

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

**CIV-2014-404-1067
[2014] NZHC 2978**

UNDER the Criminal Proceeds (Recovery) Act
2009

BETWEEN COMMISSIONER OF POLICE
Applicant

AND MICHAEL JOSEPH CAVANAGH
First Respondent

AND VICTORIA LOUISE CAVANAGH
Second Respondent

AND LISA MARIE RYAN
Third Respondent

AND SHANNON KAY STEVENS
Fourth Respondent

AND DAVID GERALD O'CARROLL
Fifth Respondent

AND NIGEL JOHN BOWKER
Sixth Respondent

Hearing: 26 November 2014

Appearances: M R Harborow for Applicant
No appearance by G C Gotlieb for Sixth Respondent

Judgment: 26 November 2014

ORAL JUDGMENT OF VENNING J

Solicitors: Crown Solicitor, Auckland
Neilsons Lawyers Ltd, Auckland

Copy to: G Gotlieb, Auckland
M Ryan, Auckland
I Koya, Auckland
E Leary, Auckland

[1] By way of applications, dated 15 May 2014 and 30 May 2014, the Commissioner of Police applied in respect of various property, particularly for present purposes a number of motor vehicles and a motor launch, for restraining orders and related orders, including orders directing the sale at fair market value with the Official Assignee to hold the proceeds of sale in accordance with the restraining orders.

[2] On 12 June and 24 May 2014 restraining orders were made over the property and on 3 July 2014 Lang J made sale orders in respect of eight vehicles comprising part of the property. On 3 July 2014 the Judge also set the matter down for all remaining issues to be determined at a single half day fixture to be held on 26 November 2014 at 11.45 am. The matter comes before the Court to resolve outstanding issues on that basis.

[3] There have been a number of affidavits filed in support of the Commissioner's position, some directly relevant to the issue of restraint and some touching on the issue of sale. In considering the determination of the applications before the Court, particularly the application for sale of the identified property, I have taken into account the previous affidavits of Detective Latimer sworn on 5, 9, 12 and 29 May 2014, an affidavit of Detective Sergeant Sowter, an affidavit of Detective Latimer of 12 September 2014 in reply, and affidavits of Detective Lee and Detective Sergeant Sowter in reply sworn on 12 and 17 September 2014. In addition, for the purposes of the hearing this morning, Detective Latimer has filed a further affidavit in support of the application for sale orders.

[4] The application for sale orders follows the process of seizure of the vehicles and launch in question after the termination of a large scale police investigation known as Operation Genoa. During the course of the operation the police conducted covert surveillance and obtained mobile phone data for the respondents pursuant to production orders and search and surveillance device warrants. Following termination of the operation the police located an active clan lab in an enclosed trailer and one kilogram of methamphetamine and six kilograms of ephedrine. The police also located and seized substantial property assets including numerous

vehicles which are scheduled to the various applications before the Court, a money counting machine, engineering equipment and approximately \$260,000 in cash.

[5] Eight defendants were arrested. They collectively face a large number of charges including the manufacture of the class A drug methamphetamine, possession of equipment, money laundering, forgery, receiving property and participating in an organised criminal group.

[6] The Commissioner accepts that, although the property is restrained, application for forfeiture will follow the conclusion of the criminal proceedings. That may be one year – 18 months away. For those reasons the Commissioner seeks sale orders in relation to the wasting assets, namely motor vehicles and the launch.

[7] A sale order may be made at any time. Typically sale orders are pursued by the Commissioner where the restrained assets in relation to which the sale orders are sought have high depreciation rates combined with additional costs of storage and insurance which ultimately decrease the potential return to the Commissioner and/or be parties who claim an interest in the assets. There is a further additional benefit in the sale in that, once the assets are sold, the Official Assignee is able to hold the funds in an interest bearing account.

[8] Section 35(e)(v) provides for the Court to direct the Official Assignee to sell the restrained property in order to preserve the value of the restrained property. In *Commissioner of Police v Chen & Ors* Courtney J observed:¹

[30] The underlying purpose of the restraining order is to preserve the subject property because it represents a monetary value to the parties concerned. The legislature can be taken to have appreciated that property may be subject to a restraining order for a considerable time and that circumstances may change over the life of the order that so as put the property at risk. Some risks may be of a kind that action, including disposition of the property itself, may be needed to preserve the value that the property represents. If there were no mechanism for responding to such risks the rationale for the scheme would be significantly undermined.

[31] Section 35(e)(v) specifically recognises the need to preserve the value of the restrained property through the sale of it. There are many foreseeable circumstances that might justify such an order. These include a

¹ *Commissioner of Police v Chen & Ors* [2013] NZHC 2259 at [30]–[31].

significant drop in the property market, the risk of a mortgagee sale and the reduction in value caused by lack of funds to maintain the property. For these reasons I consider that the ancillary orders can properly be made in the terms sought.

Similar reasoning applies to the position before the Court in relation to the vehicles for which the sale orders are sought.

[9] Detective Latimer's most recent evidence discloses that the Inland Revenue Department applies depreciation rates to motor cycles at 30 per cent per year, motor vehicles at 30 per cent per year and for pleasure vessels 13 per cent per year. Mr Harborow accepted that those are maximum rates of depreciation for accounting purposes but I accept his submission they give an indication of and support the instinctive view one might take that cars and boats are depreciating assets. That is particularly so where the cars, motor cycles and boats are of recent vintage and have no particular value in terms of speciality or uniqueness. The Official Assignee has obtained estimates valuations of a number of the vehicles which reflects and supports the view that they are wasting assets.

[10] The application before the Court this morning has effectively proceeded as a formal proof. There is no opposition to the orders sought save for one matter I should clarify and that is in relation to Mr Bowker, whom Mr Gotlieb represents. It appears that Mr Gotlieb intended to appear this morning. There was an email exchange between the Registrar and Mr Gotlieb about this morning's hearing. Mr Gotlieb was advised by the Registrar the hearing was at 10 am. Mr Gotlieb then emailed the Registrar to advise that, when he discovered this was on the list at 11.45 am, he was unable to attend at 11.45 am as he had arranged his day around it proceeding at 10 am. He has said 'I would be obliged if the matter relating to the Harley motor bike can be dealt with at a later stage'.

[11] I am not prepared to adjourn the matter relating to the Harley motor bike which Mr Bowker claims an interest in to be dealt with at a later date. The minute of Lang J, dated 3 July 2014, recorded that Mr Gotlieb was present that day when the Judge allocated the fixture on today's date, 26 November 2014, commencing at 11.45 am. The minute would have been distributed to all counsel, including Mr Gotlieb. There was no reason or need for Mr Gotlieb to seek further clarification

from the Court when the matter would be heard given that clear direction of the Judge.

[12] Further, if Mr Gotlieb expected the matter to be dealt with in the Duty Judge List at 10 am, the Duty Judge List often runs past the 11.30 am adjournment, so he may well have been required to be here after 11.30 am or at 11.45 am in any event, even if the matter were listed at 10 am.

[13] Also, if Mr Gotlieb was seeking to have matter adjourned, at the very least the courtesy of arranging an appearance in support of such application was required.

[14] Further, I note that in a memorandum filed for the Court on 19 November 2014, Mr Gotlieb, instead of filing submissions, filed a memorandum noting:

The remaining vehicles the Crown seeks to have sold [which his client was interested in] are:

- a. Isuzu Truck;
- b. MTE Trailer; and
- c. 2014 Harley Davidson Motorbike.

He concluded his memorandum with the following advice:

9. Due to the realistic approach by Mr Bowker the three vehicles sought to be sold can be consented to by Mr Bowker, but on the basis that they are not tainted and needed to be considered in the overall determination of the Criminal Court matters.

[15] In the circumstances I decline the informal request for an adjournment which Mr Gotlieb advanced by way of email to the Registrar. It appears in further communication, which Mr Harborow properly provided to the Court, between Mr Gotlieb, the Registrar and counsel for the Commissioner, that Mr Gotlieb wished to advance the proposition that:

The motor bike has only done about 200 km. It appears from advice I have received that Harleys in mint condition hold their value and depreciation is of very limited effect.

[16] There is, of course, no evidence to support that hearsay advice Mr Gotlieb has obtained. By contrast, there is the evidence of Detective Latimer as to the depreciation.

[17] For all the above reasons I decline to put the matter off in relation to that vehicle and am satisfied that, like the other vehicles sought to be the subject of an order for sale this morning, that the order for sale is appropriate in order to preserve the value of the restrained property through sale.

[18] For the above reasons I make orders for the sale of the following items:

- 1 2009 Dodge Nitro motor vehicle registration number FBA247, registered to Allen McHugh.
- 2 2004 BMW motor vehicle registration number HGE843, registered to Stuart Gordon.
- 12 2013 Harley Davidson, Sportster motorbike registration A7PDA registered to Victoria Cavanagh.
- 13 2013 Ford Ranger motor vehicle registration HEY654 registered to Marlene Turner.
- 14 2007 Maserati Gransport motor vehicle registration FMM748 registered to Lisa Ryan.
- 15 2013 Harley Davidson motorbike registration AIRAS registered to Nicholas Ussher.
- 16 2002 Porsche Boxster motor vehicle registration DCU455 registered to Lisa Ryan.
- 17 2000 Ferrari 360 Modena motor vehicle registration BGKHNA registered to Jason Cavanagh.
- 18 2005 Ford Explorer motor vehicle registration CUL539 registered to Deborah Henry, trading as Nitro Juice Limited.
- 19 1941 Indian 741 motorbike registration A6AJZ registered to Jason Cavanagh
- 21 2004 LVVTA, OCC Chopper motorbike registration A1NMS registered to Victoria Cavanagh.
- 22 2007 BMW X5 station wagon motor vehicle registration HEG549 registered to Rocket Rentals Limited.

- 23 2007 BMW M3 Coupe motor vehicle registration GLE141 registered to Elizabeth Meurant.
- 24 The motor vessel, being built in approximately 1954, 10m launch 'Navahoe' registered to Maria Hilton.
- 25 2001 Harley Davidson Softail motorbike registration A3HHP registered to Jason Cavanagh.
- 26 2012 Food Trailer registration T228M registered to Deborah Henry, trading as Nitro Juice Limited.
- 27 2014 Harley Davidson V-Rod Night Rod motorbike registration A6TJH registered to Nigel Bowker.

[19] I record that an order is not sought in relation to the 2014 Audi Q3 noted at item 20 on the schedule because counsel's advice is that it already been sold. Inquiries are being made as to how or why that vehicle was sold when it was subject to a restraint order.

[20] I also record, for the avoidance of doubt, that the issues of any entitlement to the proceeds of sale will be determined on any application for forfeiture, which I understand is to follow at the conclusion of the criminal proceedings. To the extent it is necessary, I also direct that the Official Assignee may deal with the proceeds of sale by investing the same through a commercial bank account.

Venning J