SUPREME COURT OF QUEENSLAND

CITATION:	*State of Queensland v Bank of Queensland & Anor* [2013] QCA 225
PARTIES:	**STATE OF QUEENSLAND** (appellant) **v** **BANK OF QUEENSLAND** (first respondent) **BRETT RAYMOND STEVENS** (second respondent)
FILE NO/S:	Appeal No 8887 of 2012 SC No 1014 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	19 February 2013
JUDGES:	Gotterson JA and Atkinson and Martin JJ Separate reasons for judgment of each member of the Court, Gotterson JA and Martin J concurring as to the orders made, Atkinson J dissenting
ORDERS:	**1. Appeal dismissed.** **2. Appellant to pay the first respondent's costs of the appeal on the standard basis.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – CONFISCATION OF PROCEEDS OF CRIME AND RELATED MATTERS – RESTRAINING OR FREEZING ORDER – OTHER MATTERS – where a restraining order was in place – where there was a non-intentional breach of the restraining order – where consideration of illegality must be made of the effect of non-intentional breach of the restraining order – whether the advances made by the respondent Bank were void – whether the respondent Bank had a legally enforceable right to recover the further indebtedness created by those advances *Criminal Proceeds Confiscation Act* 2002 (Qld), s 28(3), s 29, s 31, s 37, s 46, s 52, s 56, s 58(1), s 65, s 68, s 69 *Bank of Queensland v Stevens* [2013] QSC 169, cited *Bank of Western Australia v Ocean Trawlers Pty Ltd* (1995) 13 WAR 407, cited

Clarke v Chadburn [1985] 1 WLR 78, cited
Davenport v The Queen (1877) 3 App Cas 115; [1877] UKPC 49, cited
David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353; [1992] HCA 48, cited
Equuscorp Pty Ltd v Haxton (2012) 246 CLR 498; [2012] HCA 7, cited
Fender v St John-Mildmay [1938] AC 1, cited
Fitzgerald v FJ Leonhardt Pty Ltd (1997) 189 CLR 215; [1997] HCA 17, cited
Heatons Transport (St Helens Colliery) Ltd v Transport and General Workers Union [1973] AC 15, cited
Meridien AB Pty Ltd & Anor v Jackson & Ors [2013] QCA 121, cited
Miller v Miller (2011) 242 CLR 446; [2011] HCA 9, cited
Nelson v Nelson (1995) 184 CLR 538; [1995] HCA 25, cited
Scott v Brown, Doering, McNab & Co [1892] 2 QB 724, cited
Smith v Jenkins (1970) 119 CLR 39; [1970] HCA 2, cited
Thompson v Groote Eylandt Mining Co Ltd (2003) 173 FLR 72; [2003] NTCA 5, cited
Wilkinson v Osborne (1915) 21 CLR 89, cited
Z Bank v D1 [1994] 1 Lloyd's Rep 656, distinguished

COUNSEL: R Douglas QC, with J Rolls, for the appellant
T Sullivan QC, with M Drysdale, for the first respondent
No appearance by the second respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
HWL Ebsworth Lawyers for the first respondent
No appearance by the second respondent

[1] **GOTTERSON JA**: The appellant, State of Queensland ("the State"), appeals against orders made in the Supreme Court of Queensland on 31 August 2012. The orders concern the extent to which the proceeds of sale of three parcels of land at Narangba ("the land") may be applied by the first respondent, Bank of Queensland ("the Bank"), in reduction of the debit balance of an account conducted with the Bank by a company, Brett Stevens Transport Pty Ltd ("Stevens Transport"), which is associated with the second respondent, Brett Stevens ("Mr Stevens").

[2] Mr Stevens was the registered proprietor of the land. At the time when the orders were made, proceeds of sale were anticipated to arise upon the exercise by the Bank of a power of sale conferred on it by a Bill of Mortgage registered in its favour against the titles to the land. The State's interest in first, the land and then, the proceeds of sale of it arose pursuant to provisions of the *Criminal Proceeds Confiscation Act* 2002 (Qld) ("the CPC Act").

[3] It will assist both an explanation of the orders made by the learned judge at first instance and an analysis of the grounds of appeal to detail the chronology of events and history of the litigation which led to the making of them. I turn first to that.

Chronology of events and history of the litigation

[4] In February 1998 Mr Stevens became the registered proprietor of Lot 2 on RP 851006 in the County of Stanley Parish of Redcliffe, Title Reference 18561243. In March and April 2004 he became the registered proprietor of Lots 28 and 27 on RP 77681 also in the County of Stanley Parish of Redcliffe, Title References 12781042 and 12784172 respectively[1]. These lots had street addresses at 100, 82 and 92 Callaghan Road, Narangba respectively.

[5] On 26 May 2006, Bill of Mortgage No 709627798[2] ("the mortgage") was registered against the title to each of these lots, and of two other lots also owned by Mr Stevens. The mortgage had been executed by Mr Stevens in favour of the Bank on 22 February 2006. The debt or liability secured by the mortgage was defined by reference to the expression "total amount owing" as defined in the Bank's Real Property Mortgage General Conditions filed in the Land Registry.[3] All the terms of that document were expressed to be incorporated in the mortgage. The expression "total amount owing" was defined to mean all money at any time, then or in the future, owing by Mr Stevens to the Bank under the mortgage or "an agreement covered by the mortgage". That latter term was defined to mean an agreement or arrangement (including a deed) under which Mr Stevens incurred or owed obligations to the Bank or under which the Bank had rights against him.[4]

[6] On 28 August 2008, Stevens Transport accepted an offer of a Business Term Loan facility[5] by the Bank. The facility was for the amount of $350,000. Its purpose was to pay out an existing loan account and to provide an additional $200,000 working capital for the company. The facility was made available to the company by Business Term Loan Account 20759418 ("BTL Account").

[7] The security required under the terms of the offer included a guarantee and indemnity to be provided by Mr Stevens and a first registered mortgage over the land. The mortgage was on foot. Mr Stevens executed an instrument of guarantee and indemnity with a guaranteed limit of $1,300,000 in favour of the Bank on 3 September 2008.[6]

[8] Stevens Transport had previously executed by way of security a fixed and floating charge over its assets and undertaking in favour of the Bank on 28 February 2006. The charge had been duly registered on 30 May 2006 and given the number 1306252. The Bank also required by way of security a guarantee and indemnity and a fixed and floating charge from another company associated with Mr Stevens, Brett Stevens Racing Pty Ltd ("Stevens Racing"). The guarantee and indemnity document was executed. It was supported by a fixed and floating charge (1306257)[7] which had been executed and registered at the same time in 2006 as that given by Stevens Transport had been executed and registered. Both charges were current at all material times.

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1 AB 50-52.
2 AB 53-55.
3 AB 57-79.
4 The respective definitions in clause 1 of the General Conditions are lengthy and their general effect is summarised for convenience.
5 AB 80-100.
6 AB 101-124.
7 AB 126-143.

[9] On 30 January 2009, the State filed in the Supreme Court an originating application[8] for orders under ss 28(3)(a)(iii) and 31(1) of the CPC Act that none of the property of Mr Stevens shall be dealt with by any person. Without derogating from its generality, the application listed specific property against which orders were sought. The list included the land and property "registered in the name of" Stevens Transport and Stevens Racing. Auxiliary orders were also sought in respect of the land that any general restraint orders made not prevent the Bank from exercising any of its rights under the mortgage. This application initiated Proceeding S1014 of 2009. The application was heard ex-parte on the date that it was filed and a restraining order which applied only to certain chattels, principally drag vehicles and motor cycles, was made.[9] The application was otherwise adjourned to 18 February 2009. The Bank was served with a copy of the originating application on 4 February 2009.[10]

[10] An amended originating application[11] for restraining orders returnable on 18 February 2009 was prepared by the State. The Bank was served with it on 13 February 2009.[12] It indicated that it did not intend to appear at the hearing. The amended originating application was filed by leave in the proceeding on 18 February. At the hearing, more extensive restraining orders which mirrored the amended document and referred expressly to the land, were made.[13] Order 2 specifically ordered that under ss 28(3)(a)(i) and 31(1) of the CPC Act, none of the land "shall be dealt with by any person" and included the auxiliary orders to which I have referred.

[11] On the following day, 19 February 2009, the State served the Bank with a copy of the restraining orders, lodged caveats against the titles to the land, and filed a separate application in proceeding S1014 of 2009.[14] This application[15] seeks orders under ss 56(1) and 58(1) of the CPC Act that specified property be forfeited to the State. The list of specified property in the application is wide ranging. It matches the property the subject of the restraining orders and includes the land and, property "registered in the name of" Stevens Transport and Stevens Racing. This application was served on Mr Stevens, these companies and the Bank. To this point, no final orders disposing of it have been made.

[12] However, a number of further applications have been filed and orders made in the proceeding which have related to some only of the listed property. On 3 December 2009, the restraining orders were varied by an order[16] made under ss 37(1), 46(2) and (4) of the CPC Act which directed the Public Trustee to sell the drag vehicles and motor cycles. The order was made on the application[17] of the State filed on 21 August 2009. The Bank's solicitors notified[18] the State that this property was owned by Stevens Racing. The Bank did not oppose the application. The variation to the order anticipated that any chargeholder who held a charge over the vehicles

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8 AB 566-582.
9 AB 583-4.
10 AB 456-7.
11 AB 464-472.
12 AB 459-460.
13 AB 473-488.
14 AB 463.
15 AB 601-609.
16 AB 614-615.
17 AB 610-611.
18 AB 175-6.

and cycles would be paid out with any remaining net proceeds of sale to be held by the Public Trustee pending finalisation of the proceeding. Before detailing yet other applications which were subsequently filed, including those on which the order under appeal was made, I shall set out relevant aspects of the indebtedness of Mr Stevens and his associated corporate entities to the Bank and events concerning the application of the proceeds of sale.

[13] Stevens Transport defaulted on the BTL Account facility. Under cover of a letter dated 6 August 2009,[19] the Bank's solicitors notified the company that the Bank thereby terminated that account and served a notice of demand requiring payment of the amount of $335,727.40 then owing on the account by 20 August 2009.[20] The evidence does not disclose whether there was any activity on the account between 6 August 2009 and 30 April 2010 when the debit balance was $347,467.79. The pattern for succeeding months suggests that the account was not active in the interval to which I have referred except for debits by the Bank of interest and loan service fees monthly and of legal expenses, and the crediting of ad hoc deposits made to the account to reduce indebtedness.

[14] By separate letter of the same date,[21] Mr Stevens was notified of the default and served with a notice of demand[22] made to him as guarantor. It required payment of all money secured by his guarantee and indemnity and mortgage by the same date. Those moneys included the amount owing on the BTL Account. None of the moneys demanded were paid. On 24 August 2009, the Bank gave notice of exercise of power of sale[23] under the mortgage on the basis that an amount of $2,787,669.73 owing to it which was due for repayment by Mr Stevens on 20 August 2009, had not been repaid.

[15] The motor vehicles and cycles were sold by auction on 10 June 2010. The sale yielded net proceeds of $317,715.77. On 29 July 2010, the Public Trustee paid that amount in full to the Bank's solicitors on the basis that the Bank as chargee of Stevens Racing was entitled to it under the terms of that charge and the varied order.

[16] On 30 July 2010, an officer of the Bank who was then a commercial manager in the Bank's Commercial Collections and Recoveries Department, Mr Kevin Ryan, notified Mr Stevens by email[24] that the Bank would apply the auction proceeds to the BTL Account and that it would like to "finalise" that account and "start the process of getting your home loan up to date". At that point, there were two home loan accounts. One of them, HL Account 20259546, had a debit balance of $1,238,994.21. No repayments had been made on it for the months of April to July 2010 inclusive; however, interest of no less than $6,500 had been debited to that account for each of those months. For the other account, HL Account 20259549, the indebtedness then was $301,425.07. During the same months, interest had been debited monthly and only one repayment in an amount of a little more than one month's interest, had been made.[25]

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19 AB 167.
20 AB 168.
21 AB 169.
22 AB 170.
23 AB 172.
24 AB 189.
25 Payment was at the end of June 2010; AB 330.

[17] An affidavit sworn by a solicitor employed by the Bank's solicitors discloses[26] that the following events then occurred:

(a) On or about 6 August 2010, the Bank's solicitors drew a cheque on their trust account in the amount of $316,954.62 made payable to "Brett Stevens Transport Pty Ltd" pursuant to instructions received on 30 July 2010 from Mr Kevin Ryan, to deduct professional legal fees and charges from the net sale proceeds of $317,715.77 and remit the balance to the BTL Account;

(b) On 6 August 2010, $316,954.62 was deposited into the BTL Account. As at 29 July 2010 the balance owing on that account was $327,916.36. After the deposit on 6 August 2010, the balance owing on the account was $10,961.74;[27]

(c) On 10 August 2010, a total of $304,524.06 was then transferred from the BTL Account resulting in a debit balance of $315,385.80. The components of the money transferred were:

(i) three transfers totalling $68,963.22 to HL Account 20259546;
(ii) a transfer of $16,772.58 to HL Account 20259549;
(iii) five transfers totalling $177,058 to a business cheque account 20838088 conducted by Stevens Transport with the Bank;
(iv) a transfer of $9,000 to a business cheque account 20321065 conducted by Stevens Racing with the Bank;
(v) a transfer of $5,257.96 to Mr Stevens' account with another banking institution;
(vi) a transfer of $3,000 to a reverse charges account 20256742 conducted by Mr and Mrs Stevens with the Bank; and
(vii) three transfers totalling $24,472.30 to persons unrelated to Mr Stevens or his companies.

[18] This affidavit contains the statement,[28] admitted without objection, that the solicitors have been instructed by the Bank that the cheque was deposited into the BTL Account "under the misapprehension that (that account) had been frozen, the intended effect of the payment being to credit (that account) and reduce (Stevens Transport's) indebtedness" to the Bank. This statement implies that the Bank recognised that the restraining orders operated to freeze the account and that it was under a misapprehension that effective steps had been taken internally to freeze the account.

[19] So far as freezing the BTL Account is concerned, the prohibition against dealing with the property of Mr Stevens would extend to dealing with any property of an entity under his effective control.[29] As its sole director, Stevens Transport was

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26 Affidavit of Germaine Mei Lin Kee sworn 30 April 2012, paragraphs 19-20,21; AB 44-45.
27 AB 191.
28 At para 21.
29 CPC Act s 19(a)(iii).

under his effective control.[30] However, this account was in debit at all material times. Since the date on which the order was made, there appears never to have been a credit balance in the account as might have been regarded as property within the meaning of that term as defined in s 36 of the *Acts Interpretation Act* 1954 and s 19 of the CPC Act. It follows, in my view, that the order has never applied to the BTL account by reason of there having been a credit balance in it which would have qualified as property of Stevens Transport. It was never necessary for the Bank to freeze the account in order to prevent a dealing in it by way of a withdrawal of a credit balance. However, it was necessary for the Bank to freeze the account once the order was made because of the potentiality, which on the Bank's case, was realised, that an increase in the debit balance of the account by a withdrawal would effectuate a dealing in other property of Mr Stevens, namely, the land.

[20] I note also that there is no explanation in the evidence as to who was under the misapprehension or how it arose, what steps, if any, were taken to freeze the account and, if they were taken, whether and, if so, how they failed to prevent the transfers. However, her Honour did find that it was by mistake that the Bank did not freeze the account.[31] This finding was not challenged on appeal.

[21] Also unexplained was how it was that no steps were apparently taken upon termination of the facility in August 2009 to prevent further withdrawals from the BTL Account. In the Bank's own interests there would have been good reason to have taken such steps then, and even more so on 6 August 2010, when the amount of $316,954.62 was credited to the account and the debit balance was thereby very substantially reduced towards zero. An alternative measure that might have been taken was to have deposited that amount to a separate suspense account to which Mr Stevens did not have access. By not implementing such measures, the Bank ran the risk that the benefit of the payment it had received in hand upon realisation of the security over the Stevens Transport property would be lost through withdrawals allowed to be made from the BTL account. If that occurred, then, in place of that benefit, the Bank would have the less liquid and potentially problematic benefit of a commensurately increased indebtedness on the part of that company secured over land which by then was subject to both a restraining order and a forfeiture application.

[22] An affidavit[32] sworn by a senior manager at the Bank, Mr Dugald King, on 21 June 2012 states that Mr Stevens was the only person authorised to use the BTL Account and that the transfers and payments made from that account on 10 August 2010 were made by him using the Bank's internet banking service.[33] Mr King explains that such transfers and payments "are processed automatically, such that no positive action or authorisation by (Bank) personnel is required before those transfers/payments are effected".[34]

[23] On 27 August 2010, the Bank's solicitors wrote to Mr Stevens advising him that the Bank "has become aware" that the transfers to the housing loan accounts had been made on 10 August. This letter[35] contended that these transfers constituted use of

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30 CPC Act s 20; AB 150.

31 Reasons [15].

32 AB 503-4.

33 Notwithstanding, an email from Mr Stevens to a Bank officer, Mr Kumar, sent on 30 August 2010 (AB 426) indicates that it was his wife who effected the transfers to the home loan accounts.

34 At para 4(b)(iv).

35 AB 424-5.

the BTL Account facility for a different purpose from that for which it had been granted and that on that account, breach of that facility agreement and, consequently, of all other facilities, including the home loans, had occurred. Mr Stevens was given until 10 September 2010 to make satisfactory arrangements to repay or refinance the facilities in full. At that date, the total indebtedness under all the facilities was $1,779,025.68, including $314,651.96 owing on the BTL Account.

[24] Several days later, on 31 August 2010, the Bank's solicitors wrote[36] to Mr Stevens with a request that he arrange for a verified statement of financial position of himself and related entities and that he particularise the purpose for which money transferred from the BTL Account on 10 August to destinations other than the home loan accounts, was applied. Apparently, the Bank's requests were not met. An amount of $50,000 was paid by way of direct credit to Stevens Transport's cheque account on 1 September 2010. On the following day, the Bank, claiming to exercise a right of set-off, transferred that amount to the BLT Account, crediting it accordingly.

[25] Following the involvement in 2011 of the Financial Ombudsman Service in a conciliation conference convened to address issues between the Bank and Mr Stevens, Mr Stevens filed an application in the proceeding on 2 March 2012 for variation of the restraining orders in order to permit a sale of the land. The application was heard on 2 May 2012. The Bank, which had filed an application on 30 April 2012[37] for an order that it be joined as a respondent to this application, was represented at the hearing. Permission for a sale of the land to Bohica Nominees Pty Ltd at a sale price of not less than $2,230,000 was given. Orders were made for distribution of the proceeds of sale as follows:

- firstly, in payment of amounts owing to the Bank on the two home loan accounts;
- secondly, payment of a sum of $350,000 to the Public Trustee under s 32 of the CPC Act to be held on trust pending determination of the Bank's joinder application and of the issue whether the amount owing to the Bank on the BTL Account was to be paid from the proceeds of sale of the land; and
- thirdly, payment of the balance sale proceeds to the Public Trustee under s 32 pending finalisation of proceeding S1019 of 2009 in exchange for a withdrawal of the caveats that the State had lodged over the land.

[26] It is evident from these orders that an issue had arisen between the State and the Bank as to the extent of any legal entitlement the Bank had to have the indebtedness on the BTL Account discharged from the proceeds of sale of the land. The Bank claims an entitlement which extends to the whole of the indebtedness. The State concedes an entitlement to the extent of $10,961.74 only together with interest accruing thereon from 6 August 2010. It will be recalled that the balance owing on the BTL Account immediately after the deposit of $316,954.62 was made to it on that date and before the transfers were made from it on 10 August 2010 was $10,961.74. In summary, the State denies any entitlement on the Bank's part to the

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36 AB 428-9.

37 AB 616-7.

extent that indebtedness on the account was increased by the transfers made on that date.

[27] This issue was made the subject of litigation by a further application[38] filed by the Bank in the proceeding on 4 June 2012. In this application, the primary relief sought by the Bank was an order that so much of the proceeds of sale of the land as was necessary to discharge the outstanding balance of the BTL Account and to meet the Bank's costs of that application be excluded from any forfeiture. The relief was sought under s 65(2) of the CPC Act which permits a person who claims an interest in property to apply to the Supreme Court for an exclusion order.

[28] It remains to note that the sale to Bohica Nominees Pty Ltd did not eventuate. By consent, the restraining orders were again varied on 31 July 2012 to permit sale of the land to Defwom Property Management Pty Ltd for a sale price of not less than $2,200,000 subject to similar orders with respect to distribution of the proceeds of sale, modified in the case of the $350,000 to an order that it be held by the Public Trustee under s 32 pending determination of the Bank's application filed on 4 June 2012.

Decision at first instance

[29] The Bank's application for an exclusion order was heard on 22 June 2012. The Bank and the State were legally represented at the hearing. Mr Stevens indicated through his solicitor that he did not wish to participate actively in it. The affidavits to which I have referred were read as were several others filed on behalf of the State. No deponent was required for cross-examination.

[30] By an exclusion order made on 31 August 2012 under s 68(1) of the CPC Act, the learned judge at first instance declared that the Bank has an interest as mortgagee under the mortgagee in the land (Lots 100, 82 and 92) and that the Bank's interest in the land extends to the repayment of the total amount owing on the BTL Account. It was also ordered that, to the extent necessary, the proceeds of sale realised through exercise of the power of sale under the mortgage be applied to extinguish the debit balance of the BTL Account. Further, her Honour, by order, excluded the Bank's property to the extent stated in the exclusion order, from any forfeiture order that might be made in the proceedings. The State was ordered to pay the Bank's costs of the application on the standard basis.

[31] Putting to one side the breach of the restraining orders, her Honour was satisfied that the total indebtedness on the account was secured by the mortgage pursuant to the "all moneys" provision and that the Bank had a commensurate interest in the land for the purposes of s 68(2)(a) of the CPC Act.[39] This was not challenged on appeal. Her Honour thereby accepted that the Bank's interest had been increased by the amount of the withdrawals by transfer and, by inference, that the value of Mr Stevens' interest in the land had been correspondingly decreased.

[32] Her Honour noted that it was not argued by the State that the Bank had been in contempt of court.[40] However, she did find that on 10 August 2010 both the person who withdrew the moneys transferred and the Bank dealt with property which was

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38 AB 621-623.

39 Reasons [24].

40 Reasons [18].

restrained pursuant to the order made on 18 February 2009.[41] That finding was tantamount to a finding that both that person and the Bank had thereby breached the restraining orders on that date. In reaching that finding, her Honour attributed to the restraints against dealing with property imposed by the order, the expansive definition given to the expression "dealing with property" in the dictionary schedule to the CPC Act. In my view, given the express references to s 28 and s 31 of the CPC Act in the order, both of which are concerned with orders which restrain any person from dealing with property, her Honour's attribution of meaning was correct.

[33] This definition includes "engaging in a transaction that has the direct or indirect effect of changing the value of a person's interest in property".[42] In accordance with a submission made on behalf of the State,[43] her Honour found that the Bank had made an advance of money when the electronic system it had set up for the account was activated to make a withdrawal, and thereby participated in a transaction which had the effect of changing the value of its interest in the land and the mortgage.[44] In making this finding, her Honour considered that the Bank had "engaged" in the transaction notwithstanding that the withdrawals by transfer were made electronically by the account holder and without human intervention on the part of the Bank. That, too, in my view, was correct.

[34] Her Honour recorded that the State did not seek to rely on the voiding provision in s 52(3) of the CPC Act.[45] For the most part, the reasons addressed and argument advanced by the State that independently of s 52(3), the legal doctrine of illegality applied to render the transaction void and that on that account, it should not be given legal recognition by way of the exclusion order. Her Honour reasoned that s 52 was intended to state exhaustively the circumstances in which a dealing with property carried out in contravention of a restraining order is void.[46] That is to say, it leaves no room for the concurrent operation of the general doctrine with respect to such a dealing. Without deciding how the doctrine might have operated had it applied, her Honour noted that no illegal purpose could be attributed to the Bank, observing that although it might be said that the Bank neglected its own interests in failing to freeze the BTL Account, no bad faith could be attributed to it.[47]

[35] In the course of discussing the topic of illegality, her Honour made the following findings and observations:-

> "[24] Cases dealing with illegality generally have regard to the illegal purposes of those involved in impugned transactions. Here the only illegal purpose was on the part of the person who withdrew the money on 10 August 2010. No illegal purpose could be attributed to the bank. No bad faith could be attributed to the bank, although it might be said that it neglected its own interests in failing to freeze the account. Having regard to the terms of s 52(3) I think it is relevant that the bank paid away its own money, and in that sense gave full consideration for the transaction…

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41 Reasons [15].
42 Paragraph (da).
43 Reasons [14].
44 Reasons [14], [15].
45 Reasons [17].
46 Reasons [20].
47 Reasons [24].

> [25] Often in illegality cases there is a competition between a party with an illegal purpose and a party who is viewed by the Court as innocent. The situation here contrasts in the sense that both the State and the bank are free from any illegal purpose. The person who withdrew the money on 10 August 2010 presumably did have an illegal purpose and is the only person who has benefitted from the transaction. In such circumstances there is little attraction in an argument that the loss ought to lie where it falls."

No challenge was made in the appeal to the findings with respect to absences of illegal purpose and of bad faith on the part of the Bank.

The appeal

[36] By Notice of Appeal filed on 25 September 2012, the State appealed against the exclusion order. It seeks variations to the order which would have the effect that the proceeds of sale of the land are to be applied to extinguish the debit balance of the BTL Account to the extent of $10,961.74 together with interest accruing thereon from 6 August 2010, only. The State also appeals against the costs order and seeks an order that the Bank pay the State's costs of the application at first instance and of the appeal on the standard basis.

[37] The appeal was heard on 19 February 2013. Mr Stevens was notified of the hearing. There was no appearance on his behalf.

The grounds of appeal

[38] There are two sections of the CPC Act which are central to the State's grounds of appeal as summarised in oral argument. They are s 52 in Part 3 of Chapter 2 which deals with restraining orders and s 68 in Part 4 thereof which deals with exclusion orders. These sections are as follows:-

> "**52 Contravention of restraining order**
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> (1) A person who conceals restrained property or does another act or makes another omission in relation to restrained property with the intention of directly or indirectly defeating the operation of the restraining order commits a crime.
>
> Maximum penalty—350 penalty units or 7 years imprisonment.
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> (2) It is a defence to a charge of an offence against subsection (1) for the person to prove that the person had no notice that the property was restrained under a restraining order and no reason to suspect it was.
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> (3) A dealing with property in contravention of subsection (1) is void unless it was either for sufficient consideration or in favour of a person who acted in good faith.
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> …
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> **68 Making of exclusion order**
>
> (1) The Supreme Court, on an application under section 65 or 66, may make an exclusion order.

> (2) The Supreme Court must, and may only, make an exclusion order if it is satisfied—
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> (a) the applicant has or, apart from the forfeiture, would have, an interest in the property; and
>
> (b) it is more probable than not that the property to which the application relates is not illegally acquired property."

[39] An application may be made for an exclusion order pursuant to s 65(2) when an application for a forfeiture order is pending. If made in these circumstances, the exclusion order "excludes the applicant's property from the application for the forfeiture order": s 69(1)(b). I interpret this provision to mean that the order excludes the property concerned from the forfeiture order to the extent necessary to satisfy the applicant's interest in it. The orders made by her Honour reflect that interpretation.

[40] Mr Douglas QC who appeared for the State, distilled the State's case on appeal to two propositions. The first of them relates to s 68 and the second, to s 52.

[41] It may be noted that s 68(2) empowers the Supreme Court to make an exclusion order only if it is satisfied as to matters (a) and (b) therein. If it is so satisfied, then it must make the exclusion order. There is no residual discretion whether to make the order or not.

[42] The State's first proposition concerns matter (a). The Court was told emphatically that the State raised no issue with respect to matter (b).[48] Matter (a) is that the applicant has or, apart from the forfeiture, would have, an interest in the property. This proposition involves a series of contentions which, it is argued, yield the conclusion that her Honour could not have been satisfied that, at the time she made the exclusion order, the Bank had an interest in the land of a value beyond $10,961.74 together with interest thereon from 6 August 2010.

[43] The series of contentions on which the State relies are, first, that in dealing with the land on 10 August 2010 the Bank contravened the restraining order; second, that the Bank thereby committed an illegal act; third, that either by virtue of the common law doctrine of illegality or implied legislative intention, or both, the transaction by which the dealing was effected was void on that account, and in particular, and did not have the consequence of increasing the indebtedness of Stevens Transport to the Bank; and, fourth, that the Bank's interest in the land as a security for the indebtedness was not thereby increased.

[44] I ought mention here that at first instance, the dealing by the Bank on which the State relied as a breach by it of the restraining orders was its participation in the advances and withdrawals which took place on 10 August 2010. It was in that context that her Honour recorded at paragraph [17] of her reasons that "The State did not contend that the dealing by the bank was within s 52(1) …" and that "The State thus accepted that s 52(3) did not apply to the dealing which took place on 10 August 2010."

[45] In contrast to that, at the hearing of the appeal, the State contended that, the relevant dealing by the Bank was broader, it being one that began with the crediting by it of

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48 T 1-16 LL2-3.

the funds received from the Public Trustee to the BTL Account, continued by its retaining those funds in the account and concluded with advances made when the withdrawals by transfer took effect. To my mind, that conception of the operative dealing is too broad. Here, the relevant change in the Bank's interest in the land was the increase in it which occurred as a consequence of the withdrawals; it did not include the decrease in that interest which occurred earlier in consequence of the deposit of the funds to that account.

[46] In advancing the first proposition, the State contended that, at common law, any contravention of a restraining order is illegal and therefore void without regard for the quality of the contravening conduct, that is to say, without regard for whether it was wilful, negligent or merely inadvertent.[49] It also referred to several authorities concerning illegal transactions in a statutory context.[50] These authorities considered the circumstances in which a court would refuse to enforce a transaction entered into in contravention of a statutory provision where the statute concerned did not deal expressly with enforceability. Drawing on those authorities, the State also developed a second proposition which is centred upon s 52. It will be recalled that the provision criminalises conduct of intentionally defeating, directly or indirectly, the operation of a restraining order: subs. (1); provides an absence of notice defence: subs. (2); and, significantly for present purposes, renders void a dealing in property in contravention of subs (1) unless it was either for sufficient consideration or in favour of a person who acted in good faith: subs. (3).

[47] The State's second proposition is that s 52 does not "cover the field by way of civil remedy for breach of a restraining order".[51] More specifically, it is that the provisions of s 52(3) do not state exhaustively the circumstances in which a transaction entered into in contravention of a restraining order is void. This proposition contends for a concurrent parallel operation of s 52(3) and the common law doctrine of illegality.[52]

Section 52(3)

[48] Before considering these propositions, I think it appropriate to refer to several aspects to s 52(3) that featured in argument at first instance or on appeal. The first of them relate to interpretational aspects.

[49] The section is applicable only to a dealing with property "in contravention of subsection (1)". Whilst that subsection enacts that a person who carries out certain acts or omissions commits a crime, it does not use the word "contravention" or any variant thereof. Nor is it expressed as a required standard of conduct, the non-observance of which might be regarded as a contravention. Despite these infelicities, the context strongly suggests that s 52(3) must be read as referenced to a dealing in property which is constituted by an act or omission, or combination of them, that, by virtue of s 52(1), is a crime.

[50] Secondly, the section is subject to two exceptions. Significantly, those exceptions are joined by the word "or". Ordinarily, this word is used as a disjunctive. There is no reason for thinking that it is used otherwise here. Indeed, comparison with

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49 T 1-15 LL25-35.

50 Notably, *Nelson v Nelson* (1995) 184 CLR 538, *Equuscorp Pty Ltd v Haxton* [2012] HCA 7; (2012) 286 ALR 12; (2012) 86 ALJR 296.

51 T 1-2 LL54-56.

52 T 1-25 LL 10-12.

ss 50(1) and 63(1)(a) where the conjunction "and" is used, is apt to suggest that the choice of the disjunctive in s 52(3) was deliberate. In my view, it is clear that each circumstance which follows the word "unless" in the section operates as an exception to it independently of the other.

[51] As to other aspects, on appeal, the decision taken by the State in the litigation with respect to s 52 as her Honour had recorded it, was explained as being attributable to the Bank's not having intentionally contravened s 52(1) coupled with the necessary consequence that s 52(3) could not have been engaged. That outcome may be accepted as correct if the frame of reference for its operation is confined to the conduct of the Bank as a participant in the transaction which constituted the dealing with property found by her Honour.

[52] During the course of argument of the appeal, attention was drawn to the conduct of the other person who participated in the dealing. Had that person, by the manner of his or her participation, committed a crime against s 52(1), then s 52(3) would have been engaged to render the dealing void unless either of the exceptions applied. As to the first-mentioned exception, there was also some debate in argument as to whether her Honour's observation with respect to the Bank having given "full consideration" amounted to a finding made on a hypothetical basis that the Bank had given "sufficient consideration" for the purposes of the exception.

[53] However, at no point at first instance or on appeal has the State advanced an argument that s 52(3) had been so engaged by the conduct of the other person; that neither exception applied; and that, as a consequence, the dealing was void by operation of that section. No occasion for the Bank to respond to such an argument arose and it has not done so. For that reason alone, it is not open to this Court to resolve the appeal by adoption of an argument along those lines. Besides, there are additional reasons which would preclude this Court from taking that course.

[54] First, although her Honour stated[53] that "the only illegal purpose was on the part of the person who withdrew the money on 10 August 2010", she did not find that that person committed a crime under s 52(1). Such a finding would require satisfaction on the Court's part to, the requisite standard, on the issue of intent. Here, as noted, the evidence suggested that it was Mrs Stevens who effected the withdrawals.[54] However, there was no evidence that she herself knew of the contents of the restraining orders. Furthermore, those orders did not themselves refer specifically to the BTL Account as an item of restrained property. To have known that a withdrawal from that account was a dealing which was prohibited by the orders would have required knowledge at least of the structure of the securities under which the land was security for indebtedness on the BTL Account. Here, too, there was no evidence of such knowledge on the part of Mrs Stevens.

[55] Secondly, so far as the finding of the Bank having given "full consideration" is concerned, it seems that her Honour's attention was not directed to, and she did not have regard for, the definition of "sufficient consideration" in Schedule 6 of the CPC Act, namely:

> "in relation to property means a consideration, that, having regard solely to commercial considerations, reflects the value of the interest."

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53 At reasons [24].

54 Notwithstanding, an email from Mr Stevens to a Bank officer, Mr Kumar, sent on 30 August 2010 (AB 426) indicates that it was his wife who effected the transfers to the home loan accounts.

On that account, I am unable to regard her Honour's finding as equivalent to a finding that sufficient consideration was given by the Bank for the purposes of the exception.

[56] The reference to "commercial consideration" in the definition might well cause one to question whether advances which were made under a facility that the Bank had said that it had terminated a year earlier and which were the result of withdrawals that the Bank some weeks later characterised as having been made for a purpose beyond those for which the facility was granted, would satisfy the statutory definition. A countervailing consideration might well be that the increase in indebtedness to the Bank resulting from the withdrawals was secured and in that sense reflected the value of the moneys advanced when the withdrawals were made. Nevertheless, the operation of the exception was not put in issue by the State. Consequently, all evidence relevant to its operation may not have been adduced, nor arguments upon its operation fully formulated or put. Accordingly, it is not an issue on which this Court is in a position to make a finding either way.

[57] Thirdly, and in any event, there are her Honour's findings that neither an illegal purpose nor bad faith could be attributed to the Bank.[55] There is no appeal against these findings. For the purposes of the second exception, the relevant enquiry is whether in participating in the dealing which resulted in an increase in its interest in the land, the Bank acted in good faith. Whilst these findings are not precisely in those terms, the absence of any challenge to them effectively precludes this Court from making a concurrent finding that the Bank did not act in good faith.

[58] I now turn to consider each of the State's propositions advanced on appeal.

Proposition 1 – doctrine of illegality

[59] The first of the contentions in this proposition, that the order was contravened by the Bank when it dealt with the land on 10 August 2010, is uncontroversial. The second of them requires some elucidation. The description as an illegal action on the Bank's part of its participation in the transaction that constituted the dealing in the land is referable solely to there having been a breach of the restraining orders as lawfully-made and enforceable orders of the court. It is not to be understood as encompassing attributes either of illegal purpose which her Honour found could not be attributed to the Bank,[56] or of contempt of court which the State has not argued had been committed by the Bank.[57] In this respect, this case differs significantly from other cases referred to in argument, notably *Nelson v Nelson*[58] where enforcement was sought of an agreement made for the purpose of circumventing a benefits scheme and *Equuscorp Pty Ltd v Haxton*[59] where loan agreements were made in furtherance of an illegal purpose by the party that sought recovery under them.

[60] It is upon the third contention that argument focused at the hearing of the appeal. This contention is that the transaction was void and therefore did not have the consequence of increasing the indebtedness of Stevens Transport to the Bank. For this contention, the State seeks to invoke the doctrine of illegality from two different

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55 Reasons [24].
56 Reasons [24].
57 Reasons [18].
58 (1995) 184 CLR 538.
59 [2012] HCA 7; (2012) 286 ALR 12; (2012) 86 ALJR 296.

approaches. The first of them attributes directly the void character of the transaction to the contravention of the restraining orders. The second is referenced to the statutory setting in which those orders were made and attributes directly the void character of the transaction to a perceived contravention of the policy of the CPC Act.

[61] In support of the first-mentioned approach, reference was made by the Bank to several cases, none of which is factually similar to this case. The case of *Clarke v Chadburn*[60] concerned changes made to the rules of a trade union at a conference notwithstanding that a restraining order made by Chancery Division of the High Court had ordered that resolutions for those changes not be put or voted upon. The issue was whether the resolutions that were passed were void. In concluding that they were void for illegality, Sir Robert Megarry V-C stated:

> "The point seems to be wholly devoid of any direct authority. Mr. Burton could cite none, and although I took a little time to consider the matter, I could find none. Mr. Burton says that the change of rules altered the contract between the N.U.M. and the plaintiffs, and an alteration of a contract, like the making of a contract, is liable to be invalidated by illegality; and to do something in breach of an order of the court must inevitably be illegal. Mr. Burton cited various authorities on illegality as affecting contracts, but I did not find them of much help. I have to consider the point as a matter of principle.
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> I need not cite authority for the proposition that it is of high importance that orders of the court should be obeyed. Wilful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal. If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of court for doing what they did, nevertheless those acts were validly done. Of course, if an act is done, it is not undone merely by pointing out that it was done in breach of the law. If a meeting is held in breach of an injunction, it cannot be said that the meeting has not been held. But the legal consequences of what has been done in breach of the law may plainly be very much affected by the illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them."[61]

[62] His Lordship was concerned with "wilful disobedience" of a court order in defiance of a prohibition contained in it. That circumstance was highlighted by Owen J in *Bank of Western Australia v Ocean Trawlers Pty Ltd*[62] in which an application was made for declarations that certain share sales were illegal and void as having been transacted in breach of a Mareva injunction. The vendor knew of the injunction but the party who ultimately acquired the shares had no knowledge of it. After citing the passage from *Clarke* to which I have referred, his Honour observed:

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60 [1985] 1WLR 78.

61 At pp 80G-81C.

62 (1995) 13 WAR 407.

> "With respect, I think that this is a most apt description of a basic principle. There is a clear public policy in favour of, and a clear public interest in, a court jealously guarding the integrity of its own procedures. Respect for the administration of justice and for the role of the courts as protectors of individual rights would be seriously at risk were it to be seen that court orders could be ignored with impunity. Nonetheless, I think each situation has to be looked at closely and judged according to its circumstances. What Sir Robert Megarry had before him was a deliberate and contemptuous flouting of a clear order. There could be no doubt, and there was an express finding that the parties enjoined had notice of the order and embarked on a course of action that they knew to be in breach of the restraints. In those circumstances, the Vice-Chancellor had no hesitation in moving to deprive the guilty parties of any gain from their illegal endeavours. He referred, in the dicta that I have quoted, to 'wilful disobedience' and to 'such' disobedience being illegal. He focused on those who 'defy' a prohibition and to the fruits of such 'defiance'. These concepts can, and in my opinion should, be applied to a transaction where the parties act with knowledge of the breach. The question that I have to decide is whether they also apply where a party takes without notice of the breach.
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> I have not found any case in any Australian jurisdiction (or for that matter in the United Kingdom) in which *Clarke* has been considered. I, too, must go back to basic principles."[63]

[63] As to those principles, Owen J commented:

> "There is an inevitable tension between the public policy in the enforcement of court orders and the private rights of an individual who has become involved in a questionable transaction. Generally, public policy will override private rights: see *Wilkinson v Osborne* (1915) 21 CLR 89 at 94. But what if the individual enters the transaction without adequate knowledge of the questionable circumstances? There is some debate as to whether the class of cases which the common law regards as illegal on grounds of public policy is closed. I do not think that a case of this nature would involve inventing a new head of public policy. One of the existing and well recognised heads is a contract prejudicial to the administration of justice. In discussing the nature of this vitiating factor the authors of *Cheshire and Fifoot's Law of Contract* (5th Aust ed, 1988), par 1103, pose the question: 'Which of the contracts that have been frowned upon by the courts are so patently reprehensible – so obviously contrary to public policy – that they must peremptorily be styled 'illegal'?' In *Fender v St John-Mildmay* [1938] AC 1 at 12 Lord Atkin said:
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> > '…the doctrine should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds, I think this should be regarded as the

63 At p 436.

> true guide. In popular language,…, the contract should be given the benefit of the doubt.'
>
> Courts of equity have always recognised, and protected the position of a bona fide purchaser for the value without notice. Circumstances such as the present disclose further tensions between public policy in its broadest sense and the role of the court in its equity jurisdiction."[64]

Consistently with these comments, his Honour refused to grant the declaratory relief sought.

[64] Reference was also made, by the State to one other case in which a Mareva injunction was breached. In *Z Bank v D1*,[65] a foreign bank was restrained from removing any of its assets from the jurisdiction. It knew of the injunction but, notwithstanding, several of its officers continued to operate an account which it held with Bankers Trust within the jurisdiction. Bankers Trust was never advised of the injunction. These were contempt proceedings in which penalty by way of sequestration was sought against the foreign bank. No question arose as to whether any transactions on the account were void or not. It appears to have been assumed that as between the foreign bank and Bankers Trust, the contravening transactions were not void. The decision of Colman J was drawn to this court's attention for its discussion of the appropriate penalty for contempt where the contemnor has been negligent. His Lordship observed:

> "That is not to say that the Court is obliged to punish every neglectful contempt. Clearly, unless the contempt is "casual or accidental and unintentional" some penalty will normally be appropriate in support of the proper administration of justice and the protection of the orders of the Court: see Lord Wilberforce in *Heatons Transport*,[66] sup., at p. 109E. That, however, does not mean that there are no cases of negligent contempt where a penalty in the form of committal or sequestration would be appropriate. For example, where a contemnor had committed an isolated breach of a *Mareva* injunction due to the negligence of those responsible for giving appropriate orders to junior staff or perhaps due to having received negligent legal advice and had attempted to purge the contempt by restoring the status quo as far as possible, it might well be quite unnecessary for the protection of the administration of justice for any penalty to be imposed. Where by contrast there has been a very culpable degree of negligence which has resulted in numerous breaches of the Court's order involving the abstraction of large sums of money, it will often be appropriate to impose not merely a nominal penalty but one which will be recognised as reflecting the serious view taken by the Court of the failure to comply with its orders.
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> In my judgment the present case clearly falls into the latter class. Here the degree of negligence on the part of those responsible for the administration of the bank and for advising those who managed it,

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64 At pp 436-7.

65 [1994] 1 Lloyd's Rep 656.

66 *Heatons Transport (St Helens Colliery) Ltd v Transport and General Workers Union* [1973] AC 15.

> notably Mr. A. and Mr. B. was considerable. There were repeated breaches of the order extending over a period of 5 months. When the bank came to appreciate that it had been in breach it failed to restore to the Bankers Trust account anything like sufficient funds to restore the status quo."[67]

Leave to issue a writ of sequestration against the foreign bank's assets was granted with execution stayed for 14 days in which the foreign bank might restore the Banker's Trust account.

[65] To my mind, none of these cases stands as authority for a principle of general law that any transaction entered into in breach of a court order is void and unenforceable without regard for the character of the breach. They do indicate that the transaction will be unenforceable where it is entered into with intent to breach the order but even in such a case, the transaction may be enforced by an innocent party to it who has acted *bona fide* and given good consideration for it. In the case of the careless contravener, the decision in *Z Bank* suggests that whilst that person may be liable to a civil penalty for contempt of the court, the transaction is not void and is not unenforceable by the person. I therefore do not accept that such a principle would have applied with the result that the advances made by the Bank when the withdrawals by transfer occurred would have been irrecoverable by the Bank on either a contractual or a restitutionary basis.

[66] The second approach taken by the State impliedly acknowledges, as is the case, that under the scheme of the CPC Act, an express prohibition against dealing in property is imposed directly by the restraining order which imposes it, and not by the Act itself. It is on account of that circumstance that this approach looks to the policy of the CPC Act, and not to any specific sanction within it. This approach seeks to infer from policy a legislative intention that any and every dealing in property in contravention of a restraining order made under the CPC Act is void and unenforceable.

[67] The observations of McHugh J in *Nelson*[68] quoted by Heydon J in *Equuscorp*[69] and by her Honour[70] offer guidance on when a court will sanction conduct beyond any sanction for which the legislation which impugns it as illegal, expressly provides. The quotation by Heydon J, which omits footnotes and places due emphasis, is as follows:

> "If courts withhold relief because of an illegal transaction, they necessarily impose a sanction on one of the parties to that transaction, a sanction that will deprive one party of his or her property rights and effectively vest them in another person who will almost always be a willing participant in the illegality. Leaving aside cases where the statute makes rights arising out of the transaction unenforceable in all circumstances, such a sanction can only be justified if two conditions are met.
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> First, the sanction imposed should be proportionate to the seriousness of the illegality involved. It is not in accord with contemporaneous

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67 At p 668.
68 At pp 612-3.
69 At [122].
70 Reasons [19].

> notions of justice that the penalty for breaching a law or frustrating its *policy* should be disproportionate to the seriousness of the breach. The seriousness of the illegality must be judged by reference to the *statute* whose terms or policy is contravened. It cannot be assessed in a vacuum. The *statute* must always be the reference point for determining the seriousness of the illegality; otherwise the courts would embark on an assessment of moral turpitude independently of and potentially in conflict with the assessment made by the *legislature*.
>
> Second, the imposition of the civil sanction must further the *purpose of the statute* and must not impose a further sanction for the unlawful conduct if *Parliament* has indicated that the sanctions imposed by the *statute* are sufficient to deal with conduct that breaches or evades the operation of the *statute* and its *policies*. In most cases, the statute will provide some *guidance*, express or inferred, as to the *policy of the legislature* in respect of a transaction that contravenes *the statute or its purpose*. It is this *policy that must guide* the courts in determining, consistent with their duty not to condone or encourage breaches of the statute, what the consequences of the illegality will be. Thus, the *statute* may disclose an *intention*, explicitly or implicitly, that a transaction contrary to *its terms or its policy* should be unenforceable. On the other hand, the *statute* may inferentially disclose an *intention* that the only sanctions for breach of the *statute or its policy* are to be those specifically provided for in the *legislation*." (Emphasis added)

[68] It is the second condition identified by McHugh J that is of particular relevance here. During the course of submissions, reference was made to a number of provisions in the CPC Act: s 4 which states the objects of the Act; s 10 which ensures the operation of any other law providing for the forfeiture of property; s 13 which explains Chapter 2; and ss 28, 30A and 31 which concern application for, and the making of, a restraining order. Having reflected upon those provisions, I am unable to draw from them an indication of a legislative intention that every dealing in property in contravention of a restraining order is to be unenforceable.

[69] The concluding observation of McHugh J in his discussion of the second condition draws attention to inferential disclosure of a legislative intention that the only sanctions for breach of a statute or its policy are those specifically provided for in the legislation. To my mind, s 52 has a significant role to play in this respect. Division 8 of Part 3 in which the section is located is headed "Other provisions about restraining orders" and the section itself is headed "Contravention of restraining order". The section criminalises conduct carried out intentionally to defeat the operation of a restraining order, provides a defence to a charge of that offence, and then enacts that a dealing in property in contravention of the section is void, subject to the two exceptions.

[70] The location of the section within Division 8, the headings and the section's operative provisions together are indicative of a legislative intention that s 52 deal comprehensively with the topic of contravention of a restraining order and its criminal law and civil law consequences. In particular, in legislating for avoidance of a dealing in property where there is intention to defeat a restraining order, the provisions of s 52(3) rather imply that the legislature did not intend that a dealing with property where there is no such intent also be void.

[71] Other considerations confirm that implication in my view. One consideration is that as a restraining order is made under a jurisdiction conferred by statute, there is reason to expect that the governing statute will deal expressly with all, and not some only, of the consequences that the legislature intended are to flow from a breach of an order.

[72] A second consideration is that it is unlikely that the legislature intended that other dealings in property in breach of a restraining order also be void but without the relief offered by the exceptions in s 52(3). Particularly is this so where the class of other dealings would include less culpable contraventions not involving an intention to defeat the operation of the order.

[73] Thirdly, and at a much more general level, as Professor Carter observes:

> "The topic of illegality is one of the least satisfactory branches of contract law. This is perhaps more true of the consequences of the illegality than the issue of when a contract is in fact illegal or contrary to public policy, but it is also true of the concept of illegality itself."[71]

Given the uncertainties that attend this legal topic, there is reason to suppose that the legislature enacted for certainty by defining the circumstance in which it intended that a dealing with property in contravention of a restraining order be void.

[74] For these reasons, I do not accept the second approach taken by the State in Proposition 1. I conclude that the third contention on which this proposition depends, fails as does the proposition itself.

[75] For completeness, I note that the State did not submit, at first instance or on appeal, that the rule of statutory construction that no person can take advantage of their own wrong is applicable to preclude the making of an exclusion order in the Bank's favour. This rule was referred to recently by this Court in *Meridien AB Pty Ltd & Anor v Jackson & Ors*.[72]

[76] It is understandable that the State did not seek to avail of that rule. Neither s 65(2) or s 68(1) is expressed ambiguously. The mandatory provision in the second of them for making an exclusion order would leave little scope for its application.[73] Furthermore, application of the rule in circumstances of a non-intentional wrongdoing, is problematic.

Proposition 2

[77] This proposition, namely, that s 52(3) does not "cover the field by way of civil remedy for breach of a restraining order", could avail the State only if Proposition 1 is valid. In the course of examining the second approach to that proposition, I have expressed my conclusion that s 52(3) states exhaustively the circumstance in which the legislature intended that a dealing in property in contravention of a restraining order be void. In light of that conclusion and the reasons I have given for it, I do not accept this proposition either.

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71 *Carter on Contract*, Vol 2 para [27-001].

72 [2013] QCA 121 at [20]-[27], citing *Thompson v Groote Eylandt Mining Co Ltd* (2003) 173 FLR 72.

73 See *Davenport v The Queen* (1877) 3 App Cas 115 at 121.

Conclusion

[78] In my view, the advances made by the Bank, which arose when the withdrawals by transfer were made from the BTL Account on 10 August 2010, were not void. The Bank's right to recover the further indebtedness created by those advances was a right that was legally enforceable. Her Honour was entitled to hold, as she did, that the Bank's interest in the land as a security was increased by the amount of that indebtedness and to make the orders she made.

Disposition

[79] In accordance with these reasons, I consider that the appeal should be dismissed.

Orders

[80] I would propose the following orders:

1. Appeal dismissed.
2. Appellant to pay the first respondent's costs of the appeal on the standard basis.

[81] **ATKINSON J:** This is an appeal from an order excluding certain property from the ambit of a forfeiture order sought under the *Criminal Proceeds Confiscation Act* 2000 (Qld) ("the Act"). The appellant, State of Queensland, submitted that a transaction between the respondents on 10 August 2010 was vitiated by illegal conduct on the part of the Bank of Queensland ("the bank"). That illegal conduct was the contravention or breach of a restraining order imposed by the court. Nothing, it submitted, in the Act derogates from that proposition where the bank is the contravening party and itself, not some third party, seeks to take advantage of the contravention.

[82] To understand whether or not the bank was entitled to the exclusion order it is necessary to set out an overview of the Act and a history of this proceeding.

The Legislative Scheme

[83] The Act, which came into force on 1 January 2003, was introduced to provide further disincentives against illegal activity and organised crime by removing the need to secure a conviction before the State could commence confiscation proceedings. Prior to the introduction of the Act, recovery action was limited to the profits of a specific offence.[74] The main object of the Act as set out in s 4(1) is to remove the financial gain and increase the financial loss associated with illegal activity, whether or not a conviction is obtained. Chapter 2 of the Act deals with confiscation of property without conviction and Chapter 3 with confiscation after conviction.

[84] Under the scheme of the Act, the Crime and Misconduct Commission (CMC) can institute proceedings on behalf of the State of Queensland. As a preliminary step, the Act enables the Supreme Court "to make a restraining order preventing property, whether the property of the person who engaged in the relevant illegal activity or the serious crime derived property of someone else, being dealt with without the court's leave."[75]

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74 See *Crimes (Confiscation) Act* 1989 (Qld).

75 Section 13(3). See generally s 13.

[85] Part 3 of Chapters 2 and 3 of the Act sets out the statutory framework for restraining orders. I shall refer specifically to the sections in Chapter 2 noting that the provisions in Chapters 2 and 3 are in similar terms. Pursuant to s 28(1):

> "The State may apply to the Supreme Court for an order ('restraining order') restraining any person from dealing with property stated in the order (the 'restrained property') other than in a stated way or in stated circumstances."

[86] The potential ambit of an application is broad. Under s 28(3) of the Act, the application may relate to all of the property of a person suspected of having engaged in one or more serious crime related activities (the "prescribed respondent"). A "serious crime related activity" is "anything done by a person that was, when it was done, a serious criminal offence."[76] A "serious criminal offence" is defined as, *inter alia*, an indictable offence for which the maximum penalty is at least 5 years imprisonment.[77] The provision applies:

> "whether or not the person has been charged with the offence or, if charged –
>
> (a) has been tried; or
> (b) has been tried and acquitted; or
> (c) has been convicted, even if the conviction has been quashed or set aside."[78]

[87] "Property" is defined widely in s 19 of the Act as follows:

> "***Property*** of a person —
>
> (a) includes —
>
> (i) an interest the person has in a licence a person must hold to carry on a particular business; and
> (ii) an interest the person has in the goodwill of a business; and
> (iii) property of someone else that is under the effective control of the person; and
>
> (b) does not include property of the person that is under the effective control of someone else.
>
> *Note —*
>
> This provision is in addition to the definition of property given by the *Acts Interpretation Act 1954*, section 36."

[88] Section 20 of the Act gives a very wide meaning to "effective control of property" referred to in s 19(a)(iii).

[89] The definition of "property" in the *Acts Interpretation Act* 1954 is also in very wide terms. It provides:

> "***property*** means any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes things in action."

[90] The definition of "dealing with property" found in Schedule 6 of the Act is also in extremely wide terms. It includes:

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76 s 16(1).
77 s 17.
78 s 16(2). See also Schedule 2, Part 1.

"(a) acquiring the property; and
(b) disposing of the property ; and
(c) encumbering the property; and
(d) if property is a debt — making a payment to anyone to reduce the amount of the debt; and
(da) engaging in a transaction that has the direct or indirect effect of changing the value of a person's interest in the property; and
(e) removing the property from Queensland; and
(f) receiving or making a gift of the property; and
(g) vesting the property in a person while administering the estate of a deceased; and
(h) dealing with the property in another way; and
(i) attempting to do a thing mentioned in paragraph (a), (b), (c), (d), (da), (e), (f), or (g) or to deal with property in another way."

[91] The State may make an application for a restraining order without giving notice to the person to whom it relates.[79] The application must, however, be accompanied by an affidavit in support from an authorised officer of the CMC or a police officer.[80] That officer must state that he or she suspects the prescribed respondent has engaged in one or more serious crime related activities and has derived proceeds from those activities.[81] The content of the affidavit depends on the ownership of the property and the nature of the serious crime related activity. For offences which may be described as "intrinsically 'proceeds-orientated' offences and generally associated with organised crime"[82] such as murder, extortion, bribery, corruption, money laundering, prostitution, gambling, child pornography and crimes involving dangerous drugs,[83] the officer must state a suspicion that the prescribed respondent has engaged in one or more serious crime related activities and support this suspicion with reasons.[84] There is an additional threshold test for any other indictable offence punishable by five years or more but not falling within the ambit of Schedule 2, Part 1. The officer must state that he or she has a reasonable suspicion that the prescribed respondent has derived proceeds from engaging in one or more of those serious crime related activities.[85] An application for a restraining order against property of a person other than the prescribed respondent can be made if the officer states a suspicion that the property itself is serious crime derived property.[86]

[92] The meaning of "serious crime derived property" is found in s 23 of the Act which provides:

"(1) Property is ***serious crime derived property*** if it is all or part of the proceeds of a serious crime related activity.
(2) Property is also ***serious crime derived property*** if—

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79 s 28(2)(b).
80 s 28(2)(a).
81 ss 29(1)(b)(i), (ii).
82 Explanatory Memorandum, Criminal Proceeds Confiscation Bill, 2002, 13.
83 See Schedule 2 Part 1. It should be noted, however, that not all of those offences are necessarily associated with organised crime.
84 s 29(1)(a).
85 s 29(1)(b).
86 s 29(1)(c). See also s 29(1)(d).

(a) it is all or part of the proceeds of dealing with serious crime derived property; or

(b) all or part of it was acquired using serious crime derived property.

(3) For subsection (2), it does not matter whether the property dealt with or used in the acquisition became serious crime derived property because of subsection (1) or subsection (2).

(4) Subsections (1) and (2) apply whether or not the activity, dealing or acquisition because of which the property became serious crime derived property happened before the commencement of this section.

(5) Also, if the proceeds of dealing with serious crime derived property are credited to or placed in an account, the proceeds do not lose their identity as proceeds because they are credited to or placed in an account."

[93] Section 25 of the Act provides that serious crime derived property retains its character - even if it is disposed of, including by using it to acquire other property - until it stops being property of that character under s 26 of the Act:

"**26. When property stops being illegally acquired property or serious crime derived property**

Property stops being illegally acquired property or serious crime derived property—

(a) when it is acquired by a person for sufficient consideration, without knowing, and in circumstances not likely to arouse a reasonable suspicion, that the property was illegally acquired property or serious crime derived property; or

(b) when it vests in a person on the distribution of the estate of a deceased; or

(c) when it is disposed of under this Act, including when discharging a pecuniary penalty order or a proceeds assessment order; or

(d) when it is the proceeds of the disposal of property under this Act other than by sale under a condition of a restraining order or by order of the Supreme Court under section 46 or 138; or

(e) when it is acquired by Legal Aid as payment of reasonable legal expenses payable because of an application under this Act or in defending a charge of an offence; or

(f) in circumstances prescribed under a regulation."

[94] Section 27 of the Act provides that if property that was serious crime derived property is again acquired by the person who owned it when it had that character, the property again becomes property of that character.

[95] The Supreme Court must make a restraining order in relation to the relevant property if, after considering the application and the supporting affidavit, the court "is satisfied there are reasonable grounds for the suspicion on which the application is based."[87]

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87 s 31(1).

[96] Proceedings under this Act are civil. Questions of fact must, therefore, be decided on the balance of probabilities.[88] The court may refuse to make an order if it appears that it is not in the public interest or that the State has not given the Court the appropriate undertakings for the payment of damages or costs regarding the order.[89]

[97] The restraining order must expressly state the property to which it applies.[90] Every order includes a condition that the owner of the restrained property must undertake steps to preserve the property.[91] The court may impose any other condition it thinks appropriate such as a condition regarding who is to have possession of the property.[92]

[98] Ancillary to the restraining order provisions are provisions enabling the court to make other orders under Div 3 of Part 3 of Chapter 2 including administration[93] and investigation orders[94] to facilitate due investigation into the restrained property. Additionally, the Supreme Court may direct restrained property to be sold in some circumstances such as if the property may rapidly deteriorate or lose value.[95] When such a sale takes place, s 26(d) ensures that the proceeds do not lose their identity as illegally acquired property or serious crime derived property.

[99] It is an offence to do an act or make an omission in relation to restrained property with the intention of defeating the operation of a restraining order.[96] The Act provides for certain transactions entered into when that offence has been committed to be void. As these are significant for the determination of this appeal, I shall set out the relevant provisions of s 52 of the Act in full:

> "**52 Contravention of restraining order**
>
> (1) A person who conceals restrained property or does another act or makes another omission in relation to restrained property with the intention of directly or indirectly defeating the operation of the restraining order commits a crime.
>
> Maximum penalty—350 penalty units or 7 years imprisonment.
>
> (2) It is a defence to a charge of an offence against subsection (1) for the person to prove that the person had no notice that the property was restrained under a restraining order and no reason to suspect it was.
>
> (3) A dealing with property in contravention of subsection (1) is void unless it was either for sufficient consideration or in favour of a person who acted in good faith."

[100] The Act sets out the procedure by which a prescribed respondent may apply for the exclusion of particular property from a restraining order.[97] The timeframe for such

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88 s 8.

89 s 31(2).

90 See s 31(4).

91 s 32(1).

92 See s 32(2).

93 See ss 37, 38.

94 See ss 38A – 42.

95 s 46. This section only applies if the restrained property is the subject of an application for a forfeiture order which has not yet been decided. The proceeds of a sale are similarly restrained under the restraining order.

96 s 52.

97 s 47.

an application is limited, however, because it must be made before the State applies for a forfeiture order. The Supreme Court may grant an exclusion order if it is satisfied the property is not likely to be illegally acquired property.[98] The timeframe limitations do not apply to an application brought by a person other than the prescribed respondent.[99] The court may exclude the applicant's property if it is satisfied the applicant has a bona fide interest in the property: the property was acquired in good faith, for sufficient consideration and without knowledge that the property was illegally acquired.[100]

[101] Part 4 of Chapter 2 and Chapter 3 sets out the framework for obtaining forfeiture orders. The State may apply for a forfeiture order with regard to property subject to a restraining order.[101] Under s 58, the court must make a forfeiture order if it concludes "it is more probable than not that… the prescribed respondent mentioned in that application engaged… in a serious crime related activity"[102] during the statutorily set limitation period of six years.[103] Forfeiture of serious crime derived property is permitted even if the person who engaged in the activity remains unidentified.[104] Forfeited property is vested in the State of Queensland.[105] Contravention of a forfeiture order carries a maximum penalty of seven years imprisonment.[106]

[102] Section 58(4) provides a public interest exception: the court may refuse to make a forfeiture order if it is satisfied it is not in the public interest to do so.[107] Once a forfeiture order is made, the Act prescribes hardship order provisions which allow the court to provide for innocent dependants despite the operation of the order.[108] The court may also, where the circumstances in s 63(1) are satisfied, make orders discharging an encumbrance. Such orders may be made where the court is satisfied an encumbrancee took an encumbrance over property to be forfeited under a forfeiture order:

(1) in good faith;

(2) for valuable consideration; and

(3) in the ordinary course of the encumbrancee's business.

[103] Subdivision 4 of Division 2 of Part 4 of the Act provides for the exclusion of property from forfeiture under an exclusion order. Section 65 provides a person may apply to the Supreme Court for an exclusion order in respect of property which is the subject of a pending forfeiture order. Similar to the procedure regarding restraining orders, the application for an exclusion order may be made by a person, including the prescribed respondent, who claims an interest in property to which the application relates.[109] The State must give notice to the applicant if it intends to

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98 See s 48.
99 See s 49.
100 s 50.
101 s 56.
102 s 58(1).
103 s 58(9).
104 ss 58(1)(b), 58(2); Explanatory Memorandum, Criminal Proceeds Confiscation Bill 2002, 10.
105 s 59.
106 s 60(1). Contravention of a restraining order carries the same penalty.
107 s 58(4).
108 See s 62.
109 s 65 (2).

oppose the application.[110] If a forfeiture order has been made, the exclusion order application must be filed within six months or an applicant must seek leave to apply for the exclusion of an interest in property.[111]

[104] Section 68(1) provides that the Supreme Court may make an exclusion order on an application under s 65. Section 68(2) prescribes the evidentiary burden incumbent on the court in determining such applications:

> "The Supreme Court must, and may only, make an exclusion order if it is satisfied –
>
> (a) the applicant has, or, apart from the forfeiture, would have, an interest in the property; and
>
> (b) it is more probable than not that the property to which the application relates is not illegally acquired property."

[105] Section 69(1)(a) provides that an application for an exclusion order is an order that:

> "states the nature, extent and, if necessary for the order, the value, when the order is made, of the applicant's interest in the property".

If the application for the forfeiture order has not yet been decided, an exclusion order operates to exclude the applicant's property from the application of the forfeiture order.[112]

History of the applications and orders made in this proceeding

[106] A restraining order was made in this case by Douglas J sitting in the applications jurisdiction on an *ex parte* application on 30 January 2009. That order restrained dealing in the following property of Brett Stevens:

> "1. Under ss.28(3)(a)(i) and 31(1) of the *Criminal Proceed[s] Confiscation Act 2002* ('the Act') none of the BRETT RAYMOND STEVENS property stated below ('the restrained property'), shall be dealt with by any person:
>
> (a) 2006 Ford Falcon BF XR8 Jack Daniels Racing Top Doorslammer;
>
> (b) 2000 Ford Mustang, Kitten Car Care Products Top Alcohol Funny Car;
>
> (c) 2006 Ford Falcon BF XR8 Mack Top Doorslammer;
>
> (d) 2006 Ford Falcon BF XR8 Makita Top Doorslammer;
>
> (e) 2006 Ford Falcon BF XR8 SP Racing Top Doorslammer;
>
> (f) 2005 Ford Falcon BA XR8 Jack Daniels Burnout Ute, owned by Brett STEVENS;
>
> (g) Jack Daniels Racing Top Bike 800hp Nitro Harley;
>
> (h) SP Racing Top Bike 800hp Nitro Harley;
>
> (i) Mack Top Bike 800hp Nitro Harley;
>
> (k) Makita Top Bike800hp Nitro Harley;
>
> (l) Kitten Pro Stock S&S Powered Pro Stock Buell."

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110 See ss 65(6) – (8).

111 s 66. See also s 67.

112 s 69(1)(b).

[107] The order further provided that the Public Trustee take possession of the restrained property described in paragraph 1(a) to (i). On 3 February 2009, Fryberg J made an order correcting a clerical mistake so that the Public Trustee was able to take possession of the restrained property described in paragraphs 1(a) to (l).

[108] On 4 February 2009, the Director of Public Prosecutions ("DPP") notified the bank that he was acting for the State of Queensland in the proceeding under the Act and served the originating application for restraining order filed by leave of the court on 30 January 2009 and informed the bank that it was returnable at the Supreme Court on 18 February 2009. On 13 February 2009 the DPP sent another letter to the bank by facsimile transmission enclosing an amended originating application. In that letter, as in the letter of 4 February 2009, the DPP drew the bank's attention to parts of the application which particularly concerned the bank. In the letter of 13 February 2009 that was in the following terms:

> "I draw your attention to paragraphs 2.1 to 2.5 of the enclosed application, concerning real property subject to a registered security interest in favour of Bank of Queensland Limited. I also draw your attention to paragraphs 9 to 13 of the application, which provides that nothing in the restraining order sought by the State shall prevent Bank of Queensland Limited, its transferees or assignees, from exercising any rights pursuant to its registered mortgages in respect of the properties mentioned in paragraphs 2.1 to 2.5.
>
> I also draw your attention to paragraphs 2.44, 2.45 and 2.46 of the enclosed application, concerning other property subject to a registered security interest in favour of Bank of Queensland Equipment Finance Limited. I also draw your attention to paragraph 17 of the application, which provides that nothing in the restraining order sought by the State shall prevent Bank of Queensland Equipment Finance Limited, its transferees or assignees, from exercising any rights pursuant to its registered mortgages in respect of the property mentioned in paragraphs 2.44, 2.45 and 2.46.
>
> I also draw your attention to paragraphs 2.8, 2.9, 2.10 and 2.11 of the enclosed application, concerning companies over which Bank of Queensland Limited hold a fixed or a fixed and floating charge. I also draw your attention to paragraphs 21, 23, 25 and 29 of the enclosed application which provides that nothing in the restraining order sought by the State shall prevent Bank of Queensland Limited, its transferees or assignees, from exercising any rights pursuant to the fixed or fixed and floating charges held by Bank of Queensland Limited in respect of the property mentioned in paragraphs 2.8, 2.9, 2.10 and 2.11."

[109] On 13 February 2009, the bank informed the DPP that it did not intend to appear at the hearing of the application and asked for copies of any orders affecting the bank or its subsidiary BOQ Equipment Finance.

[110] On 18 February 2009, an order was made by Douglas J after a hearing on notice to the second respondent, Brett Raymond Stevens ("the restraining order").

[111] All of Mr Stevens' property was restrained by paragraph 1 of the restraining order of 18 February 2009 which provided:

> "Under ss 28(3)(a)(iii) and 31(i) of the *Criminal Proceeds Confiscation Act* 2002 ("the Act"), none of the property of BRETT RAYMOND STEVENS, ("the restrained property") shall be dealt with by any person."

[112] Section 28(3)(a)(iii) of the Act provides that an application for a restraining order may relate to all of the property of a prescribed respondent such as Mr Stevens on the basis that he is a person suspected of having engaged in one or more serious crime related activities. As previously noted, s 31(1) of the Act provides that the Supreme Court must make a restraining order in relation to property if, after considering the application and the relevant affidavit, it is satisfied there are reasonable grounds for the suspicion on which the application is based.

[113] Paragraph 1 of the restraining order not only covered all of Mr Stevens' property, it also covered all of the property under his effective control which included property of companies under his control including those companies specifically listed in later paragraphs of the restraining order: Brett Stevens Transport Pty Ltd ("Brett Stevens Transport"), Brett Stevens Racing Pty Ltd ("Brett Stevens Racing"), Brett Stevens Race Fabrication Pty Ltd ("Brett Stevens Race Fabrication") and Brett Stevens Employment Pty Ltd ("Brett Stevens Employment").

[114] The property was restrained on the basis that it was property reasonably suspected of being obtained from serious crime related activity.

[115] As well as the general restraining order found in paragraph 1 of the 18 February 2009 restraining order, specific items of property were listed in other paragraphs of the order, without derogating from the generality of paragraph 1. Some of those were particularly relevant to the bank. Specifically itemised in paragraphs 2.1 - 2.5 of the 18 February 2009 restraining order were various lots of real property owned by Mr Stevens:

(1) Lot 2, Registered Plan 851006, County of Stanley, Parish of Redcliffe with the title reference 18561243 located at 100 Callaghan Road Narangba;

(2) Lot 1, Registered Plan 851006, County of Stanley, Parish of Redcliffe with title reference 18561242 located at 96 Callaghan Road Narangba;

(3) Lot 27, Registered Plan 77681, County of Stanley, Parish of Redcliffe with the title reference 12784172 located at 92 Callaghan Road Narangba;

(4) Lot 28, Registered Plan 77681, County of Stanley, Parish of Redcliffe with title reference 12781042 located at 82 Callaghan Road Narangba; and

(5) Lot 2, Registered Plan 91972, County of Stanley, Parish of Redcliffe with title reference 13257002 located at 176 Marsden Road Kallangur.

Each property was subject to a mortgage in favour of the bank, being mortgage number 709627798 which was registered on 26 May 2006.

[116] Relevant to the consideration of this appeal, included within the property under the effective control of Mr Stevens and therefore restrained by paragraph 1 of the restraining order was a Business Term Loan ("BTL") by the bank to Brett Stevens Transport dated 28 August 2008. The BTL allowed Brett Stevens Transport to draw up to $350,000. The term of the BTL was ten years. The account number was

20759418. The BTL was secured by first registered mortgages by Brett Stevens over the land at 82, 92, and 100 Callaghan Road, Narangba and 176 Marsden Road, Kallangur, a guarantee and indemnity provided Brett Stevens, Katherine Stevens, Brett Stevens Racing, Brett Stevens Race Fabrication, Brett Stevens Employment and fixed and floating company charges by Brett Stevens Transport, Brett Stevens Racing, Brett Stevens Race Fabrication and Brett Stevens Employment.

[117] The purpose of the BTL was said to be:

> "to pay out existing loan account 20259529 and provide additional funds of $200,000 to assist working capital requirements."

[118] Brett Stevens Racing had previously provided a fixed and floating charge over its assets to the bank on 28 February 2006. It had been signed on behalf of Brett Stevens Racing by Brett Stevens who described himself as its sole director and sole secretary. An ASIC search showed that he was also its only shareholder.

[119] Paragraphs 8 to 12 of the restraining order made on 18 February 2009 also provided that notwithstanding paragraphs 2.1 to 2.5 of the order, nothing in the order prevented the bank, its transferees or assignees, from exercising any rights pursuant to its encumbrance, mortgage number 709627798, in respect of the property mentioned in paragraphs 2.1 to 2.5 of the order.

[120] Other property which was specifically subject to restraint was, under paragraph 2.8, the 100 shares in Brett Stevens Employment; under paragraph 2.9, and the 100 shares in Brett Stevens Race Fabrication; under paragraph 2.10, the 100 shares in Brett Stevens Racing; and under paragraph 2.11, the three shares in Brett Stevens Transport.

[121] Under paragraph 20, notwithstanding paragraph 2.8, nothing in the order prevented the bank from exercising any rights pursuant to fixed and floating charge number 1306255 in respect of Brett Stevens Employment. Under paragraph 22, notwithstanding paragraph 2.9, nothing in the order prevented the bank from exercising any rights pursuant to fixed and floating charge number 1306254 in respect of Brett Stevens Race Fabrication. Under paragraph 24, notwithstanding paragraph 2.10, nothing in the order prevented the bank from exercising any rights pursuant to fixed and floating charge number 1306257 in respect of Brett Stevens Racing. Under paragraph 28 notwithstanding paragraph 2.11, nothing in the order prevented the bank from exercising any rights pursuant to fixed and floating charge number 1306252 in respect of Brett Stevens Transport.

[122] There were three vehicles each registered in the name of Brett Stevens Transport which were encumbered by the Bank of Queensland Equipment Finance Ltd ("BOQ Equipment Finance"): a 2003 Mick Murray Semi Trailer, Queensland registration number 629 QKC - (Vehicle Identification Number 6T9T25NT032YMW001) encumbrance number 160908; a 2003 Mick Murray Semi Trailer, Queensland registration number 630 QKC - (Vehicle Identification Number 6T9T25NT032YMW002) encumbrance number 160907; and a 1997 Semi Trailer, Queensland registration number 984 QDU - (Vehicle Identification Number 6K9T25000T2F39006) - encumbrance number 160909. They were specifically enumerated in paragraphs 2.44, 2.45 and 2.46 of the 18 February 2009 restraining order. Paragraph 16 of that order reserved the rights of BOQ Equipment Finance pursuant to the encumbrance.

[123] Paragraphs 2.47 to 2.57 restrained the specific property which had been listed in paragraph 1(a)-(l) of the ex parte restraining order made by Douglas J on 30 January 2009.

[124] On 19 February 2009, the DPP served on the bank an application for forfeiture order and the order of Douglas J made on 18 February 2009. The application for forfeiture was for the forfeiture of all the property of Mr Stevens which had been restrained by the restraining order and as the DPP informed the bank it was returnable on 5 March 2009 on which date directions would be sought for the future conduct of the matter. The application for forfeiture order was made pursuant to s 56(1) and 58(1) of the Act and was filed on 19 February 2009.

[125] The substantive application for forfeiture order has not yet been heard and determined. A number of variations have, however, been made to the restraining order.

[126] On 17 March 2009, Philippides J varied the *ex parte* restraining order made by Douglas J by 30 January 2009 by removing reference to the property described in paragraph 1(i) of the order named the "Mack Top Bike 800hp Nitro Harley." It was returned to Kim Broderick Stevens upon his written undertaking to restrain the property until the resolution of these proceedings.

[127] On 18 May 2009, Philippides J ordered a variation to the restraining order made by Douglas J on 18 February 2009 to add the following paragraph:

> "2.84. Upon the execution of the agreed settlement deed between the Respondent ('Respondent') and Brett Stevens Transport Pty Ltd, Brett Stevens Haulage Pty Ltd, Brett Stevens Race Fabrication Pty Ltd, Brett Stevens Racing Pty Ltd and Brett Stevens Employment Pty Ltd ('the Stevens' group of companies') and Mack Trucks Australia Pty Ltd, Volvo Commercial Vehicles Australia Pty Ltd, VCVA Financial Services Pty Ltd ('the Volvo Group'), the net settlement sum of $235,000 shall be paid by Clayton Utz by way of bank cheque made payable to the Public Trustee of Queensland."

By paragraph 2 of her Honour's order the Public Trustee was to take possession of the settlement sum of $235,000.

[128] On 27 May 2009, Philippides J ordered that in respect of the $235,000 which had been the subject of the orders made on 18 May 2009, those moneys be released from restraint upon the undertaking by Mr Stevens by his counsel to pay the funds in accordance with various listed payments to creditors and staff. Those payments included $45,314.50 described as an outstanding loan payment to the bank.

[129] On 3 August 2009, Philip McMurdo J made an order further varying the restraining order made by Douglas J, so as not to prevent CBFC Limited exercising its rights pursuant to hire purchase agreements over two of the items of property listed in the restraining order.

[130] On 6 August 2009, the bank wrote to Mr Stevens terminating Brett Stevens Transport's BTL (account 20759418). As at 5 August 2009, the amount owing was $335,727.40 with interest accruing at $69.80 daily. A notice of demand was sent by the bank to Brett Stevens Transport and to Brett Stevens (as guarantor) on 6 August 2009. Unfortunately, as later events showed, the bank did not apparently take the steps required to prevent Mr Stevens from being able to access the BTL account

electronically and therefore make withdrawals from it in spite of the restraining order made by the court which had been served on the bank on 19 February 2009 and the bank's letter of 6 August 2009. On 24 August 2009, the bank sent to Mr Stevens a notice of exercise of power of sale over the real property subject to mortgage number 709627798.

[131] On 21 August 2009, the appellant filed an application seeking an order that certain of the motor vehicles and motor cycles restrained by the orders made by Douglas J on 30 January 2009 and 18 February 2009, be sold by Public Trustee with the proceeds to be held by the Public Trustee pending determination of the confiscation proceedings against Mr Stevens. The bank sought an adjournment of the application in order for further investigation to be made as to whether the vehicles belonged to Mr Stevens personally or to Brett Stevens Racing and were therefore subject to the bank's fixed and floating charge over that company, as the bank asserted they were.

[132] On 3 December 2009, an order was made by consent by Byrne SJA under s 37(1), s 46(2) and (4) of the Act directing the Public Trustee to sell certain vehicles listed in the restraining order made by Douglas J. The property listed in the order was the property listed in paragraphs 2.47-2.57[113] (under the heading "Brett Stevens Racing and Jack Daniel's Racing") and paragraph 2.76 (under the heading "Other Property") of the restraining order made by Douglas J on 18 February 2009. None of that property was property specifically identified in the restraining order as subject to an encumbrance to the bank or BOQ Equipment Finance. Paragraph 2 of the order provided for the proceeds of the sale to be restrained. Paragraph 3 provided:

> "3. The net sale proceeds (*being the balance of the sale proceeds after paying out all chargeholders whom hold a charge over any of the items referred to above at paragraphs 1.(a) to (k)*) from the sale of the restrained property referred to above in paragraph 1.(a) to (k) shall be paid by bank cheque at settlement to the Public Trustee of Queensland to be held pending finalisation of the Supreme Court proceeding number 1014/09."

[133] The order made on 3 December 2009 was varied by an order made by A Lyons J on 4 June 2010 on an application made by the State of Queensland to delete paragraph 3 and replace it with the following paragraphs:

> "3. The sale proceeds from the sale of the restrained property referred to above in paragraph 1(a) to (l) ('the restrained property') shall be paid by bank cheque at settlement to the Public Trustee of Queensland and shall be applied in accordance with paragraph 3A.
>
> 3A. The Public Trustee of Queensland shall apply the proceeds of sale from the sale of the restrained property as follows:
>
> (a) Firstly, in payment of fees or charges payable to the Public Trustee and/or expenses incurred by the Public Trustee in selling the restrained property;
>
> (b) Secondly, in paying out all chargeholders whom hold a charge over any of the restrained property; and

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[113] With the exception of the Mack Top Bike 800hp Nitro Harley which had been returned to Kim Stevens pursuant to the order made by Philippides J on 17 March 2009.

(c) Finally, the balance of the sale proceeds shall be held by the Public Trustee of Queensland pending finalisation of the Supreme Court proceeding number 1014/09."

[134] On 16 June 2010, the bank's solicitors informed the appellant that the bank would hand over signed discharges or releases for the vehicles from the fixed and floating charge over the assets of Brett Stevens Racing "once the monies have been received into their account." It can be deduced that the bank was being treated as a chargeholder under paragraph 3A(b) of the order of 4 June 2010.

[135] On 30 July 2010, Kevin Ryan from the bank informed Mr and Mrs Stevens that the Public Trustee was sending the proceeds of the auction to the bank's solicitors and that after solicitor's fees approximately $310,000 would be credited to the BTL account which would leave it $15,000 in arrears. Mr Ryan said, "As discussed I would like to finalised *[sic]* this account and start the process of getting your home loan up to date." On the same date the bank's solicitors received the net auction proceeds from the Public Trustee in the sum of $317,715.77.

[136] On 6 August 2010, the bank's solicitors drew a cheque to Brett Stevens Transport in the amount of $316,954.62 on instructions from Mr Ryan. The cheque was paid into the bank account of Brett Stevens Transport, account number 20759418, which thereby reduced the indebtedness to the bank on the BTL from $327,916.36 to $10,961.74.

[137] However the bank had not frozen the account, which had been amongst the property restrained by paragraph 1 of the restraining order made by Douglas J on 18 February 2009. The solicitor acting on behalf of the bank swore an affidavit that an officer of the bank had informed her that the files maintained by the bank in relation to Mr Stevens and his related companies did not indicate that the bank received any instructions from the DPP in relation to the operating of bank accounts held by Mr Stevens and his related companies after the making of the restraining order by the court in this proceeding on 18 February 2009. However she also swore that the solicitors had been instructed by the bank that the funds were paid into the BTL account under the misapprehension that that account had been frozen, the intended effect of the payment being to credit the Brett Stevens Transport BTL account and reduce Brett Stevens Transport's indebtedness to the bank. The learned primary judge found that the bank was under a misapprehension that the account had been frozen when it had not. Indeed the affidavit filed by the bank's solicitors on the hearing of the application before the learned primary judge exhibits bank statements which show that the bank had failed to freeze a number of accounts held with the bank by Mr Stevens and the companies over which he had control. There was no evidence of any attempt by the bank to comply with the restraining order to prevent it from paying moneys out of those accounts to Mr Stevens by way of electronic transfer.

[138] On 10 August 2010, the bank therefore did not prevent the use of the BTL account to make 15 withdrawals from that account in the total amount of $304,524.06, notwithstanding that dealing in the property of Mr Stevens was restrained by court order and the bank had purported to terminate the account on 6 August 2009. By the end of that day the indebtedness of Brett Stevens Racing had increased once more from $10,961.74 to $315,485.80. There can be no doubt that the bank knew of the restraining order and could have taken steps to prevent the breach of the

restraining order by freezing this and other accounts or by paying the moneys received from the Public Trustee on the sale of the vehicles into a suspense account.

[139] The bank statements show the 15 transfers on 10 August 2010 from the BTL account in the name of Brett Stevens Transport, account number 20759418 and what happened to those moneys. There were three transfers to a home loan account in the name of Brett Stevens, account number 20259546: transfers of $7,662.58, $30,650.32 and $30,650.32 (a total of $68,963.22). These transfers reduced the indebtedness on the home loan account from $1,236,994.21 to $1,168,030.99. However with interest charges and default fees the debt had grown to $1,238.110.33 by 27 August 2011.

[140] Another transfer on 10 August 2012 from the Brett Stevens Transport account number 20759418 was in the sum of $16,772.58 to another home loan account in Mr Stevens' name which had the effect of reducing the indebtedness on that account from $300,425.07 to $283,652.49. With interest, default fees and legal expenses the balance in that account reached $302,666.61 overdrawn by 5 May 2011.

[141] Five transfers were made from the BTL account number 20759418 to account number 020838088, also held in the name of Brett Stevens Transport, four in the sum of $40,000 and one in the sum of $17,058 (a total of $177,058).

[142] A total of 66 payments were then made out of the business cheque account in the name of Brett Stevens Transport, account number 20838088, on 10 August 2010. They included two payments to GE Auto Fin Services which totalled $30,086.51; three payments totalling $24,447.81 to GE CAP; six payments to CBFC Limited totalling $24,143.64; three payments to Westpac EQP Fin OPS for the total amount of $19,743.99; Tax Office payments in the amount of $17,108; a payment of Bohica Nominees Pty Ltd ("Bohica Nominees") in the sum of $20,000; 22 payments to Queensland Transport totalling $11,189.55; a payment to the Panda Tyre Co in the amount of $10,000; a payment to CB Richard Ellis in the sum of $4,375.28; a payment to Capital Finance in the sum of $2,418; a payment to Battery World in the sum of $1,376.60; a payment to AGL Sales in the sum of $1,132.81; a payment to Optus Billing in the sum of $838.13; a payment to Avit Australia in the sum of $802; three payments to Royal Wolf totalling $776.16; a payment to Engine Engineering in the sum of $768.40; three payments to ASIC in the sum of $654; a payment to NSANE Developments in the sum of $613.54; a payment to Eagle Canvas Pty Ltd in the sum of $597.50; a payment under Liquor and Gaming Regulations of $531.45; a payment to YHI Australia in the sum of $522; a payment to Ignite by Westpac in the sum of $492; a payment to Millars Hardware in the sum of $489.66; two payments to GE Credit Line in the total sum of $400; payment to Justice SPER in the sum of $274.35; payments of $200 to each of ANZ Cards and Citibank Credits Cards and NAB Cards; and a payment to Corey Stevens Enterprises in the sum of $120.20.

[143] On the following day, 11 August 2010, more payments were made including a sum of $2,000 to AW Bale Trust Account and $2,000 to Holman Webb Lawyers.[114] At the commencement of 10 August 2010 bank account number 20838088 was in credit in the sum of $7,521.02. $177,058 was transferred into it from the account

[114] It should be noted that s 37(2) and s 38(1)(f) are the only provisions of the Act under which payment for legal expenses may be made for expenses payable because a person is a party to a proceeding under the Act or is a defendant in a criminal proceeding.

which received the moneys paid by the Public Trustee (account number 20759418). By the end of 11 August 2010 the credit balance of account number 20828088 had been reduced to $2,190.

[144] In addition $9,000 was transferred from the Brett Stevens Transport account number 20759418 to Brett Stevens Racing trading as VIP Corporate Charters, business cheque account number 20321065. On the following day, 11 August 2010, $233.20 and $432.40 from the Brett Stevens Racing business cheque account was transferred to Sensis Pty Ltd, a payment of $6,000 to Bohica Nominees and four payments to QMM totalling $1,184.78.

[145] In addition moneys were transferred from the Brett Stevens Transport bank account number 20759418 to a reverse charges account in the name of Brett Stevens and Katherine Stevens in the amount of $3,000. That was used on 12 August 2010 to make a visa debit purchase in the following name "Queensland MO Eight Mile PL AU".

[146] Other payments were made out of the Brett Stevens Transport account number 20759418 on 10 August 2010. They were $5,257.96 to Brett Stevens, $10,749.80 to Ampol Beenleigh, $8,722.50 to Rivergate Marina and $5,000 to Panda Tyre Co.

[147] On 27 August 2010, the bank's solicitors wrote to Mr Stevens referring to four transfers from the business loan account number 20759418 on 10 August 2010: three transfers to the home loan account number 2025946 of $7,662.58, $30,640.32 and $30,640.32 and a transfer to the home loan account number 20259459 of $16,772.58. The solicitors asserted that those transfers constituted a breach of four accounts held with it, being home loan account number 20259456 which had a debit balance of $1,175,227.53, home loan account number 20259549 which had a debit balance of $285,983.01, business term account number 20759418 which had a debit balance of $314,651.96 and business cheque account number 20248523 which had a debit balance of $3,163.18. The total outstanding on those four accounts as at 26 August 2010 was $1,779,025.68. The breaches were said to arise from the fact that the BTL account had been used for a purpose different to the purpose stated in the facility schedule without the bank's consent. The bank said that in its opinion the transfers and other dealings with the BTL account demonstrated a material change in circumstances affecting Mr Stevens' ability to repay the total amounts owing under the facility agreement or the bank's ability to recover the total amount owing in that funds from a BTL facility were being applied to satisfy a personal loan facility. Accordingly the bank called upon Mr Stevens to make satisfactory arrangements to repay or refinance the facilities in full. The bank made no reference to the transfers being in breach of the restraining order made by the court.

[148] In reply Brett Stevens asserted by email that he and his wife were under the impression that the home loan arrears were to be paid and then the remaining applied to the BTL. As this did not occur and the entire balance was shown as available funds in the BTL account, he asserted that Mrs Stevens made the home loan payments by internet transfer bringing the accounts up to date and in advance by one month. An affidavit filed by Dugald King a senior manager in the bank's asset management group, however, deposes that the only signatory to, and person authorised to use, the Business Term Loan account number 20759418 in the name of Brett Stevens Transport was Mr Stevens and that Mr Stevens' customer number was used to log into the bank's internet banking service on 10 August 2010 to make the transactions. The learned primary judge found that the only person authorised to make withdrawals electronically was Mr Stevens.

[149] It should also be noted that the analysis above shows that many more transactions were undertaken rather than merely a transfer of moneys from the BTL account to home loan accounts. The explanation given by Mr Stevens does not reveal the true extent of the dealings with the moneys paid by the Public Trustee into account number 20759418.

[150] On the following day the bank wrote to Mr Stevens pointing out that in addition to the transfers to home loan accounts, other transfers were made from the BTL account to other bank accounts and subsequently disbursed by a series of electronic transactions. The bank required details of those payments, in particular to what purpose and to whom those funds were applied, and also required a completed statement of financial position for Mr Stevens and his related entities verified by a certified accountant.

[151] It appears that Mr Stevens then referred a dispute about the various accounts to the financial ombudsman service. A conciliation conference was held on 24 November 2011 and three options for resolution were proposed and discussed. On 11 January 2012 Mr Stevens signed a document showing that he was choosing option two which was in the following form:

> "**Option 2 - You are to make application to the Supreme Court to vary the restraining order made on 18 February 2009 in proceeding number S1014/09 between yourself and the State of Queensland**
>
> - You will instruct a valuer, at your cost, to undertake valuations of properties at 82, 92 and 100 Callaghan Road, Narangba;
> - If the combined valuation of properties at 82, 92 and 100 Callaghan Road, Narangba is insufficient to repay the full indebtedness to BOQ on account of Home Loans 20259546 and 20259549, Business Term Loan 20759418 and Business Cheque Accounts 20248545 and 20838088, the properties are to be marketed and sold by BOQ as mortgagee in possession, and the proceeds of sale will be utilised to reduce the indebtedness on account of Home Loans 20259546 and 20259549, Business Term Loan 20759418 and Business Cheque Accounts 20248545 and 20838088. In the event of a shortfall, BOQ will give consideration to a repayment proposal to clear any residual debt. The proposal must be submitted by you within 14 days of being notified of a shortfall. However BOQ does not waive or vary its rights under other securities held by it by agreeing to consider a repayment proposal;
> - If the combined valuation of properties 82, 92 and 100 Callaghan Road Narangba is sufficient to repay the full indebtedness to BOQ on account of Home Loans 20259546 and 20259549, Business Term Loan 20759418 and Business Cheque Accounts 20248545 and 20838088, plus any legal and other costs that may be incurred by BOQ in relation to those accounts; you will make an application to the Supreme Court to vary the restraining order made on 18 February 2009 in proceeding number S1014/09 to permit properties at 82, 92 and 100 Callaghan Road, Narangba to be sold by you to

Bohica Nominees Pty Ltd for a price which is not less than the combined valuation of the properties;

- The application to the Supreme Court is to be filed by no later than 22 December 2011. BOQ is to be immediately notified of the filing of the application, and provided with a copy of the application and all relevant documents;
- BOQ will allow sufficient time for the application to be considered by the Supreme Court. You agree not to seek an adjournment of the hearing of the application. However, you agreed that if the Supreme Court has not determined the application by 30 June 2012, vacant possession of the properties at 82, 92 and 100 Callaghan Road, Narangba is to be surrendered to BOQ on 14 July 2012, on the understanding that the properties will be marketed and sold by BOQ as mortgagee in possession should the abovementioned loans remain in default at that time;
- If the application to the Supreme Court to vary the restraining order is successful, BOQ will allow a period of 6 weeks from the date of the decision by the Supreme Court for settlement of the purchase by Bohica Nominees Pty Ltd from you to be concluded, to fully repay the indebtedness to BOQ on account of Home Loans 20259546 and 20259549, Business Term Loan 20759418 and Business Cheque Accounts 20248545 and 20838088. If settlement of the purchase is not completed within 6 weeks of the Supreme Court's decision, vacant possession of properties at 82, 92 and 100 Callaghan Road, Narangba is to be surrendered to BOQ within 2 weeks thereafter, on the understanding that the properties will be marketed and sold by BOQ as mortgagee in possession should the abovementioned loans remain in default at that time; and
- If the application to the Supreme Court to vary the restraining order is unsuccessful, vacant possession of properties at 82, 92 and 100 Callaghan Road, Narangba is to be surrendered to BOQ within 2 weeks of the Supreme Court's decision to refuse to make the orders sought in the application, on the understanding that the properties at 82, 92 and 100 Callaghan Road, Narangba will be marketed and sold by BOQ as mortgagee in possession should the abovementioned loans remain in default at that time.

Should any of the abovementioned conditions not be met BOQ will immediately commence legal proceedings to take possession of properties at 82, 92 and 100 Callaghan Road, Narangba on the understanding that the properties will be marketed and sold by BOQ as mortgagee in possession should the abovementioned loans remain in default at that time."

[152] On 2 March 2012 (not 22 December 2011 as agreed), Mr Stevens filed an application seeking release of the real properties listed in paragraphs 2.1, 2.3 and 2.4 of the restraining order made on 18 February 2009 to enable them to be sold to

Bohica Nominees.[115] On 30 April 2012, the bank filed an application to be "included as a party to this proceeding (including the application by [Brett Stevens] against the [State of Queensland] filed on 2 March 2012)."

[153] On 2 May 2012, on the application filed by Mr Stevens on 2 March 2012 and the application filed by the bank on 30 April 2012, Douglas J ordered further variations to the restraining orders made by him on 18 February 2009 pursuant to s 37(1) and s 38(1) of the Act by inserting the following paragraphs:

> "A. Subject to the conditions detailed below, the Respondent is permitted to sell the real properties detailed at paragraphs 2.1, 2.3 and 2.4, of the restraining order, namely:
>
> (a) Real property located at 100 Callaghan Road, Narangba, described as Lot 2, Registered Plan 851006, County of Stanley, Parish of Redcliffe registered in the name of Brett Raymond STEVENS. Title reference 18561243;
>
> (b) Real property located at 92 Callaghan Road, Narangba, described as Lot 27, Registered Plan 77681, County of Stanley, Parish of Redcliffe registered in the name of Brett Raymond STEVENS. Title reference 12784172;
>
> (c) Real property located at 82 Callaghan Road, Narangba, described as Lot 28, Registered Plan 77681, County of Stanley, Parish of Redcliffe registered in the name of Brett Raymond STEVENS. Title reference 12781042.
>
> ('the real properties')
>
> B. The real properties will be sold to Bohica Nominees Pty Ltd (ACN 143 731 793) for a sale price of not less than $2,230,000.
>
> C. At settlement of the contract of sale of the real properties, the proceeds of sale shall be distributed as follows:
>
> (a) Firstly, in payment of amounts owing to Bank of Queensland Limited on the following accounts under its first registered mortgage number 709627798:
>
> (i) a Home Loan account number 20259546 in the name of Brett Stevens; and
>
> (ii) a Home Loan account number 20259549 in the name of Brett Stevens;
>
> (b) Secondly, payment of a sum of $350,000 to the Public Trustee of Queensland under section 32 of the Act to be held on trust pending determination of the application filed by Bank of Queensland Limited on 30 April 2012 in this proceeding, and the issue of whether the amount owing to Bank of Queensland Limited on a Business Term Loan account number 20759418 in the name of Brett Stevens Transport Pty

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115 It should be noted that Bohica Nominees had been the recipient of funds paid from Brett Stevens Transport BTL account number 20759418 on 10 August 2010 to Brett Stevens Transport business cheque account and to Brett Stevens Racing business cheque account and was apparently owned by Katherine Stevens.

Ltd is to be paid from the proceeds of sale of the real properties;

(c) Thirdly, the balance sale proceeds shall be paid to the Public Trustee of Queensland under section 32 of the Act pending finalisation of proceeding number 1014/09 in exchange for a withdrawal of the caveats lodged by the State of Queensland over the real properties."

[154] On 30 July 2012, I ordered a further variation which replaced the name of the purchaser as "Defwom Property Management Pty Ltd" ("Defwom") and the sale price as not less than "$2,200,000." That order was made by consent.[116]

[155] On 4 June 2012, the bank filed an application for the following orders:

"1. That under s65 (2) of the *Criminal Proceeds Confiscation Act* 2002 (Qld), so much of the proceeds of sale of the property of Brett Raymond Stevens described as:

(a) Real property located at 100 Callaghan Road, Narangba, described as Lot 2, Registered Plan 851006, County of Stanley, Parish of Redcliffe registered in the name of Brett Raymond Stevens. Title reference 18561243;

(b) Real property located at 92 Callaghan Road, Narangba, described as Lot 27, Registered Plan 77681, County of Stanley, Parish of Redcliffe registered in the name of Brett Raymond Stevens. Title reference 12784172;

(c) Real property located at 82 Callaghan Road, Narangba, described as Lot 28, Registered Plan 77681, County of Stanley, Parish of Redcliffe registered in the name of Brett Raymond Stevens. Title reference 12781042.

(together hereinafter referred to as **"the real properties"**) as is necessary to discharge the outstanding liability balance to the Bank of Queensland Limited (**"BOQ"**) in respect of a Business Term Loan Account Number 20759418 in the name of Brett Stevens Transport Pty Ltd (**"Transport"**) and to meet BOQ's costs of and incidental to this Application, be excluded from any forfeiture order made pursuant to the *Criminal Proceeds Confiscation Act* 2002."

[156] On 31 August 2012, the learned primary judge made the following orders on the application filed on 4 June 2012 which was heard on 22 June 2012:

"1. Declare the Bank of Queensland Limited has an interest as mortgagee under Registered Mortgage 709627798 in the following property of Brett Raymond Stevens:

(a) Real property located at 100 Callaghan Road, Narangba, described as Lot 2, Registered Plan 851006, County of Stanley, Parish of Redcliffe registered in the name of Brett Raymond STEVENS. Title reference 18561243;

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[116] The sale did not eventuate: see *Bank of Queensland v Stevens* [2013] QSC 169.

(b) Real property located at 92 Callaghan Road, Narangba, described as Lot 27, Registered Plan 77681, County of Stanley, Parish of Redcliffe registered in the name of Brett Raymond STEVENS. Title reference 12784172;

(c) Real property located at 82 Callaghan Road, Narangba, described as Lot 28, Registered Plan 77681, County of Stanley, Parish of Redcliffe registered in the name of Brett Raymond STEVENS, Title reference 12781042.

2. Declare that the Bank of Queensland Limited's interest in the aforesaid property extends to the repayment of the total amount owing on Loan Account No 20759418 in the name of Brett Stevens Transport Pty Ltd.

3. Order that proceeds of sale realised pursuant to Registered Mortgage No 709627798 are to be applied to the extent necessary to extinguish the liability balance in respect of Loan Account No 20759418.

4. Exclude the Bank of Queensland Limited's property, to the extent stated in orders numbered 1, 2 and 3 above, from any forfeiture order made in these proceedings pursuant to the *Criminal Proceeds Confiscation Act* 2002.

5. The State of Queensland is to pay the costs of the Bank of Queensland Limited on a standard basis of and incidental to the application to be assessed or agreed."

The appellant's submissions

[157] The State of Queensland has appealed against the decision and sought orders deleting orders 2 and 3 and the order for costs. In lieu of orders 2 and 3 it seeks that the following declarations and orders be made:

"2. Declare that the interest of the Bank of Queensland Limited, as mortgagee of the property referred to above in paragraph 1, extends to an amount owing in respect of loan account number 20759418, in the name of Brett Stevens Transport Pty Ltd, in the sum of $10,961.74, together with interest on that sum accruing from 6 August 2010 to date of payment, such interest being that agreed in accordance with banking arrangements which existed on that date between the said bank and the said account holder.

3. Order that the proceeds of sale realised pursuant to Registered Mortgage No. 709627798 be applied to the extent necessary to extinguish the balance in respect of loan account 20759418 referred to above in paragraph 2."

[158] The grounds of appeal were firstly that the learned primary judge erred in failing to find that the banking transaction which ensued on 10 August 2010, between the respondent as banker, and the account holder as customer, which was found to constitute a dealing in contravention of a restraining order made by the court on 18 February 2009, did not render the transaction illegal, and in turn void or unenforceable.

[159] The second ground of appeal was that the learned primary judge erred in finding that s 52 of the Act constituted the full ambit of relief available for contravention of a restraining order made under the Act and that therefore no jurisdiction existed in relation to an unintentional contravention of a restraining order as occurred in this case by the respondent and that as a consequence the restrained real property could not be diminished in value for the operation of a forfeiture order by reason of a further advance being granted on the security of that property.

[160] The third ground of appeal was that the learned primary judge erred in failing to find that by reason of the bank's being on notice as to the making of the restraining order, or alternatively by receipt of notice of the lodging of a caveat by the State of Queensland over the restrained property, and by reason of the transaction being illegal in character, the bank was not a bona fide purchaser for value without notice or a person in ignorance of or mistaken as to the existence or content of the order and so could not take the benefit of the transaction by exercise of the jurisdiction of the Supreme Court in respect of that transaction.

[161] The State of Queensland submitted that the restraining order, consistent with its legislative purpose, was designed to preserve the status quo pertaining to that property, including its full realisable value, until the finalisation of forfeiture proceedings. The primary judge found that each of the bank and the person who withdrew the relevant money from the relevant account on 10 August 2010 engaged in a dealing with the restrained property. Such dealing, being in contravention of the restraining order, was illegal in character, and thereby ineffective to create a legal right in favour of the bank. The bank's entitlement was confined to the original balance and not the post-contravention balance. Notwithstanding the absence of deliberate or intentional conduct on the part of the bank with respect to the contravention, the fact of its enjoying prior notice of the order entailed its not falling within the exception to relief from illegality, relevantly, in the case where a "claimant was ignorant or mistaken as the factual circumstances which render an agreement or arrangement illegal." The appellant referred to *Nelson v Nelson*[117] in support of its argument. The appellant submitted that the bank was remiss in respect of known facts, not ignorant of those facts.

[162] The appellant further submitted that the sanction of refusing to enforce the bank's right to the post-contravention balance was not disproportionate to the seriousness of the unlawful conduct of contravention of the order and that the imposition of the sanction was necessary, having regard to the terms of the Act, to protect its objects or policies.

[163] The appellant submitted that the Act does not disclose an intention that the sanctions and remedies contained therein are to be the only legal consequences of a contravention and to afford the bank a remedy would be to frustrate the policy of the Act. Section 52 of the Act should not be construed so as to cover the field of available remedies. For example, s 52 does not prescribe a proceeding for contempt as a remedy for a contravention (intentional or unintentional) of a restraining order, but plainly that is open in any particular case. Consequently, the court ought not have afforded the declaratory or s 69(1) of the Act relief to the extent of the post-contravention balance.

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117 (1985) 184 CLR 538 at 604.

The respondent's submissions

[164] The respondent bank submitted that the dealing in this case was the further encumbering of three real properties as a result of the increase in the secured debt caused by the withdrawals on 10 August 2010. The learned primary judge found that no illegal purpose could be attributed to the bank, no bad faith could be attributed to the bank and, having regard to the terms of s 52(3), the bank paid away its own money, and in that sense gave full consideration for the transaction.

[165] Accordingly, based on her Honour's findings the dealing with the property was valid pursuant to s 52(3) of the Act as the bank gave sufficient consideration and acted in good faith. Under s 52(3) it is only necessary for the bank to satisfy one of the two criteria set out in the statutory exception.

[166] The statute must always be the starting point for a consideration of the consequences of a contravention of a restraining order which arises from the statute itself. The imposition of a further civil sanction, in the sense of voiding a disposition, must further the purpose of the statute. The imposition of a further civil sanction is inappropriate if Parliament has indicated sanctions which are sufficient to deal with the relevant conduct.

[167] It was submitted that public policy would not require that result in circumstances where the legislature has expressly provided the criteria for determining the validity or invalidity of dealings with restrained property, where there has been an intentional contravention of the restraining order by one or both of the parties to the transaction. Contrary to the appellant's contention, s 52(3) does cover the field in relation to the criteria to determining whether a particular transaction is void or, alternatively, is valid. Her Honour's reasoning in this respect was correct.

[168] In this case the dealing resulted from the mistake of the bank in misapprehending that the relevant account had been frozen and by reason of another party acting with an illegal purpose. Notice of the restraining order does not alter the bank's mistake and ignorance of the withdrawals that had taken place. Such mistake or ignorance is sufficient ground to enable the bank to continue to rely on its legal rights under the mortgage.

[169] It was further submitted that the imposition of the sanction contended for by the State is not necessary having regard to the terms of the statute to protect its objects or policies. The Act expressly provides that there may be contraventions of restraining orders which do not render a dealing void. It cannot have been the intention of the legislature that a dealing with restrained property, albeit for valuable consideration, with the intention of deliberately defeating the restraining order, is valid but an unintentional dealing is not.

[170] Her Honour recognised that both the State and the bank were free from any illegal purpose. Where the bank paid away its own money, and thereby gave full consideration for the dealing, the sanction contended for by the State would be disproportionate to the conduct of the bank.

Discussion

[171] It is appropriate to start with the provision in the Act about the making of an order excluding property from a forfeiture order. Section 68(2) provides for the only

circumstance in which the court may make such an exclusion order and if that circumstance is satisfied then the court must make an exclusion order. The only matter in contention in this proceeding was whether or not the bank had or, apart from the forfeiture, would have an interest in the property. In this case the sum of $316,954.62, which was the proceeds of the sale of property released by the court from property that had been restrained, was paid into the bank account of Brett Stevens Transport, account number 20759418, which reduced its drawings on that account from $327,916.36 to $10,961.74. $304,524.06 was then transferred from the bank account of Brett Stevens Transport on 10 August 2010 as set out in these reasons creating a further debt to the bank. The court can only make an exclusion order with regard to that property paid out by the bank, if the bank has an interest in that property.

[172] There seems little doubt, as the learned primary judge found, both the person withdrawing the money on 10 August 2010 and the bank dealt with property which was restrained pursuant to the order of 18 February 2009. This is clearly correct as the transaction changed the value of the bank's interest in the property and the transaction was of necessity engaged in by both the bank and the person who withdrew the money. The appellant did not suggest that the bank's conduct fell within s 52(1) of the Act. It was not suggested that the bank dealt with the restrained property "with the intention of directly or indirectly defeating the operation of the restraining order". If it had done so it would have committed a crime. However it would not matter for the consequence set out in s 52(3) that the bank had not committed a crime under s 52(1). If the other party to the dealing had committed the crime set out in s 52(1) of the Act then the dealing would be void unless either of the ameloriating conditions set out in s 52(3) was met.

[173] The State of Queensland did not seek to prove that Mr Stevens committed the crime set out in s 52(1) of the Act although an analysis of the dealings makes that appear to be an almost inevitable inference. The Act sets out in s 52(3) that such a dealing would be void unless it was for sufficient consideration or in favour of a person who acted in good faith. For the reasons given by Gotterson JA, the dealing was not for sufficient consideration[118] and the person in whose favour the dealing was, that is Mr Stevens, could not be said to have acted in good faith.

[174] However whether or not the dealing was void under s 52 is not in my view the end of the matter. A transaction may be unlawful or illegal because it is prohibited by common law or by statute, it may be contrary to the policy of a statute or contrary to public policy, or it may be illegal because it is in breach of a court order. A transaction may fall into more than one of those categories. The High Court has in recent times dealt extensively with the effect of illegality on rights *inter partes*.[119] However, none of those cases deals with a transaction which was illegal because in breach of a court order. In this case the transaction between the bank and Mr Stevens was illegal because it was in breach of a court order. The court order was made pursuant to statute but it was not the statute that made the dealing unlawful, but the breach of the court's order.

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118 See the definition of "sufficient consideration" in Schedule 6 of the Act.

119 See, for example, *Nelson v Nelson* (1995) 184 CLR 538; *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215; *Miller v Miller* (2011) 242 CLR 446; [2011] HCA 9; and *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498; [2012] HCA 7.

[175] The effect of illegality on a transaction is that it may impugn the parties' rights apparently effected by the transaction.[120] However, the law no longer applies the strict, unbending rule set out by Lindley LJ in *Scott v Brown, Doering, McNab & Co*:[121]

> "No court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal."[122]

[176] As French CJ, Grennan and Keifel JJ held in *Equuscorp Pty Ltd v Haxton*[123], ordinarily contracts made in furtherance of an illegal purpose are unenforceable. There are, however, a number of exceptions to that rule, which were set out by McHugh J in *Nelson v Nelson* at 604-605.

[177] *Nelson v Nelson* dealt with the equitable relief available to a party who engaged in a transaction with the intention of obtaining in the future an entitlement under statute to which she was not entitled. The contravention of the policy of the statute did not mean that she was automatically disentitled to equitable relief, although the court ordered her to repay the moneys which she had received from the Commonwealth in breach of the statute as a condition of her obtaining equitable relief.

[178] This is not a case about illegality consisting of contravention of a statute or the policy of a statute such as was dealt with by the High Court in *Nelson v Nelson* and therefore the illegality and the unenforceability of any transaction was defined and confined by the statute[124] but rather illegality or loss of rights because of contravention of a restraining order of a court of which the bank had knowledge. All of Mr Stevens' property was subject to a restraining order made by the court.

[179] The position of each of the three parties whose interests are potentially affected by this transaction is different. There seems to be no reason in principle why the bank should not have a restitutionary claim against Mr Stevens for moneys had and received albeit that the dealings between them were illegal because they were in breach of a court order: see eg *David Securities Pty Ltd v Commonwealth Bank of Australia*[125] as explained in *Equuscorp Pty Ltd v Haxton*.[126] To deny such a remedy would be to allow Mr Stevens to keep the advantage he gained by breach of the court order.

[180] That is not, however, the position between the bank and the State of Queensland, where the bank was in breach of the court order obtained by the State. The bank's negligence was responsible for that breach whereas the State was completely lacking in blame.

[181] Section 10 demonstrates that the Act is not a code. It does not in terms purport to be a code for the effect of the breach of a court order on the legality of a dealing. Section 52 deals with when the contravention of a restraining order made under the Act is a crime and the effect on a dealing where a person has committed that crime.

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120 *Nelson v Nelson* at 550.
121 [1892] 2 QB 724 at 728.
122 See *Smith v Jenkins* (1970) 119 CLR 397 at 412 referred to in *Nelson v Nelson* at 561; see also *Miller v Miller*.
123 At 514; [27].
124 Cf per McHugh J at 613.
125 (1992) 175 CLR 353.
126 At 516, 518, [30], [33].

There can be no doubt that a dealing in which one of the parties commits a crime would be void and that s 52(3) provides some amelioration of that consequence. However s 52 does not deal with all of the consequences of the breach of a restraining order, including but limited to proceedings for contempt for such breach,[127] nor of the effect on the validity as against the State of a transaction or a dealing by a party in breach of the restraining order imposed by the court but which is not alleged to have committed a crime.

[182] The bank claims that, notwithstanding that it was paid moneys owing to it by one of Mr Stevens' companies and that payment was made by the Public Trustee pursuant to a court order varying a court order that otherwise restrained all of the property, and that the bank then negligently allowed the moneys to be withdrawn from that account by Mr Stevens or those acting on his behalf in breach of the restraining order, it nevertheless has an interest in another repayment to it of that amount of money. The bank argues that this is so notwithstanding that the moneys were paid out by the bank to Mr Stevens in breach of the restraining order. There is no suggestion that the bank has committed a crime under s 52 of the Act nevertheless its negligence allowed the court order to be breached. This is a very serious matter. To allow financial institutions such as the bank to fail to put in place procedures to ensure that court orders are not breached in these circumstances would undoubtedly undermine the efficacy and thus the authority of court orders. As Owen J said in *Bank of Western Australia v Ocean Trawlers Pty Ltd*:[128]

> "There is a clear public policy in favour of, and clear public interest in, a court jealously guarding the integrity of its own procedures. Respect for the administration of justice and for the role of the courts as protectors of individual rights would be seriously at risk were it to be seen that court orders could be ignored with impunity. Nevertheless, I think each situation has to be looked at closely and judged according to its circumstances."

[183] His Honour referred to a decision of Sir Robert Megarry V-C in *Clarke v Chadburn*[129] where an injunction granted by the court was wilfully flouted. The Vice Chancellor held that:[130]

> "those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them."

[184] Owen J held that the same concepts could and in his opinion should be applied to a transaction where the parties act with knowledge of the breach, unlike the case before him where a transaction took place in breach of a Mareva injunction where the purchaser had no knowledge of the Mareva injunction over the assets of the defendants.

[185] In this case the bank had clear knowledge of the restraining order over all of the property of Mr Stevens and that the purpose of the payment by the Public Trustee to the bank was to reduce Mr Stevens' indebtedness to the bank. Nevertheless, the bank negligently allowed Mr Stevens to transfer the money from the Brett Stevens Transport account thus increasing his indebtedness to the bank notwithstanding the

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127 See, for example, *Z Bank v D1* [1994] 1 Lloyd's Law Reports 657 at 666-667.

128 (1994) 13 WAR 407 at 436.

129 [1985] 1 WLR 78.

130 At 80-81.

restraining order by the court which should have prevented it. The bank therefore was not in the position of a person who acts with no knowledge of the breach of court order.

[186] It is difficult to see on what basis it could be held that the bank continues to have an interest in property which it allowed to be withdrawn in breach of a restraining order made by the court of which it had notice. The bank had the capacity, but failed, to protect its own interests. It lost its interest in the property for no commercial consideration. In those circumstances I am not persuaded that the court should lend its remedies to the bank's being repaid those moneys again from the property restrained by the court order.

[187] In terms of s 68(2)(a) of the Act, the bank lost its interest in the property when it paid the moneys out to Mr Stevens, or those acting on his behalf, in breach of the restraining order. Accordingly, the court could and should not have made the exclusion order under s 65(2) of the Act.

[188] I would allow the appeal and delete paragraphs 2, 3 and 5 of the orders made by the learned primary judge and in their place insert the orders and declarations sought by the appellant.

[189] **MARTIN J**: I agree with Gotterson JA.