

SUPREME COURT OF QUEENSLAND

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

PARTIES: **In Appeal No 3885 of 2013:**
COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE
(appellant)
v
STEVEN IRVINE HART
(first respondent)
FLYING FIGHTERS PTY LTD
ACN 067 895 005
(second respondent)
MERRELL ASSOCIATES LIMITED HK
(third respondent/not a party to the appeal)
NEMESIS AUSTRALIA PTY LTD
ACN 010 225 537
(fourth respondent)
MERRELL ASSOCIATES (AUSTRALIA) PTY LTD
(fifth respondent/not a party to the appeal)
YAK 3 INVESTMENTS PTY LTD
ACN 010 623 560
(sixth respondent)
BUBBLING SPRINGS OLIVE GROVE PTY LTD
ACN 010 281 866
(seventh respondent)
In Appeal No 3908 of 2013:
FLYING FIGHTERS PTY LTD
ACN 067 895 005
(first appellant)
YAK 3 INVESTMENTS PTY LTD
ACN 010 623 560
(second appellant)
BUBBLING SPRINGS OLIVE GROVE PTY LTD
ACN 010 281 866
(third appellant)
NEMESIS AUSTRALIA PTY LTD
ACN 010 225 537
(fourth appellant)
v
COMMONWEALTH OF AUSTRALIA
(first respondent)
COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE
(second respondent)

In Appeal No 4987 of 2013:**COMMONWEALTH OF AUSTRALIA**

(appellant)

v

YAK 3 INVESTMENTS PTY LTD

ACN 010 623 560

(first respondent)

BUBBLING SPRINGS OLIVE GROVE PTY LTD

ACN 010 281 866

(second respondent)

NEMESIS AUSTRALIA PTY LTD

ACN 010 225 537

(third respondent)

FLYING FIGHTERS PTY LTD

ACN 067 895 005

(fourth respondent)

ALFREDTON PTY LTD

ACN 070 015 057

(fifth respondent)

FILE NO/S: Appeal No 3885 of 2013
Appeal No 3908 of 2013
Appeal No 4987 of 2013
DC No 1416 of 2003
DC No 3068 of 2006

DIVISION: Court of Appeal

PROCEEDING: Miscellaneous Application – Civil

ORIGINATING COURT: District Court at Brisbane – [2013] QDC 60

DELIVERED ON: 8 November 2016

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Morrison JA and Douglas and Peter Lyons JJ
Separate reasons for judgment of each member of the Court,
Douglas and Peter Lyons JJ concurring as to the orders made,
Morrison JA not determining

ORDERS: **In Appeal No 3885 of 2013:**

- 1. The appeal be dismissed.**
- 2. The appellant pay the respondents' costs of and incidental to the proceedings, to be assessed on the standard basis.**

In Appeal No 3908 of 2013:

- 1. The appeal be allowed.**
- 2. Paragraphs 1, 2, 3 and 4 of the orders of the District**

Court made on 6 May 2003 be set aside.

3. The Commonwealth be released from its undertaking made to the District Court in respect of the orders made on 15 December 2006 not to sell the following aircraft without the appellants' consent:
 - a. North American T-6 with registration VH-USN;
 - b. Yakovlev Yak 50 with registration VH-YAY;
 - c. De Havilland DH82 with registration VH-WEM;
 - d. Yakovlev Yak 50 with registration VH-YAX;
 - e. Yakovlev Yak 3 with registration VH-YZK;
 - f. American Champion 8KCAB with registration VH-DEC.
4. Declare that Flying Fighters Pty Ltd as trustee for Flying Fighters Discretionary Trust had legal ownership of the following aircraft and motor vehicle, subject to a charge in favour of Merrell Associates Ltd, immediately prior to their forfeiture to the Commonwealth on 18 April 2006:
 - a. North American Aviation T-28 Trojan with registration VH-SHT;
 - b. Hawker Sidley Aviation Sea Fury FB11 with registration VH-SHF;
 - c. Aerovod L-39C with registration VH-SIC;
 - d. Akrotech CAP232 with registration VH-SHI;
 - e. North American Aviation T-28 Trojan with registration VH-AVC;
 - f. Mercedes Benz 380SL with registration AEROS1.
5. Declare that Yak 3 Investments Pty Ltd as trustee for Yak 3 Discretionary Trust was lessee of registered lease 704471517 (Hangar 400), subject to a mortgage to Equititrust Ltd and a charge in favour of Merrell Associates Ltd, immediately prior to its forfeiture to the Commonwealth on 18 April 2006.
6. Declare that Yak 3 Investments Pty Ltd as trustee for the trustee of the Nemesis Group Superannuation Fund was lessee of registered lease 700515084 (Hangar 101), subject to a charge in favour of Merrell Associates Ltd, immediately prior to its forfeiture to the Commonwealth on 18 April 2006.
7. Declare that Nemesis Australia Pty Ltd as trustee for Nemesis Discretionary Trust had legal ownership of

Lot 56 on RP 188161 (6 Merriwa Street), subject to a mortgage in favour of Country Wide Co-operative Housing Society Ltd and a charge in favour of Merrell Associates Ltd, immediately prior to its forfeiture to the Commonwealth on 18 April 2006.

- 8. Declare that Bubbling Springs Pty Ltd as trustee for Bubbling Springs Discretionary Trust had legal ownership of Lot 222 on RP 122682 (27 Samara Street), subject to a mortgage in favour of Sunshine Co-operative Housing Society Ltd and a charge in favour of Merrell Associates Ltd, immediately prior to its forfeiture to the Commonwealth on 18 April 2006.**
- 9. Declare that Bubbling Springs Pty Ltd as trustee for Bubbling Springs Discretionary Trust had legal ownership of Lots 235 to 238 on Crown Plan CH312074, Lots 146 and 147 on Crown Plan CH31665, Lot 154 on Crown Plan CH31821, Lot 126 on Crown Plan CC539, Lot 249 on Crown Plan CH312095, Lot 24 on Crown Plan CH312095, Lot 196 on Crown Plan CH311815, and Lot 269 on Crown Plan CH312095, located at Doonans Road, subject to a mortgage in favour of Equititrust Ltd and a charge in favour of Merrell Associates Ltd, immediately prior to their forfeiture to the Commonwealth on 18 April 2006.**
- 10. Direct the Commonwealth within 21 days:**
 - a. to transfer its interest in the aircraft and motor vehicle in paragraph 4 of this order to Flying Fighters Pty Ltd as trustee for Flying Fighters Discretionary Trust;**
 - b. to deliver possession of the above aircraft and motor vehicle with their respective log books, ownership and operational documents to Flying Fighters Pty Ltd.**
- 11. Direct the Commonwealth within 21 days:**
 - a. to transfer its interest in Hangar 400 to Yak 3 Investments Pty Ltd as trustee for Yak 3 Discretionary Trust;**
 - b. to remove all fencing erected by the Commonwealth upon and around Hangar 400;**
 - c. subject to any agreement reached with Yak 3 Investments Pty Ltd in respect of any licence or sub-lease of Hangar 400, to deliver up vacant possession of Hangar 400 to Yak 3 Investments Pty Ltd.**
- 12. Declare the value of the interest of Nemesis Australia**

Pty Ltd in 6 Merriwa Street immediately prior to forfeiture to be \$34,000.00.

- 13. Declare that there is payable by the Commonwealth to Nemesis Australia Pty Ltd the sum of \$34,000.00, together with interest in the amount of \$28,765.99 to 18 April 2013 and thereafter at the rate specified in Practice Direction 7 of 2013.**
- 14. Declare the value of the interest of Bubbling Springs Pty Ltd as trustee for Bubbling Springs Discretionary Trust in 27 Samara Street immediately prior to forfeiture to be \$174,500.00.**
- 15. Declare that there is payable by the Commonwealth to Bubbling Springs Pty Ltd as trustee for Bubbling Springs Discretionary Trust the sum of \$174,500.00, together with interest in the amount of \$142,638.61 to 27 September 2016 and thereafter at the rate specified in Practice Direction 7 of 2013.**
- 16. Declare the value of the interest of Bubbling Springs Pty Ltd as trustee for Bubbling Springs Discretionary Trust in Doonan's Road immediately prior to forfeiture to be \$388,500.00.**
- 17. Declare that there is payable by the Commonwealth to Bubbling Springs Pty Ltd as trustee for Bubbling Springs Discretionary Trust the sum of \$388,500.00, together with interest in the amount of \$337,899.83 to 27 September 2016 and thereafter at the rate specified in Practice Direction 7 of 2013.**
- 18. The respondents pay the appellants' costs of and incidental to these proceedings, to be assessed on a standard basis.**

In Appeal No 4987 of 2013:

- 1. The appeal be dismissed.**
- 2. The appellant pay the respondents' costs of and incidental to the proceedings, to be assessed on the standard basis.**

CATCHWORDS: CRIMINAL LAW – PROCEDURE – CONFISCATION OF PROCEEDS OF CRIME AND RELATED MATTERS – FORFEITURE OR CONFISCATION – SERIOUS CRIME RELATED ACTIVITY OR CONFISCATION OFFENCE – APPLICATION FOR ORDER FOR TRANSFER OF PROCEEDS OF SALE OF FORFEITED PROPERTY TO PERSONS CLAIMING AN INTEREST IN IT – where Court published reasons in *Commissioner of the Australian Federal Police v Hart & Ors; Flying Fighters Pty Ltd v Commonwealth of Australia & Anor; Commonwealth of Australia v Yak 3 Investments Pty Ltd & Ors* [2016] QCA 215

concluding that orders should be made declaring the interests of the relevant appellant in the forfeited property immediately prior to forfeiture, and ordering the transfer of the property or retained proceeds to the relevant appellant – where s 102 of the *Proceeds of Crime Act 2002* (Qld) (*POCA*) gives the Court power to declare the value of an applicant’s interest in property, and to declare that that amount is payable to the applicant by the Commonwealth – where s 100 of *POCA* provides for the disposal of forfeited property and the disposition of the proceeds of sale, and for deduction of costs, charges and expenses incurred by the Official Trustee – where three properties have been sold, and appellants seek orders for the payment of the net proceeds of sale, and interest – where the Commonwealth parties seek deductions in respect of costs, charges and expenses incurred by the Official Trustee in relation to the sale – whether s 100 of *POCA* authorises a reduction of the value of the interest to be declared under s 102

CRIMINAL LAW – PROCEDURE – CONFISCATION OF PROCEEDS OF CRIME AND RELATED MATTERS – FORFEITURE OR CONFISCATION – SERIOUS CRIME RELATED ACTIVITY OR CONFISCATION OFFENCE – APPLICATION FOR ORDER FOR TRANSFER OF PROCEEDS OF SALE OF FORFEITED PROPERTY TO PERSONS CLAIMING AN INTEREST IN IT – POWERS OF COURT – where s 102 of *POCA* gives the Court power to declare the value of an applicant’s interest in property, and to declare that that amount is payable to the applicant by the Commonwealth – where three properties have been sold, and the appellants seek orders for the payment of the net proceeds of sale, and interest – whether the net proceeds of sale represent the value of the properties immediately prior to forfeiture

Civil Proceedings Act 2011 (Qld), s 58

Proceeds of Crime Act 2002 (Cth), s 100, s 102

Commissioner of the Australian Federal Police v Hart & Ors; Flying Fighters Pty Ltd v Commonwealth of Australia & Anor; Commonwealth of Australia v Yak 3 Investments Pty Ltd & Ors [2016] QCA 215, related

COUNSEL:

In Appeal No 3885 of 2013:

A R Moses SC, with G J Del Villar, for the appellants

The first respondent appeared on his own behalf

P J Roney QC, with A J Greinke and G C Dempsey, for the second respondent

In Appeal No 3908 of 2013:

P J Roney QC, with A J Greinke and G C Dempsey, for the appellant

A R Moses SC, with G J Del Villar, for the respondents

In Appeal No 4987 of 2013:

A R Moses SC, with G J Del Villar, for the appellant
P J Roney QC, with A J Greinke and G C Dempsey, for the respondents

SOLICITORS: In Appeal No 3885 of 2013:

The Commissioner of the Australian Federal Police for the appellants

The first respondent appeared on his own behalf

No appearance for the second respondent

In Appeal No 3908 of 2013:

No appearance for the appellants

The Commissioner of the Australian Federal Police for the respondents

In Appeal No 4987 of 2013:

The Commissioner of the Australian Federal Police for the appellant

No appearance for the respondents

- [1] **MORRISON JA:** I have read the further reasons of P Lyons J. In the circumstances, there is no need for me to express a view as to the matters they deal with.
- [2] **DOUGLAS J:** I agree with the reasons of Peter Lyons J and the orders his Honour proposes.
- [3] **PETER LYONS J:** The Court published reasons in this matter and invited the parties to agree on a form of order, or to make submissions about the orders to be made. As a result, it is necessary to deal with a number of issues, which can be understood by reference to the Court's earlier reasons¹.
- [4] The Hart companies satisfied the learned primary Judge that the property referred to as Hangar 607 was acquired lawfully by Nemesis, and was not derived from unlawful activity². Although the Commonwealth parties challenged that finding in Appeal 4987/2013³, the issue was not pursued at the hearing⁴. The property was a lease which expired on 31 August 2011.
- [5] The property referred to as Hangar 101 was a lease of land at Archerfield Airport. The learned primary Judge held that Yak was the company which held an interest in that property prior to its forfeiture. The learned primary Judge also held that Yak did not derive or realise its interest in Hangar 101 from unlawful activity. That finding has not been overturned. However the lease expired on 13 November 2014.
- [6] The Hart companies have also established that the properties referred to as 6 Merriwa Street, 27 Samara Street, and Doonan's Road were lawfully acquired, and

¹ [2016] QCA 215.

² See RJ [754]: I shall continue the references adopted in the earlier reasons.

³ Ground 11.

⁴ T 3-113; see the Reasons for Judgment of Morrison JA at [825].

were not derived from unlawful activity. These matters were in issue on the appeal, the Commonwealth parties being unsuccessful in respect of them. However, each of those properties was sold after it had been forfeited, with the net proceeds as determined by the learned primary Judge retained by the Official Trustee⁵. While in the appeals the Commonwealth parties challenged the power of the learned primary Judge to order the transfer of forfeited assets which remain vested in the Commonwealth without a declaration of their value, they did not submit that, if the Hart companies established that these three properties were lawfully acquired and not derived from unlawful activity, the relevant company was not entitled to some form of relief in relation to those proceeds.

- [7] With the agreement of Douglas J, I concluded that an order for the transfer of the retained proceeds to the relevant company should be made, and invited the parties to agree as to the form of order, or to make submissions about matters on which they disagree.
- [8] The Hart companies contend that an order should be made that the Commonwealth pay Nemesis \$41,012.80 as the value of its interest in Hangar 607, including interest of \$19,512.80. The Commonwealth parties contend that there are no retained proceeds relating to this property, and the order sought does not reflect what I proposed. That submission is correct. There is no suggestion that this property was sold before the lease expired; and accordingly, there are no retained proceeds. The property which was forfeited no longer exists. No order should be made in respect of Hangar 607.
- [9] The Hart companies seek a declaration that Nemesis was the lessee of Hangar 607 (subject to a charge to Merrell) immediately prior to the forfeiture of this property. There is power to make such a declaration under s 102 of the *POCA*. The apparent purpose is to identify the interest in property to be transferred pursuant to an order under that section; or as a step to identifying an amount to be paid by the Commonwealth consequent on an order under the same section. No such order is to be made. There does not appear to be any dispute about the interest of Nemesis prior to forfeiture of this property. It has not been shown that the declaration would have any utility, and I would not make it.
- [10] It seems that all that had been done for the purpose of recording the forfeiture on the title for Hangar 101 was to lodge a caveat. The order of 6 May 2013 required the removal of the caveat, on payment of the sum of money referred to in the earlier reasons, to the Commonwealth⁶. Hangar 101 was an income-earning property. All parties propose an order that would result in the payment to Yak of income generated from the hangar while it was under the control of the Official Trustee, less the Trustee's costs; though the Hart companies also propose an order to the effect that any dispute be remitted to the District Court. No party has sought to demonstrate how any of the proposed orders might be made under s 102; or what source of power there might otherwise be for this Court to make those orders in these appeals. In the circumstances, it does not seem to me appropriate to make them.
- [11] The Hart companies seek orders for the payment of the net proceeds of sale of the three properties which have been sold, and interest. The orders proposed by the Commonwealth parties in relation to these three properties are to similar effect, save

⁵ RJ [784], [798], [813].

⁶ AD 18.

that there would be deducted the costs, charges and expenses incurred by the Official Trustee in relation to the sale. They submit that these are payable pursuant to s 100 of the *POCA*, and diminish the retained proceeds. They accept that s 58 of the *Civil Proceedings Act 2011* (Qld) gives the Court power to include an award of interest if there is a principled basis for such an order. Their proposed order would limit the interest payable to that which has accrued. They have not submitted that no amount is payable to the Hart company which had an interest in the property prior to its forfeiture.

- [12] This dispute invites closer examination of the powers of the Court. Aside from the power to award interest, no source of any power to make relevant orders has been identified beyond s 102 of the *POCA*. Amongst the powers conferred on the Court by that section is a power to declare the value of an applicant's interest in property, and to declare that that amount is payable to the applicant by the Commonwealth.
- [13] The Commonwealth parties maintain their submission that the affidavit of Ms Goodey cannot be relied upon to establish the value of these three properties. However, and subject to their submission about s 100 of the *POCA*, it is implicit in the submissions of the Commonwealth parties that the value of the interest of the relevant company may be determined by reference to the net proceeds of sale. The sales in fact occurred not long after forfeiture. The Commonwealth parties did not submit that some allowance should be made by reason of the Merrell charge. It seems to me that the sales provide an appropriate basis of the determination of the value of the interest of each relevant company in these properties; and an appropriate declaration should be made as to that value.
- [14] Section 100 of the *POCA* is directed to the disposition of the proceeds of the sale of a forfeited property. It does not seem to me to be relevant to determining the value of the interest of an applicant under s 102. Accordingly, I would not reduce the value of such an interest by reference to the provisions of s 100.
- [15] It therefore seems to me appropriate to declare the value of the interest of each relevant company in these three properties as the net proceeds of sale. There is a discrepancy between the net proceeds as found by the learned primary Judge, and those for which the Hart companies contend, based on the affidavit of Mr Gary Hobson sworn 6 May 2013, the latter being lower. In the absence of some explanation for the differences, I would adopt the amounts for which the Hart companies contend (with some rounding). I would accordingly declare the value immediately prior to forfeiture of 6 Merriwa Street to be \$34,000; of 27 Samara Street to be \$174,500; and of Doonan's Road to be \$388,500; and I would declare that each of those amounts is payable to the relevant company by the Commonwealth.
- [16] Section 58 of the *Civil Proceedings Act* authorises an award of interest from the date when the cause of action arose. Relief would have been available from the date of forfeiture, the grounds not depending on any subsequent event. The Hart companies have provided calculations which appear generally consistent with the section, and which have not been the subject of any challenge. Accordingly I would award interest in the amounts proposed by the Hart companies (notwithstanding slight differences in the amounts on which their calculations are based).