IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV 2010-419-000635
[2013] NZHC 3111

IN THE MATTER OF	An application pursuant to sections 43, 44, 52 and 58 of the Criminal Proceeds (Recovery) Act 2009
UNDER	the Criminal Proceeds (Recovery) Act 2009
BETWEEN	COMMISSIONER OF POLICE Applicant
AND	SCOTT WARREN FILER First Respondent
AND	CRAIG BRENNAN CULLEN Second Respondent

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Hearing:	14 and 15 October 2013
Appearances:	P V Cornegé for the Applicant S N B Wimsett for the Respondent
Judgment:	26 November 2013

JUDGMENT OF GILBERT J

This judgment was delivered by me on 26 November 2013 at 4.30 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:.....

AND	SCOTT WARREN FILER, PENNY NINA TAYLOR, and MICHAEL GODFREY BRUCE CURTIS as trustees of the Otahu Properties Trust Third Respondents
AND	KATHLYN JULIA HALL Interested Party
AND	N R & S L CURLE LIMITED T/A Barry Armstrong Motors Interested Party
AND	NORMAN JAMES BALL Interested Party
AND	SCOTT ANTHONY PIGGOTT Interested Party

Introduction

[1] The Commissioner applies for a profit forfeiture order against Mr Filer pursuant to s 55 of the Criminal Proceeds (Recovery) Act 2009. This application is made following Mr Filer's conviction at trial of eight offences involving the manufacture and supply of methamphetamine. He is currently serving a sentence of 17 years, four months' imprisonment for these offences.

[2] Mr Filer accepts that he has unlawfully benefitted from significant criminal activity and that he has interests in property. I am therefore obliged to make a profit forfeiture order.[1]

[3] The value of the benefit is presumed to be the value stated in the Commissioner's application, namely $1,592,656.21, unless this presumption is rebutted by Mr Filer on the balance of probabilities.[2]

[4] The issues to be determined are:

(a) the value of the benefit; and

(b) the property to be disposed of.

The value of the benefit

[5] Because of the statutory presumption, it does not matter how the Commissioner assessed the benefit. It is nonetheless helpful to explain how he did so, because Mr Filer seeks to rebut the presumption by demonstrating that the factual assumptions underpinning the Commissioner's assessment are incorrect.

The Commissioner's assessment

[6] The benefit from significant criminal activity is to be assessed during the relevant period of criminal activity as defined by s 5 of the Act. In this case, because

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[1] Criminal Proceeds (Recovery) Act 2009, s 55.
[2] Above n1, s53.

the profit forfeiture application relates to restrained property, the relevant period begins seven years prior to the date of the application for the restraining order and ends on the date the profit forfeiture order was applied for. The application for a restraining order was filed on 27 May 2010, so the relevant period began on 27 May 2003. The application for a profit forfeiture order was filed on 24 April 2013 and accordingly the relevant period ended then.

[7] In his application, the Commissioner alleges that Mr Filer unlawfully benefitted to the value of $1,592,656.21 from significant criminal activity, namely, manufacturing and selling methamphetamine from 4 August 2003 to 17 May 2010. However, the Commissioner's assessment of benefit is confined to the period from 1 January 2005 to 17 May 2010.

[8] The Commissioner's assessment has three components. The main component is the wholesale value of the methamphetamine the Commissioner believes was manufactured during the period covered by the charges, from 1 October 2009 to 17 May 2010. Mr Filer was sentenced on the basis that he was a principal party to the manufacture of three to four kilograms of methamphetamine during this period.[3] For the purposes of his assessment, the Commissioner adopts the lower figure of three kilograms and calculates that this would have yielded a wholesale price of $1,285,700.

[9] The second component relates to the period from 1 January 2005 to 1 October 2009, which is prior to the offending for which Mr Filer was convicted. The Commissioner calculates that during this 57 month period, Mr Filer's known uses of cash exceeded his known legitimate sources of cash by $254,956.21. This equates to nearly $4,500 per month.

[10] The Commissioner calculates the known uses of cash by totalling all cash deposited into Mr Filer's bank accounts and all cash payments he made for goods or services. From this total, the Commissioner deducts all cash received from identified sources including cash withdrawals from Mr Filer's bank accounts. The resulting balance represents the unexplained cash available to Mr Filer. This is a

[3] *R v Filer* [2012] NZHC 149 at [14] - [15].

conservative figure because, as Mr Filer acknowledges, he made many cash purchases over this period for which no receipts were obtained or are now available. If these purchases were taken into account, the surplus unexplained cash available to Mr Filer would be higher.

[11] The third component relates to the purchase of a marina berth at Whangamata in August 2008. The Commissioner claims that Mr Filer's brother purchased and paid for this on Mr Filer's behalf and was reimbursed, to the extent of $52,000, by way of eight cash deposits and a bank cheque purchased with cash. The Commissioner claims that Mr Filer paid for the marina in this way to launder the cash he had obtained from his criminal activity.

What is required to rebut the statutory presumption?

[12] The Commissioner has the initial onus of proving on the balance of probabilities that the respondent unlawfully benefitted from significant criminal activity. If the Commissioner succeeds in discharging that initial onus, the value of the benefit is presumed to be the amount stated in his application. The onus then shifts to the respondent. If the respondent wishes to rebut the statutory presumption, he or she must do so on the balance of probabilities:

> **53 Value of benefit presumed to be value in application**
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> (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 s 52(c); or
> (b) if the case requires, the amended application.
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> (2) The presumption stated in subsection (1) may be rebutted by the respondent on the balance of probabilities.

[13] Section 53(2) of the Act does not make clear whether the respondent has to go further than show that the Commissioner's assessment is wrong and prove what the actual benefit was. However, in my view, this is the correct interpretation. 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. This interpretation serves the purposes of the forfeiture regime which include eliminating the chance for persons to profit from undertaking or being associated with significant criminal activity and deterring such activity.[4] These objectives could be frustrated if the legislation was interpreted so as to require the Commissioner to prove the benefit in all cases where a respondent can establish some error in the Commissioner's assessment. 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. 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.

The evidence

[14] Mr Filer says that his participation in the offending was limited to facilitating the supply of Contact NT to support his use of methamphetamine. He acknowledges that he facilitated the delivery of 35 to 40 sets of Contact NT at $12,000 per set. However, he claims that all he did was to count the money provided by one co-accused and telephone another co-accused, who arranged the supply, to confirm that the money was available. He says that the only benefit he received in return for his involvement was methamphetamine for his own use worth between $17,500 and $20,000. He says that he did not receive any cash and that he acquired the assets the Commissioner now seeks to realise through legitimate business activities, long before his offending.

[15] The Commissioner disputes Mr Filer's claim that he only facilitated the supply of 35 to 40 sets of Contact NT. He also disputes Mr Filer's claim that he did not receive any cash for his participation.

[16] Mr Filer is 50 years of age and a motor mechanic by trade. In 1983, he was sentenced to nine months' imprisonment for possession of cannabis for supply. After he was released from prison, he started a demolition business trading under the name 'Whangamata Demolition'. This business operated from premises at

[4] Section 3(2).

Aickin Road, Whangamata which Mr Filer purchased in about 1986. The business involved preparing building sites by removing existing buildings and levelling the sites. Mr Filer also carried out demolition work in partnership with Craig Cullen through Coastal Demolition Limited, which they owned in equal shares.

[17] The demolition businesses enabled Mr Filer to develop a substantial business trading in secondhand goods. He says that when his business was at its peak, he had seven yards in Whangamata, and two acres in Waihi for storage of demolition materials and other items he obtained. Most of his trading in this business was conducted in cash.

[18] Mr Filer says that he also made a significant amount of money out of property development in the period from 1986 to 2004. During this period he acquired and on-sold numerous properties, having developed and in some cases subdivided them.

[19] Mr Filer's businesses went into decline when he was sentenced to 14 months' imprisonment on 30 August 2002 for selling cannabis to an undercover police officer. Mr Cullen was also sentenced to imprisonment for cannabis offending at that time and Coastal Demolition Limited ceased trading. No tax returns have been submitted for this company since 2002.

[20] Mr Filer's business activities further deteriorated in 2005, when he and his de facto wife ended their 20 year relationship. In order to fund payment of her share of the relationship property, most of the business assets were liquidated, including the Aickin Road property which was sold in April 2007. Mr Filer stopped doing demolition work at that time. The relationship property agreement signed in 2007 records that Mr Filer was left with the house at Walmsley Road, Waihi, and approximately $315,000, being his share of the proceeds of sale of Aickin Road. The financial statements for Whangamata Demolition show that all plant, equipment and stock was disposed of during the course of the financial year ended 31 March 2008.

[21] Mr Filer traded unprofitably in all subsequent years. Whangamata Demolition made losses of $49,885 in the year ended 31 March 2007 and $20,128 the following year. Mr Filer's total trading losses in 2008 were $39,645 taking into account other business losses. His personal financial statements for the year ended 31 March 2009 show a further trading loss of $20,846 and accumulated losses to be carried forward of $212,835.

[22] However, despite the ongoing trading losses, the number and amount of cash deposits suddenly increased from February 2008, as did the unexplained cash available to Mr Filer. In the 2008 financial year, cash deposits totalled $22,633 and unexplained cash available totalled $104,556. In 2009, the cash deposits totalled over $64,000 and the unexplained cash available totalled $123,056. This takes no account of the cost of the Contact NT Mr Filer admits to supplying. Nor does it take into account the cost of the methamphetamine he admits using regularly from 2008 onwards.

[23] Mr Filer says that he started using methamphetamine after suffering the trauma of witnessing a friend accidentally shoot and kill himself in September 2008. Following this tragic accident, Mr Filer says that he panicked and hid the pistol which led to him being charged with obstructing the course of justice and unlawfully possessing a firearm. He pleaded guilty to these offences and was sentenced to seven months' home detention commencing on 9 September 2009. This further curtailed his legitimate business activities.

[24] The Commissioner relies on Keane J's sentencing notes to counter Mr Filer's evidence that he only supplied 35 to 40 sets of Contact NT. Keane J found that Mr Filer participated in the supply of sufficient Contact NT to manufacture three to four kilograms of methamphetamine. The Commissioner conservatively estimates that this would have involved 64.5 sets having a wholesale value of $645,000.

[25] The convictions are conclusive proof, save in exceptional circumstances that do not apply here, that Mr Filer committed the underlying offences.[5] Mr Filer is therefore not able to challenge in this proceeding the factual findings that are implicit

[5] Evidence Act 2006, s 47.

in the jury's verdicts. However, subject to that qualification, the factual findings in the sentencing decision are not binding on the parties in this proceeding because the doctrine of issue estoppel is confined to determinations in civil actions between the same parties or their privies and has no place in criminal law.[6]

[26] I consider that Mr Filer's challenge to those findings in this proceeding does not constitute an abuse of process or a collateral attack on the sentencing decision. In my view, it would be wrong to deny a respondent to an application for a profit forfeiture order the right to adduce evidence relevant to the benefit he or she received in order to rebut the statutory presumption merely because it might lead to a different conclusion than that indicated by the factual findings of a sentencing judge following an earlier criminal trial. The correctness of the sentencing judge's findings are not called into question because they were made applying a different standard of proof and were based on the evidence adduced at the criminal trial. Mr Filer, who exercised his right to remain silent at the criminal trial, must be entitled to give evidence about the amount of Contact NT he supplied in seeking to discharge the onus cast on him in this proceeding. Equally, the Commissioner is entitled to contend in this proceeding that the supply of Contact NT was greater than that found beyond reasonable doubt by the Judge for sentencing purposes.

[27] However, for the reasons that follow, the factual findings in the sentencing decision are admissible as evidence in this proceeding. Indeed, they are highly probative of those facts given the standard of proof required for such findings.

[28] In *Hollington v Hewthorn & Co. Ltd*,[7] the English Court of Appeal held that proof of a conviction was not admissible as evidence in a subsequent civil proceeding that the offence had been committed. However, in *Jorgensen v New Media Ltd*,[8] the New Zealand Court of Appeal declined to follow *Hollington* and ruled that proof of a conviction was admissible as evidence that the offence had been committed. In reaching this conclusion, the Court followed the Privy Council's

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[6] *Hunter v Chief Constable of West Midlands and anor* [1982] AC 529; [1981] 3 All ER 727; *R v Davis* [1982] 1 NZLR 584 (CA).
[7] *Hollington v Hewthorn & Co. Ltd.* [1943] 1 K.B.587; [1943] 2 All E.R. 35.
[8] *Jorgensen v New Media Ltd.*[1969] NZLR 961 (CA).

judgment in *Harvey v The King*[9] which held that a finding by a Master in Lunacy that a person was of unsound mind, was sufficient evidence of that fact unless contradicted. Lord Lindley, who delivered the advice of the Board, stated:[10]

> Mr Haldane was bold enough to contend that the orders in Lunacy were not admissible in evidence in these proceedings at all, and that the Courts in Ceylon were justified in paying no attention to them. Their Lordships are not prepared to accede to this contention. The orders are not conclusive evidence of anything except their own existence; but, being made by a competent tribunal in a matter within its jurisdiction they cannot be rejected as inadmissible, or as no evidence of the truth of those facts recited in them which are essential to their validity. They are admissible as *prima facie* evidence, and if uncontradicted they ought to be regarded as sufficient evidence of those facts, not only in this country, but in all His Majesty's dominions.

[29] The Court of Appeal in *Jorgensen* concluded that evidence of a conviction is admissible as proof that the crime had been committed despite the evidence being hearsay opinion evidence. The Court considered that a new exception to the hearsay rule should be recognised to permit the admission of such evidence.

[30] Section 47 of the Evidence Act 2006 now provides that proof of a conviction is conclusive evidence that the offence was committed and no evidence to the contrary may be offered save in exceptional circumstances.

[31] The factual findings made by Keane J regarding the extent of Mr Filer's involvement in the manufacture and supply of methamphetamine were essential to his sentencing decision. These findings are admissible as evidence in this proceeding as proof of the benefit he is likely to have received. I consider that this is admissible hearsay evidence under s 18 of the Evidence Act, and possibly also under s 19. The exclusionary rule in s 50 only applies to factual findings in civil proceedings. It does not apply to factual findings in a criminal proceeding, no doubt because of the much higher standard of proof required.

[32] I set out the relevant passages from the Judge's sentencing notes:[11]

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[9] *Harvey v The King* [1901] A.C. 601.
[10] Above n9, at 611.
[11] R v Filer, above n 3.

[2] Between 1 October 2009 – 15 February 2010 and 16 February 2010 – 17 May 2010 you, together with Steven Mehrtens, manufactured methamphetamine, in the sense at least that you were indispensable parties to that offence. On 17 May 2010 you conspired with Mr Mehrtens to continue manufacture. On 15 November 2009 you offered methamphetamine to Delia Fonotia, a co-offender. On 23 December 2009 you, together with Mr Mehrtens, possessed methamphetamine for supply. On 19 April 2010 you, together with Mr Mehrtens supplied methamphetamine. On 17 May 2010 you possessed methamphetamine for supply.

[3] The Crown's case against you at your trial was that you and Mr Mehrtens offended co-extensively. He was tried in his absence. You at trial denied manufacture. At the very most you conceded that you may have been a party to the purchase of pseudoephedrine and to its supply. That was also Mr Mehrten's case at trial.

[4] Clearly the jury accepted that the Crown had made out its case that you were at least a party in the sense that you purchased pseudoephedrine indispensable to large scale manufacture yourself, and that you were so closely linked to that manufacture that you intended it to take place. So, in that sense, the jury appears to have accepted that you were a central player in the manufacture.

Course of offending

[5] The Crown's case against you at trial, which as I have said the jury accepted, was that you and Mr Mehrtens, each of you then living in or near Whangamata, were privy to manufacture in that area.

[6] You were then serving a sentence of home detention but, the Crown's case was, and the jury evidently accepted, while he saw to any transactions beyond Whangamata, most typically in Auckland, you were certainly active by telephone. You were also active in Whangamata transactions.

[7] The Crown's case is that your first source of pseudoephedrine supply was Delia Fonotia and that she supplied to you on at least seven occasions. If she did so, she would have supplied you in the vicinity of 36 sets. The Crown's case is that, though the recipients in her other supply counts were not identified, you could well have been the recipient. You were her principal market.

[8] Ultimately, the Crown's case is, you could have received from her as much as 67 sets of pseudoephedrine, yielding potentially three kilograms of methamphetamine. At the least, the Crown case was, you would have received half that, if not more.

[9] After Ms Fonotia was arrested, the Crown's case was and the jury accepted, and this was the basis for your second manufacture offence, you continued to obtain supplies of pseudoephedrine from Ms Fonotia's own source, your co-offenders Phap Ly and Huang Hguyen. The Crown's case is that they supplied you some 31 sets and that this would have yielded between 1.4 - 2 kilograms of methamphetamine.

[10] The jury also accepted that on termination date, 17 May 2010, you and Mr Mehrtens were continuing to play your part in ongoing manufacture, and that you were frustrated only by your arrest and that the methamphetamine found in your possession on that day, each of you, was indicative. Mr Mehrtens also had a further kilogram of pseudoephedrine. That is the basis for the conspiracy.

[11] Though the jury acquitted you of a number of counts of possession and supply, distinguishing you in this from Mr Mehrtens, it found you both to be in joint possession of methamphetamine for supply on 23 December 2009. In Mr Mehrten's possession that day in a vehicle in which, on the Crown case you had an interest, was 161.6 grams of methamphetamine. He had as well 17 grams more directly in his possession. The larger quantity certainly, the jury found, was in your joint possession.

[12] You were also found jointly responsible for an actual supply on 19 April 2010 to Mr Sample of 1.7 grams of methamphetamine and, more significantly on termination date, you had in your possession 17 grams of methamphetamine, a quantity well beyond the presumption for supply. That apart, earlier you had offered Ms Fonotia an ounce of methamphetamine that, in the event was not, it seems, delivered.

[13] You put in issue on sentence as a matter of fact whether you can be held accountable for manufacture on the scale the Crown contends for because there was no evidence at trial as to where manufacture took place or what your part in it was precisely. Your position is that you can only be held accountable for a level of manufacture consistent with what was found in your possession, and that of Mr Mehrtens, some 250 grams.

[14] As your counsel says, precisely on what basis the jury held you accountable for manufacture is not clear. He contends that it might well have been that the jury accepted that you merely dealt with the money aspect. But I have to say, as the Judge who must sentence you that I find that the evidence is consistent with you having been, as the Crown alleged, the source of the pseudoephedrine to the manufacturer, whoever that was and whether or not it was you. I must sentence you as a principal, not peripheral, player. The supplies of pseudoephedrine that you were privy to were so large that no other inference is open.

[15] I do not accept, literally, the Crown's calculation that you received all the supplies notionally possible from Ms Fonotia and Mr Ly and Mr Nguyen. A level of inference is called for because not all the people she supplied are identified. You are to be sentenced on the basis that you received supplies consistent with the manufacture of three – four kilograms of methamphetamine.

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[36] In sentencing for your principal offences, the two manufacturing offences, I sentence you on the basis that in reality you were party to a consistent pattern of manufacture interrupted only and inconsequentially by Ms Fonotia's arrest...

[37] On the evidence before the jury, which I believe it plainly accepted but which I myself find cogent, you obtained pseudophedrine from your sources

> of supply on a scale that would have yielded methamphetamine well in excess of two kilograms and more likely three – four kilograms.

Factual findings

[33] There is no dispute that, at the very least, Mr Filer participated in the supply of Contact NT sufficient to manufacture significant quantities of methamphetamine. The 35 to 40 sets of Contact NT that Mr Filer acknowledges he supplied would have had a wholesale value of $420,000 to $480,000. I consider it unlikely that Mr Filer would have supplied even this quantity without any payment other than methamphetamine for his own use worth between $17,500 and $20,000. In any event, I accept the Commissioner's submission that the likely quantity of Contact NT supplied far exceeded this amount in view of Keane J's findings for the purposes of sentencing. On the basis of these findings, Mr Filer is likely to have facilitated the supply of at least 64 sets.

[34] Further, Mr Filer's claim that he did not receive any cash for his involvement is not supported by his financial records which show a significant increase in the level of cash deposits and cash otherwise available to him during the period of his offending. The surplus cash evidenced by this analysis is in addition to the cash Mr Filer must have had access to in order to fund the purchase of Contact NT that he admits supplying and the methamphetamine he admits using regularly throughout this period. Mr Filer has not been able to provide a plausible explanation as to the source of this cash. Given that his businesses were making losses at this time, the likely explanation is that he obtained this cash from his involvement in the manufacture and supply of methamphetamine.

[35] For these reasons, I reject Mr Filer's evidence that he did not receive any cash for his involvement in the manufacture and supply of methamphetamine for which he was convicted. I accept the Commissioner's submission that Mr Filer's participation in this offending is likely to have commenced well before 1 October 2009, having regard to the marked increase in the unexplained surplus cash available to him from February 2008. Mr Filer has failed to prove the benefit he received from this offending on the balance of probabilities. He has not displaced the

statutory presumption. I am therefore obliged to adopt the figure in the Commissioner's application.

[36] The total benefit received by Mr Filer, determined in accordance with s 53 of the Act, is therefore $1,592,656.21.

What property is to be disposed of?

10A Walmsley Street, Waihi

[37] The legal description of this property is all that parcel of land containing 584 square metres more or less being Lot 1, Deposited Plan 91609 and being all that land comprised and described in Certificate of Title 97850, South Auckland Land Registration District. Mr Filer acknowledges that he owns this property and there is no reason why it should not be included in the profit forfeiture order.

28 Quarry Road, Waihi

[38] The legal description of this property is all that parcel of land containing 7,438 square metres more or less being Lot 1, Deposited Plan 304552 and being all that land comprised and described in Certificate of Title 18243, South Auckland Land Registration District. The Commissioner seeks to have this property included in the order on the basis that Mr Filer has effective control over it and should therefore be treated as having an interest in it in terms of s 58 of the Act, which relevantly provides:

> **58 Court may treat effective control over property as interest in property**
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> (1) If the High Court is satisfied that a respondent has effective control over property, the Court may, on an application made by the Commissioner, order that the property is to be treated as though the respondent had an interest in the property specified by the Court.
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> (2) An order under subsection (1) may –
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> (a) be made even if the respondent has no interest in the property; and

(b) specify an interest that differs from the interest that the respondent has in the property.

(3) Without limiting the generality of subsections (1) and (2), the Court may have regard to –

(a) shareholdings in, debentures over, or directorships of, any company that has an interest (whether direct or indirect) in the property; and

(b) any trust that has a relationship to the property; and

(c) family, domestic, and business relationships between persons having an interest in the property or in companies of the kind referred to in paragraph (a) or in trusts of the kind referred to in paragraph (b), and any other persons.

[39] The Waihi property is registered in the name of Coastal Demolition Limited which, as noted, was owned by Mr Filer and Mr Cullen in equal shares. That company was removed from the Companies Register on 24 June 2008. Mr Cornegé submits that in these circumstances, given that Mr Filer owned half the company, he is entitled to half the value of the property. However, this submission overlooks s 324 of the Companies Act 1993, which provides that property of a company removed from the register vests in the Crown with effect from the date of removal.

[40] The title to the Waihi property continues to record Coastal Demolition Limited as the registered owner. Mr Cullen, who owned the other half of the shares in the company, approached Mr Filer in April 2007 asking whether he would be interested in acquiring his shareholding. There is no evidence that Mr Filer took up this offer and he says that he did not do so. Even if he had, this would have given him all of the shares in the company but not an interest in the property. This would not have prevented the property vesting in the Crown when the company was removed from the register.

[41] It appears that this property has already vested in the Crown. I am therefore not prepared to include this property in the forfeiture order. If the Commissioner wishes to pursue his application in relation to this property, he should file submissions addressing this issue in accordance with the timetable set out at the conclusion of this judgment.

Otahu River, Whangamata

[42] The legal description of this property is all that parcel of land containing 2,428 square metres more or less described as Whangamata 4D4B2B2A Block being all that land comprised and described in Certificate of Title SA9D/175, South Auckland Land Registration District.

[43] Mr Filer is one of the three registered proprietors of this property as one of the trustees of the Otahu Properties Trust. The property was owned by Mr Filer before it was transferred to the trustees of the Trust in November 2002. However, the Trust Deed was not signed until 1 May 2003. It appears that Mr Filer was not paid for the property. He stated in a letter to Keane J on 13 December 2011 that he "gifted the estuary property into trust for our boys and their children to come". Mr Filer is the settlor and one of the three trustees of the Trust. He has the sole power to appoint and remove trustees. He is also one of the two preferred beneficiaries. The Trust Deed specifically authorises the trustees to give preference to the wishes of the preferred beneficiaries. Mr Filer also advised Keane J in his letter that that he and others spent the better part of a year renovating this property after his friend shot himself in September 2008. I note that the other trustees have not applied for relief under s 61. I am satisfied on the basis of this evidence that Mr Filer has effective control of this property in terms of s 58 of the Act and that it should also be included in the order.

17 Pekama Drive, Cable Bay, Northland

[44] The legal description of this property is all that land comprised and described in Certificate of Title 298963, Far North District Land Registration District, being 6,985 square metres more or less being Lot 14, DP 374066.

[45] This property, which had a market value of $75,000 as at 31 January 2013, is registered in the name of Scott Piggott. Mr Filer registered a caveat against the title to this property on 28 May 2008, 12 days after he advanced $165,000 to Mr Piggott to assist with the purchase. Mr Piggott signed a deed of acknowledgement of debt

and agreed to execute a mortgage over the land in favour of Mr Filer to secure repayment of the advance.

[46] Despite the agreement to mortgage and Mr Filer's caveat claiming an interest in this property, Mr Filer says in his affidavit that he does not have an interest in the property and never has had. I do not accept this evidence. It is contradicted by the contemporaneous documents, including the deed prepared by solicitors and signed by Mr Piggott in the presence of a solicitor.

[47] Mr Piggot has not claimed an interest in this property or applied for relief. I am satisfied that Mr Filer has an interest in this property as a result of the agreement to mortgage which secures the outstanding debt, including interest, as set out in the deed of acknowledgement of debt. Mr Filer's interest in this property should be included in the order.

Marina berth

[48] As noted, the Commissioner contends that Mr Filer owns the marina berth in the Whangamata Marina, initially paid for by his brother. This is a 12 metre berth numbered AO7. Mr Filer acknowledges that he made three payments for this marina berth. However, he claims that he owns the marina with his brother, Craig. He says that it is difficult to determine the precise share given the informality of the arrangements between them.

[49] The Commissioner's evidence is that the berth was purchased in August 2008 for $80,496. $70,496 was transferred by Craig Filer on 27 August 2008 to the solicitors acting on behalf of the Marina Company. Bank enquiries establish that from 26 August to 5 November 2008, Craig Filer received $42,000 in eight separate cash deposits. He also received a bank cheque to the value of $10,000 on 14 November 2008. I accept the Commissioner's submission that these payments were made by Mr Filer. When spoken to by the police, Craig Filer confirmed that he had funded the initial purchase of the berth and had been partially reimbursed. He claims no interest in the marina berth and confirms that it is owned by his brother.

[50] I am satisfied on the basis of the evidence that the marina berth is owned by Mr Filer and should be included in the forfeiture order.

Subaru Legacy

[51] Detective Rolley produced a vehicle offer and sale agreement dated 20 January 2010 which shows that Mark Deryck Hall purchased a 2001 Subaru Legacy registration number FGG746 from its current registered owner Harnett & Milne. He also produced a hand-written note signed by M D Hall on 27 February 2010 which shows that Mr Hall sold this vehicle to Mr Filer. The note reads as follows:

> Sold Subaru B4
> Reg. No. FGG746 to
> Scott
> $5,000 owing

[52] I accept Detective Rolley's interpretation of this document as indicating that the vehicle was transferred to Mr Filer in satisfaction of a debt and that a further $5,000 remained owing by Mr Hall at that time.

[53] Mr Filer says that he was in the process of purchasing a Volkswagen from Mr Hall and paid part of the purchase price and also paid for repairs to it but he says that he did not complete the purchase. He says that he ended up with an agreement to purchase the Subaru instead of the Volkswagen but decided not to complete the purchase of either of the vehicles and has no intention of doing so because he has insufficient funds. He says that he does not consider that the cars are his and he makes no claim to them.

[54] Neither Mr Hall nor anyone else has made any claim to either of these vehicles. I am satisfied on the evidence that the Commissioner has established that Mr Filer is the owner of the Surbaru and that it should be included in the order.

Volkswagen Passat

[55] The Commissioner has obtained various documents showing that Mr Filer purchased this vehicle as well. These documents include a file note of a discussion

between Mr Filer and a solicitor recording Mr Filer's advice that he paid $3,000 on account of a total purchase price of $7,500 and also paid for repair costs. The file note records that Mr Filer had taken possession of the vehicle and was the owner of it.

[56] I have already summarised Mr Filer's position in relation to this car. Although he does not dispute that he agreed to purchase it and that he has paid part of the purchase price, he claims that he did not complete the purchase and does not regard himself as the owner.

[57] Mr Hall has made no claim in relation to this vehicle which is a 2001 Volkswagen Passat registration number DMK657. I am satisfied on the evidence that Mr Filer either owns or has effective control over this vehicle. It should be included in the order on the basis that the sum of $2,118.22 owed to N R and S L Curle Limited trading as Barry Armstrong Motors, Waihi, for repairs to this vehicle is to be paid from the proceeds of sale.

Holden Utility

[58] Mr Filer confirms that he is the owner of this vehicle which is a 1994 Holden Utility registration number AWR994. This vehicle should be included in the order.

Kobelco Digger

[59] This Kobelco SK100V digger, serial number YW-07653, was seized by the police from Mr Filer's property at Quarry Road, Waihi. Mr Filer claims that he sold this digger to a former employer, Norman Ball, in approximately 2007 but that Mr Ball did not obtain possession until some later date. He claims that the purchase price was $18,000 which was partly paid in cash by Mr Ball and partly satisfied by work completed by him. Mr Filer says that he also waived some of the purchase price because Mr Ball paid for necessary repairs to the digger.

[60] Mr Ball has not claimed any interest in the digger nor has he applied for relief under s 61. I do not accept Mr Filer's evidence that Mr Ball is the owner of the

digger. I am satisfied that Mr Filer either owns the digger or has effective control over it and this explains why it was on his property years after he claims to have sold it to Mr Ball. The digger should be included in the order.

Bonus Bonds

[61] Mr Filer confirms that he is the owner of Bonus Bonds held under the name of 'S W Filer' and 'Scott Warren Filer' with the ANZ Bank under bond holder number 3053319. These should be included in the order.

Bank Accounts

[62] Mr Filer also acknowledges that the funds held in the Westpac account number 03-1577-0407002-004 in the name of Whangamata Demolition belong to him as do the funds in the Westpac account number 03-1577-0416574-000 in the name of Scott Warren Filer. The funds in these accounts should also be included in the order.

Result

[63] I make a profit forfeiture order pursuant to s 55 of the Act.

[64] The value of the benefit determined in accordance with s 53 of the Act is the sum of $1,592,656.21.

[65] The maximum recoverable amount determined in accordance with s 54 of the Act is the sum of $1,592,656.21.

[66] The property to be disposed of, being property in which the respondent has, or is treated as having, interests, is the property referred to in [37] to [62] above with the exception of the Waihi property referred to at [38].

[67] If the Commissioner wishes to pursue his application for a forfeiture order in relation to the Waihi property, he should make further submissions addressing the issue as to whether this property has already vested in the Crown by virtue of s 324

of the Companies Act. These should be filed and served within 21 days of the date of delivery of this judgment. Any submissions in reply should be filed and served within 21 days thereafter.

M.A. Gilbert J

M A Gilbert J