

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

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

**CIV-2020-419-154
[2023] NZHC 798**

UNDER the Criminal Proceeds (Recovery) Act 2009

BETWEEN COMMISSIONER OF POLICE
Applicant

AND ALAN CLINTON MCQUADE
First Respondent

RAY ALAN TYLER-WAUGH
Second Respondent

GABRIELLE SUZANE LEIFTING-BULL
Third Respondent

Contd/2

Hearing: 22 March 2023

Appearances: K Whyte for the Applicant
K Hogan for Alan McQuade (First Respondent) and Emna Tritar
(Interested Party)
No appearance by or on behalf of remaining respondents or
interested parties

Judgment: 17 April 2023

JUDGMENT OF WOOLFORD J

*This judgment was delivered by me on Monday, 17 April 2023 at 3:30 pm
pursuant to r 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Solicitors: Hamilton Legal (Office of the Crown Solicitor), Hamilton
Cook Morris Quinn, Auckland

Counsel: J Hogan, Auckland

RYAAN THOMAS SIMPSON
Fourth Respondent

EMNA TRITAR
Interested Party

GREG JIMMY RAUMATI
Interested Party

LESLIE KENNETH MOTLEY
Interested Party

JAMES WOOLRICH
Interested Party

A and S CUSTOM CONTAINERS
LIMITED (6325048)
Interested Party

BANK OF NEW ZEALAND
Interested Party

BASECORP FINANCE LIMITED
Interested Party

[1] On 3 July 2020, the Commissioner of Police (Commissioner) obtained without notice restraining orders in respect of two properties, funds held in bank accounts, watches, jewellery and nine motor vehicles. On notice orders were obtained on 30 September 2020.

[2] On 30 August 2022 the Commissioner filed an application for the sale of the nine restrained motor vehicles to preserve their value because of on-going storage costs and depreciation. It is this application that is for determination.

[3] Five of the vehicles are said to be beneficially owned by Mr Alan McQuade (the first respondent) and/or his partner, Ms Emna Tritar (an interested party). Three of the vehicles are beneficially owned by the second respondent, Mr Ray Tyler-Waugh, and one of the vehicles is beneficially owned by the fourth respondent, Mr Ryaan Simpson.

[4] The second and fourth respondents have taken no steps to oppose the application. However, Mr McQuade and Ms Tritar oppose the application. A joint notice of opposition was filed on 2 November 2022. On 14 November 2022, an affidavit sworn by Ms Tritar was filed in support of the notice of opposition.

[5] In response to the notice of opposition, the Commissioner has filed a number of affidavits from an investigator attached to the Waikato/Bay of Plenty Asset Recovery Unit based in Hamilton, Mr William Cassidy, and an affidavit dated 21 November 2022 from Mr Andrew Booth, a specialist vehicle consultant and broker.

[6] At the hearing before me of the application in the Hamilton High Court on 22 March 2023, Mr Booth and Ms Tritar were cross-examined on their affidavits.

Sale orders – the law

[7] The application is brought pursuant to ss 33 – 36 of the Criminal Proceeds (Recovery) Act 2009. Section 35(e)(v) provides:

35 Types of further order

Without limiting the generality of section 34(1), a court may, on an application under section 33(1), make 1 or more of the following further orders in relation to restrained property:

...

(e) an order relating to the Official Assignee that—

...

(v) directs the Official Assignee to sell restrained property (including, without limitation, a business) in order to preserve the value of the restrained property:

[8] *Adams on Criminal Law* notes that sale orders are not automatically made in relation to restrained assets such as motor vehicles.¹ The reduction in the eventual return caused by the holding costs cannot be sufficient of itself to warrant an order for sale. The learned authors continue:²

Factors that are taken into account include the nature and value of the asset, the length of time before the substantive proceeding will be determined, the extent to which the asset may depreciate during that period and the wishes of the owner of the asset and any other person who may have an interest in it ... Although storage and insurance costs were expressly excluded from consideration in *Commissioner of Police v Evans* (above) at [33], in other cases those costs have been recognised as relevant and considered along with other factors.

History of proceeding

[9] In February 2020, Police commenced an investigation into the manufacture, sale and supply of methamphetamine by a group of persons in the Waikato and Auckland regions. Without notice restraining orders were granted in the High Court at Hamilton on 3 July 2020.

[10] On 7 July 2020, the Police operation was terminated. Mr McQuade, Mr Tyler-Waugh and Mr Simpson were among those arrested and charged with the various drug offences. All three later pleaded guilty to numerous offences. On 22 April 2021, Mr Tyler-Waugh was sentenced to 11 years and three months' imprisonment. On 17 December 2021, Mr Simpson was sentenced to three years and six months'

¹ Simon France (ed) *Adams on Criminal Law – Sentencing* (online ed, Thomson Reuters) at [CP35.02].

² .At [CP35.02].

imprisonment. On 25 March 2022, Mr McQuade was sentenced to five years and three months' imprisonment.

[11] Although Mr McQuade was sentenced as long ago as 25 March 2022, the Commissioner has not yet filed a civil forfeiture application and affidavits in support of such an application. Counsel submits that examination of Mr McQuade under s 107 of the Criminal Proceeds (Recovery) Act 2009 was required, but while a number of attempts were made to examine him earlier, Mr McQuade was only able to be examined on 28 February 2023. It is now necessary to make further enquiries because of the information provided by Mr McQuade, but counsel advises the Court that the forfeiture application and affidavits in support will be filed on or before June 2023.

Holding costs

[12] The cost to the Official Assignee to store vehicles is currently \$14.30 per day (as from 1 May 2021), which includes a daily security and administration charge of \$2.30 and a daily mechanical maintenance charge of \$0.80. This compounding fee is settled at the time of sale of the vehicle and detracts from the return to the community should the Commissioner be successful in his forfeiture application or, alternatively, preserves the position of the respondent should the Commissioner's forfeiture application not succeed. The total projected annual cost to store the nine vehicles is \$46,975.00. This does not include insurance or additional maintenance costs.

[13] As to depreciation, passage of time for a motor vehicle is generally a factor in the depreciation of its market value with each year passing typically seeing an erosion of that value. The Inland Revenue Department (IRD) publishes a schedule of depreciation for individual assets. It provides various percentages for asset value calculation, depending on the asset being depreciated. In relation to motor vehicles, the diminishing value percentage is set at 30 per cent and straight-line value is 21 per cent per annum. To take an example, one of the motor vehicles sought to be sold, NSANE8, had a valuation of \$55,000 determined by Turners Auctions when it was restrained and placed in storage. Its value less storage and depreciation calculated on a diminishing value percentage of 30 per cent after one year would be \$33,532.

Opposition to application for sale orders

[14] Mr McQuade and Ms Tritar oppose sale orders in respect of the five vehicles in which they are said to have a beneficial interest. These are a:

- (a) 2013 Holden HSV Clubsport R8 motor vehicle, registration number NSANE8, valued by Turners Auctions at \$55,000;
- (b) 2014 Jeep Wrangler motor vehicle, registration number MQD96, valued at \$28,000;
- (c) 2016 Holden HSV GTS motor vehicle, registration number JQG400, valued at \$70,000;
- (d) 2003 Holden Monaro CV8 motor vehicle, registration number HCD624, valued at \$4,000; and a
- (e) 1990 Toyota Coaster van, registration number LWH95, valued at \$18,500.

[15] The grounds set out in the notice of opposition are:

- (a) There has been no application to sell the vehicles in the proceeding two years of restraint and the proceeding should soon be completed or resolved.
- (b) Some of the restrained vehicles (NSANE8, JQG400, HCD624) are appreciating in value.
- (c) One of the restrained vehicles (NSANE8) is of particular sentimental value to the first respondent.
- (d) An innocent party, Mr Glenn McGlade, holds an ownership interest in LWH95.

[16] The affidavit by Ms Tritar confirms the grounds of opposition relied upon. As to the purported appreciation in value of three of the vehicles, Ms Tritar relies on Holden retiring its branded vehicles from New Zealand and referred to a private vendor listing on the website Trade Me in respect of a Holden HSV only.

[17] As to the sentimental value of NSANE8, Mr McQuade did not file an affidavit. Ms Tritar claims on his behalf that he “always wanted to own a vehicle like this”. In addition, some of his father’s ashes are in the vehicle. As to Mr McGlade’s interest in LWH95, that is to be for unpaid work undertaken by him on the van to the value of \$15,000. Ms Tritar annexes an agreement apparently signed in March 2019. Mr McGlade has not filed an affidavit, but has made a statement to Police.

Evidence of value

[18] Mr Booth is a specialist vehicle consultant and broker. He has provided high-end and specialist vehicle consultation, valuation and sales broking services to the Ministry of Business, Innovation and Employment since 2016. In October 2022, he inspected two of the five vehicles at issue and gave wholesale values for them both.

[19] As to JQG400, Mr Booth states:

The subject vehicle is a 2016 model HSV GTS sedan first registered new in New Zealand in February 2016. It is optioned with the more desirable manual transmission. HSV models, in particular the GTS variant, have experienced an increase in desirability since manufacture of all Holden/HSV vehicles ceased in 2017. Values climbed sharply throughout 2020/21 as certain models came to be viewed as collectable combined with a general uplift in prestige and classic vehicle values due to COVID influenced market factors. Throughout 2022 these values have shown a steady decline with examples marketed at premium prices remaining unsold for long periods.

[20] Mr Booth was of the opinion that an achievable wholesale price for JQG400 was \$55,000 to \$60,000 including GST. He later updated the valuation following responses sought from two motor vehicle dealers, both very active in the HSV market, on current market conditions for this vehicle. Mr Booth revised the expected achievable wholesale value for JQG400 to \$64,000 to \$69,000 including GST.

[21] As to NSANE8, Mr Booth stated:

The subject vehicle is a 2013 model HSV Clubsport R8 first registered new in Australia in June 2013 and imported to New Zealand in 2017. The vehicle displays several mechanical and bodywork modifications as well as evidence of previous accident damage. Many vehicles have been imported into New Zealand from Australia as damaged or ex insurance statutory write-offs and whilst no importation related document was provided there is a very high chance that this vehicle was imported in a damaged condition.

[22] Mr Booth was of the opinion that an achievable wholesale price for NSANE8 was \$20,000 to \$25,000 including GST. He noted that the vehicle's value would be significantly higher in original factory specification, including return to original colour, however it would not be economic to undertake the work required to achieve this and the obvious damage history has a permanent impact on saleability.

[23] In her affidavit, Ms Tritar refers to appreciation in value of Holden motor vehicles. She states:

On 17 February 2020, General Motors announced that the Holden brand would be retired by 2021. GM stated it would no longer make right-hand drive vehicles globally, leaving the Australia and New Zealand market altogether.

As a result, certain Holden vehicles have become collectors' items and are appreciating in value.

For example, a 2016 Holden HSV GTS motor vehicle odometer 32258, but not supercharged (which JQG400 is) was recently valued by Trade Me at \$107,750.

Because it is supercharged JQG400 will be significantly more valuable than that.

[24] She further states that similar vehicles are current advertised on Trade Me for prices of \$164,900 and \$119,990. Unlike these vehicles, JQG400 is a manual, which makes it more valuable. She then notes that JQG400 was valued by Turners Auctions in February 2022 at \$70,000.

[25] In cross-examination, Ms Tritar stated that her understanding of the value in part of JQG400 comes from a Trade Me listing of another vehicle.

Discussion

JQG400

[26] In the end, the opposition to the sale order focused on the value of one vehicle, JQG400. What is important, however, is not the actual wholesale or retail price, but the trend in value. In October 2022, Ms Tritar obtained a Trade Me valuation for JQG400 of \$107,750 (medium value). Mr Booth commented that such a valuation gives absolutely no consideration to the condition of a vehicle as it was not inspected by Trade Me. He also assumes that Trade Me creates a value by some algorithm based on an average of asking prices for vehicles for sale on Trade Me. He commented “[s]o a Trade Me valuation that is averaging asking prices is not directly reflective of what vehicles are selling for”.

[27] Mr Booth also pointed out that the stated odometer reading of 32,258 kilometres was incorrect as when he inspected the vehicle the odometer reading was 65,970 kilometres. He said that the value should therefore be discounted by 15 to 20 per cent. This would bring the Trade Me value down to a range of \$86,200 to \$91,587.50.

[28] Mr Booth also produced an updated valuation obtained from Trade Me on 17 March 2023, five months after the valuation obtained from Ms Tritar. It gave a (medium) value of \$79,400. This was “high indicative” of the dropping in market values for these vehicles, according to Mr Booth.

[29] Although there had been a significant increase in value for the vehicle in 2020/2021, I accept Mr Booth’s evidence that there is now a substantial correction underway. In these circumstances, it is preferable to sell JQC400 now before further value is eroded.

NSANE8

[30] The circumstances around “some of” Mr McQuade’s father’s ashes being “in the vehicle” are unclear. No ashes were identified when the vehicle was seized, notwithstanding a thorough examination, but it is to be assumed that some of his ashes

were scattered inside the vehicle. If so, this case is similar to *Commissioner of Police v Drummond*,³ in which Lang J accepted that the respondent had a sentimental attachment to the vehicle which formerly belonged to the respondent's deceased wife, but nonetheless made sale orders.

[31] When compulsorily examined by the Commissioner on 28 February 2023 under s 107 of the Criminal Proceeds (Recovery) Act, Mr McQuade said he acquired NSANE8 after a number of trade-ins and it was his "forever" car. That is why he was storing it, as well as other investments, at his sister's address. He had previously crashed NSANE8 while driving it and he wanted it to be out of his reach.

[32] There is nothing particularly unique about this vehicle. It has been accident damaged and, according to Mr Booth, it would be uneconomic to return it to its original condition in an attempt to extract more value from it. Mr McQuade had stored the vehicle and was not using it. In these circumstances it is preferable to sell NSANE8 to retain what value it does have.

LWH95

[33] Mr McQuade and Ms Tritar oppose a sale order for LWH95 on the basis of what Ms Tritar says is an ownership interest held by Mr McGlade. She states she and Mr McQuade contracted Mr McGlade to undertake a significant restoration of LWH95 to turn it into a house bus for them. The basis of the contract was that Mr McQuade would later pay Mr McGlade in kind by giving him a refurbished container. Mr McQuade's arrest meant that he could not refurbish and provide the container to Mr McGlade as agreed. Ms Tritar confirms that they have not otherwise paid Mr McGlade for any of his work.

[34] Police have contacted Mr McGlade, who confirmed that he was going to supply labour and materials to an agreed value of \$15,000 and in return he was to receive a \$5,000 shipping container and a \$10,000 bank deposit. He estimates he is owed approximately \$10,000 for the work he has done to date. The Police confirmed with Mr McGlade that he was okay with selling LWH95 so long as he could "have a

³ *Commissioner of Police v Drummond* [2018] NZHC 1730.

crack at the money from it". The Police have accordingly now made application on notice for a new parties order that Mr McGlade be made a party to the current proceedings. This will enable him to make his case for recognition of a legal interest in the proceeds of sale of LWH95.

MQD96/HCD624

[35] These are two further vehicles in which Mr McQuade is said to have a beneficial interest, the first being a Jeep Wrangler valued at \$28,000 and the second a Holden Monaro CV8 valued at \$4,000. No particular submissions were directed at these vehicles. As to the latter, I note that being valued at \$4,000, it would have already started to cause loss to the Official Assignee through annual storage costs of approximately \$5,000 since it was restrained in 2020 and placed under the Official Assignee's control. I see sale orders as necessary to preserve whatever value these two vehicles currently have.

Remaining motor vehicles

[36] Of the nine motor vehicles, subject to the Commissioner's application for sale orders, three are beneficially owned by Mr Tyler-Waugh and one by Mr Simpson. No steps have been taken by them to oppose the sale orders.

[37] The vehicles beneficially owned by Mr Tyler-Waugh are a:

- (a) 2014 Mercedes C63 AMG motor vehicle, registration number MTS482, valued by Turners Auctions at \$36,000.
- (b) 2016 Mercedes E63 AMG motor vehicle, registration number MUN685, valued at \$41,000.
- (c) 2007 Holden Commodore SV6 motor vehicle, registration number HFA744, valued at \$5,000.

[38] The vehicle beneficially owned by Mr Simpson is a:

- (a) 1997 Toyota Hilux motor vehicle, registration number INVADR, valued at \$6,000.

[39] Of these four vehicles, two are valued at \$5,000 and \$6,000 respectively and have already started to cause loss to the Official Assignee through annual storage costs of approximately \$5,000 each since they were restrained in 2020 and placed under the Official Assignee's control. It is time for the Official Assignee to cut its losses on these two vehicles.

[40] As to the other two Mercedes motor vehicles beneficially owned by Mr Tyler-Waugh, no steps have been taken by him to oppose the sale order. The vehicles are now nine and seven years old. If storage costs for a year are taken into account together with depreciation on a diminishing value percentage of 30 per cent, they now have values of \$23,732 and \$20,232 respectively. They too should be sold to preserve their value.

[41] I am of the view that the delay in making an application for sale orders until 30 August 2020, when the Police operation was terminated over two years previously is a neutral factor. A sale order can be made at any time, even after a forfeiture order has been made. The delay has not been detrimental to Mr McQuade or Ms Tritar. In fact, it may have benefited them in as much as Mr Booth gave evidence that values climbed sharply throughout 2020/2021, but since 2022 these values have shown a steady decline. The decline in value seems, however, not as fast as the rise in values.

[42] Furthermore, it seems that there will be a considerable length of time before the Commissioner's civil forfeiture application can be heard. If not filed in Court until June this year, a defended hearing date will probably not be available until sometime in 2024. This is not a neutral favour, but one which favours the making of sale orders now, when three of the motor vehicles have already incurred storage costs which exceed their value.

Result

[43] The Commissioner's application for early sale orders is granted. There will be:

- (a) An order directing the Official Assignee to sell the following restrained property in order to preserve the value of the restrained property:

Alan Clinton McQuade – first respondent

- (i) 2013 Holden HSV Clubsport R8 motor vehicle, registration number NSANE8;
- (ii) 2014 Jeep Wrangler motor vehicle, registration number MQD96;
- (iii) 2016 Holden HSV GTS motor vehicle, registration number JQG400;
- (iv) 2003 Holden Monaro CV8 motor vehicle, registration number HCD624; and
- (v) 1990 Toyota Coaster van, registration number LWH95.

Ray Alan Tyler-Waugh – second respondent

- (vi) 2014 Mercedes C63 AMG motor vehicle, registration number MTS482;
- (vii) 2016 Mercedes E63 AMG motor vehicle, registration number MUN685; and
- (viii) 2007 Holden Commodore SV6 motor vehicle, registration number HFA744.

Ryaan Thomas Simpson – fourth respondent

- (ix) 1997 Toyota Hilux motor vehicle, registration number 1NVADR.
- (b) An order directing the Official Assignee to hold any remaining funds derived from the sale of the property listed above in an interest-bearing trust account until the resolution of the proceedings.

Woolford J