**ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES OR IDENTIFYING PARTICULARS OF CONNECTED PERSONS.**

**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TE WHANGANUI-A-TARA ROHE**

**CIV-2020-485-43**
**[2020] NZHC 3132**

| | |
|---|---|
| UNDER | the Criminal Proceeds (Recovery) Act 2009 |
| IN THE MATTER OF | an application under sections 22, 24 and 25 |
| BETWEEN | THE COMMISSIONER, THE NEW ZEALAND POLICE<br>Applicant |
| AND | DAVID CHARLES RAE<br>Respondent |
| AND | SARAH LOUISE RAE<br>First Interested Party |
| | S LIMITED<br>Second Interested Party |
| | R LIMITED<br>Third Interested Party |

| | |
|---|---|
| Hearing: | 20-21 October 2020 |
| Counsel: | A Britton/S B McCusker for the Applicant<br>Y Wang/R Langdana for the Respondent<br>M G Robinson for the United States Government (Non-party) |
| Judgment: | 26 November 2020 |

---

**JUDGMENT OF COOKE J**

---

## Table of Contents



[1] By application dated 19 February 2020 the Commissioner seeks an on notice restraining order pursuant to ss 21, 24 and 25 of the Criminal Proceeds (Recovery) Act 2009 (the Act). The application seeks continuation of restraining orders made by me on a without notice basis on 13 February 2020. The restraint covers certain funds in New Zealand bank accounts totalling more than US$6.5 million.

[2] On 23 June 2020 I discharged the restraint in relation to one of the accounts so restrained having a balance of approximately $50,520.70. It became apparent after service of the proceedings on Mr Rae, the first respondent, that certain important information had not been disclosed to the Court when the without notice orders were made. After hearing from Mr Rae I determined the appropriate course was for the Commissioner's on notice application for restraint to be set down for hearing, and for Mr Rae's complaints in relation to what had not been put before the Court to be addressed at that time. I discharged the restraint over the funds referred to above given what appeared to be material non-disclosure when the without notice application had been made, and to ensure that Mr Rae had the ability to obtain legal representation in New Zealand, particularly in the circumstances of the COVID-19 pandemic. At the time Mr Rae was in Thailand.

[3] The application for restraint on notice is opposed by Mr Rae by notice of opposition dated 26 June 2020. There are two grounds of opposition — that the order should be discharged in its entirety because of the Commissioner's failure to disclose relevant information when the without notice orders were sought, and that the order should be discharged on the basis that the proceedings are an abuse of process.

[4] Voluminous material has been filed. A number of affidavits with extensive exhibits have been provided in support of the application. Affidavits have also been filed by Mr Rae. Cross-examination took place on those affidavits over a period of more than a day and a half, with the deponents being cross-examined by audio visual link from the United States and Thailand given the location of the witnesses, and the implications of COVID-19. The Commissioner's written submissions in support of the application totalled some 84 pages, and Mr Rae's 29 pages.

[5] Much of this material, particularly the cross-examination, has ultimately little relevance to what the Court is called upon to decide, however.

**Factual background**

[6] I begin by setting out the factual background. Whilst detailed information has been put before the Court, for the purposes of a summary I can confine myself to a general overview.

[7] The Commissioner alleges that Mr Rae has engaged in money laundering which is an offence under s 243(2) of the Crimes Act 1961. He alleges that Mr Rae has used entities to "launder" proceeds of fraudulent schemes that took place in the United States, and that the proceeds currently held in the New Zealand bank accounts are proceeds of those frauds.

[8] Similar allegations have also been investigated in the United States. On 19 December 2019 Mr Rae pleaded guilty in the United States District Court for the District of New Jersey to one count of conspiracy to commit international money laundering. On 7 February 2020 he was sentenced to 10 months' imprisonment, and was released on time served.

[9] There are two related fraudulent schemes which the Commissioner alleges were in existence. The first is a durable medical equipment scheme, and the second is a cancer screening scheme. Both seek to take advantage of the Medicare system of medical insurance operating in the United States.

[10] The alleged fraud in relation to durable medical equipment is alleged to have taken advantage of the Medicare insurance benefits for disabled individuals aged 65 and over. Those benefits include cover for medical equipment such as arm, leg, back and neck braces. It is alleged that telemarketers persuaded beneficiaries of this insurance to obtain such equipment irrespective of medical need. The telemarketers would then refer those patients to a doctor, who would write prescriptions for the patients for a flat fee, and without any meaningful patient interaction. Companies would then supply the equipment to the patients, and then submit what the Commissioner says were fraudulently and unlawfully obtained claims to Medicare for payment. The companies that supplied the equipment then paid commissions, referred to as "kickbacks" to the telemarketers. It is alleged that this fraudulent system was set up by the beneficial owners of at least 22 equipment supply companies.

[11] The cancer screening scheme allegedly followed a similar general pattern. Medicare covers genetic cancer screening by clinical laboratories. Again it is alleged that telemarketers, a telemedicine company, and a clinical laboratory that undertakes genetic cancer screening persuaded patients to undertake genetic cancer screening irrespective of need, with claims then being filed with Medicare (or private insurers), and kickbacks then earned.

[12] Part of the allegations in relation to both of these schemes include a contention that both involve a violation of a Federal "anti-kickback statute".[1] I understand this statute to prohibit commissions being earned for such referrals, and that the allegations effectively involve offending in the nature of earning secret commissions. But the allegations go further, certainly in respect of the medical equipment scheme, on the basis that there was no genuine need for the medical service. In other words these were dishonest claims for those medical services.

---

1 Public Health and Welfare Act 42 USC § 1320a, s 7b(b).

[13] It is alleged that the architects, or at least proponents, of these schemes were Mr Aaron Williamsky and Ms Nadia Levit. The majority of the funds in the New Zealand bank accounts are in the name of the second interested party, S Ltd. The Commissioner alleges that Mr Williamsky is the true owner of these funds, and that Mr Rae is only the nominal beneficiary of the accounts in his capacity as a money launderer, albeit he is entitled to some of the proceeds.

[14] It is alleged that Mr Rae is in the business of offering international business structures through vehicles incorporated in various jurisdictions which are then used to assist persons like Mr Williamsky to dissipate funds from their fraudulent activities in order to avoid detection. It is alleged that Mr Rae does this for a fee, representing part of the return from the illegitimate activities.

[15] In particular, in relation to the medical equipment scheme it is alleged that proceeds were moved from a bank account in New Jersey to a bank account in Hong Kong in the name of Cargill Consulting Ltd. It is then alleged that funds from the Cargill account were moved into the New Zealand accounts in the names of the second and third interested parties, "S Ltd" and "R Ltd". Similarly funds in relation to the cancer screening scheme in the name of a company called Clinical Lab Solutions LLC were also transferred into the S Ltd account.

[16] On 9 April 2019 Mr Rae was arrested and indicted in the state of New Jersey on two counts of money laundering. He was also indicted in the state of South Carolina for money laundering. On 19 December 2019 Mr Rae and the United States Department of Justice entered a formal plea agreement by way of counter-signed letter. Under the terms of that plea agreement:

(a) Mr Rae agreed to plead guilty to two counts of money laundering in the New Jersey indictment, and the one count of money laundering in the South Carolina indictment.

(b) In terms of forfeiture Mr Rae agreed to pay US$1,775,000 in relation to the indictments, and to forfeit all of his right, title, or interest in

property referred to in a schedule. This included the proceeds in the ANZ S Ltd account.

(c) Mr Rae agreed that he would not file any claim in any forfeiture proceedings in respect of the property in the schedule.

(d) The Department of Justice for New Jersey agreed not to initiate any further criminal charges against Mr Rae for his role in international money laundering.

[17] The plea agreement did not address the R Ltd accounts. The evidence discloses that there was a proposal that the agreement would cover the R Ltd accounts, but it was agreed that it would not do so.

[18] It is also common ground that Mr Rae cooperated with the United States authorities, including by providing information at interviews, and that the plea agreement recognised the cooperation he had given. These factors are also reflected in the sentence imposed after Mr Rae entered guilty pleas, which effectively involved his release on time served.

**Grounds for restraint**

[19] I deal first with the requirements set out in the Act for obtaining a restraining order on notice. There are two preliminary points of significance.

[20] First, it is possible to obtain restraint orders in support of foreign forfeiture orders under ss 140–147 of the Act. That applies when a foreign court has made a forfeiture order, and there is a request for New Zealand assistance under the Mutual Assistance in Criminal Matters Act 1992. That is potentially relevant here because the United States Court for the District of New Jersey had made what is in substance a profit forfeiture order for an amount of US$1,775,000. But the Commissioner here has not proceeded in accordance with those provisions. What he has sought is restraining orders in relation to an anticipated forfeiture application for New Zealand

offending. That has significance in the present case in terms of Mr Rae's opposition on the grounds of abuse of process, which I address below.[2]

[21] Secondly Mr Rae's opposition to the restraint application does not include a challenge or opposition to the establishment of the requirements for a restraint order on notice. Rather the opposition is based on the contention that any restraint orders should be discharged for the reasons I have summarised. Ms Wang explained that this stance had been taken for essentially for strategic reasons, principally because of the low threshold that needs to be established in relation to the allegations of offending before the Court can make a restraint order. Having said that, Mr Rae does not consent to the orders so it is still necessary for the Commissioner to satisfy the Court that the statutory requirements are met.

*The statutory requirements*

[22] The Commissioner's application relies on both ss 24 and 25 of the Act. Section 25 provides:

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

---

2 See [70]–[78] below.

[23] Significant criminal activity is defined in s 6, and by way of summary involves offences punishable by a maximum term of five years or more, or an offence where property, proceeds or benefits of $30,000 or more have been acquired or derived. The application here is only in relation to particular property, being the funds in the New Zealand bank accounts I have referred to. Section 24 involves similar requirements for an order in relation to specific property if that property is "tainted property" as defined.[3]

[24] The relevant requirements for making orders under s 25 were summarised by Clark J in *Commissioner of Police v Smith*:[4]

> [10] The threshold for making an order under s 25 has been described as "relatively low".[5] That is because the court is not required to make a finding that the respondent has unlawfully benefited from significant criminal activity. As the Court of Appeal explained in *Vincent v Commissioner of Police* restraining orders are often sought in situations of urgency.[6] Restraining orders are temporary orders to give the police time to gather further evidence leading to possible forfeiture of property. Restraining orders are made where the court has reasonable grounds for the requisite statutory belief.[7] The onus on the Commissioner is not one of proof but to adduce a sufficient evidential basis to enable the court to be satisfied it has reasonable grounds for the requisite belief. Thus, an application for a restraining order may proceed justifiably on an evidentiary basis that in other contexts would be regarded as non-compliant with requirements of the Evidence Act 2006 as to admissibility.[8]

[25] The last point is a significant one. At the restraint stage the Commissioner is not expected to adduce evidence in relation to the underlying allegations meeting evidentiary standards normally relevant to making those allegations, for example the rules in relation to hearsay. Rather the evidence is directed to a reasonable belief, and that belief can arise from other than admissible evidence. In the present case the primary evidence of the alleged underlying offending has been provided in the affidavits of FBI Special Agent Marc VanZetta, although there is also relevant evidence in other affidavits filed.

---

3 Criminal Proceeds (Recovery) Act 2009, s 5, definition of "tainted property".

4 *Commissioner of Police v Smith* [2018] NZHC 10.

5 See for example the cases cited at Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Thomson Reuters) at [CP25.02].

6 *Vincent v Commissioner of Police* [2013] NZCA 412 at [47].

7 That is, in the case of applications under s 24 that the property is "tainted" property and in the case of applications under s 25 that the respondent had unlawfully benefitted from significant criminal activity.

8 *Vincent v Commissioner of Police*, above n 6, at [45]–[48].

*The alleged offending*

[26] The relevant offending alleged by the Commissioner is money laundering under s 243 of the Crimes Act 1961. That section provides:

> **243 Money laundering**
>
> (1) For the purposes of this section and sections 243A, 244 and 245,—
>
> **act** includes an omission
>
> **conceal**, in relation to property, means to conceal or disguise the property; and includes, without limitation,—
>
> (a) to convert the property from one form to another:
>
> (b) to conceal or disguise the nature, source, location, disposition, or ownership of the property or of any interest in the property
>
> **deal with**, in relation to property, means to deal with the property in any manner and by any means; and includes, without limitation,—
>
> (a) to dispose of the property, whether by way of sale, purchase, gift, or otherwise:
>
> (b) to transfer possession of the property:
>
> (c) to bring the property into New Zealand:
>
> (d) to remove the property from New Zealand
>
> **interest**, in relation to property, means—
>
> (a) a legal or equitable estate or interest in the property; or
>
> (b) a right, power, or privilege in connection with the property
>
> **offence** means an offence (or any offence described as a crime) that is punishable under New Zealand law, including any act, wherever committed, that would be an offence in New Zealand if committed in New Zealand
>
> **proceeds**, in relation to an offence, means any property that is derived or realised, directly or indirectly, by any person from the commission of the offence
>
> **property** means real or personal property of any description, whether situated in New Zealand or elsewhere and whether tangible or intangible; and includes an interest in any such real or personal property.
>
> (2) Subject to sections 244 and 245, every one is liable to imprisonment for a term not exceeding 7 years who, in respect of any property that is the proceeds of an offence, engages in a money laundering transaction,

knowing or believing that all or part of the property is the proceeds of an offence, or being reckless as to whether or not the property is the proceeds of an offence.

(3) Subject to sections 244 and 245, every one is liable to imprisonment for a term not exceeding 5 years who obtains or has in his or her possession any property (being property that is the proceeds of an offence committed by another person)—

(a) with intent to engage in a money laundering transaction in respect of that property; and

(b) knowing or believing that all or part of the property is the proceeds of an offence, or being reckless as to whether or not the property is the proceeds of an offence.

(4) For the purposes of this section, a person engages in a money laundering transaction if, in concealing any property or by enabling any person to conceal any property, that person—

(a) deals with that property; or

(b) assists any other person, whether directly or indirectly, to deal with that property.

(4A) Despite anything in subsection (4), the prosecution is not required to prove that the defendant had an intent to—

(a) conceal any property; or

(b) enable any person to conceal any property.

(5) In any prosecution for an offence against subsection (2) or subsection (3),—

(a) it is not necessary for the prosecution to prove that the defendant knew or believed that the property was the proceeds of a particular offence or a particular class of offence:

(b) it is no defence that the defendant believed any property to be the proceeds of a particular offence when in fact the property was the proceeds of another offence.

(6) Nothing in this section or in sections 244 or 245 limits or restricts the operation of any other provision of this Act or any other enactment.

(7) To avoid doubt, for the purposes of the definition of offence in subsection (1), New Zealand law includes, but is not limited to, the Misuse of Drugs Act 1975.

[27] Section 245 also relevantly provides:

**245 Application of section 243 to acts outside New Zealand**

(1) Section 243 applies to an act that has occurred outside New Zealand and that is alleged to constitute an offence resulting in proceeds only if—

(a) the act was an offence under the law of the place where and when it occurred; or

(b) it is an act to which section 7 or 7A of this Act applies; or

(c) an enactment provides that the act is an offence in New Zealand, and no additional requirement exists for the act to be an offence in the place where and when it occurred.

(2) If a person is charged with an offence under section 243 and subsection (1)(a) applies, it is to be presumed, unless that person puts the matter at issue, that the act was an offence under the law of the place where and when it occurred.

[28] Contrary to the Commissioner's written submissions, and the way his case was originally presented, the "offence" which has generated the proceeds being referred to in s 243(2) is not an offence under foreign law. The offence referred to in s 243(2) is defined in s 243(1) to be an offence under New Zealand law, even though it may have been committed overseas. What s 245 then adds is effectively a requirement for double criminality — where the offending has taken place overseas it must also be an offence in that place under s 245(1)(a) unless subsections (b) or (c) apply.

[29] By way of summary the following requirements arise in the present case:

(a) There must have been conduct that is an offence under New Zealand law.

(b) The conduct must also have been an offence where it was committed.

(c) There must be property that are proceeds of that offence.

(d) The defendant must know, believe or be reckless as to whether the property is the proceeds of the offence.

(e) The person must deal, or assist a person dealing with that property by concealing, or enabling a person to conceal it as defined.

[30] For the purposes of the restraining order, the Commissioner needs to demonstrate reasonable grounds to believe that this offence has been committed.

*Are there reasonable grounds to believe the offence was committed?*

[31] The fact that the Commissioner presented his case based on offences having being committed against the laws of the United States is significant. There are material differences between the health systems operated in each country. As part of the laws of the United States there is a particular statute prohibiting "kickbacks".[9] That might be seen to be a particular feature of that regime. The violation of the anti-kickback laws appears to have been the central feature of the allegations made in the United States. It is possible that this conduct would not amount to an offence under New Zealand law.

[32] After the point was raised at the hearing Mr Britton accepted that the relevant offending generating the proceeds must be offending under New Zealand law. He then identified s 241 of the Crimes Act — the offence of obtaining or causing loss by deception — as the relevant New Zealand offending. I accept that the offence under s 241(a) is relevant to the conduct the Commissioner has raised. He also referred to s 310, although that provision itself requires conduct which would be an offence if committed in New Zealand. There may be other relevant New Zealand offences, and not only under the Crimes Act. Although Mr Britton did not refer to it, there are offences under the Secret Commissions Act 1910 that may have relevance.[10] They may be the closest New Zealand equivalent to the anti-kickback laws at the centre of the allegations in the United States.

[33] On the basis of the evidence that has been adduced I am satisfied that there are reasonable grounds to believe that conduct that is an offence under New Zealand law has taken place in relation to the durable medical equipment scheme. Even putting to one side the question of secret commissions, it seems to me that the evidence of the conduct involves patients being prescribed and supplied medical equipment when it was not genuinely needed, which would involve obtaining financial advantage by

---

9 See [12] above.

10 For example, Secret Commissions Act 1910, ss 10 and 13, maximum penalty seven years' imprisonment.

deception. The evidence currently before the Court on this offending is not extensive, and largely takes the form of allegations rather than the evidence supporting them. But as the authorities say the threshold must be addressed in light of the restraint orders being designed as a kind of holding pattern in relation to the proceeds in question.[11] Applying that approach I am satisfied that there are reasonable grounds to believe that the offending has taken place.

[34] The allegations in relation to the cancer screening scheme are less clear cut, as it is not quite so clear that the cancer screening services were not genuinely needed by the patient. The allegations are even more clearly based on the anti-kickback regime. But I nevertheless accept that the standard required by s 25 of the Act has been met. At its heart the allegations involve a system of setting up telemarketers, doctor referrals, and a provider to take advantage of Medicare's funding of this medical service. The system that has been established, and then the elaborate mechanisms for withdrawing the proceeds from the jurisdiction, satisfy me that it was intended to generate financial benefits derived from cancer screening services that were known not to be properly available under Medicare's cover.

[35] In addition I am satisfied that the requirement of s 245(1)(a) of the Crimes Act is satisfied. In particular I accept that the conduct in question is an offence under the law of a place where and when it occurred — namely in the United States. This arises from the anti-kickback provisions that were the focus of the Commissioner's application.

[36] For these reasons I accept that a qualifying offence under New Zealand law in relation to both schemes has been established to the required statutory threshold.

[37] In terms of the remaining elements of the offence of money laundering under s 243 of the Crimes Act I also conclude they are also established to the standard required. In particular there are reasonable grounds to believe that the funds that are now in the New Zealand bank accounts are proceeds of the alleged offending, and that Mr Rae knew, or was reckless as to whether the proceeds were proceeds from such

---

[11] See *Yan v Commissioner of Police* [2015] NZCA 576, [2016] 2 NZLR 593 at [7]; and *Vincent v Commissioner of Police*, above n 6, at [47].

offending, and that he dealt with the funds to enable the participants in this scheme to conceal those funds.

[38] Mr Rae's evidence was that he was involved in international business, which included use of entities incorporated in different countries — here entities operated in Hong Kong and New Zealand — for such activities. He said that this involved legitimate international business. For example he said they were involved in the business of consulting and that the funds in the accounts were the product of those activities.

[39] For the purpose of the standard required under ss 24 and 25 of the Act, I do not accept his explanation on the basis of the evidence received. To the extent that documentation is in existence that suggests legitimate business, such as agreements for consulting services, it is notable that there is no real evidence of what the commercial activities or consulting services that generated the relevant funds actually was. It would be a reasonably straightforward matter to identify the activities that generated the kinds of sums in question had they taken place. Moreover there is little explanation for the use of entities incorporated in different countries, and the movement of funds between jurisdictions other than for the purpose of concealing the dissipation of funds. The very fact that there are entities in New Zealand operated by trust officers holding significant sums demonstrates the point. There is no suggestion that there is any commercial or business activity taking place in New Zealand, and I do not understand Mr Rae or any of the other protagonists have any real connection with New Zealand. Yet significant sums are held in New Zealand bank accounts which in turn received funds from entities incorporated or conducting business in other countries, including Hong Kong. It is also relevant to take into account that Mr Rae has pleaded guilty to charges of money laundering in the United States District Court for New Jersey. In light of the general character of the conduct I have described, a strong basis for the belief that this involved money laundering in New Zealand exists.

[40] For these reasons I am satisfied that the statutory pre-requisites for an on notice restraining order under s 25 are satisfied.

[41] In the alternative the Commissioner contended that the funds can be restrained under s 24 on the basis that the funds in the accounts are tainted property. Tainted property is defined in s 5 in the Act to include property "wholly or in part" resulting from significant criminal activity. It has been held that "even modest contributions to an asset is sufficient to taint the asset".[12] For this reasons, even if some of the funds in the account were not the proceeds of the alleged offending, or themselves funds which have been laundered, the intermixing with funds that are of that quality means the funds in totality are tainted property. For this reason, therefore, the requirements for orders under s 24 are satisfied as well as for orders under s 25.

## Material non-disclosure

[42] As indicated one of the two key grounds of the position advanced by Mr Rae to the on notice restraining orders is that the Commissioner failed to comply with his obligation to provide full disclosure when applying for restraining orders on a without notice basis. On that basis Mr Rae contends that the current restraining orders should be discharged.

### *The obligation*

[43] Applications under the Act proceed by way of a civil proceeding under Part 19 of the High Court Rules 2016 (the Rules).[13] Rule 19.10(e) provides that r 7.23 of the Rules applies to Part 19 proceedings. Rule 7.23 provides:

> **7.23 Application without notice**
>
> (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.
>
> (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:

---

12 *Commissioner of Police v Cheah* [2018] NZHC 2825 at [26]; see also *Commissioner of Police v Yim* [2019] NZHC 1681 at [38].

13 See r 19.2(r).

(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.

[44] In terms of the pre-requisites set out in r 7.23(2)(iv), it is relevant that s 22 of the Act provides:

**22 Application for restraining order without notice**

(1) A court that receives an application for a restraining order may, on the request of the applicant, consider the application without notice being given to any or all of the persons mentioned in section 21(1)(a) if the court is satisfied that there is a risk of the proposed restrained property being destroyed, disposed of, altered, or concealed if notice were given to the person or those persons.

> (2) If an application is made for a restraining order without notice, the court must, so far as it is practicable and consistent with the interests of justice, ensure that the application is dealt with speedily.
>
> (3) Any provisions of this subpart that relate to restraining orders applied for on notice apply, with any necessary modifications, to restraining orders applied for without notice.

[45] Section 22 contemplates the application being made without notice, and accordingly in accordance with r 7.23 of the Rules. Form 2 of the Criminal Proceeds (Recovery) Regulations 2009 is a form for making a without notice application, and it refers to a certification that the application complies with the Rules. Form G32 of the Rules more explicitly requires the party, or a solicitor, to certify that the requirements of r 7.23(2) have been met.[14] But form 2 is to the same effect as it is a certification that the requirements of the Rules, and accordingly that r 7.23 have been complied with. Certification is more than merely a technicality, and is a mandatory pre-condition.[15] As indicated by the authors of *McGechan on Procedure* "the certificate emphasises the importance of accuracy and propriety in an application without notice because, by definition, an application without notice is a denial of the natural justice upon which all litigation is fundamentally intended to rest".[16]

[46] The relevant obligation on the Commissioner is spelled out in r 7.23(2)(b). It can be described as a "duty of candour", but the substance of the obligation goes a little further than that phrase suggests. The obligation requires the applicant to make "reasonable enquiries" to ensure that all relevant information is placed before the Court. The "relevant information" not only contemplates any defence to the application a party might rely on, but also any facts that would support the position of that party. This is a long standing principle.[17] As Hughes LJ said in *Re Stanford International Bank* in relation to the equivalent proceeds of crime provisions operating in England and Wales:[18]

---

14 The Criminal Proceeds (Recovery) Regulations 2009, r 4(1)(b) provides that form 2 should be used for a without notice application, and form 2 more simply provides that "as required by r 19.10(1)(e) of the High Court Rules 2016 … I certify this application complies with the Rules".

15 *Craig v Craig* [2019] NZHC 414, (2019) 4 NZTR 29-030 at [5].

16 Andrew Beck and others *McGechan on Procedure* (looseleaf ed, Thomson Reuters, updated to 2 October 2020) at [HR 7.23.01].

17 See *United People's Organisation World Wide) Inc v Rakino Farms Ltd (No 1)* [1964] NZLR 737 (HC).

18 *Re Stanford International Bank (in liq)* [2010] EWCA Civ 137, [2011] CH 33.

> [191] … In effect a prosecutor seeking an *ex-parte order* must put on his defence hat and ask himself what, if he were representing the defendant or third party with the relevant interests, he would be saying to the Judge, and, having answered that question, that is what he must tell the Judge.

[47] There are features of the regime established by the Act that are different from the legislation in England and Wales. Under s 39(1) a without notice restraining order only lasts for seven days unless a with notice application is made. There are then other provisions that ensure that the applications are dealt with promptly.[19] What this means is that any without notice orders are soon superseded by an application with notice that must be determined promptly. That is not the case in England and Wales — there the approach is that a respondent can apply to discharge a without notice order. But the approach described by Hughes LJ nevertheless seems to me to be appropriate, as it corresponds to what the New Zealand rule provides.

*Breach of the obligation*

[48] The application here was supported by two affidavits, one from Detective Sergeant Alex Macdonald dated 7 February 2020, and one from Mr VanZetta dated 5 February 2020. The application itself was preceded by an earlier application dated 11 February 2020 to allow the affidavits to be filed to refer to information obtained from a suspicious activity report provided under s 40 of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. The Commissioner sought, and was granted, permission under s 47 of that Act to put forward information derived from that report.

[49] The primary evidence outlining the existence of conduct generating proceeds warranting the making of orders under ss 24 and 25 of the Act was set out in Mr VanZetta's affidavit. That affidavit outlined the nature of the alleged fraudulent schemes, the nature of the alleged money laundering activities in association with the schemes, and described that Mr Rae had been indicted in the United States District of New Jersey. A copy of the indictment itself had been provided in a memorandum of counsel. Further relevant information was set out in Mr Macdonald's affidavit. In particular he explained that Mr VanZetta had advised him on 3 January 2020 that

---

[19] See Criminal Proceeds (Recovery) Act 2009, s 39(3) and (4). See *Yan v Commissioner of Police*, above n 11, at [142] per Asher J (dissenting, but not on this point).

Mr Rae had entered a guilty plea in relation to his indictments and was to be sentenced in February 2020, that his likely sentence would normally be between 57 and 71 months' imprisonment "however with his co-operation to the investigation the Judge may sentence him to less than this at his discretion".

[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:

(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).

(b) That the forfeiture so agreed, and then ordered, did not include any funds in the R Ltd accounts.

(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.

[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.

[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.

*Consequences of breach*

[53] A question then emerges as to what the consequences should be if it is established that the Commissioner has obtained an order without notice in circumstances where there has been a failure to comply with the requirements.

[54] In advancing submissions for Mr Rae, Ms Wang referred to the analogous situation where the Court grants freezing notice orders on a without notice application. Ms Wang accepted that the Court would discharge such orders in what has been described as "egregious cases".[20] 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.[21] 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.[22] 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".[23]

[55] 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:[24]

> [34] While proceedings under the Act are civil proceedings, they are, because of these public policy factors, distinguishable from ordinary

---

20 See *Allen v Commissioner of Inland Revenue* [2004] 21 NZTC 17, 718 (CA) at [93].
21 See *Zhou v Chi* [2018] NZHC 1298 at [72]–[73]; and *Haven Insurance Ltd v Lombard* [2017] NZHC 1336 at [25].
22 With reference to *Solicitor-General v Alice* [2007] 2 NZLR 783 (HC) at [48].
23 *Jennings v Crown Prosecution Service* [2005] EWCA Civ 746, [2006] 1 WLR 182 at [56].
24 *Yan v Commissioner of Police*, above n 11, per French and Simon France JJ.

> interlocutory measures in civil proceedings such as interim injunction and freezing order applications.
>
> …
>
> [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.[25] 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.[26] 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

---

25 At [57].

26 See *Allen v Commissioner of Inland Revenue*, above n 20, at [93]; and *Mudajaya Corporation Berhad v Keng* [2019] NZHC 1436 at [24].

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.

[58] I approach the present case on that basis.

*Was the breach here egregious?*

[59] A number of affidavits were filed on behalf of the Commissioner, and cross-examination took place on those affidavits. The short point is that, whilst I have concerns about the way in which the Commissioner approached the application, I am satisfied that he did not act in bad faith. The failure to meet the duty of candour arising with the without notice application was the consequence of a lapse of standards and errors of judgment on behalf of those involved, but not bad faith.

[60] First, I am satisfied from the evidence that has been filed, including the evidence of Mr Macdonald and Detective Senior Sergeant Brent Murray (the manager of the Commissioner's Central Asset Recovery Unit), that the Commissioner was unaware of the matters that were not properly disclosed, and misdescribed. In particular they were 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.

[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.

[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.

[63] Given the above findings, I am satisfied that 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.

[64] In reaching these conclusions I nevertheless wish to identify matters that seem to me to be of concern in relation to the approach the Commissioner took which may suggest a more systemic issue. When he gave evidence Mr Macdonald explained that whilst he was aware of the relevant obligation it had not been discussed with the Crown solicitor when the application was formulated. He also explained that he had been involved in approximately 10 without notice applications to the High Court, but said that he did not think he had ever had a conversation with a Crown solicitor or otherwise about the duty when those applications were made. Similarly when Mr Murray was cross-examined and asked why the Commissioner had not asked the United States authorities for further information he responded that that was not his job. When contemporaneous documents were put to him suggesting it was apparent there was more involved — for example references to Mr Rae cooperating with the United States authorities — he said that was a matter for the United States and Mr Rae. In effect his evidence was the Commissioner had made the relevant enquiries of the United States authorities which had resulted in the evidence that provided a basis for the application, and that they saw no need to go any further.

[65] What this suggests is the potential for a general lack of true understanding of the extent of the Commissioner's obligations around without notice applications under the Act. It is not simply a matter of providing adverse material if the Commissioner becomes aware of it. The Commissioner is obliged to make reasonable inquiries to ensure that any material that may be advanced by the other party is fairly placed before the Court.[27] The answers by the Commissioner's witnesses, when pressed, did not suggest that this obligation is taken sufficiently seriously.

[66] Many without notice applications are made in connection with alleged drug dealing operations, where the Commissioner's application in the civil jurisdiction will coincide with steps taken in potential criminal proceedings. Mr Murray estimated that approximately 80 per cent of property restrained under the provisions was drug related. These more routine applications might not be thought to so readily involve potentially exculpatory material, or material that respondents may wish to put forward. But it is a matter of observation that the Commissioner's without notice applications in such cases can sometimes appear very broad in relation to the property sought to be restrained. So it may be that even in those cases insufficient care is being taken to ensure the duty is being complied with.

**Abuse of process**

[67] Mr Rae's second ground of opposition is that the continuation of the restraint orders would amount to an abuse of process. That argument is advanced on four inter-related grounds:

(a) That the forfeiture proceedings are being advanced for the collateral purpose of recovery and repatriation of additional funds on behalf of the United States authorities.

(b) That the New Zealand proceedings relate to the same underlying criminality which has been the subject of a full and final settlement agreement, including the quantum of forfeiture, which has received judicial approval in the United States.

---

[27] See *Brink's Mat Ltd v Elcombe* [1988] 3 All ER 188 (CA).

(c) The New Zealand proceedings have, and will need to rely on, evidence from the United States which is inconsistent with the position taken by the United States authorities with respect to Mr Rae.

(d) The pursuit of forfeiture for alleged domestic criminality in New Zealand, rather than enforcing the foreign restraint order, is improper in light of the above factors.

*The arguments advanced*

[68] Ms Wang relied on a number of authorities in advancing these arguments. In terms of collateral purpose identified in [67](a) above she referred to *Financial Markets Authority v Hotchin* where the Court confirmed that a claim could be struck out as an abuse of process where it was shown that a process ancillary to a principle claim for relief had been used to effect an object not within the scope of that process, but rather to seek a collateral advantage.[28] In relation to the factor in [67](b) above she relied on issue estoppel,[29] contractual estoppel[30] and the principle in *Henderson v Henderson*.[31] In relation to the factor in [67](c) above she relied on the more limited scope of the allegations accepted by the United States authorities (and the United States Court) in the context of accepting that Mr Rae's disclosures at interview were truthful and reliable. And in relation to the factor in [67](d) she referred to the observations of the Court in *Commissioner of Police v Rodriguez* that the statutory language in relation to foreign forfeiture is permissive, and other recovery mechanisms can apply.[32] The more appropriate remedy in this case was the more confined interference with property implemented by the United States Courts, where the alleged frauds originated.

[69] Although these were advanced as separate factors, they are all based on similar considerations, and I intend to address the arguments on that basis. As Ms Wang said in her written submissions:

---

28 *Financial Markets Authority v Hotchin* [2011] 3 NZLR 469 (HC) at [140]; and *Ullrich v Ullrich* (1996) 10 PRNZ 253 (HC) at 255–256.

29 *van Heeren v Kidd* [2016] NZCA 401, [2017] 3 NZLR 141.

30 *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567.

31 *Henderson v Henderson* [1843] 67 ER 313 (Ch) at 414–415. See also *Beattie v Premier Events Group Ltd* [2014] NZCA 184, [2015] NZAR 1413 at [43].

32 *Commissioner of Police v Rodriguez* [2019] NZHC 3265 at [49]–[50].

> A clear abuse of process is the use of proceedings for a collateral purpose. As noted in the Factor A analysis above, the Commissioner's proceedings are initiated and continued for the collateral purpose of repatriating funds (at least in the [S Ltd] accounts) back to the United States. This allows the US Authorities to circumvent the Plea and Forfeiture Agreement with Mr Rae and casts the Commissioner in the role of the party who is potentially liable for procuring a breach of contract. The use of the domestic [significant criminal activity] pathway under the [Act] under Factor D allows the Commissioner to reach for more funds than those specified in the US forfeiture order.

*Assessment*

[70] In my view Mr Rae's arguments in this respect cannot succeed for two related reasons.

[71] First there is nothing about the plea and forfeiture agreement, and the related orders of the United States District Court, that prevents criminal or civil proceedings in New Zealand in relation to the same matters. Indeed the agreement recorded as follows:

> This agreement is limited to the United States Attorney's Office for the District of New Jersey and cannot bind other federal, state, or local authorities. However, this Office will bring this agreement to the attention of other prosecuting offices, if requested to do so.
>
> This agreement was reached without regard to any civil or administrative matters that may be pending or commenced in the future against RAE. This agreement does not prohibit the United States, any agency thereof (including the Internal Revenue Service and Immigration and Customs Enforcement) or any third party from initiating or prosecuting any civil or administrative proceeding against RAE.

[72] There is disagreement as to whether Mr Rae was expressly told by one of the United States attorneys that the agreement could not bind New Zealand authorities, or control what actions New Zealand might take, before the agreement was entered. That is what Ms Ward testified, but Mr Rae disputed that. Whether that was said or not is not ultimately material as the agreement is plain on its face, and does not purport to prevent any action by New Zealand authorities in New Zealand in relation to the same matters.

[73] Mr Rae may be able to argue that the steps that have been taken by the United States authorities, including by swearing substantial affidavits in relation to these proceedings, is not fully consistent with the spirit of the plea agreement even if there

may be no inconsistency with its terms. The Commissioner's proceedings before the New Zealand courts to seek forfeiture orders — which will involve proceedings to establish the underlying illegality of the alleged fraudulent schemes in the United States — will no doubt require substantial evidence from the United States. The more relaxed rules concerning admissibility do not apply at the forfeiture order stage. The Commissioner may need to establish that the schemes were fraudulent as part of establishing the offending under s 243 of the Crimes Act, albeit only to the required civil standard. It seems inevitable the Commissioner will need substantial assistance from the United States authorities.

[74] But whether the provision of that assistance, including assistance by way of providing evidence, is fully consistent with the spirit of the plea and forfeiture agreement is not something that is relevant to the New Zealand Court. If Mr Rae says that the United States Attorney's office for the District of New Jersey cannot properly provide that kind of assistance to the Commissioner, that is something for him to raise in New Jersey. That is not something to be controlled by the New Zealand Court.

[75] This then leads to the second point, which is that the Commissioner has determined to advance his own case in this proceeding. The Commissioner has decided not to simply enforce the foreign forfeiture order. He has made his own contentions that offences under s 243 of the Crimes Act have been committed as a consequence of conduct overseas that is regarded as an offence under New Zealand law. He takes on the additional burden on proving that offending before the New Zealand Court in these proceedings. The amount to be forfeit if he succeeds is then determined by the Act. It is an independent process from the one that has taken place in the United States. It follows there is no abuse of process in the Commissioner advancing that argument, rather than enforcing the United States forfeiture order. That is exactly what the Act contemplates.

[76] Mr Rae contended that the Commissioner was effectively acting on behalf of the United States authorities, and in particular that any forfeited funds would be repatriated to the United States. I accept the position might be different if the Commissioner was acting as the agent of the United States government. I do not accept that he is. It is true that the United States authorities appear to have this

objective in mind, but I do not accept that there has been any agreement or arrangement to that effect. If the forfeiture proceedings the Commissioner brings are ultimately successful, the Act requires that the relevant proceeds be forfeit to the Crown. If an assets forfeiture order is made under s 50, the property vests in the Crown absolutely and is in the custody and control of the Official Assignee.[33] If a profit forfeiture is made the order amounts to a debt recoverable by the Crown under s 55(4). Section 83 then prescribes how the priorities are to be followed by the Official Assignee after disposal of the property subject to the order. This includes payment of any amounts ordered by way of reparation under s 79 of the Summary Proceedings Act 1957. The Act does not specify, for example, that any amounts will be paid by the Crown to the alleged victims of the underlying offending in the United States.

[77] That is also so in relation to the registration of a foreign forfeiture order. Section 144 simply provides the amount so restrained vests in the Crown absolutely under the custody and control of the Official Assignee. So it would appear that any decision to repatriate monies to the United States is not regulated by the Act. That would appear to be a governmental decision only. Mr Britton confirmed that this was the Commissioner's position.

[78] In any event I accept the evidence given on behalf of the Commissioner that no arrangement has been made to repatriate any sums to the United States authorities. For this reason I do not accept Mr Rae's argument that the Commissioner is acting as the effective agent of the United States authorities.

[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.

---

[33] Criminal Proceeds (Recovery) Act 2009, s 50(3).

[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.

[81] There is, however, a final complication.

*Service on parties*

[82] During the course of the hearing I raised an issue with Mr Britton and Mr McCusker concerning the service of the proceedings as required by the Act. Section 21 of the Act provides:

> **21 Application for restraining order on notice**
>
> (1) An applicant for a restraining order must,—
>
> (a) so far as is practicable, serve a copy of the application on any person who, to the knowledge of the applicant, has an interest in the proposed restrained property (including, if applicable, the respondent); and
>
> (b) serve a copy of the application on the Official Assignee.
>
> (2) The court hearing an application for a restraining order may, at any time before the application is finally determined, direct the applicant to serve a copy of the application on a specified person or class of persons, in the manner and within the time that the court thinks fit.

[83] It had earlier been identified that the first interested party, Mrs Rae, needed to be served with these proceedings. At the hearing Mr Britton confirmed that she had not yet been served in accordance with the earlier directions of the Court. Following the conclusion of the hearing an affidavit has subsequently been filed indicating that Mrs Rae has now been served.

[84] More troubling is the Commissioner's argument that Mr Rae was only the notional owner of the restrained funds, and the true beneficial owner of them is Mr Williamsky. When I asked whether Mr Williamsky had been served, or given notice of the application, Mr Britton indicated that it had not occurred to the Commissioner that this was necessary.

[85] It seems to me that in those circumstances the requirements of s 21 have not been satisfied. The obligation in s 21 is mandatory. On the Commissioner's case before this Court it has not been satisfied. It seems to me that the Court should not finally determine the with notice restraining orders until the obligation under s 21 has fully been addressed.

[86] For these reasons, whilst I accept that the grounds for a with notice order are established, and I dismiss Mr Rae's grounds of opposition, I do not yet make the with notice restraining orders. The appropriate outcome given the above conclusions is for the without notice restraint to continue, the with notice application adjourned pending service on the parties required to be served under s 21, and any argument advanced by them has been considered.

**Costs**

[87] The Commissioner would normally be entitled to an award of costs given the grounds of opposition advanced by Mr Rae have been rejected. But, as previously indicated, the Commissioner's earlier failure to meet his duty when making a without notice application may properly be addressed by other means, including through a costs award.

[88] Ms Wang submitted that, even if the Commissioner's application was successful, Mr Rae should be awarded costs on an indemnity basis under r 14.6 of the Rules. She relied on *Commissioner of Inland Revenue v Dymock* where the Court ordered indemnity costs when the Commissioner of Inland Revenue had applied for freezing orders without notice but it failed to disclose all relevant material to the Court.[34] For his part Mr Britton accepted that the Court could take into account the failure to meet the duty when deciding what costs award should be made, but he argued that it did not reach the point where an indemnity award of costs against the Commissioner was appropriate. He referred to the decision of the English and Welsh High Court in *National Crime Agency v Simkus* where the Court had referred to the

---

[34] *Commissioner of Inland Revenue v Dymock* [2013] NZHC 3346.

ability to reduce the costs award in favour of the National Crime Agency in light of similar factors.[35]

[89] I do not see this case is in the same category as *Commissioner of Inland Revenue v Dymock*. There the Court discharged freezing orders that had been granted, and noted that there were a number of aspects about the without notice application that were inappropriate. The Court described them as "significant, avoidable and troubling".[36] Such conduct would be within the concepts referred to in r 14.6(4)(a) of the Rules. Whilst the Commissioner's failure here is significant, it was not deliberate, and I have concluded that the grounds for restraint orders exist in any event. I accept, however, that the Court should take into account the Commissioner's breach of duty in deciding what costs award should be made. In effect, what has now been put before the Court is a corrected picture. It was always necessary for the Commissioner to come back to the Court and correct this misleading impression given about those circumstances. He also needed to explain the breach of his obligation. In other words the Commissioner was obliged to incur the cost of this application in any event because of his earlier breach. Whilst Mr Rae's opposition meant that the cost of the application became more extensive, that can also be seen as a consequence of the Commissioner's earlier breach. For these reasons the appropriate course is not to award the Commissioner any costs of this application.

[90] On the other hand, it does not seem to be to be appropriate to award Mr Rae costs. He has failed with the arguments that he has pursued. For these reasons there will be no award of costs in the Commissioner's favour, and no award of costs in Mr Rae's favour. Costs will lie where they fall.

**Conclusion and formal orders**

[91] For the reasons outlined above I make the following formal orders:

(a) Mr Rae's opposition to the with notice restraining order is dismissed.

---

35 *National Crime Agency v Simkus* [2016] EWHC 255, [2016] 1 WLR 3481 at [116]; and *National Crime Agency v Simkus* [2016] EWHC 728 (Admin), [2016] Lloyd's Rep FC 300 at [38]–[40]. See also *Mudajaya Corporate Barhad v Keng*, above n 26.

36 *Commissioner of Inland Revenue v Dymock*, above n 34, at [36].

(b) Notwithstanding that the grounds for a with notice restraining are made out, the application is adjourned to enable the Commissioner to satisfy the requirements of s 21 of the Act.

(c) The restraining orders already made in the proceedings continue in effect pending formal determination of the with notice restraining order.

(d) The matter is to be set down for a telephone conference before me at which the steps required by the Commissioner to satisfy the requirements of s 21 are to be addressed, and any other directions for the proceeding are also considered.

(e) The costs of the hearing before me are to lie where they fall.

**Cooke J**

Solicitors:
LukeCunninghamClere, Wellington for the Applicant
K3 Legal Ltd, Auckland for the Respondent
Robinson Legal, Wellington for the United States Government