

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA28/2024  
[2024] NZCA 367**

BETWEEN                      COMMISSIONER OF THE NEW  
    ZEALAND POLICE  
    Appellant

AND                                TEREVA DAVID AKAVI  
    Respondent

Hearing:                      20 June 2024

Court:                              Collins, Venning and van Bohemen JJ

Counsel:                      E M Ferrier and S Deng for Appellant  
    No appearance for Respondent

Judgment:                      5 August 2024 at 10 am

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**JUDGMENT OF THE COURT**

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- A The appeal is allowed.**
- B The profit forfeiture order of the High Court is amended to specify that the value of the benefit determined in accordance with s 53 of the Criminal Proceeds (Recovery) Act 2009 is \$468,000. The maximum recoverable amount determined in accordance with s 54 is \$468,000 and the property to be disposed of in accordance with s 83(1) of the Act is as set out in the appendix to the High Court decision, being assets totalling \$98,850.54 in value.**
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**REASONS OF THE COURT**

(Given by Venning J)

## **Introduction**

[1] The Commissioner of Police (the Commissioner) sought a profit forfeiture order under the Criminal Proceeds (Recovery) Act 2009 (the Act) against Tereva Akavi. Neither Mr Akavi nor his brother, David Akavi, an interested party, filed any opposition or appeared at the High Court hearing. The Commissioner's application proceeded by way of formal proof before Isac J.

[2] In a judgment delivered on 30 November 2023, the Judge made a profit forfeiture order in the sum of \$98,850.54.<sup>1</sup> The Commissioner had sought a profit forfeiture order in the sum of \$468,000. The Commissioner appeals and submits the sum awarded by the Judge should have been \$468,000.

## **Background**

[3] We take the background from Isac J's judgment:

[8] Mr Akavi was an individual targeted by a Police operation called Operation Bonito. The investigation focused on methamphetamine dealing in the Wellington area.

[9] As part of Operation Bonito, between 6 June 2018 and 13 May 2019, undercover Police officers were deployed to make purchases of methamphetamine from known methamphetamine suppliers in the Wellington District. The investigations identified that the respondent was the head of a methamphetamine supply network that involved fellow King Cobra gang member Marlin Marsters and King Cobra gang associate Dominic Sua.

[10] The operation insofar as it concerned Mr Akavi spanned only a fraction of the total time covered by Operation Bonito. In particular, the transactions involving the sale and supply of significant quantities of methamphetamine by Mr Akavi and his two associates to an undercover officer occurred between 13 February 2019 and terminated with Mr Akavi's arrest on 13 May 2019, a period of three months.

[11] During searches of Mr Akavi's home addresses and vehicles, a significant amount of methamphetamine, cash and cannabis were located by Police.

[12] Criminal charges were filed against the respondent and others involved in the methamphetamine supply network. On 29 October 2021, the respondent was sentenced in the Hutt Valley District Court after pleading guilty to the following charges:

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<sup>1</sup> *Commissioner of Police v Akavi* [2023] NZHC 3449 [High Court judgment] at [34] and [35].

- (a) four representative charges of supplying methamphetamine (relating to 7 grams on 25 February 2019; 28 grams on 22 March 2019; 14 grams on 28 March 2019; and 14 grams on 4 April 2019):
- (b) one representative charge of possession for supply of methamphetamine (relating to 140 grams and 14 grams found at the respondent's home on 13 May 2019);
- (c) one representative charge of offering to supply methamphetamine (relating to offers to supply 7 or 28 grams on 25 February 2019);
- (d) one charge of possession of cannabis for supply (relating to 140 grams);
- (e) two charges of possession of firearms/ammunition contrary to the Arms Act 1983; and
- (f) one charge of failing to assist Police.

[13] As the summary of facts on which Mr Akavi was sentenced confirms, he supplied a total of 63 grams of methamphetamine to an undercover Police officer. In addition, he offered to supply a further 28 grams and was in possession of 154 grams of methamphetamine for the purpose of supply when arrested on 13 May 2019.

[14] Mr Marsters, Mr Akavi's associate, supplied 65 grams of methamphetamine to undercover Police and offered to supply 147 grams. He was also in possession with Mr Akavi of a total of 140 grams on 13 May 2019. Finally, Mr Sua separately supplied 56 grams of methamphetamine to an undercover Police officer.

[15] It is clear from the summary of facts that all three defendants were members of the King Cobra gang and dealing in methamphetamine as a joint enterprise. I infer from the summary that Mr Akavi was the senior member, who appears responsible for sourcing drugs supplied by Messrs Sua and Marsters, and for collecting and retaining cash from sales.

[16] A number of vehicles, jewellery and significant sums of cash were seized by Police and are subject to the current proceedings. In summary they consisted of:

- (a) Harley Davidson motorcycles;
- (b) a Chevrolet Impala motor vehicle;
- (c) cash and bank funds totalling \$36,357.25; and
- (d) gold rings, a gold bracelet, and a Louis Vuitton bag.

## The High Court judgment

[4] After referring to the above background, the Judge noted that the Commissioner sought a profit forfeiture order under the Act in the sum of \$468,000, calculated on the basis that Mr Akavi had either directly, or through his subordinates, sold a minimum of one ounce of methamphetamine per week, at \$9,000 per ounce, for the year preceding his arrest.<sup>2</sup> The Judge noted the calculations were based on the evidence of Detective Paul Brown:

- 6.2 I have calculated the unlawful benefit figure on the basis that the respondent (Akavi) has either directly or through his subordinates, sold a minimum of one ounce of methamphetamine per week at a cost of \$9,000 per ounce.
- 6.3 Mr Marsters either supplied or offered to supply a total of 182 grams of methamphetamine valued at \$60,000 to undercover officer [A] during the six occasions Mr Marsters interacted with undercover officer [A] between 25 February 2019 – 4 April 2019.
- 6.4 When the 182 grams of methamphetamine supplied or offered for sale by Mr Marsters is divided by the six interactions that occurred between Mr Marsters and undercover officer [A] between 25 February 2019 – 4 April 2019, the average quantity of methamphetamine supplied or offered for sale during each interaction was approximately one ounce per week.
- 6.5 The following chart outlines how I have obtained the 182 grams of methamphetamine and the \$60,000 figures for this period.

Date	Drug amount	Drug value	Information source
25.02.2019	21 grams	\$6,000	Undercover officer [A] offered 1 ounce (28 grams) of methamphetamine by Mr Marsters for \$8,000. Unlawful benefit calculated on the basis that after purchasing only 7 grams from Mr Marsters that same day, the respondent (Akavi) would still have at least 21 grams available for sale.
25.02.2019	7 grams	\$2,800	Undercover officer [A] purchases 7 grams of methamphetamine from Mr Marsters for \$2,800 cash.
22.03.2019	1 ounce (28 grams)	\$9,000	Undercover officer [A] purchased 1 ounce (28 grams) of methamphetamine from Mr Marsters for \$9,000 cash.

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<sup>2</sup> At [17].

26.03.2019	3 ½ ounces (98 grams)	\$31,500	Undercover officer [A] offered 4 ounces (112 grams) of methamphetamine by Mr Marsters for \$9,000 per ounce. Unlawful benefit calculated on the basis that [A] purchases ½ an ounce (14 grams) of methamphetamine from Mr Marsters two days later (28.03.2019) so the respondent (Akavi) would still [have] at least 3 ½ ounces (98 grams) available for sale.
28.03.2019	14 grams	\$5,500	Undercover officer [A] purchased 14 grams of methamphetamine from Mr Marsters for \$5,500 cash.
04.04.2019	14 grams	\$5,200	Undercover officer [A] purchased 14 grams of methamphetamine from Mr Marsters for \$5,200 cash.
<b>Totals</b>	182 grams	\$60,000	

- 6.6 I believe it is reasonable to conclude that undercover officer [A] is just one of many customers the respondent (Akavi) has been selling methamphetamine to either directly or through his subordinates.
- 6.7 If the respondent (Akavi) sold one ounce of methamphetamine each week for \$9,000 per ounce he would have accumulated an unlawful benefit of \$468,000 over the course of one year.
- 6.8 I believe the actual quantity of methamphetamine sold by the respondent (Akavi) either directly or through his subordinates over the course of a one year period is likely to be much higher and that the unlawful benefit figure of \$468,000 should be considered as conservative.
- 6.9 The IRD reports on the respondent (Akavi)'s recorded income shows that his declared earnings are not at a sufficient level to allow for the accumulation of the assets identified as well as supporting day to day living expenses.
- 6.10 The evidence obtained by the criminal investigation team has identified that the respondent (Akavi) has supplied a significant amount of methamphetamine and is dealing in significant amounts of cash. The level of legitimate income enjoyed by the respondent (Akavi) is simply too low to support such activities.

[5] In addition, Detective Brown noted that, from 1 April 2012 to 31 March 2018 Mr Akavi's recorded gross earnings were \$86,411.01 in total. There was no record of his income for the year ended 31 March 2014. For the year ended 31 March 2018, his declared gross income was only \$2,044.

[6] The Judge referred to the decision of this Court in *Commissioner of Police v de Wys*, in which the Court discussed the inferences capable of being drawn from

circumstantial evidence.<sup>3</sup> The Judge then went on to state, after referring to s 53 of the Act:<sup>4</sup>

[29] Unless there is a sound basis for doing so, the Court will not readily depart from the reasonable inferences drawn by the Commissioner in calculating the unlawful benefit gained from the significant criminal activity. In *Commissioner of Police v He*, where the Commissioner's estimate was conservative with various tolerances built in, the extrapolation from the information available through observation over a shorter period of drug dealing was found to be reasonable in the absence of evidence to the contrary.

[7] While accepting there was no doubt Mr Akavi had derived an unlawful benefit, the Judge considered the difficulty in the present case was “the lack of a reliable yardstick on which to assess an overall value”.<sup>5</sup> The Judge considered that, without an objective measure on which to define the parameters of the calculation, the Court would not be determining the ultimate issue based on evidence and reasonable inferences.<sup>6</sup> He was not satisfied the unlawful benefit could reliably be said to amount to \$468,000, but what there was no doubt about was the extent and value of the property linked to Mr Akavi.<sup>7</sup> For those reasons, he made a profit forfeiture order based on the value of the property seized by Police, which equated to \$98,850.54.

## **Appeal**

[8] The Commissioner appeals on the basis that the Judge erred in his interpretation of s 53 of the Act by failing to take the presumed value of the unlawful benefit as the value stated in the Commissioner's application under s 52(c) of the Act. Also, the Judge erred in his application of s 55 of the Act by granting a profit forfeiture

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<sup>3</sup> *Commissioner of Police v de Wÿs* [2016] NZCA 634 at [9]–[10].

<sup>4</sup> High Court judgment, above n 1 (footnotes omitted).

<sup>5</sup> At [30].

<sup>6</sup> At [31].

<sup>7</sup> At [32].

order for a value other than the maximum recoverable amount determined in accordance with s 54 of the Act.

## **Analysis**

[9] Section 55 of the Act provides for the making of a profit forfeiture order:

### **55 Making profit forfeiture order**

- (1) The High Court must make a profit forfeiture order if it is satisfied on the balance of probabilities that—
  - (a) the respondent has unlawfully benefited from significant criminal activity within the relevant period of criminal activity; and
  - (b) the respondent has interests in property.
- (2) The order must specify—
  - (a) the value of the benefit determined in accordance with section 53; and
  - (b) the maximum recoverable amount determined in accordance with section 54; and
  - (c) the property that is to be disposed of in accordance with section 83(1), being property in which the respondent has, or is treated as having, interests.
- (3) Subsections (1) and (2) are subject to section 56.
- (4) A profit forfeiture order is enforceable as an order made as a result of civil proceedings instituted by the Crown against the person to recover a debt due to it, and the maximum recoverable amount is recoverable from the respondent by the Official Assignee on behalf of the Crown as a debt due to the Crown.

[10] Under s 52 of the Act, the application for a profit forfeiture order must:

- (a) name the respondent; and
- (b) describe the significant criminal activity within the relevant period of criminal activity from which the respondent is alleged to have unlawfully benefited; and
- (c) state the value of that benefit; and
- (d) identify the property in which the respondent holds interests and the nature of those interests.

[11] Importantly, s 53 of the Act provides:

**53 Value of benefit presumed to be value in application**

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

[12] Section 54 sets out the mechanism by which the Court determines the maximum recoverable amount: the value of any property forfeited to the Crown as a result of an assets forfeiture order made in relation to the same significant criminal activity is deducted from the value of the benefit determined in accordance with s 53:

**54 High Court must determine maximum recoverable amount**

- (1) Before the High Court makes a profit forfeiture order, the Court must determine the maximum recoverable amount by—
  - (a) taking the value of the benefit determined in accordance with section 53; and
  - (b) deducting from that the value of any property forfeited to the Crown as a result of a type 1 assets forfeiture order made in relation to the same significant criminal activity to which the profit forfeiture order relates.
- (2) In determining the value of any property under subsection (1)(b), the Court may, at its own discretion or at the request of either party to the proceedings, seek an independent valuation as to the value of the property.
- (3) If a type 1 assets forfeiture order relating to a determination under this section is discharged on appeal, the Court may, on application by the Commissioner, vary the maximum recoverable amount in the profit forfeiture order to reflect that there is no longer a deduction to be made on account of the type 1 assets forfeiture order.

[13] As noted, the Judge found that the Commissioner had proved Mr Akavi unlawfully benefited from significant criminal activity.<sup>8</sup> Once that onus is satisfied,

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<sup>8</sup> At [30].



as it was in the present case, then, under s 53 of the Act, the onus shifts to the respondent to rebut the presumed value of the unlawful benefit advanced by the Commissioner in the application under s 52(c). In *Cheah v Commissioner of Police*, this Court confirmed:<sup>9</sup>

[47] Under s 53 there are only two possible outcomes. The first is that the Commissioner enjoys the benefit of the presumption and the respondent fails to rebut the presumption. In that case the presumed value stands. The second is where the respondent succeeds in rebutting the presumption. As for the latter, by necessary construction, it follows that the respondent must prove a different value. Under s 53 the Court's role is limited to deciding on the balance of probabilities whether the Commissioner has proved that the respondent unlawfully benefitted, during the relevant period of criminal activity, from significant criminal activity, and whether the respondent has rebutted the presumption that the value of that benefit is correctly stated in the application. That may be contrasted with s 54, where the High Court is specifically tasked with determining the maximum recoverable amount by taking the value determined under s 53 and deducting from it the value of any property forfeited to the Crown as a result of the assets forfeiture order. In other words, the Act draws a distinction between values which are for the Court to assess and others which are for others to prove.

[14] In *Cheah*, this Court cited with approval the previous decisions of the High Court in *Commissioner of Police v Tang* and *Commissioner of Police v Filer*.<sup>10</sup>

[15] In *Filer*, Gilbert J had considered the basis of the Commissioner's assessment of value and stated:<sup>11</sup>

[13] ... I conclude that if the respondent fails to prove the benefit on the balance of probabilities, the amount stated in the Commissioner's application must stand, even if the correctness of the underlying assessment is questionable.

[16] In *Cheah*, this Court went on to state:<sup>12</sup>

[49] We acknowledge that the result in this case is severe. The Commissioner's projection of profits fails to make a reasonable concession for the fact that Mr Cheah was probably not supplying on the same scale over the 196 weeks. The vast majority of dealing cases which come before the Court involve dealing which increases incrementally over time. Nevertheless, this is what is required by the statutory onus on a defendant in

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<sup>9</sup> *Cheah v Commissioner of Police* [2020] NZCA 253.

<sup>10</sup> *Commissioner of Police v Tang* [2013] NZHC 1750; and *Commissioner of Police v Filer* [2013] NZHC 3111.

<sup>11</sup> *Commissioner of Police v Filer*, above n 10.

<sup>12</sup> *Cheah v Commissioner of Police*, above n 9.

such proceedings. Section 53 would not result in such a tough outcome if the figures put forward by the Commissioner had been credibly challenged.

[17] The correctness of that approach was recently confirmed by this Court in *Snowden v Commissioner of Police* where, in rejecting a submission that the respondent's inability to recall details of income should not be to the Commissioner's advantage, the Court stated:<sup>13</sup>

[47] We are unable to accept this submission, which runs directly contrary to other decisions of this Court, most notably that in *Cheah v Commissioner of Police*. In that case this Court gave approval to prior High Court decisions, namely the decisions of Katz J in *Commissioner of Police v Tang* and Gilbert J in *Commissioner of Police v Filer*. The tenor of these decisions is that once the Commissioner discharges the initial onus under s 53(1), the onus of proving the correct figure rests with the respondent under s 53(2) and does not pass back to the Commissioner. That interpretation best serves the purposes of the forfeiture regime, including eliminating the chance for persons to profit from undertaking or being associated with significant criminal activity and deterring such activity. As Gilbert J noted in *Filer*, the respondent will know what the benefit was and will have access to the witnesses and records that may be needed to prove this, whereas the Commissioner does not. If the respondent fails to prove the benefit on the balance of probabilities, the amount stated in the Commissioner's application stands, even if its accuracy is questionable.

[18] Given that Mr Akavi took no steps to respond to the application, the value put on the profit forfeiture by the Commissioner must stand. The Judge should not have rejected it. *Cheah* confirms that there is no statutory justification requiring the Court to undertake an assessment of the benefit.<sup>14</sup> The evidential threshold on the Commissioner under s 53(1) is to show that the respondent has, "in the relevant period of criminal activity, unlawfully benefited from significant criminal activity". The Commissioner did so in this case. The Judge accepted there was no doubt Mr Akavi had derived an unlawful benefit from significant criminal activity.<sup>15</sup>

[19] While the Judge referred to the decision of *Commissioner of Police v de Wys* as to the drawing of inferences from circumstantial evidence, in that case the issue was whether the Commissioner had established that Mr de Wys had engaged in the significant criminal activity alleged. Further, while the Judge also referred to the case

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<sup>13</sup> *Snowden v Commissioner of Police* [2021] NZCA 336 (footnotes omitted).

<sup>14</sup> *Cheah v Commissioner of Police*, above n 9, at [25].

<sup>15</sup> High Court judgment, above n 1, at [30].

of *Commissioner of Police v He*,<sup>16</sup> that case does not support his departure from the Commissioner's assessment of the value under s 52(2). We note the Judge did not refer to *Cheah* or *Snowden*.

[20] In the absence of opposition to this application or to the appeal, the Commissioner has responsibly referred to three High Court decisions where the Court queried the Commissioner's unlawful benefit figure. We agree with the submissions for the Commissioner that the cases can be distinguished.

[21] In *Commissioner of Police v Burgess*,<sup>17</sup> the Court found the Commissioner had not complied with s 52(c) as the Commissioner had set the benefit value to be "at least \$2,031,180".<sup>18</sup> The Court considered precision was needed, instead of the open-ended figure proposed by "at least", and accordingly amended the value.<sup>19</sup> In Mr Akavi's case, the Commissioner's application has stated an exact value for the unlawful benefit.

[22] In *Commissioner of Police v Bartlett*,<sup>20</sup> a profit forfeiture order was only considered as an alternative to an assets forfeiture order (which was granted).<sup>21</sup> The Court accepted that a benefit had been derived from the cultivation and sale of cannabis during the analysis period and that the property in question was tainted. It made an assets forfeiture order accordingly.<sup>22</sup> However, the Court did not accept that it could make a profit forfeiture order based on the valuation of plants that had been discovered by police and were removed and destroyed before they could have resulted in any proceeds to the respondent.<sup>23</sup> In Mr Akavi's case, the Commissioner's nominated benefit value is derived from sales completed.

[23] In *Commissioner of Police v Robinson*,<sup>24</sup> the Court considered the respondent had rebutted some of the presumed values stated in the Commissioner's application

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<sup>16</sup> *Commissioner of Police v He* [2022] NZHC 533.

<sup>17</sup> *Commissioner of Police v Burgess* [2015] NZHC 2026.

<sup>18</sup> At [9].

<sup>19</sup> At [10]–[15].

<sup>20</sup> *Commissioner of Police v Bartlett* [2019] NZHC 1449.

<sup>21</sup> At [113]–[114].

<sup>22</sup> At [99]–[100] and [112].

<sup>23</sup> At [124].

<sup>24</sup> *Commissioner of Police v Robinson* [2022] NZHC 2328.

and made adjustments accordingly. In Mr Akavi's case, no rebuttal evidence was offered by the respondent. The Judge in *Robinson* continued on to state that, for the values that had not been rebutted he was "therefore obliged to adopt the figure in the Commissioner's application less the amounts [he had] identified in respect of which adjustments should be made".<sup>25</sup>

[24] Having accepted, as he did in this case, that the Commissioner had satisfied the onus under s 53(1) of the Act, and in the absence of any evidence querying the value put on that profit by the Commissioner, the Judge was wrong to substitute his own calculation of the unlawful benefit value. The Judge was required to take the presumed value of the unlawful benefit as \$468,000.

[25] Turning to the application of s 54 of the Act, while the court has a role in assessing the maximum amount recoverable, the section prescribes how that assessment is to be conducted and notes it is to be completed before the court makes a profit forfeiture order. It is essentially a two-step process:<sup>26</sup>

- (a) the Court takes the value of the benefit determined in accordance with s 53 — in this case, \$468,000; and
- (b) deducts from that value any property forfeited to the Crown as a result of a type 1 assets forfeiture order made in relation to the same significant criminal activity to which the profit forfeiture order relates.

[26] If there are no forfeiture orders made in relation to the same significant criminal activity, then the maximum recoverable amount fixed under s 54 is that specified under s 52(c).<sup>27</sup>

[27] Section 55 then applies. It is prescriptive. The court does not have a discretion. At that stage, the court must make a profit forfeiture order in the sum fixed as above, provided it is satisfied, on the balance of probabilities, that the respondent has

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<sup>25</sup> At [111].

<sup>26</sup> Criminal Proceeds (Recovery) Act 2009, s 54(1).

<sup>27</sup> See for example *Commissioner of Police v Clifford* [2014] NZHC 181 at [24].

unlawfully benefited from significant criminal activity within the relevant period of criminal activity, and that the respondent has interests in property.

[28] We agree with the submission for the Commissioner that any practical difficulties as to there not being sufficient assets to meet the profit forfeiture order are accounted for by the scheme of the Act through the requirement of s 55(2)(c) to specify the property to be disposed of in accordance with s 83(1). Section 55(4) contemplates the value of the benefit, and the maximum recoverable amount may exceed the property identified in s 55(2)(c). The shortfall is a debt to the Crown which may be enforced by the Official Assignee.<sup>28</sup>

### **Outcome**

[29] The appeal is allowed. We answer the issues on appeal:

- (a) The High Court erred in law in its interpretation of s 53 of the Act by failing to take the presumed value of the unlawful benefit as the value stated in the Commissioner's application under s 52(c) of the Act.
- (b) The High Court erred in law in its application of s 55 of the Act by granting a profit forfeiture order for a value other than the maximum recoverable amount determined in accordance with s 54 of the Act.

### **Result**

[30] The appeal is allowed.

[31] The profit forfeiture order of the High Court is amended to specify that the value of the benefit determined in accordance with s 53 of the Criminal Proceeds (Recovery) Act is \$468,000. The maximum recoverable amount determined in accordance with s 54 is \$468,000 and the property to be disposed of in accordance

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<sup>28</sup> Criminal Proceeds (Recovery) Act, s 55(4); and see *Commissioner of Police v Fennell* [2018] NZHC 2249 at [18].

with s 83(1) of the Act is as set out in the appendix to the High Court decision, being assets totalling \$98,850.54 in value.

Solicitors:  
Luke Cunningham Clere, Wellington for Appellant