NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF ANY IDENTIFYING PARTICULARS OF R LTD AND S LTD REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA750/2020
[2023] NZCA 4

BETWEEN	DAVID CHARLES RAE Appellant
AND	COMMISSIONER OF POLICE Respondent

Hearing:	24 November 2022
Court:	Katz, Mander and Downs JJ
Counsel:	Appellant in person G H Allan as counsel assisting AWM Britton and S B McCusker for Respondent
Judgment:	3 February 2023 at 10:00 am

JUDGMENT OF THE COURT

A The respondent's application to adduce further evidence is granted.

B The appellant's application to adduce further evidence is declined.

C The appeal is dismissed.

D The appellant must pay costs to the respondent for a standard appeal on a Band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Downs J)

The issue

[1] The High Court made a without notice restraining order over funds in the control of David Rae following alleged money laundering in the United States of America and here. The Commissioner of Police[1] failed to inform the High Court of all relevant information when seeking the order. The Court later varied the order, but otherwise declined to rescind it. Mr Rae appeals. He contends the High Court should have rescinded the order once the Commissioner's failings became known. The case raises what should happen when without notice restraint is marred by non-disclosure on the part of the Commissioner.

Background

[2] We confine this part of the judgment to a brief overview. We provide detail, as needed, later.

[3] On 11 February 2020 the Commissioner applied, without notice, for a restraining order over more than $6.5 million in two bank accounts, which concerned R Ltd and S Ltd.[2] The Commissioner alleged the funds were tainted property and Mr Rae had unlawfully benefitted from significant criminal activity. More particularly, the Commissioner alleged Mr Rae committed the crime of money laundering by transferring to New Zealand the proceeds of fraudulent schemes committed in the United States of America in relation to that country's Medicare scheme.

[4] The Commissioner adduced evidence: (a) United States authorities had investigated the fraudulent schemes; (b) on 19 December 2019 Mr Rae pleaded guilty in the United States District Court for the District of New Jersey to one charge of conspiracy to commit international money laundering; and (c) on 7 February 2020

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1 The Commissioner.

2 Doogue J made suppression orders in relation to the accounts: *Commissioner of Police v Rae* HC Wellington CIV-2020-485-43, 21 February 2020 (Minute).

Mr Rae was sentenced to 10 months' imprisonment for this offence but released given the time he had served.[3]

[5] On 13 February 2020 Cooke J granted the restraining order. As required, the Commissioner then promptly filed and served an application for on notice restraint.

[6] On 12 March 2020, Mr Rae filed and served an affidavit in which he said the Commissioner had not made full disclosure to the High Court when seeking without notice restraint.

[7] On 23 June 2020, Cooke J discharged the restraining order in relation to R Ltd. The Judge also scheduled a hearing to determine the Commissioner's on notice application, which Mr Rae opposed on the basis of non-disclosure.[4]

[8] On 20 and 21 October 2020, the Judge conducted that hearing. The parties adduced what the Judge described as "[v]oluminous material",[5] much of which had "little relevance".[6]

High Court decision

[9] Cooke J concluded the grounds for a restraining order were established as the funds in S Ltd appeared to be tainted property and Mr Rae appeared to have unlawfully benefited from significant criminal activity. This aspect of the decision is not challenged, and we say no more about it.

[10] The Judge then turned to non-disclosure. He recorded there was "no dispute" that "certain key information" was not put before the Court when the Commissioner sought without notice restraint.[7] Because of the importance of this aspect of the decision, we capture it in the Judge's own words:

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3 The list of evidence is not exhaustive.

4 Successful opposition to the on notice application would have resulted in the restraining order being discharged, so, in substance, Mr Rae sought to rescind the order. For convenience, we express the position this way.

5 *Commissioner of Police v Rae* [2020] NZHC 3132 at [4].

6 At [5].

7 At [50].

> [50] There is no dispute that there was certain key information that was not put before the Court on the without notice application. In particular:
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> (a) The Court was not advised that a formal agreement had been reached between Mr Rae and the United States authorities, which led to the guilty pleas, and that forfeiture would be ordered limited to a particular sum (US$1,775,000).
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> (b) That the forfeiture so agreed, and then ordered, did not include any funds in the R Ltd accounts.
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> (c) That these limitations were agreed as a consequence of Mr Rae providing assistance to the United States authorities, including by providing detailed information at interviews.
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> [51] Not only was the Court not informed of these matters, but Mr VanZetta's affidavit stated that the United States was asking for repatriation of the New Zealand funds for the purpose of compensating Medicare which had suffered more than $212 million in losses as a result of the criminal activity he described. The New Zealand funds described specifically included the R Ltd account. Those statements were made notwithstanding the agreement between Mr Rae and the United States authorities that forfeiture would be limited to US$1,775,000, and that the R Ltd account was not part of the agreed forfeiture.
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> [52] I am satisfied the matters not disclosed, and misrepresented, were material to the decisions the Court made. In particular these facts and matters would have been relevant to the consideration of whether restraint should exist over the full amount of the balances in the New Zealand bank accounts, whether it should include the R Ltd account, whether the underlying offending had already been resolved, and whether there was genuinely a risk of dissipation given the cooperation Mr Rae had provided. It may well be that without notice orders would still have been made, but it was incumbent upon the Commissioner to squarely place those matters before the Court as information that could support Mr Rae's position.

[11] The Judge then considered what should happen in light of these failings.

[12] Cooke J found the Commissioner "did not act in bad faith"[8] because he was "unaware of the matters that were not properly disclosed, and misdescribed".[9] In particular, the Commissioner was "unaware that there had been a formal agreement between Mr Rae and the United States authorities which resulted in more limited forfeiture orders not including the R Ltd account".[10]

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8 At [59].
9 At [60].
10 At [60].

[13] The Judge also found there was no bad faith on the part of the United States authorities:

> [61] I also accept that the misleading information set out in Mr VanZetta's affidavit, and its material non-disclosures, were not the consequence of bad faith on behalf of either Mr VanZetta or the other United States officials. I heard evidence from Mr VanZetta, and also from Ms Barbara Anne Ward, an Assistant United States Attorney for the district of New Jersey. Ms Ward was engaged in the relevant events for the United States Attorney's office. I accept that there was no intention to mislead the New Zealand Court, or misdescribe the factual position in the evidence. Mr VanZetta was unaware of the plea and forfeiture agreement at the time he swore his affidavit in support of the without notice application. That is so notwithstanding that the affidavit was sworn after that agreement was entered. The fact that the affidavit was not reviewed more carefully and updated for completeness before it was sworn by those who were aware can be criticised. But at least part of the reason why that did not happen was that there was a lack of appreciation by those dealing with it in the United States that there was a need to ensure the affidavit complied with a duty to provide complete information.
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> [62] In short, the United States authorities were not advised by those acting for the Commissioner that there was any duty to provide full disclosure of all matters, including matters that might be said to support Mr Rae's position. The Commissioner's personnel were then not told of those matters when Mr VanZetta's affidavit was finalised and the Commissioner completed his preparations for making the without notice application.

[14] The Judge concluded "the case did not involve egregious behaviour by the Commissioner, even though there was a significant failure to meet the requirements for a without notice application".[11]

[15] The Judge declined to rescind the restraining order because "the missing information does not alter the decision that would have been made in relation to restraint"[12] and, as observed, the Commissioner's failings were not "egregious".[13]

A précis of the competing cases

[16] Mr Rae, who is unrepresented, highlights the shortcomings identified by Cooke J in relation to disclosure when the Commissioner sought without notice restraint. Mr Rae argues once these are taken together, this is a case involving egregious behaviour, hence the restraining order should have been rescinded even

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11 At [63].
12 At [56].
13 At [63].

though grounds for it were otherwise established. Mr Rae emphasises the Commissioner is no ordinary litigant, and high standards are expected of the Crown in litigation irrespective of its persona.[14]

[17] Mr Allan, who appeared as counsel assisting the Court, contends the Judge's analysis "is vulnerable to appeal" on the basis the Judge wrongly elevated egregiousness as a standard or test for non-disclosure in this context. Mr Allan stresses the importance of the obligation of candour when a litigant seeks without notice relief, particularly when that litigant is the Commissioner.

[18] On behalf of the Commissioner, Mr Britton contends Cooke J did not err. Mr Britton emphasises the desirability of egregious behaviour as a touchstone for rescinding an otherwise proper restraining order following material non-disclosure by the Commissioner.

Analysis

[19] We begin with the uncontroversial.

[20] An application for a restraining order under the Criminal Proceeds (Recovery) Act 2009 (the Act) is civil in nature.[15] Such an application may be made without notice provided the Court is satisfied "there is a risk of the proposed restrained property being destroyed, disposed of, altered, or concealed if notice were given".[16]

[21] Form 2 of the Criminal Proceeds (Recovery) Regulations 2009 applies to without notice applications. The form requires the applicant to certify the application complies with r 19.10 of the High Court Rules 2016. Under r 19.10, an application without notice must comply with r 7.23 therein, which reads:

> **7.23 Application without notice**
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> (1) A person who wants to make an application to the court and have the application determined without any other party having been served (in these rules referred to as an **application without notice**) must use form G 32.

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14 Crown Law *Attorney-General's Values for Crown Civil Litigation* (30 August 2013).
15 Criminal Proceeds (Recovery) Act 2009, s 10(1); and High Court Rules 2016, r 19.2(r).
16 Criminal Proceeds (Recovery) Act, s 22(1).

(2) An application without notice may be made only—

(a) on 1 or more of the following grounds:

(i) that requiring the applicant to proceed on notice would cause undue delay or prejudice to the applicant:

(ii) that the application affects only the applicant:

(iii) that the application relates to a routine matter:

(iv) that an enactment expressly permits the application to be made without serving notice of the application:

(v) that the interests of justice require the application to be determined without serving notice of the application; and

(b) if the applicant has made all reasonable inquiries and taken all reasonable steps to ensure that the application and supporting documents contain all material that is relevant to the application, including any defence that might be relied on by any other party and any facts that would support the position of any other party.

(3) An applicant who makes an application without notice must, if the application is of a kind that is likely to be contested if it were made on notice, file a memorandum with the application that sets out—

(a) the background to the proceeding (including the material facts that relate to the proceeding); and

(b) the grounds on which each order is sought; and

(c) an explanation of the grounds on which each order is sought without notice; and

(d) all information known to the applicant that is relevant to the application, including any known grounds of opposition or defence that any other party might rely on, or any facts that would support opposition to the application or defence of the proceeding by any other party.

(4) Failure to disclose all relevant matters to the court or to comply with subclause (3) may result in the court—

(a) dismissing the application; or

(b) if 1 or more orders have been made by the court in reliance on the application, rescinding those orders.

…

[22] Certification of compliance with the Rules is no mere technicality; it is a prerequisite of a without notice application.[17]

[23] As is apparent, r 7.23(2)(b) requires the applicant to have made "all reasonable inquiries" and "taken all reasonable steps to ensure" the application contains "all material … relevant to the application, including any defence that might be relied on by any other party and any facts that would support the position of any other party".

[24] If the application were likely to be opposed if made on notice, the applicant must also file a memorandum that complies with r 7.23(3)(d), in turn setting out "all information known to the applicant that is relevant to the application, including any known grounds of opposition or defence that any other party might rely on, or any facts that would support opposition to the application or defence of the proceeding by any other party".

[25] As is also apparent from r 7.23(4), a failure to disclose "all relevant matters" or non-compliance with r 7.23(3) may lead to the court dismissing the application or rescinding the order it made earlier. For convenience, we call this the discharge principle.[18]

[26] Rule 7.23 does not identify *how* the discharge principle is to be applied. The common law is more instructive, so to that we turn.

[27] The leading case remains *Brink's Mat Ltd v Elcombe*.[19] In *Brink's Mat,* the applicant obtained a without notice freezing order following the robbery of more than £25 million worth of gold bullion. The High Court of England and Wales later rescinded that order in relation to two respondents on the basis the applicant had not complied with its disclosure obligations when obtaining the order. The applicant successfully appealed to the Court of Appeal.

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17 Robert Osborne (ed) *McGechan on Procedure* (loose-leaf ed, Thomson Reuters, updated to 2 October 2020) at [HR7.23.01].

18 This is a label, not more.

19 *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 (CA).

[28] Ralph Gibson LJ said if there had been material non-disclosure when the order was obtained, the Court would be "astute to ensure [the] plaintiff … is deprived of any advantage he may have derived by that breach of duty".[20] The Judge added:[21]

> (6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
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> (7) Finally, it "is not for every omission that the injunction will be automatically discharged". … The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:
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> > "when the whole of the facts, including that of the original non-disclosure, are before[the court, it] may well grant … a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:" …

[29] Ralph Gibson LJ held the applicant had failed to place all relevant information before the High Court, and it was therefore open to that Court to "set aside" the freezing order even though grounds for the order had otherwise been established.[22] Or, in the Judge's words, the applicant was at the "mercy" of the Court.[23] However, because the freezing order would have been made if the "additional information" had been placed before the High Court, the Judge held the appeal should be allowed and the order restored against the two respondents.[24]

[30] Balcombe LJ said the discharge principle deprived an applicant of their improperly obtained advantage and served to promote the duty of candour.[25] But, the principle "cannot be allowed itself to become an instrument of injustice".[26] It followed there was a discretion "to continue the injunction, or to grant a fresh injunction in its

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20 At 1357.
21 At 1357 citing *Bank Mellat v Nikpour* [1985] FSR 87 (CA).
22 At 1357.
23 At 1357.
24 At 1357.
25 At 1358.
26 At 1358.

place, notwithstanding … non-disclosure".[27] That discretion should be exercised, and the appeal allowed, because the applicant's non-disclosure was (a) "innocent" and (b) "immaterial".[28]

[31] Slade LJ considered the discharge principle should not "be carried to extreme lengths".[29] He too held the appeal should be allowed, for, while the applicant had failed to disclose everything of relevance to the High Court, the omission was "innocent" and did not compromise the case for a freezing order; there remained "a good arguable case that the initial deposit … represented proceeds of the stolen gold".[30]

[32] *Brink's Mat* was cited by this Court in *Allen v Commissioner of Inland Revenue*.[31] The Commissioner obtained a without notice freezing order against Mr Allen following an allegedly fraudulent investment scheme. Mr Allen argued the Commissioner failed to disclose relevant information when obtaining the order. The argument was rejected on the facts, but the Court observed:[32]

> [93] The [freezing order] was obtained ex parte. Consequently there was a requirement on the part of the Commissioner to make appropriate disclosure: see for instance *Brink's – MAT Ltd v Elcombe* [1988] 3 All ER 188. No doubt a plaintiff who fails to make appropriate disclosure is at risk of adverse consequences which may, perhaps, extend to the discharge of the order inappropriately obtained (albeit that if the order was otherwise warranted, a further order is likely to be made, as in the *Brink's - MAT* case). But, given that there is an entitlement to seek review of orders made ex parte and such review proceeds on a de novo basis, the power to discharge an ex parte order on this ground is likely to be exercised *only in egregious cases*.

[33] In *Mudajaya Corporation Berhad v Keng*,[33] the respondents argued freezing orders should be rescinded "because of what they say was material non-disclosure on the without notice application".[34] Fitzgerald J referred to *Allen* and said:

> [24] The alleged material non-disclosure was the focus of the respondents' arguments on their application. I therefore consider these issues first. I accept

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27 At 1358.
28 At 1358.
29 At 1359.
30 At 1361.
31 *Allen v Commissioner of Inland Revenue* (2004) 21 NZTC 18,718 (CA).
32 At [93] (emphasis added).
33 *Mudajaya Corporation Berhad v Keng* [2019] NZHC 1436.
34 At [5].

> that if there was egregious non-disclosure, setting aside the orders would be justified (i.e. without going on to consider the merits of the case and whether "new" orders should be made). I also accept that if any non-disclosure does not reach that threshold, the Court's findings may nevertheless be relevant to matters such as costs.

[34] We pause to observe *Allen* did not offer egregiousness as a standard or test in relation to the discharge principle. Rather, it offered egregious non-disclosure as an *example* of when the exercise of that principle may be appropriate. As will become apparent, the distinction is important.

[35] In *Green Way Ltd v Mutual Construction Ltd*,[35] the applicant obtained a suite of orders without notice to prevent a corporate rival from allegedly exploiting its confidential information. In so doing, the applicant did not inform the High Court of correspondence in which the respondents denied possessing or exploiting the information and acknowledging they would recognise the applicant's intellectual property. Campbell J said executed search orders would be rescinded in "exceptional circumstances" only,[36] but material non-disclosure may qualify. With reference to *Brink's Mat*, the Judge said the applicant was at the "mercy" of the Court.[37]

[36] Campbell J discharged all of the without notice orders because it was unlikely they would have been made had there been full disclosure, and the missing disclosure went to the very need for without notice relief.

[37] This brings us back to United Kingdom authority. In *Jennings v Crown Prosecution Service*,[38] the Crown obtained a without notice restraining order in the wake of alleged fraud. In obtaining the order, the Crown did not inform the High Court of a letter sent to it by Mr Jennings. The letter was relevant because it showed Mr Jennings told the Crown of his intentions in relation to the property.[39] He argued the order should be discharged for this reason.

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35 *Green Way Ltd v Mutual Construction Ltd* [2021] NZHC 1704.
36 At [77].
37 At [77], citing *Brink's Mat Ltd v Elcombe*, above n 19, at 1357.
38 *Jennings v Crown Prosecution Service* [2005] EWCA Civ 746, [2005] 4 All ER 391.
39 At [53].

[38] The High Court rejected the argument. Mr Jennings appealed unsuccessfully to the Court of Appeal. Laws LJ said:

> [56] It seems to me that there are two factors which might point towards a different approach being taken to without notice applications for restraint orders in comparison to applications in ordinary litigation for freezing orders; but they pull in opposite directions. First, the application is necessarily brought (assuming of course that it is brought in good faith) in the public interest. The public interest in question is the efficacy of s 71 of the Act of 1988. Here is the first factor: the court should be more concerned to fulfil this public interest, if that is what on the facts the restraint order would do, than to discipline the applicant – the Crown – for delay or failure of disclosure. But secondly, precisely because the applicant is the Crown, the court must be alert to see that its jurisdiction is not being conscripted to the service of any arbitrary or unfair action by the state, and so should particularly insist on strict compliance with its rules and standards, not least the duty of disclosure.
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> [57] The court needs to have both these considerations in mind. But they do not, I think, promote some distinct and separate test for the exercise of the s 77 jurisdiction. They are relevant factors which in his [or her] good sense the judge will consider and weigh as they arise case by case.

[39] Longmore LJ said:[40]

> The fact that the Crown acts in the public interest does, in my view, militate against the sanction of discharging an order if, after consideration of all the evidence, the court thinks that an order is appropriate. That is not to say that there could never be a case where the Crown's failure might be so appalling that the ultimate sanction of discharge would be justified.

[40] Lloyd LJ agreed with both Judges.

[41] The Court dismissed the appeal because the failure to disclose the letter reflected nothing more sinister than "inadvertence" and the "impact of disclosure of the letter would only have been 'to increase the concern of dissipation of assets, rather than reduce it'".[41]

[42] *Jennings* was cited in the more recent High Court decision of *Malabu Oil & Gas Ltd v Director of Public Prosecutions*.[42] *Malabu* involved a restraining order sought by an Italian prosecutor using the mutual assistance process. The application failed to disclose, among other things, a long investigation had been inconclusive as

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40 At [64].
41 At [8] and [53].
42 *Malabu Oil & Gas Ltd v Director of Public Prosecutions* [2016] Lloyd's Rep FC 108 (EWHC).

to whether money laundering had occurred. This was one of the offences which underlay the application.

[43] In *Malabu*, Edis J said the public interest in restraining orders "is likely to weigh more heavily than the need to enforce high standards in those who make the application", but whether this is so "in an individual case will depend on a variety of factors including the culpability of the failures in disclosure".[43] The Judge noted the possibility of "other sanctions for non-disclosure apart from discharging an order which should otherwise stand", including costs and professional disciplinary proceedings.[44]

[44] Edis J concluded non-disclosure was "closer to" the scenario contemplated by Longmore LJ in *Jennings*, as being "so appalling ... the ultimate sanction of discharge would be justified". However, Edis J held this sanction was not justified because a restraining order would still have been made had full disclosure been made when the order was sought.[45]

[45] Before returning to Mr Rae's case, we attempt to summarise the effect of the common law in two propositions.

[46] First, the discharge principle is potentially engaged whenever an applicant fails to comply with their obligations under r 7.23(4); that is, whenever an applicant fails to disclose "all relevant matters to the court or to comply with subclause (3)".

[47] Second, whether the discharge principle is exercised depends on the circumstances of each case, including:

(a) Whether the applicant acted in good faith or otherwise. Unsurprisingly, the common law treats this factor as important. Campbell J discharged the orders in *Green Way* absent a conclusion of bad faith. But, as Campbell J noted, the applicant in that case was unrepentant about its failure to provide the Court with all relevant information.

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43 At [49].
44 At [49].
45 At [78].

(b) The significance of the missing information. This too is an important consideration, for reasons that are self-evident. *Brink's Mat*, *Jennings* and *Malabu* all involved missing information that was relevant but immaterial. In each case, the Court concluded the order would have been made had the information been before the Court.

(c) The identity of the applicant, at least when it is the Crown. As observed by Laws LJ in *Jennings*, the court "must be alert to see that its jurisdiction is not being conscripted to the service of any arbitrary or unfair action by the state … not least [in relation to] the duty of disclosure".[46]

(d) The interests protected and promoted by the duty of candour. This factor is largely implicit to the common law, but the concept is clear enough. Without notice applications trench upon natural justice. It is therefore important applicants in this context make full disclosure. It is equally important courts are not misused.

(e) The public interest. This factor has obvious importance when the case involves restrained property believed to be tainted property; a respondent who appears to have unlawfully benefited from significant criminal activity; or both. In each situation, the Commissioner seeks restraint acting "in the public interest".[47] *Jennings* and *Malabu* provide examples.

[48] We return to this case. The parties' submissions presuppose Cooke J adopted egregiousness as a standard, test or touchstone, rather than applying the approach just summarised. We do not read the decision that way. Indeed, as will be apparent from the extracts below, the Judge explicitly refrained from attempting to circumscribe the discharge principle:[48]

> [54] In advancing submissions for Mr Rae, Ms Wang referred to the analogous situation where the Court grants freezing notice orders on a without

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46 *Jennings v Crown Prosecution Service*, above n 38, at [56].
47 At [56].
48 *Commissioner of Police v Rae*, above n 5 (footnotes omitted).

notice application. Ms Wang accepted that the Court would discharge such orders in what has been described as "egregious cases". But she argued that the Court would also do so when the non-disclosure was sufficiently material to impact on the original decision to grant the order. She emphasised the higher standards that are expected of the Crown in litigation before the Courts, and argued that the Crown must be an exemplar of high standards. A related concept was that the Commissioner was exercising the powers of the state such that the Court "should particularly insist on strict compliance with its rules and standards, not least the duty of disclosure".

[54] I accept it is relevant that the Commissioner is exercising powers of the state, and that there are particular expectations that the Court has in relation to his conduct of litigation. But as Mr Britton argued, there are additional considerations of significance. In *Yan v Commissioner of Police* the Court of Appeal stated, in respect of the potential requirement for the Commissioner to give an undertaking as to damages or costs under s 29 for a restraining order:

> [34] While proceedings under the Act are civil proceedings, they are, because of these public policy factors, distinguishable from ordinary interlocutory measures in civil proceedings such as interim injunction and freezing order applications.
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> …
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> [39] There is a strong public interest in preventing criminals from benefiting as a result of significant criminal activity and, accordingly, a strong public interest in preserving tainted property prior to forfeiture being reasonably obtainable and preventing dissipation of those assets. On the other hand, a restraining order represents a significant infringement of property rights and has the potential to cause considerable injustice should it transpire the order was not justified. Section 29 provides a potential safeguard against the latter injustice.

[56] In *Jennings v Crown Prosecution Service*, the English and Welsh Court of Appeal referred to the competing policy considerations of the kind I have referred to and indicated that, while important considerations, they did not promote a distinct or separate test on the question of discharge. I respectfully agree. The Commissioner is making the application in the furtherance of the public interest and is exercising the power of the state against the individual. There are expectations that he will be exercise high standards in the conduct of litigation. The consequences of the failure to disclose are to be assessed against that background, but the same principles apply. I also consider that, if the Court is persuaded that the missing information does not alter the decision that would have been made in relation to restraint, then the order should only be discharged in what has been described as "egregious" cases. That is also consistent with the scheme of the Act, as the question of discharge will likely arise at the same time as the consideration of the on-notice application. So if the requirements of an on-notice order are met, there would need to be compelling reasons why it should not be made.

> [57] As to what is regarded as an "egregious" case, and without seeking to circumscribe future cases, it seems to me that such a case would most likely arise when the non-disclosure, or misrepresentation, is deliberate. That is, that there is an element of bad faith in the pursuit of the application. It is perhaps only then that the Court would be able to say that the integrity of the administration of justice is a more significant consideration than the public interest in offenders not being able to enjoy the fruits of their significant offending. A failure to act in accordance with the requirements, even accompanied by a certification, would not in itself be sufficient in itself to warrant such an outcome. Mere negligence is not enough. Such a failure may be addressed by other means, such as a costs awards.
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> [58] I approach the present case on that basis.

[49] Our view of the Judge's approach is buttressed by his approval of *Jennings*, which, as will be apparent from our earlier discussion, does not refer to egregiousness, and instead eschews "some distinct and separate test".[49] It follows most of the submissions are directed at a premise that does not arise. Furthermore, we do not consider the role or involvement of the Commissioner warrants a distinct approach for the reasons identified in *Jennings*, especially those of Laws LJ.

[50] In any event, we consider Cooke J was correct not to rescind the restraining order given the considerations we have summarised, even if the Judge did adopt egregiousness as is suggested. In view of the considerations set out at [46]–[47], we note:

(a) The Commissioner acted in good faith. He did not know there had been a formal agreement between Mr Rae and the United States authorities, and therefore did not know those authorities had excluded the R Ltd bank account. Relatedly, the misleading information provided by the United States authorities was "not the consequence of bad faith" for the reasons explained by the Judge.[50] We add that unlike the applicant in *Green Way*, the Commissioner accepted these shortcomings once they were identified.

(b) The missing (and misdescribed) information was important. However, that information would not have changed the outcome had it been

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49 *Jennings v Crown Prosecution Service*, above n 38, at [57].
50 *Commissioner of Police v Rae*, above n 5, at [61].

known, save in relation to the bank account of R Ltd. The exclusion of that account by United States authorities would presumably have led to that aspect of the restraining order application being declined. But Cooke J rescinded the order in relation to R Ltd long before the contested hearing on 20 and 21 October 2020. So, this aspect had already been remedied by the time the Judge was asked to rescind the order in its entirety. And, as observed, the balance of the order would have been made had the missing information been before the Court.

(c) The Commissioner was the applicant. Unlike the earlier factors, this favoured the restraining order being rescinded.

(d) The same is true of the interests protected and promoted by the duty of candour.

(e) The public interest favoured ongoing restraint. Money laundering is a serious crime and one, we consider, that can be difficult to detect. Mr Rae allegedly derived significant benefit from that crime in New Zealand and through similar offending abroad.

[51] We dismiss Mr Rae's invitation to assess the combination of circumstances differently. We consider the balance of interests told against the exercise of the discharge principle. To borrow language from another area of the law, we consider rescinding the restraining orders would have been disproportionate to the impropriety.[51]

[52] This conclusion is consistent with the outcomes in the cases we have referred to.

Other matters

[53] This leaves other matters. Mr Rae contends the Commissioner's application to restrain the property constitutes an abuse of process because he will "be made to

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[51] Evidence Act 2006, s 30.

comply with two [separate] forfeiture orders in relation to the same funds". Mr Rae also raises contentions about the Judge's factual determinations. We can address these arguments reasonably swiftly.

Abuse of process

[54] Mr Rae contended in the High Court that continuation of the restraining order would amount to an abuse of process. Cooke J rejected the contention for two reasons. First, Mr Rae's formal agreement with the United States authorities[52] did not bind the New Zealand government. Indeed, the Judge noted the agreement was expressly confined "to the United States Attorney's Office for the District of New Jersey and cannot bind other federal, state, or local authorities".[53] Second, the Commissioner was acting independently in seeking restraint under New Zealand law, rather than as an agent of the United States authorities. The Judge then added this:

> [79] There is one complication, however. As I understand it the forfeiture order made by the District Court for the State of New Jersey has not been satisfied. Mr Rae should not be placed in the position where he is obliged to comply with two forfeiture orders in relation to the same funds. I am not presently clear the appropriate procedural pathway for ensuring that that does not happen. Perhaps the United States Government/Mr Rae should apply for relief against forfeiture, or even relief against restraint, to allow the United States order to be satisfied. This issue will need to be addressed.
>
> [80] Nevertheless for the above reasons I do not accept that the application on notice for restraint is an abuse of process for the reasons advanced by Mr Rae. Given that I have concluded that the ground to make a restraint order on notice has been established, and that neither of the grounds of opposition advanced by Mr Rae are accepted, then the foundation to make the order sought has been made out.

[55] Mr Rae raises the potential complication identified by the Judge as the basis for a fresh argument that restraint constitutes an abuse of process. However, Mr Rae did not elaborate on this in his written or oral submissions. Counsel assisting did not pursue the point either.

[56] Mr Britton observes the formal agreement required Mr Rae to pay US$1,775,000 and forfeit any interests he might have had in an identified United States bank account. However, that agreement did not prevent action by the

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52 The formal agreement.

53 *Commissioner of Police v Rae*, above n 5, at [71].

New Zealand government or govern the restrained property. Mr Britton sought permission to adduce, as fresh evidence, *United States of America v Rae*, a decision of Judge McNulty of the United States District Court for the District of New Jersey, dated 9 February 2022.[54] The decision implies the funds in the United States bank account are not Mr Rae's and may not be used by him to satisfy payment of US$1,775,000. On this basis, Mr Britton contends Mr Rae's abuse of process submission has no grounding in fact.

[57] We consider it undesirable to express a view on these contentions. The short point remains restraint cannot constitute an abuse of process for the reasons identified by Cooke J. Moreover, the Act contains machinery by which the potential problem identified by Cooke J may be addressed if it comes to pass, most obviously, prospect of relief for undue hardship.[55]

Factual determinations

[58] Mr Rae contends Cooke J failed to make a discrete factual determination in relation to the evidence of Detective Sergeant Macdonald. A little more background is required.

[59] Detective Sergeant Macdonald filed an affidavit in support of the without notice application for the restraining order. Mr Rae contended Detective Sergeant Macdonald was untruthful in asserting he was unaware of the formal agreement as a Google search at the time the application was filed would have revealed a news article referring to the formal agreement and Mr Rae's sentencing. The Commissioner asked an IT technician to review the hard drive on Detective Sergeant Macdonald's computer. That review yielded nothing to support the proposition the officer had conducted a Google search at or about the relevant time. Despite this, Mr Rae put to Detective Sergeant Macdonald in cross-examination he deleted the history of such a search. The officer denied the allegation (in strong terms). Mr Rae contends the Judge did not specifically address this point in his decision.

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54 *United States of America v Rae* US Dist (NJ) no 19-cr-895 (KM), 9 February 2022. Mr Rae offered no objection to the decision being received as fresh evidence. He described it as "helpful background". We receive it in the interests of justice, but as will be apparent, do not act upon it.

55 Criminal Proceeds (Recovery) Act, s 56(1).

[60] We accept as much. However, a court is not required to deal with *every* factual controversy in a case. Were it otherwise, courts would be overwhelmed. Furthermore, the Judge's factual determinations leave no room for ambiguity or misapprehension. Again, the Judge found the Commissioner was "unaware that there had been a formal agreement between Mr Rae and the United States authorities which resulted in more limited forfeiture orders not including the R Ltd account".[56] The Judge could not have reached this conclusion if he considered Detective Sergeant Macdonald had been aware of the formal agreement, whether by a Google search or otherwise. All of which is to say we have no doubt the Judge did not overlook the point.

[61] Mr Rae filed an additional written submission the day before the appeal hearing. By it, Mr Rae invites the Court to take a different view of the facts than Cooke J. Mr Rae says this is justified because on 31 May 2022 he sent an email to the lawyers "representing the US Government in these proceedings" requesting what is described as "non-party discovery". Mr Rae invites us to receive the email and conclude that because United States authorities have not provided the information sought, they and the Commissioner have acted egregiously.

[62] We decline to approach things this way for three reasons. First, the contention is speculative. Second, it is far from obvious how "discovery" of the information could materially affect the Judge's conclusion which, we note, was made with the benefit of (extensive) live testimony. Third, we consider this another instance in which material of little relevance is being offered as if it were otherwise. We decline to receive the email as fresh evidence for the same reasons.[57]

Result

[63] The respondent's application to adduce further evidence is granted.

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[56] *Commissioner of Police v Rae*, above n 5, at [60].

[57] Mr Rae also offered as fresh evidence (a) email correspondence between the Commissioner and the United States authorities prior to the without notice application and (b) a decision of the New Zealand Lawyers and Conveyancers Disciplinary Tribunal: *National Standards Committee 1 v Reed* [2021] NZLCDT 23. Item (a) was before the High Court and so no ruling is required. No ruling is required in relation to item (b) either; the (legal) decision concerns the discharge principle and is not evidence. For completeness, we note the decision does not add anything of principle to the cases we have discussed.

[64] The appellant's application to adduce further evidence is declined.

[65] The appeal is dismissed.

[66] The appellant must pay costs to the respondent for a standard appeal on a Band A basis and usual disbursements.

Solicitors:
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