This and the following 18 pages are the Appellant's submissions for publication pursuant to paragraph 27 of Practice Note No. SC CA 1.

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Written Submissions

COURT DETAILS	
Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00205659

TITLE OF PROCEEDINGS	
First Appellant	Kaldon Karout
First Respondent	New South Wales Crime Commission ABN 51897996354

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Filed for	Kaldon Karout,Appellant 1
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ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (Appellant's Submissions.pdf)

[attach.]

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

KALDON KAROUT

- v -

NEW SOUTH WALES CRIME COMMISSION

SUBMISSIONS ON BEHALF OF THE APPELLANT

I. Introduction

1. By summons, dated 27 October 2015 (**Red 1**), the respondent applied, relevantly, for a proceeds assessment order to be made against the appellant in accordance with s. 27 *Criminal Assets Recovery Act 1990*. Since the appellant had previously pleaded guilty to two offences of supplying a large commercial quantity of a prohibited drug, contrary to s. 25(2) *Drug Misuse and Trafficking Act 1985*, there was no dispute that such an order should be made. The only question, which arose for determination, was the amount that should be fixed by the Court.

2. The respondent contended that the order should be made in the sum of $ 4,694,838.91 (Plaintiff's submissions, dated 1 May 2025, at [46]) (**Black 227J**). In contrast, it was submitted on the appellant's behalf that the amount should be $ 1,883,912 (Defendant's submissions, dated 4 May 2025, at 15 [58]) (**Black 243O**). The matter was heard by Fagan J., who determined that the appropriate amount was $ 4,602,659.91, *see New South Wales Crime Commission v. Karout* [2025] NSWSC 538 (**Red 12**).

3. On 29 May 2025, the appellant gave notice of his intention to appeal (**Red 47**). By notice of appeal, dated 27 August 2025 (**Red 51**), the appellant now appeals against his Honour's assessment of the quantum of the order.

II. The legislative background

4. The *Criminal Assets Recovery Act* gives the respondent the power to apply for a range of orders for the disgorgement of ill-gotten gains. One such order is the proceeds assessment order, which can be made by the Supreme Court, pursuant to s. 27 of the Act. The amount of the order is an amount assessed by the Court as the value of the proceeds derived by the person from an illegal activity or illegal activities in the 6 years prior to the application for the order, *see* s. 27(1).

5. Section 28 of the Act sets out various ways in which the burden apparently placed upon the respondent by virtue of s. 27 is alleviated. In the present case, one such provision was s. 28(3), which provides that any expenditure during the relevant time period is to be treated as proceeds derived from an illegal activity or activities, unless the defendant proves that the expenditure was funded from income, or money from other sources, unrelated to an illegal activity or activities.

III. The issues below

6. Much of the debate was concentrated on whether the appellant could prove that his expenditure, during the relevant period, had come from monies from other sources, unrelated to an illegal activity or activities. The issues were outlined by the learned trial judge (at 9 [17]) (**Red 20J**).

IV. Ground 1: His Honour erred in concluding (at (22]) that the total value of the prohibited drugs in the appellant's possession at the time of his arrest was $546,095 as proceeds derived by the appellant from his illegal activities, in circumstances where that amount, as quantified by Mr. Bull, was the value of the prohibited drugs rather than the value of the appellant's "interest" in his possession of the prohibited drugs or the "benefit" of that possession.

7. The appellant had previously pleaded guilty to two offences of supplying a large commercial quantity of a prohibited drug, namely heroin and cocaine, contrary to s. 25(2) *Drug Misuse and Trafficking Act 1985*. The facts underlying those pleas of

guilty were set out in an agreed statement of facts. Although that document included a considerable amount of contextual material, the prohibited drugs, the values of which are relevant to the present ground of appeal, were those discovered during the execution of the search warrant at the appellant's premises (*see* at 3 [3]) (**Red 14C**). There was no evidence as to whether the drugs were owned by the appellant or whether he merely possessed them either for others or "on tick". Importantly for present purposes, the drug expert called by the respondent, Detective Inspector O'Neil, accepted that there was no evidence that the appellant had paid for the drugs found to be in his possession T104.38-48) (**Red 104S-104W**)

8. Since there was no evidence of expenditure, it was submitted that it was a matter for the respondent to prove the value of the prohibited drugs. In the absence of evidence of how the appellant came to be in possession of those drugs, it was submitted that the appropriate value was that of the possessory interest of the drugs, rather than the potential street value, which had been the basis of Mr. Bull's calculation. While his Honour appears to have accepted that the evidence established only that the appellant had a possessory interest, his Honour nevertheless attributed the entire value of the drugs to the appellant, holding (at 11 [22]) (**Red 22N-R**):

> Through his involvement in the illegal activity of which he was convicted on 1 June 2018, the defendant acquired an "interest" of possession in the drugs, or at least he obtained the "benefit" of that possession. The value of his interest or benefit was as calculated by Mr Bull, adopting the lower end of DI O'Neill's value range. The amount calculated should more accurately be brought to account under s 28(1)(a)-(c), rather than in the summation of expenditure under s 28(3). That consideration makes no arithmetic difference.

9. Importantly, for present purposes, his Honour focussed on subsections (1)(a)-(c) of s. 28, rather than subsection (3). In other words, consistent with the appellant's argument, the primary judge rejected any suggestion that the appellant must have expended monies equivalent to the value of the prohibited drugs in order to gain possession. Nevertheless, it is submitted that his Honour's reliance on subsection (1) was misplaced.

10. Section 28(1)(a) requires a court to have regard *inter alia* to "the value of any interest in property." Plainly, the value of an interest differs, depending on whether the property is possessed outright, on consignment, or as part of a bailment arrangement.

This submission is not undermined by subsection (1)(c), which requires the Court to have regard to the market value of a similar drug. That provision merely simplifies proof in terms of quantification. In other words, the respondent is not, for example, required to prove what was the value of the particular property – in this case, the drugs seized.

11. The value of the appellant's interest was a matter for the respondent to prove on the balance of probabilities. The respondent did not attempt to do so other than by referring to the value the drugs would have had, if possessed outright. Since the evidence was equivocal as to the extent of the appellant's interest, the respondent failed to discharge his burden. Accordingly, it is submitted that the primary judge erred in taking into account the amount of $ 546,095 in the assessment.

V. Ground 2: In calculating, as part of the appellant's expenditure, the maintenance payments to Ms. Taylor, his Honour erred (at [26]) in taking into account the evidence given by the appellant during his compulsory examination held in accordance with s. 12(1) *Criminal Assets Recovery Act 1990*, even though such statements were not admissible for their truth

12. In seeking to prove the extent of the appellant's expenditure, the respondent also sought to rely upon the evidence given by the appellant during a compulsory examination, which had been ordered in accordance with s. 12(1)(b)(i) *Criminal Assets Recovery Act 1990*. The respondent argued that, during his examination, the appellant had given evidence about monthly maintenance payments of $ 23,000 being made to his former wife. Because these monies would plainly be classified as expenditure, unless they could be shown to have been derived from sources other than illegal activity, they would necessarily be included in the assessed amount.

13. The appellant objected to the use of this material on the basis that anything recorded in the transcript of the examination would be second-hand hearsay and therefore excluded under s. 82(2) *Evidence Act 1995*. At the conclusion of the debate, Fagan J. stated (T92.40-43) (**Black 92T-U**):

> Thank you, [counsel]. I'm against you. I think that so far is what is said in the examination, as recorded in the transcript, can be proved by the transcript to the extent that it constitutes admissions against interest by Mr Karout. I'll give reasons for that in my judgment on the whole case.

14. Notwithstanding that passage, and notwithstanding the arguments advanced on behalf of the appellant, the entirety of his Honour's reasons, as to the admissibility of the transcript, is contained in the following pithy paragraph (at 13 [26]) (**Red 24U-W**): "Over objection from the defendant, I ruled the transcript of that evidence admissible pursuant to s 54(5) of the Act to prove the answers given by the defendant, which constitute admissions against his interest and are evidence of the truth of the matters he asserted." It is submitted that the primary judge erred in admitting the transcript as admissions and therefore for the truth of the assertions.

15. Section 54(5) of the Act provides: "In any proceedings on an application for an order under this Act, the transcript of any examination under section 12 or 31D is evidence of the answers given by a person to a question put to the person in the course of the examination." It is submitted that the provision is directed to the manner of proof of answers given, rather than the use to which those answers might be put. The submission can be tested in the following manner. Arguably, the provision can have one of two effects, given that its phraseology is not without ambiguity.

16. Firstly, it could allow for the admissibility of the answers given during an examination for their truth, without regard to the *Evidence Act*. Such a conclusion is, however, most unlikely, since examinations under s. 12 or s. 31D of the *Criminal Assets Recovery Act* need not necessarily be of the person, who is the defendant in the asset forfeiture proceedings. Other persons may be examined and may ultimately not be available at the hearing of the asset forfeiture proceedings. If such a construction were correct, then statements made by others, who could not be challenged, would become admissible and could form the basis of the assessment of the order.

17. Altenratively, the application of the provision could be limited, as suggested herein, to the mechanics of proof of the answers given. In other words, if required to prove what the witness said, a party to the asset forfeiture proceedings need not call, for example,

the court reporter, if relevant, or play the recording and prove that the voice was that of the witness.

18. Fagan J., however, appears to have adopted what might, with respect, be called a halfway house. The position adopted by his Honour was that s. 54(5) *Criminal Assets Recovery Act 1990* overcomes part of the rule against hearsay (to render the answers contained in the transcript first-hand hearsay), but that otherwise the *Evidence Act* applies. Such an approach cannot be reconciled with the legislation.

19. Importantly, it is to be noted that the provision does not purport to alter the *Evidence Act* in any way, let alone in respect of the rule against hearsay. This is in contrast to s. 28C(12) of the Act, which expressly departs from the strictures of the *Evidence Act*. Therefore, unless s. 54(5) operates as a stand-alone basis of admissibility, independent of the *Evidence Act* (i.e. the first possibility alluded to above), then admissibility continues to be governed by that Act.

20. Plainly, the words printed in the transcript of the examination would, absent some modification to the *Evidence Act*, be classified as second-hand hearsay. This was explained in *Australian Securities and Investments Commission v. Fortescu* (2009) 176 FCR 529 at 536 [32] *per* Gilmour J (dealing with transcripts of compulsory examinations undertaken in accordance with s. 19 *Australian Securities and Investments Commission Act 2001 (C'th)*):

> The s. 19 transcript of [the witness's] examination purportedly contains admissions made by [the witness] in the examination. But [the witness] is not the author of the document recording his alleged admissions. The transcript records representations made by the transcriber of the tape recording of the examination in relation to statements made by [the witness] at the examination. Therefore, s 82(b) prevents ASIC from relying on s. 81 as a basis for the tender of the transcript.

21. Therefore, unless s. 54(5) modifies the meaning of representation, as it is defined by the *Evidence Act*, then there is no reason to conclude that the printed words are first-hand hearsay, as found by Fagan J.

22. That does not mean that the provision would have no work to do. One situation in which the provision would operate is where the answers are to be tendered for a non-

hearsay purpose. Another and perhaps more important role would be in relation to previous inconsistent statements. If a defendant in such proceedings were to give evidence, inconsistent evidence could be put to the defendant without the need to prove the answers, for example, by calling evidence from the court reporter or playing the recording and proving that it was the defendant speaking.

23. In considering the submission, regard should also be had to the context in which the provision appears. The legislature chose to use the phrase "evidence of the answers given by a person", rather than other expressions used in other subsections, which clearly express the legislative intention that documents be admissible as proof of their contents. For example, subsection (4) provides (emphasis added): "In any proceedings on an application for an order under this Act, *the court may, in determining the application, have regard to the transcript of any proceedings against a person for an offence* to which the application relates and to the evidence given in any such proceedings." Such language, which is different from the language employed in subsection (5), clearly expresses the legislative intention that such transcripts are admissible, irrespective of any limitation that might otherwise arise from the *Evidence Act*.

24. The different legislative language used in subsection (4) is also of particular relevance, when one bears in mind that the admissibility of compelled evidence, while deprecated in the purely criminal jurisdiction, has been common practice for a considerable time. For example, in the bankruptcy sphere, legislation has provided that evidence of examination may later be admissible in evidence in civil proceedings. The *Corporations Act* also included provisions, now found in s. 76 of the *ASIC Act*, which expressly provided for the admissibility of such evidence.

25. For those reasons, it is submitted that Fagan J. erred in admitting evidence of the appellant's answers during his compulsory examination, and for those reasons, his Honour erred in taking into account an amount of expenditure in the sum of $ 627,653, being the amount calculated by Mr. Bull (at 11-12 [23]) (**Red 22U-23C**), minus the adjustment calculated by the primary judge (at [39]).

VI. Ground 3: His Honour erred in assessing the appellant's expenditure during the relevant period by finding (at [39]), in the absence of evidence and notwithstanding the fact that the burden of proof to establish the appellant's expenditure fell upon the respondent, that the amounts paid to Ms. Taylor by the appellant by way of maintenance payments would have equated to $23,000 per month, because this was consistent with the appellant's evidence that there would have been large and small payments from time to time and that these, therefore, would have equated to the monthly amount of $23,000 on average

26. In assessing the expenditure attributable to the maintenance payments, his Honour held (at [39]):

> At its highest the defendant admitted under examination to an approximate amount of $23,000 per month. He did not say the amount paid was the same every month. It is consistent with his evidence that there would have been large and small payments from time to time, equating to the monthly amount on average.

27. The primary judge's conclusion was predicated upon the appellant's statement (if admissible) at the compulsory examination, "That went on till probably 2017 that was going, approximately 23 and a half thousand a month. That was paid via my current partner to Ms Taylor." (at 13 [25]) (**Red 24B**), and, when asked whether "the same amount, approximately $ 23,000 per month" was being transferred, the appellant answered "Thereabouts" (at 13 [25]) (**Red 24H**). As the primary judge himself acknowledged (at 18 [39]) (**Red 29N**) that was a limitation to the appellant's admission. Because this part of the assessment involved an assessment of expenditure, it was incumbent upon the respondent to prove that expenditure. The mere assertion by the appellant that he provided approximately $ 23,000 per month to Ms. Taylor was incapable of demonstrating that he transferred that amount, on average, each and every month over the period from 21 November 2012 until 27 October 2015.

28. The suggestion that he transferred such amounts on average is further undermined by errors in the appellant's recollection. His Honour observed (at 15 [31]) (**Red 26I-N**):

> [The appellant's] erroneous assertion that [the payments] continued up to 2017 does not detract from the essential admission. Nor is the admission of $23,000 per month negated by his incorrect statement that payments at that rate were made from Ms Karout's bank account prior to his imprisonment. The defendant's admission does not lose its evidentiary force from the

> circumstance that he appears to have confused the method of payment by which the reduced allowance of about $3,500 per month was made while he was in prison with the method of payment of the higher monthly amount at earlier times.

29. It is submitted that these errors in his recollection affected the weight, which could be given to the appellant's admissions, particularly in circumstances where he was being examined in 2020 (at 12 [25]) (**Red 23H-J**) about matters, which took place in 2012-2015 (at 11 [23]) (**Red 22V**), and without resort to records. The suggestion that the appellant's partner, Ms. Nariman Karout, had transferred approximately $ 23,000 per month to Ms. Taylor was contradicted by her and confirmed by banking records. His Honour acknowledged this inconsistency (at 14 [29]) (**Red 25O-S**).

30. Furthermore, his Honour aditionally found that the appellant's generosity also supported the inference that the monthly sum, suggested by the appellant during his examination, is likely, on the balance of probabilities, to have been the amount, in fact, transferred (*see* at 15 [32]) (**Red 26O-S**). In that context, Fagan J. drew attention to transfers, which had been made from accounts associated with the appellant to Ms. Taylor. However, three of the four transfers referred to by his Honour took place shortly after the appellant's arrest, namely within a matter of days, such that it is most unlikely that he could have caused those transactions to be effected (see Plaintiff's submissions at 7 [24]-[26]) (**Black 235G-P**). Moreover, at least two transactions appear to have been carried out at a physical branch. In circumstances where it is next to impossible that those the transactions were carried out by the appellant, it gives rise to an inference that they were carried out by Ms. Taylor herself. No conclusion about the appellant's generosity could be deduced from those transfers, and, similarly, no inference could be drawn in relation to the reliability of the appellant's evidence at the compulsory examination.

31. Finally, the appellant tendered an affidavit of Ms Taylor, who had since passed away. Her affidavit, which had been tendered in Family Court proceedings, addressed the extent of payments to her by the appellant (*see* Defendant's submissions at 6 [21]) (**Black 234S-V**). Even though, Ms. Taylor spoke about payments of $ 1,000 in cash when she ran out of money, Fagan J. made no reference to her evidence whatsoever.

32. Without wishing to do an injustice to the primary judge's analysis, it appears to be as follows: because the appellant admitted to having his partner transfer approximately $ 23,000 or thereabouts to Ms. Taylor each month, he must therefore have paid her on average $ 23,000 per month in cash, with some smaller amounts being transferred by Ms. Karout. It is submitted that, in the absence of any evidence of cash payments being made regularly to Ms. Taylor, let alone in such sums, and given the contradictory evidence, his Honour should not have concluded that monthly maintenance payments of $ 23,000 were made to Ms. Taylor.

VII. Ground 4: His Honour erred in failing to be satisfied that the following amounts were monies from other sources, unrelated to an illegal activity or activities, in circumstances where those monies were transferred to the appellant as loans by the witnesses, and, despite the rule in *Browne v. Dunn* (1893) 6 R 67, it was not suggested to the witnesses by the respondent that they had been involved in any illegal activity

33. In his case, the appellant called a number of witnesses, who gave evidence that they had engaged in transactions with the appellant. On the basis of their evidence, it was submitted that those monies had not been derived from illegal activity. However, in each instance, his Honour rejected the evidence of the witnesses about the circumstances in which such transactions took place.

34. Yet, even the rejection of the witness's evidence, concerning the circumstances of the transactions, did not *ipso facto* mean that the evidence relating to the witnesses could be disregarded. The various transactions, upon which the appellant relied, were each proven by banking records. Nevertheless, Fagan J. concluded (at [47]), in relation to Ms. Elgammal, for example, "Without credible evidence of the asserted character of the transfer it is unexplained and the Court cannot be satisfied on the balance of probabilities that the money came from sources other than illegal activity."

35. It is submitted that the Court was left in the position that the source of the monies was clearly evidenced. In relation to Ms. Elgammal, for example, the monies were derived from the sale of property, which was evidenced by documentary evidence led by the respondent. At no stage was it suggested to any of the witnesses that they had been

involved in any criminal activity or had they had been aware of any criminality on the appellant's part. Indeed, almost invariably, the witnesses would have been guilty of one or more offences contrary to Part 4AC *Crimes Act 1900*, if they had knowingly received proceeds of crime from the appellant or had provided him with monies with the intention that they be used in illegal activity, or at the least, reckless as to that fact. At no stage, however, was any such suggestion put to any of the witnesses.

36. Of course, the rule in *Browne v. Dunn* (1893) 6 R 67 is well known, and therefore reference to the following description will suffice for present purposes, *MWJ v. The Queen* (2005) 80 ALJR 329 at 339 [38] *per* Gummow, Kirby and Callian JJ.: "The rule is essentially that a party is obliged to give appropriate notice to the other party, and any of that person's witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party's or a witness' credit." In explaining the purposes of the rule, the Ontario Court of Appeal stated in *R v. Quansah*, 2015 ONCA 237 at [77(iii)][1], "Without the rule, the trier of fact would be deprived of information that might show the credibility impeachment to be unfounded and thus compromise the accuracy of the verdict."

37. In the present case, it was not suggested to any of the witnesses that the monies they had transferred to the appellant were in some way related to illegal activity. It is submitted that, in those circumstances, the primary judge ought to have accepted that there were not related to illegal activity.

[1] Referred to in J. Sackar KC, *The rule in Browne v. Dunn - essential or anachronistic* at 27, available at: https://supremecourt.nsw.gov.au/documents/Publications/Speeches/2019-Speeches/Sackar_20190116.pdf.

VIII. Ground 5: His Honour erred (at [48]) in failing to be satisfied that the monies directed to be transferred to the appellant were monies from other sources, unrelated to an illegal activity or activities, in circumstances where those monies were lawfully transferred at the direction of Ms. Elgammal and it was not suggested in evidence that the appellant was the beneficial owner of the property, this despite the rule in *Browne v. Dunn* (1893) 6 R 67 and in the absence of any evidence that the property had been beneficially owned by the appellant, and in the absence of such a submission by the respondent

38. In advancing this ground of appeal, the appellant relies upon the submissions advanced above in respect of ground 5.

39. The primary judge concluded (at [49]): "[W]here the bulk of the proceeds were so freely passed over to the first defendant, in circumstances that I am not persuaded gave rise to a loan, the evidence tends toward a probability that the property was the defendant's beneficially, at least as to $1,070,000 of its value." If by the phrase "the evidence tends toward a probability that the property was the defendant's beneficially", his Honour meant that, on the balance of probabilities, the appellant had had an interest in Mrs. Elgammal's property, then it is submitted that his Honour fell into error.

40. Firstly, counsel for the respondent never suggested to Mrs. Elgammal that the appellant had had an interest in the property. The closest counsel came to the topic were a series of questions about whether Mrs. Elgammal and the appellant had ever owned property together, and Mrs. Elgammal gave evidence about a different property (T49.7-T50.22) (**Black 49E-50L**). Secondly, there was no evidence whatsoever that expressly demonstrated that the appellant had an interest in the property. Thirdly, and in the absence of other evidence, it is submitted that the "flow" of money to the appellant from Ms. Elgammal was incapable of demonstrating, on balance, that he held an earlier, beneficial interest in the property.

41. Fourthly, the respondent's closing submissions appear to have focused on undermining the accounts given by the appellant's witnesses, including Mrs. Elgammal, and therefore the capacity to prove that his income was not derived from illegal activity. Perhaps because it was not suggested to Mrs. Elgammal that the

appellant held a beneficial interest, so, too, it was not suggested in closing that that was the case.

42. In those circumstances, by adopting a line of reasoning, which had not been advanced by counsel for the respondent, and had not been flagged with counsel for the appellant, it is submitted that the primary judge denied the appellant procedural fairness, and fell into error by finding that the appellant held a beneficial interest in the property, which had been sold and which provided the source of the monies transferred to the appellant by Mrs. Elgammal.

IX. Ground VI: In rejecting the evidence of the witnesses Elgammal (at [45]-[47]), Issa (at [58]), Samia (at [66]) and Barton (at [83]), his Honour erred by having regard to supposed practices concerning *inter alia* loans, their documentation and their repayment, in circumstances where, in accordance with s. 144 *Evidence Act 1995* and the principles explained in *Holland v. Jones* (1917) 23 CLR 149, it was not open to his Honour to take judicial notice of such supposed practices

43. In relation to each of the appellant's witnesses, the primary judge rejected their accounts, on the basis that he found their conduct not to be plausible. To illustrate his Honour's analysis, it suffices to refer to the findings in respect of Mr. Samia, although similar reasoning was applied in respect of Mrs. Elgammal (at [45]-[47]), Issa (at [58]), and Barton (at [83]). At 26 [66] (**Red 37Q-V**), Fagan J. said the following (emphasis added):

> The Court is asked to accept Mr Samia's superficial affidavit evidence, of undocumented loans totalling $250,000 with no commercial terms, in the absence of any plausible explanation as to why he, a businessman and property developer, would have advanced this significant sum so improvidently, without agreement upon terms that are basic to the commercial interests of any lender. Mr Samia deposed that he has known the defendant for more than 20 years. *That of itself provides no explanation that could give plausibility to the highly improbable transactions with the defendant that Mr Samia describes.*

44. It is submitted that the primary judge brought to bear his own understanding of how commercial transactions would be conducted, irrespective of any friendship that

might have existed between Mr. Samia and the appellant. In determining that the transactions were "highly improbable", his Honour must have employed his own esoteric knowledge or understanding of what was commercially probable, since there was no evidence from any witness about the improbability, or otherwise, of the transactions. While, of course, it is open for a judge, sitting as a tribunal of fact, to take judicial notice of matters, it submitted that that was not possible in the present case.

45. The risk of a judge, sitting as a tribunal of fact, from taking into account his or her own esoteric knowledge was considered by this Court in *Ohlstein bht Ohlstein v. E. & T. Lloyd trading as Otford Farm Trail Rides* [2006] Aust Torts Reports 81-866 at [150]:

> The established rule is that a court may judicially notice a fact whenever it "is so generally known that every ordinary person may be reasonably presumed to be aware of it" (*Holland v. Jones* [1917] HCA 26; (1917) 23 CLR 149 at 153). A judge's life experience may cause him or her to form assumptions about certain groups of people, including young children, that are not held by all. There are great dangers in relying on assumptions about the behavioural characteristics of particular groups of people. In *Australian Broadcasting Corporation v. Lenah Game Meats Pty. Ltd.* (2001) 208 CLR 199 Callinan J said at 298 to 299; [251] to [253]:
>
> > Judges sometimes make assumptions about current conditions and modern society as bases for their decision. Great care is required when this is done. An assumption of such a kind may be unsafe because the judge making it is necessarily making an earlier assumption that he or she is sufficiently informed, or exposed to the subject matter in question, to enable an assumption to be made about it. That is why judges prefer to, and indeed are generally required to act on evidence actually adduced, and are conservative about taking judicial notice of matters of supposed notoriety.

See also Strinic v. Singh (2009) 74 NSWLR 419 at 430 [60]-[61] *per* Beazley JA; *McDiarmid v. R* [2023] NSWCCA 322 at [44] *per* Harrison CJ at CL.

46. At common law, it has been said that, "Save in the plainest of cases, Judges cannot be expected to take some form of judicial notice of what is or is not in accordance with reasonable standards of commercial practice", *Greenbank New Zealand Ltd. v. Haas* [2000] 3 NZLR 341 at [25] *per* Tipping J. Of course, the issue of judicial notice is now one governed by s. 144(1) *Evidence Act 1995* rather than the common law, *see*

Gattellaro v Westpac Banking Corporation (2004) 78 ALJR 394 at 397-398 [17] *per* Gleeson CJ, McHugh, Hayne and Heydon JJ. That section provides:

> Proof is not required about knowledge that is not reasonably open to question and is –
>
> (a) common knowledge in the locality in which the proceeding is being held or generally, or
>
> (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.

47. In the present case, it could scarcely be said that the commercial practices between two friends was a matter of "common knowledge", nor was a matter capable of verification by reference to a document. Therefore, it was not open to Fagan J. to take judicial notice of what was commercially improbable, in the absence of evidence. This is arguably all the more the case, when the ethnicity of the appellant and the witnesses was different from that of his Honour.

48. The difficulties in a judicial officer deploying his or her own esoteric knowledge was described by this Court in *Strinic v. Singh* (2009) 74 NSWLR 419 at 430 [64] *per* Beazley JA:

> Even if a particular judge sitting in a court of general jurisdiction is experienced in adjudicating medical cases, that experience does not replace the requirement to base findings on the evidence. A court cannot assume that its knowledge of any particular matter is correct, even if the individual judge has a great deal of experience dealing with, for example, medical issues, as was the case here. In *Saunders v. Adderley* [1998] UKPC 29; [1999] 1 WLR 884 it was said that such a process involved an error of law. Underlying that error is a fundamental breach of procedural fairness. A party is not afforded procedural fairness where a trial judge makes findings of fact based upon that judge's own purported knowledge or understanding of matters that do not form part of the evidence.

49. Accordingly, it is submitted that the primary judge erred in taking into account his own perceptions of how such transactions would have been effected, if they had taken place, in the absence of any evidence of such matters.

X. Ground 7: His Honour mistook the onus, which rested upon the appellant in accordance with s. 28(3) *Criminal Assets Recovery Act 1990*, as clarified in *Vu v. New South Wales Crime Commission* [2013] NSWCA 282, as the basis for rejecting the case for the appellant

50. These submissions in respect of this ground of appeal should be read in conjunction with those advanced in respect of ground 4.

51. Section 28(3) of the *Criminal Assets Recovery Act* provides (emphasis added):

> If evidence is given at the hearing of an application for a proceeds assessment order of the amount of the defendant's expenditure during the period of 6 years before the making of the application for the order, the Supreme Court is to treat any such amount as proceeds derived by the defendant from an illegal activity or activities, except to the extent (if any) that the Supreme Court is satisfied the expenditure was funded from income, or money from other sources, unrelated to an illegal activity or activities.

52. It is submitted that the primary judge imposed too great a burden upon the appellant by requiring him prove, on the balance of probabilities, the purposes of the various transfers to him. While the primary judge focussed on the purpose of the transactions, the deeming provision found in s. 28(3) of the Act is far more limited. According to that provision, it is incumbent upon the defendant to the proceedings to prove the source of the income or money. In each case, the appellant did so by the calling of evidence from witnesses, supported by and large by banking records reflecting the transfers. In was then incumbent upon him to show that those "sources" were unrelated to "illegal activity or activities". Again, the origin of those sources was explained in the evidence of the various witnesses, sometimes supported by objective evidence, such as in the case of Mrs. Elgammal. In Mrs. Elgammal's case, the source of the funds was the sale of a property (see T44.37-T49.3) (**Black 44R-49C**). In Mr. Barton's case, the source was a divorce settlement (T57.20-26) (**Black 57K-N**). In other words, the appellant adduced evidence that the sources were unrelated to an illegal activity or activities.

53. The civil standard of proof was described as follows in *Henderson v. Queensland* (2014) 255 CLR 1 at 28 [90] *per* Gageler J. (as his Honour then was) (dissenting as to the outcome) (footnotes omitted):

That description of the ordinary operation of the civil standard of proof applies equally to a case in which the legal burden of a party is to prove the non-happening of an event or the non-existence of a particular state of affairs as to a case in which a party's legal burden is to prove the happening of an event or the existence of a particular state of affairs. As Davidson J earlier explained in the Supreme Court of New South Wales in *Ex parte Ferguson; Re Alexander*:

> In all legal proceedings the basic principle at common law is that in civil cases a plaintiff must prove the essential elements of his case even if that course involves establishing the assertion of a negative ... He must establish what is really the affirmative in substance, not what is merely affirmative in form ... But if the party bearing the onus furnishes some evidence which gives rise to a presumption or inference of fact in his favor or that presumption already exists, the onus shifts to the other party.

His Honour's reference to evidence adduced by the party bearing the legal burden of proof giving rise to a "presumption or inference of fact" was to nothing more than an inference of fact drawn, in accordance with ordinary processes of inferential reasoning, in the absence of further evidence. His Honour's reference to an "onus" then shifting to the other party was to nothing more than the practical need (sometimes referred to as a "tactical burden") for an opposing party to adduce further evidence if that party wants to prevent such an inference of fact actually being drawn in the circumstances of the case.

54. In accordance with the above analysis, the appellant had adduced evidence sufficient to give rise to an inference that the monies transferred were unrelated to an illegal activities or activities. The respondent did not attempt to adduce evidence to undermine the witness's accounts of where the monies had been sourced. In those circumstances, it is submitted that the appellant had discharged the burden of proof, and he was not required to prove the context of the transactions, in order to escape the deeming provision in s. 28(3) of the Act.

XI. Ground 8: His Honour erred in failing to accept the evidence of the witnesses Elgammal, Issa, Samia and Barton, and in using the evidence given by the appellant during his compulsory examination held in accordance with s. 12(1) *Criminal Assets Recovery Act 1990* only adversely to his case

55. The nub of this ground of appeal has already been touched upon in the submissions relating to a number of the earlier grounds, namely grounds 4,5, 6 and 7. Ultimately, it

is submitted that Fagan J. ought to have accepted the evidence of the appellant's witnesses, that is, that they had transferred monies to the appellant, which were unrelated to illegal activity or activities. It is further submitted that the appellant's answers during the compulsory interview (if admissible) did not demonstrate that he had transferred on average $ 23,000 each month over the relevant time period.

XII. Ground 9: His Honour erred in failing to give adequate reasons for doing so

56. Alternatively to ground 8, it is submitted that his Honour failed to give adequate reasons for rejecting, in relation to the witnesses Elgammal, Issa, Samia and Barton, the contention that they had provided monies to the appellant unrelated to illegal activity or activities. Similarly, it is submitted that his Honour failed to give reasons as to why the evidence of the appellant's answers, given during the course of the compulsory examination, were to be preferred to the circumstantial evidence provided by the appellant's partner, Ms. Naiman Karout, as well as the direct evidence of Ms. Taylor, in circumstances where parts of the appellant's answers were contradicted by the objective evidence.

XIII. Conclusion

57. For the foregoing reasons, it is submitted that the appeal should be allowed and the proceeds assessment order reduced substantially. It is further submitted that the respondent should pay the appellant's costs.

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22 October 2025