

SUPREME COURT OF QUEENSLAND

CITATION: *Flying Fighters Pty Ltd v Official Trustee in Bankruptcy* [2019] QSC 120

PARTIES: **FLYING FIGHTERS PTY LTD (ACN 067 895 005) (RECEIVERS AND MANAGERS APPOINTED) AS TRUSTEE FOR THE FLYING FIGHTERS DISCRETIONARY TRUST**
(Applicant)
v
OFFICIAL TRUSTEE IN BANKRUPTCY
(First Respondent)

AND

COMMONWEALTH OF AUSTRALIA
(Second Respondent)

AND

NIGEL MARKEY
(Third Respondent)

AND

ANN FORDYCE
(Fourth Respondent)

BS No 4275 of 2018

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 10 May 2019

DELIVERED AT: Brisbane

HEARING DATE: 15 June 2018; Further submissions received 9 July 2018 and 13 August 2018

JUDGE: Brown J

ORDER: **The order of the Court is that:**

- 1. The appointment of the third and fourth respondents as receivers pursuant to the Merrell charge was invalid**

pursuant to s 418A of the *Corporations Act 2001* (Cth).

2. I will hear the parties as to costs and as to any further relief, particularly given Flying Fighters only raised the argument upon which it was successful on the day of hearing.
3. Such submissions should be made within 14 days of the Order made.

CATCHWORDS:

PROPERTY – CHARGE – MERGER AND EXTINGUISHMENT – whether merger of interests as result of forfeiture of aircraft and charge to Commonwealth under the *Proceeds of Crime Act 2002* (Cth)

ESTOPPEL – ESTOPPEL BY JUDGMENT – ISSUE ESTOPPEL – GENERAL PRINCIPLES – whether issue estoppel arising out of earlier proceedings

ESTOPPEL – ESTOPPEL BY JUDGMENT – ANSHUN ESTOPPEL – GENERALLY – whether *Anshun* estoppel arising out of earlier proceedings

MORTGAGE-DEBENTURE – RECEIVERS – APPOINTMENT – where the third and fourth respondents were appointed as receivers at the instigation of the Official Trustee in Bankruptcy in respect of aircraft under a charge over the aircraft which had alongside the legal estate in the aircraft been forfeited to the Commonwealth under the *Proceeds of Crime Act 2002* (Cth) – whether appointment of receivers valid

LIMITATION OF ACTIONS – LIMITATION OF PARTICULAR ACTIONS – MORTGAGES AND CHARGES – whether appointment of receivers under the charge statute-barred

Corporations Act 2001 (Cth), s 418A

Limitation of Actions Act 1974 (Qld), s 26(1)

Proceeds of Crime Act 2002 (Cth) s 92, s 96, s 99, s 100, s 102, s 104, s 141, s 338

Property Law Act 1974 (Qld), s 17

AD v Commissioner of the Australian Federal Police (2018) 97 NSWLR 588, cited

Australia & New Zealand Banking Group Ltd v Douglas Morris Investments Pty Ltd [1992] 1 Qd R 478, followed

Australian Energy Ltd v Lennard Oil NL (No 2) [1988] 2 Qd R 230, cited

Batistatos v Roads and Traffic Authority of New South Wales (2006) 226 CLR 256, cited

Bofinger v Kingsway Group Ltd (2009) 239 CLR 269, considered

CDPP v Hart & Ors; Yak 3 Investments P/L as t/tee for Yak 3 Discretionary Trust & Ors v Commonwealth of Australia [2013] QDC 60, considered
Commissioner of Australian Federal Police v Hart; Commonwealth of Australia v Yak 3 Investments Pty Ltd; Commonwealth of Australia v Flying Fighters Pty Ltd (2018) 262 CLR 76, considered
Commissioner of Australian Federal Police v Hart; Flying Fighters Pty Ltd v Commonwealth; Commonwealth v YAK 3 Investments Pty Ltd (2016) 336 ALR 492, considered
Commissioner of the Australian Federal Police v Hart & Ors; Flying Fighters Pty Ltd v Commonwealth of Australia & Anor; Commonwealth of Australia v Yak 3 Investments Pty Ltd & Ors [2016] QCA 284, considered
Commonwealth of Australia v Lee [2008] NSWSC 1014, cited
DPP v Le (2007) 232 CLR 562, followed
In re The Australian Deposit and Mortgage Bank Limited [1907] 1 VLR 348, distinguished
Minister for Lands and Forests & Anor v McPherson & Anor (1991) 22 NSWLR 687, cited.
PNJ v R (2009) 252 ALR 612, cited
Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589, applied
Ramsay v Pilgram (1968) 118 CLR 271, followed
Sandhurst Trustees Ltd v 72 Seventh Street Nominees Pty Ltd (In Liq) (1998) 45 NSWLR 556, considered
Sardon Pty Ltd v Registrar of Titles [2004] WASC 56, cited
Tomlinson v Ramsey Food Processing Pty Ltd (2015) 256 CLR 507, followed

COUNSEL: KN Wilson QC with J O'Connor for the applicant
 PD Hay for the respondents

SOLICITORS: James Conomos Lawyers for the applicant
 HopgoodGanim for the respondents

- [1] Flying Fighters Pty Ltd¹ seeks to challenge the appointment of receivers by the Official Trustee in Bankruptcy exercising powers under a charge which was forfeited to the Commonwealth. This application follows what has already been prolonged and hard fought litigation. To understand the application it is necessary to provide some background.

Background

¹ Throughout this judgment, the applicant will be referred to as 'Flying Fighters' in relation to the period both before and after the appointment of the receivers.

- [2] Flying Fighters owned two aircraft, Aerovod L-39C with registration VH-SIC and Akrotech CAP 232 with registration VH-SHI. Merrell Associates Ltd ('Merrell') held a charge over the aircraft.
- [3] Mr Steven Hart was charged with a number of offences under the *Crimes Act 1914* (Cth) and *Criminal Code Act 1995* (Cth) as a result of operating a systematic tax fraud. In 2003, the Commonwealth Director of Public Prosecutions ("CDPP") obtained orders under the *Proceeds of Crime Act 2002* (Cth) ("the POCA") restraining a number of assets owned or leased by Mr Hart or the companies believed to be under the effective control of Mr Hart pursuant to s 17 of the POCA. The charge in favour of Merrell was also the subject of the Restraining Order.
- [4] In May 2005, Mr Hart was convicted of nine counts of defrauding the Commonwealth.
- [5] On 18 April 2006, the property which was the subject of the Restraining Order was automatically forfeited to the Commonwealth pursuant to s 92 of the POCA. The property forfeited included the aircraft and the Merrell charge to which they were subject. Under s 96 of the POCA, the forfeited property "vests absolutely in the Commonwealth". Notwithstanding that, provision is made under s 104 of the POCA for a party to make an application for a declaration of the nature, value and extent of their interest and the transfer of that interest or its monetary equivalent under s 102 of the POCA, if the party can satisfy the Court of the statutory preconditions.
- [6] On 17 October 2006, an application was made seeking orders under s 102 of the POCA by five companies (referred to as the Hart companies), including Flying Fighters, in respect of various property forfeited to the Commonwealth including the aircraft. Some of the property claimed by the other Hart companies was also the subject of Merrell charges.² In particular, one of the Hart companies, Nemesis Australia Ltd, owned real property at Merriwa St which was forfeited to the Commonwealth. Merriwa St was subject to a charge held by Merrell and a mortgage held by Countrywide Co-Operative Housing Ltd. It was sold by the Official Trustee on 8 January 2007.
- [7] On 30 November 2010, a pecuniary penalty order was made against Mr Hart in the total sum of \$14,757,287.
- [8] The Commonwealth made an application that pursuant to s 141 of the POCA, the property sought under s 102 of the POCA should be made available to satisfy a pecuniary penalty order made against Mr Hart on 19 November 2010. That application was determined at the same time as the application for orders under s 102 by the Hart Companies.
- [9] The s 102 and s 141 of the POCA proceedings were protracted and lengthy. On 2 April 2013, judgment was delivered at first instance by Andrews SC DCJ³ determining the application in respect of various properties under s 102 of the POCA and dismissing the claim by the CDPP pursuant to s 141 of the POCA. Final orders were made after further argument on 6 May 2013.

² It is uncontroversial that the charges held by Merrell in respect of the forfeited property were substantively in the same terms.

³ *CDPP v Hart & Ors; Yak 3 Investments P/L as t/tee for Yak 3 Discretionary Trust & Ors v Commonwealth of Australia* [2013] QDC 60.

Those orders provided, *inter alia*, that subject to payment of money owing under the charge in the sum of \$1.6 million the aircraft be transferred to Flying Fighters. That decision was appealed.

- [10] On 29 August 2016, the Court of Appeal gave reasons allowing the appeal in part.
- [11] On 8 November 2016, Flying Fighters obtained orders from the Queensland Court of Appeal declaring that it had legal ownership of the aircraft subject to the charge in favour of Merrell immediately prior to the forfeiture of those aircraft to the Commonwealth of Australia. Order 10 of the orders made by the Court of Appeal further directed the Commonwealth to transfer its interest in the aircraft to Flying Fighters and to deliver possession of the aircraft with their respective log books, ownership and operational documents.⁴ Those orders were not subsequently appealed, although other orders and findings of the Court of Appeal were the subject of appeal to the High Court.⁵ In particular, orders made in respect of Merriwa St were the subject of the further appeal. The CDPP appealed to the High Court and on 7 February 2018, the High Court gave judgment. The appeal did not include the orders made by the Court of Appeal in respect of the transfer of the aircraft to Flying Fighters.
- [12] On 27 February 2018, the third and fourth respondents as receivers were appointed in respect of the aircraft at the instigation of the Official Trustee in Bankruptcy as a delegate of the Commonwealth of Australia, pursuant to the Merrell charge forfeited to the Commonwealth.
- [13] On the day that the aircraft were due to be delivered to Flying Fighters, the Official Trustee of Bankruptcy, as delegate of the Commonwealth, wrote to the solicitors for Flying Fighters informing them that receivers had been appointed pursuant to the Merrell charge and that compliance with Order 10 would be effected by delivering the aircraft to the receivers. Flying Fighters' solicitors responded that the Commonwealth did not receive any secured interest in the aircraft pursuant to which it could appoint receivers and that the Commonwealth had never asserted in any of the proceedings before the District Court, Court of Appeal or High Court that they had become the chargor or had a right to enforce the Merrell charge.
- [14] The question for this Court is whether the appointment of the receivers in respect of the aircraft is valid.
- [15] Flying Fighters contends that the Commonwealth did not have the right to appoint the receivers and that their appointment is invalid and seeks relief under s 418A of the *Corporations Act 2001* (Cth). The application is opposed by the respondents ("the Commonwealth parties"). In that regard, the application raises a number of issues for determination by this Court:

⁴ *Commissioner of Australian Federal Police v Hart; Flying Fighters Pty Ltd v Commonwealth; Commonwealth v YAK 3 Investments Pty Ltd* (2016) 336 ALR 492; on appeal from the decision of Andrews SC DCJ in *CDPP v Hart & Ors; Yak 3 Investments P/L as t/tee for Yak 3 Discretionary Trust & Ors v Commonwealth of Australia* [2013] QDC 60.

⁵ *Commissioner of Australian Federal Police v Hart; Commonwealth of Australia v Yak 3 Investments Pty Ltd; Commonwealth of Australia v Flying Fighters Pty Ltd* (2018) 262 CLR 76.

- (a) First, whether upon forfeiture of the aircraft to the Commonwealth pursuant to s 96 of the POCA, the charge ceased to operate because there had been forfeiture to the Commonwealth of both the asset and the charge, as a result of which the charge was extinguished;⁶
- (b) If the charge was not extinguished, whether Flying Fighters can rely on issue estoppel or *Anshun* estoppel to estop the Commonwealth from enforcing the charge and appointing receivers and invalidate the appointment of the receivers;
- (c) If Flying Fighters can rely on estoppel, whether there is an issue estoppel arising from the POCA proceedings which estops the Commonwealth from exercising any of the powers of the chargee under the Merrell charge;
- (d) If there is no issue estoppel, whether there is an *Anshun* estoppel estopping the Commonwealth from now asserting that it is entitled to exercise powers under the charge by way of appointment of the receivers against the two aircraft;
- (e) Whether even if there is an estoppel, the Court can consider whether there are special circumstances which militate against the Commonwealth being estopped and exercise its discretion on the basis of those special circumstances to find the Commonwealth is not estopped in the present case; and
- (f) Whether as a result of s 26(1) of the *Limitation of Actions Act 1974* (Qld), under which an action cannot be brought to recover a principal sum secured by a mortgage or charge after the expiration of 12 years from the date on which the right to receive the money accrued, which in the present case was 24 April 2002,⁷ any powers under the charge including the power to appoint receivers are time barred.

[16] Before considering each individual issue, it is necessary to set out some of the relevant legislative provisions and the relevant findings of the District Court, Court of Appeal and High Court.

Proceeds of Crime Act 2002 (Cth)

⁶ The contention by Flying Fighters that there was a merger as a result of the forfeiture of the charge and assets to the Commonwealth on 18 April 2006, pursuant to s 92 of the POCA, was not a matter that was originally articulated in its written submissions. As a result, the Commonwealth parties sought additional time to provide submissions in relation to that point. The Court granted such time and further submissions were received, such that final submissions in relation to this matter were not received until 13 August 2018. Flying Fighters in its supplementary outline of submissions indicated that the second, third and fourth grounds in paragraphs 76 to 80 of its primary written submissions were not pressed and only the first ground in paragraphs 69 to 75 of its primary written submissions contending that the appointment of the receivers was statute barred was pressed. As a result, the second, third and fourth grounds are not the subject of further consideration by this Court.

⁷ In the judgment of Andrews SC DCJ, Hart is said to have been declared bankrupt on 22 April 2002: see [2013] QDC 60 at 213. The Applicant's Outline of Submissions, with reference to the Affidavit of Conomos filed 1 May 2018, Exhibit JNC-2, state Hart was declared bankrupt on 24 April 2002. It is unnecessary for me to resolve which date is correct.

- [17] Pursuant to s 92 of the POCA, if a person is convicted of a serious offence and the relevant property is covered by a Restraining Order against the person that relates to the offence, that property is forfeited to the Commonwealth at the end of the period prescribed in s 92(3).
- [18] Section 96 of the POCA provides that:
- “Property forfeited under section 92 vests absolutely in the Commonwealth at the time of the forfeiture.”
- [19] There is no contention that the exceptions in ss 97 or 98 of the POCA apply in relation to the aircraft.

[20] Under s 99(1), it is provided that:

“The Commonwealth, and persons acting on its behalf, can dispose of, or otherwise deal with, property forfeited under section 92 in relation to a person’s conviction of a *serious offence if and only if:

- (a) the period applying under subsection (3) has come to an end; and
- (b) the conviction has not been *quashed by that time.”

[21] The period in the present case had come to an end by the time of the s 102 proceedings.

[22] Section 100 of the POCA provides that the Commonwealth can deal with the forfeited property as provided in s 99. The Official Trustee must on the Commonwealth’s behalf dispose of the forfeited property and apply it in the manner prescribed.

[23] The argument in the present case relates to a determination under s 102 of the POCA. Section 102 provides as follows:

“102 Court may make orders relating to transfer of forfeited property etc.

If property is forfeited to the Commonwealth under section 92, the court that made the restraining order referred to in paragraph 92(1)(b) must, if:

- (a) a person who claims an *interest in the property applies under section 104 for an order under this section; and
- (b) the court is satisfied that:
 - (i) the applicant had an interest in the property before the forfeiture of the property; and
 - (ii) the applicant’s interest in the property is neither *proceeds of unlawful activity nor an *instrument of unlawful activity; and
 - (iii) the applicant’s interest in the property was lawfully acquired;
 make an order:
 - (c) declaring the nature, extent and value of the applicant’s interest in the property; and
 - (d) either:
 - (i) if the interest is still vested in the Commonwealth—directing the Commonwealth to transfer the interest to the applicant; or
 - (ii) directing the Commonwealth to pay to the applicant an amount equal to the value declared under paragraph (c).”

[24] An application for orders under s 102 is made pursuant to s 104 of the POCA and must be made before the end of a period of six months commencing on the day on which the property to which the application relates is forfeited to the Commonwealth.

[25] Section 141(1) of the POCA relevantly provides that:

“(1) If:

- (a) a person is subject to a *pecuniary penalty order; and
- (b) the *responsible authority applies to the court for an order under this section; and
- (c) the court is satisfied that particular property is subject to the *effective control of the person;

the court may make an order declaring that the whole, or a specified part, of that property is available to satisfy the pecuniary penalty order.”

[26] Section 338 of the POCA defines various terms used in the Act. Relevantly, “interest” and “property” are defined as follows:

“**Interest**, in relation to property or a thing, means:

- (a) a legal or equitable estate or interest in the property or thing; or
- (b) a right, power or privilege in connection with the property or thing;

whether present or future and whether vested or contingent.

...

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

[27] As is evident from the definitions of “property” and “interest” in s 338, the statutory meaning of property is broad. Under a predecessor to the present Act where similarly broad definitions of “property” and “interest” were used, Kirby and Crennan JJ in *DPP v Le*⁸ said of the definition at [81]:

“Far from distinguishing “property” as signifying only a thing or an object (eg, Blackacre) from “property” as signifying a “legal relationship with a thing” (eg, a joint tenancy), the definitions in s 3(1) indicate that the statutory meaning of property comprehends “property” in both manifestations.” (footnotes omitted)

[28] Section 418A of the *Corporations Act 2001* (Cth) provides:

“(1) Where there is doubt, on a specific ground, about:

- (a) whether a purported appointment of a person, after 23 June 1993, as receiver of property of a corporation is valid; or
- (b) whether a person who has entered into possession, or assumed control, of property of a corporation after 23 June 1993 did so validly under the terms of a security interest in that property;

⁸ (2007) 232 CLR 562.

the person, the corporation or any of the corporation's creditors may apply to the Court for an order under subsection (2).

- (2) On an application, the Court may make an order declaring whether or not:
- (a) the purported appointment was valid; or
 - (b) the person entered into possession, or assumed control, validly under the terms of the security interest;

as the case may be, on the ground specified in the application or on some other ground.”

Judicial decisions in relation to s 102 of the POCA

[29] The application for a determination under s 102 and s 141 of the POCA was heard in the District Court. The applicants included Flying Fighters. The five applicants were referred to as the “Hart companies”. The Merrell charges⁹ were raised by the Commonwealth in its defence to the relief sought where the property in which the interest was sought was subject to a Merrell charge. The Commonwealth asserted that the Hart companies failed to establish the nature, extent and value of their interest in the property outlined in the schedule which included the aircraft, because the Hart companies had not accounted for the value of the charges. The Merrell charges were otherwise not in issue in the pleadings.

[30] While the Commonwealth appeared to confine their submissions to the effect of the Merrell charges on the value of the interest where the relevant property was subject to the Merrell charges, Andrews SC DCJ in his reasons¹⁰ considered the Merrell charges in a broader context. His Honour referred to the fact that the consequences of the forfeited charges received no analysis in submissions for either side, and that the Hart companies conceded in argument that the charges had been forfeited to the Commonwealth and would be available to be enforced by the Commonwealth subsequent to the transfer of property.¹¹ While his Honour noted that the Commonwealth had pleaded that the property of Flying Fighters “is” subject to a charge to Merrell, he considered that to be in error, because Merrell had forfeited its chargee rights in April 2006.¹² His Honour did not interpret the Commonwealth’s pleading as asserting that the Commonwealth had a chargee’s rights over the assets nor an entitlement to the debt owed to Merrell.¹³

[31] However, his Honour considered an alternative position in case he had misunderstood the Commonwealth’s position and the Commonwealth had intended to submit that it had, by

⁹ It is uncontentious that the separate Merrell charge in respect of each of the companies was in substantively the same terms.

¹⁰ *CDPP v Hart & Ors; Yak 3 Investments P/L as t/tee for Yak 3 Discretionary Trust & Ors v Commonwealth of Australia* [2013] QDC 60.

¹¹ At [437].

¹² At [441].

¹³ At [443] and [447].

forfeiture of Merrell's charges, received Merrell's choses in action for the recovery of advances Merrell made to the companies. His Honour did not consider that the Commonwealth would have the benefit of Merrell's choses in action as a result of the forfeiture of the Merrell charges. In particular, his Honour said that:¹⁴

"Merrell's rights as creditor and its rights as chargee are separate rights. Merrell's loss of a charge over an aircraft owned by a company does not result in the loss of Merrell's right to sue the company for payment of debts due.

... The forfeiture of the mortgage debenture containing the charging agreement did not invest the Commonwealth with Merrell's rights against Fighters for payment of money. The forfeiture of the charge deprived Merrell of its chargee's rights over Fighter's aircraft and parts. Merrell lost its security, not its rights as a creditor."

- [32] His Honour did find that the charge was relevant to the assessment of the value of Flying Fighters' interest.¹⁵ His Honour concluded that the two aircraft, L-39C and CAP 232, were not substantially derived from tainted funds or from unlawful activities, thus entitling Flying Fighters to have its interest transferred back to it. His Honour determined that the value of Flying Fighters' interest in the aircraft at the time of forfeiture was diminished by the value of Merrell's charge securing payment of \$1.6 million.
- [33] His Honour therefore concluded that it was within the power of the Court to make orders under s 102(1) of the POCA to allow, *inter alia*, the Hart companies, or any of them, to pay to the Commonwealth \$1.6 million and that if the companies, or any of them, made such payment to the Commonwealth it was within the power of the Court to make declarations and orders for transfer.¹⁶ The formal orders were made after further argument during which the Court was informed that the Commonwealth had no intention of selling the aircraft, amongst other property, in light of his Honour's orders in contending that it should be released from its undertaking not to sell the property claimed by the applicants.¹⁷
- [34] Flying Fighters submits that the Commonwealth was obliged at the time when relief was argued to raise the possibility of its appointing receivers under the forfeited charge as it otherwise rendered the order to transfer the interest in the aircraft to Flying Fighters futile. The Commonwealth parties state that was not necessary, given that Andrews SC DCJ had ordered that the transfer of the aircraft was conditional on the payment of \$1.6 million, which was the amount owing under the Merrell charges.
- [35] His Honour dismissed the Commonwealth's application under s 141 of the POCA.

Court of Appeal decision

¹⁴ At [444].

¹⁵ At [448].

¹⁶ At [854].

¹⁷ T1-23.

[36] Both the Commonwealth and the Hart companies, including Flying Fighters, appealed the decision at first instance. Ground 2A and 2B of Flying Fighters' Further Amended Notice of Appeal¹⁸ provided that:

“2A The primary judge erred in finding that the value of the appellants' interest in the assets the subject of the application was diminished by reason of the charges in favour of Merrell.

2B The primary judge ought to have found that by reason of the forfeiture of the charges to the Commonwealth, such charges ceased to have effect.”

[37] The majority judgment was given by P Lyons J, with whom Douglas J concurred.¹⁹ Morrison JA gave a dissenting judgment. Morrison JA did not consider the position of the charges post-forfeiture on the basis that the exercise required under s 102 of the POCA only required a consideration of the value of the applicant's interest pre-forfeiture.²⁰ P Lyons J upheld the finding of the learned primary Judge that the interest of Flying Fighters in the aircraft L-39C and CAP 232 was not derived from unlawful activity.²¹ P Lyons J stated that the proceedings before the Judge at first instance were conducted on “the basis that the assets forfeited on 18 April 2006 were (no doubt until forfeiture) subject to charges to Merrell; and that each charge provided security for the total amount of the debt owed to Merrell”.²²

[38] A number of the findings made at first instance were not challenged upon appeal. P Lyons J stated at [1232] that:

“The Merrell charges were also forfeited to the Commonwealth on 18 April 2006. The learned primary Judge concluded that Merrell's rights as creditor and its rights as chargee were separate rights; and that its loss of a charge over an asset owned by one of the Hart companies did not result in the loss of its right to sue the company for payment of the debt secured by that charge. His Honour also concluded, in respect of the mortgage debenture granted by Fighters to Merrell, that its forfeiture did not invest the Commonwealth with Merrell's rights against Fighters for the payment of money. His Honour also concluded that he did not accept that the Commonwealth “has received Merrell's right to sue for the amount owed by the (Hart) ‘companies’ to Merrell”. Again, these findings are not in issue in the appeals.” (footnotes omitted)

[39] P Lyons J stated that since the property had been forfeited to the Commonwealth, s 102 of the POCA must require a declaration of the applicant's interest immediately prior to forfeiture. His

¹⁸ Further Amended Notice of Appeal, CA3908/13.

¹⁹ *Commissioner of Australian Federal Police v Hart; Flying Fighters Pty Ltd v Commonwealth; Commonwealth v YAK 3 Investments Pty Ltd* (2016) 336 ALR 492.

²⁰ *Commissioner of Australian Federal Police v Hart; Flying Fighters Pty Ltd v Commonwealth; Commonwealth v YAK 3 Investments Pty Ltd* (2016) 336 ALR 492 at [236]-[237].

²¹ At [1056] and [1093].

²² At [1231].

Honour stated in that regard that he could not clearly identify the purpose the learned primary Judge had in mind when dealing with the sum of \$1.6 million.²³ His Honour stated that while each asset was the subject of a charge, he considered that did not affect the nature of the interest of the Hart companies in any relevant asset on the basis that, until the secured creditor exercises the rights under a charge, the rights of the owner of the asset are generally not affected.²⁴

[40] His Honour concluded that:²⁵

“...since Merrell no longer held the charges, and the Commonwealth did not have any assignment of the debts which would entitle it to enforce them, the charges had no practical effect. It would follow that the determination of the nature and extent of the interest of the Hart companies as being diminished by \$1.6 million dollars was erroneous; and so were orders made to give effect to such a determination.” (emphasis added)

[41] His Honour also found that the effect of the learned Judge’s order was to treat the Commonwealth as the beneficial owner of that sum of money, which was inconsistent with the findings of Andrews SC DCJ at first instance that the Commonwealth did not have an entitlement to the benefit of the debt.²⁶

[42] In the present application, Flying Fighters relies on the reference by his Honour to the charges being of “no practical effect” as supporting the fact his Honour considered the equitable interest created by the charge had merged with the legal title of the aircraft upon forfeiture of the aircraft and the charge. The Commonwealth parties contend that the reference recognises that the charge continues to have legal effect and had not merged upon forfeiture. In my view, neither matter appears to have been considered. There is no evidence the question of merger was raised or considered. His Honour did not appear to consider that Merrell held an interest under the charge prior to forfeiture which diminished the legal rights of Flying Fighters, nor that the Commonwealth had an assignment of the debt of Merrell to enforce them. His Honour therefore did not need to consider the ongoing existence of the charge once forfeited to the Commonwealth.

Terms of order made by Court of Appeal

[43] Following further submissions the Court of Appeal ordered that:

- “1. The appeal be allowed.
2. Paragraphs 1, 2, 3 and 4 of the orders of the District Court made on 6 May 2003 be set aside.

²³ At [1241].

²⁴ At [1242]-[1243].

²⁵ At [1243]. The Commonwealth submits that his Honour’s conclusion in this regard is wrong as a matter of law.

²⁶ At [1244].

...

4. Declare that Flying Fighters Pty Ltd as trustee for Flying Fighters Discretionary Trust had legal ownership of the following aircraft and motor vehicle, subject to a charge in favour of Merrell Associates Ltd, immediately prior to their forfeiture to the Commonwealth on 18 April 2006:
 - a. North American Aviation T-28 Trojan with registration VH-SHT;
 - b. Hawker Sidley Aviation Sea Fury FB11 with registration VH-SHF;
 - c. Aerovod L-39C with registration VH-SIC;
 - d. Akrotech CAP232 with registration VH-SHI;
 - e. North American Aviation T-28 Trojan with registration VH-AVC;
 - f. Mercedes Benz 380SL with registration AEROS1.

...

10. Direct the Commonwealth within 21 days:
 - a. to transfer its interest in the aircraft and motor vehicle in paragraph 4 of this order to Flying Fighters Pty Ltd as trustee for Flying Fighters Discretionary Trust;
 - b. to deliver possession of the above aircraft and motor vehicle with their respective log books, ownership and operational documents to Flying Fighters Pty Ltd.²⁷

High Court

[44] The Commonwealth subsequently successfully appealed to the High Court.²⁸ The majority agreed with the reasons of Gordon J who delivered the primary judgment. Although the Amended Notice of Appeal sought to appeal the whole of the judgment and set aside Orders 1 and 4 to 18,²⁹ ultimately, for reasons unexplained, it did not appeal the orders in relation to the aircraft in paragraphs 4(c), 4(d) and 10, which apply to the aircraft, the subject of this application.³⁰

[45] The Commonwealth did, however, appeal the decision of the Court of Appeal in relation to a number of assets, including other aircraft such as the Hawker Sidley Aviation Sea Fury FB 11,³¹

²⁷ *Commissioner of the Australian Federal Police v Hart & Ors; Flying Fighters Pty Ltd v Commonwealth of Australia & Anor; Commonwealth of Australia v Yak 3 Investments Pty Ltd & Ors* [2016] QCA 284.

²⁸ *Commissioner of Australian Federal Police v Hart; Commonwealth of Australia v Yak 3 Investments Pty Ltd; Commonwealth of Australia v Flying Fighters Pty Ltd* (2018) 262 CLR 76.

²⁹ Affidavit of Conomos CFI 2 JNC-1, p 393.

³⁰ Affidavit of Conomos CFI 2 JNC-1, p 393; (2018) 262 CLR 76 at [46].

³¹ In relation to which the Court of Appeal had also made orders in paragraph 4 b and 10 of its orders referred to above. In that regard, the Commonwealth was successful in contending that the preconditions for those

in relation to which Flying Fighters was seeking the return of its interests, and the Merriwa St property which was subject to one of the Merrell charges.³²

- [46] Merriwa St was sold by the Official Trustee on 8 January 2007 with the consent of Nemesis³³ and after a mortgage to Countrywide Co-Operative Housing Society Ltd had been paid out. There is no suggestion that it was sold subject to the Merrell charge being discharged. The net proceeds of \$40,252.07 had been banked by the Official Trustee and remained in the bank at the time of the s 102 of the POCA proceedings. The Commonwealth's primary contention in the High Court, that Nemesis had failed to establish that there was no relevant connection between the derivation of property and the unlawful activity relied upon, was unsuccessful. It appears that the Commonwealth did not seek to allege that the Countrywide Co-Operative Housing Ltd mortgage was serviced with tainted funds.³⁴
- [47] The Commonwealth, however, also contended that the majority of the Court of Appeal erred in declaring the value of Nemesis' interest immediately prior to forfeiture to be \$34,000 on the basis that it had ignored the effect of the Merrell charge on the value of that interest.
- [48] Gordon J found that the "declarations were not correct because they failed to address the value of the Merrell charge and therefore properly address the value of Nemesis' interest immediately prior to forfeiture", as was required under the POCA.³⁵ Her Honour determined that the charges should be set aside and that orders should be made which addressed the nature, extent and value of the Merrell charge.
- [49] Her Honour stated that one issue before the High Court was how a Court is to address the nature, extent and value of an applicant's interest in property where the property is subject to a security and where both the property and security interest have automatically been forfeited to the Commonwealth.³⁶ The question of merger was not considered.
- [50] Gordon J stated that if property the subject of an application for orders under s 102 of the POCA is subject to a security interest, the nature, extent and value of the security interest must be considered in determining the nature, value and extent of an applicant's interest in property.³⁷
- [51] Gordon J referred to the fact that the Merrell charge was a fixed charge over certain assets and a floating charge over all other assets. Relevantly, all of the assets in issue before the High

aircraft had not been satisfied. The question of the effect of the Merrell charges was not therefore considered in relation to the aircraft.

³² (2018) 262 CLR 76 at [46].

³³ One of the Hart companies.

³⁴ [2013] QDC 60 at [432] and [790]. Nor did it appear to register the mortgage interest in its favour after forfeiture.

³⁵ At [250].

³⁶ At [253]

³⁷ At [265].

Court were subject to a fixed charge.³⁸ Given the nature of a fixed charge, her Honour found that the subject property was appropriated immediately to the chargee upon the chargor acquiring an interest and that the charge is thereupon fixed.³⁹ Under the terms of each charge all monies owing under the charge became immediately payable and the security enforceable when the company's assets, interests or property were confiscated or forfeited.

[52] Her Honour stated that from the time of execution of each of the Merrell charges, Merrell at least had an equitable interest in part of the assets of the chargor, which relevantly included all of the assets the subject of the proceedings or the proceeds of those assets, which were in issue before the High Court. On forfeiture Merrell had an equitable interest in all of the assets of the chargor.⁴⁰

[53] Her Honour concluded that:

“[270] Accordingly, the nature, extent and value of the relevant Company's interest in any asset were to be determined subject to the relevant Merrell Charge, a first ranking fixed charge over that asset securing repayment of \$1.6 million. That liability had to be satisfied before the asset was entitled to be transferred to the relevant Company. And there were other complications. The obligation to pay \$1.6 million was secured by each of the Merrell Charges and the Merrell Charges were forfeited to the Commonwealth. Therefore, the declarations and orders made had to take account of (1) the existence of the directly applicable Merrell Charge as well as the interrelationship between the liability for the indebtedness under all of the Merrell Charges and (2) the fact that each of the Merrell Charges vested in the Commonwealth on forfeiture, either absolutely or subject to any registration requirements.

[271] Consistent with the wording of s 102(1), the order that the Court of Appeal might have made was in the following terms:

- (1) Declare that [X] has legal ownership of the [named asset], subject to the rights of the mortgagee under the [named] mortgage;
- (2) Direct that upon satisfaction of the amount of \$[Y] secured by that mortgage, if any part of the proceeds of sale of the [named asset] have not been applied to meet that liability, the balance of proceeds then remaining, if any, together with interest on that balance, is payable to [X].” (references omitted)

[54] The appeal by the Commonwealth seeking an order in relation to s 141 of the POCA was dismissed.

³⁸ At [266]

³⁹ At [267]

⁴⁰ At [269].

- [55] The High Court set aside Orders 4(a),(b),(e) and (f) of the Court of Appeal, but not Orders 4(c) and (d) or Order 10, which dealt with aircraft L-39C and CAP 232 and were not the subject of the appeal.⁴¹

Was the charge extinguished upon forfeiture to the Commonwealth?

Contentions

- [56] In the present proceedings, Flying Fighters contends that upon forfeiture of the aircraft and the charge to the Commonwealth pursuant to s 96 of the POCA there was a merger of interests and the charge was extinguished, given that the Commonwealth became the legal owner of the aircraft as well the beneficiary of the charge. Flying Fighters contends that as the Commonwealth held the greater estate (the legal estate in the two aircraft) and the lesser estate (an equitable interest in the two aircraft), those interests merged at the time of forfeiture and the Merrell charge ceased to exist.
- [57] Both the aircraft and the Merrell charge were the subject of a Restraining Order under the POCA. The Merrell charge was restrained because of the relationship between Merrell and Mr Hart. Merrell did not pursue any application to exclude its charges from the restraining order or for orders pursuant to s 102 of the POCA.⁴² Flying Fighters submits that Merrell was not an innocent third party.
- [58] Flying Fighters contends that the reasons of the majority of the Court of Appeal and Gordon J are consistent with the charge having been extinguished on forfeiture. In that regard, Flying Fighters refers to the reference of P Lyons J to the charge being of “no practical effect”⁴³ and to the reference of Gordon J to the fact that “there were other complications”,⁴⁴ which it states should be construed as a reference to the fact there was a merger upon forfeiture.
- [59] In any event, Flying Fighters contends that the charge ceased to operate upon forfeiture of both the aircraft and the charge as the interests under the two merged. If the charge was extinguished, it contends that there was no power to appoint a receiver under the charge.
- [60] As to whether there was a merger of interests upon forfeiture, Flying Fighters relies upon *Bofinger v Kingsway Group Ltd*,⁴⁵ in which the plurality stated the principle as follows:

⁴¹ At [293].

⁴² *Commissioner of Australian Federal Police v Hart; Commonwealth of Australia v Yak 3 Investments Pty Ltd; Commonwealth of Australia v Flying Fighters Pty Ltd* (2018) 262 CLR 76 at [255]. Merrell had been incorporated in Hong Kong and is said to have been wound up and dissolved in or about 2010.

⁴³ *Commissioner of Australian Federal Police v Hart; Flying Fighters Pty Ltd v Commonwealth; Commonwealth v YAK 3 Investments Pty Ltd* (2016) 336 ALR 492 at [1243].

⁴⁴ *Commissioner of Australian Federal Police v Hart; Commonwealth of Australia v Yak 3 Investments Pty Ltd; Commonwealth of Australia v Flying Fighters Pty Ltd* (2018) 262 CLR 76 at [270].

⁴⁵ (2009) 239 CLR 269 at 77.

“The rule of the common law is that whenever a greater and a lesser estate meet in the same person, without any intermediate estate, the lesser is sunk or drowned in the greater. Accordingly, at common law, where a person entitled to land acquires a security over it, a merger is conclusively presumed; the security merges and disappears in the greater estate. However, equity gives effect to an intention of the parties that there be no merger. But to that acceptance of intention as controlling the outcome there is an exception. This is identified as the rule in *Otter v Lord Vaux*. A mortgagor who has paid off an encumbrance thereafter cannot set it up in priority to a puisne mortgage which the mortgagor has granted. Why is this so? The answer, which has the support of Viscount Haldane LC and Megarry J, is as follows: ‘a second mortgage, as between the parties, is a grant of the mortgagor’s entire interest in the property, saving only the rights of the prior incumbrancer, and the mortgagor cannot derogate from his grant by holding the first mortgage against the second mortgagee.’ The rule in *Otter v Lord Vaux* has been applied to securities over personal property. But as indicated above, there was no question in the present case of any merger by operation of law, with a contrary intention to which equity would not give effect.” (references omitted)

- [61] Flying Fighters contends that the question of whether the interests of the applicant and Merrell in the two aircraft merged upon the forfeiture of the aircraft and the charge is answered by the proper construction of the POCA. In particular, it places reliance on s 96 of the POCA, which provides that property vests absolutely in the Commonwealth when it is forfeited under s 92. Given that the Act does not expressly deal with the question of merger, Flying Fighters submits that the Act should follow the law. It submits that as a consequence, the appointment of the receivers pursuant to that charge was beyond power and invalid.
- [62] The Commonwealth parties submit that no merger was effected and place reliance on s 17 of the *Property Law Act 1974 (Qld)* which provides that “[a]n estate does not merge by operation of law only if the beneficial interest in the estate would not be merged or extinguished in equity”,⁴⁶ as well as the operation of equity. The Commonwealth parties contend that as there is no statement of the parties’ intentions or conduct from which such intention could be inferred or implied,⁴⁷ equity requires that the Court must apply the most advantageous position to the Commonwealth as the party acquiring both estates. According to the Commonwealth parties, the position that is the most advantageous to the Commonwealth would be to keep the estates alive so that any requirement to divest one or the other, for example, pursuant to an order under s 102, preserves the other for the benefit of the

⁴⁶ No issue was raised by the parties as to the application of the doctrine of merger to property other than real property. Given equitable and legal interests are created in property, there appears to be no reason in principle why it would not apply.

⁴⁷ The Merrell charge itself reveals an intention on the part of Flying Fighters and Merrell against merger: clause 2(j) and clause 32. Although reference to contractual terms is relevant to ascertaining intention in equity, it is not relevant here since the Commonwealth acquired its interest by the POCA, not under the document. That is not relevant for the purposes of determining the present matter in determining the Commonwealth’s intention in acquiring the interest under the charge, nor does the Commonwealth make such a contention. The terms of s 92 and s 96 clearly override clause 32.

Commonwealth. The Commonwealth parties also contend that a merger would prejudice the rights of an innocent third party who succeeds under a section 102 application.

- [63] Neither the Commonwealth parties nor Flying Fighters contend that any intention relevant to the operation of equity can be derived from the POCA itself. That must be correct, since the POCA does not evidence any intention of the parties themselves when the Commonwealth acquires the relevant interests upon forfeiture. The question is whether the principles of merger at law and in equity apply.
- [64] Flying Fighters contends that the question of whether there is a merger depends upon the proper construction of s 96 of the POCA and that s 17 of the *Property Law Act 1974* (Qld) and the intentions of the parties are irrelevant.
- [65] According to Flying Fighters, given that the POCA provides that both the legal and equitable interests in the two aircraft have vested absolutely in the Commonwealth there is no room for equity to intervene. In that regard it relies on the right of the Commonwealth to dispose of the property in s 100 and contend that pursuant to that power, the Commonwealth would dispose of the aircraft unencumbered by the charge.
- [66] Flying Fighters further contends that as s 92 operates automatically the parties' intentions as to the merger or otherwise of their legal or equitable interests upon forfeiture are irrelevant. It also contends that equity would not apply, given the forfeiture operated automatically. It therefore contends that the presumption at law that a merger has occurred would apply.

Consideration

- [67] Upon forfeiture there was a coincidence of interests that vested in the Commonwealth absolutely pursuant to s 96 of the POCA, such that the doctrine of merger could apply to extinguish the lesser interest, in this case, the security interest under the charge.
- [68] A merger may occur when the two estates which are supposed to coalesce become vested in the same person at the same time and in the same right.⁴⁸ At common law merger occurred by operation of law and, according to *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, where a person entitled to land acquires a charge over it, extinguishment is presumed irrespective of the parties' intentions unless the party acquiring the property acquires them in different capacities.⁴⁹

⁴⁸ In this case, which involves interests such as charges which are collateral to an interest or estate in that they issue out of or depend on the relevant interest in the estate, the outcome is more aptly described as "extinguishment" than "merger". Extinguishment concerns the sinking of an interest collateral to an interest or estate: JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (2015) 5th Ed, LexisNexis Butterworths. For ease of reference and given the parties did not make such a distinction, the judgment will refer to merger.

⁴⁹ JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (2015) 5th Ed, LexisNexis Butterworths at 41-115.

[69] In equity, however, merger was a matter of the intentions of the parties such that it did not occur unless intended by the person who acquired the two estates.⁵⁰ If no intention is expressed the court considers what is most advantageous for the person acquiring the interest and orders accordingly.⁵¹ The Court would presume that the security would be kept alive if it was for the benefit of the acquirer of the interest.⁵² According to Bryson J in *Sandhurst Trustees Ltd v 72 Seventh Street Nominees Pty Ltd (In Liq)*:⁵³

“Equity prevented accidental or unintended results from mergers by treating interests which merged at law as still subsisting.”

[70] It has been held that there is no reason or principle for adopting a different approach to the existence of basic rules of equity in the construction of statutes than that which is adopted in respect of basic principles of common law in that context.⁵⁴ A statute is to be read as operating harmoniously with those principles unless the statute makes it clear that Parliament intended to derogate from those principles.

[71] In the present case the legal interest of Flying Fighters and the equitable interest of Merrell by reason of the charge were separate interests. Both were subject to the Restraining Order and upon forfeiture vested absolutely in the Commonwealth. Notwithstanding that the property once forfeited vests absolutely in the Commonwealth, s 102(d)(i) of the POCA provides for the Commonwealth to transfer back the interest of a party who successfully establishes the pre-conditions. While there appears to be some tension in the notion of property vesting absolutely in the Commonwealth but being liable to be transferred back, s 102(d)(i) only applies if the interest still exists. Section 102(d)(ii) of the POCA provides the Court with power to declare that the Commonwealth pay an amount equal to the interest declared under paragraph (c).

[72] The assessment of the nature, value and extent of an applicant’s interest is made on the basis of the interest of the relevant applicant pre-forfeiture. However, any order for transfer or payment of the equivalent value of the interest takes place in the context of the forfeiture already having occurred under s 92 of the POCA and the property having vested under s 96 of the POCA.

[73] Given the terms of the POCA and its automatic operation to vest property “absolutely” in the Commonwealth, I consider that, to the extent that the principles of equity have any application, they can only apply in determining whether or not the most advantageous position to the Commonwealth would be for a merger not to occur. The Commonwealth parties contend that the most advantageous position would be that the forfeited interests

⁵⁰ *Capital and Counties Bank Ltd v Rhodes* [1903] 1 Ch 631 at 652-653, per Cozens-Hardy LJ.

⁵¹ *Thorne v Cann* [1895] AC 11 at 19. *Meagher, Gummow and Lehane’s Equity Doctrines and Remedies* at 41-115.

⁵² *Swinfen v Swinfen (No 3)* (1860) 29 Beav 199.

⁵³ (1998) 45 NSWLR 556 at 566.

⁵⁴ *Minister for Lands and Forests & Anor v McPherson & Anor* (1991) 22 NSWLR 687 at 700 per Kirby P; See also *Williams v Wreck Bay Aboriginal Community Council* (2019) 93 ALJR 279 at [71]-[72] and [75].

remain separate given they may be ordered to transfer them back to a party under s 102 of the POCA.

- [74] The Commonwealth parties also argue that equity will have regard to any prejudice that may be caused to an innocent third party as a result of the merger and, if there is such an interest, that circumstance will militate against there being a merger or extinguishment. The Commonwealth parties contend that a third party's interests could be affected were merger to apply.
- [75] I do not consider that either of the arguments of the Commonwealth parties negate the application of merger in the present case for the following reasons.
- [76] The most advantageous position for the Commonwealth, given the purpose of the forfeiture of the property is to enable the Commonwealth to dispose of property from the proceeds of crime and for the proceeds to be paid to the Commonwealth after the disposal, is for it to have absolute title to the property in order for it to dispose of the property unencumbered by any security interest. The Commonwealth's argument that the most advantageous position for it is for the interests to remain separate in case it is ordered to transfer the interest back is unpersuasive, given that if the Commonwealth has not retained the interest, the Court may order that the Commonwealth pay the equivalent value to the interest under s 102(d)(ii) of the POCA.
- [77] Similarly, the argument that an innocent third party's position would be prejudiced is unconvincing. No such prejudice arises in the present case because Merrell has not sought a transfer of its interest under the charge. Protection is provided for an innocent party under the POCA at a number of different points in time. Such a party may make an application to exempt its interest from a Restraining Order or make an application pursuant to s 104 of the POCA. If the innocent party's interest has not been exempted from the Restraining Order, the POCA provides that the property is to be absolutely vested in the Commonwealth upon forfeiture. An innocent third party may then make an application under s 104. If the interest is no longer vested in the Commonwealth, s 102(d)(ii) still provides for the third party to be paid the equivalent value of the declared interest. While the Commonwealth parties submit that it is not a sufficient answer to say that the former security holder should be content with an order under s 102(d)(ii), it does serve as a further mechanism for the protection of the third party consistent with the fact that the interest may no longer exist for any number of reasons, including merger of the interest. For example, the Official Trustee may have disposed of that interest or, more relevantly to the present context, the property the subject of the charge without the property being encumbered by it, prior to an application under s 104 of the POCA being made.
- [78] Nor do I find that the doctrine of merger does not apply because it is contrary to the terms or purpose of s 102 of the POCA. While s 102 refers to the identification of the applicant's interest in the property and contemplates an order directing the Commonwealth to transfer the interest back to a successful applicant, it does not operate so as to preserve any interest in property that was forfeited and which vested in the Commonwealth absolutely under s 96 of the POCA as a separate interest. That is evident from the terms of s 102(d)(ii) as well as the caveat in s 102(1)(d)(i) of "if the interest is still vested". I consider that the terms of s 102 of

the POCA can be read harmoniously with the law and equity in relation to the doctrine of merger.

- [79] This finding is supported by other provisions in the legislation. The reference to “absolutely” in s 96 permits the Commonwealth to begin to deal with and dispose of the forfeited property⁵⁵ as contemplated by ss 99 and 100, and to not be liable for any interference with a proprietary right in that regard. The time at which the Commonwealth may through the Official Trustee dispose of the forfeited property commences at the end of the period in which a party can appeal a conviction, unless they have in fact appealed. Given that the appeal period in many cases expires within one month of a person being convicted, the Commonwealth may therefore provide for the property forfeited to be disposed of prior to the end of the six month period in which an application can be made under ss 102 or 103, without leave.⁵⁶ Section 102 specifically contemplates such a possibility by providing in s 102(d)(ii) for the Commonwealth to pay an amount equal to the value of the applicant’s interest in the property. Section 103 is less clear,⁵⁷ but Section 103(b)(ii) provides for such a matter to be addressed insofar as it provides that the Court must be satisfied “there is no other reason why the interest should not be transferred to the person”. Section 105(1)(c) also contemplates payment being made while the interest is still vested in the Crown.
- [80] The Commonwealth parties’ primary contention is that the High Court made no finding about the enforceability of the Merrell charge post-forfeiture. However, they contend in the alternative that if the Court considered that Gordon J did consider the question of whether the charge was enforceable upon forfeiture, the orders made by her Honour were consistent with the ongoing enforcement of the charge.⁵⁸ If her Honour’s reasons did relevantly find that the charge continued in existence after forfeiture, even though that finding may not be strictly binding upon me, good reason would be required to warrant departing from that position. I do not however find that the High Court did make a finding about the enforceability of the Merrell Charge post-forfeiture.
- [81] Consistent with her Honour’s formulation in [271], the actual declaration made in respect of Merriwa St was as follows:

“(b) in Appeal No 3908/13, declare that:

- (i) Nemesis Australia Pty Ltd had legal ownership of Lot 56 on Registered Plan 188161, also known as 6 Merriwa Street, subject to the rights of the mortgagee under the mortgage in favour of Countrywide Co-operative Housing Society Ltd and the chargee under a mortgage debenture in favour of Merrell Associates Ltd,

⁵⁵ Which includes legal and equitable interests.

⁵⁶ In *AD v Commissioner of the Australian Federal Police* (2018) 97 NSWLR 588, Beazley P (with whom Meagher and Gleeson JJA agreed) noted at [55]-[58] that property vests absolutely in the Commonwealth under s 96, but the effect of forfeiture may be ameliorated by Divs 3 and 5 of Pts 2 and 3.

⁵⁷ White J in *Commonwealth of Australia v Lee* [2008] NSWSC 1014 at [17] noted that it was difficult to marry up s 96 with s 103.

⁵⁸ Respondents’ Outline of Submissions, [98]-[100]; T1-48/36-46,-T1-49/1-24 and T1-53/44-50-T1-54/1-5.

immediately prior to its forfeiture to the Commonwealth on 18 April 2006; and

- (ii) upon satisfaction of the mortgage in favour of Countrywide Co-operative Housing Society Ltd and upon satisfaction of the amount of \$1.6 million secured by the mortgage debenture in par (i), if any part of the proceeds of sale of 6 Merriwa Street has not been applied to meet that liability, the balance of proceeds then remaining (if any), together with interest on that balance, is payable by the Commonwealth to Nemesis Australia Pty Ltd.”

[82] The Commonwealth parties particularly rely on the reference in the Order to the “satisfaction of the amount of \$1.6 million secured by the mortgage debenture” and “if any part of the proceeds of sale...has not been applied to meet that liability” (emphasis added) as implying the continued existence of the Merrell charges post-forfeiture. I do not consider her Honour’s reasons or the terms of the Order made considered the existence of the charge post-forfeiture.

[83] In interpreting an order one can have regard to the reasons.⁵⁹

[84] I consider that the reference to the mortgage debenture refers to the fact that her Honour found that Merrell held an equitable interest in Merriwa St as a result of it being a fixed charge. This accords with the finding that the interest of Nemesis Pty Ltd was diminished by the equitable interest in the assets as a result of the charge.

[85] Gordon J noted in her reasons⁶⁰ that none of the findings of Andrews SC DCJ in relation to the Merrell charges at [444] and [462] were challenged on appeal by either the Commonwealth or the Hart Companies, although no party sought to uphold the orders dealing with the Merrell charges.⁶¹ Andrews SC DCJ at [444] had concluded, *inter alia*, that Merrell’s loss of a charge over the assets did not result in the loss of its right to sue the relevant Company for payment of the debt secured by the charge. Andrews SC DCJ also found the forfeiture of the charge granted by Flying Fighters to Merrell did not invest the Commonwealth with Merrell’s rights against Flying Fighters for the payment of money.⁶²

[86] Gordon J identified that on forfeiture all monies owing under the charge became immediately payable and the security became enforceable by the chargee under the terms of the charge. Her Honour found that on execution of the charge Merrell had an equitable interest in Merriwa St as the charge was fixed in relation to it and that on forfeiture Merrell had an equitable interest in all of the assets of the chargor.⁶³ In those circumstances, her Honour

⁵⁹ *Australian Energy Ltd v Lennard Oil NL (No 2)* [1988] 2 Qd R 230.

⁶⁰ At [256] and [260], referring to *Commissioner of Australian Federal Police v Hart; Flying Fighters Pty Ltd v Commonwealth; Commonwealth v YAK 3 Investments Pty Ltd* (2016) 336 ALR 492 at 738.

⁶¹ At [261].

⁶² [2013] QDC 60 at [444].

⁶³ At [269].

determined that the nature, extent and value of Nemesis' interest was to be determined subject to the relevant charge which was a first ranking fixed charge over that asset securing repayment of \$1.6 million. It therefore diminished the value of Nemesis' interest arising from its legal ownership of the property. The liability which Gordon J referred to as having to be satisfied before the asset was entitled to be transferred⁶⁴ was therefore the liability to Merrell, which had attached to the asset. That is further supported by her Honour's statement that "[t]he obligation to pay \$1.6 million was secured by each of the Merrell Charges and the Merrell Charges were forfeited to the Commonwealth."⁶⁵ The equitable interest of Merrell was forfeited to the Commonwealth. It would appear that her Honour was addressing the fact that the monies were owing to Merrell but the charges were forfeited when she stated that, in relation to the orders under s 102:

"Therefore, the declarations and orders made had to take account of (1) the existence of the directly applicable Merrell Charge as well as the interrelationship between the liability for the indebtedness under all of the Merrell Charges and (2) the fact that each of the Merrell Charges vested in the Commonwealth on forfeiture, either absolutely or subject to any registration requirements".⁶⁶

- [87] The meaning of her Honour's reference to the "complications" caused by charges forfeited is not readily identifiable but, in the context of the judgment, it would appear to be referring to the difference in the identity of the creditor under the charge and the Commonwealth on forfeiture of the charge.⁶⁷
- [88] The Commonwealth parties refer to the fact that her Honour did not make reference to the monies being payable to Merrell, stating that her Honour would have done so if she accepted that there was no money payable to the Commonwealth and no enforceable security remaining over the asset.
- [89] While the orders made with respect to Merriwa St referred to the balance being payable by the Commonwealth to Nemesis, the order does not state which party is entitled to be the recipient of the payments required to satisfy the mortgage or the charge. The proceeds of the sale were, however, held by the Commonwealth. This is consistent with the reference by Gordon J to the fact that there was no appeal from the findings of Andrews SC DCJ.
- [90] The fact that the order was not referring to ongoing enforceability of the charge by the Commonwealth is further supported by the fact that Merriwa St had been sold.

⁶⁴ At [270].

⁶⁵ At [270].

⁶⁶ At [270].

⁶⁷ The assignment of a security without the debt owing does not necessarily result in the security being unenforceable although the recovery of the monies owing would be held on trust for the creditor, the two rights being independent. See *Native Bond Pty Ltd (Controller Appointed) v Cant* [2016] VSC 206 at [30], referring to *Morley v Morley* (1858) 25 Beav 253.

- [91] There was an intermediate interest in the property held by Countrywide, which was paid the amount owing under the mortgage at the time of sale.⁶⁸ That further interest could affect any application of the principles of merger. As such, I do not consider that the High Court's order implicitly determines that there could be no merger of an interest in the circumstances of the present case.
- [92] In the present case, the equitable interest of Merrell in the aircraft held pursuant to the charge was forfeited to the Commonwealth and by the coincidence of the Commonwealth being vested with both the legal and security interests under the charge absolutely in the same capacity, a merger of the interests occurred.
- [93] In those circumstances, the right to appoint a receiver in respect of that equitable interest under the terms of the charge did not remain. It follows that the purported appointment by the Official Trustee of receivers of the aircraft under the charge is invalid.
- [94] The Commonwealth parties contend that such a result may result in a windfall to Flying Fighters if the interest of the Commonwealth is transferred to Flying Fighters without being diminished by the debt secured by the charge. That may well be the outcome given the position of Merrell, but in my view, to the extent that occurs it is the result of the Commonwealth deciding not to appeal the orders in respect of the aircraft to the High Court.

The Court of Appeal Orders

- [95] Flying Fighters and the Commonwealth parties are in dispute as to the construction of the orders of the Court of Appeal, particularly paragraph 10(a). The Commonwealth parties contend that Order 10 of the Court of Appeal orders was directed at the transfer of the pre-forfeiture interest of Flying Fighters consistent with s 102 of the POCA, and was confined to the legal interest held by Flying Fighters. Flying Fighters emphasise that Order 10 referred to the Commonwealth transferring "its" interest. When one has regard to the reasons of the majority. I find that the proper construction of Order 10 is that the Commonwealth's interest was to be transferred to Flying Fighters and was not confined to its legal interest, notwithstanding that Orders 4(c) and 4(d) declared the legal interest of Flying Fighters pre-forfeiture to have been the subject of the charge.
- [96] It follows that I consider that Flying Fighters' construction of clause 10(a) of the Court of Appeal orders is the preferable one.
- [97] Although s 102(d)(i) contemplates the transfer of the interest of the applicant, not the transfer of the Commonwealth's interest, the order in paragraph 10(a) requires the Commonwealth to transfer its interest. While the Court of Appeal recognised in paragraphs 4(c) and (d) of its orders that the legal ownership of Flying Fighters was subject to the Merrell charge prior to forfeiture, paragraph 10(a) does not order the transfer subject to the liability under the charge being met. That is consistent with the reasons of the Court of Appeal, even though the application sought the transfer of the applicant's interest. The majority found that the charge did not affect the owner's rights until the rights under the charge were exercised. Further, it

⁶⁸ The doctrine of merger may not apply to land under Torrens Title: *Shell Co of Australia Ltd v Zanelli & Anor* [1974] 1 NSWLR 216 at 220-221.

found that the forfeited charge was of no practical effect, nor was the Commonwealth entitled to the benefit of the debt. The Court of Appeal therefore determined that the nature and extent of the interest in the Hart companies was not diminished by \$1.6 million, contrary to the orders of Andrew SC DCJ.⁶⁹ The order in paragraph 10(a) is consistent with that finding. Given that determination, the fact that the majority of the Court of Appeal did not order that the Merrell charge should be transferred or otherwise divested does not mean it was seeking to limit the transfer by reference to the charge. Rather, it was consistent with their view that it did not affect the rights of Flying Fighters pre-forfeiture and that the charge had no practical effect upon forfeiture. Section 338 of the POCA defines “interest” to include both legal and equitable interests. Consistent with that view, Order 10 provided for the transfer of the Commonwealth’s interest without qualification, notwithstanding the terms of the declaration in Orders 4(c) and 4(d).

- [98] Order 10(a) is not qualified by Order 4. Order 4 was dealing with the position pre-forfeiture, and the orders as to transfer were made in the context of forfeiture having occurred and the view of the Court that Flying Fighters’ ownership of the aircraft was not affected by the charge, such that the two orders can be read harmoniously.
- [99] Orders 4 and 10 are arguably inconsistent with the orders made by the High Court. The determination by the High Court and the orders made did not accept the Court of Appeal’s approach and the orders made in respect of the Merriwa St property.⁷⁰ This is not, however, a case where it is relevant to construe the orders by reference to the orders of the High Court as submitted by the Commonwealth.⁷¹ Those orders were, however, separate from paragraphs 4 and 10 of the Court of Appeal orders dealing with separate interests in respect of different property, albeit also being subject to the Merrell charge.⁷²
- [100] That is sufficient to dispose of the present matter. However, I will briefly consider the alternative arguments that were raised by Flying Fighters.

Does the Court of Appeal order prevent the Commonwealth appointing receivers?

⁶⁹ *Commissioner of Australian Federal Police v Hart; Flying Fighters Pty Ltd v Commonwealth; Commonwealth v YAK 3 Investments Pty Ltd* (2016) 336 ALR 492 at [1243]; see also *Commissioner of Australian Federal Police v Hart; Commonwealth of Australia v Yak 3 Investments Pty Ltd; Commonwealth of Australia v Flying Fighters Pty Ltd* (2018) 262 CLR 76 at [262].

⁷⁰ *Commissioner of Australian Federal Police v Hart; Commonwealth of Australia v Yak 3 Investments Pty Ltd; Commonwealth of Australia v Flying Fighters Pty Ltd* (2018) 262 CLR 76 at [250].

⁷¹ The case of *Re Muirhead: Ex parte Commonwealth Bank Of Australia* (unreported, Federal Court of Australia, Drummond J, QG 7002 of 1997, 13 May 1997) is distinguishable from the present case. In that case the Federal Court of Appeal had given leave to amend a defence when a final order had been made by the primary judge by way of summary judgment and the question was whether there was a final judgment for the purposes of the *Bankruptcy Act 1966* (Cth).

⁷² I reject the Commonwealth’s argument that the order would prevail because it related to the same issue.

- [101] Flying Fighters contends that the Commonwealth parties are estopped from exercising powers as chargee, including the power to appoint receivers, on the basis of issue estoppel or *Anshun* estoppel arising out of the determinations in the s 102 of the POCA proceedings.
- [102] The Commonwealth parties submit that estoppel does not apply to the exercise of a private contractual power to appoint receivers. They contend that issue estoppel and *Anshun* estoppel only apply to court proceedings to prevent the re-litigation of issues. They contend that the estoppels are therefore irrelevant and afford no basis upon which to declare the appointment of the receivers invalid.
- [103] Flying Fighters submits that in the s 102 of the POCA proceedings:
- (a) The decision of the District Court was that the Commonwealth was obliged to transfer the two aircraft to Flying Fighters subject to a condition of payment being made (namely the amount owing under the Merrell charge, which was \$1.6 million) and that the Commonwealth was not entitled to exercise any rights as chargee against those aircraft;
 - (b) The applicant did not appeal against any of the findings made by Andrews SC DCJ regarding the Merrell charges. Flying Fighters appealed the condition requiring payment of \$1.6 million before the aircraft were required to be transferred. Ground 2B of the Further Amended Notice of Appeal asserted that the primary Judge ought to have found by reason of the forfeiture of the Merrell charges to the Commonwealth that such charges ceased to have effect;
 - (c) The Commonwealth did not seek to argue in the District Court or Court of Appeal that the orders to return the aircraft lacked utility and should not be made because it would act to appoint the receiver under the Merrell charge; and
 - (d) The Court of Appeal orders requiring the return of the aircraft to Flying Fighters, namely 4(c), 4(d) and 10, were initially the subject of the notice of appeal to the High Court but ultimately were not the subject of the appeal. The High Court orders only authorised the deduction of the money owing under the Merrell charges from the proceeds of some real property at Merriwa St. By orders 4(c), 4(d) and 10 of the Court of Appeal, which were undisturbed by the orders of the High Court, the issue of whether the Commonwealth is entitled to exercise any powers of the chargee (including the power to appoint a receiver) against the two aircraft has already been decided against the Commonwealth.
- [104] Flying Fighters contends that there is an issue estoppel in respect of the entitlement of the Commonwealth to exercise its powers under the Merrell charge vis-à-vis the two aircraft given that:
- (a) There was a final decision on the same question between the parties;
 - (b) The issue estoppel extends to all matters that were indispensable or fundamental to the earlier judicial determination, whether or not those matters were contested in the earlier proceeding; and
 - (c) The third and fourth respondents are privies for the purposes of issue estoppel.
- [105] The Commonwealth parties contend that:

- (a) The orders of the District Court and the Court of Appeal requiring delivery of the aircraft to the company of themselves say nothing as to the Commonwealth's power to appoint receivers;
- (b) The orders cannot be construed as having such effect upon the Commonwealth's power to appoint receivers as it was not in issue or decided by the decisions of the Court of Appeal or District Court;
- (c) No estoppel can arise because the Commonwealth's powers under the forfeited charge were not in issue in the proceedings and were not necessary or relevant to the determination of the application under the POCA, which was a determination which arose pre-forfeiture;
- (d) The comments as to the rights of the chargee were strictly speaking obiter;
- (e) Alternatively, the High Court rejected the analysis of the lower courts and specifically rejected the proposition that the applicant under s 102 could have return of a secured asset without first accounting for the secured debt.

[106] The Commonwealth parties also submit that the application is a bid by Flying Fighters to improve its position by receiving the aircraft unencumbered when, immediately prior to forfeiture, the planes were secured for the repayment of a debt of \$1.6 million. They contend such an outcome would be contrary to the High Court's decision and the purpose of the POCA.

Could issue estoppel or *Anshun* estoppel estop the Commonwealth or its privies from appointing receivers under the Merrell charge?

[107] The Commonwealth parties rely on the statements by the majority⁷³ of the High Court in *Tomlinson v Ramsey Food Processing Pty Ltd*⁷⁴ to support their argument that neither issue estoppel nor *Anshun* estoppel can operate in relation to the appointment of a receiver under the Merrell charge. The majority stated that:

"[22] Three forms of estoppel have now been recognised by the common law of Australia as having the potential to result from the rendering of a final judgment in an adversarial proceeding. ... The second form of estoppel is almost always now referred to as "issue estoppel". Estoppel in that form operates to preclude the raising in a subsequent proceeding of an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in the judgment. The classic expression of the primary consequence of its operation is that a "judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies". The third form of estoppel is now most often referred to as "*Anshun* estoppel", although it is still sometimes referred to as the "extended principle" in *Henderson v Henderson*. That third form of estoppel is an

⁷³ French CJ, Bell, Gageler and Keane JJ.

⁷⁴ (2015) 256 CLR 507.

extension of the first and of the second. Estoppel in that extended form operates to preclude the assertion of a claim, or the raising of an issue of fact or law, if that claim or issue was so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding. The extended form has been treated in Australia as a “true estoppel” and not as a form of res judicata in the strict sense. Considerations similar to those which underpin this form of estoppel may support a preclusive abuse of process argument.

[23] The present significance of the recognition of those three forms of estoppel is that each has the potential to preclude assertion of a right or obligation, or the raising of an issue of fact or law, between parties to a proceeding or their privies. Absent a principled basis for distinction — and none has been suggested — one principle must govern the identification of privies for the purpose of all forms of estoppel which result from the rendering of a final judgment in an adversarial proceeding.” (emphasis added) (footnotes omitted)

[108] The majority of the High Court identified that there is a relationship between the doctrine of estoppel and the doctrine of abuse of process, because abuse of process is informed by similar considerations of finality and fairness. According to the High Court, the doctrine of abuse of process overlaps with the doctrine of estoppel:⁷⁵

“Thus, the assertion of a right or obligation, or the raising of an issue of fact or law, in a subsequent proceeding can be simultaneously: (1) the subject of an estoppel which has resulted from a final judgment in an earlier proceeding; and (2) conduct which constitutes an abuse of process in the subsequent proceeding.”

[109] The point made by the Commonwealth parties is that they have not sought to make any claim in a legal proceeding seeking an order for the appointment of a receiver but rather exercised a private right under the charge forfeited to the Commonwealth, as the Commonwealth was entitled to do, given that an interest in relation to property includes a right, power or privilege in connection with the property.⁷⁶ The Commonwealth parties contend that the exercise of a private right is not something that can be restrained by issue or *Anshun* estoppel.

[110] Flying Fighters makes two submissions in response:

- (a) Firstly, that upon proper analysis of principles, issue estoppel or *Anshun* estoppel does not apply; and
- (b) Secondly, that the Court has a power to prevent abuse of its processes.

[111] Flying Fighters accepts that there is no authority where the *Anshun* principle had been applied to extra-curial appointments of receivers but it contends that the principles of *Anshun* would

⁷⁵ At [24].

⁷⁶ See definition of “interest”, s 338 of the POCA.

extend to that situation. In particular, it relies upon the majority judgment in *Port of Melbourne Authority v Anshun Pty Ltd*,⁷⁷ where the majority stated that there would be no estoppel unless it appeared that “the matter relied upon by as a defence was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it”.⁷⁸ In the present case, Flying Fighters contends that it was unreasonable for the Commonwealth to appoint a receiver under the forfeited charge where it did not raise any argument before the District Court or the Court of Appeal that it would be futile to make the orders proposed under s 102 of the POCA as to the transfer of the aircraft to Flying Fighters because it had a right to appoint a receiver under the forfeited charge. They also contend it is unreasonable when the Commonwealth did not appeal the orders made in respect of the aircraft by the Court of Appeal.

[112] There is no doubt that issue estoppel and *Anshun* estoppel are directed at preventing matters from being re-litigated in further proceedings. This is in recognition in part of the need for finality in litigation and fairness.⁷⁹

[113] Handley J observed extra-judicially,⁸⁰ that:

“Two policies support the doctrine of *res judicata* estoppel: the interests of the community in the termination of disputes and the finality and conclusiveness of judicial decisions; and the interest of an individual in being protected from repeated suits and prosecutions for the same cause.” (footnotes omitted)

[114] The High Court in recognising the broader-based *Anshun* estoppel also emphasised the need to avoid inconsistency between judgments.⁸¹

[115] The question is whether the operation of the estoppels can extend beyond curial proceedings to the exercise of a private right. The extension of the estoppels to the exercise of a legal right which has been determined or should have been determined in legal proceedings in some respects could be said to be a natural extension consistent with the proper administration of justice. However, on the present state of law, I do not consider that either issue estoppel or *Anshun* estoppel can be extended so far consistently with legal principle. While the scope of legal proceedings and the findings made therein, which may found either of the estoppels, have broadened, the application of the estoppels has been confined to legal proceedings consistent with the fact that the doctrine’s underlying purpose is to ensure finality in litigation and that parties are not vexed multiple times by legal proceedings. This is evident from review of the authorities.

⁷⁷ (1981) 147 CLR 589.

⁷⁸ (1981) 147 CLR 589 at 602, per Gibbs CJ and Mason and Aickin JJ.

⁷⁹ *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at [24].

⁸⁰ Justice KR Handley, *Spencer Bower and Handley: Res Judicata* (2009) 4th Ed, LexisNexis UK, [1.10].

⁸¹ See *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 611-612, per Brennan J.

- [116] In *Ramsay v Pilgram*⁸² which was referred to in *Tomlinson*, Barwick CJ stated that:
- “... an estoppel is available to prevent the assertion in those proceedings of a matter of fact or of law in a sense contrary to that in which that precise matter has already been necessarily and directly decided by a competent tribunal in resolving rights or obligations between the same parties in the same respective interests or capacities, or between a privy of each, or between one of them and a privy of the other in each instance in the same interest or capacity. The issue thus determined, as distinct from the cause of action in relation to which it arose, must have been identical in each case.” (emphasis added)
- [117] Similarly in *Port of Melbourne Authority v Anshun Pty Ltd*,⁸³ the majority consisting of Gibbs CJ and Mason and Aickin JJ emphasised that the broader doctrine is directed to a claim or defence in a second proceeding:
- “...there will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it. Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding.” (emphasis added)
- [118] The majority in *Anshun* emphasised that the estoppel sought to avoid “conflicting judgments”, which the majority stated extends to judgments which are contradictory though they may not be pronounced on the same cause of action.⁸⁴
- [119] *Anshun* estoppel has been described by Handley J writing extra-judicially as an extended doctrine “based on the court’s inherent jurisdiction to prevent abuse of its process by proceedings which are vexatious, that is, unreasonable” (emphasis added).⁸⁵
- [120] In discussing the three forms of estoppel recognised by the common law of Australia, namely cause of action estoppel, issue estoppel and *Anshun* estoppel, the High Court in *Tomlinson v Ramsey Food Processing* recognised that “making a claim or raising an issue which was made or raised and determined in an earlier proceeding, or which ought reasonably to have been made or raised for determination in that earlier proceeding, can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel”.⁸⁶

⁸² (1968) 118 CLR 271 at 276; see also *Blair v Curran* (1939) 62 CLR 464 at 531-532, per Dixon J.

⁸³ (1981) 147 CLR 589 at 602.

⁸⁴ At 603-604.

⁸⁵ Justice KR Handley AO, “Anshun Today” (1997) 71 Australian Law Journal 934 at 940.

⁸⁶ (2015) 256 CLR 507 at [26].

- [121] Similarly, abuse of process applies where the use of the Court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute.⁸⁷
- [122] The common thread in relation to the estoppels and abuse of process in this respect is that they relate to the making of a claim or raising of an issue in further proceedings which was or should have been the subject of earlier proceedings. The development over time of the jurisprudence in relation to the application of issue estoppel, *Anshun* estoppel or abuse of process has not reached a point where it can be said that they apply to the exercise of a legal right outside of Court proceedings. That may lead to a highly undesirable outcome where the exercise of the legal right may be inconsistent with earlier findings of the Court and where a party has been involved in several proceedings in order to secure the transfer of its interest in property, only to find that course of action is futile because of the exercise of a private right. Conversely, it may be said to be consistent with the fact that the Courts are cautious to find that a party has lost a legal right.⁸⁸
- [123] Issue estoppel or alternatively *Anshun* estoppel are two of the bases upon which Flying Fighters seeks to positively rely to establish the invalidity of the appointment of receivers under s 418A of the *Corporations Act 2001* (Cth). The Commonwealth has not sought to rely on its right to appoint receivers by way of a claim or by way of defence in court proceedings. As recognised by Flying Fighters, there is no authority for using either estoppel to estop the exercise of a private right by a party. In effect Flying Fighters seeks to use estoppel as a sword. In my view issue estoppel, *Anshun* estoppel and to the extent it is related, the doctrine of abuse of process, do not extend to preventing the exercise of a private right which occurs outside of Court proceedings, albeit which is related to matters which have been determined by the Court. This may be an undesirable outcome, given the amount of litigation which has taken place already. However, I do not consider that Flying Fighters can rely on either estoppel to prevent the Commonwealth and other respondents from exercising rights under the forfeited charge if they can in fact exercise those rights.
- [124] I accept that the Commonwealth parties' submission that issue estoppel or *Anshun* estoppel, if operable, fetter or potentially fetter the rights of the parties in subsequent Court proceedings and do not apply to the situation of a private appointment of receivers and managers.
- [125] It is unnecessary for me to consider further the arguments as to issue estoppel or *Anshun* estoppel.

Is the action statute barred?

- [126] Flying Fighters also submits that the Commonwealth was prevented from exercising rights under the charge because the forfeiture of assets occurred on 18 April 2006 and s 26(1) of the *Limitation of Actions Act 1974* (Qld) provides that an action cannot be brought to recover a principal sum due under a mortgage or charge 12 years from the date on which the right to receive the money accrued..

⁸⁷ *PNJ v R* (2009) 252 ALR 612 at [3], referring to *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256.

⁸⁸ *Conference & Exhibition Organisers Pty Ltd v Johnson* [2016] NSWCA 118 at [5]-[6].

- [127] By clause 2(aa) of the Merrell charge the principal became immediately payable upon the bankruptcy of the guarantor. Steven Hart was the guarantor and became bankrupt on 24 April 2002.⁸⁹ Therefore the right to receive the principal accrued on no later than 24 April 2002. The time for pursuing the debt is therefore statute barred.
- [128] Flying Fighters therefore contends that if there was no right to pursue the underlying debt under the Merrell charge there was no power to appoint receivers to facilitate such recovery or, alternatively, the appointment is futile because they cannot recover the monies owing secured by the charge.
- [129] The Commonwealth parties contend that the *Limitation of Actions Act 1974* (Qld) did not apply to the appointment of receivers under a charge but only in relation to the recovery of monies secured by a mortgage or charge. In particular, they rely on Handford's *Limitation of Actions: The Laws of Australia*,⁹⁰ where it is said:
- “The barring of the right of action against the mortgagor for the principal money does not prevent the mortgagee exercising the power of sale or the power to appoint a receiver out of court, because the exercise of these powers is not an “action” to which the Limitation Acts apply.”
- [130] This view receives some support from *In re The Australian Deposit and Mortgage Bank Limited*⁹¹, where the Victorian Full Court considered that while the mortgagee's right was statute barred, the limitations statute in that case did not take away the remedy of the power of sale. However in that case, the Full Court noted as relevant that the mortgagee had been in possession of the land.⁹²
- [131] In *Sardon Pty Ltd v Registrar of Titles* [2004] WASC 56, Barker J found that unlike *Australian Deposit and Mortgage Bank Limited*, the mortgagee had not entered into possession of the land. In those circumstances, Barker J considered that the right to exercise the power of sale or seek an order for foreclosure had been lost, and that s 30 of the *Limitation Act 1935* (WA) applied so that the mortgagee's right and title to the land had been extinguished.
- [132] Section 26(1) of the *Limitations of Actions Act 1974* (Qld), like the legislation considered in *Australian Deposit and Mortgage Bank Limited*, is directed at the recovery of the principal sum of money secured by a mortgage or other charge but further extends to bar an action “to recover proceeds of the sale of land after the expiration of 12 years from the date on which the right to receive the money accrued.” The latter limitation does not extend to personalty as

⁸⁹ In the judgment of Andrews SC DCJ, Hart is said to have been declared bankrupt on 22 April 2002: see [2013] QDC 60 at 213. The Applicant's Outline of Submissions, with reference to the Affidavit of Conomos filed 1 May 2018, Exhibit JNC-2, state Hart was declared bankrupt on 24 April 2002. It is unnecessary for me to resolve which date is correct.

⁹⁰ Peter R Handford, *Limitation of Actions: The Laws of Australia* (2017) 4th ed, Thomson Reuters at p 250.

⁹¹ [1907] 1 VLR 348.

⁹² At 357.

opposed to land, although the limitation of the recovery of the principal sum of money does extend to personalty.

[133] It is uncontentionous that the Commonwealth had been in possession of the aircraft since April 2006. The Commonwealth parties submit therefore that they are not precluded from seeking foreclosure under s 26(2) of the *Limitation of Actions Act 1974* (Qld). I accept that submission.

[134] In the present case, while the action for the recovery of the debt owing secured by the charge is statute barred, other remedies such as the appointment of receivers under a charge are outside the terms of s 26(1) of the *Limitation of Actions Act 1974* (Qld) and would not have been statute barred had I found a merger had not occurred.⁹³ I do not consider that the appointment of the receivers would have been futile when the recovery of the debt itself is statute barred.⁹⁴ This is consistent with the decision of *Australia & New Zealand Banking Group Ltd v Douglas Morris Investments Pty Ltd*,⁹⁵ where McPherson J⁹⁶ stated that:

“If amounts of principal and interest due to the bank under the scrip lien have become statute-barred, the next question is what, if any, effect this has on the bank’s charge over or in respect of the Pioneer shares and share certificates subject to the scrip lien. The answer is, I consider, that it has no effect. The charge created by the lien operated to vest in the bank an equitable proprietary interest in those shares. The barring of the proceedings to recover the debt which the charge was intended to secure does not touch that interest.”⁹⁷

[135] No argument in relation to the application of the *Limitation of Actions Act 1974* (Qld) was raised in the POCA proceedings.

Conclusion

[136] I find on the basis of the reasons set out above that:

- (a) Upon forfeiture of the aircraft and the Merrell charge and both the legal and equitable interests vesting in the Commonwealth, the charge merged with the legal interest and was extinguished;
- (b) If there had not been a merger. Flying Fighters could not rely on either issue estoppel or *Anshun* estoppel to estop the Commonwealth parties appointing receivers under the terms of the Merrell charge;

⁹³ Cf the position in New South Wales, Northern Territory and Tasmania: G.E. Dal Pont, *Law of Limitation* (2016) LexisNexis Butterworths, [9.14].

⁹⁴ No question was raised as to the Commonwealth’s power under the POCA to enforce the charge in the absence of a right to the monies secured.

⁹⁵ [1992] 1 Qd R 478.

⁹⁶ With whom Connolly and Williams JJ agreed.

⁹⁷ At 492-493; see also discussion at 496-497.

- (c) If the charge had not been extinguished as a result of the merger of interests, the Commonwealth parties would not be statute barred from appointing receivers under the terms of the Merrell charge.

Orders

[137] I order that:

1. The appointment of the third and fourth respondents as receivers pursuant to the Merrell charge was invalid pursuant to s 418A of the *Corporations Act 2001* (Cth).
2. I will hear the parties as to costs and as to any further relief, particularly given Flying Fighters only raised the argument upon which it was successful on the day of hearing.