

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

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHU ROHE**

**CIV-2021-409-000198
[2022] NZHC 3184**

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| UNDER | the Criminal Proceeds (Recovery) Act 2009 |
| IN THE MATTER | of an application for forfeiture orders |
| BETWEEN | COMMISSIONER OF POLICE Applicant |
| AND | LYNDON VAUGHAN RICHARDSON First Respondent |
| AND | TERRENCE AUSTIN MCFARLAND Second Respondent |
| AND | SIMON JOHN TURNER Third Respondent |

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| Hearing: | 31 October – 3 November 2022 |
| Appearances: | K South and C C White for Applicant S N B Wimsett and L R Toepfer for Second Respondent and Lincoln Property Investments Ltd |
| Judgment: | 30 November 2022 |
| Reissued: | 5 December 2022 |

JUDGMENT OF DUNNINGHAM J

*This judgment was delivered by me on 30 November 2022 at 3 pm, pursuant to
r 11.5 of the High Court Rules*

*Registrar/Deputy Registrar
Date:*

Introduction

[1] At 31 Vickerys Road (the property), Christchurch, on the boundary between residential housing and light industry, sits the clubrooms of a gang known as the Head Hunters Motorcycle Club (the Head Hunters). The property has been extensively renovated. The main house contains a bar and lounge area, a new kitchen and bathroom, and an attic sleeping area. Outside there are two new standalone buildings containing sleeping accommodation, along with a large steel framed workshop for storing and repairing motorbikes. The yard is extensively hard surfaced to enable vehicle parking. There is also an outside deck area for socialising and a dedicated gymnasium area.

[2] The Commissioner of Police (the Commissioner) says the property was improved, at least in part, by funds gained from significant criminal activity. As a consequence, the property should be forfeited to the Commissioner under the Criminal Proceeds (Recovery) Act 2009 (the Act). Forfeiture orders are also sought in respect of cash totalling \$6,162.30 taken from gaming or “pokie” machines at the property, and a black, 2008 Harley-Davidson VRS 08 NIGHT-R motorcycle, registration A6YNS and registered in the name of the first respondent.

[3] The respondents are the shareholders of Lincoln Property Investments Ltd (LPIL), the company which owns the property. Two of them are also directors of the company. The company was struck off the Companies Register on 15 May 2018, and the property is currently vested in the Crown. However, the Commissioner says that the respondents have effective control over the property as they have the ongoing ability to apply to restore the company to the Companies Register, which would result in the Vickerys Road property being returned to LPIL. Indeed, counsel for the respondents states that if the application for forfeiture orders is declined, the respondents will apply to have LPIL restored to the register. As effective control by the respondents is not disputed, there is no need to make an order confirming that that is the case.¹

¹ Under s 58, Criminal Proceeds (Recovery) Act 2009.

The Criminal Proceeds (Recovery) Act 2009

[4] The Commissioner's application for an assets forfeiture order is brought under s 49 of the Act on the grounds the relevant property is "tainted property". "Tainted property" is defined in s 5(1) of the Act:

- (a) means any property that has, wholly or in part, been:
 - (i) acquired as a result of significant criminal activity; or
 - (ii) directly or indirectly derived from significant criminal activity;
- (b) includes any property that has been acquired as a result of, or directly or indirectly derived from, more than 1 activity if at least 1 of those activities is a significant criminal activity.

[5] The term "significant criminal activity" is defined, at s 6, to mean either offending that if prosecuted, would consist of, or include, one or more offences punishable by a maximum term of five or more years' imprisonment, or an offence from which property, proceeds or benefits of a value of \$30,000 or more have been acquired or derived directly or indirectly.

[6] Section 50(1) of the Act sets out when such an order must be made:

If, on an application for an assets forfeiture order, the High Court is satisfied on the balance of probabilities that specific property is tainted property, the Court must make an assets forfeiture order in respect of that specific property.

The only exception to the mandatory requirement to make an assets forfeiture order under s 50, is where the Court is satisfied that "having regard to all of the circumstances, undue hardship is reasonably likely to be caused to the respondent if the property is included in the assets forfeiture order".²

[7] An assets forfeiture order can have a draconian effect. As long as some of the funding which went into acquiring or improving a property came from the proceeds of significant criminal activity, the whole property is considered tainted property and

² Section 51(1).

is liable to be forfeited. That was confirmed by the Court of Appeal in the *Commissioner of Police v Drake* when it said:³

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

The only avenue to avoid an assets forfeiture order being made in those circumstances is when undue hardship can be established under s 51.

[8] While seemingly harsh, I observe that such consequences were envisaged by Parliament when enacting this legislation. As the then Minister of Justice said when the bill was introduced:⁴

The Proceeds of Crime Act allows the Crown to confiscate the profit made from crime, after a person is convicted of that crime. That approach is all very well if the criminal is the only person who profits and if the crime is readily provable, but in this day and age, increasingly that is quite often not the case. Organised criminal gangs – particularly those involved in large scale drug dealing – will not be called for every crime they commit. They will also spread the profits from crime around their membership. We see a lot of evidence of that. In the end, the person selling the \$20 tinnies every day is usually not the same person who, as with their gang mates, lives a lavish lifestyle off the proceeds of such criminal activity.

The Criminal Proceeds (Recovery) Bill deals with this issue. It gives the Crown the power to confiscate profits and assets obtained through criminal activity on the civil standard of proof. That is to say that if the Crown can prove on the balance of probabilities that a person has benefited from significant criminal activity, that person’s property will be liable to forfeiture ... The bill establishes ... the assets forfeiture order, which targets property that has been acquired or directly or indirectly derived from criminal activity, regardless of who the owner is. This approach will allow us to target gang leaders who do not get their own hands dirty but in the end enjoy the benefits of their fellow gang members’ illegal activity.

[9] The above sets out the legislative framework within which the Commissioner’s application is made. I now turn to the evidence advanced to support, and oppose, that application.

³ *Commissioner of Police v Drake* [2020] NZCA 494 at [73].

⁴ (20 March 2007) 638 NZPD 8120.

The Vickerys Road property

[10] The Vickerys Road property was originally the clubrooms for another motorcycle gang, the Epitaph Riders. By 2015, there were only a couple of members of that gang left and the clubrooms at Vickerys Road were largely abandoned. One of the last members, Simon Turner, patched over to the Head Hunters, and it was agreed with Mr Turner and another that the Head Hunters would take over running the clubrooms at Vickerys Road. The clubrooms were owned by LPIL, and the transfer was effected by changes to the directors and shareholders of LPIL. Mr Turner explains that the property transfer was not a result of any animosity or “taxing”, but was more like a “patch over or a merger” because most of the Epitaph Riders had left that club and moved to the Head Hunters.

[11] In January 2016, once ownership of LPIL was effectively transferred to the Head Hunters, that gang set about fixing up the property. The scope of the renovations were extensive. As Lyndon Richardson explains, there was a massive hedge around the property when they took over and it was a major project to remove it. The hedge was taken away to a farm and burnt so no dump fees were incurred. The hedge was replaced with a fence which Mr Richardson says he installed along with Carrick Broadley, who at the time was working as a project manager for Nor West Contracting, undertaking outdoor hard landscaping projects on residential properties and larger civil developments. The site was then scraped and levelled using diggers which were borrowed from Mr Broadley and Nor West Contracting. The fence was largely constructed from panels which are used in cool stores. These comprised metal outer panels with a layer of insulation sandwiched between them. Mr Richardson says the panelling which they used was donated by Lyall Anderson. The same panelling was also used to build the sleepout units.

[12] Large metal gates were also constructed for the vehicle entrance to the property. While the pedestrian gate was existing, the vehicle gate was said by Michael Murphy to be constructed by him using scrap metal and using his experience as a metal worker. He then painted the gates and put gang insignia on them.

[13] A large timber deck was built using the services of gang members and associates, some of whom were qualified builders. Mr Richardson explains that the pine timber which was used for the external construction was obtained through Kori Loper. Mr Loper worked at Shands Road Sawmills Ltd and had a trade account. Mr Richardson says they paid about \$2,000 for the timber used for fence posts, deck, interior framing and french doors, which Mr Loper confirmed in evidence.

[14] A large part of the external area had new concrete laid. Mr Richardson said the outdoor concreting was completed by Mr Broadley and a friend of Benjamin Kney. He says the Head Hunters brought two loads of cement from Concut, a firm which was located across the road from the property, and each load cost about \$400. He also says that concrete was obtained from another concrete business close by, and the owner would drop off his leftover loads whenever they needed concrete for fence posts. The owner also got some of his workers to drop them off gravel for mixing concrete. Mr Broadley also confirms that he laid all the outdoor concrete. He says the concrete which came from the company across the road were leftovers which the company had in their mini mixers and that he would box the concrete and put a stop end in it, or they also made their own concrete in a mixer with hardfill and a couple of bags of cement. He also installed the drainage works on the property saying, "I did not use any new pipe or materials. They were all leftover from the contract landscaping jobs I did".

[15] Inside the house was fully renovated. Walls were lined with GIB board and plastered. A new kitchen was installed which Mr Richardson says was an ex-display kitchen that was given to him by a former business partner. The tongue and groove laminate in the kitchen was also donated, and the new shower was bought off TradeMe for around \$750. He says the red carpet which was installed was bought for \$1 from TradeMe and laid by a friend of a friend, who was a carpet layer. The sleepouts were built from scratch with the leftover cool store panelling. The four sets of sliding doors used on the sleepout units were second-hand ones which were either donated or bought off TradeMe.

[16] The metal framing for the motorcycle workshop was already there when the Head Hunters took over the property. Mr Richardson says they put corrugated iron on

the roof and the walls, using iron donated from a member who was a roofer. He also says there was a lot of materials left at the property, when it was transferred to them including scrap metal and Pink Batts insulation, as well as a caravan and two trailers. Much of this was sold and the money went towards any building materials they had to purchase. The GIB board which was used was either donated or sourced as offcuts through Facebook. Donated windows were used to replace the rotten ones and all the labour was free because the property was worked on by members, friends and family. Mr Richardson estimates they spent no more than \$10,000 in total to purchase items such as concrete, timber, paint and paint brushes. He denies that any of the money spent was from the proceeds of criminal activity. He says the funds were raised through the \$25 a week club membership fees, \$50 a week boarding fees, weekly fundraising raffles run by his wife, and selling the items that the Epitaphs had left behind.

[17] The Commissioner called evidence from Stewart Harrison, a registered quantity surveyor, who prepared estimates of what the improvements would have cost on a commercial basis. His estimates were based on viewing an extensive body of photographs which police had provided of the unrenovated and then renovated property, along with a visit to the site to take measurements of the dwelling and its surrounds and to take further photographs. On a commercial basis, Mr Harrison estimates that the improvements which occurred between 10 February 2016 to 6 December 2016 would have cost \$159,520, and the further improvements carried out to 20 October 2017 would have cost a further \$22,978. These works do not include works which were carried out after this period, including replacing the kitchen and putting hot mix down one side of the property.

[18] While Mr Harrison acknowledged that he was simply pricing items on a commercial basis and could not comment on whether those labour or product costs were actually incurred, he did cast doubt on the evidence that the concrete hardstand had been poured over multiple days using the leftover concrete from other concrete jobs. In his view, it was clear that what was seen at Vickerys Road was a “professional job” which had a consistent colour and texture. His evidence was that “I don’t think for a moment that it’s been poured as smaller, smaller loads or smaller areas”. He said “if it was poured in batches there’d be a lot more joints visible, you’d see a lot of cold

joints between the concrete pours”. Other indicia Mr Harrison saw of professional work was the exterior fence, which was regularly spaced with everything having been put in place at once, rather than in a piecemeal fashion. Similarly, the flashing used on the external sleepouts appeared to him to be purpose made or bought for this job.

[19] I am satisfied that the renovation works cost nothing like the commercial costing that Mr Harrison presented to the Court. However, for reasons I will come to later, I am also satisfied that considerably more money was spent on the renovations than was evident from the evidence of Mr Richardson and others. While the Head Hunters were no doubt given a huge amount of materials for free and were assisted by people who had experience as roofers, carpet layers, builders, tilers and concrete layers, they also had to pay for professional expertise at times, including, for example, electricians and plumbers.

[20] I am also satisfied that not all the evidence given about how the Head Hunters saved or avoided cost was correct. In particular, while Mr Richardson gave evidence of the concrete hardstand being poured in multiple pours using end lots, Mr Murphy’s evidence was that “you didn’t want to have part pours”, and his recollection was that they laid all the exterior concrete in two pours. That evidence was far more consistent with the evidence of Mr Harrison, which I accept, that the concrete was professionally poured and was not poured over multiple days with multiple small lots of concrete.

The significant criminal activity alleged

[21] The Commissioner alleges the members of the Head Hunters gang who frequented the Vickerys Road property were involved in the following significant criminal activity:

- (a) sale and supply of controlled drugs and in particular, methamphetamine, contrary to s 6 Misuse of Drugs Act 1975;
- (b) theft under s 219 Crimes Act 1961 and/or demanding property with menaces and intent to steal under s 239(2) Crimes Act 1961; and

- (c) facilitating illegal gambling under s 19(1) Gambling Act 2003, from which benefits in excess of \$30,000 accrued.

Sale and supply of drugs

[22] Ms South submitted that it was abundantly clear that the Christchurch-based members and associates of the Head Hunters were deeply enmeshed in the sale and supply of methamphetamine.

[23] In 2006, when Mr Richardson and Darrin Baylis were members of the Road Knights gang, before they became members of the Head Hunters, they were convicted of conspiracy to supply 406 g of methamphetamine.

[24] As a result of a police investigation known as “Operation Block” carried out in 2016, Mr Richardson ultimately pleaded guilty to a charge of participating in an organised criminal group. When Mr Richardson was sentenced, the sentencing judge described his offending as follows:⁵

[4] Between August and December 2016, you, together with other Head Hunters and associates, regularly sold methamphetamine. The deals would be organised over the phone followed by a meeting. Some of your customers would on-sell the methamphetamine for a profit. You received a share of the proceeds from some of your associates’ methamphetamine sales. In addition, you received a share of any drug debt recovered by your associates.

[25] Ms South notes that the period of this offending coincided with the time significant improvements were being made to the property.

[26] Mr Turner, the third respondent, was convicted of being in possession of methamphetamine for supply in February 2016.

[27] Steven Strickland, another patched member of the Head Hunters in Christchurch, also pleaded guilty to participating in an organised criminal group and conspiring to supply methamphetamine as a result of Operation Block. Other

⁵ *R v Richardson* [2021] NZHC 1160.

associates of the gang who were charged with, and convicted of, participating in an organised criminal group were Mr Kney and Mr Broadley.

[28] Mr Broadley also pleaded guilty to charges of supplying methamphetamine, offering to supply methamphetamine, and possession of firearms and ammunition. In total, Mr Broadley offered to supply 102.75 g of methamphetamine. Mr Broadley's offending included dealing methamphetamine from 31 Vickerys Road, as was demonstrated by the content of intercepted phone conversations.

[29] In August 2016, Mr Baylis was pulled over while driving a Range Rover, at a time when he was acknowledged to be the gang's treasurer. Located in the vehicle console was, among other things, \$26,770 in cash, a notebook containing accounting records related to the Vickerys Road pokie machines, electronic scales, a meth pipe, and 22 g of methamphetamine packed in 18 individual zip lock bags. Another occupant of the vehicle pleaded guilty to possession.

[30] On 23 September 2020, while Mr Baylis was still a patched member of the Head Hunters and their treasurer, his residential home was searched and 12.7 g of methamphetamine remnants were located along with the gang accounting notebooks, electronic scales, zip lock bags and Mr Baylis' gang patch.

[31] A search at Vickerys Road on the same day located 38.7 g of methamphetamine, digital scales, snap lock bags and around \$1600 in cash.

[32] Other evidence which supports the fact that methamphetamine consumption and supply took place at Vickerys Road is recorded in the photographs of the property taken by police in both 2016 and 2020. For example, a wall clock was constructed so that it concealed a hidden cavity in which meth pipes and a small set of electronic scales were stored. Meth pipes were also located in the sleepouts and the main downstairs lounge area of the pad, and small plastic snap lock bags were located in the attic space.

[33] On 30 March 2021, Mr Baylis's residential property was again searched and 12.10 g of methamphetamine was found, along with other indicia of

methamphetamine supply. He pleaded guilty to possession of methamphetamine for supply.

[34] Mr Broadley confirmed in evidence that he was regularly selling methamphetamine in the period August 2016 and December 2016, albeit he said he did so to support his own habit, and acknowledged that some of his supply would come from Mr Strickland. While he denied he sold on behalf of Mr Richardson or gave the proceeds of sale to Mr Richardson, that was not consistent with the summary of facts that he pleaded guilty to, and I was not persuaded that the denials he gave in this hearing were correct. He did, however, acknowledge that Mr Richardson was “higher up” the chain of command in the meth dealing business.

[35] Witnesses called for the respondents sought to distance the evidence of commercial methamphetamine dealing by Head Hunter members and associates from the activities of the clubrooms. For example, Mr Richardson’s wife, Lynda Richardson, said she did not see any drug dealing or manufacturing at the property and club members would have been in trouble if they were caught doing that sort of thing in the clubrooms. She did, however, acknowledge that there was “recreational” methamphetamine use at the club and that she was involved in such use. Similarly both Mr Broadley and Mr McFarland said the Club had rules against methamphetamine dealing in the club. However, Mr Broadley’s intercepted telephone calls and texts did not support that. They demonstrate he was using the clubrooms as a place to complete drug transactions. In addition, the evidence of methamphetamine dealing, such as electronic scales and numerous small plastic snap lock bags, which were found on searches of the clubrooms, made those claims implausible.

[36] I am satisfied that the fact key individuals associated with Vickerys Road were convicted of methamphetamine dealing, along with the evidence of methamphetamine dealing found at Vickerys Road, shows the gang was heavily involved in methamphetamine dealing at the time of the renovations, including from the Vickerys Road property.

Theft and/or robbery through gang “taxings”

[37] The second type of significant criminal activity alleged by the Commissioner is theft,⁶ or demanding property with menaces and intent to steal,⁷ through the practice of gang “taxings”.

[38] The Commissioner adduced evidence from Detective Inspector Kevin McNaughton regarding gang organisation, structure and activities. Detective Inspector McNaughton explained that the Head Hunters members who are based in Christchurch report to the West Chapter of the gang located in Henderson in Auckland. Mr Richardson was the senior member based in Christchurch, reporting to the West Chapter hierarchy.

[39] One of the activities undertaken by the gang involves “taxing” where, for example, a portion of the sales made of drugs is paid to a representative of the gang as a tax. Another activity is a “standover”, which “relates to the process of extricating payment for [a] real or imagined debt”. Detective Inspector McNaughton explained that the activity of taking property, whether for a debt or in retribution for a slight on the gang, would likely constitute a crime such as aggravated robbery, aggravated burglary, or kidnapping and demands with menaces. However, even where the police are called, the victim is rarely prepared to sign a formal statement to be used in court. He says, therefore, quantifying taxings or standovers is difficult due to significant underreporting to police.

[40] The topic of taxings or standovers was explored in cross-examination. For example, Ms South questioned Mr Broadley on a text he sent to an unknown number where he said “seems you ended up with cash that’s the clubs and owed to me for months” and which, “should’ve been paid before”. Mr Broadley denied this was him chasing up gang money, although I consider this is a logical inference from the text of the exchange.

⁶ Crimes Act 196, s 219.

⁷ Crimes Act, s 239(2).

[41] Similarly, in an intercepted telephone call between Mr Broadley and Mr Kney, a gang prospect, on 13 November 2016, Mr Kney repeatedly said that he had to be “Stove’s guard” (Stove being the nickname for Mr Strickland who was being de-patched from the gang at the time), and the reason proffered was so that Mr Strickland could “pay for that [f ...] ticket bro”. A little further on, Mr Kney said to Mr Broadley that Mr Strickland was “gone” and “he’s gonna lose a lot more than just that [f...ing] you know”.

[42] It was put to Mr Broadley that he was being told Mr Strickland was out of the gang, and Mr Kney was guarding the property because he was about to have that property taken off him, or taxed, but Mr Broadley claimed not to comprehend or remember what this conversation was about. However, there was evidence that at least a utility vehicle and a motorcycle were taken from Mr Strickland at this time. On 15 November 2016, intercepted text messages and phone calls between Mr Richardson and another associate revealed that they were discussing the sale of Mr Strickland’s Harley-Davidson V-Rod and his ute. The associate sent a text message to Mr Richardson which read:

Hey bro I don’t know if this is a bit early or cheeky but what’s happening with Stove’s V-rod and what sort of price would it be.

Mr Richardson subsequently replied, “13k for vrod bro”. Mr Richardson later phoned another associate and asked if he was interested in the V-Rod. He told the associate that he did not know how much it would be, but the arrangement would be “halves”, with half the sale price going to “the boys up top”. Again, prices of between \$12,000 and \$14,000 were mentioned.

[43] In a later discussion between Mr Richardson and the associate, he enquired about the sale of the V-Rod and asked “who got the ute”, to which Mr Richardson replied, “Terry got the ute”. When Mr Richardson was asked what the recipient paid for the ute, Mr Richardson replied, “Oh 10”. A few days later, on 26 November 2016, Mr Strickland’s 2003 Holden Utility, registration JZA96, was seen parked outside 31 Vickerys Road. Later the vehicle was stopped driving north near Hanmer Springs Road and Lewis Pass Road. Mr McFarland, the second respondent, was driving it and he told police he had purchased the vehicle off Mr Strickland and was taking it to

Auckland. On 19 November 2016, Mr Strickland sent Mr Broadley a text saying “iv lost dam near everythn this week im in debt & broke as fuk, with no income 2 speak off 4 obvious reasonz”.

[44] The logical inference that the vehicles were taken from Mr Strickland as a penalty for the circumstances which led him to being ousted from the gang, and the vehicles then sold with half the proceeds going to the West Auckland chapter, was supported by records in the gang’s accounting notebooks (which will be discussed later). On 16 November 2016, the notebooks recorded “red ute – \$5,000” in the “in” column. Mr Richardson confirmed in cross-examination that that represented someone paying \$10,000 for the ute with \$5,000 going to the Christchurch funds and \$5,000 to Auckland West.

[45] Similarly, the records show that there is a notation, “Night Rod”, by an entry for income of \$6,000 which is half of the price of \$12,000 discussed for the sale of Mr Strickland’s motorcycle. While Mr Richardson was cagey about saying exactly how Mr Strickland’s vehicles came to the gang, he did acknowledge that a vehicle and a motorcycle were taken off Steve Strickland saying, “[y]eah I believe that was the case” and confirming that Mr Strickland was ejected from the gang.

[46] The Commissioner also alleges Mr Broadley was involved in the taxing of a Ford Falcon utility registration BCN158. On 30 September 2016, Mr Broadley sent a photo of a blue XR6 Ford Falcon ute to Mr Strickland and sent a text saying “That’s the xr6 bro that Natt had”. Later that night in an intercepted phone call, he spoke to Mr Strickland about the blue Falcon belonging to Nate and said, “the boys went and took it this morning bro”.

[47] Mr McFarland, the second respondent, acknowledged “taxing” in his examination interview.

TM Aw, I’ve taxed a few people.

WR Okay, now, by taxing, w-, what do you mean by that?

TM Well made them pay for their errors, yeah.

WR Okay, and what’s that, tell me about that business?

TM Well, it, it, it could just be a matter of, dropping names and bad talking you know. And then, and then getting caught out so, yeah, they pay.
...

WR But what would happen to them if they don't pay you?

TM Well they can go live somewhere else.

Ms South submits the clear inference from this is that if the gang member wants to continue living where they are living, they cannot keep the property which is claimed as a tax.

[48] Ms South submits that the fact there are no complainants in relation to these or other taxings is unsurprising as the victims are themselves associated with illegal conduct, and the gang uses intimidation, threats of violence and actual violence to enforce these transactions, so the victims do not go to police.

[49] Ms South notes that the gang accounts books records \$40,650 in income as being related to various vehicles. There is no evidence that the gang was trading in vehicles commercially and there are no sums recorded for vehicle purchases. Instead, it is far more probable that the source of the \$40,650 was through taxed vehicles that the gang then sold. She submits that individuals either wronged the gang or incurred debt to the gang, most likely for methamphetamine, and were then threatened or intimidated into relinquishing their vehicles to the gang.

[50] The Commissioner also relied on the activities of a debt collecting company run by Mr Richardson called Ironclad Securities to demonstrate that the gang unlawfully stole property from individuals using actual or threatened violence. Ironclad was not a licensed repossession company as required by the Private Security Personnel and Private Investigators Act 2010, nor were any of its directors. Instead, Ms South submitted that they embarked on debt collection work utilising gang members as a means of intimidation. Up until the Head Hunters took over the Vickerys Road property, the premises of Ironclad Securities also operated as the de facto gang pad for the Head Hunters, and Mr Richardson's office contained items which were associated with the Head Hunters.

[51] Mr Wimsett was critical of the suggestion that Ironclad Securities was involved in illegal activity. He pointed out there was no evidence of Mr Richardson ever employing improper tactics during his debt collection work. Where the activity is debt collecting, without threats of violence or actual violence and the debt is lawfully owed, then that too does not amount to a crime. In that regard, Mr Richardson's evidence demonstrates that Ironclad had "the correct paper work". Mr Richardson explained that he would buy the debt so the debt was that of Ironclad Securities and, "anybody can collect their own debt".

[52] While Mr McFarland acknowledged taxing was a feature of gang life, Mr Wimsett submitted that there was no certainty that the activity amounted to a crime in any particular case. However, there was evidence that if a person joined the Head Hunters and was helped with the purchase of a motorbike, then it was on the clear understanding that if they left, it had to be returned. In such a scenario there would be a "claim of right" defence. Furthermore, the respondents had no convictions for offences arising out of the alleged taxings.

[53] In short, Mr Wimsett submits that none of the circumstances relied on have a sufficient evidential basis to show that the individual taxing amounted to "significant criminal activity".

[54] I accept there is insufficient evidence to demonstrate Ironclad Securities and Mr Richardson were engaged in activities that would amount to theft or demanding with menaces under ss 219 or 239 of the Crimes Act. However, I do not consider the transactions involving Mr Strickland's two vehicles or the blue Ford Falcon (registration BCN158) can reasonably be coloured as anything other than the illegal taking of those vehicles, without colour of right, and through direct or implied threats if the vehicles were not relinquished. It is quite clear from Mr Strickland's text that he did not voluntarily relinquish the vehicle, nor was it plausible that he would do so. Indeed, that is why Mr Strickland's vehicles had to be guarded in the interim. Nothing was paid for the vehicles. Their proceeds were simply divided between the local Head Hunters and the West Auckland branch. I am satisfied that, on the balance of probabilities, these vehicles were stolen from their owners, most likely under threat, with the proceeds of sale going to the gang.

Breach of the Gambling Act 2003

[55] When the Vickerys Road property was searched by police on 6 December 2016, the police located six gaming or “pokie” machines at the address, three of which were operational. The Commissioner says the pokie machines at Vickerys Road were not authorised for use as required by the Gambling Act 2003 and thus, by permitting the machines to be used at the property, the owners were conducting illegal gambling contrary to s 19 of the Gambling Act.

[56] While offences under that section of the Gambling Act do not amount to significant criminal activity by virtue of the maximum sentence available, where more than \$30,000 of unlawful benefit is derived, the offending is defined as significant criminal activity.

[57] The Commissioner’s claim that such a benefit was received relies largely on the evidence contained in a red notebook seized from Mr Baylis’s car when it was stopped on 27 August 2016 (the pokies notebook). The first page of the pokies notebook said: “This note Book is for the Pokie Machines Only”. It then includes financial records, starting from the rear of the book and moving forward, which span the time period from 14 July 2016⁸ to 26 August 2016, which is the day before the pokies notebook was seized.

[58] Each page in the pokies notebook records what the Commissioner asserts to be the volume of cash removed from each of the three machines by the gang. Detective Sergeant Patten says this totalled \$13,640 in the period 14 July to 26 August 2016, averaging \$317.21 a day. Assuming the pokie machines operated at this rate between 14 July 2016 (which is the first record in the pokies notebook) and 5 December 2016, when the search on Vickerys Road was conducted, then the takings from the machines in this period would be \$45,678. When the search was conducted, cash totalling \$6,162.30 was seized from the unlicensed pokie machines and that, too, is the subject of an application for a forfeiture order.

⁸ There are some miscellaneous entries with earlier dates, but the records which relate to the three gambling machines commence on 14 July 2016.

[59] Mr Wimsett, however, challenged whether the records in the pokies notebook could be relied on in this way to calculate the total “benefit” as defined under s 6 of the Act. Section 6 states that significant criminal activity includes offending “from which property, proceeds, or benefits of a value of \$30,000 or more have, directly or indirectly been acquired or derived”. Section 6(3) requires any expenses or outgoings in connection with an activity of the kind described as significant criminal activity to be “disregarded for the purposes of calculating the value of any property, proceeds, or benefits under subsection (1)(b)”.

[60] Mr Wimsett says, in a gambling context, a person does not benefit in the total amount that is gambled. It is the amount that is retained, that is above the float or initial amount of money in the machine, that represents the amount of a benefit. In his submission, turnover does not equal the benefit.

[61] He submits this approach is supported by the decision in *Commissioner of Police v Snook*, where Ellis J declined to make a profit forfeiture order, saying that those were:⁹

... concerned with “profit” which, like “benefit”, connotes a gain or surplus. The purpose of such an order is to ensure that a respondent is not better off as a result of the relevant offending than he or she was before. It seems to me that the word “benefit” must also be interpreted in that context and in that light.

[62] However, *Snook* involved a case where the respondent sold her lawfully owned house to a drug dealer and received payment in cash which she then used, in part, to buy another property with the balance being funded by a mortgage from the ANZ [b]ank. Ellis J rejected the Commissioner’s position that the \$270,000 she received in cash for her property was a benefit as defined in the Act, saying the definition “can and, in my view, must also be read consistently with the ordinary meaning of that term which (as the relevant dictionary definition makes clear) means “pecuniary advantage, profit or gain.”

[63] In my view, the decision in *Snook* is clearly distinguishable from the facts in the present case, but in any event, I am satisfied the money recorded in the notebook

⁹ *Commissioner of Police v Snook* [2018] NZHC 2537 at [63].

and used in Detective Sergeant Patten's calculations is profit in the conventional sense. For that reason, I do not need to decide whether, if it was turnover, it could still be caught by the statutory definition. By way of example, in Mr Murphy's examination interview, he confirmed there was "probably three to four grand a week going through those machines". Mr Murphy confirmed in evidence that the content of that examination interview was true and correct. However, it is not clear from Mr Murphy's evidence whether that was net income or simply turnover. The phrase "going through those machines" suggests it is turnover. That would explain why it is a greater amount than the sums recorded in the pokies notebook which represent what was taken out of the machine. The fact that the three machines were found to contain over \$6,000 when the search was conducted also supports the Commissioner's assertion that the sums recorded in the notebook, which only totalled a few hundred dollars on each occasion, were the sums removed from the machines as profit. Finally, the fact the pokies notebook recorded what the sums from the machines were spent on, and in each case were largely consumed by other gang expenses, also supports the fact the \$317 drawn out per day was net profit and readily fits within the definition of "benefit".

[64] I am satisfied that significant money went through the machines, and the calculation of net profit which exceeds \$30,000 from the operation of the pokie machines was proved on the balance of probabilities.

Were any of the improvements funded from significant criminal activity?

[65] The respondents' position was that minimal money was expended on the improvements, and the Commissioner cannot prove that the funds came from any other source than member subscriptions, sale of materials and items left at the property, and fundraising activities including raffles and sale of Head Hunters branded clothing.

[66] Mrs Richardson explained how she ran a weekly lottery raffle over six months which raised \$400 a week for the club building fund. Mr McFarland spoke about the requirement to pay a subscription to the gang although he acknowledged the number

of members who paid subs was small, sometimes as few as only three or four, but up to 10 at other times.

[67] However, the Commissioner relies heavily on the gang's own accounting records to support the claim that tainted money was used to fund some of the improvements to the Vickerys Road property. The primary document relied on is an accounting notebook which was seized from the home address of Mr Baylis on 23 September 2020. The accounting notebook covers the period from 10 November 2016 to 20 January 2020 and records total income and expenditure over this period. The Commissioner notes that the main income sources are as follows:

- (a) vehicles: \$40,650;
- (b) no reference: \$20,345;
- (c) "Mag book": \$18,963 (Mr Baylis was known by the gang as Mag or Maggot);
- (d) loan repayments: \$11,980;
- (e) "donations": \$11,300;
- (f) drinks: \$13,725;
- (g) raffles: \$3,380;
- (h) club fines: \$560

[68] The Commissioner submits that the money which is coded as "donations", or which does not have a reference, and which totals \$31,645, is money derived from members who have engaged in significant criminal activity such as the sale of methamphetamine and taxings. This all went into the same pool of cash which funded the gang's outgoings on the property. Indeed, \$24,125.16 of the outgoings is directly identified as funding improvements to Vickerys Road. The accounting notebook

contains a number of references to expenditure on improvements to the property including:

- | | | |
|-----|--------------------|---------------------------------|
| (a) | gravel: | \$220 |
| (b) | cable: | \$260 |
| (c) | concrete: | \$600 |
| (d) | sleepouts: | \$1,000, \$4,000 and \$500 |
| (e) | asphalt: | \$3,500 |
| (f) | sliding door: | \$250 |
| (g) | swimming pool: | \$1800 |
| (h) | fence posts: | \$50 |
| (i) | moving digger: | \$85 plus \$120 |
| (j) | panels: | \$1,800 |
| (k) | Concut payments: | \$3,000 |
| (l) | building supplies: | \$720 |
| (m) | sleepout wheels: | \$240 |
| (n) | sleepouts: | \$500 |
| (o) | electrician: | \$1,000, \$400, \$200 and \$100 |
| (p) | builder: | \$500 and \$700 |

[69] I am satisfied that the income was not all legitimate and that improvements to the property were met, at least in part, using the proceeds from significant criminal activity. The starting point is that where income was from rent, repayment of loans, payment from sale of gang clothing or gang subscription fees, it was entered as such in the accounting notebook. For example, on 16 September 2017, there is an entry for “Benji fees” and for “Si rent” and “Si fees”. There are also a number of entries for T-shirts which were sold at \$40 each and for the sale of goods, such as an entry which records the sale of scrap metal for \$380 on 2 November 2017.

[70] However, there are also large sums of money which are either related to vehicle taxings, for example, the sale of the Night Rod, or which are recorded as income with no source given or as “donations”. I do not consider the description of “donations” was accurate. As Mr Richardson candidly acknowledged, the likelihood of people simply making cash donations to the Head Hunters was “pretty slim but not impossible”.

[71] These sums are then quickly expended on work on the property. For example, on 26 November 2016, \$3,850 is showing as income with no source given and before the next date entry, which is 29 November 2016, a payment of \$600 is made for concrete. Similarly, on 1 June 2017, \$1,580 is recorded as income followed by expenditure of \$1,000, on 4 July 2017, to an electrician. On 7 July 2017, \$2,000 is recorded as a donation. It is followed, on 17 July 2017, by payment to an electrician.

[72] It is, in my view, implausible that the income which is not coded to a specific source is income generated from one of the legitimate sources identified by witnesses for the respondents. The gang was reasonably careful about record keeping, noting accountability to each other was important, so if it was income from rent, subscriptions or sale of gang property, I expect they would have recorded it as such. Furthermore, I note that the accounting records cover only the later stages of the renovations. It can be inferred that even more money was expended in the early phase of renovations during 2016 where it can be expected that similar, if not greater expenditure was made on labour and materials.

[73] While the expenditure will be far less than that anticipated by Mr Harrison's evidence because the gang did, indeed, rely on a great deal of donated goods and labour, it is an inescapable conclusion that the renovations were, at least in part, funded by the proceeds of drug sales and the theft of motor vehicles from those whom the gang had fallen out with.

[74] A particularly stark example of this is found in the text messages between Mr Broadley and Samuel Lowsley. On 14 October 2016, Mr Broadley offered methamphetamine for sale to Mr Lowsley saying, "can do ten at 650 lowest I can go. I'm paying 6". A little later Mr Broadley sends a further communication to Mr Lowsley where he says, "just when ya get ya first 650 could I grab mate I got a pay for some concrete for the morning." While Mr Broadley said he could not recall what was going on at the time, I am in no doubt that this was an example of money from drug sales being spent directly on improvements to the gang pad.

[75] The same pattern is replicated in the pokies notebook records. That notebook covers the period from 14 July 2016 to 26 August 2016 and records outgoings on building related expenses. For example, on an undated page in the notebook, between 21 July 2016 and 27 July 2016, \$2,200 is recorded as being expended on concrete and \$750 on carpet. On another undated page between those two dates, \$400 is recorded as being expended on concrete. On 18 August 2016, \$610 is recorded for a plumber, and on 26 August, three rolls of electrical wire were purchased at a cost of \$150. There is a clear connection between income earned from the illegal pokie machines and expenditure on improving the property.

[76] It is an inescapable conclusion, clearly supported by the accounting and pokie notebooks, that the improvements to the gang pad were not paid for solely from legitimate sources of income but were also paid for from significant criminal activity.

[77] The property at 31 Vickerys Road is therefore tainted and I am satisfied an asset forfeiture order should be made in respect of it.

Undue hardship

[78] If I reached the conclusion that the property should be forfeited as tainted property, then the respondents say that I should exercise the power under s 51 to grant relief from forfeiture on the grounds of undue hardship. Mr Wimsett submits that the value of any unlawful expenditure on 31 Vickerys Road is an extremely small proportion of the total value of the property. It would therefore be disproportionately harsh if an asset forfeiture order were made in respect of the property when only a small portion of its value was tainted or obtained illegitimately. The Crown would be receiving a “serious windfall”, and “disproportionate” forfeiture would be contrary to the principles of the Criminal Proceeds Act which is not intended, in his submission, to be punitive.

[79] In particular, Mr Wimsett says that undue hardship is likely to be caused to the respondents if they are not granted relief because:

- (a) If tainted, there is a significant disproportion between any unlawful funds applied to the property and the total value of the property, being something less than 10 per cent of its total value.
- (b) The gravity of the offending involved is low and occurred over a short period. In particular, the offence under the Gambling Act only attracts a maximum penalty of one year imprisonment, and here, the gaming machines were on private property and were only open to be used by members or their associates. The methamphetamine offences of the relevant parties at the relevant time are also at the lower end of the spectrum.
- (c) Improvements to the clubroom were a labour of love. People brought skills and materials to the project over many working bees in order to build something meaningful for the group.
- (d) The clubroom is a place where members and associates of the Head Hunters can spend time, socialise, exercise and seek accommodation if necessary. Members of the club are often ostracised from society

because of their tattoos and general appearance. The clubroom, however, provides a space for them to relax and socialise and so is of psychological benefit to such a group.

Discussion

[80] The term “undue hardship” is a term well understood by the Courts. Mere hardship resulting to the respondent as a consequence of the execution of the forfeiture order is not sufficient. The word “undue” means something more. The applicant for relief must show much more than mere inconvenience or difficulty, but that the hardship would be “grossly disproportionate” or amount to extreme and undue privation.¹⁰

[81] In determining whether relief should be granted on the grounds of undue hardship, the Court may have regard to:¹¹

- (a) the use that is ordinarily made, or was intended to be made, of the property that is, or was proposed to be, the subject of the assets forfeiture order; and
- (b) the nature and extent of the respondent’s interest in the property; and
- (c) the circumstances of the significant criminal activity to which the order relates.

In my view, none of these factors support the respondents’ submission that undue hardship will result to them.

[82] In terms of the use that the property is put to, it is not a family home, nor does anyone reside there on a permanent basis. It is a clubroom for a small number of gang members and their associates, the membership of which changes over time as members leave the gang or join it. There is nothing to suggest the current respondents

¹⁰ *Commissioner of Police v Nelson* HC Auckland CIV-2010-404-989, 30 July 2010 at [73]–[75]; and *Commissioner of Police v Winsor* [2014] NZHC 161 at [57].

¹¹ Section 51(2).

have any particular connection to the clubrooms. Both Mr Richardson and Mr Turner are no longer members of the Head Hunters. While Mr McFarland remains in the gang, he is based in Auckland, where the West Chapter of the Head Hunters have other clubrooms. No persons other than the respondents have applied for relief from forfeiture, so it is not clear to me that I can take account of hardship (undue or otherwise) to any other individual, but in any event, no evidence has been adduced which suggests other gang members would lose anything more than the benefit of access to the clubrooms which is only available to them as a result of their predecessors' efforts.

[83] In terms of the nature and extent of the respondents' interest in the property, they are, of course, shareholders of a company which owns the property, and Mr Wimsett appeared for the company. While the company owns the property in totality, it did not fund the acquisition of the property. The evidence showed that the named respondents had shares in the company transferred to them at no cost. Furthermore, while I have found tainted money was used to fund the renovations to the property, I accept entirely that nothing like the sum which Mr Harrison calculated was actually spent on the renovations, and the three respondents have not injected significant, if any, amounts of personal money into the property.

[84] Finally, I accept that the offending under the Gambling Act is not at the most serious end of criminal activity. Nevertheless, for the reasons given, it does constitute significant criminal activity. More importantly though, the methamphetamine offending which was used to fund improvements is serious offending, regardless of the quantities involved.

[85] For these reasons, none of the circumstances listed in s 51(2) persuade me that the respondents will suffer "undue hardship". I therefore decline to exclude the Vickerys Road property from the assets forfeiture order I will make.

Night Rod motorcycle

[86] The Commissioner seeks an assets forfeiture order in relation to a 2008 Harley-Davidson Night Rod motorcycle registered to Mr Richardson. Mr Richardson purchased the motorcycle in late May 2013 and paid the purchase price by trading in

a 2003 Harley-Davidson Softail motorcycle for \$12,000 and paying the balance of \$8,969.69 in cash.

[87] The Commissioner points out that in the years prior to purchase, Mr Richardson had declared the following net income:

- (a) year ending 31 March 2011: nil
- (b) year ending 31 March 2012: \$8,579.34;
- (c) year ending 31 March 2013: \$35,874.98; and
- (d) year ending 31 March 2014: \$27,488.77.

[88] The Commissioner says in the years before Mr Richardson purchased the motorcycle, he was either incarcerated or declared a very modest income which would not have permitted him to acquire significant savings or disposable income. Mr Richardson was sentenced on 14 March 2008 to nine years and four months' imprisonment of charges of conspiracy to supply methamphetamine, firearms charges and receiving charges, and he was released from custody on 10 August 2011. At the time of his offending, Mr Richardson was associated with the Road Knights motorcycle gang but shifted allegiance to the Head Hunters in 2014. The balance Mr Richardson paid for the motorcycle was paid in cash and the Commissioner points out that cash is frequently utilised by those who are involved in criminal activity. In all the circumstances, the Commissioner submits that the motorcycle is tainted property, having been paid for, at least in part, from the proceeds of significant criminal activity.

[89] Mr Richardson filed an affidavit responding to this aspect of the application and opposing forfeiture of the motorcycle. In it he says he cannot remember exactly where the cash he used to pay for the balance came from because it was a long time ago. However, he said it was not from the proceeds of any criminal activity. He says he had been working for Fulton Hogan around that time so had an income. He also said he sold his Ford XR8 ute and XR8 van in the period, so had money from those

sales. In cross-examination, Mr Richardson said that he had borrowed the balance because “the ute hadn’t sold and we just covered the rest, and I had money myself, me and my wife, and she was working fulltime.”

[90] It is clear from Mr Richardson’s examination interview that neither he, nor his wife, had significant sources of income during this period. They lived in rented properties and had, at various times, both been on a benefit. While he said he earned income from Ironclad Securities while it was operating, that company was not incorporated until 2014, which is after he acquired the motorcycle. When his wife was working, it was for Brinks Chickens, and there is no evidence to suggest this was a job which enabled the family to generate surplus cash, particularly when the couple had two teenage children to support at home at the time of purchase.

[91] In my view, there is no evidence which supports the possibility that Mr Richardson had access to nearly \$9,000 in legitimately acquired cash at the time he paid for the Harley-Davidson Night Rod motorcycle. The family had limited sources of legitimate income and the normal outgoings of a family with two children. I also do not accept that the cash contribution was funded from the sale of other vehicles. Mr Richardson’s oral evidence was that he borrowed the money until one of his vehicles sold, which was not suggested in his original affidavit evidence. However, he did not get finance through the dealer who sold the motorcycle to him, nor is there any evidence to explain how borrowed funds were converted into cash.

[92] Given his history of methamphetamine dealing and the access this gave him to large cash sums, I consider the most likely explanation for the source of the cash payment is money made from methamphetamine dealing. Accordingly, I am satisfied that the motorcycle was, at least in part, paid for from the proceeds of significant criminal activity and is therefore tainted.

Cash from the pokie machines

[93] I have already set out my reasons for finding that the money seized from the pokie machines represented money gained from significant criminal activity. Accordingly, the cash sum of \$6,162.30 seized from those machines on 6 December 2016 is also tainted money.

Form of the orders

[94] Counsel for the Commissioner presented a draft assets forfeiture order which also sought ancillary orders to assist in the process of effecting the sale of the property by giving the Official Assignee, or his delegate, the power to execute any deed or instrument in the name of the registered proprietors for the purpose of effecting these orders.

[95] I consider the draft order was appropriate. In order to sell the property the Official Assignee will need authority to execute certain documents or take other associated steps. Accordingly, pursuant to s 50 of the Criminal Proceeds (Recovery) Act 2009;

- (1) I make an assets forfeiture order as sought:
- (2) The property to which this order applies;
 - (a) vests in the Crown absolutely; and
 - (b) is to be in the Official Assignee's custody and control.
- (3) This order applies to the following property:
 - (a) the residential property at 31 Vickerys Road, Wigram, Christchurch, described in Certificate of Title 234777, registered proprietor being Lincoln Property Investments Ltd, a company now struck off the Companies Register;
 - (b) cash totalling \$6,162.30 seized on 6 December 2016 from 31 Vickerys Road, Wigram, Christchurch, being the proceeds obtained from unlicensed gaming machines; and
 - (c) a black, 2008 Harley-Davidson VRS 08 NIGHT R motorcycle, registration A6YNS, registered in the name of the first respondent, Lyndon Vaughan Richardson.

(4) To give effect to the assets forfeiture order I make the following ancillary orders:

- (a) an order directing the Official Assignee to sell the property listed at, 3(a) and (c) above;
- (b) an order for the purpose of effecting the sale of the property in accordance with 3(a) above, the Official Assignee (including a person delegated who has functions and powers under the Criminal Proceeds (Recovery) Act 2009) has the power to execute any deed or instrument in the name of the registered proprietors and to do anything necessary to give validity and operation to the deed or instrument.

Solicitors:
Raymond Donnelly & Co., Christchurch

Copy To:
S N B Wimsett, Barrister, Auckland