HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, GORDON AND EDELMAN JJ

Matter No B21/2017

COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE — APPELLANT

AND

STEVEN IRVINE HART & ORS — RESPONDENTS

Matter No B22/2017

COMMONWEALTH OF AUSTRALIA — APPELLANT

AND

YAK 3 INVESTMENTS PTY LTD AS TRUSTEE FOR YAK 3 DISCRETIONARY TRUST & ORS — RESPONDENTS

Matter No B23/2017

COMMONWEALTH OF AUSTRALIA & ANOR — APPELLANTS

AND

FLYING FIGHTERS PTY LTD & ORS — RESPONDENTS

Commissioner of the Australian Federal Police v Hart
Commonwealth of Australia v Yak 3 Investments Pty Ltd
Commonwealth of Australia v Flying Fighters Pty Ltd
[2018] HCA 1
7 February 2018
B21/2017, B22/2017 & B23/2017

ORDER

Matter No B21/2017

Appeal dismissed with costs.

Matter No B22/2017 and Matter No B23/2017

1. *Appeal in Matter No B22/2017 allowed in part.*

2. *Appeal in Matter No B23/2017 allowed.*

3. *Set aside the orders of the Court of Appeal of the Supreme Court of Queensland made in Appeal No 4987/13 on 29 August 2016 and 8 November 2016, and orders 1, 4(a), (b), (e) and (f), 5, 7 to 9, and 11 to 18 of that Court made in Appeal No 3908/13 on 8 November 2016, and in their place make the following orders and declarations:*

   (a) each appeal be allowed in part;

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

      (i) Nemesis Australia Pty Ltd had legal ownership of Lot 56 on Registered Plan 188161, also known as 6 Merriwa Street, subject to the rights of the mortgagee under the mortgage in favour of Countrywide Co-operative Housing Society Ltd and the chargee under a mortgage debenture in favour of Merrell Associates Ltd, immediately prior to its forfeiture to the Commonwealth on 18 April 2006; and

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

   (c) in each of Appeal No 3908/13 and Appeal No 4987/13, each party bear its own costs.

On appeal from the Supreme Court of Queensland

Representation

S P Donaghue QC, Solicitor-General of the Commonwealth and G J D del Villar with J Freidgeim for the appellants (instructed by Commissioner of the Australian Federal Police, Criminal Assets Litigation)

B W Walker SC with A J Greinke and G C Dempsey for the respondents (instructed by James Conomos Lawyers)

CATCHWORDS

Commissioner of the Australian Federal Police v Hart
Commonwealth of Australia v Yak 3 Investments Pty Ltd
Commonwealth of Australia v Flying Fighters Pty Ltd

Criminal law – Forfeiture of property – Where restraining orders made in respect of certain property suspected of being under effective control of person suspected of certain offences – Where person convicted of offences – Where property automatically forfeited to Commonwealth under s 92 of *Proceeds of Crime Act* 2002 (Cth) – Where companies associated with convicted person applied for orders under s 102 of *Proceeds of Crime Act* for recovery of interests, or amounts equal to value of interests, in forfeited property – Whether forfeited property "not used in, or in connection with, any unlawful activity" within s 102(3)(a) of *Proceeds of Crime Act* – Whether "use" requires that property be necessary for or have made unique contribution to unlawful activity – Whether degree of use must be proportionate to forfeiture of property – Whether forfeited property "not derived or realised, directly or indirectly, by any person from any unlawful activity" within s 102(3)(a) of *Proceeds of Crime Act* – Whether property "derived" if wholly or partly derived from unlawful activity – Whether degree of derivation must be substantial – Whether forfeited property "acquired ... lawfully" within s 102(3)(b) of *Proceeds of Crime Act* – Whether applicant must prove each step in process of acquisition lawful – Whether applicant must prove all consideration paid for property lawfully acquired.

Criminal law – Forfeiture of property – Application under s 141 of *Proceeds of Crime Act* 2002 (Cth) for order that forfeited property be available to satisfy pecuniary penalty order against convicted person – Where court must be satisfied property subject to effective control of convicted person – Whether effective control determined as at date of restraining order in respect of property or as at date of determination of application under s 141.

Words and phrases – "acquired the property lawfully", "derived", "directly or indirectly", "effective control", "forfeiture", "interest", "lawfully acquired", "partly derived", "proceeds of an offence", "proceeds of crime", "realised", "unlawful activity", "used in, or in connection with", "wholly derived".

Proceeds of Crime Act 2002 (Cth), ss 5, 6, 16, 17, 18, 24, 24A, 25, 26(4), 29, 42, 44, 66, 67, 92, 102, 104, 116, 141, 314, 315, 317, 329, 330, 337, 338.

1 KIEFEL CJ, BELL, GAGELER AND EDELMAN JJ. Three appeals are brought from a decision of the Court of Appeal of the Supreme Court of Queensland[1] on appeal by way of rehearing from the decision of the District Court of Queensland[2] in a matter arising under the *Proceeds of Crime Act* 2002 (Cth) ("the POCA"). Two of the appeals turn on the construction and application of s 102(3) of the POCA, in the form in which that section existed in 2006 before it was substantially amended in 2010[3]. The third of the appeals turns on the construction and application of s 141 of the POCA, in the form in which it existed in 2006 and continues to exist.

2 The procedural history of the appeals and the relevant provisions of the POCA are comprehensively set out in the reasons for judgment of Gordon J, with whose factual analysis and legal conclusions we agree. On the construction and application of s 141 of the POCA, we have nothing to add to what her Honour has written. It is necessary only to mention a few matters of fact by way of background to the issues which arise as to the construction of s 102(3) of the POCA.

3 Mr Steven Hart was an accountant who operated tax minimisation schemes. He was convicted of nine offences of defrauding the Commonwealth in contravention of s 29D of the *Crimes Act* 1914 (Cth). Pursuant to s 92 of the POCA property, including that of companies with which he was associated ("the Companies") and which had previously been the subject of a restraining order, was automatically forfeited to the Commonwealth.

4 The Companies filed an application under s 102 of the POCA seeking orders for recovery of their interests in certain of the forfeited property, or the payment by the Commonwealth of an amount equal to the value of their interests. The Commonwealth Director of Public Prosecutions applied under s 141 for a declaration that the property the subject of the s 102 application was available to satisfy any pecuniary penalty order made against Mr Hart. A pecuniary penalty order was subsequently made. It required Mr Hart to pay $14,757,287.35 to the Commonwealth.

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1 *Commissioner of the Australian Federal Police v Hart* (2016) 336 ALR 492.

2 *Commonwealth Director of Public Prosecutions v Hart* [2013] QDC 60.

3 *Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2)* 2010 (Cth).

Construction of s 102(3) of the POCA

5 Section 102(1) provides that where property is forfeited to the Commonwealth under s 92, the court that made the restraining order may, on the application of a person who claims an interest in the property, make an order declaring the "nature, extent and value" of the applicant's interest in the property. The court may make further orders directing the Commonwealth to transfer the interest to the applicant or declaring that there is payable by the Commonwealth to the applicant an amount equal to that value.

6 An order under s 102(1) can only be made if the court is satisfied as to the grounds set out in s 102(2) and (3). The focus in these appeals is on the conditions stated in s 102(3). Those conditions, which the applicant by force of s 317 bears the onus of proving on the balance of probabilities, include that:

- "the property was not used in, or in connection with, any unlawful activity" ("the use condition");
- "the property ... was not derived or realised, directly or indirectly, by any person from any unlawful activity" ("the derivation condition"); and
- "the applicant acquired the property lawfully" ("the acquisition condition").

7 Proof of those conditions is proof in a State or Territory court invested with jurisdiction under s 314 of the POCA in a matter arising under the POCA and in a proceeding which by force of s 315 is civil to which the Commonwealth is a necessary party. It is proof in an adversarial proceeding conducted in accordance with the civil procedure of that court[4], including such procedure as exists in that court for the definition of issues between parties. The primary judge and the Court of Appeal were correct in taking the view that, where an application for orders under s 102 proceeds on pleadings, an applicant need not negative possibilities which the Commonwealth does not raise in its defence[5].

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4 Cf *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at 491 [7]; [2006] HCA 38, citing *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW* (1956) 94 CLR 554 at 560; [1956] HCA 22.

5 *Commissioner of the Australian Federal Police v Hart* (2016) 336 ALR 492 at 678-679 [935]. See also *Director of Public Prosecutions (Cth) v Jeffery* (1992) 58 A Crim R 310 at 313-314.

8 "[T]he property" referred to in the use condition and in the derivation condition is the property once the subject of the restraining order that has been forfeited to the Commonwealth under s 92. The property, ordinarily the "thing"[6], is that which at the time of the application has vested absolutely in the Commonwealth under s 96 by reason of the forfeiture that has occurred, in which the applicant claims to have had an interest at the time of forfeiture that the applicant would have retained had forfeiture not occurred. Read with the definitions of "property" and of "interest" in s 338, the reference to "the property" in the use condition and in the derivation condition extends also to any legal or equitable estate or interest in the forfeited thing and any right, power or privilege in connection with that thing.

9 "[U]nlawful activity", referred to in the use condition and in the derivation condition, is defined in s 338 to mean an act or omission that constitutes an offence against a law of the Commonwealth or against a law of a foreign country or an indictable offence against a law of a State or Territory.

10 Satisfaction of the use condition requires proof by an applicant on the balance of probabilities that the thing forfeited was not used in, or in connection with, an act or omission that constituted a relevant offence, and that no legal or equitable estate or interest in that thing and no right, power or privilege in connection with that thing was used in, or in connection with, an act or omission that constituted a relevant offence. Consistently with the construction of equivalent language adopted by the Full Court of the Supreme Court of South Australia in *Director of Public Prosecutions v George*[7], use in or in connection with an act or omission that constituted a relevant offence is a broad conception involving practical considerations which do not readily admit of detailed exposition in the abstract. The conception requires neither a causal link between the property and the offence nor that the property was necessary for the commission of the offence or made a unique contribution to the commission of the offence. Implicit in the expression of the condition is that the use can be by any person. Implicit also is that the degree of use need not be proportionate to the forfeiture that has occurred.

11 Satisfaction of the derivation condition requires proof by an applicant on the balance of probabilities that the thing forfeited (and every legal or equitable

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6 Cf *Director of Public Prosecutions (Cth) v Hart (No 2)* [2005] 2 Qd R 246 at 257 [20].

7 (2008) 102 SASR 246.

estate or interest in that thing, and every right, power or privilege in connection with that thing) was not "derived or realised", directly or indirectly, by any person from an act or omission that constituted a relevant offence. The term "realised" in this context adds nothing of significance to the term "derived". There is a definition of "derived" in s 336, but because that definition is limited to "[a] reference to a person having derived proceeds, a benefit or literary proceeds", that definition has no application to the derivation condition. The definition, in any event, is inclusive rather than explicatory.

12 Section 329, defining when property is "proceeds of an offence", and s 330, defining when property becomes, remains and ceases to be "proceeds of an offence", are nevertheless instructive because they indicate the sense in which "derived" is used in the POCA. Absent any contrary indication in s 102, the sense in which the term is used in those sections can accordingly be taken to indicate the sense in which the term is used in the derivation condition.

13 One of the principal issues on appeal to this Court concerns the approach of the Court of Appeal to the derivation condition. The majority considered that the condition would be satisfied where an asset was derived from a combination of sources of funds, some of which were not tainted as proceeds of the commission of an offence. In their Honours' view, the only circumstance in which the condition would not be satisfied was where the asset was "wholly derived" from the commission of an offence[8].

14 Contrary to the conclusion of the majority of the Court of Appeal, s 329(1) and (4) indicate that property can be derived from an act or omission that constitutes a relevant offence even if the property is not "wholly derived" from that act or omission. In that respect, the juxtaposition of s 329(1)(a) and s 329(1)(b) makes clear that property is sufficiently derived from the act or omission that constitutes the relevant offence if the property is either "wholly derived" or "partly derived" from the act or omission. In either case, the property is "derived". The difference between the two cases is one of degree. Property would not answer the description of being "partly derived" from an act or omission if the degree of derivation were no more than trivial[9]. Beyond that, however, there is no requirement that the degree of derivation must be substantial. And there is no requirement that the degree of derivation must be proportionate to the forfeiture that has occurred.

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8 (2016) 336 ALR 492 at 654-655 [832], 675 [921], 676 [923], 700 [1027].

9 Cf *Williams v The Queen* (1978) 140 CLR 591 at 602; [1978] HCA 49.

15 Section 330(1) is also important in indicating that property can be derived from an act or omission that constitutes a relevant offence by reason of being wholly or partly derived from a disposal of, or other dealing with, other property that has been derived from that act or omission.

16 Conformably with the question of whether property has been used in or in connection with a relevant offence, the question of whether property has been derived by a person from an act or omission that constitutes a relevant offence turns on considerations of substance and economic reality which can be expected to vary in different factual settings. Derivation might in one factual setting be constituted by a non-trivial causal connection between the relevant act or omission and the acquisition or continued holding by the person of the thing forfeited (or a legal or equitable estate or interest in that thing, or a right, power or privilege in connection with that thing). Derivation might in another factual setting be constituted by the act or omission resulting in money or some other property being disposed of or otherwise dealt with so as to make a non-trivial contribution to payment for the thing forfeited (or a legal or equitable estate or interest in that thing, or a right, power or privilege in connection with that thing). Those examples are not exhaustive. As with the use condition, the derivation condition does not lend itself to detailed exposition in the abstract.

17 Contrasting with the same term in the use condition and in the derivation condition, "property" in the acquisition condition can only refer to the interest in the thing forfeited that is claimed by the applicant. The focus of the acquisition condition is on the process by which the applicant came to hold that interest. The applicant must prove that each step in that process was lawful. Where the applicant purchased the property, to prove that the applicant acquired the property lawfully the applicant must prove that all of the consideration for the acquisition was lawfully acquired.

Application of s 102(3) of the POCA

18 Against the background of the factual analysis undertaken by Gordon J, application of the three critical conditions imposed by s 102(3) for the making of an order under s 102(1) is perhaps best illustrated by reference to four items of forfeited property.

19 Two of those items are the aircraft referred to as "the T-28" and "the North American Trojan" in each of which Flying Fighters Pty Ltd ("Fighters"), as registered owner at the time of forfeiture, claimed an interest. The other two are the items of real property respectively referred to as Doonan's Road, Grandchester ("Doonan's Road"), of which Bubbling Springs Pty Ltd ("Bubbling") was registered owner at the time of forfeiture and in which it

claimed an interest, and 6 Merriwa Street, Sunnybank Hills ("Merriwa Street"), of which Nemesis Australia Pty Ltd ("Nemesis") was registered owner at the time of forfeiture and in which it claimed an interest.

The T-28 and the North American Trojan

20 Fighters purchased a 50 per cent interest in the T-28 for $133,000 and later purchased the remaining 50 per cent interest in the T-28 for a further $149,100. There was no dispute between Fighters and the Commonwealth that $83,100 of that further $149,100, amounting to approximately 29 per cent of the total purchase price of the T-28, was paid from a trust account out of an amount of $100,000 paid into that trust account by Merrell Associates Ltd ("Merrell") from an amount of $300,000 paid to Merrell by United Overseas Credit Ltd ("UOCL"). No issue was joined between Fighters and the Commonwealth as to the use condition. The principal issues joined between Fighters and the Commonwealth were as to the derivation condition and the acquisition condition.

21 One of the unchallenged findings of the primary judge was that he was not satisfied on the balance of probabilities that funds sourced by Fighters from Merrell or UOCL did not result from actions of Merrell and UOCL which constituted offences against s 29D of the *Crimes Act* 1914 (Cth) or s 135.1(5) of the *Criminal Code* (Cth). That conclusion alone was sufficient to mean that Fighters failed to prove on the balance of probabilities that the T-28 was not derived, partly and indirectly, from unlawful activity of Merrell and UOCL. Fighters for that reason failed to establish the derivation condition.

22 Another of the unchallenged findings of the primary judge was that he was not satisfied on the balance of probabilities that receipt, possession and disposal by Fighters of money paid directly or indirectly by Merrell or UOCL to Fighters did not constitute offences against s 82(1) of the *Proceeds of Crime Act* 1987 (Cth) or s 400.9 of the *Criminal Code* (Cth) ("the money laundering offences"). That further finding was also sufficient to mean that Fighters failed to prove on the balance of probabilities that the T-28 was not derived, partly and indirectly, from unlawful activity of Fighters. Fighters for that additional reason failed to establish the derivation condition.

23 The finding of the primary judge concerning the money laundering offences was also sufficient to mean that Fighters failed to prove on the balance of probabilities that each step in the process by which it came to acquire its interest in the T-28 was lawful. Fighters for that reason failed to establish the acquisition condition.

24 Fighters purchased the North American Trojan for $228,500. The Commonwealth did not put in issue the source of the funds used by Fighters to pay that purchase price and no issue was joined as to the acquisition condition. Issue was joined as to the use condition and as to the derivation condition by reference solely to an amount of $50,000 which Fighters later sourced from UOCL and spent on repairs.

25 There is nothing to suggest that undertaking the repairs contributed to Fighters continuing to own the North American Trojan at the time of forfeiture. There is in the circumstances no other basis for considering that Fighters failed to establish the derivation condition.

26 The primary judge's finding as to the money laundering offences makes the position in relation to the use condition different. Given that the amount of money which Fighters spent on the repairs was not trivial and that it was sourced from UOCL, Fighters failed to prove on the balance of probabilities that the North American Trojan was not used in, or in connection with, the unlawful activity of disposing by Fighters of that amount which Fighters received from UOCL.

Doonan's Road and Merriwa Street

27 The main issue concerning Doonan's Road is whether Bubbling succeeded in establishing the use condition given the finding of the primary judge that he was unable to be satisfied that Perpetual Nominees Ltd ("Perpetual") was not induced to lend to Bubbling and to Yak 3 Investments Pty Ltd ("Yak 3") by the making of a loan application which contained a fraudulent representation in contravention of s 408C(1)(f) of the *Criminal Code* (Q) ("the Perpetual offences") and by the proffering of Doonan's Road as security. The proffering of Doonan's Road as security for the Perpetual loans was a use of Doonan's Road. That use was not a use in the fraudulent act that constituted the Perpetual offences. But it was a use in connection with that fraudulent act: both formed material parts of a single proposal which was directed to and which resulted in Perpetual making the loans. Bubbling for that reason failed to establish the use condition.

28 Unlike Doonan's Road, Merriwa Street was not proffered as security for the Perpetual loans. Merriwa Street was not otherwise referred to in the transaction documents for the Perpetual loans. Nemesis did not by reason of the Perpetual offences fail to establish the use condition.

29 The main issue concerning Merriwa Street is whether Nemesis succeeded in establishing the derivation condition given the finding of the primary judge

that the moneys loaned by Perpetual to Bubbling and to Yak 3 were sought and were used to repay part of a loan to Nemesis from the National Australia Bank ("NAB") in respect of which NAB had a mortgage over Merriwa Street. As explained by Gordon J, the primary judge did not find, and the evidence did not justify a finding, that repayment to NAB of the amounts of the loans made by Perpetual to Bubbling and to Yak 3 prevented NAB from exercising its rights over Merriwa Street so as to have been a cause of Nemesis continuing to have its interest in Merriwa Street at the time of forfeiture; indeed, the bulk of the funding used to repay NAB came from loans to Nemesis by Equititrust Ltd ("Equititrust"). Absent a basis for inferring such a causal connection to have existed, Nemesis did not by reason of the Perpetual offences fail to establish the derivation condition.

30 The final issue is whether Nemesis failed to establish the derivation condition in respect of Merriwa Street against the background of the finding of the primary judge that some of the moneys used to repay loans to Nemesis by Equititrust were sourced from UOCL. As Gordon J explains, the amounts sourced from UOCL on which the Commonwealth relies in raising this issue were found by the primary judge to have amounted to no more than five per cent of the total repayments to Equititrust. There is no basis for inferring those amounts may have been a cause of Nemesis continuing to have its interest in Merriwa Street at the time of forfeiture.

Orders

31 We agree with the orders proposed by Gordon J.

32 GORDON J. The *Proceeds of Crime Act* 2002 (Cth)[10] ("the POCA") is intended to, and does, prevent criminals from enjoying the fruits of their crimes, deprive them of the proceeds of and benefits derived from criminal conduct, prevent the reinvestment of those proceeds and benefits in further criminal activities, punish and deter breaches of laws, and enable law enforcement authorities to trace the fruits of offences[11].

33 It achieves these objects through a confiscation scheme[12] which provides for orders restraining persons from disposing of or otherwise dealing with particular property[13], forfeiture orders[14], automatic forfeiture of property following conviction of a serious offence[15] and pecuniary penalty orders[16].

34 These appeals raise issues about the construction and application of the provisions of the POCA allowing a court to make orders relating to the transfer of forfeited property. In particular, the appeals require consideration of s 102(3), which provides that the court that made a restraining order may make orders excluding particular property from automatic forfeiture to the Commonwealth if a number of grounds are established. Those grounds require the applicant to establish, in effect, that there is nothing unlawful about the property, in the sense that the property was not used in, or in connection with, any unlawful activity; that the property was not derived, directly or indirectly, from unlawful activity; and, finally, that the applicant acquired the property lawfully.

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10 The applicable version of the POCA for the purposes of these appeals is the POCA as at 13 July 2006, taking into account amendments up to the *Law Enforcement Integrity Commissioner (Consequential Amendments) Act* 2006 (Cth). The POCA, including s 102, was amended in 2010: see generally *Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2)* 2010 (Cth). Whether, and to what extent, the changes would lead to a different outcome in these appeals is, of course, not decided.

11 s 5 of the POCA; Australia, House of Representatives, Proceeds of Crime Bill 2002, Explanatory Memorandum at 1-2.

12 See s 6 of the POCA.

13 Pt 2-1 of the POCA.

14 Pt 2-2 of the POCA.

15 Pt 2-3 of the POCA.

16 Pt 2-4 of the POCA.

35 Although the immediate focus of these appeals is the construction and application of s 102, the determination of those issues requires close examination of the overall scheme of the POCA and separate consideration of each of the various items of property in issue[17]. There is also an issue about the construction and application of another provision of the POCA (s 141), which deals with enforcement of a pecuniary penalty order.

36 Hence, the balance of these reasons is organised as follows:

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17 Hawker Sea Fury FB11 (registration VH-SHF) ("the Sea Fury"); 1983 Mercedes Benz 380SL ("the Mercedes"); North American Aviation T-28 Trojan (registration VH-SHT) ("the T-28"); North American Aviation T-28 Trojan (registration VH-AVC) ("the North American Trojan"); 27 Samara Street, Sunnybank ("Samara Street"); 6 Merriwa Street, Sunnybank Hills ("Merriwa Street"); Archerfield Airport lease 703146442 sublease 70447517 ("Hangar 400"); and Doonan's Road, Grandchester ("Doonan's Road").

A. Proceedings below

37 In May 2003, the Commonwealth Director of Public Prosecutions ("the CDPP") suspected that Mr Steven Irvine Hart had committed indictable offences in operating tax minimisation schemes. The CDPP sought, and subsequently obtained, restraining orders under the POCA prohibiting disposal of, or dealing with, specific property that was suspected of being under Mr Hart's effective control.

38 On 26 May 2005, Mr Hart was found guilty of nine offences of defrauding the Commonwealth in contravention of s 29D of the *Crimes Act* 1914 (Cth). He was sentenced to seven years' imprisonment for each offence, with the sentences to be served concurrently. On 18 April 2006, the property that was subject to the restraining orders was automatically forfeited to the Commonwealth under s 92 of the POCA.

39 Following the automatic forfeiture of the restrained property to the Commonwealth, two applications were filed in the District Court of Queensland. First, an application was made by a number of companies with which Mr Hart was affiliated: relevantly, Flying Fighters Pty Ltd as trustee for Flying Fighters Discretionary Trust ("Fighters"), Bubbling Springs Pty Ltd as trustee for Bubbling Springs Discretionary Trust ("Bubbling"), Nemesis Australia Pty Ltd ("Nemesis") and Yak 3 Investments Pty Ltd as trustee for Yak 3 Discretionary Trust ("Yak 3") (together, "the Companies"). That application was made for orders under s 102 of the POCA to recover their respective interests, or an amount equal to the value of their interests, in some of the forfeited property ("the s 102 application"). In respect of each item of property, the Companies contended that the property was not *used* in, or in connection with, any unlawful activity[18]; the property was not *derived or realised*, directly or indirectly, by any

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18 s 102(3)(a) of the POCA.

person from any unlawful activity[19]; and the relevant Company had *acquired* the property lawfully[20].

40 Second, the CDPP applied under s 141 of the POCA for a declaration that any property recovered by the Companies pursuant to the s 102 application was available to satisfy any pecuniary penalty order made against Mr Hart ("the s 141 application"). The CDPP alleged that although the property was not owned by Mr Hart, it was subject to his effective control.

41 On 19 November 2010, pursuant to s 116 of the POCA, a pecuniary penalty order was made against Mr Hart ordering him to pay $14,757,287.35 to the Commonwealth. In determining the amount of that penalty, the value of the property automatically forfeited in 2006, following Mr Hart's convictions, was taken into account to reduce the amount of the pecuniary penalty order[21].

42 The primary judge initially refused to make the orders sought in the s 102 application because he found that the Companies had failed to prove the value of their interest in specific assets at the time of the forfeiture[22]. However, his Honour indicated that he would grant the Companies relief in respect of those assets, on condition that the Companies paid the Commonwealth $1.6 million[23]. Orders were made in those terms on 6 May 2013. The $1.6 million represented an amount owed under a number of fixed and floating charges which had been granted by each of the Companies over their assets to Merrell Associates Ltd ("Merrell")[24]. The charges to Merrell had been forfeited to the Commonwealth. The primary judge dismissed the s 141 application on discretionary grounds[25].

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19 s 102(3)(a) of the POCA.

20 s 102(3)(b) of the POCA.

21 *Commonwealth Director of Public Prosecutions v Hart* (2010) 81 ATR 471 at 477-478 [5], 598 [558]. See also *Commonwealth Director of Public Prosecutions v Hart* [2013] QDC 60 at [877]-[879].

22 *Hart* [2013] QDC 60 at [852]-[853]. See also *Commissioner of the Australian Federal Police v Hart* (2016) 336 ALR 492 at 654 [828]-[830], 741 [1247], 746 [1272]-[1273].

23 *Hart* [2013] QDC 60 at [852]-[855].

24 See *Hart* [2013] QDC 60 at [472].

25 *Hart* [2013] QDC 60 at [867]-[885].

43 The Commonwealth[26] appealed to the Court of Appeal of the Supreme Court of Queensland against the dismissal of the s 141 application and, separately, against the 6 May 2013 orders in relation to the s 102 application. The Companies appealed against the primary judge's refusal to make the orders they had sought under s 102 and against the 6 May 2013 orders (including the requirement that they pay $1.6 million).

44 The Court of Appeal, by majority (Peter Lyons J, Douglas J agreeing; Morrison JA dissenting), dismissed the two appeals by the Commonwealth and allowed the Companies' appeal[27]. In the Companies' appeal and the Commonwealth's s 102 appeal, the majority held that none of the assets in the proceedings was used in, or in connection with, any unlawful activity or was derived or realised, directly or indirectly, by any person from any unlawful activity[28]. An important step in the majority's reasoning was its approach to the phrase "derived or realised" in s 102(3)(a), which it construed as meaning "wholly derived" or "wholly realised"[29]. In the Commonwealth's s 141 appeal, the majority held that effective control was to be assessed at the date of the determination of an application under s 141[30] and that, in this case, the

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26 In the Court of Appeal, the appellant in the s 141 appeal was the Commissioner of the Australian Federal Police. The appellant in the s 102 appeal was the Commonwealth. In the Companies' appeal, both the Commonwealth and the Commissioner of the Australian Federal Police were named as respondents. The appeals to this Court were brought respectively by each of the Commissioner of the Australian Federal Police, the Commonwealth, and the Commonwealth and the Commissioner of the Australian Federal Police. It is not necessary for the purposes of these reasons to distinguish between the Commonwealth and the Commissioner of the Australian Federal Police as parties. It will be convenient to refer to both as "the Commonwealth".

27 *Hart* (2016) 336 ALR 492 at 654 [828]-[830], 741 [1247], 746 [1272]-[1273].

28 *Hart* (2016) 336 ALR 492 at 697-698 [1017] (the T-28), 700 [1027] (the Sea Fury), 717 [1115] (the North American Trojan), 723 [1144] (Hangar 400), 724 [1158] (Merriwa Street), 727 [1172] (Samara Street), 731 [1194] (Doonan's Road), 732 [1199] (the Mercedes).

29 *Hart* (2016) 336 ALR 492 at 675-676 [918]-[923] per Peter Lyons J, 654-655 [831]-[833] per Douglas J; cf at 521 [123], 523-524 [138] per Morrison JA.

30 *Hart* (2016) 336 ALR 492 at 745-746 [1268].

Commonwealth could not establish that Mr Hart had effective control of the assets at that date[31].

45 The Court of Appeal made orders declaring the value of the Companies' interests in certain assets immediately before forfeiture and requiring the Commonwealth to pay the Companies that value, with interest. It also ordered the transfer of certain assets and interests in property to the Companies with the result that those assets and interests would not be available to be applied towards the pecuniary penalty order.

B. These appeals

46 These appeals concern the following assets automatically forfeited to the Commonwealth on 18 April 2006: three aircraft (the Sea Fury, the T-28 and the North American Trojan) and a motor vehicle (the Mercedes), all owned by Fighters; and four pieces of real property (Samara Street and Doonan's Road, owned by Bubbling; Merriwa Street, owned by Nemesis; and Hangar 400, a sublease over Commonwealth land, registered in the name of Yak 3).

47 Fixed and floating charges, described as mortgage debentures, were granted by each of Fighters, Bubbling, Nemesis and Yak 3 over their respective assets to Merrell ("the Merrell Charges"). As has already been mentioned, these were also automatically forfeited to the Commonwealth. As will be seen, Merrell was a central participant in the unlawful activity undertaken as part of Mr Hart's tax minimisation schemes. It was common ground before the Court of Appeal, and before this Court, that at the date of forfeiture the value of the debt owed to Merrell under each charge was $1.6 million and remained unsatisfied.

48 As noted at the outset, questions about the construction of s 102(3) of the POCA and its application to the assets in issue in these appeals require consideration of each limb of s 102(3) and an understanding of the framework erected by the POCA, being the statutory context in which the provision sits.

49 It is against that framework that an applicant for an order under s 102(3), in relation to specific "property"[32] that has been forfeited to the Commonwealth, must establish on the balance of probabilities[33] that:

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31 *Hart* (2016) 336 ALR 492 at 743 [1256].

32 "[P]roperty" is defined in s 338 of the POCA and, by reference to the definition of "interest" in s 338, includes any present, future, vested or contingent legal or equitable estate or interest in the property or thing as well as any right, power or privilege in connection with the property or thing.

33 s 317 of the POCA.

"(a) the property was not used in, or in connection with, any *unlawful activity and was not derived or realised, directly or indirectly, by any person from any unlawful activity; and

(b) the applicant acquired the property lawfully; and

(c) the applicant is not the person convicted of the offence to which the forfeiture relates."

50 Paragraphs (a) and (b) provide, in effect, for three criteria or "limbs" that the applicant must address. The first is that the property was not used in, or in connection with, any unlawful activity (the "use limb"). The second is that the property was not derived or realised, directly or indirectly, by any person from any unlawful activity (the "source limb"). The third is that the applicant acquired the property lawfully (the "lawfully acquired limb").

51 The use limb and the source limb are negative – the applicant must establish that the property was not used in, or in connection with, *any* unlawful activity and the property was not derived or realised, directly or indirectly, by any person from any unlawful activity. The lawfully acquired limb is positive – the applicant must establish that they acquired the property (or their interest in the property) lawfully. Each limb presents a fact-specific and often fact-intensive inquiry. In each case, whether the criteria of the relevant limb are established will be a matter of fact and degree.

52 As these reasons will explain:

(1) the use limb seeks to identify a connection between the use of the property and unlawful activity. It may, and commonly will, require consideration of one or more of the following questions: *how* the property was used in or in connection with unlawful activity; the *extent* to which the property was so used; and *how much* or *what part* of the property was used in that unlawful activity;

(2) the source limb seeks to identify a connection between the derivation of the property and unlawful activity. The inquiry may differ depending on the relevant derivation; but it may be appropriate to ask whether the extent and nature of the connection between the unlawful activity and the derivation is *not insubstantial*; and

(3) the lawfully acquired limb asks whether there was unlawful activity in the process of acquisition of the applicant's interest in the property or whether the funds used to acquire that interest in the property were unlawfully acquired. The question, simply, is whether the applicant acquired the property (or the applicant's

interest in the property) lawfully, other than in respects which would be considered de minimis.

53 On the proper construction of s 102(3), the Commonwealth's appeal in relation to the s 102 application should be allowed in part, on the basis that:

(1) in relation to the Sea Fury, the Mercedes, the T-28 and Samara Street, the relevant Company failed to establish the source limb;

(2) in relation to the Sea Fury and the T-28, the relevant Company also failed to establish the lawfully acquired limb; and

(3) in relation to the North American Trojan, Hangar 400 and Doonan's Road, the relevant Company failed to establish the use limb.

54 In relation to Merriwa Street, although Nemesis satisfied each limb of s 102(3), the orders and declarations made by the Court of Appeal failed to properly address the nature, extent and value of Nemesis' interest in Merriwa Street and, in particular, failed to address the fact that the assets of Nemesis, and therefore Merriwa Street, were subject to one of the Merrell Charges at the date of forfeiture. Accordingly, the orders made by the Court of Appeal should be set aside and, in their place, orders should be made which address the existence of the Merrell Charge granted by Nemesis, the owner of Merriwa Street.

55 Finally, for the reasons explained in Part E below, the Commonwealth's appeal in relation to the dismissal of the s 141 application should be dismissed.

C. The POCA

56 Chapter 2 of the POCA contains a scheme comprising interlocking parts: Pt 2-1 deals with restraining orders, Pt 2-2 deals with forfeiture orders, Pt 2-3 deals with automatic forfeiture following conviction of a serious offence and Pt 2-4 deals with pecuniary penalty orders[34].

57 Three elements of that statutory framework – (1) restraining orders; (2) forfeiture; and (3) exclusion from forfeiture – are considered in turn in this part of the reasons. Aspects of the POCA that relate to pecuniary penalty orders and enforcement will be considered in Part E of these reasons, which addresses the s 141 appeal.

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34 Part 2-5 of the POCA, dealing with literary proceeds, is not relevant to these appeals and may be put to one side.

(1) Restraining orders under Pt 2-1

58 A restraining order is a critical part of the scheme: it restrains the disposal of, or other dealing with, particular property that is, or might be, the subject of future forfeiture in relation to certain offences[35]. It is the mechanism that ensures property is not dissipated before it is able to be confiscated. The CDPP, as the applicant[36], must establish certain pre-conditions, on the balance of probabilities[37]. The application can be made ex parte[38].

59 The pre-conditions to the court making a restraining order vary according to the seriousness of the offence. For present purposes, it is sufficient to refer to s 18 (dealing with restraining orders for persons suspected of committing serious offences) and then, by way of contrast, s 17 (dealing with restraining orders for persons convicted of, or charged with, other indictable offences). The offences to which these appeals relate were serious offences.

60 Section 18 enables a court to make a restraining order where there are reasonable grounds to *suspect* that a person has committed a *serious offence*[39], within the six years preceding the application for the restraining order or since the application was made. It is not necessary for the reasonable grounds to be based on a finding as to the commission of a particular serious offence[40].

61 The restraining order may prohibit specific property from being disposed of, or otherwise dealt with, by any person, or prescribe that property is only to be disposed of or dealt with in a specified manner or in specified circumstances[41].

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35 s 16 of the POCA.

36 s 25 of the POCA.

37 s 317 of the POCA.

38 See s 26(4) of the POCA.

39 A "serious offence" is relevantly defined to mean an indictable offence punishable by imprisonment for three or more years involving, among other things, unlawful conduct constituted by or relating to a breach of s 81 of the *Proceeds of Crime Act* 1987 (Cth) or Pt 10.2 of the *Criminal Code* (Cth) (money laundering) and unlawful conduct by a person that causes, or is intended to cause, a loss to the Commonwealth or another person of at least $10,000: par (a)(ii) and (iv) of the definition of "serious offence" in s 338 of the POCA.

40 s 18(4) of the POCA.

41 s 18(1)(a) and (b) of the POCA.

62 A restraining order may cover property where the court is satisfied that there are *reasonable grounds to suspect* that the property is:

(1) *all* or specified property of the suspect[42], including bankruptcy property of the suspect[43]; or

(2) specified property of another person (regardless of whether that other person's identity is known) that is subject to the *effective control* of the suspect or is proceeds of the offence or offences which form the basis of the restraining order[44].

63 "[E]ffective control" is defined broadly under the POCA[45]. The definition seeks to capture aspects of control that might not otherwise be caught. For example, property may be subject to the effective control of a person whether or not the person has a legal or equitable estate or interest in the property or a right, power or privilege in connection with the property[46]; and property held on trust for the ultimate benefit of a person is taken to be under the effective control of the person[47]. The broad definition of effective control provides that a court may consider property without the CDPP needing to show that it is *in fact* under the effective control of the suspect. So, property disposed of to another person without sufficient consideration, within six years before or after an application for a restraining order, a forfeiture order or a pecuniary penalty order, is deemed to be under the effective control of the person who disposed of the property[48].

64 The intended reach of s 18 of the POCA is made clear from the outset: if there are reasonable grounds to suspect that a person has committed a serious offence, a court is able to prohibit the disposal of, and other dealing with, all of that suspect's property (together with property subject to their effective control) irrespective of its connection with the alleged serious offence. The court must make the restraining order even if there is no risk of the property being disposed

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42 s 18(2)(a) and (b) of the POCA.

43 s 18(2)(aa) and (ba) of the POCA.

44 s 18(2)(c) and (d)(i) of the POCA.

45 s 337 of the POCA.

46 s 337(1) of the POCA.

47 s 337(2) of the POCA.

48 s 337(4) of the POCA.

of or otherwise dealt with[49] and the court may specify that the restraining order covers property that is acquired by the suspect after the court makes the order[50]. After the order is made, it is up to the suspect to establish that the specified property should not be subject to restraint[51].

65 By way of contrast, s 17 applies where a person has been convicted of, has been charged with, or is proposed to be charged with, an *indictable offence*[52], which need not be a serious offence within the meaning of the POCA. If the person has not been convicted, the court must be satisfied that there are reasonable grounds to suspect that the person committed an indictable offence[53]. If the application is to restrain property of a person other than the suspect, the court must be satisfied that there are reasonable grounds to suspect that the property is subject to the effective control of the suspect or is proceeds or an instrument of the offence[54]. If these pre-conditions are met, the court must make an order that identified property must not be disposed of or otherwise dealt with by any person, or dealt with by any person except in the manner and circumstances specified in the order. Section 17 thereby sets a higher bar for the CDPP: there is no equivalent of s 18(4) (that the reasonable grounds need not be based on a finding as to the commission of a particular offence) and it provides that a court may refuse to make a restraining order in relation to an indictable offence that is not a serious offence if the court is satisfied that it is not in the public interest to make the order[55].

66 The POCA contains procedures for property to be excluded from a restraining order and for a restraining order to be revoked[56]. Consistent with the

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49 s 18(5) of the POCA. See also s 17(5) of the POCA.

50 s 18(6) of the POCA. See also s 17(6) of the POCA.

51 Div 3 of Pt 2-1 of the POCA.

52 s 17(1)(d) of the POCA. An "indictable offence" includes an offence against a law of the Commonwealth that may be dealt with as an indictable offence even if it may also be dealt with as a summary offence in some circumstances: s 338 of the POCA.

53 s 17(1)(e)-(f) and (3)(a) of the POCA.

54 s 17(1)(e)-(f) and (3)(b) of the POCA.

55 s 17(4) of the POCA.

56 See, eg, in Pt 2-1 of the POCA, s 24 (allowance for expenses), s 24A (excluding property when expenses are not allowed), s 29 (excluding specified property for

(Footnote continues on next page)

intended reach of the POCA, the circumstances are limited and the conditions strict[57]. These exclusion and revocation procedures are not directly in issue in these proceedings.

(2) Conviction forfeiture

67 The making of a restraining order against property in relation to certain offences is a step to *possible* forfeiture of that property. Under the POCA, property may be forfeited to the Commonwealth where there is a conviction for an indictable offence ("conviction forfeiture") but also where there is no conviction ("civil forfeiture"). A distinction is also drawn by reference to the seriousness of the offence.

68 Following the conviction of a person of a *serious offence*, any property the subject of a restraining order that relates to that offence is automatically forfeited to the Commonwealth[58]. The automatic forfeiture occurs six months after the date of the conviction (or at the end of an extended period specified in an extension order). The restraining order does not in fact have to relate to the specific offence of which the person was convicted: it is deemed sufficient if the restraining order was in relation to a related offence[59] of which the person had been, or was proposed to be, charged at the time of the making of the restraining order.

69 Central to the POCA scheme is the way it defines "unlawful activity" and the way that definition feeds into, and affects, the construction and operation of a number of other definitions[60].

70 "[U]nlawful activity" is defined to mean an act or omission that constitutes an offence against a law of the Commonwealth, an offence against a

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certain reasons), s 42 (application to revoke a restraining order) and s 44 (security to revoke a restraining order).

57 For example, a court must not exclude property from a restraining order under s 29 of the POCA unless the court is satisfied that a pecuniary penalty order *could not be* made against the person who owns the property or, if the property is not owned by the suspect but is under the suspect's effective control, against the suspect: s 29(4) of the POCA.

58 Div 1 of Pt 2-3 of the POCA and, in particular, s 92.

59 An offence is a "related offence" of another offence if the physical elements of the two offences are substantially the same acts or omissions: s 338 of the POCA.

60 See ss 329 and 330 of the POCA.

law of a State or Territory that may be dealt with on indictment, or an offence against a law of a foreign country[61]. Unsurprisingly, "proceeds of an unlawful activity" means proceeds of the offence constituted by the act or omission that constitutes the unlawful activity[62]. Next, property is "proceeds of an offence" if it is *wholly or partly* derived or realised, whether *directly or indirectly*, from the commission of the offence[63]. And property can be proceeds of an offence even if no person has been convicted of the offence[64] and whether the property is situated within or outside Australia[65].

71 Moreover, the scope of "proceeds of an offence" is extended by s 330, which provides that property becomes proceeds of an offence if it is wholly or partly derived or realised from a disposal of or other dealing with proceeds of the offence or wholly or partly acquired using proceeds of the offence, including because of a previous application of s 330[66]. And property remains proceeds of an offence even if it is credited to an account or it is disposed of or otherwise dealt with[67]. There is no need to adopt or meet equitable tracing principles. Indeed, s 330(5) provides that if a person once owned property that was proceeds of an offence but the person ceased to be the owner of the property and (at that time or a later time) the property stopped being proceeds of an offence or an instrument of the offence[68] and the person subsequently acquires the property again, then the property becomes proceeds of an offence again. This broad definition of "proceeds" is central to the confiscation scheme in the POCA.

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61 s 338 of the POCA.

62 s 329(4) of the POCA.

63 s 329(1) of the POCA.

64 s 329(3) of the POCA.

65 s 329(1) of the POCA.

66 s 330(1) of the POCA.

67 s 330(3) of the POCA.

68 For example, because it was acquired by a third party for sufficient consideration without the third party knowing, and in circumstances that would not arouse a reasonable suspicion, that the property was proceeds of an offence: see s 330(4)(a) of the POCA.

(3) Application by convicted person for exclusion under s 94

72 If a person convicted of a serious offence wishes to have property excluded from automatic forfeiture, that person must apply *after* conviction of the serious offence to which the restraining order relates but *before* the restrained property is automatically forfeited[69] – that is, usually within six months after conviction. The person convicted of the serious offence must own the property and the court must be satisfied that (1) the property is neither proceeds of unlawful activity nor an instrument of unlawful activity and (2) the person's interest in the property was lawfully acquired[70].

73 As is apparent, the person convicted of the serious offence must satisfy the court that the property was *not* the proceeds of *any* unlawful activity, not just of the serious offence of which the person was convicted.

(4) Application by third party for exclusion under s 102

74 In the proceedings giving rise to these appeals, Mr Hart did not apply for an exclusion order. Instead, as noted earlier, when Mr Hart was convicted and the restrained property was automatically forfeited to the Commonwealth, the Companies applied for an order under s 102 declaring the nature, extent and value of their interests in some of the forfeited property and a further order that their interests in that specific property be transferred to them or that an amount equal to the value of their interests in that property was payable by the Commonwealth to them[71].

75 Before a court may make such an order, it must be satisfied that the grounds set out in s 102(2) or (3) exist. Those sub-sections provide:

> "(2) An order under this section may be made if:
>
> (a) the applicant was not, in any way, involved in the commission of *the offence to which the forfeiture relates*; and
>
> (b) the applicant's *interest in the property is not subject to the *effective control of the person whose conviction caused the forfeiture; and

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69 s 94 of the POCA.

70 s 94(1)(c), (e) and (f) of the POCA.

71 s 102(1) of the POCA.

(c) the applicant's interest in the property is not **proceeds of the offence* or an *instrument of the offence.

(3) An order under this section may also be made if:

(a) the property was not used in, or in connection with, any *unlawful activity and was not derived or realised, directly or indirectly, by any person from any unlawful activity; and

(b) the applicant acquired the property lawfully; and

(c) the applicant is not the person convicted of the offence to which the forfeiture relates." (emphasis added)

76 Sections 102(2) and 102(3) deal with different categories of applicant. Section 102(2) only avails an applicant who was not, in any way, involved in the commission of the offence to which the forfeiture relates. Section 102(3), unlike s 102(2), may also avail an applicant who was involved in, but not convicted of, the offence to which the forfeiture relates.

(a) Innocent third party – s 102(2)

77 Although these appeals are directly concerned with s 102(3), it is necessary to start with s 102(2). Under s 102(2), if an applicant is not, in any way, involved in the commission of the offence to which the forfeiture relates, they are entitled to an order excluding the property from forfeiture if they can satisfy the court of two matters: first, that their interest in the forfeited property is not subject to the effective control of the person whose conviction caused the forfeiture; and second, that their interest in the forfeited property is, relevantly, not "proceeds of the offence".

78 For the purposes of s 102(2)(c), it is for the innocent third party applicant to establish, on the balance of probabilities[72], that the applicant's interest in the forfeited property was not "proceeds of *the* offence" (emphasis added). That is, notwithstanding that the applicant was not in any way involved in the commission of the offence to which the forfeiture relates, the applicant must establish that their interest in the property was not *wholly or partly derived or realised* from the commission of *the* offence or from a disposal or other dealing with proceeds of *the* offence and was not wholly or partly acquired using proceeds of *the* offence, in the broad sense discussed earlier[73]. And of course, if the applicant once owned but ceased to own property that was proceeds of the

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72 s 317 of the POCA.

73 See Part C(2) above.

offence and the property stopped being proceeds of the offence, the property again becomes proceeds of the offence if the applicant reacquires it. Section 102(2) sets a high bar.

(b) Other situations – s 102(3)

79 Section 102(3), unlike s 102(2), permits an application by a person who is involved in, but is not the person convicted of, the offence to which the forfeiture relates. The provision focuses on the "property" that was automatically forfeited. The pre-conditions for making the order under s 102(3) are cumulative and, unsurprisingly, more stringent than s 102(2). An applicant may be entitled to an order under s 102(3) only if they can satisfy the court of three limbs – the use limb, the source limb and the lawfully acquired limb.

(i) Use limb – par (a)

80 First, in relation to the use limb, the applicant must establish, on the balance of probabilities[74], that the property was not used in, or in connection with, *any* unlawful activity.

81 The inquiry that must be made is necessarily broad. Under this limb, "the property" is not expressed to be limited to *the applicant's interest in* the forfeited property. It refers to the property itself, including any interest in the property[75]. Moreover, not only does the use limb extend to *any unlawful activity* – not just the unlawful activity giving rise to the restraining order and the forfeiture – but the addition of the words "in connection with" reinforces the breadth of the inquiry. It is an inquiry which seeks to identify a connection between the use of the property and unlawful activity.

82 Identifying that relationship or connection may, and commonly will, direct attention to, and require consideration of, one or more of the following questions: *how* the property was used in or in connection with unlawful activity; the *extent* to which the property was so used; and *how much* or *what part* of the property was used in that unlawful activity[76].

83 Further, because the use limb is cast in negative and broad terms, it is not necessarily decisive for an applicant to show that:

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74 s 317 of the POCA.

75 See the definitions of "property" and "interest" in s 338 of the POCA.

76 cf *Director of Public Prosecutions v George* (2008) 102 SASR 246 at 261 [60].

(a) there is no causal link between the property and unlawful activity – something less than a causal link may result in the use limb not being established;

(b) the property was not essential or necessary for the commission of an offence;

(c) the property did not make a unique contribution to the commission of an offence; or

(d) the use in the unlawful activity was not the sole or dominant use of the property.

84 Some facts and circumstances will be more straightforward. If a house is used as the place to manufacture drugs, or a car is used to distribute drugs, the asset will be caught by s 102(3)(a) and the applicant will not be entitled to an order under s 102(3). Other facts and circumstances will be more complicated. If, for example, the unlawful activity is money laundering proceeds of crime through the sale or purchase of assets (or both), a question may arise whether a particular asset in that series of transactions was used in, or in connection with, the unlawful activity of money laundering. That conduct may, in certain circumstances, support a finding that a court cannot be satisfied that the property was not used in, or in connection with, *any* unlawful activity.

85 Each inquiry will be fact-specific and often fact-intensive. It is a question of fact and degree. But the onus is on, and remains on, an applicant for an order under s 102(3) to establish on the balance of probabilities that the property was not used in, or in connection with, any unlawful activity. How an applicant discharges that onus will vary between applications. However, an applicant is not required to consider or negative all possibilities irrespective of whether they are raised by the CDPP[77]. If the CDPP intends to rely upon facts and circumstances which it contends establish that a trial judge should not be satisfied that the use limb is established (or, for that matter, the source limb or the lawfully acquired limb), the CDPP should identify those facts and matters as early as possible in its defence or other pleading in response to any s 102(3) application.

(ii) Source limb – par (a)

86 Under the source limb the applicant must establish, on the balance of probabilities[78], that the property was not *derived or realised, directly or*

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77 *Hart* (2016) 336 ALR 492 at 678-679 [935]. See also *Director of Public Prosecutions (Cth) v Jeffery* (1992) 58 A Crim R 310 at 313-314.

78 s 317 of the POCA.

indirectly, *by any person* from *any unlawful activity*. As with the use limb, "the property" to which the source limb refers is not limited to *the applicant's interest in* the forfeited property. The focus is on how the property, including any interest in the property, was derived or realised. Further, the inclusion of the phrases "directly or indirectly", "by *any* person" (not limited to the applicant or the person convicted of the offence to which the forfeiture relates) and "from *any* unlawful activity" (not limited to the offence to which the forfeiture relates) is intended to, and does, broaden the circumstances which are excluded from s 102(3).

87 Put in different terms, the source limb significantly narrows the scope of the property that can be the subject of an exclusion order under s 102(3). Together with the other limbs, it sets a high bar for recovery of forfeited property: a higher bar than that in s 102(2).

88 In this Court, a central issue about the source limb was whether, as the majority of the Court of Appeal held, the source limb would be satisfied if an applicant showed that the property was not *wholly* derived (or realised) from unlawful activity[79]. It was not suggested that "realised" relevantly added to the concept of derivation for the purposes of the present appeals.

89 The majority of the Court of Appeal relied by way of comparison on how "proceeds of an offence" is defined in s 329, which relevantly provides that property is proceeds of an offence if it is "wholly" or "partly" derived or realised from the commission of the offence. First, the inclusion of "partly" in s 329 (and s 330) was said to reflect a recognition by the drafters that the ordinary meaning of "derived" was "wholly derived". Second, the majority concluded that this ordinary meaning should be applied to "derived" in s 102(3)(a), given that the phrase was not preceded by "wholly or partly".

90 The Companies' submission in this Court was, in short, that this approach was correct: if the Parliament had intended that an applicant should have to satisfy the court that property was not *partly* derived from unlawful activity, s 102(3)(a) would have either used the defined term "proceeds" or included the phrase "wholly or partly" before "derived". As will become apparent, that submission should be rejected.

91 Section 102(3)(a) speaks expressly of "property … derived … directly or indirectly". Whether property has been *derived* directly or indirectly by any

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79 *Hart* (2016) 336 ALR 492 at 654-655 [832], 675-676 [920]-[923].

person from any unlawful activity is not further defined[80]. The statutory question may be one of fact and degree. It will be fact-specific and often fact-intensive. It may involve practical considerations.

92 The word "derived" directs attention to whether there is a relevant connection between the property, its derivation and a relevant activity. Obviously, the nature of the connection may differ according to what is said to be the relevant form of derivation. Where the deriving is the original acquisition of the property, the relationship sought is a connection between unlawful activity and acquisition. In turn, that directs attention to how the unlawful activity caused or contributed to the occurrence of the derivation. The extent and nature of the connection is not unimportant: if the overall assessment is that the extent and nature of the connection is de minimis, then there is no relevant connection that could lead to a finding of derivation. Putting the matter in different terms, it may be appropriate to ask whether the extent and nature of the connection between the unlawful activity and the derivation is not insubstantial.

93 Where the unlawful activity in issue is *a* cause (not *the* cause) of the derivation – as it will be when a not insignificant part of the funds for acquisition directly or indirectly comes from unlawful activity – the property will be derived directly or indirectly from the unlawful activity.

94 Hence, it is too broad to say that "derived" in its ordinary sense means "wholly" derived and that this is how the source limb should be understood. The word, like any word in a statute, must be read in context. The context includes the surrounding words in s 102(3)(a), the purpose of s 102(3), the place of s 102(3) within s 102 and the overall statutory scheme.

95 Section 102(3) provides a mechanism for persons, including a person involved in the commission of a serious offence (but not convicted of that offence), to seek to recover property already automatically forfeited to the Commonwealth. But that mechanism is limited. And the focus of s 102(3) is not limited to proceeds of crime. Thus, the source limb is directed to ensuring that property that was *derived* by *any person from any unlawful activity* is not able to

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80 Section 336 is directed to deriving "proceeds", not deriving property. It provides:

> "A reference to a person having ***derived*** *proceeds [or] a *benefit … includes a reference to:
>
> (a) the person; or
>
> (b) another person at the request or direction of the first person;
>
> having derived the proceeds [or] benefit … directly or indirectly."

be transferred to a person who, potentially, was involved in the commission of the offence to which the forfeiture relates. It is stringent in its scope and intended reach. And consistent with that objective, the balance of s 102(3)(a) uses words of generality – the use limb requires the applicant to establish that "the property was not used in, or in connection with, any unlawful activity". To read "derived" in s 102(3)(a) as "wholly derived" would be directly contrary to the purpose of s 102(3).

96 Further, s 102(3) is clearly intended to impose a higher bar for recovery than that provided under s 102(2) to a third party who was not involved in the commission of the offence to which the forfeiture relates. To read "derived" as "wholly derived" in s 102(3)(a) would place an applicant who may have been involved in the commission of the offence in a more advantageous position than an innocent third party under s 102(2). That cannot be the intended result.

97 Next, the Companies' contention that the separate use of "wholly" and "partly" in the definition of "proceeds" in s 329 of the POCA means that Parliament was assuming or accepting that "derived" ordinarily means "wholly derived", and that it therefore bears that meaning in s 102(3)(a), is misplaced. First, it is not necessarily the case that "derived" is ordinarily understood as meaning "wholly derived". As just explained, the word takes its meaning from its context, and the context includes the fact that s 102(3) does not allow property to be recovered just because it is not proceeds of crime: it is more stringent. Second, sub-ss (1) and (4) of s 329, in their terms, indicate that derivation can include partial derivation. They provide that property can be proceeds of an offence even if the property is only partly derived from the commission of that offence. It is not necessary that the property be wholly derived from the commission of that offence. Section 330(1) also provides that property can be proceeds of a relevant offence if the property is partly derived from a disposal of, or other dealing with, other property that is derived from the commission of that offence. Again, it is not necessary that the property be wholly derived from the commission of that offence. These sections are entirely consistent with the conclusion that, in the context of the POCA, "derived" includes both "wholly" and "partly" derived. They confirm that, unless the derivation is de minimis, it is sufficient for the purposes of s 102(3)(a) if the property is partly derived from any unlawful activity.

98 During the course of oral submissions about the proper construction of the source limb, possible tests for determining whether property was "derived" from unlawful activity, including proportional tests – for example, whether *most* or a *substantial* proportion of the funds used have come from unlawful activity – or a "but for" test – whether the property would not have been obtained or retained but for the use of tainted funds – were discussed. As the preceding analysis demonstrates, the statutory question is one of fact and degree, and will be fact-specific and often fact-intensive. In considering the application of the source limb to the facts and circumstances of a specific asset, including, in particular,

the extent and nature of the connection between the unlawful activity and the derivation, a proportional test, or a "but for" test, may be of assistance. However, the answer provided by either test will not be decisive because, consistent with the broad construction of the source limb explained earlier, the statutory question is better approached by asking whether the extent and nature of the connection between the unlawful activity and the derivation is *not insubstantial*.

99 Finally, contrary to the view expressed by the majority of the Court of Appeal, the decision of the Supreme Court of Victoria in *Director of Public Prosecutions v Allen*[81] does not assist in the application of the source limb. Although *Allen* correctly recognised that property may be acquired using funds from a number of sources, some of which may be lawful and others of which might be unlawful, it did not purport to lay down a general test for when property would be derived or realised from the commission of an offence[82]. And that is unsurprising. Not only was the legislative framework in *Allen* different, but it was simply not necessary for the judge in *Allen* to consider the outer reaches of "derived" given his finding that virtually *all* the property to be forfeited in that case was derived from the commission of offences.

(iii) Lawfully acquired limb – par (b)

100 Finally, the lawfully acquired limb requires the applicant to establish, on the balance of probabilities[83], that they acquired the property lawfully[84]. Unlike the other limbs, it is framed in positive terms. Moreover, given that the focus is on acquisition *by the applicant*, the reference to "the property" in this limb must be read as a reference to the applicant's interest in the property[85]. But, as with the other limbs of s 102(3), the inquiry involves a question of fact and degree. It too will be fact-specific and often fact-intensive.

101 Under this limb, the initial focus shifts from the property to the applicant. Property will not be lawfully acquired if an offence is committed in the process of acquisition or if the funds used to acquire the property were not lawfully acquired[86]. In other cases, consideration will need to be given to the source of

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81 Unreported, Supreme Court of Victoria, 12 December 1988.

82 See also *Director of Public Prosecutions (Cth) v Corby* [2007] 2 Qd R 318 at 321.

83 s 317 of the POCA.

84 s 102(3)(b) of the POCA.

85 See the definitions of "property" and "interest" in s 338 of the POCA.

86 See *Markovski v Director of Public Prosecutions* (2014) 41 VR 548 at 563 [76], 564 [83], 567 [94]-[95], [97].

the funds used in the acquisition and its effect upon the lawfulness of the transaction.

102 So, for example, property is unlikely to be lawfully acquired if:

(1) the applicant acquired the property with the proceeds of crime or as a result of some other form of illegality (which it is presently unnecessary and inappropriate to define);

(2) the funds the applicant used to purchase the property were not themselves lawfully acquired; or

(3) the funds the applicant used to purchase the property were provided by a third party who had acquired them unlawfully.

103 Under this limb, proportional tests – for example, whether *most* or a *substantial* proportion of the asset was acquired lawfully – and a "but for" test – whether the property would not have been acquired but for the unlawful activity or tainted funds – are also unlikely to be determinative. For example, if an offence has been committed in the process of acquisition, the extent to which that unlawful activity contributed to the acquisition of the asset will usually be irrelevant because the limb will not be satisfied. For those reasons, the statutory question under this limb is better approached by asking whether the asset was acquired lawfully, other than in respects which would be considered de minimis.

(5) Order under s 102(1)

104 As the application of s 102(3) to the assets in issue in these appeals will demonstrate, assessing an application for an order from a court under s 102 is a process which requires the exercise of judgment. That is why the court "may" make the order. As has been recognised, in a statutory provision which confers a power, the word "may" can be used in more than one sense[87]. It may be used to indicate that a court or other decision-maker has a *discretion*. Alternatively, it may be used to indicate that a decision-maker has *authority* to exercise a power, which they are obliged to exercise if statutory criteria are met. In the present case, "may" in s 102(3) falls in the latter category. The criteria specified in s 102(3) are stringent; but their stringency also demonstrates that they are intended to be exhaustive. If the court is satisfied that the applicant has established that those criteria are met, an order must be made.

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87 See *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 at 128, 133-135, 138-139; [1971] HCA 12.

105 Section 102(1) provides that the court may make an order:

> "(c) declaring the nature, extent and value of the applicant's interest in the property; and
>
> (d) either:
>
> (i) if the interest is still vested in the Commonwealth—directing the Commonwealth to transfer the interest to the applicant; or
>
> (ii) declaring that there is payable by the Commonwealth to the applicant an amount equal to the value declared under paragraph (c)."

106 The form of the order made is important. In the context of these appeals, it will be considered in Part D(9) below.

D. Section 102(3) appeals

(1) Tax minimisation schemes and money laundering – UOCL and Merrell

107 Mr Hart used various companies to operate the tax minimisation schemes that led to his convictions. His clients, participants in the schemes, paid fees to some of these companies, including Merrell and United Overseas Credit Ltd ("UOCL").

108 For example, in relation to UOCL, after the CDPP applied for the pecuniary penalty order against Mr Hart, the District Court found that Mr Hart had defrauded the Commonwealth contrary to s 29D of the *Crimes Act* 1914 (Cth)[88] and had dishonestly caused a loss or a risk of loss to the Commonwealth contrary to s 135.1(5) of the *Criminal Code* (Cth)[89]. In making those findings, the District Court held that Mr Hart's means were dishonest according to the standards of ordinary people and that he knew that those means were dishonest[90]. Each offence was an indictable offence. The courts below in the current proceedings referred to these as the "UOCL Offences". It is appropriate to adopt the same terminology.

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88 These offences were in addition to the nine offences of defrauding the Commonwealth contrary to s 29D of the *Crimes Act* 1914 (Cth) of which Mr Hart had been convicted in 2005.

89 *Hart* (2010) 81 ATR 471.

90 *Hart* (2010) 81 ATR 471 at 558-559 [373], [376], 581 [462], 587 [499].

109 With respect to the UOCL Offences, there is now no dispute that the primary judge was satisfied that any funds UOCL provided to Merrell[91] (which were then provided to the Companies) "may reasonably be suspected of being proceeds of crime" within the meaning of s 82(1) of the *Proceeds of Crime Act* 1987 (Cth) ("the POCA 1987") or fell within the equivalent terms of its successor provision, s 400.9 of the *Criminal Code* (Cth)[92].

110 The primary judge stated that:

(1) Mr Hart exercised a "high degree of control" over UOCL and Merrell at all material times[93] including over their day to day operations[94];

(2) the Companies had not satisfied his Honour that Mr Hart was not in effective control of the Companies when the UOCL Offences were committed[95];

(3) practically all of Merrell's funds were derived or realised, directly or indirectly, from UOCL[96];

(4) money paid by UOCL to Merrell and to the Companies was money "derived from the commission of" the UOCL Offences and constituted "proceeds of crime"[97];

(5) where UOCL funds or Merrell funds were received by companies of which Mr Hart was in effective control or an agent, his Honour was "suspicious" that an offence against s 82(1) of the POCA 1987

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91 *Hart* [2013] QDC 60 at [72].

92 *Hart* [2013] QDC 60 at [81]; see also at [284]. Section 82(1) of the POCA 1987 was superseded by s 400.9 of the *Criminal Code* (Cth) from 1 January 2003: see s 2 of the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act* 2002 (Cth). The provisions were framed in different terms but are not relevantly different for present purposes.

93 *Hart* [2013] QDC 60 at [290].

94 *Hart* [2013] QDC 60 at [77], [265].

95 *Hart* [2013] QDC 60 at [77].

96 *Hart* [2013] QDC 60 at [72]-[76].

97 *Hart* [2013] QDC 60 at [287].

or s 400.9 of the *Criminal Code* (Cth) was committed by the recipient and was satisfied that the recipient had Mr Hart's state of mind[98];

(6) any funds Merrell or UOCL provided in relation to the assets in issue in the proceedings before his Honour "may reasonably be suspected of being proceeds of crime" within the meaning of those words in s 82(1) of the POCA 1987 or fell within the equivalent terms of s 400.9 of the *Criminal Code* (Cth)[99]; and

(7) where money was paid by UOCL or Merrell to one of the Companies and was used to derive or realise a relevant asset, the primary judge was not satisfied that such an asset was not also directly derived from an offence against s 82(1) of the POCA 1987 or s 400.9 of the *Criminal Code* (Cth), in addition to being indirectly derived from the unlawful activity constituting the UOCL Offences[100].

These unchallenged findings of the primary judge are important because funds sourced from one or both of UOCL and Merrell were provided in relation to some of the assets in issue in these appeals – the Sea Fury, the T-28 and the North American Trojan.

(2) Structure of this part of the reasons

111 Each asset requires separate consideration and application of the three limbs of s 102(3). That task is complex. It is necessary to analyse the facts and contentions in relation to each asset in some detail. Each asset is considered by reference to the relevant findings of the primary judge, the approach of the Court of Appeal and then the issues in this Court, framed by the Commonwealth's appeal grounds and any relevant grounds in the notices of contention filed by the Companies.

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98 *Hart* [2013] QDC 60 at [296].

99 See *Hart* [2013] QDC 60 at [81].

100 See *Hart* [2013] QDC 60 at [81].

(3) Sea Fury

112 Fighters was the registered owner of the Sea Fury. It purchased the plane using five separate cash flows[101]:

Cash flow	Date	Payer (as loan to Fighters)	
1	17.12.1999	Nemesis	$58,600.45
2	14.02.2000	Merrell	$20,161.00
4	16.10.2000	Merrell	$165,405.00
5	16.10.2000	Unlimited Aero Maintenance Pty Ltd ("UAM")	$382,141.93
6	19.10.2000	UAM	$38,027.44
			$664,335.82

113 There was no dispute that cash flow 1 ($58,600.45) was not tainted[102]. Cash flows 2 and 4 ($185,566) were paid by Merrell to Fighters; they had been immediately preceded by payments, in similar amounts, from UOCL to Merrell. For the reasons set out in Part D(1) above, the primary judge was not satisfied that those cash flows were untainted[103]. That finding was not challenged in the Court of Appeal[104].

114 The primary judge was also not satisfied that $300,000 of the UAM payments (cash flows 5 and 6) had not been derived indirectly from the UOCL Offences[105]. Accordingly, the primary judge was not satisfied that $485,566 (or 73 per cent) of the purchase price of the Sea Fury had not been derived indirectly from unlawful activity – namely, the UOCL Offences.

115 The Court of Appeal did not disturb the findings of the primary judge[106]. The Court of Appeal found no error in the primary judge's conclusion that he was not satisfied that 73 per cent of the funds used to purchase the Sea Fury was not derived from unlawful activity. Nor did the Court of Appeal disturb the finding

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101 The cash flows are numbered in accordance with an affidavit sworn by Mr Vincent, a forensic accountant engaged by the Commonwealth to identify the sources of funds.

102 *Hart* [2013] QDC 60 at [613]; *Hart* (2016) 336 ALR 492 at 617 [610].

103 *Hart* [2013] QDC 60 at [614].

104 *Hart* (2016) 336 ALR 492 at 698 [1019].

105 *Hart* [2013] QDC 60 at [615]-[616].

106 *Hart* (2016) 336 ALR 492 at 619 [624], 699 [1026].

of the primary judge that it was reasonably certain that bringing into Australia, receiving, possessing or disposing of the $300,000 would have contravened s 82(1) of the POCA 1987 or s 400.9 of the *Criminal Code* (Cth)[107]. However, the majority of the Court of Appeal held that the Sea Fury was not derived, directly or indirectly, from unlawful activity because it construed s 102(3)(a) so that the source limb would be satisfied unless the property was *wholly* derived or realised, directly or indirectly, from unlawful activity[108]. That is, the majority considered that the property would not be considered to be "derived" or "realised" from the commission of an offence if it was "derived" or "realised" from a combination of the commission of that offence and some other, untainted source.

116 The Court of Appeal made the following declaration and order ("the Sea Fury declaration and order"):

> (1) a declaration that Fighters had legal ownership of the Sea Fury, subject to the charge in favour of Merrell, immediately prior to the forfeiture to the Commonwealth on 18 April 2006; and
>
> (2) an order directing the Commonwealth, within 21 days, to transfer its interest in the Sea Fury to Fighters and to deliver possession of the Sea Fury and its operational documents to Fighters.

117 On appeal to this Court, the Commonwealth contended that no s 102(3) order should be or could be made in relation to the Sea Fury because Fighters had failed to establish each limb of s 102(3). By a notice of contention, the Companies sought to challenge the finding of the primary judge, not disturbed by the Court of Appeal, that he was not satisfied that $300,000 of cash flows 5 and 6 was from untainted sources.

118 It is first necessary to address the notice of contention. To understand the Companies' contention, the following findings of the primary judge in relation to the $300,000 are relevant:

> (1) part of cash flow 5 was met by a $361,000 payment from Nemesis on 6 November 2000, which was, in turn, sourced from a payment to Nemesis of $1.3 million from Blackshort Pty Ltd ("Blackshort") on 3 November 2000[109];

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107 *Hart* (2016) 336 ALR 492 at 699 [1024]-[1026]; *Hart* [2013] QDC 60 at [81], [405], [615]-[616].

108 *Hart* (2016) 336 ALR 492 at 700 [1027]; see also at 675 [920].

109 *Hart* [2013] QDC 60 at [615].

(2) Blackshort had made the $1.3 million payment to Nemesis on behalf of Watson Benefit Services Pty Ltd ("WBS")[110];

(3) in the month prior to the payment of $1.3 million to Nemesis, WBS had received two payments from UOCL totalling $2 million[111]; and

(4) the possibility existed that UOCL had transferred funds to Nemesis via WBS[112].

119 Given the findings of the primary judge about the UOCL Offences[113], his Honour was not satisfied that $300,000 of the $361,000 paid by Nemesis was untainted[114].

120 In this Court, by their notice of contention, the Companies contended that the Court of Appeal ought to have excluded the $300,000 from Blackshort as not having been derived from unlawful activity or pleaded as a source of tainted funds. In particular, the Companies challenged the finding of the primary judge that the possibility existed that UOCL had transferred funds via WBS to Nemesis. The Companies contended that the primary judge should not have permitted the CDPP to rely on these allegations at trial because they were not the subject of affidavit evidence adduced by the CDPP, and were raised for the first time in cross-examination, at which time it was too late for the Companies to obtain evidence from the relevant bank's records.

121 The Companies further contended that, in any event, the evidence was inconsistent with the transfer of UOCL monies to Nemesis through Blackshort because the primary evidence of the Blackshort bank account did not show that any monies were paid by UOCL.

122 In relation to the alleged lack of notice, the evidence was to the contrary. The conduct of the litigation reveals that Mr Vincent, the Commonwealth's forensic accountant, referred to the payment of $1.3 million from Blackshort in a report he prepared dated 2 September 2009, in which he concluded that there was

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110 See *Hart* (2016) 336 ALR 492 at 698-699 [1022].

111 *Hart* [2013] QDC 60 at [615]; *Hart* (2016) 336 ALR 492 at 698-699 [1022]. WBS also received $1 million from Nemesis on 6 October 2000: *Hart* (2016) 336 ALR 492 at 698 [1021].

112 *Hart* [2013] QDC 60 at [615].

113 See Part D(1) above.

114 *Hart* [2013] QDC 60 at [615]-[616].

insufficient evidence to draw a conclusion about the original source of the funds used to acquire the Sea Fury because the documentation was "[i]nsufficient to ascertain how Fighters[,] and the companies allegedly making payments on their behalf, derived the funds in order to make the payments used to acquire [the Sea Fury]".

123 Mrs Laura Hart, one of the Companies' witnesses, responded to the Vincent report in an affidavit dated 21 September 2010. She asserted that the $1.3 million deposit had arisen because Nemesis had invested $1 million with WBS and the investment had returned $300,000 in one month. She further asserted that the investment was the subject of a written agreement but did not produce it. In a supplementary report dated 21 October 2010, Mr Vincent restated his earlier views about the $1.3 million payment. As that history reveals, the ultimate derivation of the $1.3 million was in issue, the Companies were aware of it being in issue and they sought to address it through Mrs Hart's evidence. There was no lack of notice.

124 The problem for the Companies was not lack of notice but the fact that Mrs Hart's evidence on this issue was rightly rejected. The Companies' explanation for the $1.3 million was supplied by Mrs Hart and yet she did not provide primary evidence of the alleged written agreement with WBS[115]. As the primary judge found, Mrs Hart gave no evidence of whether she had read the written agreement or how she knew its terms[116] and the Companies did not adduce any evidence of the agreement (including by way of subpoena) or evidence from anyone who might have been able to shed light on the transactions, and that absence of evidence was not explained[117]. And the banking documents that were in evidence did not assist the Companies. WBS's bank statement showed that UOCL had deposited funds into WBS's account in October 2000 but did not demonstrate that only a small amount subsequently went to Blackshort and Blackshort's bank statement did not demonstrate the source of funds used to restore the credit balance to that account after the payment to Nemesis on 3 November 2000. The Court of Appeal's analysis[118] was not shown to be in error on this point.

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115 *Hart* [2013] QDC 60 at [615].

116 *Hart* [2013] QDC 60 at [615].

117 *Hart* (2016) 336 ALR 492 at 619 [622].

118 *Hart* (2016) 336 ALR 492 at 618 [617], 699 [1024].

(a) Source limb

125 The question is whether Fighters has discharged its onus of establishing that the Sea Fury was not derived, directly or indirectly, by any person from any unlawful activity[119]. On the findings summarised above, the answer is "no".

126 The primary judge and the Court of Appeal were not satisfied that $485,566 (or 73 per cent) of the purchase price of the Sea Fury had not been derived indirectly from unlawful activity – the UOCL Offences[120].

127 The connection between the unlawful activity and the derivation of the Sea Fury was direct. The unlawful activity contributed to the derivation, namely the acquisition, of the Sea Fury and it did so in a not insubstantial way. The Court of Appeal was in error in making the Sea Fury declaration and order.

(b) Lawfully acquired limb

128 Given the conclusion reached in relation to the source limb, it is strictly unnecessary to reach a concluded view about the lawfully acquired limb. However, the facts as described above are sufficient to show that Fighters also did not establish this limb.

129 $485,566 of the purchase price was from the UOCL Offences. And, as explained earlier, Mr Hart controlled UOCL and was aware of the transfer of funds from UOCL. Fighters bore the onus of establishing that it lawfully acquired the Sea Fury. But, on the facts as described, the Sea Fury was not lawfully acquired. It was acquired, in part, using proceeds of crime and that is unlawful: receiving, possessing and then disposing of the proceeds of crime is money laundering contrary to s 82(1) of the POCA 1987 or s 400.9 of the *Criminal Code* (Cth). Fighters has not discharged the onus it bore of establishing that it lawfully acquired the Sea Fury.

(c) Use limb

130 Given the conclusions reached in relation to the other limbs in s 102(3), it is unnecessary to reach a concluded view about the use limb.

131 That is not to be read, however, as precluding the possibility that there may be circumstances in which property will be used in, or in connection with, unlawful activity where the unlawful activity is money laundering of proceeds of crime. That is, the particular facts and circumstances may indicate that proceeds

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119 See Part C(4)(b)(ii) above.

120 See Part D(1) above.

of crime have been "washed" by the sale and purchase of a particular asset or assets.

(4) Mercedes

132 Fighters was the registered owner of the Mercedes prior to forfeiture. As will be seen, an important feature of the factual context is that the loan which funded Fighters' purchase of the Mercedes was secured by a charge over the Sea Fury. That charge was the only security for the loan, and recourse was limited to that security. The issue on appeal to this Court is whether the source limb was satisfied.

(a) Primary judge

133 Before Fighters acquired the Mercedes in 2001, it was owned by Nemesis[121]. There was no evidence that Nemesis acquired the car using tainted funds or funds derived from unlawful activity[122].

134 In September 2001, when Nemesis went into receivership, the car was sold to Fighters using funds borrowed from a Dr Fleming[123]. Dr Fleming's loan was in the amount of $400,000. A charge in favour of Dr Fleming was placed over some of Fighters' assets, including the Sea Fury[124].

135 The primary judge was not satisfied that Dr Fleming's loan would have been made without the security of the charge over the Sea Fury[125]. Accordingly, because the primary judge was not satisfied that the Sea Fury was not derived from unlawful activity, he was also not satisfied that the Mercedes was not derived from unlawful activity[126].

136 The primary judge was unable to determine whether the interest of Fighters in the Mercedes had a value at the date of forfeiture because the Merrell Charge over it secured repayment of $1.6 million and his Honour could not be

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121 *Hart* [2013] QDC 60 at [834].

122 *Hart* [2013] QDC 60 at [834].

123 *Hart* [2013] QDC 60 at [835].

124 *Hart* [2013] QDC 60 at [835].

125 *Hart* [2013] QDC 60 at [845].

126 *Hart* [2013] QDC 60 at [845].

satisfied of the total value of all of the assets which were charged[127]. As previously explained, the Merrell Charges covered assets of each of the Companies. The $1.6 million figure represents the total indebtedness of the Companies at the date of forfeiture. His Honour did not determine the amount individually owing by each of the Companies, but observed that the parties had treated the Companies as though they were "cross-guarantors for one another's debts to Merrell"[128].

(b) Court of Appeal

137 In the Court of Appeal, Morrison JA did not disturb the primary judge's findings[129] and made additional findings[130] that:

(1) Dr Fleming's loan to Fighters for the purchase of the Mercedes was provided by a deed of loan and was made on security that included the Sea Fury;

(2) Dr Fleming described the charge over the Sea Fury as the "primary security" after he had satisfied himself that it was sufficient to cover the loan;

(3) the charge in favour of Dr Fleming was the first registered charge and, so that it would have first priority over the Merrell Charge, a deed of priority was entered into with Merrell; and

(4) cl 1 of the deed of loan specified that the loan was subject to the execution of the "Collateral Security", which was defined as the first registered company charge over the Sea Fury, and cl 6 limited recourse by Dr Fleming against Fighters to the extent of any monies recovered upon enforcement of the "Collateral Security".

138 Hence, Morrison JA concluded that where the loan was expressed to be on the basis of the provision of security over the Sea Fury, the charge over the Sea Fury was the only security and recourse was limited to that security, it was "easy to infer" that the loan would not have been made without the charge over

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127 *Hart* [2013] QDC 60 at [846].

128 See *Hart* [2013] QDC 60 at [468].

129 *Hart* (2016) 336 ALR 492 at 620 [632].

130 *Hart* (2016) 336 ALR 492 at 622 [641].

the Sea Fury[131]. As Morrison JA stated, this was not a case where a general security placed over an asset coincidentally covered the forfeited asset[132].

139 The majority of the Court of Appeal did not disturb the findings of the primary judge. The majority did find that Dr Fleming later received $500,000 "to release the fixed charge over [the Sea Fury]"[133].

140 Given the majority's conclusion that Fighters had shown that its interest in the Sea Fury was not *wholly* derived or realised, directly or indirectly, from unlawful activity, it also concluded that Fighters' interest in the Mercedes was not so derived or realised. The majority found it unnecessary to deal with other matters[134]. As explained above, the majority of the Court of Appeal was wrong to conclude that the source limb was satisfied unless the asset was *wholly* derived from unlawful activity[135].

141 The Court of Appeal made the following declaration and order ("the Mercedes declaration and order"):

(1) a declaration that Fighters had legal ownership of the Mercedes, subject to the charge in favour of Merrell, immediately prior to the forfeiture to the Commonwealth on 18 April 2006; and

(2) an order directing the Commonwealth, within 21 days, to transfer its interest in the Mercedes to Fighters and to deliver possession of the Mercedes and its operational documents to Fighters.

(c) High Court

142 On appeal to this Court, the Commonwealth contended that no s 102(3) order should be or could be made in relation to the Mercedes because Fighters had failed to establish the source limb. Specifically, the Commonwealth contended that the majority was mistaken in its finding about the Sea Fury's derivation and, as a consequence, was also mistaken in its finding about the Mercedes.

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131 *Hart* (2016) 336 ALR 492 at 623 [642].

132 *Hart* (2016) 336 ALR 492 at 623 [643].

133 *Hart* (2016) 336 ALR 492 at 731 [1196].

134 *Hart* (2016) 336 ALR 492 at 732 [1199].

135 See Part C(4)(b)(ii) above.

143 By a notice of contention, the Companies contended that the Court of Appeal ought to have found that the Mercedes was not derived from unlawful activity because it was not acquired using tainted funds. It is appropriate to first address the notice of contention. The ground raised in the notice of contention should be rejected.

144 The notice of contention proceeded on an incorrect construction of the source limb. It assumed that the majority of the Court of Appeal was correct to conclude that the source limb was satisfied unless the asset was *wholly* derived from unlawful activity. As has been seen, that construction was wrong. Hence, the Companies' contention that, because the majority found that the Sea Fury was not derived from unlawful activity, the issue about the use of the Sea Fury as security for the loan from Dr Fleming fell away should be rejected.

145 The Companies further contended that, even if the majority's construction of the source limb was not correct, "[t]he reasoning of the primary judge was wrong in principle". The Companies submitted that "[a]n asset that was not 'derived … from any unlawful activity' does not lose that status because a general security (such as a fixed and floating charge, or 'all monies' mortgage) is temporarily granted over that asset, together with another asset or fund which happens to be tainted", particularly where, as happened here, "the loan to refinance the vehicle had been discharged entirely from lawful sources". That contention is contrary to the facts and proceeds on a misconstruction of the source limb.

146 The findings of the primary judge (not disturbed by Morrison JA and not addressed by the majority) establish that this was not a case where a general security placed over an asset coincidentally covered a tainted asset. This was a case where the loan was expressed to be on the basis of the provision of security over the Sea Fury, the charge over the Sea Fury was the only security and recourse was limited to that security, with the result that – as Morrison JA observed – it was "easy to infer" that the loan would not have been made without the charge over the Sea Fury.

147 Finally, the Companies' contention that the loan from Dr Fleming was discharged entirely from lawful sources does not and cannot provide a complete answer to the source limb. The question is whether, on the approach earlier explained[136], Fighters has discharged its onus of establishing that the Mercedes was not derived, directly or indirectly, by any person from any unlawful activity. On the findings which are summarised above, the answer is "no".

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136 See Part C(4)(b)(ii) above.

148 The connection between the unlawful activity and the derivation of the Mercedes was not direct. However, without the provision of the Sea Fury, an asset derived from unlawful activity, the Mercedes would not have been financed and acquired. The unlawful activity contributed to the derivation, namely the acquisition, of the Mercedes and it did so in a not insubstantial way. The fact that the loan from Dr Fleming was allegedly discharged entirely from lawful sources is not determinative. The intended reach of the POCA is broader. The Court of Appeal was in error in making the Mercedes declaration and order.

(5) T-28

149 The T-28 was purchased by Fighters in two transactions – the first half share for $133,000 in 1996, the second half share for $149,100 in 1998. The second half share was funded using three cash flows:

Cash flow	Date	Payer	Payee	
5	23.10.98	Merrell	Geoff Klooger Trust Account	$83,100
6	07.12.98	Fighters	AGC & MP Rolph-Smith (via the Geoff Klooger Trust Account)	$64,000
7	14.04.99	Fighters	Kim Rolph-Smith	$2,000

150 In the Court of Appeal, the Companies did not challenge the primary judge's findings about cash flow 5: namely, that the Merrell funds originally came from UOCL and were not shown to be lawfully derived[137]. In relation to cash flow 6, the majority found that the primary judge's finding[138] that the $64,000 was derived from unlawful activity was an error[139].

151 In relation to the source limb, the majority concluded that the T-28 was not derived from unlawful activity because it was not *wholly* derived from unlawful activity[140]. The majority did not consider the use limb or the lawfully acquired limb.

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137 *Hart* [2013] QDC 60 at [487]; see also at [56]-[68]; *Hart* (2016) 336 ALR 492 at 623 [647], 694 [1001].

138 *Hart* [2013] QDC 60 at [488].

139 *Hart* (2016) 336 ALR 492 at 697 [1016].

140 *Hart* (2016) 336 ALR 492 at 697-698 [1017].

152 The Court made the following declaration and order ("the T-28 declaration and order"):

> (1) a declaration that Fighters had legal ownership of the T-28, subject to the charge in favour of Merrell, immediately prior to the forfeiture to the Commonwealth on 18 April 2006; and
>
> (2) an order directing the Commonwealth, within 21 days, to transfer its interest in the T-28 to Fighters and to deliver possession of the T-28 and its operational documents to Fighters.

153 In this Court, there was no challenge to the majority's conclusion about cash flow 6. The only issue was what consequences should follow from the unchallenged findings about cash flow 5, being that $83,100 (or 29 per cent) of the purchase price of the T-28 came from tainted funds. The Commonwealth submitted that no s 102(3) order should be or could be made in relation to the T-28 because Fighters could not satisfy any of the three limbs in s 102(3). It is convenient to begin with the source limb.

(a) Source limb

154 The question is whether Fighters has discharged its onus of establishing that the T-28 was not derived, directly or indirectly, by any person from any unlawful activity[141]. On the findings of the primary judge, the answer is "no".

155 There was no dispute that $83,100 of the purchase price was derived from unlawful activity and that the payment made by Merrell was derived from the UOCL Offences[142].

156 The Companies submitted that while the funds were ultimately sourced from UOCL, they only indirectly contributed to the purchase of the T-28 since the monies were not applied directly but were sourced from the trust account of Geoff Klooger & Associates, solicitors for the Companies and Merrell. That is, while they did not dispute that the ultimate source of the funds was UOCL, they contended that the "indirect contribution to the acquisition of the T-28 mean[t] that there was no money laundering offence involved in the acquisition of the T-28". Those contentions should be rejected.

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141 See Part C(4)(b)(ii) above.

142 *Hart* (2016) 336 ALR 492 at 623 [646]-[647], 694 [1001], 697-698 [1017]. The UOCL Offences have been explained earlier in these reasons: see Part D(1) above.

157 First, the contentions are contrary to the evidence the Companies adduced before the primary judge. The evidence was that, on 23 October 1998, Merrell lent Fighters $100,000 which was advanced by telegraphic transfer to the trust account of Geoff Klooger & Associates and that, on 2 November 1998, Fighters used $83,100 of that $100,000 to pay the vendor for the T-28. In light of the primary judge's findings about Mr Hart's control of the Companies (and Merrell) during the UOCL Offences and his knowledge about the source of Merrell's funds, Fighters had failed to discharge the onus it bore of establishing that the T-28 was not derived, directly or indirectly, from unlawful activity.

158 Put in different terms, $83,100, or 29 per cent, of the purchase price was from unlawful activity. The connection between the unlawful activity and the derivation of the T-28 was direct. The unlawful activity contributed to the derivation, namely the acquisition, of the T-28 and it did so in a not insubstantial way. The Court of Appeal was in error in making the T-28 declaration and order.

(b) Lawfully acquired limb

159 Given the conclusion reached in relation to the source limb, it is strictly unnecessary to reach a concluded view about the lawfully acquired limb. However, the facts as described above are sufficient to show that Fighters also did not establish this limb.

160 The $83,100 of the purchase price sourced from Merrell was from the UOCL Offences. And, as explained earlier, Mr Hart controlled UOCL and was aware of the transfer of funds from UOCL. Fighters bore the onus of establishing that it lawfully acquired the T-28. But, on the facts as described, the T-28 was not lawfully acquired. It was acquired using proceeds of crime and that is unlawful – receiving, possessing and disposing of the $83,100 would have contravened s 82(1) of the POCA 1987 or s 400.9 of the *Criminal Code* (Cth)[143]. Fighters had failed to discharge the onus it bore of establishing that it lawfully acquired the T-28.

(c) Use limb

161 The primary judge did not make a finding about whether the T-28 was used in, or in connection with, any unlawful activity; nor did the Commonwealth raise that issue by notice of contention in the Court of Appeal. In this Court, the Commonwealth contended that the majority of the Court of Appeal erred in failing to consider the use limb and that the majority should have found that the use limb was not established. Given the conclusions already reached in relation

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143 cf *Hart* [2013] QDC 60 at [81], [405], [615]-[616]; *Hart* (2016) 336 ALR 492 at 699 [1024], 714 [1098].

to the other limbs in s 102(3), it is unnecessary either to address those contentions or to reach a concluded view about the use limb.

(6) North American Trojan

162 The North American Trojan was purchased in 2001 by Fighters for $228,500. The primary judge recorded that the Commonwealth "[did] not impugn" the original purchase price[144]; accordingly, it can be inferred from his Honour's reasons that he found that the funds used to purchase the North American Trojan were untainted. Prior to forfeiture, the North American Trojan was registered in the name of Fighters and subject to one of the Merrell Charges. There was no evidence of the market value of the aircraft at the time of forfeiture or at the trial of the s 102 application.

163 In this Court, the focus was on $50,000 spent on restoration works. The source limb and the use limb were in issue.

(a) Primary judge

164 From 2003 to 2005, Fighters allegedly spent $75,800 towards part restoration of the aircraft. $50,000 of the work was done in the 2003 financial year and recorded as a debt due by Fighters to Flying Fighters Maintenance and Restoration Pty Ltd ("FFMR"). Despite the restoration works, the value of the plane did not increase by the $50,000 recorded in Fighters' books of account[145]. Fighters failed to produce any documentary evidence to support the additional $25,800 claimed as a restoration cost (over and above the $50,000) and therefore the primary judge declined to find that that cost had been incurred[146].

165 Between 30 January 2003 and 3 February 2003, Fighters transferred $159,500 to FFMR by three payments. There was no dispute that the ultimate source of these three payments was UOCL and that the repairs to the aircraft were funded by UOCL[147].

166 As has been seen, the primary judge found that any funds UOCL provided "may reasonably be suspected of being proceeds of crime" within the meaning of s 82(1) of the POCA 1987 or fell within the terms of s 400.9 of the *Criminal*

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144 *Hart* [2013] QDC 60 at [723].

145 *Hart* [2013] QDC 60 at [722]-[723].

146 *Hart* [2013] QDC 60 at [724], [726].

147 *Hart* [2013] QDC 60 at [725].

Code (Cth)[148]. Accordingly, his Honour found that the money used to fund the restoration works in 2003 ($50,000) was "substantially tainted funds"[149]. However, for the purposes of the source limb, the primary judge concluded that the North American Trojan was not *substantially* derived from tainted funds and that it was therefore lawfully derived[150]. The primary judge was satisfied that the value of Fighters' interest in the plane at the time of forfeiture was diminished by the charge to Merrell and concluded that the value of Fighters' interest in the North American Trojan was not proved[151]. His Honour initially refused to make an order under s 102 but subsequently ordered that the North American Trojan be transferred to Fighters on condition that the Companies pay the Commonwealth $1.6 million.

(b) Court of Appeal

167 The Court of Appeal did not disturb the primary judge's factual findings[152]. In particular, all members of the Court of Appeal accepted the primary judge's finding that the funds expended on restoration ($50,000) were tainted funds[153].

168 Morrison JA would have allowed the Commonwealth's appeal in relation to the North American Trojan[154]. In reaching that conclusion, his Honour stated that, in his view, the assessment of whether property or an interest in property has been derived from unlawful activity under the source limb required an examination of the contributions to the property or interest as part of the tracing back exercise, including expenditure after acquisition[155]. His Honour considered that the precise form of expenditure did not make a difference in this assessment – it was a question of fact in each case[156].

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148 *Hart* [2013] QDC 60 at [81].

149 *Hart* [2013] QDC 60 at [726].

150 *Hart* [2013] QDC 60 at [726].

151 *Hart* [2013] QDC 60 at [727].

152 *Hart* (2016) 336 ALR 492 at 626 [659]-[661], 713-714 [1094]-[1096].

153 *Hart* (2016) 336 ALR 492 at 626 [661], 629 [677], 713-714 [1096].

154 *Hart* (2016) 336 ALR 492 at 629 [679].

155 *Hart* (2016) 336 ALR 492 at 627 [669]-[670].

156 *Hart* (2016) 336 ALR 492 at 628 [671]-[673].

169 However, under the source limb, the majority considered that the expenditure on restoration and repairs did not affect their conclusion that the aircraft was not derived from unlawful activity[157]. It considered that the relevant question was how the interest in a given asset was acquired. As Douglas J put it, "[t]he more natural meaning is that [the asset] had been derived lawfully *when it was bought*"[158] (emphasis added).

170 The majority further found that even if restoration and repair funds could be taken into account, the "relatively small amount" spent on repairs and restoration, relative to the purchase price, was not sufficient to affect the conclusion that the aircraft was not derived from unlawful activity[159]. Accordingly, the majority found that Fighters' interest in the aircraft was not derived from the proceeds of crime and therefore from the commission of an offence under s 82(1) of the POCA 1987 or s 400.9 of the *Criminal Code* (Cth)[160].

171 The Court made the following declaration and order ("the Trojan declaration and order"):

> (1) a declaration that Fighters had legal ownership of the North American Trojan, subject to the charge in favour of Merrell, immediately prior to the forfeiture to the Commonwealth on 18 April 2006; and
>
> (2) an order directing the Commonwealth, within 21 days, to transfer its interest in the North American Trojan to Fighters and to deliver possession of the North American Trojan and its operational documents to Fighters.

(c) High Court

172 On appeal to this Court, the Commonwealth contended that no s 102(3) order should be or could be made in relation to the North American Trojan because Fighters had failed to establish the source limb or the use limb, or both, because the $50,000 spent on repairs and restoration was paid for using proceeds of crime.

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157 *Hart* (2016) 336 ALR 492 at 655 [833], 716 [1108].

158 *Hart* (2016) 336 ALR 492 at 655 [833].

159 *Hart* (2016) 336 ALR 492 at 716 [1109].

160 *Hart* (2016) 336 ALR 492 at 717 [1115]-[1117].

173 In relation to the source limb, the unlawful activity (money laundering of the proceeds of crime) had no direct or indirect role in the initial derivation of the North American Trojan. Although, in some circumstances, it might be possible to contend that the proceeds of crime had a direct or indirect role in the derivation of the property by reason of expenditure after acquisition (for example, because the funds were used to substantially increase the value of the asset, as in a home renovation), that is not this case. The finding made by the primary judge was that, despite the restoration works of $50,000, the value of the North American Trojan did not increase.

174 That is not to be read as precluding the possibility that there may be circumstances in which property will be derived from unlawful activity, such as money laundering of the proceeds of crime to carry out restoration works, where the works altered the shape, form or use of the asset in a not insubstantial manner, even though the value of the asset was not affected or the money was spent after the asset was acquired. However, there was no evidence in these proceedings that the works altered the shape, form or use of the North American Trojan.

175 In relation to the use limb, the question is whether the North American Trojan was used in, or in connection with, an unlawful activity where the unlawful activity was money laundering $50,000 of proceeds of crime. As explained in relation to the Sea Fury[161], there may be circumstances where property will be used in, or in connection with, unlawful activity where the unlawful activity is money laundering of proceeds of crime. In the circumstances of the North American Trojan, it is not possible to rule out that hypothesis. Having regard to the source of the funds said to have been spent on repairs and restoration, there were reasonable grounds to suspect that the aircraft was used in connection with the unlawful activity of money laundering. It must be recalled that receiving, possessing and disposing of the $50,000 may have contravened s 82(1) of the POCA 1987 or s 400.9 of the *Criminal Code* (Cth)[162] and $50,000 is a not insubstantial sum.

176 The Trojan declaration and order must be set aside.

(7) Samara Street

177 Samara Street was registered in the name of Bubbling immediately prior to forfeiture. There are two issues in this Court: whether the source of the funds used to purchase Samara Street was in fact unlawful activity (raised by the

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161 See Part D(3)(c) above.

162 *Hart* [2013] QDC 60 at [81], [405], [615]-[616]; *Hart* (2016) 336 ALR 492 at 699 [1024].

Companies' notices of contention) and, if so, whether Bubbling had discharged its onus under the source limb (raised by the Commonwealth's appeal).

(a) Primary judge

178 Samara Street was purchased by Bubbling on 3 March 1998 for $150,571.12 with funding of $45,000 from Astion Pty Ltd ("Astion"), $100,000 from the ANZ Bank and the balance ($5,571.12) from other sources[163]. The primary judge was not satisfied that the $45,000 was not derived from unlawful activity because Astion was an entity involved in "the Hendon Arrangement"[164]. His Honour was also "doubtful" that the ANZ Bank or any other commercial lender would have lent 100 per cent of the purchase price and that Samara Street would have been purchased without the contribution from Astion[165].

179 The Hendon Arrangement[166] concerned the Westside Commerce Centre, a real estate development in South Australia that was owned by Westside Commerce Centre Pty Ltd ("WCC") as trustee of the Hendon Unit Trust. At 30 June 1993, WCC had substantial accrued losses ($5,472,742), was in default with its financier, had external creditors and was unable to borrow the funds required to complete the development[167].

180 Mr Hart and a Mr Adcock (who was aware of the Westside development and the position of WCC prior to taking up employment with Mr Hart) developed a tax minimisation proposal which involved a joint venture between WCC and the Hendon Unit Trust. Mr Hart established Astion to take over as trustee from WCC and to acquire the real estate development[168]. The participants in the Hendon Arrangement were clients of Harts Accountants and Auditors ("Harts Accountants")[169].

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163 *Hart* [2013] QDC 60 at [799]-[800].

164 *Hart* [2013] QDC 60 at [801], [807].

165 *Hart* [2013] QDC 60 at [807].

166 See generally *Hart* [2013] QDC 60 at [318]-[346].

167 *Hart* [2013] QDC 60 at [319].

168 *Hart* [2013] QDC 60 at [319].

169 *Hart* [2013] QDC 60 at [320]-[322].

181 The proposal was that trustee clients would appoint WCC as a beneficiary of their trusts and appoint income to it but that the income would be isolated from the creditors of WCC[170]. Out of the appointed income, 10 per cent was to be paid to Astion and 2 per cent to Tinkadale Pty Ltd[171].

182 On 30 June 1995, Astion was appointed trustee of the Hendon Unit Trust[172]. Of the $12,031,072 in income that was purportedly appointed to WCC, Astion received approximately $1.2 million, which it then provided to entities associated with Mr Hart, including Bubbling[173]. But there were problems. The primary judge found that there were reasonable grounds to suspect offences of recklessly making false or misleading statements, in breach of s 8N of the *Taxation Administration Act* 1953 (Cth) ("the TAA"), in relation to the Hendon Arrangement[174].

183 As the primary judge said[175]:

> "Harts [Accountants] had legal advice that the effectiveness of the clients' resolutions appointing WCC would depend on the terms of the clients' trust deeds and whether the terms authorised the appointments. Harts [Accountants] knew that if the terms did not authorise such an appointment, Harts [Accountants] could advise the client how to take steps provided for in proforma documents and execute them so as to make subsequent appointments of income to WCC valid. If the accountants had ensured that the process had been followed, the distributions of income would have been valid. The accountants' fault was inaction when they were forewarned by lawyers that action by the accountants was required. With respect, the finding of recklessness was based on a strong footing."

184 Accordingly, his Honour was not satisfied that the payments Astion received as purported distributions were not substantially derived or realised from unlawful activity[176]. Two other findings of the primary judge are important

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170 *Hart* [2013] QDC 60 at [322].

171 *Hart* [2013] QDC 60 at [323].

172 *Hart* [2013] QDC 60 at [319].

173 *Hart* [2013] QDC 60 at [326]-[331].

174 *Hart* [2013] QDC 60 at [336].

175 *Hart* [2013] QDC 60 at [335].

176 *Hart* [2013] QDC 60 at [343].

to the issues in these appeals: first, that Bubbling had not been able to show that, but for the distributions derived from that unlawful activity, Astion would have been able to save rent it had earned lawfully to provide the $45,000[177]; and second, that it seemed likely that the ANZ Bank would not have lent the whole of the purchase price and the property would not have been purchased without the $45,000 provided by Astion[178].

185 Samara Street was subject to a fixed and floating charge over the assets of Bubbling in favour of Merrell to secure $1.6 million; that charge was forfeited to the Commonwealth[179]. It was sold by the Official Trustee on 20 April 2007 (with the consent of Bubbling) and the net proceeds of sale, after a mortgage was paid[180], were still held by the Official Trustee at the time of the decision of the primary judge[181].

(b) Court of Appeal

186 On appeal to the Court of Appeal, the Companies submitted that the fees paid to Astion from the Hendon Arrangement were not derived or realised from unlawful activity and that the primary judge erred in finding that Bubbling had not been able to show that, but for the distributions derived from unlawful activity, Astion would not have been able to save the $45,000 from rent it had earned lawfully[182].

187 The majority rejected those contentions. The majority concluded that the primary judge was correct to find that the Companies had failed to establish that the fees derived from the Hendon Arrangement were not derived or realised from unlawful activity[183] and that Bubbling had failed to establish that the $45,000 provided by Astion for the acquisition of Samara Street did not come from the

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177 *Hart* [2013] QDC 60 at [343]-[345].

178 *Hart* [2013] QDC 60 at [807].

179 *Hart* [2013] QDC 60 at [797].

180 Immediately prior to forfeiture, the interest of Sunshine Co-operative Housing Society Ltd, as the registered mortgagee for Samara Street, was excluded from forfeiture by order of the District Court made on 18 April 2006.

181 *Hart* [2013] QDC 60 at [798].

182 *Hart* (2016) 336 ALR 492 at 634 [710]-[711].

183 *Hart* (2016) 336 ALR 492 at 686 [968].

Hendon Arrangement[184]. Significantly, the majority stated that it was a reasonable inference that Astion provided the $45,000 to Bubbling because of the association of both companies with Mr Hart and that, as the primary judge had found, it seemed likely that the ANZ Bank would not have lent the whole of the purchase price and the property would not have been purchased without the $45,000 provided by Astion[185].

188 Although the majority concluded that the provision of $45,000 was a "relatively significant feature" of the acquisition of Samara Street[186], because of its construction of s 102(3)(a) it found that the source limb was established on the basis that Bubbling had shown that the property was not *wholly* derived from unlawful activity, notwithstanding the role which the Astion money had played in the acquisition of the property[187].

189 The Court made the following declarations ("the Samara Street declarations"):

(1) a declaration that Bubbling had legal ownership of Samara Street, subject to the charge in favour of Merrell, immediately prior to the forfeiture to the Commonwealth on 18 April 2006;

(2) a declaration that the value of Bubbling's interest in Samara Street immediately prior to forfeiture was $174,500; and

(3) a declaration that there was payable by the Commonwealth to Bubbling the sum of $174,500, together with interest in the amount of $142,638.61 to 27 September 2016 and thereafter at a prescribed rate.

(c) High Court

190 In this Court, the Commonwealth contended that no s 102(3) order should be or could be made in relation to the proceeds of Samara Street because Bubbling had failed to establish the source limb.

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184 *Hart* (2016) 336 ALR 492 at 726 [1169].

185 *Hart* (2016) 336 ALR 492 at 726 [1168].

186 *Hart* (2016) 336 ALR 492 at 726 [1168].

187 *Hart* (2016) 336 ALR 492 at 726-727 [1171]-[1172].

191 The Companies, by notices of contention, challenged the finding that the funds provided through the Hendon Arrangement were funds from an unlawful activity. They submitted that:

(1) the funds were lawfully obtained by Astion from the Astion Unit Trust and that the Court of Appeal ought to have found that Mr Hart and others did not "recklessly" cause statements to be made to a taxation officer within the meaning of s 8N of the TAA;

(2) there was no admissible evidence before the primary judge from which an inference could reasonably be drawn that Harts Australasia Ltd's ("Harts Australasia") clients or their accountants made dishonestly false statements to the Commissioner of Taxation; and

(3) the evidence disclosed that Harts Accountants were operating on a false assumption as to the efficacy of the scheme in respect of some clients and they further submitted that even if the trust deeds had not been checked, that was at most negligence rather than dishonesty.

192 Alternatively, the Companies contended that even if the notices of contention failed, the contribution of unlawful funds was no more than 30 per cent of the purchase price and therefore the majority's conclusion that Samara Street was not derived directly or indirectly from unlawful activity was correct.

(i) Notices of contention

193 As was explained earlier, it is first necessary to deal with the grounds in the notices of contention. Those grounds should be rejected.

194 Before the primary judge, the CDPP adduced affidavit evidence from Mr Stevens, who had worked in what he described as the Harts Australia Limited Group[188], and from Mr Young of the Australian Taxation Office, both of whom outlined the nature of the Hendon Arrangement. Mr Young gave evidence that the Commissioner of Taxation had assessed primary tax as payable by the participants in the Hendon Arrangement and had imposed penalty tax on them based on the recklessness of their tax agent, Harts Australasia.

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188 It was not clear to the primary judge precisely which companies the "Harts Australia Limited Group" covered.

195 The Companies did not object to those two affidavits being read[189]. And the Companies did not call any of the following people to give evidence: Mr Hart, Mr Adcock or anyone else who had worked under them; anyone from Cleary & Hoare Solicitors, who provided the pro forma documents used by the participants and who gave the Harts Australia Limited Group legal advice on how to implement the arrangement (advice which was ignored); or any of the 52 participant trustees.

196 In those circumstances, it was therefore not an "obvious inference" that persons involved with the Hendon Arrangement had simply been negligent[190]. The primary judge's findings in relation to the Hendon Arrangement (not disturbed by the majority of the Court of Appeal) were open. The relevant grounds in the notices of contention should be rejected.

(ii) No s 102 order

197 The remaining question is whether Bubbling has discharged its onus of establishing that Samara Street was not derived, directly or indirectly, by any person from any unlawful activity[191]. On the findings of the primary judge, which are summarised above, the answer is "no".

198 The unlawful activity (the offences committed as part of the tax minimisation scheme) generated the funds used to provide part of the purchase price. That contribution of funds from an unlawful activity ($45,000) was 30 per cent of the purchase price. The connection between the unlawful activity and the derivation of Samara Street was direct. The unlawful activity contributed to the derivation, namely the acquisition, of Samara Street and it did so in a not insubstantial way. Further, the contribution was in circumstances where the ANZ Bank would not have lent the whole of the purchase price and the property would not have been purchased without the $45,000 provided by Astion. The Court of Appeal was in error in making the Samara Street declarations.

(8) The Perpetual Offences

199 Merriwa Street, Hangar 400 and Doonan's Road are interrelated and involve what were described in the courts below as the "Perpetual Offences". The Perpetual Offences relate to a finding by the primary judge that he was not satisfied that two of the Companies – Yak 3 and Bubbling – did not fraudulently

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189 *Hart* (2016) 336 ALR 492 at 684 [958].

190 cf *Hart* (2016) 336 ALR 492 at 683 [955].

191 See Part C(4)(b)(ii) above.

induce Perpetual Nominees Ltd ("Perpetual") to approve two loans in contravention of s 408C(1)(f) of the *Criminal Code* (Q)[192].

200 In this Court, the Companies contended by notice of contention that the Court of Appeal ought to have found that neither Yak 3 nor Bubbling fraudulently induced Perpetual to approve the loans in contravention of s 408C(1)(f) of the *Criminal Code* (Q). It is necessary to address the notice of contention before considering the application of s 102(3) to each of the properties.

201 The history may be stated shortly. In May 2001, the National Australia Bank ("NAB") issued to Nemesis a notice of termination and demanded immediate repayment of $2.3 million and $1.05 million, followed by a default notice and a demand to Nemesis, and subsequently a notice of exercise of power of sale over all assets of Nemesis[193].

202 It was not good timing. Harts Australasia had a consolidated net loss after tax of $92.8 million for the year ended 30 June 2001[194]. And before 25 September 2001, Nemesis and Sea Fury Investments Pty Ltd had applied to McLaughlin Financial Services ("MFS") for funding and been advised by MFS that it would not proceed with those loans because of "further searches, media coverage and information further revealed"[195].

203 By 1 October 2001, Bubbling and Yak 3 knew that MFS would not be likely to approve loans to companies associated with Mr Hart[196]. On that day, Mr Hart resigned as a director of Bubbling and as a director and secretary of Nemesis[197].

204 In about October 2001, Mr and Mrs Hart informed Dr Ambler (a wealthy client) that NAB wanted all their loans paid out[198]. Mr Hart informed Dr Ambler

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192 *Hart* [2013] QDC 60 at [275]-[276]; see generally at [198]-[276].

193 *Hart* [2013] QDC 60 at [204]-[205]. See also *Hart* (2016) 336 ALR 492 at 580 [437], 629-630 [682]-[684].

194 *Hart* [2013] QDC 60 at [206].

195 *Hart* [2013] QDC 60 at [207].

196 *Hart* [2013] QDC 60 at [210].

197 *Hart* [2013] QDC 60 at [210].

198 *Hart* [2013] QDC 60 at [211]-[212].

that he (Mr Hart) was unable to refinance the mortgage because of his adverse circumstances but that Perpetual would agree to refinance the mortgage if a personal guarantee was provided. Mr Hart asked Dr Ambler to give that personal guarantee so Yak 3 could secure a loan[199]. Dr Ambler agreed to offer his guarantee so long as he was adequately protected against the risk of being called upon under the guarantee[200]. Dr Fleming was asked to give a similar guarantee, on similar terms, for Bubbling's loan[201]. On 23 October 2001, Dr Ambler was appointed as a director of Yak 3 and Dr Fleming was appointed as a director of Bubbling[202]. In return for the guarantees, Dr Ambler and Dr Fleming were offered, and later granted, an option to purchase Hangar 400 and Doonan's Road respectively[203].

205 On 1 November 2001, NAB appointed a controller of Nemesis[204].

206 Sometime before 3 December 2001, Bubbling applied to MFS for a loan facility for $1 million from Perpetual and Yak 3 applied to MFS for a loan facility for $650,000 from Perpetual ("the Perpetual facilities")[205]. On 3 December 2001, MFS advised them that their loan facility applications were conditionally approved[206]. The condition was that each borrower and the guarantors (Dr Ambler and Dr Fleming) provide a written representation that "they are entering into a loan agreement on their own behalf and are not doing so on behalf of [Mr Hart] or any of his associated companies"[207].

207 Each borrower, each director and each relevant guarantor signed a document entitled Loan Facility Terms and Conditions which included a representation ("the cl 16 representation") that[208]:

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199 *Hart* [2013] QDC 60 at [215]; see also at [212].

200 *Hart* [2013] QDC 60 at [211].

201 *Hart* [2013] QDC 60 at [217].

202 *Hart* [2013] QDC 60 at [220].

203 *Hart* [2013] QDC 60 at [215], [217], [229], [232].

204 *Hart* [2013] QDC 60 at [221].

205 *Hart* [2013] QDC 60 at [222].

206 *Hart* [2013] QDC 60 at [224].

207 *Hart* [2013] QDC 60 at [223].

208 *Hart* [2013] QDC 60 at [225].

> "The borrower and guarantor represent and acknowledge that they are entering into this agreement of their own volition and are not doing so on behalf of [Mr Hart] nor any associated company with which he is associated. Neither [Mr Hart] nor any associated company is indemnifying us as to the repayment of the loan. We make this representation acknowledging that the lender is relying upon this representation in approving the loan facility."

208 The primary judge found that the documents were signed to induce MFS and Perpetual to approve the loans and to lend[209]. The primary judge was "not satisfied that MFS and [Perpetual] did not require and rely on the representations they requested and received"[210].

209 On 19 December 2001, Perpetual lent Bubbling $650,000, on the security of Doonan's Road, and lent Yak 3 $650,000, on the security of Hangar 400[211]. The borrowed funds were then used by Nemesis to partly repay monies it owed to NAB[212]. The primary judge found that there was evidence tending to prove that[213]:

(1) Mrs Hart, a Ms Petersen, Dr Ambler, Dr Fleming and Mr Hart knew and believed that Dr Ambler and Dr Fleming were being given an indemnity by Yak 3 or Bubbling;

(2) Mrs Hart had read the loan documentation;

(3) Ms Petersen, Dr Ambler and Dr Fleming signed the Loan Facility Terms and Conditions, and should have read that documentation;

(4) the loan documentation included the cl 16 representation; and

(5) Mr Hart was in effective control of the Companies – including Yak 3 and Bubbling – and in effective control of their assets, in December 2001, in January 2002, and in May and December 2003.

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209 *Hart* [2013] QDC 60 at [227].

210 *Hart* [2013] QDC 60 at [271].

211 *Hart* [2013] QDC 60 at [230].

212 *Hart* [2013] QDC 60 at [409].

213 *Hart* [2013] QDC 60 at [252].

210 The primary judge was not satisfied that Yak 3 and Bubbling did not commit the crime of fraud by dishonestly inducing Perpetual to approve the loans in contravention of s 408C(1)(f) of the *Criminal Code* (Q)[214]. Further, his Honour was not satisfied[215] that Bubbling and Yak 3 did not dishonestly represent that they were not entering into the agreement on behalf of Mr Hart or any associated company with which he was associated, and was also not satisfied that Bubbling and Yak 3 – by Mrs Hart and Ms Petersen, and by Dr Ambler or Dr Fleming – did not dishonestly represent that no "associated company" was indemnifying Dr Ambler and Dr Fleming as to the repayment of the respective loans.

211 The balance of the NAB debt was met by a loan from Equititrust Ltd ("Equititrust") to Nemesis secured by a mortgage over Merriwa Street ("the Equititrust facility")[216]. The primary judge found that while Nemesis had the Equititrust facility, Nemesis received funds primarily from Unlimited Business Consultants (Qld) Pty Ltd ("UBC") (which received funds from UOCL and other sources) and from Spider Tracks Pty Ltd ("Spider") (which received funds from UBC)[217]. The funds UBC received from sources other than UOCL were substantially derived from lawful sources and the amount of funds UBC received from UOCL was about 49 per cent of the amount UBC paid to Nemesis and Spider[218]. From 21 January 2002 to 19 June 2003, Nemesis made repayments of interest to Equititrust of at least $304,111[219]. The primary judge found that the UOCL funds represented substantially less than 5 per cent of the funds used by Nemesis to repay Equititrust[220].

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214 *Hart* [2013] QDC 60 at [275]-[276]; see also at [237], [239]-[240].

215 *Hart* [2013] QDC 60 at [275].

216 *Hart* [2013] QDC 60 at [412], [787].

217 *Hart* [2013] QDC 60 at [413]-[414], [419].

218 *Hart* [2013] QDC 60 at [419].

219 *Hart* [2013] QDC 60 at [420], [787].

220 *Hart* [2013] QDC 60 at [791].

212 The Court of Appeal did not disturb these findings[221]. In particular, the finding of the primary judge that he was not satisfied that no offences were committed in obtaining the Perpetual facilities was held not to be erroneous[222].

213 As stated earlier, in this Court the Companies filed a notice of contention contending that the Court of Appeal ought to have found that neither Yak 3 nor Bubbling fraudulently induced Perpetual to approve the loans in contravention of s 408C(1)(f) of the *Criminal Code* (Q). That contention should be rejected. The factual findings set out above were open and were based on the credit of witnesses. Although Dr Ambler and Dr Fleming gave evidence, the Companies failed to lead any evidence from them about their understanding of the arrangements. Indeed, the primary judge accepted Dr Ambler's and Dr Fleming's evidence, which indicated that they believed they were given an indemnity – in the sense of protection or security – by Yak 3 and Bubbling respectively[223]. The primary judge's acceptance of that evidence recognised that the cl 16 representation was both objectively false and known to be so[224].

214 The sole evidence adduced by the Companies was from Ms Petersen and Mrs Hart. The primary judge, who had seen them cross-examined, did not accept that their evidence was credible – a finding upheld by the Court of Appeal[225]. The Companies failed to call evidence from Mr Hart, the lawyers who Mrs Hart alleged had prepared the option agreements in favour of Dr Ambler and Dr Fleming, or anyone from MFS or Perpetual who had been involved in approving the loans. And it must be recalled that the primary judge found that Mr Hart was in effective control of Yak 3 and Bubbling at all relevant times[226] and that finding was not challenged on appeal to the Court of Appeal.

215 The primary judge's conclusion (not disturbed by the Court of Appeal) that he was not satisfied that Yak 3 and Bubbling had not committed the Perpetual Offences disclosed no error.

216 It is against that background that the three properties – Doonan's Road, Hangar 400 and Merriwa Street – are considered.

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221 *Hart* (2016) 336 ALR 492 at 579-589 [431]-[480], 688-694 [978]-[999].

222 *Hart* (2016) 336 ALR 492 at 688-694 [978]-[999].

223 *Hart* [2013] QDC 60 at [215], [217].

224 *Hart* (2016) 336 ALR 492 at 692-693 [996].

225 *Hart* (2016) 336 ALR 492 at 585-586 [463]-[466], 692-693 [996].

226 *Hart* [2013] QDC 60 at [261]-[266].

(a) Doonan's Road

217 Immediately prior to forfeiture, Doonan's Road was registered in the name of Bubbling. Merrell had a charge over the assets of Bubbling to secure an obligation to pay $1.6 million. That charge was also forfeited to the Commonwealth. Equititrust's interest as registered mortgagee was excluded from forfeiture by order of the District Court made on 18 April 2006[227]. On 18 August 2006, Doonan's Road was sold by Equititrust as mortgagee in possession and, after the amount owing under the mortgage and tax were paid, net proceeds of $501,580.53 were banked by the Official Trustee[228].

218 In relation to the use limb, the primary judge construed the words "used in, or in connection with, … unlawful activity" as requiring there to be a "substantial connection between the activity in question and the use of the property"[229]. Adopting that construction, his Honour concluded that there was no sufficient connection with unlawful activity arising from the provision of Doonan's Road as security for the Perpetual loan to Bubbling, which had been arguably induced by fraudulent misrepresentations[230]. The primary judge concluded that Doonan's Road was not used in, or in connection with, the alleged fraudulent misrepresentations by being used as security for the repayment of the loan induced by the misrepresentations[231]. The primary judge also found that the value of Bubbling's interest in Doonan's Road at the time of forfeiture was $501,580.53 before considering the effect of the Merrell Charge on that value[232].

219 In the Court of Appeal, the Commonwealth challenged the finding of the primary judge that the use of the property as security for the Perpetual loan to Bubbling was too tenuous a connection for the purposes of the use limb[233].

220 Morrison JA did not disturb the factual findings of the primary judge. However, his Honour disagreed with the primary judge's conclusion and held that, on the facts, it was difficult to reach any conclusion other than that

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227 *Hart* [2013] QDC 60 at [812].

228 *Hart* [2013] QDC 60 at [813].

229 *Hart* [2013] QDC 60 at [119], [282].

230 *Hart* [2013] QDC 60 at [827].

231 *Hart* [2013] QDC 60 at [282].

232 *Hart* [2013] QDC 60 at [829].

233 *Hart* (2016) 336 ALR 492 at 630 [687].

Doonan's Road *was* "used in, or in connection with, … unlawful activity"[234]. His Honour came to that conclusion having regard to the following facts and matters. First, the central misrepresentation was in cl 16, and without it Perpetual would not have advanced the Perpetual facilities[235]. Second, there was no reason to conclude that Perpetual was indifferent to Doonan's Road being offered as security for the loan to Bubbling: Perpetual in fact stipulated that Doonan's Road be offered as security and there was no basis to think that the funds would have been lent without it[236]. And, third, when the cl 16 representation was made to Perpetual, it was made by Bubbling, apart from the individuals who conducted the negotiations, and Bubbling used Doonan's Road as part of a process to convince Perpetual to lend to it, by offering Doonan's Road as security. The whole purpose of obtaining the Perpetual facilities was so that the funds could be on-lent to Nemesis, so that Nemesis could pay out NAB, which was threatening to move against Nemesis. Had NAB not been satisfied, it would almost certainly have resulted in property being lost to Nemesis. There was no evidence that Nemesis had any other way of meeting NAB's demand but that which involved the Perpetual facilities and the Perpetual Offences[237].

221 By contrast, the majority found that Bubbling had established both the source limb and the use limb[238]. In the majority's view, although Doonan's Road was used in connection with the Perpetual loan to Bubbling, it was not used in connection with the fraudulent inducement used to obtain that facility[239].

222 The Court made the following declarations:

(1) a declaration that Bubbling had legal ownership of Doonan's Road, subject to Equititrust's mortgage and the charge in favour of Merrell, immediately prior to the forfeiture to the Commonwealth on 18 April 2006;

(2) a declaration that the value of Bubbling's interest in Doonan's Road immediately prior to forfeiture was $388,500; and

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234 See *Hart* (2016) 336 ALR 492 at 631 [695].

235 *Hart* (2016) 336 ALR 492 at 631 [692].

236 *Hart* (2016) 336 ALR 492 at 631 [693].

237 *Hart* (2016) 336 ALR 492 at 631 [694].

238 *Hart* (2016) 336 ALR 492 at 731 [1194].

239 *Hart* (2016) 336 ALR 492 at 731 [1193].

(3) a declaration that there was payable by the Commonwealth to Bubbling the sum of $388,500, together with interest in the amount of $337,899.83 to 27 September 2016 and thereafter at a prescribed rate.

223 On appeal to this Court, the Commonwealth contended that no s 102(3) order should be or could be made in relation to Doonan's Road because, by reason of the NAB loan and the Perpetual facilities, Bubbling had failed to establish one or both of the use limb and the source limb.

(i) Use limb

224 For the reasons identified by Morrison JA[240], Doonan's Road was used in, or in connection with, the Perpetual Offences. When the cl 16 representation was made to Perpetual it was made by Bubbling, apart from the individuals who conducted the negotiations, and Bubbling used Doonan's Road to convince Perpetual to lend to it, by offering Doonan's Road as security. The security offered to Perpetual was a package and Perpetual sought Doonan's Road as security, as well as the cl 16 representation. Without security over Doonan's Road, it is reasonable to infer that the cl 16 representation would not have been given or accepted.

(ii) Source limb

225 Given the conclusion reached in relation to the use limb, it is unnecessary to reach a concluded view about the source limb.

(b) Hangar 400

226 Hangar 400 is in a not dissimilar position to Doonan's Road.

227 Immediately prior to forfeiture, Hangar 400 – more particularly, a sublease over certain land at Archerfield Airport – was registered in the name of Yak 3[241]. The Merrell Charge over Hangar 400 was also forfeited to the Commonwealth on 18 April 2006[242]. Equititrust's interest as registered

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240 *Hart* (2016) 336 ALR 492 at 631 [692]-[695]. See [220] above.

241 See *Hart* (2016) 336 ALR 492 at 720 [1132]; cf *Hart* [2013] QDC 60 at [756]-[758].

242 *Hart* [2013] QDC 60 at [760].

mortgagee was excluded from forfeiture by order of the District Court made on 18 April 2006[243].

228 Despite the findings of the primary judge in relation to the Perpetual Offences[244], the primary judge rejected the contention that because the funds borrowed from Perpetual, lent on the security of Hangar 400, were used to pay out a loan from NAB, it had not been established that the interest in Hangar 400 was not derived from unlawful activity[245].

229 Similar to his Honour's findings in relation to Doonan's Road, the primary judge found that, on the facts, the connection between Hangar 400 and the Perpetual Offences was too tenuous because the cl 16 representation was not the sole cause of the Perpetual facilities being advanced[246]. His Honour found that Yak 3 had established both the source limb and the use limb. However, the primary judge found that Yak 3 had not proved the value of the interest in Hangar 400 at the time of forfeiture, having regard to the Merrell Charge[247].

230 On appeal to the Court of Appeal, the Commonwealth challenged the primary judge's finding that the use of the property as security for the Perpetual loan to Yak 3 was too tenuous a connection to lead to the conclusion that the property was used in, or in connection with, unlawful activity[248].

231 Morrison JA held that the primary judge's finding that, on the facts, the cl 16 representation was not the sole cause of the Perpetual facilities could not be sustained, and that Hangar 400 was "used in, or in connection with, … unlawful activity" for the reasons set out above[249]. As with Doonan's Road, the

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243 *Hart* [2013] QDC 60 at [759].

244 *Hart* [2013] QDC 60 at [275]-[276].

245 *Hart* [2013] QDC 60 at [761]-[782]. The primary judge proceeded on the basis that Hangar 400 was registered in the name of Nemesis. On appeal, the Court of Appeal identified Yak 3 as the entity holding the sublease, with Peter Lyons J concluding that the primary judge's identification of Nemesis was mistaken: see *Hart* (2016) 336 ALR 492 at 720 [1132]; see also at 630 [685]. In this Court, no party suggested that anything turned on how the primary judge identified the lessee.

246 *Hart* [2013] QDC 60 at [781].

247 *Hart* [2013] QDC 60 at [761], [782].

248 *Hart* (2016) 336 ALR 492 at 630 [687].

249 See [220] above.

majority found that Yak 3 had established both the source limb and the use limb. In the majority's view, although the property was used in connection with the Perpetual loan to Yak 3, it was not used in connection with the fraudulent inducement used to obtain the loan[250].

232 The Court made a declaration and order in the following terms:

(1) a declaration that Yak 3 was lessee of Hangar 400, subject to Equititrust's mortgage and the charge in favour of Merrell, immediately prior to the forfeiture to the Commonwealth on 18 April 2006; and

(2) an order directing the Commonwealth, within 21 days, and subject to any agreement reached with Yak 3 in respect of any licence or sublease of Hangar 400, to transfer its interest in Hangar 400 to Yak 3 and deliver up vacant possession of Hangar 400 to Yak 3.

233 On appeal to this Court, the Commonwealth contended that no s 102(3) order should be or could be made in relation to Hangar 400 because, by reason of the NAB loan and the Perpetual facilities, Yak 3 had failed to establish one or both of the use limb and the source limb.

(i) Use limb

234 For the reasons identified by Morrison JA[251], Hangar 400 was also used in, or in connection with, the Perpetual Offences. When the cl 16 representation was made to Perpetual it was made by Yak 3, apart from the individuals who conducted the negotiations, and Yak 3 used Hangar 400 to convince Perpetual to lend to it, by offering Hangar 400 as security. The security offered to Perpetual was a package and Perpetual sought Hangar 400 as security as well as the cl 16 representation. Without Hangar 400 being offered as security, it is reasonable to infer that the cl 16 representation would not have been given or accepted.

(ii) Source limb

235 Given the conclusion reached in relation to the use limb, it is unnecessary to reach a concluded view about the source limb.

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250 *Hart* (2016) 336 ALR 492 at 722-723 [1143]-[1144].

251 *Hart* (2016) 336 ALR 492 at 631 [692]-[695]. See [220] above.

(c) Merriwa Street

236 Immediately prior to forfeiture, Merriwa Street was registered in the name of Nemesis[252]. Merrell had a charge over the assets of Nemesis to secure an obligation to pay $1.6 million and that charge was forfeited to the Commonwealth[253]. Merriwa Street was sold by the Official Trustee on 8 January 2007 with the consent of Nemesis and after a mortgage to Countrywide Co-operative Housing Society Ltd ("Countrywide") was paid out; the net proceeds of sale ($40,252.07) were banked and, at the time of the primary judge's decision, were still held by the Official Trustee[254].

237 Merriwa Street was purchased by Nemesis in 1986 for $69,470.72. It was not at that time derived from unlawful activity[255].

238 Merriwa Street was not sought by, offered to or taken by Perpetual as security; a mortgage was provided to Equititrust on 20 December 2001, when Nemesis borrowed $1.825 million from Equititrust to assist to repay the NAB loan[256].

239 As the primary judge found, while Nemesis had the Equititrust facility, Nemesis received funds primarily from UBC, which received funds from UOCL and other sources[257]. From 21 January 2002 to 19 June 2003, Nemesis made repayments of interest to Equititrust of at least $304,111[258]. The primary judge found that the UOCL funds represented substantially less than 5 per cent of the funds used by Nemesis to repay Equititrust[259]. The primary judge was satisfied that Merriwa Street was not derived from unlawful activity and was not acquired unlawfully[260].

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252 *Hart* [2013] QDC 60 at [783].

253 *Hart* [2013] QDC 60 at [783].

254 *Hart* [2013] QDC 60 at [784].

255 *Hart* [2013] QDC 60 at [785].

256 *Hart* [2013] QDC 60 at [412], [786]-[787].

257 *Hart* [2013] QDC 60 at [413]-[414], [419].

258 *Hart* [2013] QDC 60 at [420].

259 *Hart* [2013] QDC 60 at [791].

260 *Hart* [2013] QDC 60 at [792].

240 Before the Court of Appeal, the Commonwealth submitted that the primary judge erred in a number of respects[261]. In particular, the Commonwealth contended that Nemesis had failed to demonstrate that its interest in Merriwa Street (after the discharge of the NAB mortgage) was not derived from an offence against the *Criminal Code* (Q), that Merriwa Street was used in connection with the Perpetual Offences and that some of the monies used to repay Equititrust came from UOCL, which meant that Nemesis' interest was derived from unlawful activity.

241 Morrison JA considered that the Commonwealth should succeed in relation to the source limb, although he rejected its submissions in relation to the use limb. In relation to the source limb, his Honour found that:

(1) when the circumstances surrounding the Merriwa Street mortgage (being that Merriwa Street had been mortgaged to NAB and repayments to NAB had been sourced, at least in part, from funds from UOCL) were added to the Perpetual Offences which enabled the NAB loan to be paid out, as well as the repayments by Nemesis to Equititrust from UOCL funds, the effect was that Merriwa Street was derived from unlawful activity[262];

(2) the use of tainted funds to make loan repayments, on a property mortgaged as security for those repayments, was capable of leading to the conclusion that the property had been derived from unlawful activity[263];

(3) it was reasonable to infer that the repayments to NAB served to keep NAB from moving against the property; the Perpetual facilities were obtained to prevent NAB from exercising its rights under its loan agreement, including against Merriwa Street; and the repayments to Equititrust were necessary to ensure that Equititrust did not exercise its rights as mortgagee against Merriwa Street[264]; and

(4) each of the repayments (to NAB and Equititrust) involved the use of UOCL funds, which were tainted funds. Even if the tainted funds were "substantially less than five per cent of the funds used

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261 *Hart* (2016) 336 ALR 492 at 723-724 [1152].

262 *Hart* (2016) 336 ALR 492 at 632-633 [700]-[704].

263 *Hart* (2016) 336 ALR 492 at 632 [701].

264 *Hart* (2016) 336 ALR 492 at 632 [702].

> to repay the amount owed to Equititrust"[265], that contribution, combined with the fact that the NAB repayments were also sourced in part from UOCL funds, should have led the primary judge to find that he could not be satisfied that Merriwa Street was not derived from unlawful activity[266].

242 As to the use limb, Morrison JA was satisfied that Merriwa Street was not used in, or in connection with, unlawful activity, because Merriwa Street was not part of the security offered to Perpetual and because Nemesis did not make the representations relied on for the Perpetual Offences[267].

243 By contrast, the majority found that:

(1) by 1993, Nemesis held Merriwa Street unencumbered and had paid for it using funds not derived from unlawful activity, meaning that Nemesis had demonstrated that its interest in Merriwa Street was not derived from unlawful activity[268];

(2) given the history of the NAB demands, it was "rather unlikely" that NAB would not have released its mortgage over the property on the basis that it would receive the monies from Equititrust. Further, if that was correct, there was no basis for thinking that the NAB mortgage over Merriwa Street was released by reference to the Perpetual facilities. In addition, given that Merriwa Street was mortgaged to secure the repayment of the advance by Equititrust, but not the Perpetual facilities, it was difficult to ascribe any role to the Perpetual facilities in relation to the release of the NAB mortgage over Merriwa Street[269];

(3) assuming that it was relevant to consider the source of funds used to repay the loan from Equititrust, the "quite small role" played by the UOCL funds did not affect the finding that Nemesis' interest in

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265 *Hart* (2016) 336 ALR 492 at 723 [1151].

266 *Hart* (2016) 336 ALR 492 at 633 [703]-[704].

267 *Hart* (2016) 336 ALR 492 at 633 [707]-[708].

268 *Hart* (2016) 336 ALR 492 at 724 [1153].

269 *Hart* (2016) 336 ALR 492 at 724 [1154].

Merriwa Street was not derived or realised from unlawful activity[270]; and

(4) the Commonwealth's submission that Merriwa Street was used in connection with the Perpetual Offences was wrong because Merriwa Street was not mortgaged to support the Perpetual facilities, and there was no other basis on which it might be said to have been so used[271].

244 The Court made the following declarations ("the Merriwa Street declarations"):

(1) a declaration that Nemesis had legal ownership of Merriwa Street, subject to the Countrywide mortgage and the charge in favour of Merrell, immediately prior to the forfeiture to the Commonwealth on 18 April 2006;

(2) a declaration that the value of Nemesis' interest in Merriwa Street immediately prior to forfeiture was $34,000; and

(3) a declaration that the sum of $34,000 (together with interest in the amount of $28,765.99 to 18 April 2013 and thereafter at a prescribed rate) was payable to Nemesis by the Commonwealth.

245 On appeal to this Court, the Commonwealth contended that no s 102(3) order should be or could be made in relation to the proceeds of Merriwa Street because Nemesis had failed to establish the source limb.

246 The Commonwealth's contention was that funds from the Perpetual Offences (which the Court of Appeal was not satisfied had not been committed), together with funds from Equititrust, were used to repay the NAB loan and that therefore the Perpetual facilities played an important role in Nemesis retaining its interest in Merriwa Street, affecting the lawfulness of Nemesis' derivation of its interest in the property. That contention should be rejected.

247 By 1993, Nemesis held Merriwa Street unencumbered and its interest in Merriwa Street was not derived from unlawful activity[272]. In May 1993, Merriwa Street was mortgaged to NAB to support a loan facility which, when paid out in December 2001, was in excess of $2.993 million. From August 1998 to May

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270 *Hart* (2016) 336 ALR 492 at 724 [1156].

271 *Hart* (2016) 336 ALR 492 at 724 [1157].

272 *Hart* [2013] QDC 60 at [785].

2001, Nemesis paid NAB $105,441 in interest. At least $93,000 of those interest payments was derived from lawful sources[273]. If the balance came from tainted funds, it was, in the circumstances, de minimis.

248 In December 2001, when the NAB facility was paid out, Merriwa Street was mortgaged to secure the Equititrust facility (of $1.825 million). Merriwa Street was not offered as security for, and did not secure, the Perpetual facilities. Nemesis did not make the cl 16 representation to Perpetual. And, contrary to the finding of Morrison JA, there was no basis to infer that the funds used to pay out the NAB facility in December 2001 kept NAB from moving against Merriwa Street. Indeed, as the majority of the Court of Appeal concluded, given the history of the NAB demands[274], it was "rather unlikely" that NAB would not have released its mortgage over Merriwa Street, on the basis that it would receive the $1.825 million from Equititrust[275]. Finally, from December 2001 to June 2003, of the $3.398 million in principal and interest repayments made by Nemesis to Equititrust, substantially less than $152,055 in interest payments (or substantially less than 5 per cent of the total repayments) came from UOCL[276].

249 In those circumstances, it is not open to conclude that Merriwa Street was derived, directly or indirectly, by or as a result of the Perpetual Offences. The majority of the Court of Appeal was right to conclude that there was no relevant connection between the derivation of the property and the unlawful activity relied upon.

250 The Commonwealth also contended that the majority erred in declaring the value of Nemesis' interest immediately prior to forfeiture to be $34,000, on the basis that it had ignored the effect of the Merrell Charge on the value of that interest. That contention should be accepted. The Merriwa Street declarations were not correct because they failed to address the value of the Merrell Charge and therefore properly address the value of Nemesis' interest immediately prior to forfeiture. Accordingly, those declarations should be set aside and, in their place, declarations and orders should be made which address the nature, extent and value of the Merrell Charge. The Merrell Charges are considered next.

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273 *Hart* [2013] QDC 60 at [409], [411].

274 *Hart* [2013] QDC 60 at [204]-[205]; *Hart* (2016) 336 ALR 492 at 580 [437], 629-630 [682]-[684].

275 *Hart* (2016) 336 ALR 492 at 724 [1154].

276 *Hart* [2013] QDC 60 at [420].

(9) Section 102(1) – order declaring the nature, extent and value of an interest and the Merrell Charges

251 If the court is satisfied of the criteria specified by s 102(3) of the POCA, an order under s 102(1) should be made[277].

252 As has been seen, s 102(1) provides:

> "If property is forfeited to the Commonwealth under section 92, the court that made the *restraining order referred to in paragraph 92(1)(b) may, if:
>
> (a) a person who claims an *interest in the property applies under section 104 for an order under this section; and
>
> (b) the court is satisfied that the grounds set out in subsection (2) or (3) exist;
>
> make an order:
>
> (c) declaring the nature, extent and value of the applicant's interest in the property; and
>
> (d) either:
>
> (i) if the interest is still vested in the Commonwealth—directing the Commonwealth to transfer the interest to the applicant; or
>
> (ii) declaring that there is payable by the Commonwealth to the applicant an amount equal to the value declared under paragraph (c)."

253 In drafting an order under s 102(1), s 102(1)(c) and (d) must be addressed. In these appeals, one issue is how a court is to address the nature, extent and value of an applicant's interest in property where the property is subject to a security interest, and where both the property and the security interest have been automatically forfeited to the Commonwealth.

254 In these appeals, the Merrell Charges were a form of security interest comprising a fixed and floating charge, described as a mortgage debenture, granted by each of Fighters, Bubbling, Nemesis and Yak 3 over their respective assets to Merrell. The Merrell Charges were subject to a restraining order and, on Mr Hart's conviction, were automatically forfeited to the Commonwealth.

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277 See Part C(5) above.

(a) Primary judge

255 The proceedings were conducted on the basis that the assets forfeited on 18 April 2006 were (until forfeiture) subject to the Merrell Charges and that each charge provided security for the total amount of the debt owed to Merrell[278]. Indeed, Merrell had applied to exclude the Merrell Charges from automatic forfeiture but discontinued that application[279].

256 The primary judge concluded that Merrell's rights as creditor and its rights as chargee were separate rights; and that its loss of a charge over an asset owned by one of the Companies did not result in the loss of its right to sue the relevant Company for payment of the debt secured by that charge[280]. His Honour also concluded, in respect of the charge granted by Fighters to Merrell, that its forfeiture did not invest the Commonwealth with Merrell's rights against Fighters for the payment of money[281]. Further, his Honour did not accept that the Commonwealth had "received Merrell's right to sue for the amounts owed by the Companies to Merrell"[282].

257 The primary judge concluded that the nature and extent of the collective interests of Fighters, Yak 3, Nemesis and Bubbling in the relevant assets and proceeds (relevantly Hangar 400, the Sea Fury, the North American Trojan and the T-28, and the proceeds of sale of Doonan's Road, Merriwa Street and Samara Street retained by the Official Trustee) was that they were interests in the whole of those assets and those proceeds then retained, less $1.6 million being the equivalent of the amount the repayment of which was secured by the Merrell Charges at the date of forfeiture against all relevant assets[283].

258 Hence, on 6 May 2013, the primary judge relevantly ordered that:

> "1. Within 60 days of this order, [the Companies] pay to the Commonwealth … the sum of $1,600,000.00 less those funds held by the Insolvency and Trustee Service of Australia ('ITSA') in respect of:

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278 *Hart* [2013] QDC 60 at [436], [468].

279 *Hart* [2013] QDC 60 at [433].

280 *Hart* [2013] QDC 60 at [444].

281 *Hart* [2013] QDC 60 at [444].

282 *Hart* [2013] QDC 60 at [462].

283 *Hart* [2013] QDC 60 at [849], [853].

a. the sale proceeds of [Merriwa Street] and [Doonan's Road].

…

3. Upon the payment by [the Companies] of the funds specified in paragraph 1 of this Order and notification to the Commonwealth by its banker that the funds have been cleared:

a. ITSA has 60 days in which to vacate Hangar 400;

b. The Commonwealth is to remove the caveats lodged with respect to [the sublease of Hangar 400] and to provide notice to the parties of that removal; and

c. The aircraft, namely … [the North American Trojan] be transferred to [Fighters].

…"

259 The order for payment of $1.6 million reflected the primary judge's finding that, on 18 April 2006, the Companies were indebted to Merrell in an amount of "no more than $1,600,000"[284].

(b) Court of Appeal

260 None of the findings concerning the Merrell Charges was challenged on appeal to the Court of Appeal[285].

261 However, neither the Commonwealth nor the Companies sought to uphold the orders dealing with the Merrell Charges. The Commonwealth contended that the primary judge should not have made the orders because he was unable to declare the monetary value of the Companies' interest in the assets in accordance with s 102(1)[286]. The Companies contended that the primary judge was wrong to treat the value of the assets the subject of his Honour's 6 May 2013 orders as reduced by the Merrell Charges because when the charges were forfeited they "became empty"[287] and ceased to have any effect on the Companies. In their

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284 *Hart* [2013] QDC 60 at [472].

285 *Hart* (2016) 336 ALR 492 at 738 [1230], [1232].

286 *Hart* (2016) 336 ALR 492 at 739 [1237].

287 *Hart* (2016) 336 ALR 492 at 739 [1238].

submission, the Merrell Charges did not diminish the value of the assets which were forfeited.

262 The majority of the Court of Appeal found that while each asset was subject to a charge, that did not affect the nature of the Companies' interests in the assets; and, further, that until the secured creditor exercised its rights of sale, the rights of the owner of the asset were generally "not affected"[288]. Peter Lyons J concluded[289]:

> "since Merrell no longer held the charges, and the Commonwealth did not have any assignment of the debts which would entitle it to enforce them, the charges had no practical effect [and it] would follow that the determination of the nature and extent of the interest of [the Companies] as being diminished by $1.6 million … was erroneous; and so were orders made to give effect to such a determination".

263 The Court of Appeal set aside pars 1 and 3 of the orders made by the primary judge and then adopted a formula along the following lines, as has been seen in the discussion of each of the relevant assets in the earlier parts of these reasons:

> (1) a declaration that [X] had legal ownership of the [named asset], subject to the charge in favour of Merrell, immediately prior to the forfeiture to the Commonwealth on 18 April 2006; and
>
> (2) in the case of Samara Street, Doonan's Road and Merriwa Street, declarations as to the value of [X]'s interest immediately prior to forfeiture and that a corresponding sum was payable to [X] by the Commonwealth; and in each other case, an order directing the Commonwealth, within 21 days, to transfer its interest in the [named asset] to [X] and to deliver possession of the [named asset] to [X].

(c) Section 102(1) order

264 The primary judge[290] and the Court of Appeal[291] considered par 1 of the primary judge's orders to be a "conditional" order. The Court of Appeal

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288 *Hart* (2016) 336 ALR 492 at 740 [1242]-[1243].

289 *Hart* (2016) 336 ALR 492 at 740 [1243].

290 *Hart* [2013] QDC 60 at [465], [854].

291 See *Hart* (2016) 336 ALR 492 at 530 [170]-[171], 534 [196]-[197], 538-540 [230]-[243], 676-678 [924]-[932], 737 [1228].

concluded that the power to make orders under s 102(1) included a power to make orders which are subject to conditions[292]. That conclusion is misplaced and may be put to one side.

265 First, in drafting an order under s 102(1), s 102(1)(c) and (d) must be addressed. An applicant must establish, on the balance of probabilities, the nature, extent and value of their interest in the property. That inquiry must consider whether the property is subject to a security interest and, if so, the nature, extent and value of that security interest.

266 Here, each security interest, one of the Merrell Charges, was described as a mortgage debenture which secured an agreed amount of $1.6 million and was duly registered under the *Corporations Act* 2001 (Cth). Each was a fixed charge over certain assets (including all of the assets, or proceeds of assets, in issue in these proceedings) and a floating charge over all other assets.

267 The essence of a fixed charge is that property is "appropriated" or "made available as security" for the payment of a debt. Once property is appropriated in this manner, the charge is said to "fix". Where, as here, the subject property is appropriated immediately to the chargee upon the chargor acquiring an interest, the charge is thereupon "fixed"[293].

268 Further, under the terms of each charge, the monies owing under the charge became immediately payable, and the security enforceable by the chargee, if, amongst other things, any part of the relevant Company's assets, interests or property was confiscated or forfeited. There was no lacuna[294].

269 Accordingly, from the time of execution of each of the Merrell Charges, Merrell at least had an equitable interest in part of the assets of the chargor (including all of the assets, or proceeds of the assets, in issue in these proceedings) and, on forfeiture, an equitable interest in all of the assets of the

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292 *Hart* (2016) 336 ALR 492 at 538 [228], 676 [925].

293 *Illingworth v Houldsworth* [1904] AC 355 at 358; *Luckins v Highway Motel (Carnarvon) Pty Ltd* (1975) 133 CLR 164 at 173; [1975] HCA 50; *United Builders Pty Ltd v Mutual Acceptance Ltd* (1980) 144 CLR 673 at 686; [1980] HCA 43. See also *National Provincial and Union Bank of England v Charnley* [1924] 1 KB 431 at 449-450; Gough, *Company Charges*, 2nd ed (1996) at 17, 20.

294 See generally *Barba v Gas & Fuel Corporation (Vict)* (1976) 136 CLR 120 at 137; [1976] HCA 60.

chargor[295]. Put in other terms, at all times Merrell had a right in equity to restrain the legal owner of the asset from dealing with the asset contrary to the terms of the mortgage debenture.

270 Accordingly, the nature, extent and value of the relevant Company's interest in any asset were to be determined subject to the relevant Merrell Charge, a first ranking fixed charge over that asset securing repayment of $1.6 million. That liability had to be satisfied before the asset was entitled to be transferred to the relevant Company. And there were other complications. The obligation to pay $1.6 million was secured by each of the Merrell Charges and the Merrell Charges were forfeited to the Commonwealth. Therefore, the declarations and orders made had to take account of (1) the existence of the directly applicable Merrell Charge as well as the interrelationship between the liability for the indebtedness under all of the Merrell Charges and (2) the fact that each of the Merrell Charges vested in the Commonwealth on forfeiture, either absolutely or subject to any registration requirements[296].

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

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

272 In these appeals, that form of order should be made in relation to the proceeds of Merriwa Street.

E. Section 141 appeal

273 Finally, it is necessary to consider Div 4 of Pt 2-4 of the POCA, which deals with enforcement of a pecuniary penalty order.

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295 See, eg, *Barba* (1976) 136 CLR 120 at 137; Gough, *Company Charges*, 2nd ed (1996) at 17, 20, 69. The parties did not address the implications, if any, of the *Personal Property Securities Act* 2009 (Cth).

296 ss 66 and 67 of the POCA.

274 Relevantly, s 141(1) provides that:

> "If:
>
> (a) a person is subject to a *pecuniary penalty order; and
>
> (b) the *DPP applies to the court for an order under this section; and
>
> (c) the court is satisfied that particular property *is subject to the *effective control of the person*;
>
> the court may make an order declaring that the whole, or a specified part, of that property is available to satisfy the pecuniary penalty order." (emphasis added)

275 This appeal is concerned with two questions of construction in relation to s 141(1)(c): first, at what date must the court be satisfied that the particular property is not subject to the effective control of the person subject to the pecuniary penalty order; and second, the court's discretion to make such an order. As will become apparent, the second issue is not reached. Before turning to the construction of s 141, it is necessary to explain in greater detail the background to the s 141 application and the reasoning of the courts below.

(1) Date for determining effective control

276 The Companies and the CDPP made separate applications for orders under s 102 and s 141 respectively. The applications were determined on 2 April 2013. Further orders in the s 102 application were made on 6 May 2013.

277 The s 141 application was brought in response to, and was evidently designed to anticipate the outcome of, the s 102 application. The CDPP sought a declaration that any property which had been forfeited to the Commonwealth but was "recovered" as a result of the s 102 application was property that was available to satisfy any pecuniary penalty order made against Mr Hart. Thus, to the extent the Companies established that property was recoverable under s 102, attention turned to whether, for the purposes of the s 141 application, Mr Hart was in effective control of the Companies and (therefore) their assets. The CDPP bore the onus of proof[297].

278 At the hearing of the s 102 and s 141 applications before the primary judge, the CDPP submitted that, on the proper construction of s 141, the relevant

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297 s 317 of the POCA.

time for determining effective control for the purposes of s 141 was the date of the restraining orders[298].

279 Mr Hart, who appeared on his own behalf and on behalf of the Companies, conceded that effective control for the purposes of s 141 had to be determined at the date of the restraining orders[299] and that the District Court had previously found that Mr Hart remained in effective control of the Companies, as well as in effective control of their property, at the date of the restraining orders[300] notwithstanding that he had formally resigned as director of three of those companies[301].

280 Consistent with those submissions and the concession by the Companies and Mr Hart, the primary judge found that Mr Hart had effective control of the Companies and their assets on 8 May 2003 and 19 December 2003[302]. The primary judge also made findings as to dates before 2003, including that Mr Hart had effective control of the Companies' assets in December 2001[303] and January 2002[304], and that there were "reasonable grounds to suspect that he was in effective control" of the Companies at all material times, before, in and from December 2001[305].

281 In the Court of Appeal, Mr Hart and the Companies adopted a different stance and submitted that effective control was to be assessed at the date of the determination of the s 141 application rather than the date of any restraining

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298 *Hart* [2013] QDC 60 at [859].

299 *Hart* [2013] QDC 60 at [864]-[865]; see also at [148], [255].

300 First made on 8 May 2003 and then varied on 19 December 2003.

301 *Commonwealth Director of Public Prosecutions v Hart* [2004] QDC 121 at [166]. That finding was upheld by the Court of Appeal: *Director of Public Prosecutions (Cth) v Hart (No 2)* [2005] 2 Qd R 246 at 261 [32].

302 *Hart* [2013] QDC 60 at [252], [865].

303 *Hart* [2013] QDC 60 at [252], [266].

304 *Hart* [2013] QDC 60 at [266].

305 *Hart* [2013] QDC 60 at [293].

order[306]. That submission was accepted by the majority of the Court of Appeal[307].

282 In this Court, the Commonwealth submitted that the majority of the Court of Appeal erred in holding that effective control was to be assessed at the date of the determination of the s 141 application. That submission should be rejected.

283 Consistent with the statutory language of "is" in s 141(1)(c), the court must be satisfied that the particular property is not subject to the effective control of the person subject to a pecuniary penalty order at the date of the s 141 order.

284 Contrary to the submissions of the Commonwealth, it cannot be the date of the restraining order. There is nothing to suggest that an application under s 141 could not and would not be made by the CDPP in respect of property that is not presently forfeited and perhaps never was forfeited to the Commonwealth or subject to a restraining order. The time at which the court assesses effective control does not and cannot change depending on the property in question. It cannot be the date of the application in some cases, the date of the initial restraining order in others, and the date of the s 141 order in other cases still[308]. Indeed, if "is" in s 141 referred to the time of the s 141 application – as appeared to be suggested at one point in oral argument – then the Commonwealth could not have obtained the order in issue in these appeals because the property was forfeited.

285 The Commonwealth identified other provisions in the POCA which fix on whether property "is" under or subject to the effective control of some person – namely, ss 29(4), 102(2)(b) and 116(3) – and submitted that "is" in those provisions could not be read literally. It was contended that the same logic could and should apply to s 141(1)(c). That contention should be rejected. As the Commonwealth recognised, those other provisions, unlike s 141(1)(c), apply *only* to property which is presently forfeited or is subject to a restraining order. Thus, the word "is" in s 102(2)(b) must be read as referring to something other than the date of the determination of the application, because s 102 *only applies to presently forfeited property*. If s 102(2)(b) were read as referring to the time of the application, it would always be satisfied and the provision would be redundant. That is not the case for s 141(1)(c), which is not confined to presently restrained or forfeited property. For the same reason, the decision in *Logan Park Investments Pty Ltd v Director of Public Prosecutions (Cth)*[309], which concerned

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306 *Hart* (2016) 336 ALR 492 at 742 [1252].

307 *Hart* (2016) 336 ALR 492 at 745-746 [1268].

308 cf *Hart* (2016) 336 ALR 492 at 544-545 [268]-[275].

309 (1994) 122 FLR 1.

a provision of the POCA 1987 that applied only to presently restrained property, takes the matter no further.

(2) No effective control at date of determination of s 141 application

286 Once it is accepted that effective control for the purposes of s 141(1)(c) is to be assessed as at the date of the determination of the application, it follows that, in this case, the condition in s 141(1)(c) could not be satisfied on the evidence at trial.

287 As the primary judge recorded, "[t]here was no issue litigated in these proceedings about whether Mr Hart would have or would be given effective control of property if the Commonwealth is directed to transfer property to the Companies or to pay the value of property to them"[310].

288 Later in his reasons, the primary judge concluded that[311]:

(1) no issue had been raised in the pleadings about whether Mr Hart continued to be in effective control of the Companies at the time of the trial;

(2) it was "possible" that Mr Hart "remain[ed] in effective control of the Companies" but the issue had "not been adequately explored in evidence"; and

(3) his Honour was "not persuaded that Mr Hart is currently more than the trusted adviser to the directors" of the Companies.

289 Some matters mentioned in the primary judge's reasons may be considered relevant to effective control as at 2 April 2013 (the date on which the s 141 application was determined) but, as noted above, the evidence is scant and there were no direct findings. Those matters include, for example, that Mr Hart acted as a McKenzie friend for the Companies in the proceedings before the primary judge[312] and that there was evidence before the primary judge that Mr Hart remained a beneficiary of at least two discretionary trusts for which one of the Companies was trustee, although the CDPP did not submit that Mr Hart was

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310 *Hart* [2013] QDC 60 at [168].

311 *Hart* [2013] QDC 60 at [880].

312 *Hart* [2013] QDC 60 at [29].

thereby (or for any other reason) the "beneficial owner" of the Companies' assets or any particular asset[313].

290 Further, in the Court of Appeal, the majority – having concluded, as the Companies contended, that effective control was to be assessed at the date of the determination of the s 141 application rather than the date of any restraining order – stated that "[t]here has been no suggestion that the Commonwealth parties might have led evidence" to address effective control at the date of determination[314].

291 That last observation by the majority is important because, by reason of s 317 of the POCA, the CDPP bore the onus of proving the matters necessary to establish the grounds for making the s 141 order for which it applied. The CDPP did not address those matters, and therefore did not discharge that onus.

292 For those reasons, the Commonwealth's appeal in relation to s 141 should be dismissed.

F. Conclusion and orders

293 For those reasons, the following orders should be made:

Matter No B21/2017

Appeal dismissed with costs.

Matter No B22/2017 and Matter No B23/2017

(1) Appeal in Matter No B22/2017 allowed in part.

(2) Appeal in Matter No B23/2017 allowed.

(3) Set aside the orders of the Court of Appeal of the Supreme Court of Queensland made in Appeal No 4987/13 on 29 August 2016 and 8 November 2016, and orders 1, 4(a), (b), (e) and (f), 5, 7 to 9, and 11 to 18 of that Court made in Appeal No 3908/13 on 8 November 2016, and in their place make the following orders and declarations:

(a) each appeal be allowed in part;

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313 *Hart* [2013] QDC 60 at [883].

314 *Hart* (2016) 336 ALR 492 at 743 [1256].

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

(i) Nemesis Australia Pty Ltd had legal ownership of Lot 56 on Registered Plan 188161, also known as 6 Merriwa Street, subject to the rights of the mortgagee under the mortgage in favour of Countrywide Co-operative Housing Society Ltd and the chargee under a mortgage debenture in favour of Merrell Associates Ltd, immediately prior to its forfeiture to the Commonwealth on 18 April 2006; and

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

(c) in each of Appeal No 3908/13 and Appeal No 4987/13, each party bear its own costs.