Supreme Court
New South Wales

Medium Neutral Citation:	**Commissioner of the Australian Federal Police v Kogan (No 4) [2023] NSWSC 1557**
Hearing dates:	30 November and 11 December 2023
Date of orders:	11 December 2023
Decision date:	12 December 2023
Jurisdiction:	Common Law
Before:	Fagan
Decision:	1. The first defendant's notice of motion filed 20 October 2023 is dismissed. 2. The first defendant is to pay the plaintiff's costs of the notice of motion.
Catchwords:	CRIME – confiscations – restraining order – where defendants' property restrained pursuant to ss 18 and 19 of *Proceeds of Crime Act 2002* (Cth) – application of first defendant pursuant to s 24 of the Act for payment of $587,479.18 debt to be met out of restrained crypto currency – where sum owed to private school attended by first and second defendants' five children was wholly incurred after imposition of restraining order – whether first defendant had disclosed all his interests in property as required by s 24(2)(c) – whether debt incurred in good faith or a reasonable living expense – whether debt could be discharged out of unrestrained property of the defendants
Legislation Cited:	*Proceeds of Crime Act 2002* (Cth).
Cases Cited:	*Commissioner of the Australian Federal Police v Kogan (No 3)* [2023] NSWSC 965 *The Commissioner of the Australian Federal Police v Memon (No. 3)* [2020] NSWSC 1799

	The Commissioner of the Australian Federal Police v Pharmacy Depot Hurstville Pty Ltd (in liq) (No 2) [2020] NSWSC 1571
Category:	Procedural rulings
Parties:	Commissioner of the Australian Federal Police (plaintiff) Vladislav Kogan (defendant)
Representation:	Counsel: R Perla with M Short (plaintiff) E W Greaves (defendant) Solicitors: Solicitor for Australian Federal Police (plaintiff) Harrow Legal (defendant)
File Number(s):	2019/397482
Publication restriction:	Nil

JUDGMENT

1 On 17 December 2019 the plaintiff filed a summons against the four defendants claiming, amongst other relief, restraining orders pursuant to ss 18 and 19 of the *Proceeds of Crime Act 2002* (Cth). Restraining orders were made ex parte on 17 December 2019 and entered on 18 December. The property restrained includes certain crypto currency, the passwords and electronic means of access for which were handed over by the first defendant (Mr Kogan) to officers of the Australian Federal Police ("AFP") during the execution of a search warrant at the home of Mr Kogan and the second defendant (Mrs Kogan) on 18 December 2019. Utilising the passwords, the Official Trustee took control of the crypto currency from 18 December 2019. On 30 November 2023 a further order was made by consent for the Official Trustee to continue to exercise that control.

2 On 20 October 2023 Mr Kogan filed a notice of motion claiming, principally, the following interlocutory relief:

> 2 Pursuant to s 24(1)(d) of the *Proceeds of Crime Act 2002* (Cth) the Official Trustee is directed as soon practical to pay from the property in Schedule A the sum of $587,479.18 to the Moriah War Memorial Jewish College Association Ltd ("Moriah College") in the manner described in Schedule B.

> 3 Pursuant to s 24(1)(b) of the Act, alternatively s 24(1)(a), the Official Trustee is directed to pay, from the property in Schedule A, such sums as may be invoiced by the Moriah College for the enrolment of the first and second defendants' children for tuition fees, in the manner described in Schedule B. Such payments are to be made within 14 days of provision of an invoice by the Moriah College to the Official Trustee.

3 Schedule A to the Notice of Motion specifies the crypto currency as the property from which Official Trustee should pay the arrears of school fees and the fees expected to be incurred in the future. Schedule B specifies the bank account details of the College and the email addresses to which notice of remittance should be sent.

4 Section 24 of the Act is as follows, extracted so far as relevant to the present application. The sub-paragraphs relied upon in the parties' arguments are emphasised:

> **24 Allowance for expenses**
>
> (1) The court may allow any one or more of the following to be met out of property, or a specified part of property, covered by a *restraining order:
>
> (a) the reasonable living expenses of the person whose property is restrained;
>
> **(b) the reasonable living expenses of any of the *dependants of that person;**
>
> (c) the reasonable business expenses of that person;
>
> **(d) a specified debt incurred in good faith by that person.**
>
> (2) The court may only make an order under subsection (1) if:
>
> (a) the person whose property is restrained has applied for the order; and
>
> (b) the person has notified the *responsible authority in writing of the application and the grounds for the application; and
>
> **(c) the person has disclosed all of his or her *interests in property, and his or her liabilities, in a statement on oath that has been filed in the court; and**
>
> (ca) the court is satisfied that the expense or debt does not, or will not, relate to legal costs that the person has incurred, or will incur, in connection with:
>
> (i) proceedings under this Act; or
>
> (ii) proceedings for an offence against a law of the Commonwealth, a State or a Territory; and
>
> **(d) the court is satisfied that the person cannot meet the expense or debt out of property that is not covered by:**
>
> **(i) a *restraining order; or**
>
> (ii) an *interstate restraining order; or
>
> (iii) a *foreign restraining order that is registered under the *Mutual Assistance Act.**

5 The following definitions in s 338 of the Act are significant to the operation of s 24:

> ***interest***, in relation to property or a thing, means:
>
> (a) a legal or equitable estate or interest in the property or thing; or
>
> (b) a right, power or privilege in connection with the property or thing;
>
> whether present or future and whether vested or contingent.

> ***property*** means real or personal property of every description, whether situated in *Australia or elsewhere and whether tangible or intangible, and includes an *interest in any such real or personal property.

6 Mr and Mrs Kogan have five children. At the date when the restraining orders were made all five were enrolled at Moriah College for the forthcoming school year, 2020. The account of Mr and Mrs Kogan with the College was at that time in arrears in the amount of $67,095.18. Over the school years 2020-2023 inclusive, while the restraining orders have remained in place, Mr and Mrs Kogan have maintained the children's enrolment and attendance at the college but have not paid any of the invoices rendered for further fees incurred. In that period they have paid all but $205.18 of the arrears that were owing at 18 December 2019. The resulting overdue balance of $587,479.18 is for four years' tuition for five children. The eldest child has completed his schooling this year. Order 2 in Mr Kogan's notice of motion is directed to obtaining payment of that debit balance out of the restrained crypto currency assets and order 3 is sought to enable funding of tuition for the four children who are still of school-age through 2024 and beyond.

7 The orders in the notice of motion are framed by reference to both pars (b) and (d) of s 24(1). The plaintiff's opposition to the notice of motion requires the Court to determine whether Mr Kogan has established on the balance of probabilities the following matters:

(1) that he has disclosed all of his interests in property and his liabilities so as to satisfy s 24(2)(c);

(2) that the accrued and/or future Moriah College fees are reasonable living expenses within the meaning of s 24(1)(b);

(3) that the accrued College fees in respect of the years 2020-2023 inclusive constitute a debt incurred in good faith within the meaning of s 24(1)(d).

8 The College has engaged in protracted discussions and correspondence with Mr Kogan concerning the unpaid fees. It has taken the position that if the arrears are not discharged by today, 12 December 2023, the four children will not be enrolled for 2024. Mr Kogan has pressed for his notice of motion to be determined by that deadline. Mr and Mrs Kogan do not dispute their debt to the College. They did not defend proceedings brought against them in the District Court for recovery of the debt. Judgment was entered against them on 5 December 2023 for $581,155.18, inclusive of costs.

9 The current notice of motion in this Court was listed for hearing on 30 November 2023 with a gross under estimate of one day. The material relied upon by the parties comprises over 200 pages of affidavits, including some annexures, and 1800 pages of tendered documents in three volumes. The material is dense. It includes detailed

financial information concerning the defendants and related entities in respect of a period of 12 years. One of the tender items is a transcript of an extensive examination of Mr Antonius Taktak, the defendants' accountant and tax agent.

10 The first day of hearing of the notice of motion was mostly taken up with cross-examination of Mr Kogan. That was not completed within the day. Due to prior listings the hearing could not resume until 11 December 2023, when there was a further half day of oral evidence followed by submissions. The Court has been presented with a very demanding task to resolve the disputed issues within the timeframe that the circumstances have imposed.

The substantive proceedings

11 The restraining orders of 18 December 2019 were made pursuant to ss 18 and 19 of the Act. Stated very broadly and incompletely, orders may be made under s 18 where a person is suspected of having committed a *serious offence* and the property restrained is either owned by the suspect or is in his or her *effective control*. Orders may be made under s 19 where there are grounds to suspect that the property restrained is the *proceeds* of an offence or an *instrument* of an offence. The italicised terms are defined in s 338.

12 Orders 29 and 30 of 18 December 2019 were made pursuant to s 18 and are to the effect that "any and all of the property" of Mr Kogan and Mrs Kogan "is not to be disposed of or otherwise dealt with by any person". There are eight schedules to the orders, containing particulars of property in the following categories:

> Schedule 1: residential real property at Macdonald Street, Vaucluse registered in the name of the fourth defendant ("Digitec Trading").
>
> Schedule 2: bank accounts in the name of Mr Kogan.
>
> Schedule 3: bank accounts in the name of the third defendant ("Dealtex Capital").
>
> Schedule 4: bank accounts in the name of Mrs Kogan.
>
> Schedule 5: bank account in the name of Digitec Trading.
>
> Schedules 6 and 7: two motor vehicles registered in the name of Mrs Kogan.
>
> Schedule 8: crypto currency in the name or names of and/or purchased on behalf of Mrs Kogan and/or Digitec Trading.

13 Orders 10-14 were made pursuant to s 18 in respect of the property in Schedules 1-3, 6 and 7, on the basis that the specified items are either owned by or under the effective control of Mr Kogan. Orders 15-20 were made pursuant to s 18 in respect of the property in Schedules 1 and 4-8, on the basis of ownership or effective control on the

part of Mrs Kogan. Orders 21-28 were made pursuant to s 19 in respect of all of the property in Schedules 1-8, on the basis that each specified item is suspected to be either proceeds of crime or an instrument of crime.

14 In paragraphs 54-68 of the summons the plaintiff claims orders pursuant to ss 47 and 49 of the Act that the property specified in Schedules 1-8 be forfeited to the Commonwealth. Those sections are as follows:

> **47 Forfeiture orders—conduct constituting serious offences**
>
> (1) A court with *proceeds jurisdiction must make an order that property specified in the order is forfeited to the Commonwealth if:
>
> (a) the *responsible authority for a *restraining order under section 18 that covers the property applies for an order under this subsection; and
>
> (b) the restraining order has been in force for at least 6 months; and
>
> (c) the court is satisfied that a person whose conduct or suspected conduct formed the basis of the restraining order engaged in conduct constituting one or more *serious offences.
>
> Note: The order can be made before the end of the period of 6 months referred to in paragraph (1)(b) if it is made as a consent order: see section 316.
>
> (2) A finding of the court for the purposes of paragraph (1)(c) need not be based on a finding as to the commission of a particular offence, and can be based on a finding that some *serious offence or other was committed.
>
> (3) The raising of a doubt as to whether a person engaged in conduct constituting a *serious offence is not of itself sufficient to avoid a finding by the court under paragraph (1)(c).
>
> *Refusal to make a forfeiture order*
>
> (4) Despite subsection (1), the court may refuse to make an order under that subsection relating to property that the court is satisfied:
>
> (a) is an *instrument of a *serious offence other than a *terrorism offence; and
>
> (b) is not *proceeds of an offence;
>
> if the court is satisfied that it is not in the public interest to make the order.
>
> **49 Forfeiture orders—property suspected of being proceeds of indictable offences etc.**
>
> (1) A court with *proceeds jurisdiction must make an order that property specified in the order is forfeited to the Commonwealth if:
>
> (a) the *responsible authority for a *restraining order under section 19 that covers the property applies for an order under this subsection; and
>
> (b) the restraining order has been in force for at least 6 months; and
>
> (c) the court is satisfied that one or more of the following applies:
>
> (i) the property is *proceeds of one or more *indictable offences;
>
> (ii) the property is proceeds of one or more *foreign indictable offences;
>
> (iii) the property is proceeds of one or more *indictable offences of Commonwealth concern;
>
> (iv) the property is an instrument of one or more *serious offences; and
>
> (e) the court is satisfied that the authority has taken reasonable steps to identify and notify persons with an *interest in the property.
>
> (2) A finding of the court for the purposes of paragraph (1)(c):

> (a) need not be based on a finding that a particular person committed any offence; and
>
> (b) need not be based on a finding as to the commission of a particular offence, and can be based on a finding that some offence or other of a kind referred to in paragraph (1)(c) was committed.
>
> (3) Paragraph (1)(c) does not apply if the court is satisfied that:
>
> (a) no application has been made under Division 3 of Part 2-1 for the property to be excluded from the *restraining order; or
>
> (b) any such application that has been made has been withdrawn.
>
> *Refusal to make a forfeiture order*
>
> (4) Despite subsection (1), the court may refuse to make an order under that subsection relating to property that the court is satisfied:
>
> (a) is an *instrument of a *serious offence other than a *terrorism offence; and
>
> (b) is not *proceeds of an offence;
>
> if the court is satisfied that it is not in the public interest to make the order.

15 The restraining orders are, in substance, interlocutory to the Court's determination in due course of the final relief claimed under ss 47 and 49. The affidavit in support of the application for restraining orders was affirmed by Alexander Tutt, a member of the AFP who was engaged upon investigation of organised crime and the identification of profits and assets derived from criminal activity. Mr Tutt deposed to his suspicion that Mr Kogan has committed offences against the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) ("Anti-Money Laundering Act") by structuring deposits into bank accounts in amounts under $10,000 for the dominant purpose of trying to ensure that the deposits would not engage the obligation of relevant financial institutions to report the transactions. He also deposed to suspicions that Mr Kogan has committed offences of causing loss to the Commonwealth and/or obtaining a gain from the Commonwealth, contrary to s 135.1 of the *Criminal Code* (Cth), and offences of breaching his duties as a director of Dealtex Capital, contrary to the *Corporations Act 2001* (Cth).

16 Although Mr Tutt's affidavit provides reasonable grounds for suspecting that such offences have been committed and that the defendants have failed to declare income that is assessable to tax, no charges have been laid and no amended assessments have been issued by the Commissioner of Taxation. The only avenue through which any Commonwealth authority is presently seeking final recourse against the defendants' assets is the claim of the Commissioner of the AFP in these proceedings, for forfeiture orders

17 The substantive proceedings have not progressed very far towards final determination. On 18 March 2020 the defendants filed a notice of motion seeking, pursuant to s 42 of the Act, revocation of the restraining orders or, in the alternative, exclusion of some of the restrained property pursuant to s 31. On 21 July 2020 the defendants consented to that notice of motion being dismissed and gave an undertaking that they would not

make any further application pursuant to s 31 for exclusion. On a subsequent application by the defendants, Garling J set aside the consent dismissal of their notice of motion for exclusion. By orders made on 23 August 2023 Garling J released the defendants from their earlier undertaking: *Commissioner of the Australian Federal Police v Kogan (No 3)* [2023] NSWSC 965. That determination has cleared the way for the defendants to proceed to a contested final hearing of the plaintiff's forfeiture claims

Evidence of defendants' financial affairs up to 18 December 2019

Income of the defendants declared to tax

18 In his affidavit of 17 December 2019 Mr Tutt deposed that for the financial year ended 30 June 2011 ("FY11") and for subsequent years up to FY18 Mr Kogan declared annual personal income of between $10,400 and $40,500, averaging $22,766. In the same period, Mrs Kogan claimed to have received less than the taxable threshold of $6000 in FY11 and FY12, less than the threshold of $18,200 in FY13 and FY14 and only $4,241 over the three years FY15-FY17. She declared taxable income of $21,333 for FY18 and did not lodge a return for FY19.

19 For the period 28 November 2012 to 4 December 2019 Mr and Mrs Kogan claimed from the Commonwealth Department of Human Services benefits to assist with child raising. They received a total of $259,807 over those years.

20 Mr Kogan is the sole shareholder and director of Dealtex Capital which was registered on 22 October 2013. For the years FY14-FY18 Dealtex Capital declared income of between $29,300 and $155,989, an average of $92,480. It has not declared any loans to shareholders or associates, as it would be required to do if any such loans were made.

21 Mrs Kogan is the sole shareholder and director of Digitec Trading which was registered on 10 November 2017. That company has not lodged a tax return since its incorporation.

22 Mr Tutt deposed that over several years up to 17 December 2018 there were very substantial movements of funds from overseas entities into the Australian bank accounts of Dealtex Capital and numerous, high value funds movements between the bank accounts of all defendants. He identified large numbers of transfers between the defendants' accounts that appear to have been deliberately structured, in amounts of less than $10,000, to avoid the reporting obligations of financial institutions. Mr Tutt deposed to Digitec Trading's acquisition of a valuable home that is occupied by the Kogan family and he gave evidence of Mrs Kogan's ownership of two luxury European motor vehicles. Those features of the defendants' financial affairs appear to be

irreconcilable with the very modest assessable income that was declared by them, collectively, up to December 2019. Some of Mr Tutt's significant findings are summarised in the following paragraphs.

Receipts to benefit of Mr and Mrs Kogan through Dealtex Capital

23 For the period 11 December 2013 to 11 September 2019 Mr Tutt identified net incoming international funds transfers to Dealtex Capital of $4,440,760 (par 60). For the period 3 July 2017 to 6 August 2019 he identified 70 transactions by which there were deposited to a bank account of Dealtex Capital amounts that fell under the reporting threshold, to a total value of $213,245 (par 203). Between 4 February 2018 and 26 June 2019 funds totalling $46,300 were transferred by Dealtex Capital to bank accounts in the name of Mrs Kogan and to creditors of Mrs Kogan and a further $711,000 was transferred to Mrs Kogan's company, Digitec Trading (par 105). The property at Macdonald Avenue, Vaucluse was purchased by Digitec Trading for $4.3 million under a contract that settled on 7 December 2018 (pars 113-118). That property is the Kogan family home. On the face of documents examined by Mr Tutt, the Vaucluse property is mortgaged for $2.1 million.

Receipts to benefit of Mr Kogan through structured deposits

24 For the period 13 February 2017 to 5 August 2019 Mr Tutt identified 133 deposits to a Commonwealth Bank account in Mr Kogan's name, in amounts less than the reporting threshold, totalling $363,731 (par 77). Over that period total credits to the account of over $622,000 were closely matched to total debits of more than $626,000 (par 78).

25 In the first half of 2018, another account in Mr Kogan's name, this time with the National Australia Bank ("NAB"), was the subject of apparently structured deposits in a total amount of approximately $50,000 (par 82). The NAB account was also used for the deposit of the family benefits from Centrelink between October 2017 and May 2018 (par 84). Payments out from the NAB account included instalments of principal and interest on a loan to finance the purchase price of over $172,000 for the Mercedes motor vehicle (Schedule 5 of the restraining orders) and instalments on another loan of over $62,000 for the Jaguar motor vehicle (Schedule 5) (pars 85-87).

Substantial funds passing through Mrs Kogan's bank accounts

26 In respect of the period 22 October 2016 to 21 April 2019, Mr Tutt identified that a total of $710,000 was credited to one of Mrs Kogan's Commonwealth Bank accounts and almost the same sum was debited (par 92). In a second Commonwealth Bank account, during the period 1 July 2017 to 30 June 2019 there were credits totalling $1,062,082 and nearly the same total of debits (par 93).

The defendants' property disclosures in these proceedings

Affidavits pursuant to orders of 18 December 2019

27 Pursuant to order 40 of the orders made on 18 December 2019, Mr Kogan swore an affidavit on 21 January 2020 deposing to his interests in property worldwide. In that affidavit he disclosed ownership of Transxpress Payment Services, which he described as a "sole establishment entity" located in Dubai. He attributed a value of $10,000.

28 In the same affidavit Mr Kogan stated that the assets of "Dealtex Pty Ltd", which I infer to be the third defendant, Dealtex Capital, include a loan to himself of $18,600 and a loan to Digitec Trading of $2,874,100.

29 Pursuant to order 41 Mrs Kogan swore an affidavit on 21 January 2020 in which she deposed to her ownership of the Jaguar and Mercedes Benz motor vehicles and Digitec Trading's ownership of the residential property at Macdonald Street, Vaucluse.

Affidavits filed in support of the present notice of motion.

30 In an affidavit affirmed 18 October 2023 Mr Kogan deposed that he is "employed full-time as an IT Manager at Zahav Trading International Pty Ltd" (referred to hereafter as "Zahav"). He has filed tax returns for FY20 and FY21 which show the following. Mr Kogan has also given evidence of loans to himself from Dealtex Capital, which are included in the table:

	FY20	FY21
Zahav	59,692	74,575
Dealtex Capital	21,000	31,000
Foreign source	45,597	
	128,289	105,575
Est Tax	35,529	26,277
Est Net	90,760	79,277

Loans from Dealtex	65,000	70,000

31 In the same affidavit of 18 October 2023 Mr Kogan deposed that Mrs Kogan's taxable income for FY23 was $20,626. The evidence does not reveal what income she claims to have earned in other years since the restraining orders were made.

32 In an affidavit of 20 November 2023 Mr Kogan deposed that the sole establishment entity in Dubai, Transxpress Payment Services, "has some similarities to sole trader trading under a business name in Australia". From evidence that he gave in cross-examination I am satisfied that Transxpress Payment Services is no more and no less than a business name under which Mr Kogan has at times carried on business in Dubai. He deposed that the licence to carry on the business in that name expired on 17 February 2020. At par 16 of the affidavit Mr Kogan said this:

> [For] completeness I wish to note that Dealtex owes a debt to Transxpress Payment Services. I do not presently know the amount of that debt. I consider that because Transxpress Payment Services is a sole establishment entity, that debt is not an asset of mine.

33 I find that deposition unacceptable in all respects. As Mr Kogan is the sole shareholder and director of Dealtex Capital and as he is also the individual who carried on business under the name Transxpress Payment Services, he would necessarily know the amount of the debt. Moreover, having regard to the nature of the entities, it is in substance a debt owed by Dealtex Capital to himself and constitutes one of his assets. Mr Kogan was asked about this in cross-examination and claimed that his doubts about the status of an entitlement to this debt arose from uncertainty on the part of "some of the accountants" about "how to treat this entity and whether or not the loans recorded by the entity to me or from me whether or not those are really loans because it is like me owing money to myself in effect". I do not accept that as a credible basis for Mr Kogan's failure to provide concrete information about the unquantified debt owed by Dealtex to Transxpress Payment Services.

34 In the same affidavit Mr Kogan deposed that Transxpress (HK) Ltd ("Transxpress (HK)") is a Hong Kong company of which he is the sole shareholder and director and which remains registered but ceased trading in 2022. He deposed that Transxpress (HK) transferred approximately $120,000 to his solicitors, Harrow Legal, towards payment of the defendants' costs of these proceedings.

35 Mr Kogan also deposed in the affidavit of 20 November 2023 that his alleged debt to Dealtex Capital, which he quantified at $18,600 in his affidavit 21 January 2020, was in fact $369,141 as at that date. Further, he deposed that he has borrowed $146,330 from Zahav.

Evidence on the motion concerning Dealtex Capital

36 According to sworn evidence of Mr Taktak in an examination conducted on 16 March 2022, he is a Chartered Tax Advisor who has been in sole practice as an accountant and registered tax agent since 1990. He has known Mr Kogan for over 20 years. He said that since 2011 he has prepared tax returns for Mr and Mrs Kogan and their companies. He prepared the tax returns on the basis of bank statements and information given to him orally by Mr Kogan, on behalf ofall taxpayers. He did not seek from his clients contemporaneous accounting records or any transactional documents by way of substantiation.

37 Mr Taktak said that he understood Dealtex Capital's income, in the years up to December 2019, was derived from the provision of "payment services" and "software development". He understood payment services to mean arranging for the transfer of funds between third parties, presumably for commission. He did not see any invoices in relation to the derivation of this income. He took the view that seeking verification of the taxpayers' instructions would be the work of an auditor, not of a tax agent such as himself.

Evidence on the motion concerning Zahav

38 Mr Taktak told the examiner that he incorporated Zahav on 22 January 2020. He is the sole shareholder and director according to records of the Australian Securities and Investments Commission ("ASIC"). His answers about what business that company carries on were very general and disclosed no real knowledge on his part. He said that it does "general accounting, system software, bookkeeping" and "software development … just manage software development" for "whatever the client requires, worksites, payment platforms". Despite claiming to own the company, he could not name a single client of its services. He said that it generated business "through word-of-mouth, through advertising on the Internet but most of the time word-of-mouth and referrals". When asked whether the company had a website through which the Internet advertising was done he said, "Not at the moment I'm aware of, no". He said he was not aware of the entity ever having had a website. He then retracted the proposition that the company generated business through Internet advertising.

39 Mr Taktak said that Mr Kogan is the sole employee of Zahav and that he "does the consulting work and arranges contracts and contractors to do the work". He could not name a single contractor who has ever been engaged by Zahav. He said that he did not communicate by email with Mr Kogan concerning the company's business. He did not know what email address Mr Kogan used in connection with Zahav. That is despite Mr

Kogan living in the Eastern Suburbs of Sydney and Mr Taktak's office being at Granville. He claimed that all communications with Mr Kogan were by way of regular face-to-face meetings.

40 Mr Taktak gave unbelievable evidence concerning Mr Kogan's remuneration pursuant to his asserted employment by Zahav. The financial records of the company show payments directly to Mr Kogan, payments to one of the mortgagees of the Kogan family home at Macdonald Street, Vaucluse and payments for two Toyota motor vehicles that Mr Taktak said were used by or with the permission of Mr Kogan. Mr Taktak said that all of those payments were on account of Mr Kogan's remuneration. He could not say what was the total amount of that remuneration for any period. He said it was "depending on what revenue we generate" and "based on what revenue comes in" but he could not state any formula by which the calculation would be made. He had no knowledge of how much revenue was in fact derived by Zahav in any period. He gave the following answers:

> Q So [in] any month Zahav has customers for which it performs services, that's correct?
>
> A Yes.
>
> …
>
> Q … It renders an invoice for those services?
>
> A Yes..
>
> Q It's paid for those services?
>
> A M'mm.
>
> Q it renders or issues receipts for those payments?
>
> A Most likely, yes.
>
> Q Does it or does it not issue receipts to customers when invoices are paid?
>
> A Yes.
>
> Q Then how is Mr Kogan's salary for that particular month determined?
>
> A It's a private arrangement.

41 Further questioning directed to ascertaining the terms of the "private arrangement" was met with evasion and meaningless generalities. Mr Taktak acknowledged that Mr Kogan had the use of a charge card by which he charged expenses to a bank account of Zahav. He claimed that the withdrawal of funds by the use of this card, including from Automatic Telling Machines, was "on a needs basis, they form part of his wage". He said that no accounting was undertaken to quantify the extent to which the card was used.

42 I find Mr Taktak's evidence unacceptable. His claim that Zahav is his company and, by implication, that the business it conducts is operated for his benefit as the sole shareholder, is not credible. It is inconceivable that a genuine, beneficially entitled

shareholder in a company operating such a business would be entirely unaware of the identity of its customers and subcontractors and of the remuneration being drawn by its sole employee.

43 As described by Mr Taktak, the activities of Zahav appear similar to the activities described by Mr Kogan as having been carried on by Transxpress Payment Services prior to the restraining orders. There is a strong inference that when Zahav was incorporated one month after the restraining orders were made, by Mr Kogan's accountant and friend of over 20 years, its purpose was to carry on a business similar to that which Mr Kogan had operated under the name Transxpress Payment Services and to do so for Mr Kogan beneficially. The circumstances suggest that from January 2020 onwards Mr Kogan and Mr Taktak have adopted the pretence that Mr Kogan is merely an employee of Zahav. A significant circumstance supporting the inference is that in the four years from 9 July 2015 to 7 November 2019 Mr Kogan received 45 separate incoming funds transfers from overseas sources to a total value of just under $546,000 and in the four years since the restraining orders were made Zahav has received 31 separate incoming funds transfers to a total value of $625,235.

44 Mr Taktak's evidence before the examiner included the following:

> Q How did it come about that decision was made by you to incorporate Xahav Trading?
>
> A It came about that there was an opportunity for me to establish a new enterprise.
>
> Q Was that Mr Kogan's idea?
>
> A Mr Kogan suggested he could provide services and an opportunity to make money.
>
> Q And why is it that Mr Kogan didn't set up the company?
>
> A I'm not sure, a personal reason.
>
> Q Did he ask you to set up the company?
>
> A No, I set it up.
>
> Q Did he suggest to you that you should set up the company?
>
> A No

45 Despite Mr Taktak's unsatisfactory answers as summarised above, he insisted that Zahav is his and that he controls its business. He gave this answer:

> No, I have effective control. I have meetings with him, I know what's coming up, what's to be paid. I look into the financial side of it, prepare the BASs and the returns, all the requirements.

46 I do not accept that Mr Taktak controls the company. I am not satisfied on the balance of probabilities that Zahav and its business do not form part of the property of Mr Kogan. Mr Kogan's answers concerning the entity and its business, in oral evidence before me, were in many respects implausible. He claimed not to know whether the

company has other employees. He asserted that "Mr Taktak, he does overall control of the business", a proposition that, for reasons given above, I find refuted by Mr Taktak's sworn evidence under examination.

47 Mr Kogan acknowledged that he had prepared on behalf of Zahav, in June 2021, a document for submission to AUSTRAC explaining steps that would be taken by Zahav to ensure compliance with Anti-Money Laundering legislation in the conduct of trading in crypto currency by Zahav. Mr Kogan gave these answers with respect to that document:

> Q So is it the case that Zahav provides services for customers to do those things?
>
> A No.
>
> Q Why was this document being completed on behalf of the company?
>
> A Because Zahav is registered with AUSTRAC to provide such service.
>
> Q But it doesn't provide such services, is that your evidence?
>
> A This is correct. Right now at the time of speaking and for the past, I don't know maybe weeks, Zahav does not actually provide cryptocurrency services to clients as far as I'm aware.
>
> HIS HONOUR
>
> Q Has it done it at an earlier time?
>
> A I think it has at the time. This document appears to be compiled in 2021 when most likely Zahav received the registration with AUSTRAC to provide cryptocurrency services. I think this is something which was discussed. We wanted to try to provide that service but it didn't pick up.

48 In further answers Mr Kogan said that he did not believe Zahav had engaged in crypto currency trading. Then he said that he was "guessing" that "perhaps around that time [June 2021] there was some limited transactions related to crypto currency services". I sought to ascertain from him whether there was any other employee or subcontractor of the company that might have undertaken such trading. He could not name any such other employee or subcontractor and he said he did not remember whether any such person undertook crypto currency trading for Zahav. He then said this:

> … It appears that sometime in 2021 the company decided to obtain registration to perform cryptocurrency trading services. However, as far as I'm aware that was not very successful. This business did not pick up so right now the company doesn't do any cryptocurrency trading services for clients. The company concentrates on the software development and other services related to software development.

49 That answer and other answers in which Mr Kogan professed lack of knowledge of whether Zahav had traded in crypto currency and if so when and for whom are inconsistent with his claim to be, in effect the sole employee and manager of the company, bearing in mind that Mr Taktak has disclaimed that he undertook any type of trading or work on behalf of Zahav. In evidence before me Mr Kogan's answers about

the affairs of the company were evasive and gave a strong impression that he was not being frank as to what Zahav does or the extent to which its activities are carried on for his own benefit.

50 Contrary to Mr Taktak's evidence, Mr Kogan said that his salary from Zahav is $2,000 per week. The salary of an employee of a corporation is a sum paid periodically pursuant to agreement reached between the parties. I do not accept Mr Kogan's evidence as to his salary, having regard to the implausible obfuscations offered on that subject by Mr Taktak, the purported principal of the employing company. A ledger account produced by Zahav entitled "Wages – Vlad" for the financial year ended 30 June 2020 shows a net total of $50,550 paid to Mr Kogan over a period of nine weeks from 24 April 2020 to 30 June 2020 – a rate of $5600 per week. A similarly entitled ledger account for FY21 contains entries only for the period 3 August 2020 to 30 June 2021 and shows total payments of $46,550. That figure is starkly inconsistent with the amount of $74,575 shown in the income tax return (referred to at [30] above). I do not accept that these conflicting records could have been prepared by the one accountant, Mr Taktak, if the purported employment relationship were genuine. When confronted with the discrepancy, Mr Kogan could do no better than to suggest that "we need to ask Mr Taktak how does that reconcile". Mr Kogan's inability to provide any sensible explanation contributes to my conclusion that neither he nor Mr Taktak has been truthful with respect to the relationship between Mr Kogan and Zahav.

51 In oral evidence Mr Kogan said that his loan of $143,330 from Zahav (referred to at [35] above) was made pursuant to written agreement dated 1 February 2020. Documents produced by Zahav include ledger accounts that purport to be in respect of this loan. However, they do not conform to what would be expected of a ledger account for an asset in the records of a lender. For each of the years ending 30 June 2022, 2023 and 2024 there is a separate account recording debits and credits and a net total for the year. Despite the purported loan agreement being dated 1 February 2020, the earliest entries are dated 30 September 2022 and consist of five credits totalling $2700. There is no carry forward of the balance from each year to the next in these accounts. These records are not consistent with the transactions having the character of incremental advances and partial repayments, especially considering that they purport to have been prepared by a practising accountant. The annual totals added together come to a sum of $172,410.

52 Mr Kogan said he was unable to explain the entries in these accounts. He could not state what was the source of the purported credits to his alleged loan from Zahav. He could not say whether the purported debits reflected actual payments. He suggested that all of these questions be directed to Mr Taktak. Given that Mr Kogan is a

businessman, who operates bank accounts showing large volume and high value transfers over many years, I find his professed ignorance of the state of his account with Zahav to be quite inconsistent with the existence of a genuine loan.

53 The evidence concerning this purported loan is also inconsistent with an employer-employee relationship between Mr Kogan and Zahav. It is a further indication that Zahav is in fact Mr Kogan's entity, from which he has been able to draw these funds to his own benefit in a manner that is not consistent with the creation of a loan debt.

Evidence on the motion concerning Transxpress (HK)

54 The evidence includes a loan agreement between Transxpress (HK) and Zahav dated 1 February 2020, the same day that appears on the loan agreement between Zahav and Mr Kogan. This second loan agreement purports to show that Transxpress (HK) agreed to lend $250,000 to Zahav. Mr Kogan is the sole shareholder of Transxpress (HK). He acknowledged in oral evidence that it has transferred $237,900 to Zahav, of which he asserted that approximately $100,000 was advanced pursuant to the loan agreement. He said that the other $137,900 was paid to Zahav for the performance of services for Transxpress (HK) and its clients.

55 Mr Kogan claimed not to know whether Zahav had made payments of interest on the $100,000 advance, as required under that loan agreement. I asked Mr Kogan the following questions:

> Q You're the person who controls Transxpress (HK)?
>
> A Yes.
>
> Q Wouldn't you know whether or not you're getting your interest?
>
> A The repayments were made, yes, in the earlier stages.
>
> Q What do you mean by the earlier stages?
>
> A Because since the bank account of Transxpress has changed it was impossible to make repayments.
>
> Q Why?
>
> A Because until recently Transxpress (HK) didn't have an operational bank account.
>
> Q Well, that's a matter that's in your control, isn't it, to give it a bank account or not as its sole director and shareholder?
>
> A Yes, your Honour. To answer the question, some loan repayments have been made. However, all of these, for example to open up a new account for Transxpress (HK) would require me to travel to Hong Kong, which I am unable to do simply because it's just too expensive.
>
> Q So you left Transxpress (HK) Limited without a bank account, is that what you're saying?
>
> A Until quite recently. Right now it has a bank account.
>
> Q When was it closed?

A It has a bank account, it didn't close. It operates, however, there are no transactions.

56 I do not find these answers credible. No records have been produced to substantiate that any interest has been paid by Zahav to Transxpress (HK). If interest had been paid, Mr Kogan would know. I do not accept his professed uncertainty in the matter. In the absence of evidence that the loan agreement has been observed and performed according to its terms in a commercial manner, I am not satisfied that it genuinely gives rise to a debt. The dealings are consistent with Mr Kogan having a property interest in the assets and income of Transxpress (HK). The dealings are consistent with that entity having substantial liquid funds available to it, from which $237,900 has been paid to the benefit of Mr Kogan through Zahav.

57 With respect to the net worth of Transxpress (HK), Mr Kogan was asked whether it had other assets apart from the $100,000 purportedly owed by Zahav under the loan agreement of 1 February 2020 and whether it had other liabilities. He gave the following answers to questions from the bench:

> Q … What is it its balance sheet position?
>
> A I simply can't say, your Honour. I can't say because financial statements were not prepared and we are throwing figures in the air which then are used as evidence but these figures are not confirmed by the actual statements, by the actual financial statements.
>
> Q I don't think anybody is throwing figures in the air. An endeavour is being made to find out what the actual figures are, but you say the answer to that is that you don't have current financial statements, even management accounts, for your Hong Kong entity?
>
> A I have correspondence, I might have some invoices, I have bank statements. I do not have financial statements or ledgers. I would need to hire an accountant in Hong Kong to help me in preparation of those.

58 In my assessment those answers amount to no more than evasion and obfuscation. They constitute an element in Mr Kogan's concealment, from the plaintiff and from the Court, of the extent of his interests in property. He did not refer to Transxpress (HK) in the affidavit of 20 January 2020 that he provided pursuant to order 40 of the orders made on 18 December 2019. He said that the omission was because its value was less than $5,000 as at that date. The plaintiff's counsel drew to his attention that only 12 days after that affidavit was sworn, the company entered into the loan agreement with Zahav for the advance of $250,000. His purported explanation of this was: "Increase in business operations". I reject that evidence as untruthful.

59 Not only was the loan agreement entered into on 1 February 2020 but $85,000 was paid by Transxpress (HK) to Zahav on the 18th of that month. As explained below, Transxpress (HK) had paid $28,600 to the defendants' solicitors on 31 January 2020. This sudden development of liquidity, to the amount of $113,600, over the space of less than a month from the date when Mr Kogan claims to have thought that his Hong Kong entity was worth less than $5,000 is, in my assessment, fanciful. I am satisfied that on

20 January 2020 Mr Kogan knew that Transxpress (HK) had a value significantly in excess of the threshold at which he was required to declare his interest. His answers concerning the subject are damaging to his credit.

Payment of the defendants' legal costs

60 Mr Kogan gave oral evidence that since 18 December 2019 $123,877 has been advanced by Transxpress (HK) to the defendants for legal fees in relation to these proceedings. Mr Kogan said that Dealtex Capital itself has paid approximately $150,000 to Harrow Legal in respect of the costs. Further sums have been paid to the solicitors by Zahav, attributed by Mr Kogan either to his alleged salary entitlements and/or to the purported loan from Zahav. In total, $474,679 has been paid towards total costs in excess of that sum.

61 Lending of substantial funds of this order for the payment of legal costs in a proceeding such as this under the *Proceeds of Crime Act* is not a common type of commercial undertaking. In a general sense the capacity of the defendants to procure payment of this very large amount to their solicitors, from the entities with the characteristics and connections that have been described above, casts doubt upon Mr Kogan's evidence that he has made full disclosure of the defendants' interests in property. The utilisation of such a large sum for the payment of legal costs whilst no money at all has been paid to the College over the same period is a negative consideration in the assessment of whether the debt to the College has been incurred in good faith.

Other entities and transactions

62 The matters summarised above are what I regard as the principal features of the defendants' financial affairs that tell against their claim that full disclosure has been made in satisfaction of the prerequisite in s 24(2)(c). The evidence discloses a number of other entities connected with the defendants and numerous other significant financial transactions that have not been referred to. The pressure of time within which Mr Kogan's application must be resolved does not permit a complete analysis. However, I am satisfied that within the further evidence to which I have made no specific reference there is no counter indication to the conclusions that I have drawn but, rather, additional support.

Mr Kogan has not disclosed all his interests in property: s 24(2)(c)

63 In *The Commissioner of the Australian Federal Police v Memon (No. 3)* [2020] NSWSC 1799 Johnson J made the following observations with respect to the operation of s 24:

> [51] Section 24 of the [*Proceeds of Crime Act*] provides a self-contained and exhaustive statutory scheme for a court to allow for payment of expenses caught by the provision out of property covered by a restraining order. Section 24 is to be construed against the background of the purposes and objects of the … Back generally.

> [69] The facts proved must form a reasonable basis for definite conclusion, affirmatively drawn, of truth of which the tribunal of fact may reasonably be satisfied: *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246 at [44]-[55]. Quarters not authorised to choose between guesses on the ground that one guess seems more likely than any other guess: *Guest v The Nominal Defendant* [2006] NSWCA 77 at [108] …
>
> [71] A court is not always bound to make a finding one way or the other with regard to the facts averred by the parties. It is well established that where, owing to the unsatisfactory state of the evidence, the only just course may be for the Court to decide the case on the basis that the moving party has failed to discharge their burden of proof: *Guest v The Nominal Defendant*

64 For reasons that will be apparent from my consideration above of the evidence concerning the financial affairs of the defendants and of the other entities to which I have made reference, I am not satisfied that Mr Kogan has disclosed all of his interests in property and his liabilities, either "in a statement on oath that has been filed in the court" or otherwise. It follows that a pre-condition for the Court to exercise its discretion pursuant to s 24(1) has not been fulfilled and the discretion is not enlivened. I will nevertheless consider whether either of the grounds in pars (b) or (d) of s 24(1) would be satisfied on the evidence tendered, if full disclosure of Mr Kogan's property interests had been made.

The College tuition fees are not reasonable living expenses of Mr Kogan or his dependents: s 24(1)(b)

65 The amount of the accrued debt shows that the fees for educating Mr and Mrs Kogan's five children at the College amount to approximately $150,000 per annum. Reasonableness of living expenses must be considered against the available income and realisable assets of the persons concerned. The incurrence of school tuition fees at the above rate cannot be regarded as a reasonable expense for a couple who, over the four years preceding the relevant period, had a combined annual gross income, according to their tax returns, of approximately $34,000 and who, on the basis of that parlous financial condition, were in receipt of Commonwealth family support benefits.

66 For the four years over which the fees due to the College have been incurred, Mr Kogan's income has been declared to tax in higher amounts (see [30] above) but he has deposed that Mrs Kogan's assessable income has been no more than approximately $20,000 per annum. The combination of the earnings of both of them are such as to make it unreasonable that they should incur $150,000 per annum on private education. It has been beyond their disclosed means, in income terms, throughout the period 2020-2023. I am not satisfied on the balance of probabilities that such expenditure on the children's education could be characterised as a "reasonable living expense" by reference to their capital assets, having regard to the fact that such assets as are known have been subject to restraining orders throughout the period and that any other assets are denied by Mr Mrs Kogan and, in any event, of unascertained extent.

The debt to the College was not incurred in good faith: s 24(1)(d)

67 In *The Commissioner of the Australian Federal Police v Pharmacy Depot Hurstville Pty Ltd (in liq) (No 2)* [2020] NSWSC 1571 Walton J said the following with respect to the application of s 24(1)(d):

> [57] In *Secretary, Department of Education, Employment, Training and Youth Affairs v Prince* (1997) 152 ALR 127 at 130, Finn J stated "the formula 'good faith' derives its meaning from its particular context" and continued:
>
> > The significance of the statutory context in which the formula is used is in the illumination it gives as to what is that required state of affairs. It has correctly been observed that the term "good faith" (or its now less fashionable Latin equivalent "bona fide") is a protean one having longstanding usage in a variety of statutory and, for that matter, common law contexts.
>
> [58] The requirement of "good faith" must be construed by reference to the principal objects of the Act … including, relevantly in s 5(a), "to deprive persons of the proceeds of offences, the instruments of offences and benefits derived from offences". That object is affected by a Court making a forfeiture order under Part 2-2 of the Act: *Commissioner of the Australian Federal Police v Elzein* (2017) 94 NSWLR 700; [2017] NSWCA 142 at [11] (per Basten JA, with Beazley ACJ agreeing).
>
> [59] It is uncontroversial that one of the principal objects of the Act would be undermined if a person whose property is the subject of a restraining order was able to incur debts in the knowledge that those debts could only be paid out of the property the subject of the restraining order. It follows that a debt so incurred does not meet the requirement of "good faith" in s 24(1)(d), properly construed in the context of the Act, as the incurring of such a debt would unduly and deliberately circumvent the objects of the Act.
>
> ...
>
> [62] For the above reasons, I find that to incur a debt in the expectation that the debt will be met out of the restrained property is not to incur the expense "in good faith" for the purposes of s 24(1)(d) of the Act.

68 I respectfully adopt Walton J's reasoning and apply it to the present case. Knowing that the assets identified in the schedule to the orders of 18 December 2019 were restrained and knowing the limitations of their personal income, as declared in the returns of Mr and Mrs Kogan, I regard it as unreasonable from every point of view that they incurred this very significant debt to the College.

Orders

69 For the above reasons the following orders will be entered:

(1) The first defendant's notice of motion filed 20 October 2023 is dismissed.

(2) The first defendant is to pay the plaintiff's costs of the notice of motion.

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Amendments

14 December 2023 - s 24(1)(b) corrected

Decision last updated: 14 December 2023