IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-000055
[2022] NZHC 3511

UNDER	The Criminal Proceeds (Recovery) Act 2009
BETWEEN	COMMISSIONER OF POLICE Applicant
AND	KIRSTIN MARJORY SLESSOR First Respondent
	MORRIS NORMAN STANLEY ROGERS Second Respondent

Hearing: 6 December 2022

Appearances: S Earl for the Applicant
N Batts for the First Respondent
No appearance for the Second Respondent

Judgment: 19 December 2022

JUDGMENT OF GORDON J

This judgment was delivered by me
on 19 December 2022 at 3 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:
Meredith Connell, Auckland
Haigh Lyon Lawyers, Auckland

[1] The Commissioner of Police (Commissioner) applies for civil forfeiture orders under the Criminal Proceeds (Recovery) Act 2009 (Act) against the first respondent, Kirstin Slessor.

[2] Ms Slessor opposes the application. She has sworn an affidavit in support of her opposition. Both she and Detective Sergeant Simon Beal, who swore an affidavit in reply to Ms Slessor's affidavit, were cross-examined at the hearing.

[3] The Commissioner also made an application for civil forfeiture orders against the second respondent, Morris Rogers. A settlement was reached on that application, which was approved under s 95 of the Act by minute of a Judge of this Court dated 14 March 2022.

The application

[4] The Commissioner applies for orders as follows:

(a) A profit forfeiture order under s 55 of the Act to the sum of $84,000 with orders that the following property (together property) be realised to meet that order:[1]

(i) $28,778 cash seized by the Police from Ms Slessor at Caton Road, Waitakere, Auckland, on 23 November 2007 and any accrued interest (Caton Cash); and

(ii) $3,275 cash seized by the Police from Ms Slessor's handbag at 15 Waitakere Road, Waitakere, Auckland on 21 April 2020 and any accrued interest (Waitakere Cash); and

(b) An effective control order under s 58 of the Act that Ms Slessor has interests in the Caton Cash and the Waitakere Cash.

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[1] In his application the Commissioner also sought orders in relation to $3,800 cash located at 41 Riverlea Road, Whenuapai, Auckland on 21 April 2020 (Riverlea Cash). The Commissioner does not pursue the application as it relates to the Riverlea Cash.

The opposition

[5] Ms Slessor does not oppose the Commissioner's application for effective control orders. She says both the Caton Cash and the Waitakere Cash are hers. However, she opposes the application for a profit forfeiture order on the basis that:

(a) The unlawful benefit figure of $84,000 identified by the Commissioner is significantly inflated and at odds with the evidence. In her notice of opposition she nominates a figure of "no more than $1,700";

(b) The unlawful benefit figure should, in addition, be further reduced by way of set-off in light of civil liabilities that the Commissioner has in respect of Ms Slessor; and

(c) The Caton Cash cannot be realised to meet a profit forfeiture order on the basis that the Commissioner was unlawfully in possession of the Caton Cash and so allowing it to be used to satisfy a profit forfeiture order would be allowing the Commissioner to benefit from his own wrongdoing.

Key issues

[6] The key issues for the Court to determine are: whether Ms Slessor has discharged the onus on her of rebutting the presumed value of the unlawful benefit; and whether the Caton Cash can be realised to meet a profit forfeiture order. Although it will first be necessary to determine whether Ms Slessor has unlawfully benefitted from significant criminal activity.

The Commissioner's case

[7] The Commissioner says that Ms Slessor unlawfully benefited from significant criminal activity, namely the manufacture and supply of methamphetamine.

[8] In January 2020 the Police commenced an investigation into the suspected manufacture and supply of methamphetamine by Mr Rogers. The Commissioner says that the investigation revealed that Mr Rogers and Ms Slessor jointly offended in what

became a common enterprise to manufacture and supply methamphetamine. Mr Rogers was the main person involved in the manufacture process, assisted throughout by Ms Slessor. Both Mr Rogers and Ms Slessor also supplied methamphetamine.

[9] Mr Rogers, Ms Slessor and another individual (who assisted Mr Rogers in the manufacture of methamphetamine on one occasion) have been convicted and sentenced in relation to charges arising out of the investigation.

[10] In summary, in relation to the supply of methamphetamine, the Commissioner says that analysis of text message data alone, for the period 25 December 2019 to 20 May 2020 revealed that on the occasions of supply for which it was possible to identify quantum, Ms Slessor supplied 19.6 grams. Within the text message data there were 107 identified supplies, with an identifiable quantum (19.6 grams total) on 14 of those occasions. Ms Slessor was also sentenced on the basis she assisted Mr Rogers in the manufacture of 168 grams of methamphetamine.

[11] The Police analysis of Ms Slessor's financial position indicated that she received a modest declared income, being a gross income of $20,499.38 in the tax year ending 31 March 2020 and $23,120.44 in the tax year to January 2021. However, between 1 July 2019 to 1 July 2020 the Commissioner's analysis indicates that Ms Slessor received substantial funds from unexplained sources in excess of her declared gross income. The Commissioner's case is that these funds are likely the proceeds of her enterprise with Mr Rogers, to manufacture and supply methamphetamine.

[12] Ms Slessor denied any involvement in the manufacture and supply of methamphetamine when Police initially spoke to her in 2020. She later acknowledged her involvement and pleaded guilty to an Agreed Summary of Facts. I will refer to the remarks of the sentencing Judge later in this judgment.

[13] As to Ms Slessor's challenge to the benefit claimed by the Commissioner ($84,000) the Commissioner's case is that the amount of $1,700 identified by Ms Slessor in her notice of opposition is implausible and reflects an attempt by

Ms Slessor to minimise her offending in circumstances where she has already been convicted and sentenced in the related criminal proceeding.

Profit forfeiture

Statutory provisions and principles

[14] Civil forfeiture orders are provided for in subpart 3 of Part 2 of the Act. Under s 43, the Commissioner may apply for a civil forfeiture order. There are two types of civil forfeiture orders under the Act – profit forfeiture orders and assets forfeiture orders. In this case the Commissioner applies only for a profit forfeiture order.

[15] Where such an application is made, the Court must make a profit forfeiture order if satisfied on the balance of probabilities that the respondent has unlawfully benefited from significant criminal activity within the relevant period of criminal activity and has "interests" in property.[2] If the Commissioner proves on the balance of probabilities that a person has benefited unlawfully from significant criminal activity, the value of that benefit is presumed to be the value stated in the application.[3] The respondent may rebut that presumption on the balance of probabilities.[4]

[16] The term "significant criminal activity" is defined in s 6(1) of the Act as an activity engaged in by a person that if proceeded against as a criminal offence would amount to offending:

> (a) That consists of, or includes, 1 or more offences punishable by a maximum term of imprisonment of 5 years or more; or
>
> (b) From property, proceeds or benefits of a value of $30,000 or more have directly or indirectly, been acquired or derived.

[17] As proceedings under the Act are civil in nature, it is irrelevant whether criminal charges have been commenced, withdrawn or determined.[5]

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2 Section 55(1).
3 Section 53(1)(a).
4 Section 53(2).
5 Sections 6(2), 10, 15 and 16.

[18] Section 5(1) of the Act defines property as including "an interest in real or personal property". "Interest" is defined as meaning:

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

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

[19] To have unlawfully benefitted, the respondent must have knowingly (directly or indirectly) derived a benefit from significant criminal activity.[6]

[20] It is not necessary for the property itself to have been derived from the offending. Nor is it necessary for the respondent to have undertaken (or been involved in) the significant criminal activity.[7] All that matters is that the person knowingly benefitted from significant criminal activity.[8]

[21] The Commissioner is not restricted to relying on actual proceeds received by the respondent in relation to the particular offending in respect of which they were convicted.[9] The Commissioner can also rely on the disparity between moneys passing through the respondent's bank account or finding its way in the purchase of assets as compared to a respondent's declared legitimate income to prove or establish the benefit the respondent received from his or her significant criminal activities.[10] Inferences can be drawn from established criminal activity, disparity between assets and legitimate income and a lack of criminal explanation.[11]

[22] Courts will readily infer that criminal activity took place over a greater period of time than that proved beyond reasonable doubt in a criminal proceeding.[12]

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6 Section 7.
7 Section 7.
8 Knowledge under s 7 includes wilful blindness: *Vincent v Commissioner of Police* [2013] NZCA 412.
9 *Commissioner of Police v Hayward* [2012] NZHC 1097 at [22].
10 *Commissioner of Police v Hayward*, above n 9, at [22].
11 *Commissioner of Police v Dryland* [2013] NZCA 247 at [34] – [39].
12 *Hayward v Commissioner of Police* [2014] NZCA 624 at [41] – [42].

[23] The Court of Appeal confirmed in *Commissioner of Police v de Wys* that a respondent's involvement in criminal activity and their unlawful benefit from the criminal activity may be proved by circumstantial evidence.[13]

[24] The Court in that case also confirmed the importance of unexplained money as a strand of circumstantial evidence.[14]

Steps to be followed

[25] The following are the steps in determining an application for a profit forfeiture order:

(a) Whether the Commissioner has proved on the balance of probabilities that the respondent has unlawfully benefited from significant criminal activity during the relevant period;[15] and

(b) Whether the respondent has interests in property;

(c) If so:

(i) Whether the respondent has rebutted the presumption that the value of the benefit is as stated in the application, and if so, what the actual value is;

(ii) What is the maximum recoverable amount by taking the value of the benefit and deducting from it the value of any property already forfeited by virtue of an assets forfeiture order in relation to the same criminal activity;[16]

(iii) Whether any property should be excluded from the operation of the profit forfeiture order because of undue hardship likely to be caused to the respondent if such property were realised; and

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13 *Commissioner of Police v de Wys* [2016] NZCA 634 at [9] – [10].
14 At [71] and [78].
15 Section 53.
16 This step does not apply in this case as the Commissioner does not seek an assets forfeiture order.

(iv) Which property may be realised to meet the profit forfeiture order.

[26] Any such order made must specify the value of the benefit, the maximum recoverable amount, and the property that is to be disposed of.[17]

[27] The relevant period of criminal activity in this case for determining Ms Slessor's unlawful benefit under s 5 of the Act is 25 October 2019 to 21 April 2020.[18]

[28] Ms Slessor does not, in principle, contest the first two steps in [25] above. But despite pleading guilty to an Agreed Summary of Facts, she now says her involvement was much more peripheral than she previously accepted. That position informs her opposition to the value of the benefit as stated in the application.

Effective control

[29] If the Court is satisfied that the respondent had effective control over property, the Court may order that property is to be treated as though the respondent had an interest in it.[19] The fundamental question is whether, in fact, the respondent has the capacity to control, use, dispose of, or otherwise treat the property as their own.[20]

[30] There is no challenge to effective control orders being made in this case.

Significant criminal activity

[31] Although it is irrelevant to civil proceedings under the Act whether criminal charges have been commenced, withdrawn or determined, the Commissioner's case rests primarily on Ms Slessor's recent criminal convictions. A conviction in such proceedings will be conclusive proof that the respondent committed the underlying

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17 Section 55(2).
18 This is the date range for the charge of manufacturing methamphetamine to which Ms Slessor pleaded guilty and on which she was sentenced.
19 Section 58(1).
20 *Commissioner of Police v Read* [2015] NZHC 2055 at [60].

offence, save in exceptional circumstances.[21] There is no challenge in this case to the Commissioner's reliance on those criminal convictions.

[32] Ms Slessor pleaded guilty to a representative charge of manufacturing methamphetamine with Mr Rogers between 25 October 2019 and 21 April 2020[22] and a representative charge of supplying methamphetamine between 27 December 2019 and 21 April 2020[23] (there were also two lesser charges of theft on 23 March 2020 and possession of methamphetamine on 21 April 2020).

[33] Ms Slessor sought and received a sentence indication based on an Agreed Summary of Facts. She accepted the indication given on 23 April 2021 and was sentenced on 13 August 2021.

[34] Ms Slessor has therefore engaged in significant criminal activity within the definition in s 6 of the Act, being the manufacture and supply of methamphetamine. Both offences are punishable by a maximum term of life imprisonment.

Unlawful benefit from significant criminal activity

[35] Factual findings made by the sentencing Judge where they are essential to the sentencing decision may be admissible as proof of the benefit the respondent is likely to have received and may be highly probative of those facts, given the standard of proof required for such findings.[24] That does not preclude the Commissioner from contending that the supply of controlled drugs was greater than that found beyond reasonable doubt by the Judge for sentencing purposes.[25]

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21 Evidence Act 2006, s 47(1) and (2).
22 Misuse of Drugs Act 1975, s 6(1)(b) and (2)(a): maximum penalty, life imprisonment.
23 Misuse of Drugs Act, s 6(1)(c) and (2)(a): maximum penalty, life imprisonment.
24 *Commissioner of Police v Filer* [2013] NZHC 3111 at [27].
25 *Commissioner of Police v He* [2022] NZHC 533 at [43].

[36] In this case, there is the following evidence that supports an unlawful benefit from involvement in the manufacture and supply of methamphetamine, some of which was referred to in the sentence indication decision:[26]

(a) Ms Slessor's convictions on the charges referred to above;

(b) Ms Slessor was sentenced on the basis she assisted in the manufacture of around 168 grams of methamphetamine and she supplied just under 20 grams of methamphetamine over 14 quantifiable occasions out of a total of 107 identified occasions of actual supply;

(c) The sentencing Judge in his sentence indication decision, while accepting Mr Rogers was the main offender, said that Ms Slessor's involvement "was not a minor or peripheral role".[27] That statement is supported by the reference in the Agreed Summary of Facts to CCTV surveillance which recorded events between 1 April 2020 and 19 April 2020 at Mr Rogers' property at 15 Waitakere Road, Waitakere. The Agreed Summary of Facts states:

> Subsequent analysis of the footage stored on the hard drive located surveillance footage of Mr Rogers and Ms Slessor undertaking every part of the methamphetamine manufacturing process, either on the front deck or within the carport area of the property. …
>
> The footage also provides evidence of both Mr Rogers and Ms Slessor meeting unknown people who arrive at the property and supplying them with methamphetamine.
>
> What is evident from the footage is that the process of manufacturing methamphetamine takes Mr Rogers several days to complete and although he is the main person involved in the process, he is assisted throughout by Ms Slessor and by Mr Mathews on the one occasion between 9 and 12 April 2020.

(d) The Crown's submission recorded in the sentence indication that Ms Slessor allowed herself to become Mr Rogers' willing lieutenant in

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[26] *R v Epiha* HC Auckland CRI-2020-090-1767, 23 April 2021. Ms Slessor has also used the surname Epiha.

[27] At [12].

the process[28] is supported by the statement in the Agreed Summary of Facts that:

> In late December 2019 the [sic] Mr Rogers and Ms Slessor began a close personal relationship and spent considerable amounts of time together at each property [Mr Rogers' property at 15 Waitakere Road, Waitakere and Ms Slessor's residence at 41 Riverlea Road, Whenuapai]. They jointly offended from that time onwards, in what became a common enterprise.

(e) The quantum upon which Ms Slessor's sentencing was based was "likely to be a snapshot. The actual offending is probably worse";[29]

(f) During the period 1 July 2019 to 1 July 2020 cash deposits of $6,060 and third party deposits totalling $18,340 (together $24,400) were made into Ms Slessor's bank accounts.[30] These deposits exceeded Ms Slessor's declared income for the tax year ending March 2020 which was $20,499.38.

[37] The combination of the above factors establishes on the balance of probabilities that Ms Slessor has unlawfully benefitted from significant criminal activity.

Interests in property

Caton Cash

[38] On 23 November 2007 a vehicle driven by Tako Wihongi was pursued by Police. He parked the vehicle in a driveway near Ms Slessor's property in Caton Road, got out of the vehicle and ran into Ms Slessor's house. At the same time or about that time Ms Slessor left her house. She went to the vehicle in which Mr Wihongi had arrived and was found by the Police removing a black toilet bag from the front driver's seat and trying to hide it. When the bag was searched by Police it was found to contain six snap lock bags containing methamphetamine weighing a total of 24.7 grams, two

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28 At [10].
29 At [12].
30 The Commissioner accepts that $5,000 of the cash deposits can arguably be attributed to the sale of puppies bred by Ms Slessor as referred to in [63] below.

tablets (ecstasy and benzylpiperazine) and three large bundles of cash with a total value in excess of $30,000.

[39] Ms Slessor's address was also searched. The Police found numerous snap lock bags, glass containers containing residual methamphetamine to a weight of 3.6 grams, electronic scales, other items used in the supply of methamphetamine, 135 tabs of the class A drug LSD and 48 grams of cannabis plant material.

[40] Ms Slessor admitted taking the toilet bag from the vehicle but denied knowledge of what it contained. She also denied knowledge of the LSD found in her house. However, she later sought a sentence indication which she subsequently accepted. She pleaded guilty to: two counts of possession of methamphetamine for supply; one count of supplying methamphetamine; and one count of possession of LSD for the purposes of supply.

[41] In the sentence indication dated 18 March 2011 the Judge said she proceeded on the basis "that [Ms Slessor] clearly knew that there were drugs and money in the car. There was no other reason why [she] would have gone to the motor vehicle".[31]

[42] Despite her denial on arrest, in this proceeding Ms Slessor says the cash is hers. The Commissioner accepts that is the case.

Waitakere Cash

[43] The Waitakere Cash was located in Ms Slessor's handbag when the Police conducted the search at 15 Waitakere Road on termination of the Police operation on 21 April 2020. Both Mr Rogers and Ms Slessor were present and were arrested. Ms Slessor told the Police the cash was part-payment for the sale of puppies.

[44] Ms Slessor says she has an interest in the Waitakere Cash. The Commissioner accepts that.

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31 *R v Slessor* DC Auckland CRI-2009-090-10950, 18 March 2011 at [7].

Value of unlawful benefit

[45] Having found that Ms Slessor unlawfully benefitted from significant criminal activity and that she has interests in property, the Court must determine the value of the unlawful benefit.

[46] Section 53 of the Act provides:

> **53 Value of benefit presumed to be value in application**
>
> (1) If the Commissioner proves, on the balance of probabilities, that the respondent has, in the relevant period of criminal activity, unlawfully benefited from significant criminal activity, the value of that benefit is presumed to be the value stated in—
>
> (a) the application under section 52(c); or
>
> (b) if the case requires, the amended application.
>
> (2) The presumption stated in subsection (1) may be rebutted by the respondent on the balance of probabilities.

Case law

[47] In *Commissioner of Police v Tang* Katz J set out the approach to determining the value of the unlawful benefit:[32]

> [39] How the Commissioner calculated the $360,000 figure is strictly irrelevant. It is the figure itself that is important. It is not for the Commissioner to prove, on the balance of probabilities or otherwise, the amount of benefit Mr Tang received or to justify how the benefit amount he relied on was calculated. The figure of $360,000 is presumed to be the correct benefit amount unless and until Mr Tang proves otherwise. Mr Tang cannot do this by simply "critiquing" aspects of the Commissioner's methodology as, ultimately, precisely how the Commissioner calculated his benefit figure is irrelevant. Mr Tang must adduce his own evidence to establish, on the balance of probabilities, that the true benefit figure was less than $360,000.

[48] In *Commissioner of Police v Filer* Gilbert J adopted the same approach saying:[33]

> [13] Section 53(2) of the Act does not make clear whether the respondent has to go further than show that the Commissioner's assessment is wrong and prove what the actual benefit was. However, in my view, this is the correct interpretation. Once the Commissioner discharges the initial onus under

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32 *Commissioner of Police v Tang* [2013] NZHC 1750.
33 *Commissioner of Police v Filer*, above n 24.

> s 53(1), the onus of proving the correct figure rests with the respondent under s 53(2) and does not pass back to the Commissioner. … I conclude that if the respondent fails to prove the benefit on the balance of probabilities, the amount stated in the Commissioner's application must stand, even if the correctness of the underlying assessment is questionable.

[49] The approach in *Tang* and *Filer* was confirmed by the Court of Appeal in *Cheah v Commissioner of Police* where the Court of Appeal said:[34]

> [47] Under s 53 there are only two possible outcomes. The first is that the Commissioner enjoys the benefit of the presumption and the respondent fails to rebut the presumption. In that case the presumed value stands. The second is where the respondent succeeds in rebutting the presumption. As for the latter, by necessary construction, it follows that the respondent must prove a different value. Under s 53 the Court's role is limited to deciding on the balance of probabilities whether the Commissioner has proved that the respondent unlawfully benefitted, during the relevant period of criminal activity, from significant criminal activity, and whether the respondent has rebutted the presumption that the value of that benefit is correctly stated in the application. ...

[50] More recently, the Court of Appeal in *Snowden v Commissioner of Police* again confirmed that approach.[35] But the Court added what it described as an important qualification, albeit one seldom used:

> [49] … s 47(1) of the CPRA permits the court to amend an application for a civil forfeiture order, such that in an appropriate case the High Court might opt to reduce the value of the benefit claimed in a civil forfeiture application. So that provision is available in the case of executive overreach.

[51] Accordingly, although it is not necessary for the Commissioner to uphold the value stated, it is useful to understand how that value is calculated because of the Court's ability to reduce the value as noted in *Snowden* above.

[52] The Commissioner applied the price of $500 per gram to 168 grams of methamphetamine manufactured in April 2020 resulting in a value of $84,000.

[53] In challenging the Commissioner's figure of $84,000 and providing her own figure of $1,700 Ms Slessor asserts: her assistance to Mr Rogers was limited; she was only able to sell a gram of methamphetamine for $250 rather than $500; the Commissioner makes erroneous assumptions regarding the relevance of the drug

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34 *Cheah v Commissioner of Police* [2020] NZCA 253.
35 *Snowden v Commissioner of Police* [2021] NZCA 336 at [47] – [49].

dealing text messages; and the Commissioner's calculation fails to take into account any costs or expenses incurred by her in the enterprise.

[54] In his oral submissions, rather than pursuing the figure of $1,700 Mr Batts for Ms Slessor suggests different alternative figures. He submits that if the calculation is approached on the basis of the amount of methamphetamine manufactured, then because Ms Slessor's role was one of assistance to Mr Rogers the value should not be calculated on the whole 168 grams but, he says, that amount should be halved. He calculates a value of $21,000 based on 84 grams at $250 per gram. However, having made that submission, Mr Batts accepts that Ms Slessor said in evidence that some of her sales were of quarter gram amounts at $100. That would result in a price per gram of $400, not $250 as she proposes.

[55] Alternatively, Mr Batts suggests there is another and (he submits) better way of calculating the alternative value. This calculation is based on the amount supplied rather than the amount manufactured. Out of a total of 107 occasions of actual supply[36] on the 14 quantifiable occasions 19.6 grams was supplied. That equates to 1.4 grams per supply for those 14 occasions. Mr Batts calculates that extrapolating that amount across 93 further supplies results in an amount of 130.20 grams. When that is added to 19.6 grams then the amount supplied would be 149.80 grams. At a price of $250 per gram the unlawful benefit figure would be $37,450. However, Mr Batts says that figure would apply only if all the text messages on Ms Slessor's phone are attributable to sales by her. Mr Batts refers to Ms Slessor's evidence that many of her sales were for and on behalf of Mr Rogers. Mr Batts therefore suggests a reduction of around 25 per cent producing an alternative figure of just under $30,000.

[56] Mr Batts submits that Ms Slessor has offered an appropriate alternative value and has put forward all the evidence she can in support.

[57] I do not accept that Ms Slessor has discharged the onus under s 53(2) of the Act. The Court of Appeal said in *Snowden* that "to chip away at the accuracy of the sum asserted by the Commissioner" is not sufficient to engage s 53(2).[37] This is what

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36 As accepted in the Agreed Summary of Facts in the criminal prosecution.
37 At [50].

Ms Slessor is attempting to do. Providing various other possible values is not the approach anticipated by the courts for a respondent to rebut the presumption.

[58] Ms Slessor's position that the 168 grams manufactured should be halved on the basis of her assertion that her involvement was peripheral is also flawed. First, it is not necessary, as a matter of statutory interpretation, for Ms Slessor to have been involved in the manufacture. She simply needs to have benefitted from the manufacture. There are texts from her indicating she was supplying as the "cook" was being completed. Second, her assertions in the hearing that her involvement was peripheral is at odds with the Agreed Summary of Facts and as stated by the Judge in his sentence indication decision.

[59] Third, in the case of multiple respondents, I accept that it is open to a respondent:[38]

> [30] … who seeks to establish that they should only be liable for a specific portion of the overall proceeds of a criminal enterprise should prove (on the balance of probabilities):
>
> (a) that the overall benefits derived from the significant criminal activity were not received either solely by him or jointly by him and one or more co-offenders (if they were, each co-offender will be liable for the full amount of such benefit); and
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> (b) that he did not benefit at all or only benefitted to a specific amount (in which case he will only be liable for that amount).

[60] In this case, Mr Rogers and Ms Slessor were charged jointly. Their offending was characterised as a joint enterprise even though, (as the Commissioner accepts) Ms Slessor played a lesser role than Mr Rogers. It would have been open to Ms Slessor to specifically identify what proceeds were enjoyed by her solely and what was derived by Mr Rogers solely but she did not do so. Instead her evidence was cast in a general way in an endeavour to minimise her role.

[61] In any event, I did not find her evidence convincing. Under cross-examination she said, for example, that the two-litre container of acetone found during the Police

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38 *Commissioner of Police v Tang*, above n 32.

search of her home address was for her personal use in connection with acrylic nails. That seemed inherently unlikely when only ten nails are used at a time.

[62] She also said that a container of caustic soda found in the boot of her car at the time of the Police search was to unblock a blocked drain in the toilet or shower, explaining that the blockage was caused by her long hair. However, she also accepted that the container had been in the car for one to two days at the time of the search and had not been used in that time to unblock the drain. I found her explanation unlikely and designed to minimise her assistance in the manufacturing process as set out in the Agreed Summary of Facts.

[63] Additionally there are cash payments and third party payments into Ms Slessor's account over the period from 1 July 2019 to 1 July 2020 amounting to $24,400. Ms Earl for the Commissioner accepted that of that amount $5,000 could be attributed to payments for the French bulldogs that Ms Slessor explained she was breeding. Ms Slessor also explained away a few minor amounts as coming from legitimate sources. But that still leaves a relatively large unexplained sum.

[64] Finally, as to the expenses or outgoings incurred in the enterprise, they are irrelevant to the calculation of the benefit. In *Commissioner of Police v Tang* Katz J held:[39]

> [24] ... However, the fact that the CPRA requires expenses or outgoings to be disregarded in determining whether criminal activity reaches the $30,000 threshold leads, in my view, to the inevitable inference that Parliament must have also have intended that such expenses or outgoings be disregarded when a respondent seeks to rebut the statutory presumption in s 53.
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> [25] Taking all of these considerations into account, in my view the benefit to be forfeited by Mr Tang must be assessed with reference to the gross proceeds/receipts of his methamphetamine manufacturing and dealing activities, rather than any profits he made from such activities. This is consistent with the approach previously taken by the Courts to the assessment of benefit under POCA 1991.

[65] Having determined that Ms Slessor has not discharged the onus, that is as far as the Court needs to go. But to cover off any suggestion of overreach, I express the

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39 *Commissioner of Police v Tang*, above n 32.

view that the value adopted by the Commissioner is, as Ms Earl submits, conservative and favourable to Ms Slessor:

(a) To avoid any double counting between the amounts of methamphetamine manufactured and the amounts supplied, the Commissioner has based his calculation only on the amount of methamphetamine manufactured in April 2020;

(b) The Commissioner avoided double recovery as between Ms Slessor and Mr Morris. The amount of 168 grams relied upon for Ms Slessor was deducted when calculating the value for Mr Morris; and

(c) As well as the methamphetamine manufactured in April 2020, Ms Slessor admitted supplying methamphetamine in January and February 2020. None of those supplies have been taken into account by the Commissioner in calculating the value.

[66] The figure of $500 per gram adopted by the Commissioner has a valid basis. It is sourced from data collated in a National Drug Intelligence Bureau report which showed for the period from 1 April 2020 to 30 June 2020 the typical gram price for methamphetamine increased from $400 to $500.

[67] In conclusion, Ms Slessor has not rebutted the value of the unlawful benefit on the balance of probabilities. The value of the benefit is as stated in the application, namely $84,000.

Maximum recoverable amount

[68] In this case, where the Court is not also asked to make an assets forfeiture order, the value of which is required to be deducted from the value of the benefit, the maximum recoverable amount is the same as the benefit that I have found, namely $84,000.

Hardship

[69] It is open to a respondent to make an application to the Court to exclude certain property from being able to be realised under s 55(2)(c) if the Court considers that, having regard to all of the circumstances, undue hardship is reasonably likely to be caused to the respondent if the property were realised.[40]

[70] In order to establish undue hardship there must be a gross or severe disproportion between the gravity of the offending and the value of the property sought to be forfeited coupled with the other punishment inflicted on the offender.[41] The threshold is high. Hardship through forfeiture is to be expected. The applicant for relief must show that any hardship will be so disproportionate as to require the objectives of recovery to be subordinated to the particular needs of the wrongdoer. Mere inconvenience or difficulty is not sufficient.[42]

[71] Ms Slessor has not made an application as is required by the Act. Mr Batts approaches the issue of hardship in an unconventional way (refer [74] below). I nevertheless address hardship as contemplated by the Act.

[72] In her affidavit Ms Slessor says she struggles financially. She is unemployed and on the benefit. Her two older children no longer live with her. Her youngest child, aged eight years, lives with her. She does not receive any financial support from his father. Ms Slessor says she has struggled for many years with a personal drug addiction which she says has been the primary cause of her offending over the years. She is now proud to say she has been drug-free for about two years.

[73] Ms Slessor's evidence does not get anywhere near the very high threshold required. Even accepting that Ms Slessor struggles financially, it cannot be said that the hardship is grossly disproportionate or likely to cause extreme and undue want or privation.[43]

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40 Section 56(1).
41 *Lyall v Solicitor-General* [1997] 2 NZLR 641 (CA) at 647.
42 *Cheah v Commissioner of Police*, above n 34, at [64].
43 *Commissioner of Police v Nelson* HC Auckland, CIV-2010-404-989, 30 July 2010 at [73] – [75]; *Commissioner of Police v Winsor* [2014] NZHC 161 at [57].

[74] Mr Batts submits that the Caton Cash could be excluded from being realised pursuant to any forfeiture order on the grounds of hardship pursuant to s 56 on the basis of illegality on the part of the Commissioner. That is a conflation of two separate issues. There is either undue hardship or there is not. In this case Ms Slessor has not satisfied the Court that there will be undue hardship. I will separately consider the arguments regarding illegality in the next part of this judgment.

Which property may be realised?

[75] Mr Batts submits that despite a limitation defence not being available under the Act, the Court must exclude the Caton Cash from being realised in any profit forfeiture order. He submits that the Caton Cash at all times belonged to Ms Slessor and as such the Commissioner held the funds, if not on a constructive trust, then as a fiduciary for Ms Slessor's benefit. Mr Batts says that the Commissioner held the Caton Cash on trust for Ms Slessor as indicated by the fact that it was deposited into the Police Trust Account following seizure. He says that at the conclusion of the proceedings in 2011 that followed the seizure of the Caton Cash, the Commissioner had a legal obligation as a constructive trustee and/or fiduciary to return the Caton Cash to Ms Slessor.

[76] Mr Batts submits that the emails annexed to Ms Slessor's affidavit show that the Police did not intend to forfeit the Caton Cash until at least October 2020. He submits the failure to return the funds where there was no intention to apply for forfeiture was a clear breach of trust and/or fiduciary duties. He submits that the only reason the Commissioner has the Caton Cash potentially available to satisfy a profit forfeiture order is due to his own illegal act. The illegality, he says, is an unlawful seizure under s 21 of the New Zealand Bill of Rights Act 1990 (NZBORA).[44]

[77] Mr Batts accordingly submits the Commissioner is legally precluded from using the Caton Cash to satisfy any profit forfeiture order. He says the application of the *ex turpi causa non oritur actio* principle (no action can arise as a result of illegal or dishonourable conduct) must exclude the Caton Cash from any profit forfeiture

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[44] *Wilson v New Zealand Customs Service* (1999) 5 HRNZ 134 (HC) at [144]. The Court held that seizure in terms of s 21 of the New Zealand Bill of Rights Act 1990 applies both to an initial taking of possession of property and the continued detention or deprivation thereafter.

order. Mr Batts also relies on the decision of the Supreme Court in *Marwood v Commissioner of Police*[45] and submits that an entitlement to compensation from the Commissioner for an unlawful search under s 21 of the NZBORA could be set off against any forfeiture to the Commissioner.[46]

[78] Mr Batts places significant weight on the decision of the Court of Appeal in *R v Collis*[47] in support of his submission that the illegality alleged in this case is a defence that can be applied in a proceeding under the Act.

[79] In *Collis*, the Police found $103,000 in cash and a quantity of cannabis during a search of the defendant's property. As a consequence the defendant was charged with and found guilty of possession of cannabis for supply contrary to s 6 of the Misuse of Drugs Act 1975. He was sentenced to three and a half years' imprisonment and fined $17,500. The money was produced as an exhibit at the trial, at which time the defendant denied any knowledge of it.

[80] After his conviction and sentence the defendant claimed the money was his and applied to the District Court for an order that it be returned to him.[48] At the hearing of the application the defendant gave evidence that he had obtained the money as a result of illegal drug dealing. He was then charged with selling cannabis but the charge was dismissed.

[81] No order for forfeiture of the money could be made under s 32(3) of the Misuse of Drugs Act because the defendant had not received any money "in the course of or consequent upon" the particular offence for which he was convicted, namely possession for supply.

[82] The District Court Judge held that the money belonged to the defendant. The Judge made an order in accordance with the defendant's request that the money be

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45 *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260.
46 At [49].
47 *R v Collis* [1992] NZLR 287 (CA).
48 The defendant's application was treated by counsel in the Court of Appeal as having been made under s 199(3)(a) of the Summary Proceedings Act 1957.

paid to the Commissioner of Inland Revenue in reduction of his outstanding tax liability.

[83] On the application of Crown counsel the Judge agreed to reserve a question of law under s 380 of the Crimes Act 1961, namely whether as a question of law the Judge was correct to order the return of the money.

[84] The Crown argued that as the money was illegally obtained, the discretion should have been exercised against the defendant and the money paid into the Consolidated Fund. The Crown further argued that it was contrary to public policy for the Court to assist a wrongdoer to benefit from his criminal activity.

[85] Casey J (one of the two majority judges), after reviewing a number of English cases, considered the following statement from *Euro-Diam Ltd v Bathurst*[49] to be a "persuasive reconciliation of the conclusions to be drawn from the numerous and not altogether consistent authorities in this field" which he was "happy to adopt":[50]

> … where the grant of relief to the plaintiff would enable him to benefit from his criminal conduct, the ex turpi causa defence will fail *if* his claim is for the delivery of his goods, or for damages for their wrongful conversion *and if* he is able to assert a proprietary or possessory title to them, even if this is derived from an illegal contract.

[86] Accordingly, Casey J held:[51]

> The result of this analysis is that in accordance with settled authority, and in spite of [Crown counsel's] attempt to bring in a wider test of conscience, illegality in the acquisition of the money should not be a reason to exercise discretion under s 199 against the accused. He needs only to assert and rely on his ownership in order to recover it from the Police, who no longer have any right to hold it.

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49 *Euro-Diam Ltd v Bathurst* [1988] 2 All ER 23 (CA).
50 *R v Collis*, above n 47, at 293.
51 At 293.

[87] However, Casey J went on to add "a more fundamental reason for ordering its return". It is this fundamental reason that I consider enables *Collis*, which pre-dated the Act, to be distinguished from the instant case. Casey J said:[52]

> To refuse [to return the money to the defendant] would result in confiscation or forfeiture, as the money would inevitably be paid into the public account. Parliament has seen fit to grant only a limited right of forfeiture under s 32 of the Misuse of Drugs Act, but it does not extend to these circumstances and it is not for the courts to fill in or supplement perceived shortcomings of the criminal law by inflicting penalties beyond those which the legislature has thought appropriate. No doubt the public conscience and indeed the conscience of the court is affronted by the prospect of this accused retaining the benefit of his self-confessed criminal conduct. However, it is essential that in the criminal field particularly, the courts should confine themselves to their role of enforcing the law and treating it as the only relevant expression of public morality. Tempting as it is to step outside this boundary with discretionary powers, the dangers of doing so are obvious and could lead to the erosion of the even handed administration of justice under the law.

[88] The comments by Casey J must be seen in the context of what is now a civil regime whereby the Police can seek forfeiture. Although the inclusion of the Caton Cash in the order would not be on the basis of taint, the Commissioner may use the civil regime to realise it.

[89] Moreover, there was no illegality in the seizure of the Caton Cash or its availability for forfeiture. Unlike *Collis*, forfeiture would have been available at the time of sentencing. The Agreed Summary of Facts concludes with the following:

> An order is sought from the Court for the destruction of all the utensils, containers and items seized in relation to the packaging, sale and supply of the drugs found.
>
> An order is also sought from the Court from the forfeiture of all the moneys seized from the accused.

[90] I accept that it can be inferred that forfeiture was a matter that was simply overlooked at the sentencing which took place some two months after the sentence indication was given. Forfeiture was sought in the usual way by being expressed in the summary of facts. I accept there was an intention on the part of the prosecution to forfeit the sum of cash. An order could have been made. I do not accept Mr Batts'

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52 At 293.

submission that there was a deliberate course of conduct to keep the money "safely tucked away" in the Police trust account.

[91] I understand Mr Batts to also submit, again relying on *Collis*, that the Court does not need to find jurisdiction within the Act itself to exclude property from a forfeiture order.

[92] In my view that submission runs contrary to the Supreme Court decision in *Marwood v Commissioner of Police*. Further, any financial remedy for a breach of s 21 of the NZBORA would require separate proceedings:[53]

> [47] *Baigent's case* shows that there can be a financial remedy for searches in breach of s 21. In that case, there having been no offending and thus no prosecution, the question of exclusion of evidence did not arise.
>
> [48] Despite the dismissal of the charges against him, it would have been open to Mr Marwood (and perhaps Ms King) to have sought compensation for the unlawful search. Given this — and leaving aside any issues of delay or limitation — there is no reason why such claims should not be brought and heard at the same time as the Commissioner's proceedings. The relief obtainable would be confined to a vindication of the rights which were breached and non-economic loss, such as, for instance, loss of privacy and distress. It could not encompass an entitlement to retain benefits derived from significant criminal offending, for such a claim would be contrary to the policy of the CPRA and public policy generally. ...

[93] In this case Ms Slessor has not made a civil claim. I do not consider the Supreme Court was endorsing a set-off in the absence of a separate civil claim.

[94] Section 55(1) governs the jurisdiction of the Court. The Court must make an order if the prerequisites in s 55(1) are met. The property nominated by the Commissioner must be realised to meet the order. That is subject only to s 56. But s 56 is a relief provision, not a remedial provision. Nor can s 59 be called upon. It is a mechanical provision which enables the Court to make ancillary orders to give effect to the Court's own orders. It seems to me (and saying this without deciding the point) that any conduct relied upon by a respondent to support a submission that identified property not be realised to meet the order, would have to meet the very high bar of abuse of process. But that is not argued in this case.

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53 *Marwood v Commissioner of Police*, above n 45, footnote omitted.

[95] Further, the Supreme Court in *Marwood* makes it clear that the relief obtainable in a civil claim for an unlawful search could not encompass an entitlement to retain benefits derived from significant criminal offending.[54]

[96] In this case, in all the circumstances, as set out in the Agreed Summary of Facts for the 2007 offending and the sentencing Judge's remarks the irresistible and only possible inference that can be drawn is that the Caton Cash was derived from the offending in respect of which Ms Slessor was prosecuted at that time.

[97] Under cross-examination Ms Slessor gave what purported to be an innocent explanation for her possession of the Caton Cash. She said that she has been breeding French bulldogs for seven years and the money came from a family friend to help her start her business by purchasing two or three French bulldogs. Accepting Ms Slessor's evidence that she started breeding seven years ago, that would mean she was given $30,000 cash to start the business around seven years before she in fact commenced her breeding operation. That is not a credible explanation. Further, she said the reason Mr Wihongi had the cash in his car was that she was riding back to Auckland on a motorbike and she felt it would be safer for Mr Wihongi to carry the cash in a car. That is not a convincing explanation.

[98] Finally, if the $30,000 cash came from a legitimate source, Ms Slessor would no doubt have sought its return from the Police. She never did so.[55]

[99] Mr Batts further submits that even if the Caton Cash is excluded from the ambit of any profit forfeiture order and returned to Ms Slessor, she is entitled to interest on the Caton Cash from the date of its seizure (23 November 2007) or at least from the date of the conclusion of the previous criminal proceedings (sentencing on 19 May 2011). Applying the Interest on Money Claims Act 2016, Mr Batts calculates accrued interest at $23,341.79 from the date of seizure and $13,723.74 from the date of sentencing.[56]

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54 *Marwood v Commissioner or Police*, above n 45, at [48].

55 In 2020, prior to the present proceeding, the Police indicated that the cash would be returned to Ms Slessor and she accepted that proposal at the time. However, that is quite different from actively seeking its return.

56 Calculated up to the date of this hearing.

[100] The same considerations would apply in respect of any interest earned on the Caton Cash. Ms Slessor would not be entitled to receive that benefit as the interest is based on money that she obtained illegally.[57]

[101] The amount of the Caton Cash as originally seized was $30,090. In 2015 the Police seized $1,312 from the Caton Cash under warrant to pay Ministry of Justice fines that Ms Slessor had accrued. The remaining balance of the Caton Cash is $28,778. I accept that sum together with any accrued interest, and together with the $3,275 Waitakere Cash, can be disposed of in accordance with s 83(1) of the Act.

Orders

[102] I make the following profit forfeiture order against Kirstin Marjory Slessor under s 55 of the Act:

(a) The value of the benefit determined in accordance with s 53 of the Act is $84,000.

(b) The maximum recoverable amount is $84,000.

(c) The following property is to be disposed of in accordance with s 83(1) of the Act:

(i) $28,778 cash seized by the Police from Ms Slessor at Caton Road, Waitakere, Auckland on 23 November 2007 and any accrued interest (Caton Cash);

(ii) $3,275 cash seized by the Police from Ms Slessor's handbag at 15 Waitakere Road, Waitakere, Auckland on 21 April 2020 and any accrued interest (Waitakere Cash).

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[57] In any event, any interest sought under the Interest on Money Claims Act 2016 must be pleaded in a claim in compliance with s 25.

[103] I make an effective control order under s 58 of the Act:

(a) The Caton Cash and the Waitakere Cash is to be treated as though Ms Slessor had interests in it.

Costs

[104] I did not hear from the parties on costs. The Commissioner, as the successful party, is prima facie entitled to costs. If the parties are able to agree costs I direct that a joint memorandum be filed within 25 working days of the date of this judgment. In the event that costs cannot be agreed the Commissioner is to file and serve his application within five working days of the date for the joint memorandum. Ms Slessor is to file and serve her response within five working days of the date of service of the Commissioner's application on her.

[105] Costs memoranda are not to exceed four pages. I will determine costs on the papers.

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Gordon J