mr Richardson's wife. Mr Murphy explained that when he was overseeing the pokie machines, he would provide cash to "Linda" for various items such as gang members' travel costs, given "she handled … the bookings".

[47] We therefore agree with the Judge that the entries in the pokies notebook follow a logical sequence and are consistent with other evidence given at the trial. This adds to its probative value.

[48] We also agree with the Judge that the evidence about the care taken by individuals when accounting for money held on behalf of the gang adds to the likely reliability of the entries in the pokies notebook (as well as the accounting notebook). For example, Mr McFarland explained that the operations of the Head Hunters in Christchurch, and the Property, was under the control of the West Auckland chapter of the gang, and that "the aim" was for the Christchurch members "to do their own thing", but in terms of accountability of money being handled on behalf of the club:

> … there's no good letting them have take over the pad and they can't keep the upkeep of running it you know so yeah they're keeping it down what's coming in and out of the club yeah.

[49] Two Crown witnesses, Mr Murphy and Mr Tohini, also spoke about the need to keep accurate records of money being transacted on behalf of the club.

[50] We are therefore satisfied that the pokies notebook has a reasonably high degree of probative value, in terms of the profits or benefits from the pokie machines.

[51] We do not consider that the prejudice arising from the inability to cross-examine Mr Baylis outweighs the evidence's probative value. It is speculative whether much, if any, headway would have been made in cross-examining Mr Baylis,

at least in terms of undermining the logical format of the pokies notebook entries. Further, given the passage of time since Mr Baylis created the notebook, he may well not have remembered the detail of its contents in any event. Further, in the absence of cross-examining Mr Baylis, Mr Wimsett was able to exploit the informality of the notebook's contents, something he may not have been able to do if Mr Baylis had appeared and confirmed at least the broad structure and format of the daily entries.

[52] For these reasons, the Judge did not err in admitting the pokies notebook. This ground of appeal must therefore fail.

Second ground of appeal — did the Judge err in concluding that the Property was "tainted property"?

Appellant's submissions

[53] Mr Wimsett accepts that persons associated with the Property, including Head Hunters' members, have been involved in and convicted of drug dealing, and in particular, dealing in methamphetamine. He submits, however, that there was insufficient evidence for the Judge to conclude that any profits from that activity were used to fund the improvements to the Property.

[54] Mr Wimsett refers to the evidence of Mr and Mrs Richardson that no funds derived from unlawful activity (except the pokie machines) were applied to the Property. Mr Wimsett submits that this is consistent with evidence given by Mr McFarland, to the effect that the Head Hunters operates for the benefit of all members and the rule that individuals should not undermine the collective. Mr Wimsett also points to the evidence of the club raising money from legitimate sources, and to Mr Richardson's evidence that he was aware at the time that Police were watching him and his associates, and thus everything to do with the Property was kept "above board". Mr Wimsett accordingly submits that there was insufficient evidence to safely draw the inference that profits from methamphetamine dealing were applied to the improvements.

[55] Turning to the suggestion that benefits obtained from "taxings" were applied to the improvements, Mr Wimsett submits that the benefits relating to the three

vehicles discussed earlier,[55] were incorrectly determined by the Judge to be the proceeds of significant criminal activity. He submits that the scenarios put to the witnesses as examples of taxings fall short of amounting to a crime. In particular, he says that if a person joins the Head Hunters and is helped with the purchase of a motorbike on the clear understanding that if they leave, it will be returned, and that happens without complaint, there is no crime. In addition, where a debt is collected without threats of violence or actual violence, and the debt is lawfully owed, there is no crime. Mr Wimsett also notes that neither Mr McFarland nor his co-respondents in the High Court have any convictions for what might fall under the broad rubric of "taxing".

[56] In terms of the proceeds of the pokie machines, Mr Wimsett does not dispute that some of them were spent on the improvements, that being plain from the expenditure recorded in the pokies notebook itself. Rather, he submits that given the uncertainty surrounding the entries in the notebook, there was insufficient evidence to conclude that more than $30,000 in proceeds arose from the operation of the machines. In particular, Mr Wimsett presses the alternative interpretation of the entries in the pokies notebook outlined at [38] above, which if a reasonable possibility, would mean profits of far less than $30,000 were earned from them.

Respondent's submissions

[57] Ms South highlights the evidence demonstrative of Christchurch-based Head Hunters members and associates being closely involved in the supply and distribution of methamphetamine, and also evidence of commercial dealing found at the Property itself. Given the activities of Head Hunters gang members in deriving income from the sale and supply of methamphetamine, she submits that it was an inevitable conclusion that the entries in the accounting notebook either recorded as "donations", or that have no narration as to their source, represented income generated from the sale of methamphetamine. Further, Ms South submits that the entry showing incoming funds of $18,963 recorded as "Mag book" indicates that Mr Baylis (who was known as "Mag", and who was accepted to be a methamphetamine dealer at the relevant time)

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[55] See [22] above.

was running a separate drug dealing "book", and provided the gang with those funds without any further explanation or annotation being required.

[58] Ms South also submits that the evidence (and in particular, intercepted communications) permitted the Judge to draw an inference that the gang obtained the two vehicles taken from Mr Strickland (who was being de-patched) unlawfully, and that the proceeds of their sale were put towards the improvements. She takes the same position in relation to the taking of the blue Ford Falcon ute, submitting that in light of the evidence as to the process of taxing, and the intercepted communication that "the boys went and took it this morning bro", the Judge was right to conclude that this vehicle was also taken without the owner's consent.

[59] Finally, and in relation to the pokie machines, for the same reasons the Commissioner says the content of the pokies notebook was sufficiently reliable for it to be admitted, Ms South submits that the entries show that well in excess of $30,000 was earned from the machines' operation.

Discussion

[60] We are not persuaded that the Judge erred in concluding that proceeds from the sale of methamphetamine were — at least in part — applied to the costs of improving the Property.

[61] As the Judge found, a number of Christchurch members and associates of the Head Hunters gang were involved with and convicted of the supply of methamphetamine, including at around the time of the improvements. This included as a result of the termination in 2016 of "Operation Block", a Police operation targeting, amongst others, Mr Richardson and Mr Strickland. Mr Turner and Mr Baylis were also charged with methamphetamine dealing offences for conduct arising in 2016, and Mr Baylis for further such offending in 2020 and 2021.[56]

[62] The accounting notebook contains a range of entries for incoming funds, coded to those various "sources" as set out at [26] above. There is no credible explanation

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[56] Assets Forfeiture Judgment, above n 3, at [24]–[36].

of what those entries recorded as "donations", or with no narration, relate to. We agree with the Judge's conclusion that these funds are likely to have represented the proceeds of gang members and associates' involvement in the supply of methamphetamine. This is particularly so given the evidence of the relatively careful approach taken to accounting for money held on behalf of the club, such that it would be expected that if these funds had been derived from legitimate sources, they would have been recorded as such. Further, the significant amount of money deposited from the "Mag book", in excess of $18,000, is plainly a reference to funds originating from Mr Baylis. As noted, Mr Baylis was a known drug dealer at the time. Absent any other explanation of the source of those funds, it is a reasonable inference that it derived from his drug dealing activities.

[63] We also agree with the Judge's reasoning in relation to the entries in the accounting notebook representing the proceeds of sale of Mr Strickland's two vehicles and the Ford Falcon ute. A number of Crown and defence witnesses gave evidence about the process of taxing (including unchallenged expert evidence called by the Crown), the upshot being that it does not involve the owner of the property in question parting with their property voluntarily. The evidence was that the two vehicles were taken from Mr Strickland in the context of his de-patching from the gang. Intercepted communications confirm that he had not parted with his vehicles voluntarily. Mr Richardson then had control of the vehicles, their sale proceeds being split between the Christchurch-based Head Hunters and the West Auckland chapter. Intercepted communications also show that the Ford Falcon ute had been taken by "the boys" from an individual with a drug-related debt owed to an associate of the gang. Mr Richardson accepted in cross-examination that part of the money coming into the club originated from taxing. Consistent with this, proceeds from the sale of the vehicles were recorded in the accounting notebook.

[64] Once it is accepted that the likely source of the "donations", and other amounts recorded in the accounting notebook with no specific source identified, is either methamphetamine dealing or "taxings", the evidence demonstrates that those monies in part funded the improvements to the Property. As noted earlier, over the period November 2016 to July 2020, $24,125.16 is directly identified in the accounting notebook as funding improvements to the Property. We agree with the Judge that on

this basis, it is reasonable to conclude that a similar pattern existed in the period immediately prior to November 2016, when significant improvements were also carried out. It is not possible on the evidence to determine just how much was spent on the improvements, but based on the accounting notebook alone, it was certainly more than the $10,000 estimated by Mr Richardson.

[65] Turning to whether proceeds from the pokies machines also "taint" the Property, the calculations set out in the pokies notebook confirm that the amounts recorded as having been taken out of each of the three machines were profits or benefits in the conventional sense, available to fund club-related expenses, including a number of items directly associated with the improvements. This is consistent with Mr Murphy's evidence that when he was in charge of clearing the pokie machines and looking after the funds while Mr Baylis was in prison, he kept the "excess" money at his home, until "they" needed it, stating that "at that time it was, they were full on doing renovations there ye know it was a lot of it got used um concreting being done".

[66] We also agree with the Judge's finding that on the balance of probabilities, the profits from the machines exceeded $30,000.[57] While Detective Sergeant Patten's extrapolation of a daily average benefit from all three machines (based on the entries in the pokies notebook) over the period of 14 July 2016 to 5 December 2016 (the day prior to when the machines were seized by Police) is somewhat rudimentary, it is consistent with Mr Murphy's evidence that significant sums (in the thousands) were "going through" the machines each week. As the Judge noted, Mr Murphy's evidence was likely a reference to turnover, being a greater amount than recorded in the pokies notebook as the "excess" funds. This was also consistent with the three machines having more than $6,000 in them when seized by Police, again suggesting that the much smaller amounts recorded in the pokies notebook were amounts removed from them by way of profit. That the total amounts shown in the pokies notebook are then shown as being expended on club-related expenses is also consistent with those amounts being benefits in the conventional sense (i.e. after the cost of running the machines had been taken into account). Finally, we note that there is reasonably

[57] At [64].

significant headroom between the $30,000 threshold for the purposes of the definition of "significant criminal activity" and Detective Sergeant Patten's estimate of $45,678.

[67] Finally, the Judge was required to assess the credibility or otherwise of Mr Richardson and others' evidence that no unlawfully derived funds were expended on the Property. In making the findings that she did, the Judge plainly did not consider that evidence to be credible. An appeal court will be hesitant before reaching a different conclusion on such matters.[58] There is nothing before us to suggest that the Judge's assessment was wrong.

[68] For these reasons, we are satisfied that the Judge did not err in finding that the Property was tainted property.

Third ground of appeal — did the Judge err in declining to find undue hardship?

Appellant's submissions

[69] While the notice of appeal frames this ground of appeal by reference to undue hardship to Mr McFarland alone, Mr Wimsett cast his submissions in somewhat broader terms.

[70] He submits that the value of any unlawful expenditure on the Property is an extremely small proportion of the total value of the Property, suggesting that its capital valuation as at 1 August 2022 was $500,000. He says it would therefore be disproportionately harsh if an assets forfeiture order were to be made.

[71] Mr Wimsett further submits that if the Property is forfeited, the Crown would receive a "serious windfall", and it would be an extremely punitive outcome for the respondents. He suggests this is arguably a breach of s 9 of the Bill of Rights Act 1990, which protects the right not to be subject to disproportionately severe treatment or punishment by the Crown. He further says it would be contrary to the Act itself, which he submits is not intended to be punitive.

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[58] *Austin, Nichols & Co Inc v Stitching Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [13]; and *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321 at [31].

[72] In this context, Mr Wimsett submits that the Head Hunters are being treated differently to, for example, a white collar or tax evading criminal. He suggests that in relation to those types of offenders, a profit forfeiture order would only be sought in an amount commensurate with their offending. He submits that the Commissioner would not seek to forfeit a house worth millions of dollars "simply because the gardener or cleaner had been paid from ill-gotten gains".

[73] Mr Wimsett also refers to a number of factors which he says point to the conclusion that undue hardship is reasonably likely to be caused to the respondents in the High Court proceeding if they are not granted relief:

(a) The disproportionality of a forfeiture order being made.

(b) The gravity of the offending involved was low and occurred over a short period of time. In particular, in relation to methamphetamine dealing, Mr Wimsett submits that there is nothing to suggest any involvement in large scale manufacture or that the parties were making "fortunes" from methamphetamine.

(c) The improvements to the clubroom were a "labour of love", and the group utilised their own skills, friendships, and construction industry connections to build something meaningful over many working hours.

(d) The Property is a place where members and associates of the Head Hunters can spend time, socialise, exercise, and seek accommodation if necessary. The Property provides a place for them to relax and socialise, providing a social and psychological benefit to a group of ostracised people.

[74] In terms of Mr McFarland himself, Mr Wimsett notes that Mr McFarland has no convictions or complaints for any property or violence related crime during the relevant period of time, nor is there any suggestion that Mr McFarland put any of his own money towards the Property.

Respondent's submissions

[75] Ms South emphasises that the Property's intended use was as a gang pad, rather than as a residential family home or similar. She also highlights that on numerous occasions when it had been searched, the Property was found to contain methamphetamine, both for recreational use and some evidence of methamphetamine being supplied from the premises.

[76] In terms of the nature and extent of Mr McFarland's interest in the Property, Ms South notes that he is a shareholder only in the company which owns the Property, which is in substance controlled by the West Auckland chapter of the Head Hunters gang. Ms South submits that those who gave evidence of having contributed their time and effort to improving the Property appear to no longer have any association with the gang, and that Mr McFarland himself appears to have limited personal interest in the Property, residing as he does in Auckland. Ms South submits that in these circumstances, it is difficult to see how Mr McFarland will suffer undue hardship as a result of forfeiture.

[77] Ms South also notes that the gang did not transfer any money when it acquired the Property, therefore it is not "out of pocket" if forfeiture were to be ordered. Finally, Ms South submits that the Crown cannot be considered to be gaining a windfall by the forfeiture of a property that the Head Hunters gang paid nothing for, and from which the gang conducts operations that inflict social and physical harm on the New Zealand community.

Discussion

[78] We first address the question of whether suggested undue hardship to persons other than the respondent(s) can be taken into account under s 51.

[79] On its face, s 51(1) suggests not: it provides that on an application made by a respondent to an application for an assets forfeiture order, the Judge may exclude property from such an order if it considers that undue hardship is reasonably likely to be caused "*to the respondent*". On a plain reading, therefore, s 51 does not envisage a broader inquiry into potential hardship to other persons. Rather, pursuant to s 61 of

the Act, persons other than the respondent(s) who claim an interest in the property can apply under that provision for relief from forfeiture.

[80] This approach is consistent with this Court's decision in *Snowden v Commissioner of Police*, in which the Court held that as the respondents' children,[59] only one of whom resided at the property in question, had not themselves made an application for relief against forfeiture, their suggested hardship could not be taken into account under s 51 of the Act.[60] At first blush, this appears at odds with this Court's acceptance in *Duncan v Commissioner of Police* that the interests of a child residing in a residential home to be forfeited can be taken into account under s 51.[61] That can be explained, however, on the basis that undue hardship to a respondent would necessarily implicate the interests of a dependent child who does not have standing to seek an order for relief in their own right. It is also consistent with taking into account the use of the property, including by innocent third parties for legitimate purposes, pursuant to s 51(2)(a).[62]

[81] We do not need to formally determine the point, however, given that even if Head Hunters gang members' interests could be taken into account for the purposes of s 51 (which we strongly doubt), the evidence before the High Court fell far short of demonstrating undue hardship on their part in any event. As Mr Wimsett quite properly acknowledged, the highest the evidence could be put is that it would be "unfair" to gang members if the Property were to be forfeited. We agree with the Judge that the most that can be said is that those gang members will lose the benefit of access to the Property which is only available to them as a result of their predecessors' efforts.[63] That is not undue hardship. Further, the gang paid nothing for the Property when it acquired it, and on the respondents' own evidence in the High Court, the gang expended far less than commercial rates in carrying out the improvements to it.

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59 Being the discretionary beneficiaries of a trust which owned the property in issue in that case.

60 *Snowden v Commissioner of Police* [2021] NZCA 336 at [65]–[69]; leave to appeal to the Supreme Court declined: *Snowden v Commissioner of Police* [2022] NZSC 18.

61 *Duncan v Commissioner of Police*, above n 13, at [57]. See also *Drake v Commissioner of Police*, above n 10, at [76].

62 The approach adopted by the High Court in *Commissioner of Police v Drake*, above n 15, at [130].

63 Assets Forfeiture Judgment, above n 3, at [82].

[82] There is no appeal against the Judge's finding that neither Mr Richardson nor Mr Turner would suffer undue hardship were forfeiture to occur. Turning to Mr McFarland's position, and those factors to which the Court may have regard under s 51(2):

(a) The Property is a clubroom enjoyed from time to time by members and associates of the Head Hunters gang, the membership of which changes over time. It is not a family home and it is not suggested anyone lives there permanently. There is evidence of recreational drug use at the Property, and some evidence of commercial drug dealing.

(b) Mr McFarland's only interest in the Property is as a named shareholder of the company which owns the Property. It is not suggested that he has any other personal interest in or has expended any money on the Property. As noted, he lives in Auckland.

(c) We accept Mr Wimsett's submission that the significant criminal activity arising from the operation of the pokie machines is at the lower end of the scale. So too might be the extent of taxings which the Commissioner could demonstrate contributed to the improvements to the Property. However, irrespective of the individual amounts involved, the evidence demonstrates that members and associates of the Head Hunters gang, including in Christchurch, were heavily involved in the supply of methamphetamine which, as the Judge rightly noted, is serious offending.[64]

[83] Turning to Mr Wimsett's "windfall" argument, while there is no clear evidence of the value of the improvements funded by significant criminal activity, we accept that they are likely to represent a relatively small proportion of the Property's overall value.[65] Nevertheless, as noted earlier in this judgment, disproportionality is inherent in the statutory scheme. Further, the inquiry is not whether there will be a "windfall"

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64 At [84].

65 As far as we can discern, there was no direct evidence put before the High Court of the Property's value. Detective Sergeant Patton referred to the Property having a market valuation in November 2021 of $340,000, though no market valuation as at that date was adduced in evidence.

to the Crown (which is, in one sense, inherent in any forfeiture), but whether undue hardship is reasonably likely to be caused to the respondent as a result of the forfeiture. We return to the point made by this Court in *Duncan v Commissioner of Police*, namely that whether undue hardship is reasonably likely to result from forfeiture needs to be the subject of evidence specifically addressing that issue.[66] The evidence before the Judge was simply insufficient to warrant relief from forfeiture being granted.

[84] This ground of appeal must also fail.

Result

[85] The appeal is dismissed.

Solicitors:
Crown Solicitor, Christchurch for Respondent

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66 *Duncan v Commissioner of Police,* above n 13, at [58].