

CITATION: *McNamee v McNamee & Anor (No. 3)*
[2026] NTSC 52

PARTIES: McNAMEE, Clinton Blake (as litigation
guardian for Lorna Jennie Pascoe)

v

McNAMEE, Mitchell Kent

and

HERRET, Mitchell Mackenzie (as
trustee of the bankrupt estate of Mitchell
Kent McNamee)

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: Supreme Court exercising Territory
jurisdiction

FILE NOs: 2022-01009-SC & 2022-01010-SC

DELIVERED: 1 July 2026

HEARING DATE: 4 March 2025

JUDGMENT OF: Smyth A/AsJ

CATCHWORDS:

ESTOPPEL – Issue estoppel – Whether prior determination created binding estoppel – Requirement of identical issue and final determination – Effect of appeal setting aside primary orders – Whether findings at first instance survive on remittal – No extant decision capable of founding estoppel – Summary context – Abuse of process overlap

SUMMARY JUDGMENT – Application under r 23.01 of the *Supreme Court Rules 1987* (NT) – Whether defence scandalous, frivolous or vexatious – Whether there is an abuse of process – Applicable principles – Power exercised with caution and only in clear cases – ‘No real question to be tried’ test – Heavy onus on applicant – Discretionary remedy – Procedural history relevant – Presence of arguable triable issues – Application dismissed

ABUSE OF PROCESS – Inherent jurisdiction – Categories not closed – Re-litigation of issues and improper purpose – Requirement of clear misuse of Court procedures – Effect of appellate intervention setting aside earlier orders – No surviving findings capable of constituting abuse – Interaction with issue estoppel principles – Bankruptcy considerations (vesting of property interests and survival of personal rights) – Whether continuation unjustifiably oppressive or brings administration of justice into disrepute – Abuse of process not established

PRACTICE AND PROCEDURE – Appeal and remitter – Proceedings ordered to continue as if commenced by writ – Consequences for prior findings – Appropriateness of summary disposition following appellate correction of procedure – Matter to proceed to trial

Bankruptcy Act 1966 (Cth), ss 58, 58(1)(a), 60(2)

Guardianship of Adults Act 2016 (NT), s 20

Supreme Court Rules 1987 (NT), rr 4.07, 23.01, 23.01(2)

McNamee & Anor v McNamee & Anor [2024] NTSC 96; *McNamee v McNamee & Anor* [2024] NTCA 1; *JMT Builders Pty Ltd v Ryan & Ors* [2016] NTSC 6; *Sea Culture International Pty Ltd v Scoles* [1991] FCA 523; *Walton v Gardiner* (1992-3) 177 CLR 378; *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87; *Nibbs v Australian Broadcasting Corporation* [2010] NTSC 52; *Shew & Ors v Police and Citizens Youth Club & Ors* [2013] NTSC 15; *Berowra Holdings Pty Ltd v Gordon* (2006) 255 CLR 264; *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62; *MacDonnell Shire Council v Miller & Ors* [2009] NTSC 46; *Blair v Curran* (1939) 62 CLR 464; *Jackson v Goldsmith* (1950) 81 CLR 446; *Kuligowski v Metrobus* (2004) 220 CLR 363; *Helmets v Como* [2014] WASC 394; *Agar v Hyde* (2000) 201 CLR 552; *Kostov v Amelie Housing* [2019] NSWSC 16; *Henderson v Housing Choices South Australia Ltd* [2019] SASC 121; *King v King* [2012] 2 Qd R 448; *Huang v Wong (No. 2)* [2019] NSWCA 18; *Western Australia v Ward* (2002) 213 CLR 1; *Wood v Leadbitter* (1845) 153 ER 351; *Hurst v Picture Theatres Ltd* [1915] 1 KB 1; *Cowell v Rosehill*

Racecourse Co Ltd (1937) 56 CLR 605; *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242; *Attorney-General (SA) v Kowalski* [2015] SASC 123; *Bankstown Football Club Ltd v CIC Insurance Ltd* (1998) 10 ANZ Insurance Cases; *Wilcox v Chapple* [2024] NSWSC 1394; *Wilcox v Chapple* [2025] NSWCA 155; *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; *Chapple v Wilcox* [2014] NSWCA 392; *Commissioner of Railways (NSW) v Cavanough* (1935) 53 CLR 220; *AMP Henderson Global Investors Ltd v Valuer-General* [2006] NSWLEC 16; *Palazzo v Pullen* (unreported, Supreme Court of Victoria, Brooking J, 24 July 1992, BC9200663); *Griffiths v Civil Aviation Authority* (1996) 67 FCR 301, referred to.

A L.T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (Oxford University Press, 2nd ed, 2008)

J D Heydon, M J Leeming, P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrine & Remedies* (LexisNexis Butterworths, 5th ed, 2014)

REPRESENTATION:

Counsel:

Plaintiff:	R Sanders
Defendants:	D McConnel SC

Solicitors:

Plaintiff:	Ward Keller
Defendants:	Piper Grimster Jones Lawyers

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

McNamee v McNamee & Anor (No. 3) [2026] NTSC 52
No. 2022-01009-SC & 2022-01010-SC

BETWEEN:

**CLINTON BLAKE MCNAMEE (AS
LITIGATION GUARDIAN FOR
LORNA JENNIE PASCOE)**
Plaintiff

AND:

MITCHELL KENT MCNAMEE
First Defendant

**MITCHELL MACKENZIE
HERRETT (AS TRUSTEE OF THE
BANKRUPT ESTATE OF
MITCHELL KENT MCNAMEE)**
Second Defendant

CORAM: SMYTH A/AsJ

REASONS FOR DECISION

(Delivered 1 July 2026)

- [1] The Plaintiff, by way of two summonses filed 18 November 2024,
seeks the following orders:¹

¹ At the time of filing the relevant summonses, there were two plaintiffs. The Second Plaintiff has since been removed. Henceforth, the remaining party will be described as the Plaintiff and the references amended accordingly.

1. Pursuant to Rule 23.01, judgment be granted in favour of the Plaintiff for the relief sought in the Amended Originating Motion filed on 28 April 2022. That is, that the Plaintiff is entitled to possession of the land at 3A Neptuna Crescent Larrakeyah, Northern Territory (Lot 8915 Town of Darwin from Plan LT02013/105) ('the Land').
2. Pursuant to Rule 23.01, judgment be granted in favour of the Plaintiff for the relief sought in the Amended Originating Motion filed on 28 April 2022 varied as follows: By no later than 5pm on a date to be nominated by the Court, the Defendant deliver up the Camry motor vehicle registration number CE53ID (VIN JPNBA3HK703011455) ('the Vehicle') by leaving it at Supreme Court carpark, State Square, Darwin City 0800 and delivering all keys to that motor vehicle in his possession to Ward Keller, solicitor for the Plaintiff, at Level 7, 22 Mitchell Street Darwin City 0800.

[2] The following affidavits were read for the purposes of the application: Teresa Hall made 24 July 2024, James Stuchbery made 3 March 2025, and Mitchell McNamee made 30 June 2022.

Background

[3] This proceeding has a complex history. Two proceedings were consolidated by Court order on 7 October 2022, being 2022-01009-SC

and 2022-01010-SC. Both proceedings were commenced by Originating Motion seeking orders for possession in respect to certain property, namely the Land and the Vehicle. A fairly recent background to the proceeding, and the result of various outcomes, is most helpfully set out in the reasons of Luppino AsJ in *McNamee & Anor v McNamee & Anor*,² which was the determination of an application for dismissal of the First Defendant's Counterclaim for want of prosecution.³ The background facts, outlined by Luppino AsJ and as adopted and relevantly amended by me, can be summarised as follows:

1. Both proceedings were commenced by litigation guardians on behalf of Lorna Jennie Pascoe ('Mrs Pascoe'), who lost legal capacity during the course of the background events. The litigation guardians were two of Mrs Pascoe's children. They were also Mrs Pascoe's statutory guardians as appointed by the Northern Territory Civil and Administrative Tribunal ('NTCAT') pursuant to s 20 of the *Guardianship of Adults Act 2016* (NT) on 21 December 2021. The First Defendant is also a child of Mrs Pascoe. The statutory guardians were removed as guardians by order of the NTCAT on 23 June 2025 and were replaced by the Public Guardian. One of the litigation guardians, the former

² [2024] NTSC 96.

³ Additionally, further process and summary of evidence filed in the proceeding is set out in the Court of Appeal's judgment: *McNamee v McNamee & Anor* [2024] NTCA 1 at [2]-[29] ('the Court of Appeal's decision').

Second Plaintiff, was removed voluntarily by Court order on 12 February 2026.

2. Although much remains in dispute, based on the affidavit evidence together with the First Defendant's Defence and Counterclaim, the background facts are that Mrs Pascoe commenced construction of a home on the Land. She engaged a builder, but that builder did not complete the construction. The First Defendant claims that he sourced the Land, assisted with arranging the construction plans, assisted in engaging and contracting the builder, dealt with matters after the building contract was terminated and project managed the completion of the home. The First Defendant alleges that was all part of an agreement made with Mrs Pascoe which provided that, in lieu of payment for his services (including payment of a finder's fee for sourcing the Land), he would be permitted to reside in the completed home on a non-exclusive basis for six years at no cost. In relation to the Vehicle, the First Defendant claims that Mrs Pascoe gifted the Vehicle to him or it is being held on trust for him.
3. After the Plaintiffs were appointed as statutory guardians, they gave notice to the First Defendant requiring him to give up possession of the Land and the Vehicle. The First Defendant did not comply, and the Plaintiffs then commenced the two proceedings. The Plaintiffs proceeded on the application for

possession of the Land by way of the summary process pursuant to Order 53 of the *Supreme Court Rules 1987* (NT) ('the Rules').

The First Defendant opposed the application on the basis of the alleged agreement entered into with Mrs Pascoe.

4. That Order 53 application was heard and decided on 21 October 2022. The Court determined that if there was an agreement made between Mrs Pascoe and the First Defendant, it was only a contractual licence. It followed that, as a licence is not a proprietary interest, the First Defendant had no entitlement to remain in possession of the Land. The First Defendant's remedy was limited to a claim for damages for breach. The Court made the order for possession in favour of the Plaintiff and gave directions for the continuation of the contractual claim.
5. The First Defendant appealed that decision to the Court of Appeal. The Court of Appeal upheld the appeal on 22 March 2024.⁴ The Court of Appeal held that the question as to whether the First Defendant had an interest enforceable in equity resulting from the agreement allegedly made with Mrs Pascoe was arguable and therefore there was a real issue for trial, and not the summary Order 53 process. The Court of Appeal remitted the matter to the

⁴ The Court of Appeal's decision.

Court with an order pursuant to Rule 4.07 of the Rules that the proceedings continue as if commenced by Writ.

6. The First Defendant, while self-represented, filed a Defence and Counterclaim on 14 October 2022. As is commonly the case with unrepresented parties, that document did not comply with pleading rules and principles. It contained excessive facts and it is difficult to distil the material facts from the contents. It is, in effect, a 36-page statement but what is apparent is that the Defence and Counterclaim, in the case of the Land, is based on the agreement the First Defendant alleges he made with Mrs Pascoe. It is for the value of the services the First Defendant claims to have provided. The amount of the Counterclaim is in excess of \$420,000 plus GST, interest, penalty interest and further unspecified expenses. In respect of the Vehicle, the First Defendant alleges that the Vehicle was gifted to him by Mrs Pascoe.
7. By summons filed 7 August 2024 the Plaintiff sought dismissal of the First Defendant's Counterclaim for want of prosecution.
8. The First Defendant had become bankrupt by sequestration order made on 23 August 2023 and the Second Defendant was appointed as the trustee of the bankrupt estate. The Court of Appeal was not made aware of the First Defendant's bankruptcy.

[4] The summons seeking dismissal for want of prosecution, and issues concerning whether the Second Defendant had elected to prosecute or discontinue the Counterclaim, was determined by Luppino AsJ. His Honour found that a valid election had been made. The options for the Second Defendant were then limited to prosecuting the Counterclaims or formally discontinuing them. By letter dated 26 November 2024, the solicitors for the Second Defendant indicated that it did not intend to prosecute the Counterclaim in respect to either the Land claim or the Vehicle claim.⁵

[5] On 19 November 2024, Luppino AsJ ordered the filing of pleadings, including a consolidated Statement of Claim, Defence and Counterclaim. On the preceding day, 18 November 2024, the Plaintiff filed the summonses which are subject of this determination. The pleadings were filed on 13 December 2024 and 17 January 2025, respectively.

Summary Judgment

[6] In order for an applicant to succeed under Rule 23.01(2) of the Rules, it needs to be shown that the defence is ‘scandalous, frivolous or vexatious’ or ‘an abuse of the process of the Court’. If satisfied, the Court may then exercise its discretion to summarily give judgment in the proceeding.

⁵ Affidavit of James Stuchbery made 3 March 2025 at Annexure ‘JWS-2’.

[7] In *JMT Builders Pty Ltd v Ryan & Ors*, Luppino M (as he was)

summarised the principles relating to abuse of process:⁶

1. A litigant has the right to have his claim litigated provided it is not inter alia an abuse of process;
2. The court has an inherent power to prevent abuse of its own process by summary order;
3. The jurisdiction to strike out proceedings for abuse of process should be used sparingly and with circumspection;
4. The categories of abuse of process are not closed and recognised categories of abuse of process are:-
 - (a) proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;
 - (b) where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;
 - (c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose;
 - (d) multiple or successive proceedings which cause, or are likely to cause, improper vexation or oppression;
5. What is an abuse of process depends on all the circumstances of the case and whether in a particular case there is abuse will be a question of fact and degree.

[8] Additionally, an attempt to litigate a dispute or issue which has been resolved in earlier litigation in any court or tribunal may also, according to the circumstances, constitute an abuse of process even if not attracting the doctrine of *res judicata* or issue estoppel.⁷

⁶ *JMT Builders Pty Ltd v Ryan & Ors* [2016] NTSC 6 at [14], citing A L.T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (Oxford University Press, 2nd ed, 2008).

⁷ *Sea Culture International Pty Ltd v Scoles* [1991] FCA 523. See also: *Walton v Gardiner* (1992-3) 177 CLR 378 at 393.

[9] In respect to summary judgment, it is well established that:⁸

The power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried.

[10] The power to strike out or summarily dismiss proceedings is discretionary and is to be exercised judicially after taking into account all relevant considerations. The procedural history of a matter is a relevant consideration in the exercise of that discretion.⁹

[11] In *Nibbs v Australian Broadcasting Corporation*,¹⁰ the Court held that in respect of applications for summary judgment, the starting point is *Dey v Victorian Railways Commissioners*.¹¹ In that case, Dixon J said:

A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury. The fact that a transaction is intricate may not disentitle the court to examine a cause of action alleged to grow out of it for the purpose of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process.

⁸ *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87, cited in *Nibbs v Australian Broadcasting Corporation* [2010] NTSC 52 at [11]; *Shew & Ors v Police and Citizens Youth Club & Ors* [2013] NTSC 15 at [11].

⁹ *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 264.

¹⁰ [2010] NTSC 52.

¹¹ (1949) 78 CLR 62.

[12] In the context of discussing the power to stay proceedings for abuse of process, Mildren J stated in *MacDonnell Shire Council v Miller & Ors*:¹²

The onus of satisfying the Court that there is an abuse of process lies on the party alleging it. The onus is a heavy one and the power to grant a permanent stay is to be exercised only in the most exceptional circumstances.

Issue Estoppel

[13] A final judgment by a competent tribunal creates an issue estoppel in that it forever binds the parties, and all those who claim through them, in respect of any issue of fact or law which was legally indispensable to that decision. The governing principles of an issue estoppel were stated by Dixon J in *Blair v Curran*:¹³

A judicial determination directly involving an issue of fact or of law disposes once and for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion ... Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. In matters of fact the issue-estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established.

[14] The elements of issue estoppel can be summarised as:¹⁴

1. the same question has been decided;

¹² [2009] NTSC 46 at [12].

¹³ (1939) 62 CLR 464 at 531-2. See also: *Jackson v Goldsmith* (1950) 81 CLR 446 at 466.

¹⁴ *Kuligowski v Metrobus* (2004) 220 CLR 363 at [7]. See also: *Helmers v Como* [2014] WASC 394 at [30].

2. the judicial decision which is said to create the estoppel was final;
and
3. the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[15] The parties are bound in the sense that they are precluded in subsequent proceedings (or as argued in this case, the same proceeding on remittal after appeal) from asserting, as against other parties to the judgment, to the contrary of any issue fundamental to the judgment.

[16] In this matter, there is no issue raised in respect of the third element. Although, questions do arise in respect of the first and second elements. In respect of the first element, the question is whether the precise issue decided in the first proceeding (being the Order 53 hearing) is identical with what is sought to be litigated in the second proceeding (being the remittal following appeal). In respect of the second element, a question arises as to whether Burns J's decision remained final (and operative) in terms of creating an issue estoppel given the Court of Appeal's subsequent decision.

[17] Additionally, and ordinarily, an issue estoppel should be raised by the pleadings and determined at trial. In that respect, issue estoppel is

pleaded in the Plaintiff's Statement of Claim.¹⁵ However, it is also raised in the context of the Plaintiff's abuse of process interlocutory application. Where the issue is raised in an interlocutory proceeding, either alleging abuse of process or seeking summary determination, the general principles in relation to summary determination will still apply.¹⁶

Plaintiff's Submissions

[18] As noted above, notwithstanding that the present summonses were filed prior to the filing of pleadings, the Plaintiff's case on his application was essentially as set out in his Statement of Claim.¹⁷ It is the Plaintiff's case that the First Defendant does not have any right to remain in possession of the Land or Vehicle, and to allow him to take any further step in the proceedings¹⁸ would amount to an abuse of process (or otherwise be frivolous and vexatious). The abuse constituting, generally, the use of the Court's procedures being unjustifiably oppressive to one of the parties or otherwise bringing the administration of justice into disrepute (additionally, by taking a

¹⁵ Statement of Claim filed 13 December 2024 at [14d].

¹⁶ In *Helmers v Como* [2014] WASC 394, citing *Agar v Hyde* (2000) 201 CLR 552, it was said that 'the test to be applied has been expressed in various ways...but of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way'.

¹⁷ I say essentially because at paragraph 14(c) of the Statement of Claim filed 13 December 2024, the Plaintiff pleads *res judicata* whereas in the hearing of this application, the Plaintiff argued only issue estoppel as per paragraph 14(d) of the Statement of Claim.

¹⁸ 'Take any further step' was the original wording in the interlocutory summons which was filed, pursuant to Court order, prior to the filing a consolidated Statement of Claim, Defence and Counterclaim.

position which he lacks standing to take). There are two main components to this application as set out below.

[19] First, to the extent that the First Defendant held any proprietary interest in the Land (an equitable lease or equitable proprietary interest) or Vehicle (any proprietary interest, as the First Defendant claimed in filed affidavits the vehicle was a gift), any such interests are vested in the Second Defendant by virtue of the operation of s 58(1)(a) of the *Bankruptcy Act 1966* (Cth).¹⁹ Given that any such property is vested in the Second Defendant, the First Defendant has no standing to resist possession.

[20] Secondly, that any contractual claims which might survive bankruptcy²⁰ are now foreclosed by operation of an issue estoppel, and/or by order of the substance of the Court of Appeal's judgment and remitter. It is the Plaintiff's submission that by *ex tempore* judgment on 21 October 2022, it was determined against the First Defendant that (to the extent that it ever existed) any alleged licence to occupy the Land was revocable and had been revoked on 21 March 2022. As a result, it was submitted that judgment was granted in favour of the Plaintiff pursuant to Order 53 and an order of possession in respect to the Property was

19 See: *Kostov v Amelie Housing* [2019] NSWSC 16; *Henderson v Housing Choices South Australia Ltd* [2019] SASC 121.

20 As recognised in *King v King* [2012] 2 Qld R 448 at 454, an arguable claim that a right to occupy is a personal right or privilege, not a right of property. That is, the right is not being capable of realisation for the benefit of the applicant's creditors and therefore does not pass to the trustees pursuant to s 58 of the *Bankruptcy Act 1966* (Cth). See further discussion below.

made. That was a final order. As a result, an issue estoppel arose and prevented the First Defendant from contending that the alleged licence is not revocable or not revoked.

[21] Furthermore, it was submitted that on the appeal, although the Court of Appeal set aside the order for possession, it did not set aside Burns J's findings at first instance (in fact or law) regarding the existence of a contractual licence (taken at its highest) and its revocation, and as a result, did not disturb the issue estoppel which had arisen. In support, the Plaintiff pointed to the following:

- (a) a narrowing of the original and wider grounds of appeal against the whole judgment to (relevantly) an appeal as to 'the decision by his Honour was based on a narrow legal argument about my residency as a bare licence rather than a proprietary right';²¹
- (b) the First Defendant conceded that his contractual claim for the alleged licence did not provide sufficient grounds for the appeal, and that he would need to establish an equitable proprietary interest;
- (c) the manner in which the Court of Appeal determined the matter and remitted it for further case management by express reference to 'the reasons set out above'. That is, remittal only for

²¹ See: Court of Appeal transcript of 28 September 2023 at p 3. The other limb of what was described as ground 5 of the appeal, namely that 'Burns J accepted without question that as guardians they had an unfettered right to revoke that licence' was not pressed.

determination of the identifiable triable questions, which was whether or not the First Defendant had an equitable lease or equitable proprietary interest in the land (i.e. and nothing more). Additionally, it was submitted that the Court of Appeal's order merely setting aside the orders of Burns J did not evince an intention to set aside the reasons for decision, preserving his Honour's findings as to the licence and its revocation.²²

[22] Additionally, it is argued that if that is not accepted, the First Defendant won an appeal based on a point that did not belong to him, namely in respect to the existence of certain equitable proprietary interests, which belonged to the trustee in bankruptcy, and through that victory he now seeks to agitate other aspects of his claim. That, the Plaintiff says, creates a whole new kind of mischief comprises abuse of process which should not be condoned by the Court.

First Defendant's Submissions

[23] It was the First Defendant's submission that any suggestion the appeal was "ultimately agreed" and allowed on one basis only, being the existence of equitable proprietary interests (either a lease or more generally) fundamentally misconstruing the nature and the effect of the appeal in the circumstances. The First Defendant submitted that he

²² *Huang v Wong (No. 2)* [2019] NSWCA 18 at [4] was cited in support of the distinction between seeking to set aside an order and reasons. This was said in the context of an application to set aside a judgment or order pursuant to the *Uniform Civil Procedure Rules 2005* (NSW). Similarly, the definition of "judgment", as defined in s 9 of the *Supreme Court Act 1979* (NT), was referred to as drawing a distinction between and order and determination or findings.

appealed the whole of the judgment and set out five grounds of appeal.²³ The nub of his complaint was that the proceeding below had contested facts and had not been tested, as stated by Grant CJ in an exchange with Counsel: ‘[t]here was a disputation of fact which wasn’t right for determination on a summary process’.²⁴ The First Defendant submitted that one ground of appeal addressed the finding below that the entitlement to occupy the Land was a contractual licence capable of being revoked by the Plaintiffs. In filed written submissions for the appeal, the First Defendant identified numerous available defences or remedies which necessitated a full and contested hearing rather than a summary hearing. The First Defendant contended at least the following arguments could have been put at first instance: equitable proprietary interest, equitable lease, tenancy and/or a contractual licence (including with a remedy for specific performance or injunction in the event of a breach). The First Defendant submitted that the Court of Appeal was not being called upon to decide the merits of any such claims, but rather whether where such defences or remedies might succeed and the Court therefore erred in its entirety proceeding in the way it did. Furthermore, although one ground of appeal was expressly abandoned, the other grounds were not.

23 In respect to issues concerning the guardians, one ground was expressly abandoned on the appeal. See: Court of Appeal transcript of 28 September 2023.

24 Court of Appeal transcript of 28 September 2023 at p 15.

[24] Furthermore, the First Defendant submitted that although the Court of Appeal determined that there were questions to be tried in respect to the issues of an equitable lease or equitable proprietary interest, it did not purport to determine the other grounds of appeal, such as the existence of an enforceable contractual licence. The Court of Appeal found it unnecessary to decide that ground and others, and found the decision in its entirety could not stand. That was reflected in its orders allowing the whole appeal, setting aside the Court's order and remitting it.

[25] The First Defendant maintains that he retains the right to be heard in respect to a defence that is available to him and which has not vested in the trustee in bankruptcy, namely a defence based on a contractual right capable of protection by injunction or specific performance. That potential defence was briefly referred to the Court of Appeal by reference to *Western Australia v Ward*.²⁵ In this application, further authority was proffered in the context of a licensee's personal right (not a proprietary one) which does not pass to the trustee in bankruptcy pursuant to s 58 of the *Bankruptcy Act 1966* (Cth). Reference was made to the case of *King v King*,²⁶ which was not referred to before

25 (2002) 213 CLR 1 ('*Ward*') at [504] per McHugh. See: [64] of the Court of Appeal's decision. The relevant and very brief statement by McHugh J in *Ward* was: "In contrast, a licence to use land ordinarily confers only a personal right that is enforceable in contract but not by an action in trespass or ejectment... If wrongly ejected from the land, the licensee cannot maintain an action in ejectment. If ejected by the grantor, the licensee may be able to obtain an injunction restraining the grantor from breaching the personal contract."

26 [2012] 2 Qld R 448 ('*King*').

Burns J nor the Court of Appeal. *King* concerned a licensee's right to occupy a premises and the avoidance of it falling into the hands of the trustee in bankruptcy. The Queensland Court of Appeal held that such a right did not pass to the trustee in bankruptcy. In discussion of that right, the Court of Appeal also discussed how such a right might be protected. Chesterman JA, after analysis of various authorities, stated:²⁷

It would, I think, be wrong to accept (as *Wood* may have done) that a contractual licensee has any equitable proprietary interest in the land with respect to which the licence is granted. Protection is instead afforded by the implication of a negative stipulation that the licence will not be revoked and that any purported revocation may be restrained by injunction. The matter is thoroughly discussed in *Equity Doctrines and Remedies*, 4th ed (pp 759–766). It is not necessary to refer to the analysis which is irrelevant to the present application. What one takes from *Errington* and *Wood* is that the licensee's right is personal, not proprietary, and cannot be transferred by the licensee.

....

The judge was wrong to conclude that the applicant's bankruptcy had unquestionably deprived him of the right to enforce his right of occupation against the grantors of the right. The action should not have been summarily struck out. To prevent injustice the applicant should have leave to appeal and the appeal should be allowed with the result that the orders setting aside and striking out the claim must themselves be set aside.

- [26] In *King* reference is made to *Meagher, Gummow & Lehane's Equity: Doctrine & Remedies* in a subchapter entitled 'Injunctions to restrain wrongful revocation of licences', where the authors traverse the

27 *King* at pp 454, 455.

various English and Australian authorities,²⁸ including *Cowell v Rosehill Racecourse Co Ltd*.²⁹ After a fairly detailed analysis of the positions in England and Australia, the authors state the following contentions (as summarised by me):³⁰

1. *Cowell* was correctly decided insofar as it determined that *Wood v Leadbitter* is still good authority for the view that, at law, a contractual licence can be effectively revoked in breach of contract, whereupon the licensee becomes a trespasser, and that *Hurst v Picture Theatres Ltd* was wrongly decided on its first two propositions.
2. *Cowell* was not correctly decided insofar as it determined that the wrongful termination of a contractual licence cannot be restrained by injunction unless the licence is coupled with the grant of an interest or that such a wrongful termination cannot be restrained by injunction unless the contract as a whole would be appropriate for a decree of specific performance.
3. There is no inconsistency between denying that a mere contractual licensee has no proprietary interest in the land and asserting that the licensee's occupation of the land can be protected by injunction.
4. There is no anomaly involved in equity granting an injunction in any circumstances for the purposes of protecting a trespasser. When an injunction is granted in favour of a licensee, it is to enforce the licensor's implied stipulation not to treat the licensee as a trespasser until the licence has been lawfully been revoked.

[27] In his Defence filed 17 January 2025, the First Defendant pleads that, upon the promise made by Mrs Pascoe to the First Defendant, the First

28 Including *Wood v Leadbitter* (1845) 153 ER 351; *Hurst v Picture Theatres Ltd* [1915] 1 KB 1.

29 (1937) 56 CLR 605 ('*Cowell*'), which Burns J was taken to in submissions (see above); J D Heydon, M J Leeming, P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrine & Remedies* (LexisNexis Butterworths, 5th ed, 2014).

30 Noting that they are contentions and *Cowell* has not been overruled. See: J D Heydon, M J Leeming, P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrine & Remedies* (LexisNexis Butterworths, 5th ed, 2014) at p 751.

Defendant became entitled to possession of the land on the basis of an equitable³¹ or contractual licence capable of enforcement by injunction or an order for specific performance. The Defendant also pleads the Plaintiff is estopped from asserting a right of possession by reason of various statements made by Mrs Pascoe in respect to his occupancy of the land. Additionally, breaches of fiduciary duties are alleged, as well as the Plaintiff taking unconscientious advantage of the First Defendant, which the First Defendant says bears on the Court's discretion to order possession.

[28] Additionally, in respect to the Vehicle, the First Defendant says that matter has not been decided and remains disputed. Issues such as other defences may be raised (such as promissory estoppel). The First Defendant's Defence currently pleads the Vehicle has become trust property and the Plaintiff is trustee. Breach of the trustee's duties are alleged. Further, if a gift, the First Defendant denies the Plaintiff a right to claim possession of it.

Disposition

[29] In respect to the issue concerning vesting of equitable interests (or other interests) in the trustee in bankruptcy, the First Defendant does not now seek relief based on such interests and that reference to such interests in the Defence are simply references to the fact that he had

31 It is not entirely clear what an "equitable licence" is, as opposed to a licence which may be recognised and protected by equity.

become entitled to possession as a material fact at a point of time, but no longer is.³² That issue makes any determination, in respect to reliance on an equitable interest constituting an abuse of process, unnecessary.

The Land

[30] In respect to the issues concerning the Land, it is necessary to first examine what was put before Burns J and what he decided. I accept that, absent the appeal, the decision of Burns J may have created an issue estoppel in respect of the proposition that, taking the First Defendant's case at its highest, any right of occupation was no more than a contractual licence which had been revoked, leaving any remedy in damages only. Two issues flow from that. First, in light of any issue estoppel, whether the First Defendant, in his defence, continues to allege/litigate the existence of a contractual licence and deny it was revocable or revoked in circumstances where he couples it with a claim that any licence was capable of enforcement by injunction or specific performance or where the Plaintiffs are estopped by Mrs Pascoe's conduct from asserting a right to possession.³³ Secondly, to what effect the Court of Appeal's judgment had on that decision. Did it either wipe the slate clean or remit the matter, preserving the decision below in respect to the licence and its revocation?

32 Transcript of 4 March 2025 at p 33.

33 See: Defence filed 17 January 2025 at [11(b)(iii)], [11(c)(i)-(iii)].

[31] As noted above, the matter proceeded before Burns J by way of Order 53 process. The First Defendant was self-represented. Written submissions were filed by the Plaintiff on 10 October 2022. Relevantly, those submissions addressed the nature of a licence.³⁴ In those submissions, reference was made to passages in *Ward*.³⁵ Reference was also made to the common law position that where a contractual licence was not coupled with or granted in aid of an interest in land, if it was terminated in breach of contract, the licensee's only remedy was to sue the licensor for damages for breach of contract. Reference was further made to *Cowell*³⁶ and also to *Forbes v New South Wales Trotting Club Ltd*,³⁷ and the fact that the High Court left open whether a court of equity would grant injunctive relief to a mere contractual licensee.³⁸ In oral submissions, Burns J was taken to those submissions and authorities.

[32] The point which was put to Burns J, notwithstanding the obiter in *Ward* and *Forbes*, was that regardless of the licence being bare or contractual, at its highest (i.e. contractual), the Plaintiff's only remedy

³⁴ Submissions of Plaintiff filed 10 October 2022 at [17]-[23].

³⁵ (2002) 213 CLR 1, referred to herein at [25].

³⁶ *Cowell* (and judgments of Latham CJ at pp 616-617, Starke J at pp 627-628 and Dixon J at pp 629-630). Those passages included criticism of *Hurst v Picture Theatres Ltd* [1915] 1 KB 1. See: transcript of 21 October 2022 at pp 16-17.

³⁷ (1979) 143 CLR 242 ('*Forbes*').

³⁸ *Ibid.* See: Submissions of Plaintiffs filed 10 October 2022 at [22].

was in damages rather than in an injunction. That issue was expressly put to the First Defendant,³⁹ and further in the *ex tempore* decision:⁴⁰

At best any right of occupation that the defendant had with respect to the subject premises was a contractual licence. I do not, at the present time, make a finding that it was such a licence, I am simply saying that that is the defendant's case as its highest. It is clear even at its highest, the defendant's case does not extend to permitting him a right to continue occupation of the land in circumstances where the guardians of Lorna Jennie Pascoe have revoked his licence. Any remedy which the defendant may have in relation to any alleged breach of contractual arrangements with his mother lies in a claim for damages against her....But there appears to me, in effect, to be no defence which is available to the defendant in relation to his continued occupation of the land and the application which has been made by the plaintiffs for recovery of the land.

[33] In respect to issue estoppel, as noted above, one of the necessary requirements is that the issue must be identical (or the same question decided). On the basis of what was put to Burns J, and on the basis of the hearing (via transcript) and his Honour's decision, I am satisfied that the issue of the possibility of an alternate remedy existing in an injunction to restrain a breaching grantor from revoking a licence was raised in the proceeding and determined by his Honour. The Court's determination was that the only remedy available to the First Defendant was in damages.

[34] The other requirement for an issue estoppel is that the decision must be a final determination on the merits. A decision is "final" if it is

³⁹ Transcript of 21 October 2022 at p 20.

⁴⁰ Ibid at p 22.

‘completely effective unless and until it should be rescinded, altered, or amended’, even if it not expressly declared to be final.⁴¹ An interlocutory judgment cannot give rise to an issue estoppel.⁴² I have not been referred to any authority in respect to whether a decision made under Order 53 is not a final decision for the purposes of issue estoppel. In my view, it had, at the time, the quality of a final decision. Although a summary procedure (and similar, in some ways, to an interlocutory summary determination), a decision made pursuant to Order 53 provides a process for a final determination on the merits,⁴³ giving rise to an issue estoppel. That accords with the *ex tempore* decision Brownhill J made in this matter when determining an application for a stay on the execution of the warrant of possession and whether leave to appeal was necessary.⁴⁴

[35] As noted above, if the decision is final, it is final until rescinded, altered or amended. There is no estoppel if the primary decision is set aside on appeal.⁴⁵ As noted above, it was the Plaintiff’s case that the estoppel created by Burns J’s judgment survived the Court of Appeal’s decision. *Wilcox v Chapple* was cited in support of the proposition that it is possible for an issue estoppel, created by a trial judge, to survive

41 *Kuligowski v Metrobus* (2004) 220 CLR 363.

42 *Attorney-General (SA) v Kowalski* [2015] SASC 123 at [139].

43 Even assuming the Court takes the Respondent’s case at its highest.

44 See: transcript of 8 February 2023 at p 30. Brownhill J found that leave to appeal was not necessary as the decision was final, not interlocutory.

45 *Bankstown Football Club Ltd v CIC Insurance Ltd* (1998) 10 ANZ Insurance Cases 61-406 (‘*Bankstown Football Club*’).

an appeal if the finding is left undisturbed on appeal.⁴⁶ Apart from a discussion as to the general principles applying to issue estoppel, there is little discussion of the effect of an appeal court's decision on a judgment at first instance (which may by itself have created an issue estoppel) when appealed.⁴⁷ The relevant appeal court (referred to in *Wilcox*) had allowed the appeal, set aside the orders and ordered that the proceedings below, brought by the plaintiff, be dismissed.⁴⁸ Unlike the present proceeding, the Court did not uphold one ground of appeal and find it unnecessary to rule in respect to others, nor was there any issue as to the adequacy of the process at first instance (i.e. that a summary process was used which was inadequate to determine matters in issue).⁴⁹

[36] The First Defendant relied on *Commissioner of Railways (NSW) v Cavanough* for the proposition that once a decision has been overturned on appeal, it is of no force and effect, and no part of it survives (including for the purposes of estoppel).⁵⁰ In terms of issue

⁴⁶ [2024] NSWSC 1394 ('*Wilcox*'). Subsequently, subject to appeal following the hearing of this proceeding in *Wilcox v Chapple* [2025] NSWCA 155, which did not materially affect the decision at first instance although dealt primarily with the issue of *Anshun* estoppel. See also: *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

⁴⁷ *Wilcox* at [616]. The Court stated that the legal foundation for the conclusion reached in the earlier case was not disturbed on appeal, therefore the same issue had been raised.

⁴⁸ *Chapple v Wilcox* [2014] NSWCA 392.

⁴⁹ Notwithstanding that the Court of Appeal held that the trial judge's exercise of discretion had miscarried.

⁵⁰ (1935) 53 CLR 220 ('*Cavanough*').

estoppel, *Cavanough* has been referred to in a number of cases, including in *Bankstown Football Club* where it was stated:⁵¹

The Club submitted that it did not inevitably follow that finding of fact untouched on appeal, even if not taken up for the decision of the appellate court, lost the binding quality which they once had simply because there was a successful appeal. It said that the findings of fact which it identified in the points of claim were unaffected by any appellate judgments, and retained their binding quality. This is not an occasion for analysing the various judgments with a view to determining whether the relevant allegations in the points of claim are supported by findings by Cole J taken up in, or untouched by, the appellate decision, or investigating whether the findings of Cole J identified in the points of claim were findings of ultimate facts fundamental to the decision. Nor is there any point in doing so, since in my view no issue estoppels can be founded on the judgment of Cole J.

Reverting to the basis of an issue estoppel, that the issue of fact has by judicial determination been disposed of once and for all as between the parties, a trial judge's determination does not dispose of an issue of fact as a fact (ultimate or not) fundamental to a decision if the trial judge's decision is supplanted by an appellate court's decision. That is so whether the appeal be upheld or dismissed. In either event, the trial judge's determination disposes of nothing once and for all: it is the appellate court's determination which disposes once and for all of any issue of fact which might be an ultimate fact fundamental to the decision. Any finding by Cole J acquires its status as an ultimate fact fundamental to the decision from the decision of the final appellate court, and it would be incongruous if a finding giving rise to an issue estoppel because fundamental to a decision still gave rise to an issue estoppel once the decision had gone. Cole J's orders were set aside and remain set aside. There is in law no extant decision by Cole J to give binding quality to his findings of fact: see the statement of Handley JA, with whom Kirby P and Mahoney JA agreed, in *Wilson v Madden* (CA, 5 June 1992, unreported), "The first decision having been wholly set aside on appeal it ceases to have any binding force and could not ground an issue estoppel".

51 *Bankstown Football Club* at pp 74,458-74,459.

[37] *Bankstown Football Club* was referred to more recently in *AMP*

Henderson Global Investors Ltd v Valuer-General:⁵²

The question of issue estoppel arising on remission of a matter following an appeal was considered by the Court of Appeal in *Wilson v Madden* (unreported, CA(NSW), 40313/91, 5 June 1992). In that case, a matter had been remitted to the Licensing Court “for determination in accordance with” a decision of the Supreme Court: per Handley JA. At the second hearing of the application, further evidence relating to factual matters was adduced “by agreement or at least without objection”: per Mahoney JA. On the basis of the additional evidence, the second Licensing Court decision reversed an original finding of fact which the Supreme Court had found was not legally erroneous. The Licensing Court’s second decision was challenged on the basis that it was not open to the Court to revisit any questions of fact which were not overturned by the Supreme Court decision.

In rejecting the challenge to the Licensing Court’s decision, Handley JA, with whom Kirby P and Mahoney JA agreed, stated:

In my opinion the majority of the Licensing Court were entitled to reverse findings of fact made by them in their first decision. The orders made by Sully J involved the first decision being set aside and the proceedings remitted “for determination in accordance with the decision of this Court” ... Following the orders that were made the position in my opinion is that, in the words of Moffitt P in *Martin v Green*; (1984) 1 NSWLR 148 at 154, “the magistrates’ jurisdiction was to rehear the case and hence review the facts” ...

The first decision having been wholly set aside on appeal it ceased to have any binding force and could not ground any issue estoppel.

[38] Handley JA also noted that the relevant provision providing for remittal on appeal may also have extended to orders setting aside the decision only on issues directly affected by the found error and

52 [2006] NSWLEC 16 at [33]-[35].

remitting the matter only for redetermination of those issues, and without resolving that issue, noted that no such orders were made.⁵³

[39] As outlined in the Amended Notice of Appeal filed 12 January 2023, the First Defendant appealed the whole of the judgment of Burns J on some of the following grounds (paraphrased and using the numbering from the Amended Notice of Appeal):

1. Denial of an adjournment which denied natural justice. The facts were extremely contentious and not tested.
2. The decision was based on a narrow legal argument about my residency in the house as a bare licensee rather than a proprietary right and accepted without question that as guardians they had an unfettered right to revoke that licence.

[40] Those grounds were further distilled into three distinct grounds of appeal, which were (using the numbering from the Amended Notice of Appeal):⁵⁴

- (1) MM was denied procedural fairness by:
 - (i) the refusal of the adjournment of the hearing of the application for possession of the Land; and
 - (ii) the determination of the application for possession of the Land by a summary process, particularly where the facts were contentious and those facts were not tested.
- (2) The Court erred by confining its consideration to whether or not MM held a licence rather than considering whether MM held a proprietary right.
- (3) The Court failed to consider whether CM and TM were properly appointed as Ms Pascoe's guardians (expressly abandoned).

⁵³ Similar provisions exist in s 55 of the *Supreme Court Act 1979* (NT) in respect to the form of judgment on appeal.

⁵⁴ By counsel and the Court of Appeal's decision at [34].

[41] The Court of Appeal decided that:⁵⁵

Order 53 was an inappropriate process

For the reasons set out in paragraphs [50] to [62] above⁵⁶, there were questions to be tried, namely whether or not MM had an equitable lease or an equitable proprietary interest in the Property. Those questions turned on disputed factual issues that could not be readily determined on a summary hearing. The case was, therefore, not one to which the summary procedure in Order 53 properly applied. This ground of appeal has been made out.

The proper course is for the proceedings seeking recovery of possession of the Land to proceed as if commenced by writ and heard and determined at a trial.

[42] The Court of Appeal's decision appears to address, in part, distilled grounds (1)(ii) and (2) as it found that there were questions to be tried in respect to whether the First Defendant had an equitable lease or proprietary interest (ground (2)), and those questions turned on disputed factual issues that could not be determined on a summary hearing (ground (1)(ii)). The Court of Appeal found it was unnecessary to consider the other grounds of appeal⁵⁷ save to make comment that it did not believe there had been a denial of natural justice by a failure to grant an adjournment (ground 1(i)). The appeal was allowed, orders of the Court made on 21 October 2022 were set aside and the proceeding was ordered to have commenced by Writ pursuant to Rule 4.07 of the Rules. There were no other specific orders in respect to remittal.

⁵⁵ Court of Appeal's decision at [65]-[66].

⁵⁶ Which related to findings on the argument of an equitable lease or equitable proprietary interest.

⁵⁷ Court of Appeal's decision at [67].

[43] It is an understatement to say this matter is not without considerable difficulty because of the manner in which the proceeding was heard, as well as the focus on the equitable defences which were thought to possibly and properly rest in the First Defendant.

[44] I am not satisfied that the First Defendant abandoned that part of the appeal challenging the existence of the possibility of success in a defence comprising an unfettered right of the guardians to revoke to licence. That is, that a defence existed in the form of a contractual licence, enforceable by recourse to an equitable remedy such as injunction.

[45] In terms of the narrowing down of the appeal,⁵⁸ I am not satisfied that there was an abandonment, or otherwise a narrowing, of the grounds of appeal to exclude the issue concerning whether the licence could be protected by remedy of injunction or specific performance for breach. Some emphasis was placed on transcripts of the Court of Appeal hearing and exchanges between Counsel for the Appellant (i.e. the First Defendant) and the Bench. The difficulty with reliance on written transcripts is that they can, in certain circumstances, be open to interpretation.⁵⁹ What appears clear is that counsel for the First Defendant continued to maintain that there were a range of remedies available, which would be influenced by facts that were not properly

58 As expressed in the Court of Appeal transcript of 28 September 2023 at pp 3, 5 and 11.

59 For example, the exchange between the First Defendant and Grant CJ in the Court of Appeal transcript of 28 September 2023 at p 11.

determined before Burns J.⁶⁰ Counsel for the First Defendant maintains there was no such abandonment of the grounds of appeal during the course of the appeal hearing.

[46] On the appeal, counsel for the First Defendant also relied on written submissions. Those submissions included that the First Defendant should have been afforded a defence to the summary possession claim by establishing, alternatively, an equitable proprietary interest in the land and equitable lease, a tenancy or by way of an injunction against the Plaintiff to prevent a breach of contract (or to obtain specific performance of a contractual promise to permit him to occupy the premises for 6 years).⁶¹ In respect to the latter, it was submitted that ‘if there was to be an adjudication of the question whether an injunction ought to be granted, it was necessary for the Court to consider the evidence relied on by the Respondent, particularly insofar as it suggested that the Appellant had behaved in an unconscionable manner or had exerted undue influence over his mother in respect to the agreement to occupy, or in respect of any other aspect of their relationship leading up to the date of the application’.⁶²

[47] The crux of the Court of Appeal’s decision, although focused on the adequacy of any argument concerning the consideration of equitable

60 See: transcript of 28 September 2023 at p 12.

61 Submissions of First Defendant/Appellant filed 9 June 2023 at [60]-[73].

62 Submissions of First Defendant/Appellant filed 9 June 2023 at [73].

interests, was that the Order 53 process was not the appropriate process to determine the issues in dispute, and the proceeding was not one which the procedure in Order 53 properly applied.⁶³ As to the argument on the failure to properly consider whether the First Defendant had a remedy in the nature of an injunction against the Plaintiffs to enforce the terms of a contractual licence, it could be said to have fallen within distilled ground of appeal (1)(ii): ‘the determination of the application for possession of the Land by a summary process, particularly where the facts were contentious and those facts were not tested’.⁶⁴ As noted, the Court of Appeal decided it unnecessary to consider the other grounds of appeal apart from distilled ground 2 (save for commenting on the failure to grant an adjournment (ground 1(i))). The Court of Appeal set aside the orders of Burns J, it ordered the proceeding to continue as if it had commenced by Writ, and it remitted the proceeding to the Registrar to case management directions and to fix a date for trial. While the Court of Appeal set aside the orders of Burns J, it is my opinion that it did not intend to leave any part of the decision below intact. The Court of Appeal did not remit the matter (or order that the proceeding going forward) to be determined solely on the issue of the existence of an equitable lease or

63 The Court of Appeal’s decision at [65]. Although, the Court uses the phrase ‘[t]he case was, therefore, not one to which the summary procedure in Order 53 properly applied. This ground of appeal has been made out’.

64 This was made clear in the abovementioned submissions at [70] to the effect that the First Plaintiff/Respondent may have had a remedy in the nature of a contractual licence to occupy coupled with an injunction, which should have then necessitated consideration of the evidence, including of the Plaintiffs/Respondents.

equitable proprietary interest. The Court of Appeal did not dismiss some grounds of appeal and uphold others. Rather, it concluded that it was unnecessary to consider all of the other grounds of appeal and allowed the appeal. The Court remitted the proceeding and ordered it to continue as if by Writ, which is appropriate where there are to be substantial disputes of fact with pleadings and discovery. The order which the Court of Appeal made, being that the matter should proceed by writ, is one of the options recognised as being available to a trial judge hearing an Order 53 application where there is a discretion exercised to cause the issue to be subsequently tried, and not to hear the issue (or dismiss the proceeding).⁶⁵ That type of order is consistent with a finding that the hearing of the matter was not appropriate for the Order 53 process.

[48] In accordance with the authorities discussed above, I am mindful that this application is one for summary judgment by reason of an abuse of process (or for being frivolous or vexatious) as outlined above. Once it appears that there is a real question to be determined, whether of fact or law, and that the rights of the parties depend upon it, then it is not competent for the Court to dismiss the action as frivolous and vexatious or an abuse of process. In my opinion, the continued prosecution of the First Defendant's Defence does not constitute an

⁶⁵ See: Court of Appeal's decision at [36(f)], citing *Framlingham Aboriginal Trust v McGuiness* [2014] VSC 241 at [41] which, in turn, cites *Palazzo v Pullen* (unreported, Supreme Court of Victoria, Brooking J, 24 July 1992, BC9200663).

abuse of process (or is frivolous and vexatious). The Plaintiff has not established, to the high degree required on a summary application, that the First Defendant's continued reliance on a personal contractual licence capable of protection by injunction is foreclosed by issue estoppel or constitutes an abuse of process (or is vexatious or frivolous). Even if Burns J's decision would otherwise have created an issue estoppel on that issue, the Court of Appeal allowed the appeal, set aside the orders, and remitted the matter to proceed as if commenced by Writ; it did not make limited orders preserving any part of the first instance determination. In those circumstances, and given the uncertainty as to the effect of the appeal and the bankruptcy, the matter is not appropriate for summary judgment.

[49] In respect to the issue that, should the First Defendant press his Defence, a whole new mischief would follow if he was permitted to continue and, as a result of the Court of Appeal's decision, on the basis that he won an appeal which was not his to win (i.e. because any property interests had vested in the trustee in bankruptcy), that issue is similarly fraught with difficulties. It was open to the Plaintiff to challenge the Court of Appeal's decision, which he did not do. True it is that, at the time of the Court of Appeal heard that the First Defendant was bankrupt, the proceeding may have been stayed by operation of s 60(2) of the *Bankruptcy Act 1966* (Cth). That a stay may have operated is contested by the First Defendant. It was submitted

that actions which do not vest in the trustee would not give rise to a stay and may be continued by the bankrupt.⁶⁶ Further, it was argued that the appeal concerned an error of law, namely determining the proceeding according to Order 53 which was not apt in the circumstances, rather than an appeal in respect to the existence of actual property interests. Additionally, it was argued that the Court of Appeal's decision remains on the record and is to be upheld until set aside or overturned, and the Plaintiff has not taken steps to re-open the appeal proceedings on the basis that they should not have proceeded. The appeal may not have been stayed (if an application had been made) or perhaps stayed in full or in part. Further, hypothetically, assuming the appeal proceeded with knowledge of the First Defendant's bankruptcy, it is not clear what the result would have been. It may have been that the appeal was dismissed because it was futile and any equitable proprietary interests which could have been found by Burns J, had it proceeded in that way, were vested in the trustee. Alternatively, knowing of the effect of bankruptcy, the Court of Appeal could have focused its attention on other aspects of the appeal such as the protection of the licence by an injunction point, which was not

⁶⁶ *Griffiths v Civil Aviation Authority* (1996) 67 FCR 301 at pp 324-326. Additionally in that case, at p 325, it was held that '[i]n my view, "property" in s 5(1) of the Act does not include a statutory right in the nature of an appeal under s 44 of the AAT Act nor an appeal pursuant to s 19 of the *Federal Court Act*, with which we are here concerned. The statutory right does not affect any property which forms part of the bankrupt's estate and which vests in the trustee as property of the bankrupt. Nor will the institution and prosecution of the proceedings by Mr Griffiths delay the administration of the estate or expose it to any adverse order for costs. If Mr Griffiths fails in the proceedings against the respondent CAA, any order for costs against him is not provable in his estate because it would be a debt which arose after the date of the sequestration order'.

explored in detail by way of preference to those more obvious, successful aspects of the case (i.e. the existence of equitable proprietary interests). Be that the case, I remain of the view that this is not an appropriate matter for summary judgment on the basis that there has been an abuse of process in the circumstances. I decline to exercise my discretion to order summary judgment. The First Defendant's defences to the application for possession of the Land, in respect to those claims which continue to rest with him and are not vested in the trustee in bankruptcy, should be determined at a trial.

The Vehicle

[50] The claim in respect to the Vehicle was not determined by Burns J nor the Court of Appeal.

[51] Ultimately, this matter is an application for summary judgment on the basis of an abuse of process (or that it is otherwise vexatious). Whilst the First Defendant filed affidavit evidence claiming the vehicle was a gift, he was legally unrepresented at the time. It is not unusual or unexpected that, following the provision of legal advice, a party may be advised of alternate defences or causes of action which could be pleaded in the alternative. The pleading that the Vehicle is or could be trust property, in alternative to a gift, is what is currently pleaded. Whilst that position may be inconsistent with his previously filed affidavits, I do not consider arguing something to the contrary in the

alternative an abuse of process or vexatious. Whilst the Plaintiff may argue that the First Defendant's position, in respect to his entitlement to the Vehicle, has changed now the bankruptcy issue has surfaced (and if a gift it would vest in the trustee), I do not think that the First Defendant should be deprived of the opportunity to raise his defences given the state of the proceeding. That the First Defendant has made statements in affidavits (which were made exclusively on the basis that the vehicle was only ever a gift), and any change in position, are matters which may affect his credit at trial and whether the position is in fact something in law other than a gift.

[52] On the basis of the above, I am not satisfied for the purpose of this application that the First Defendant's Defence in respect to the Vehicle constitutes an abuse of process (or is otherwise vexatious) warranting summary determination of the proceeding in the circumstances.

[53] I make the following orders:

1. The Plaintiff's applications dated 18 November 2024 are dismissed.
2. I will hear the parties as to costs.
3. The matter will be listed for a further directions hearing at a time convenient to the parties and the Court.
