I, Penny Csenderits, solicitor on the record for the Respondent, hereby certify this and the following 20 pages are the Respondent's submissions for publication pursuant to paragraph 27 of Practice Note SC CA 1.

Signed:
Date: 18 November 2025

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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

FILING DETAILS	
Filed for	New South Wales Crime Commission,Respondent 1

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 (Karout v NSWCC - Respondent's submissions - Final.pdf)

[attach.]

IN THE NEW SOUTH WALES
COURT OF APPEAL

Kaldon Karout v New South Wales Crime Commission

(CA No. 2025/00205659)

Respondent's submissions

A. INTRODUCTION

1. On 27 May 2025, Fagan J made an order pursuant to s 27 of the *Criminal Assets Recovery Act 1990* (NSW) (**CARA**) for the Appellant to pay to the Treasurer the amount of $4,602,659.91 assessed by the Court as the value of the proceeds derived from the illegal activities of the Appellant or another person that took place not more than six years before the making of the Respondent's application on 27 October 2015[1] (the **relevant period** was from 21 November 2012 to 27 October 2015).[2]

2. In his Honour's decision (**PJ**), Fagan J held that the pre-requisite for the making of a proceeds assessment order (**PAO**), that the Appellant had, at any time not more than 6 years before the making of the application for the order, engaged in a serious crime related activity involving an indictable quantity (of prohibited drugs), had been satisfied (s 27(2)(a) CARA).[3] The Appellant takes no issue with this finding (Appellant's submissions (**AS**) [1]).

3. The principal means[4] by which Fagan J undertook the analysis of valuing the PAO was in accordance with s 28(3) of CARA. Fagan J held that:

> Once there is evidence before the Court of an amount of expenditure during the assessment period, the onus is on the [Appellant] to establish that the expenditure, or some part of it, was funded from sources unrelated to illegal activity: *New South Wales Crime Commission v Vu* [2012] NSWSC 129 at [75] (Johnson J), upheld in *Vu v New South Wales Crime Commission* [2013] NSWCCA 282. To the extent that the expenditure is not shown to have been legitimately funded, it is to be treated as proceeds derived from illegal activity.[5]

4. The following three factors were significant to Fagan J's assessment as to whether the Appellant had discharged his onus under 28(3) of CARA:

   (a) In relation to the generosity of his maintenance payments to Bernadette Taylor during

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[1] Red 46, at Primary Judgment (**PJ**) [94].
[2] Red 14; at PJ [6].
[3] Red 17; at PJ [8].
[4] Not including in respect of Ground 1.
[5] Red 17-18; at PJ [9].

the relevant period, the extent of the Appellant's expenditure over 2 years and 11 months being $10.2 million, or roughly $3.4 million per annum.[6]

(b) Not one of the witnesses which the Appellant had called produced any document consistent with the proposition that the impugned funds provided to him were in the nature of a loan (Hannan Elgammal,[7] Joseph Samia,[8] John Barton/Gavra Sin[9]) or the repayment of a loan (Faraj Issa),[10] let alone a loan bearing any commercial terms.

(c) That the Appellant was not called to give evidence. Fagan J found that this absence was unexplained and that the principles in ***Jones v Dunkel*** (1959) 101 CLR 298 were consequently operative.[11]

5. As a result of the finding at [4(c)] above, Fagan J inferred that evidence from the Appellant would not have assisted him with respect to the following issues that the Court was asked to resolve:[12]

(a) ...

(b) Whether payments to Ms Taylor of $719,832 should be included as expenditure;

(c) Whether $1,070,000 received by the Appellant from Ms Elgammal was a loan which should be added to legitimate income;

(d) Whether $17,000 paid by Mr Issa to the Appellant should be added to legitimate income;

(e) Whether $250,000 received by the Appellant from Mr Samia was a loan that should be added to legitimate income;

(f) Whether $123,000 received by the Appellant from Mr Barton and Ms Sin was a loan that should be added to legitimate income and whether sundry other deposits to the Appellant's personal bank accounts should be reclassified.

6. The Appellant takes no issue with Fagan J's approach to drawing inferences in accordance with *Jones v Dunkel*.

7. By his grounds of appeal, the Appellant contends that Fagan J erred in a number of respects, which, if accepted by this Court, would result in a reduction of the Appellant's

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[6] Red 26; at PJ [33]; cf Blue 993 T-V and 994 G-H (Vol 3) which suggests the Appellant's taxable income for the 2013 financial year to be $17,410, for the 2014 financial year to be $413,173, and for the 2015 financial year to be $7,173.
[7] Red 31 (at PJ [45]).
[8] Red 37 (at PJ [64]-[66]).
[9] Red 41-43 (at PJ [78], [83]).
[10] Red 35 (at PJ [58]-[59]).
[11] Red 27-29; PJ [34]-[38].
[12] Red 20; PJ [17].

PAO to $1,883,911.91.[13] This includes an amount of $85,000 corresponding with two bank entries from "Auto Motori Pty" and "Auto Motori Pty 911" ($35,000[14] and $50,000[15]),[16] but in which respect the Appellant adduced no evidence in the case below and has made no submissions on appeal.

8. For the reasons set out below, none of the nine grounds of appeal are made out.

B. PRINCIPLES ON THE STANDARD OF APPELLATE REVIEW

9. The Appellant brings his appeal by right pursuant to ss 75A and 101 of the *Supreme Court Act 1970* (NSW) (**SCA**).[17] As Fagan J's decision was given after a hearing, this appeal is by way of rehearing (s 75A(5)).

10. As outlined at [2] above, the Appellant does not dispute Fagan J's finding under s 27(2)(a) of CARA. The Appellant instead impugns the assessment of the quantum of the order (AS [3]). That assessment is to be carried out pursuant to s 28 of CARA, which relevantly provides for:

    (a) The matters to which the Supreme Court is to have regard for the purpose of making a PAO: s 28(1) CARA;

    (b) The manner in which the Supreme Court is to treat evidence of a defendant's expenditure in the relevant period, which turns on the Court's satisfaction as to whether and to what extent (if any) the expenditure was "funded from income, or money from other sources, unrelated to an illegal activity or activities": s 28(3) CARA.

11. The Respondent accepts that, despite the standard of satisfaction in s 28(3), the general assessment exercise undertaken in accordance with s 28 of the CARA is one which "demands a unique outcome", such that there "can only ever be one correct answer", although reasonable minds may sometimes differ about that answer.[18] Accordingly, the correctness standard applies.[19]

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[13] Red 53, Notice of Appeal, proposed order 3; Red 20, PJ [17]; AS [2].
[14] Blue 57 (Vol 1) (Credit of $35,000 on 17 September 2014).
[15] Blue 48 (Vol 1) (Credit of $50,000 on 7 February 2014).
[16] Red 44; PJ [87]-[88]; Red 57 at 59-60 (affidavit of Michael **Ayache** dated 24 September 2025 at [15]-[16]).
[17] Fagan J's decision was a final judgment involving a matter at issue amounting to or of the value of $100,000 or more (s 101(2)(r)(i) *Supreme Court Act 1970* (NSW)).
[18] ***Moore** v The King* [2024] HCA 30; (2024) 308 A Crim R 592 at 597-598 at [15]-[16] (the Court), citing *R v Bauer* (2018) 266 CLR 56; 271 A Crim R 558 at [61] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); also ***Smith** v **Blanch*** [2025] NSWCA 188 at [70], [76], [83] (the Court); *KMD v CEO (Department of Health NT)* [2025] HCA 4 at [45] (Jagot J).
[19] *Moore* at [14]-[15]; *Warren v Coombes* (1979) 142 CLR 531 at 552 (Gibbs A.C.J, Jacobs and Murphy JJ).

12. In applying that standard, the Court of Appeal "must make all due allowances for the advantages available to the trial judge".[20] These advantages include "the evaluation of witnesses' credibility and of the 'feeling' of a case which an appellate court, reading the transcript, cannot always fully share", and those that "derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole".[21]

13. Further, in discharging its rehearing function under s 75A of the SCA, Fagan J's findings based on credit can only be overturned if this Court is satisfied that the findings are glaringly improbable or contrary to compelling inferences or that the trial judge failed to use, or palpably misused, his or her advantage in hearing the relevant witnesses.[22]

14. In the alternative, as outlined in response to Ground 3 below, the Respondent submits that, in one respect, the applicable standard of review may be that in ***House v The King*** (1936) 55 CLR 499 at 504-505. This discrete issue relates to Fagan J's assessment of the evidence with respect to the Appellant's expenditure on Ms Taylor, with whom he had two children.

C. RESPONSE TO GROUNDS OF APPEAL

Ground 1 – Fagan J erred in concluding (at PJ (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.

15. In the "accepted" facts on which he was sentenced following pleas of guilty to two offences of supplying of prohibited drugs (cocaine and heroin) in a quantity not less than the large commercial quantity applicable to that prohibited drug (s 25(2) of the *Drug Misuse and Trafficking Act 1985* (NSW) (**DMAT Act**)), the Appellant accepted that he possessed these prohibited drugs for the purposes of supply.[23]

16. Consequently, this Court would not accept the assertion from the Appellant that his so called "possessory interest" (AS [8]) in these prohibited drugs was for any other reason, including for any type of "bailment arrangement" (AS [10]) (which would amount to a

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[20] *Smith v Blanch* at [71] (the Court), citing *Moore* at [14].
[21] ***Fox v Percy*** (2003) 214 CLR 118 at 125-126 [23] (Gleeson CJ, Gummow and Kirby JJ) (footnotes omitted).
[22] *Vu v New South Wales Crime Commission* [2013] NSWCCA 282 at [87] (McColl JA, Meagher and Emmett JJA agreeing), citing *Fox v Percy* at [25], [28] - [29] (Gleeson CJ, Gummow and Kirby JJ).
[23] Affidavit of Paul O'Neill sworn 30 July 2020, [14] (Blue 866 at 869 (Vol 2)), annexing accepted facts, [78]-[79] (Blue 872 at 891 (Vol 2)); see definition of "supply" in s 3 of the DMAT Act which includes "keeping or having in possession for supply".

traversal of the Appellant's pleas of guilty: *R v Carey* (1990) 20 NSWLR 292 at 297B per Hunt J (with whom Wood and Finlay JJ agreed)). In any event, no subtraction for expenses incurred by the Appellant in relation to his illegal activities (for example if he did obtain these prohibited drugs "on tick" and owed some other party money for them (AS [7])) is permitted for the purposes of the making of the PAO: s 28(4) of CARA.

17. In assessing the value of the proceeds derived from these illegal activities of the Appellant or another person, Fagan J took into account the definition of "proceeds" in s 4 of CARA, which, "in relation to an activity, includes any interest in property, and any service, advantage or benefit (including, without limitation, an increase in the value of an interest in property), that is derived or realised, directly or indirectly, as a result of the activity ..." (emphasis added).[24] In accordance with s 28(1)(c) of CARA, Fagan J then "had regard to" the evidence from Detective Inspector O'Neill as to the lowest range of the value of the prohibited drugs involved in the illegal activity or activities.[25] This was consistent with the Respondent's reliance on s 28(1)(c), in addition to s 28(3), at trial (cf AS [9]).[26]

18. There was no error in this approach.

Ground 2 - In calculating, as part of the Appellant's expenditure, the maintenance payments to Ms Taylor, Fagan J erred (at PJ [26]) in taking into account the evidence given by the Appellant during his compulsory examination held in accordance with s 12(1) of CARA, even though such statements were not admissible for their truth.

19. Contrary to the Appellant's contentions (AS [13]-[25]), his utterances during his examination held pursuant to s 12(1)(b)(i) of CARA before the Registrar on 4 February 2020 are not hearsay.[27] This is because they do not comprise a "previous representation" as that phrase is defined in the Dictionary to the *Evidence Act 1995* (NSW) (**Evidence Act**), meaning "a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced". The Appellant's utterances were made in the course of giving evidence in this proceeding.[28]

20. As the Appellant's utterances on his examination transcript are not "previous representation[s]", they do not engage the hearsay rule in s 59(1) of the Evidence Act (cf AS [13]). See, consistently, *New South Wales Crime Commission v Vu* (2012) 221 A

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[24] Red 21; PJ [20].
[25] Red 21-22; PJ [18] and [21].
[26] Black 2, G-L; 152, E; 155-156, Q-Z, B-R; 157, G.
[27] Affidavit of Ryan Bull affirmed 31 July 2020, [32] (Blue 893 at 904 (Vol 3)) and Tab 17 (Blue 983-1034 (Vol 3)).
[28] See Blue 983H (Vol 3) on which the proceedings number "2015/00316308" is identified on the first page of the Appellant's examination transcript; See consistently Red 13J.

Crim R 445 at [6] per Johnson J; *Vu v New South Wales Crime Commission* [2013] NSWCA 282 at [17] per McColl JA (with whom Meagher and Emmett JJA agreed). The Appellant's analogy with examinations under s 19 of the *Australian Securities and Investments Commission Act* 2001 (Cth), which occur as part of that regulator's investigations and information-gathering processes prior to the commencement of proceedings, is inapposite (cf AS [20]).[29]

21. As the Appellant correctly recognises, the effect of s 54(5) of CARA is to permit the admission of the examination transcript as evidence of an examinee's answers to the questions put to him or her without having to call the court reporter or play the audio recording of the examination (AS [17]). This is consistent with the Second Reading Speech to the *Drug Trafficking (Civil Proceedings) Amendment Act 1997* (NSW), which relevantly records the following:[30]

> Amongst these more minor changes are amendments of an evidentiary nature including provisions which will enable the following: ... the admission into evidence in other proceedings under the Act of transcripts of an examination made under section 12 of the Act ...

22. Fagan J's conclusion that the answers given by the Appellant in relation to the value of the living expenses he provided for Ms Taylor during the relevant period "constitute admissions against his interest and are evidence of the truth of the matters he asserted"[31] was correct.

23. In addition to being correct, it is submitted that Fagan J's reasons for decision were sufficiently articulated during the lengthy oral exchange his Honour had with counsel for the Appellant in relation to this application (Black 83S-93L). This is consistent with the approach taken by Payne JA (Sweeney and Huggett JJ agreeing) in *TC v R* [2025] NSWCCA 170 at [115]:

> The trial judge was asked for separate reasons about an *Edwards* lie and no separate reasons were ultimately provided. I have concluded that the trial judge's reasons for leaving the *Edwards* lie to the jury were sufficiently articulated in the course of argument. In any event, the decision of the trial judge was plainly correct, and no miscarriage of justice has occurred.

24. The Appellant has not demonstrated that Fagan J erred in admitting the transcript of his examination as the truth of the matters asserted therein.

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[29] Section 19 applies where ASIC on reasonable grounds "suspects or believes that a person can give information relevant to a matter that it is investigating, or is to investigate, under Division 1": s 19(1).
[30] Hansard, Legislative Council, 27 June 1997, p 11271 (The Hon J.W. Shaw).
[31] Red 24; PJ [26].

Ground 3 – Fagan J erred in assessing the Appellant's expenditure during the relevant period by finding (at PJ [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.

25. In his examination on 4 February 2020, the Appellant stated that he provided Ms Taylor "[w]hatever she needed" for the support of their children.[32] He then volunteered that he paid her "approximately 23 and a half thousand a month",[33] prior to and during his incarceration, until "probably 2017".[34] The following exchange then occurred:[35]

> Q. Thank you. And was that the same amount, approximately $23,000 per month?
>
> A. Thereabouts, yes.
>
> Q. Approximate?
>
> A. Approximate, yes.

26. The Appellant then confirmed, for a third time, the approximate amount of these monthly payments, being $23,000.[36]

27. Counsel for the Appellant accepted below that the Appellant's statements with respect to the $23,000 monthly payments comprised admissions against interest.[37]

28. If the correctness standard is applicable, Ground 3 is not made out. The Appellant's admissions under examination constitute evidence of the amount of his expenditure during the relevant period. Under s 28(3) of CARA, the Court "is to treat any such amount as proceeds derived by the defendant from an illegal activity or activities". Fagan J fulfilled this statutory task, including with the assistance of the *Jones v Dunkel* inference his Honour drew.

29. Fagan J also refers to payments made to Ms Taylor in the first four months of FY2016 as supportive of the "essential admission" made under cross-examination: Red 26; PJ [32]. The Appellant submits that "[n]o conclusion" about the appellant's generosity can be deduced from these transfers: AS [30]. This submission should not be accepted.

30. Mr Bull accounts for $181,905 paid to Ms Taylor from 14 September 2015 to 2 October

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[32] Blue 1030T (Vol 3).
[33] Blue 1031F (Vol 3).
[34] Blue 1031F and 1031I (Vol 3).
[35] Blue 1031J-L.
[36] Blue 1031X-1032D (Vol 3).
[37] Black 85, E-L; 92, J-M.

2015.[38] As Fagan J notes, the "bulk" of these payments ($119,400) were transferred to Ms Taylor from a personal bank account in the Appellant's name.[39] The Appellant submits that the timing of these transfers (after his incarceration) "gives rise to an inference that they were carried out by Ms Taylor herself" (AS [30]). While there is evidence that Ms Karout had access to the Appellant's personal accounts,[40] there is no evidence that Ms Taylor did.

31. The remaining $62,505 consisted of a half share of two transfers made from a joint account held by Ms Taylor and the Appellant.[41] There is no error in the primary judge's reliance on these transfers as evidence that supported the "essential admission".[42] The very existence of the joint account demonstrates the Appellant's support of Ms Taylor, who swore an affidavit under the name of "Bernadette Jane Karout" in 2019 stating that she was "solely reliant" on the Appellant for her and the children's support from 2004 until September 2015 (the month of his arrest and incarceration).[43]

32. The Appellant notes at AS [31] that Fagan J made no reference to Ms Taylor's evidence (which was prepared in separate proceedings and could not be tested, due to Ms Taylor's death in December 2021).[44] While this may be so, Ms Taylor's evidence does not undermine the Appellant's "essential admission".

33. Ms Taylor's statement that the Appellant "generally gave me $1000 cash at a time whenever I ran out of money"[45] must be read in the context of her broader statement that she was solely reliant on the Appellant for her and her children's support for over a decade, and gave up employment in 2004 at the Appellant's request.[46] The "company car, with a fuel card" [47] provided to her by the Appellant was a Porsche.[48] While not relied on by Fagan J, this evidence is consistent with his Honour's conclusion that "[t]here is every reason to treat ... the defendant's essential admission as reliable".[49]

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[38] Blue 905 (Vol 3) (being the sum of $12,500 + $1,500 + $117,900 + $50,005).
[39] PJ [32], Red 26; Blue 905H-J (Vol 3); Blue 205 (Vol 1) (Withdrawal Mobile $1500 and Withdrawal Bank Cheque $117,900).
[40] Blue 1031, P-X ("She has all the – well, she's got more access than I do to the bank accounts, my bank accounts, company accounts and all, so").
[41] PJ[32], Red 26; Blue 905D-G and K-N (Vol 3); Blue 7M and P (Vol 1).
[42] PJ[32], Red 26.
[43] Blue 1336D (Vol 3); Blue 886G, 889U (Vol 2).
[44] Blue 1330 (Vol 3). This affidavit was tendered below, limited to paragraphs [37]-[57]: Black 140Q-R. Ms Nariman Karout (**Nariman**) gave evidence of the death of Ms Taylor: Affidavit of Nariman sworn 10 March 2025, [10], Blue 1167 (Vol 3).
[45] Blue 1336I.
[46] Blue 1336D-H (Vol 3).
[47] Blue 1030X.
[48] Blue 1336W (Affidavit of Bernadette Jane Karout sworn 14 June 2019).
[49] PJ [32].

34. Nor is Ms Taylor's affidavit inconsistent with Ms Karout's evidence. The transfers made by Ms Karout to Ms Taylor (generally in monthly $3,500 instalments) began in December 2016, after the relevant period (and after the Appellant's large and sophisticated drug repackaging and supply enterprise was brought to a halt by his arrest).[50] Further, Ms Karout conceded that she would not have known if the Appellant provided Ms Taylor with cash.[51] While the Appellant stated that "some" or "a lot" of payments to Ms Taylor were "account transactions",[52] he also stated he "[a]lways operate[d] in cash" and "always had cash in [his] pocket".[53]

35. In summary, none of the complaints raised by the Appellant in relation to Ground 3 detract from his essential admission as to paying Ms Taylor $23,000 per month, which comprised evidence given at the hearing of an application for a PAO of the amount of his expenditure during the relevant period (s 28(3) CARA).

36. In the alternative, the Respondent submits that Ground 3 is not made out if the applicable standard of appellate review is on the basis of *House v The King*.

37. While the Appellant seems to contend on appeal that no allowance should be made for the maintenance payments he made to Ms Taylor during the relevant period,[54] in the proceedings before Fagan J, the Appellant conceded that "the Court would only make a small allowance for sums likely to have been paid to [her]".[55] Contrary to its claim below, Fagan J also found the Respondent's forensic accountant, Ryan Bull, to have overstated the expenditure ascribed as maintenance payments to Ms Taylor for the 2016 financial year.[56]

38. These matters are capable of supporting the proposition that, in relation to the calculation of the maintenance payments made to Ms Taylor during the relevant period, Fagan J "is allowed some latitude" and that the legal criterion he applied (ie under s 28(3) of CARA) "tolerates a range of outcomes".[57] On this basis, in the alternative, the Respondent submits that the standard of appellate review for Ground 3 (only) may be on the basis of *House v The King*. Whether or not Fagan J's judicial exercise may more aptly involve "an

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[50] Nariman Affidavit, [12]-[17], Blue 1167-1168 (Vol 3) and Annexure D, Blue 1200 (Vol 3); Black 119, J-Q; Black 120, O-V; Affidavit of Paul O'Neill sworn 30 July 2020, [14], Blue 869 (Vol 2) and Annexure "A", *R v Karout* Agreed facts at [2], [57], [74], Blue 872, 886, 889 (Vol 2).
[51] Black 118, J-L.
[52] Blue 1031H, U.
[53] Blue 1032I-J.
[54] AS [32]; Ayache affidavit [11] (Red 59I).
[55] Black 235S-V.
[56] Red 29; PJ [39].
[57] *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at [47], [49] per Gageler J.

evaluative as opposed to a truly discretionary decision" does not alter this conclusion: *Bassett v Bassett* [2021] NSWCA 320 at [71] per Bell P, Leeming and Payne JJA .

39. The Appellant has not identified an error in Fagan J's reasoning that falls within the ambit of *House v The King*. Rather, the Appellant submits that the "weight" of this evidence is affected by "errors in the appellant's recollection", which were in fact properly considered by the primary judge,[58] and do not raise a complaint of error of the kind described in that case: *TH v R* [2025] NSWCCA 121 at [72] per Yehia J (with whom Bell CJ and Garling J agreed on this point).

40. On either standard of review, no error is established by this ground.

Ground 4 – Fagan J erred in failing to be satisfied that [four specific] 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.

41. The Court would be conscious of three considerations in relation to this ground of appeal:

    (a) In accordance with s 28(3) of CARA, the Appellant bore the onus of satisfying the Court that his impugned expenditure was funded from income, or money from other sources, unrelated to an illegal activity or activities;

    (b) Fagan J found that the monies advanced to the Appellant by the relevant witnesses were not in the nature of loans (or in relation to Mr Issa a repayment of an informal credit arrangement);[59] and

    (c) None of the relevant witnesses called by the Appellant (Ms Elgammal, Mr Samia and Mr Barton) addressed in their short affidavits the underlying source and/or legality of the money purportedly loaned to the Appellant.[60]

42. The nature of the case upon which the Respondent relied to support the value of the PAO sought (which was greater than that in fact ordered by Fagan J)[61] was that the Appellant had not met his onus under s 28(3) of CARA. Specifically, the Appellant had not satisfied the Court that, in relation to the evidence adduced by the Respondent as to the amount of his expenditure, it was funded from income, or money from other sources, unrelated to an illegal activity or activities. In particular, it was submitted that the evidence of each of Ms Elgammal, and Messrs Issa, Barton and Samia, was not sufficiently credible or reliable to

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[58] AS [28]-[29]; the Appellant has not addressed r 51.36(2) of the *Uniform Civil Procedure Rules 2005* (NSW).
[59] Elgammal (Red 32; PJ [47]), Samia (Red 37; PJ [66]), Barton/Sin (Red 42; PJ [83]).
[60] Elgammal: Blue 1246 (Vol 3); Samia: Blue 1118-1119 (Vol 3); Barton: Blue 1079-1080 (Vol 3).
[61] Red 45-46 (PJ [91]-[94]).

enable the Court to feel "actual persuasion" of the occurrence of their respective asserted facts.[62]

43. The Appellant makes no complaint that this central aspect of the Respondent's case was not squarely put (cf AS [41]). In accordance with the shifting onus under s 28(3) of CARA, there was no need for the Respondent to allege, or indeed for the Court to find, that the witnesses had engaged in any criminal conduct, and the Respondent made no such imputation (cf AS [35]-[36]; ***Henderson v Queensland*** (2014) 255 CLR 1 at [28] (Bell J)).

44. Returning to the three considerations referred to at [41] above, Fagan J rejected the evidence of the impugned witnesses as to the nature of their respective transactions with the Appellant. His Honour also found, with the assistance of a *Jones v Dunkel* inference,[63] and because not one of the Appellant's witnesses could produce a single record in support of their assertions of an existing credit arrangement,[64] that the Appellant had not met his onus under s 28(3).[65]

45. As Keane J observed in *Henderson v Queensland* at [170],[66] "[t]he rejection of the only account of the provenance of the jewellery in the hands of Mr Henderson's father meant that there was, at best for Mr Henderson, no evidence as to how the jewellery had been acquired; and so Mr Henderson did not begin to meet the burden of proving that the jewellery did not bear the character of illegally acquired property". See similarly French CJ at [15] and Bell J at [28], with whom Kiefel J agreed at [21] (cf AS [53]-[54]).

46. Fagan J's finding as to the Appellant not meeting his legal onus under s 28(3) is also consistent with the following observations of Hammerschlag J in ***Neale v Bank of Western Australia*** [2014] NSWSC 315 at [198]:

> Where a party seeks to rely upon spoken words as a foundation for a cause of action the conversation must be proved to the reasonable satisfaction of the Court. This means that the Court must feel an actual persuasion of its occurrence or its existence. In the absence of some reliable contemporaneous record or other satisfactory corroboration, a party may face serious difficulties of proof.

47. No error is established by this ground.

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[62] Closing Submissions – Principles: Black 215-216 ([6]-[8]); Elgammal: Black 221 ([23]); Issa: Black 222 ([29]); Barton: Black 223 ([33]-[34]); Samia: Black 224 ([35]-[37]); Oral submissions: Black 160R-162G, 162V.
[63] Nariman: Red 29 (PJ [38]); Elgammal: Red 33 (PJ [49]); Issa: Red 35-36 (PJ [59]); Samia Red 37-38 (PJ [67]); Barton: Red 43 (PJ [86]).
[64] Black 161B-L.
[65] Elgammal: Red 32 (PJ [48]); Samia: Red 37-38 (PJ [67]); Barton: Red 43 (PJ [86]).
[66] Footnote omitted.

Ground 5 – Fagan J erred (at PJ [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.

48. In relation to the issues of onus and the rule in *Browne v Dunn*, the submissions made above in relation to Ground 4 are repeated.

49. Of all the witnesses called by the Appellant, Ms Elgammal was the most unimpressive. Having raised concerns about the "bona fides of these loans" at the hearing,[67] in the judgment, Fagan J described Ms Elgammal's evidence as to the transfer of $1,070,000 in the form of a loan to the Appellant as "fatuous and unacceptable".[68] The Respondent's submissions below contain a detailed analysis of the multiple unreliable features of Ms Elgammal's evidence. This led to the submission made by the Respondent to Fagan J that "it was entirely implausible for Ms Elgammal to have loaned $1,070,000 to anybody, less so that she even had access to such an amount of money".[69]

50. To establish this platform, multiple questions were asked of Ms Elgammal in cross-examination, including whether she was in the business of being a property developer with the Appellant,[70] whether one million dollars was a lot to her in 2014/2015,[71] whether such a sum would have paid off her mortgage at the time[72] and whether she considered herself to be financially well off over the preceding ten years.[73] Ms Elgammal was also probed as to whether the $1,070,000 sale proceeds was her money: "It's your money, isn't it?", to which she answered "Yes, it's my money".[74]

51. On two occasions during oral submissions,[75] counsel for the Appellant was asked by Fagan J what the Court could make of the evidence relating to the source of the funds by which the property at 127 Bassett Street Hurstville NSW (**Bassett Street Property**) had been purchased. The response from the Appellant's counsel to the second of these exchanges is set out below:[76]

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[67] Black 159D-E.
[68] Red 32; PJ [47].
[69] Black 221, Commission's closing submissions at [23].
[70] Black 38S.
[71] Black 40T-W.
[72] Black 40U.
[73] Black 43U.
[74] Black 42W; see also Black 51T-52J.
[75] Black 170Q-171X.
[76] Black 171T-X.

> My submission is that even if your Honour is not satisfied about the loan arrangement, and when I say, "satisfied", satisfied to the requisite standard again, that does not prove positively that there was an arrangement related to an illegal activity or activities. Rather, there's an absence of evidence.

52. It is submitted that this response is an example of the Appellant not appreciating his onus in relation to satisfying the Court that his expenditure was funded from income, or money from other sources, unrelated to an illegal activity or activities (see the references to *Henderson v Queensland* at [43]-[45] above). If this is the highest the Appellant's case rose in relation to meeting his onus under s 28(3) of CARA, then Fagan J was bound to find against him.

53. The question how the Bassett Street Property had been paid for, which Fagan J remarked "hasn't been developed in the evidence",[77] led his Honour to conclude that the Appellant had not made out his onus in relation to the transaction with Ms Elgammal.[78]

54. While not essential to the question of onus, Fagan J's finding at PJ [48]-[49] (Red 32) as to the Appellant, and not Ms Elgammal, being in all probability the beneficial owner of the Bassett Street Property was consistent with two rebuttable legal presumptions, those being: (a) that beneficial ownership is commensurate with legal title (which Fagan J found to have been rebutted); and (b) as to the existence of a resulting trust, that a person who acquires legal title with funds provided by another person otherwise than by loan or gift holds the property on trust for the provider of the funds.[79]

55. The Appellant's submission (at AS [42]) that this finding denied him procedural fairness, in the context of an appeal by way of rehearing, with a power to make fresh findings of fact,[80] raises two questions. First, whether the purported error occurred, and second, whether it was material.[81] Both are questions on which the Appellant bears the onus of proof.[82] In relation to materiality, if the complaint concerning an absence of procedural fairness can be rectified on the appeal, then it is unlikely to be material. Another way of putting this is that if this Court accepts there had been a denial of procedural fairness, it would only set aside the judgment and remit the proceedings if it were unable to resolve

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[77] Black 170W.
[78] Red 32-33; PJ [47]-[50].
[79] *Henley v Bone* [2019] NSWSC 254 at [27] per Emmett AJA.
[80] On which see *Murdoch v Mudgee Dolomite & Lime Pty Ltd (in liq)* [2022] NSWCA 12 at [128] (Leeming JA, Macfarlan and Gleeson JJA agreeing).
[81] ***LPDT** v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at 327 [9] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).
[82] *LPDT* at [10] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

the substance of the complaint.[83]

56. While it is not conceded that Fagan J denied the Appellant procedural fairness (see [49], [51] above), nor that the beneficial owner finding was material (see [54] above), the Appellant has not identified any basis upon which it could be said that this particular finding prejudiced him (cf AS [42]). This is unsurprising given the flimsy basis upon which the nature of the transaction was asserted by Ms Elgammal in her 5 paragraph affidavit dated 7 April 2025,[84] which was served late (in breach of multiple Court orders) 8 days out from trial,[85] and which she did not appear in a meaningful way to have been familiar with.[86]

57. In any event, Ms Elgammal's affidavit does not address the source of funds used to purchase the Bassett Street Property, and there was no application for the Appellant to adduce further evidence in response to the case advanced by the Respondent that it was inconceivable that she was the owner of the $1,070,000 purportedly lent to him.

58. No error, or in the alternative material error, is established by this ground.

Ground 6 - In rejecting the evidence of the witnesses Elgammal (at PJ [45]-[47]), Issa (at PJ [58]), Samia (at PJ [66]) and Barton (at PJ [83]), Fagan J 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.

59. In rejecting the evidence of Ms Elgammal and Messrs Issa, Samia and Barton, Fagan J relied on the following factors:

(a) Ms Elgammal:

(i) The paucity of her affidavit evidence;[87]

(ii) Her modest financial position and that of her husband, and the value of the purported loan at $1,070,000;[88]

(iii) That the solicitor acting on both sides of the transaction took no steps to record the purported loan coming into existence;[89]

(iv) The "incoherence" and "implausibility" of her evidence as to the transaction being

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[83] *Sydney Trains v Batshon* [2021] NSWCA 143 at [35]-[37] per Leeming JA (with whom White and McCallum JJA agreed).
[84] Red 30-31 (PJ [42]-[43]); Black 1245.
[85] See Respondent's opening submissions: Black 186G-Q.
[86] See Respondent's closing submissions below at [19]-[21]; Black 220.
[87] Red 32; PJ [43].
[88] Red 31; PJ [44]-[45].
[89] Red 31; PJ [45].

in the nature of a loan.[90]

(b) Mr Issa:

(i) Ms Karout's affidavit and oral evidence which did not support Mr Issa's evidence that she had allowed his company to use the Appellant's trade accounts with building suppliers;[91]

(ii) The banking records annexed to his affidavit which did not show any payments made by cheque to the Appellant;[92]

(iii) Contrary to his evidence about repaying the Appellant through cheques, that the entry for the impugned $17,000 payment to the Appellant records this deposit as a cash transaction;[93]

(iv) His lack of recall about any practice of retaining invoices or other documentation to record payments made to the Appellant for the use of his trade accounts, which would have comprised "substantial [tax] deductible expenses";[94]

(v) His failure to produce any invoices for at least some of the hundreds of transactions that he claimed took place between his company and the Appellant (3 per week for up to 2 years);[95]

(vi) Because no attempt was made to contact the external administrators of Mr Issa's company to obtain records documenting the building materials supply arrangement with the Appellant which Mr Issa claimed existed.[96]

(c) Mr Samia:

(i) His "superficial" affidavit saying nothing about interest, security or documentation in relation to the purported loans,[97] and the absence of any plausible explanation from him about these deficiencies;[98]

(ii) At the time of transferring $50,000 to the Appellant from Ezra Pty Ltd, no agreement was in existence for the payment of interest and no arrangement for the payment of interest had been sought since that time (ie since June 2015);[99]

(iii) He could not explain in what character the $50,000 had been withdrawn from Ezra Pty Ltd's funds.[100]

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[90] Red 3; PJ [46]-[47].
[91] Red 33-34; PJ [53].
[92] Red 34; PJ [56].
[93] Red 34; PJ [56].
[94] Red 35; PJ [57]-[58].
[95] Red 35; PJ [58].
[96] Red 35; PJ [59].
[97] Red 36; PJ [61]; Red 37; PJ [66].
[98] Red 37; PJ [66].
[99] Red 36; PJ [62].
[100] Red 36; PJ [62].

(iv) No written record was made in relation to the loan to the Appellant for $200,000 paid by Styletech Pty Ltd. Mr Samia had no recollection about the repayment date for this loan and he could not recall what, if anything, the Appellant said about its purpose. Further, interest was not discussed when Mr Samia agreed to lend this money to the Appellant in June 2015, and he has not requested for interest to be paid since that date. Nor has Mr Samia taken any steps to recover the money.[101]

(d) Mr Barton:

(i) His affidavit saying nothing as to how soon the Appellant required the advance of $130,000, when the loan would be repaid, whether interest would be paid or security given, or the purpose for which the loan was required;[102]

(ii) The "contradiction and uncertainty" in his answers during cross-examination as to the purpose for which the Appellant requested the asserted loan;[103]

(iii) Despite the absence of such an assertion in this affidavit, his answer during cross-examination that the term of the loan could have been up to five years;[104]

(iv) At the time the purported loan was advanced, Mr Barton not asking the Appellant for interest to be paid or for security, and that he has not done so during in the proceeding 11 years that the loan has been outstanding. Nor has Mr Barton calculated the amount of interest that may have accrued on the purported loan;[105]

(v) Having refused loans to other associates for $50,000, that he agreed to lend $130,000 to the Appellant on loose terms[106] where he was in "no [financial] position to do so";[107]

(vi) His self-contradictory evidence that monies were loaned to the Appellant in instalments because the terms of his bank account did not permit the withdrawal of more than $10,000 per day, when he had made 3 payments each of $9,500 to the Appellant all on one day (7 April 2010);[108]

(vii) His evidence being inherently improbable, affected by internal inconsistencies and generally unconvincing.[109]

60. The above analysis shows that, in the case of each of the impugned witnesses, Fagan J relied on a number of considerations to reject their contentions that they had loaned money

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[101] Red 37; PJ [64]-[65].
[102] Red 41; PJ [78].
[103] Red 41-42; PJ [79].
[104] Red 42; PJ [81].
[105] Red 42; PJ [82].
[106] Red 42; PJ [83].
[107] Red 42-43; PJ [80], [83], [85].
[108] Red 43; PJ [84].
[109] Red 43; PJ [86].

to the Appellant (Ms Elgammal, Messrs Samia and Barton), or in the case of Mr Issa was repaying a loan (cf AS [43]). A relevant strand in this analysis was the fact that, in purportedly advancing significant sums of money to the Appellant, none of Ms Elgammal, Mr Samia or Mr Barton had taken any steps to protect their own commercial interests (cf AS [44]).[110]

61. In *Effem Foods Pty Ltd v Lake Cumberline Pty Ltd* (1999) 161 ALR 599 at [15]-[16], the plurality (Gleeson CJ, Gaudron, Kirby and Hayne JJ) endorsed the approach taken by Tamberlain J in the proceedings below when assessing the credit of witnesses in relation to the prospect of sham transactions. Tamberlain J had said that "having regard to the seven to eight year period that has elapsed between the events and conversations raised in evidence and the hearing of the evidence before me, the only safe course is to place primary emphasis on the objective factual surrounding material and the inherent commercial probabilities, together with the documentation tendered in evidence" (emphasis added). The plurality described this approach (at [16]) as "orthodox and sensible".[111]

62. Fagan J adopted the same orthodox and sensible approach. His Honour also (permissibly) took into account that the Appellant, who was the counter-party to these transactions, had not given evidence to corroborate the assertions from these witnesses as to their nature.[112] By this approach, Fagan J: (a) was able to discount friendship as capable of explaining the absence of any factor consistent with the commercial probabilities that should have been inherent in these transactions; and (b) did not employ his own esoteric understanding of what was commercially probable or take judicial notice of such matters (cf AS [44], [49]).

63. As to the contended ethnicity differences between Fagan J, the Appellant and his witnesses, aside from the Appellant's statement in his examination transcript that he had migrated from Lebanon to Australia when he was 10 years old (which was not drawn to his Honour's attention),[113] no evidence was adduced as to the ethnicity of any of these persons, less so how, if it were accepted, such a factor could rationally affect (directly or indirectly) the assessment of any matter concerning the impugned transactions (cf AS [47]).

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[110] Elgammal: Red 32; PJ [48], Samia: Red 37; PJ [66], Barton: Red 4; PJ [83].
[111] Similarly, in *NHB Enterprises Pty Ltd v Corry (No 5)* [2020] NSWSC 1838 at [427]-[428], Ward CJ in Eq observed "Evidence is typically shown to be glaringly improbable where it is contradicted by 'uncontroverted facts' (such as uncontested oral testimony, or uncontested contemporaneous documents), or by compelling inferences of the case (such as may be drawn from the 'inherent commercial probabilities', or 'objective commercial probabilities' of the facts). … One tool for assessing the improbability of evidence in a civil context is to consider the 'inherent commercial probabilities' of the circumstances".
[112] Elgammal: Red 33; PJ [49], Issa: Red 35-36; PJ [59], Samia: Red 37-38; PJ [67], Barton: Red 43; PJ [86].
[113] Blue 986M-O (Vol 3).

64. There is no error demonstrated by this ground.

Ground 7 – Fagan J mistook the onus, which rested upon the Appellant in accordance with s 28(3) CARA, as clarified in *Vu v New South Wales Crime Commission* [2013] NSWCA 282, as the basis for rejecting the case for the Appellant.

65. At AS [52], it is contended that Fagan J imposed too great burden on the Appellant by requiring him to prove, on the balance of probabilities, the purpose of the various transfers.

66. While the Appellant may have pointed to evidence capable of indicating the source of the funds the subject of the impugned transactions, that did not mean that the Appellant had discharged his burden under s 28(3) of CARA (see [52] above; cf AS [54]).

67. The Appellant's reliance on Gageler J's sole dissenting judgment in *Henderson v Queensland* is misplaced. Unlike the Appellant in this case (who was the counter party to the transactions), in that case, Mr Henderson gave evidence.[114] At [94], Gageler J noted that "[t]here is no suggestion that Mr Henderson failed to call any other witness who might have provided another account". Each of the individual Justice's decisions in *Henderson v Queensland* stand against the Appellant's proposition that before Fagan J he "had discharged the burden of proof" (cf AS [54]).[115]

68. The submissions made above in relation to onus under Ground 4 are repeated. No error is established by this ground.

Ground 8 – Fagan J 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) CARA only adversely to his case.

69. Notwithstanding the credit findings made in the judgment (see [59] above), in submitting that Fagan J "ought to have accepted the evidence of [his] witnesses", the Appellant has not pointed to anything "glaringly improbable" about Fagan J's findings, nor has he submitted that any of the findings were contrary to compelling inferences (cf AS [55]).

70. The reference at [46] above to Hammerschlag J's statement of principle in *Neale v Bank of Western Australia* concerning the credit of witnesses relied on to discharge a legal onus to prove (or defend) a cause of action in the absence of contemporaneous records or satisfactory corroboration is repeated. As are the submissions made above in response to Grounds 3 and 6.

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[114] *Henderson v Queensland* at [147] (Keane J).
[115] *Henderson v Queensland* at [15] (French CJ); [20]-[21] (Kiefel J); [33] (Bell J); [91]-[92], [94] (Gageler J); [169]-[171] (Keane J).

71. In the proceedings below, the Appellant did not draw any specific aspect of his answers before the Registrar as contained in the examination transcript to the attention of Fagan J as being corroborative of the evidence given by his witnesses. Conversely, the Respondent made a number of submissions below as to why the Appellant's evidence from his examination does not assist with the discharge of his onus in the proceeding. Those being:

    (a) The Appellant was asked whether he had received money by way of loans from people in the period from 2012 to 2015. The Appellant confirmed he had received loans from friends. The only friends he could name, other than "a lot of people that I am not thinking about at the moment", were Joe Harp and John Barton.[116]

    (b) When informed that the examiner wished to ask questions about transactions relating to his bank accounts, the Appellant said "[p]lease give me a list of them, and I will get you all the details". He then agreed that there was documentation available to support these transactions, but that it just unavailable at the time of the examination (owing to his incarceration).[117]

    (c) When asked about payments made by Mr Issa, the Appellant provided no information about any arrangement whereby Mr Issa had been given permission to use the Appellant's trade accounts.[118]

    (d) The Appellant could not provide any explanation for the reason he received in the order of $130,000 from Mr Barton.[119]

    (e) Similarly, the Appellant could not provide any explanation for the reason he received a combined amount of $250,000 from Ezra 1 Pty Ltd and Styletech Pty Ltd. He also could not give any information as to who he understood to be related to Styletech Pty Ltd.[120] In relation to Ezra 1 Pty Ltd, the Appellant said he believed (incorrectly) that this company was linked to Joe Harp.[121]

    (f) The Appellant could not offer any information as to who he believed may be linked to Auto Motori Pty Ltd.[122]

72. No error is established by this ground.

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[116] Blue 1005M-Q (Vol 3).
[117] Blue 1007X-1008F (Vol 3).
[118] Blue 1016X-1017R (Vol 3).
[119] Blue 1014V-1016O; 1018L-U (Vol 3).
[120] Blue 1019X-1020M; 1021Q-U (Vol 3).
[121] Blue 1020S-1021U (Vol 3).
[122] Blue 1014E-I; 1019H-J (Vol 3).

Ground 9 – Fagan J erred in failing to give adequate reasons for doing so

73. The function of an appellate Court called upon to review the adequacy of reasons is to determine not the optimal level of detail required in reasons for a decision but, rather, the minimum acceptable standard (which is not one of perfection).[123]

74. The Appellant has failed to demonstrate that Fagan J's reasons for rejecting the evidence from Ms Elgammal[124] and Messrs Issa[125], Samia[126] and Barton[127] were inadequately exposed. The submissions made above in relation to Grounds 6 and 8 are repeated.

75. Nor has the Appellant demonstrated any inadequacy of reasons with respect to Fagan J's careful consideration of the Appellant's and Ms Karout's evidence, as outlined in the submissions on Ground 3 above. Ms Karout's assertion, uncorroborated by any contemporaneous record, that the Appellant's admissions as to paying Ms Taylor $23,500 per month were "incorrect", is incapable of detracting from the fact that these admissions comprised "evidence … given at the hearing … of the amount of the [Appellant's] expenditure during the period of 6 years before the making of the application for the order…".[128] In the absence of the Appellant discharging his onus under s 28(3), Fagan J was obliged to treat "such amount as proceeds derived by the defendant from an illegal activity or activities".

76. In relation to Ms Taylor's affidavit (which could not be tested), there is no inconsistency between the matters therein deposed and the generosity towards her which the Appellant admitted to during his examination (see [32]-[34] above).

77. No error is demonstrated by this ground.

6 November 2025

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[123] *Broken Hill Cobalt Project Pty Ltd v Lord* [2022] NSWCA 271 at [106] (Ward P, Mitchelmore and Kirk JJA agreeing at [173] and [174]).
[124] Red 29-33; PJ [40]-[50].
[125] Red 33-36; PJ [51]-[60].
[126] Red 36-38; PJ [61]-[67].
[127] Red 38-43; PJ [68]-[86].
[128] Nariman, [21], Blue 1168 (Vol 3); CARA, s 28(3).