

SUPREME COURT OF QUEENSLAND

CITATION: *Kirk v Moreton Resources Pty Ltd* [2026] QCA 186

PARTIES: **DARRYL EDWARD KIRK AS RECEIVER OF
MORETON RESOURCES PTY LTD
(RECEIVER APPOINTED)**
ACN 060 111 784
(appellant)
v
**MORETON RESOURCES PTY LTD
(RECEIVER APPOINTED)**
ACN 060 111 784
(first respondent)
ALEXANDER JASON ELKS
(second respondent)
COMMISSIONER OF TAXATION
(third respondent)
MRL MORETON RESOURCES PTY LTD
ACN 648 221 292
(fourth respondent)

FILE NO/S: Appeal No 2415 of 2026
SC No 1666 of 2025

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane – [2026] QSC 66 (Wilson J)

DELIVERED ON: 25 September 2026

DELIVERED AT: Brisbane

HEARING DATE: 15 September 2026

JUDGES: Boddice JA, Thomson AJA, Crowley J

ORDERS: **1. Appeal allowed.**
2. Order 2 made by the Honourable Justice Wilson on 5 May 2026 be set aside.
3. It be declared that the appellant is entitled henceforth to:
(a) maintain, conduct and carry on Proceedings numbers 2024/5627 and 2024/11109 in the Administrative Review Tribunal for and on behalf of the first respondent; and
(b) commence, maintain, conduct and carry on any proceedings for and on behalf of the first respondent in relation to the first respondent's

taxation liability for the financial year ended 30 June 2014, and do all other things that the first respondent could do or otherwise have done in relation to that liability.

- 4. The first second and fourth respondents pay the appellant's costs of the appeal, and the proceedings below, to be assessed on a standard basis.**

CATCHWORDS: CORPORATIONS – RECEIVERS, CONTROLLERS AND MANAGERS – PRIORITY OF DEBTS – where the first respondent has two proceedings in the Administrative Review Tribunal over alleged tax refunds withheld by the third respondent (the Tax Proceedings) – where the first respondent granted a security interest over its present and after-acquired property with a third party (M) pursuant to a secured debenture deed – where the first respondent subsequently entered a deed of assignment to assign its interest in the Tax Proceedings to the fourth respondent – where the appellant was appointed as receiver of the property of the first respondent by M – where the appellant sought various declarations before the primary judge and contended that M's security interest will attach to any refund received by the first respondent if it is successful in the Tax Proceedings – where the primary judge considered that any refund pursuant to the Tax Proceedings was an expectancy, and was thus not captured by M's security interest – where the primary judge considered that the first respondent's assignment of its interest in the Tax Proceedings to the fourth respondent prevented any refund from becoming the first respondent's property and thus precluded any possibility of the refund becoming after-acquired property to which M's security interest could attach – whether the primary judge erred in finding that M's security interest does not extend to a refund obtained as a result of the Tax Proceedings – whether the primary judge erred in finding that a refund would not be after-acquired property for the purposes of the *Personal Property Securities Act 2009* (Cth)

CORPORATIONS – VOLUNTARY ADMINISTRATION – DEEDS OF COMPANY ARRANGEMENT – CREDITORS ON WHOM BINDING – where the first respondent was subject to a deed of company arrangement (DOCA), which was wholly effectuated – where the appellant contends that M's secured debt is treated or deemed as still in existence for the purpose of enabling it to realise or otherwise deal with its security interest despite the operation of the DOCA – whether M's secured debt was extinguished by the DOCA – whether M's security interest was released by the DOCA

Corporations Act 2001 (Cth), s 444D, s 588FL

Income Tax Assessment Act 1997 (Cth)

Personal Property Securities Act 2009 (Cth), s 10, s 18, s 19, s 20, s 267, s 267A

Australian Gypsum Industries Pty Ltd v Dalesun Holdings Pty Ltd (2015) 297 FLR 1; [2015] WASCA 95, considered
Blackbird First Mortgage Corporation Pty Ltd v Jacobs [2025] FCAFC 136, considered
Commissioner of Stamp Duties (Qld) v Livingston (1964) 112 CLR 12; [1965] AC 694; [1964] UKPC 45, cited
Commissioner of State Taxation (SA) v Cyril Henschke Pty Ltd (2010) 242 CLR 508; [2010] HCA 43, cited
Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (in liq) (receivers and managers appointed) (2017) 52 WAR 90; [2017] WASC 152, cited
Re Anroma Pty Ltd [1987] 2 Qd R 134, considered
Re Antqip Hire Pty Ltd (in liq) [2021] NSWSC 1122, cited
Re Bluenergy Group Ltd (2015) 300 FLR 155; [2015] NSWSC 977, doubted
Re Lind [1915] 2 Ch 345, considered

COUNSEL: C A Wilkins KC, with L M Bullen, for the appellant
D D Keane KC, with M A Goldsworthy, for the first, second and fourth respondents
No appearance for the third respondent

SOLICITORS: Colin Biggers & Paisley for the appellant
Sasha Legal for the first, second and fourth respondents
No appearance for the third respondent

[1] **BODDICE JA:** I agree with Thomson AJA.

[2] **THOMSON AJA:** The first respondent (**Moreton Resources**) is seeking to recover two substantial tax refunds from the third respondent, the Federal Commissioner of Taxation. The dispute in this case concerns who is entitled to the proceeds of the refunds, if the claims against the Commissioner are successful. On the one hand, a secured creditor of Moreton Resources (**Melgear**) claims that any refunds will be the subject of its security, as they will be “after-acquired property” forming part of the secured property. On the other hand, after Melgear’s security was granted, Moreton Resources assigned the refunds to a company (**Elks Co**) controlled by a director of Moreton Resources (**Elks**). Elks and Elks Co claim that any tax refunds which are obtained by Moreton Resources must be paid to Elks Co, unaffected by Melgear’s security. In effect, there is a competition between Melgear and Elks Co for any refunds, arising from the effect of the assignment of the refunds to Elks Co. There is also a further complication. This arises from a Deed of Company Assignment (**DOCA**), executed by Moreton Resources after both the security was granted and the deed of assignment was entered. Elks and Elks Co contend that, as the DOCA operated to release any claims which Melgear might have to the amounts lent to Moreton Resources, Melgear’s security cannot now be exercised in respect of the released claims. Consequently, there are two issues which need to be resolved in this appeal: the assignment issue and the DOCA issue.

Background Facts

[3] The refunds claimed by Moreton Resources against the Commissioner are the subject of two separate proceedings in the Administrative Review Tribunal. If successful in the first proceeding, Moreton Resources may recover up to \$4,695,608.33, while it

may recover up to \$2,826,604 in the second proceeding. The refunds relate to contested claims pursuant to a research and development tax incentive scheme. The first proceeding relates to FY 2013, and the second proceeding relates to FY 2015 and FY 2016. It is unnecessary to say anything more about the basis of the claims. However, all parties to the present proceedings are agreed that the claims being pursued by Moreton Resources are “mere expectancies”, and are not property. That is, there is only a prospect or possibility that Moreton Resources will obtain the refunds.

- [4] The appellant in these proceedings is the receiver of Moreton Resources, who was appointed by Melgear. In 2024, Moreton Resources commenced the proceedings claiming the refunds. In the present proceedings, the appellant sought a declaration confirming that these proceedings had been validly commenced by Moreton Resources. This was uncontentious, and the primary judge made that declaration.
- [5] As indicated, Moreton Resources is the first respondent. The second respondent is Elks. The Commissioner is the third respondent, but has been excused from any active participation in the present proceedings. Elks Co is the fourth respondent.
- [6] Melgear is a reference to Melgear Pty Ltd, in its capacity as security trustee for the Moreton Security Trust. As explained, Melgear was responsible for appointing the appellant. Melgear replaced a previous security trustee, namely First Samuel Ltd (ACN 086 243 567) (**First Samuel**), on 16 October 2020. In its capacity as the security trustee, First Samuel issued debentures to Moreton Resources on behalf of various secured creditors.

Secured Debenture Deed and Security Trust Deed

- [7] The Secured Debenture Deed between Moreton Resources and First Samuel was executed on 24 May 2017. Advances of principal loan amounts were made to Moreton Resources by the debenture holders pursuant to the Secured Debenture Deed between 4 May 2017 and 19 January 2018. The amount outstanding by 25 July 2025 was \$1,368,597.85 (including principal of \$1,283,382.78 and interest). The Security Debenture Deed was registered on the Personal Property Securities Register, pursuant to the *Personal Property Securities Act 2009* (Cth) (**PPSA**), on 10 October 2019. At the same time as the Secured Debenture Deed was executed, the parties also executed a Security Trust Deed.
- [8] Clause 10.2(a) of the Secured Debenture Deed provided that each “Security Provider” (which included Moreton Resources and a guarantor) granted a “Security Interest” in its “Secured Property” to the Security Trustee as security for the payment of all Outstanding Moneys to the Debenture Holders, and performance of all Guaranteed Obligations under the Secured Debenture Deed.
- [9] The term “Secured Property” in clause 1.1 of the Secured Debenture Deed was defined to mean, in respect of each Security Provider:

“all of that Security Provider’s present and after-acquired property and includes everything in respect of which the Security Provider has at any time sufficient right, interest or power to grant a Security Interest.”
- [10] The term “Security Interest” was defined in cl 1.1 to mean:

“in relation to:

- (a) Personal Property, a PPS Security Interest; and
- (b) any other property, an interest or power reserved in or created or otherwise arising in or over an interest in any asset whether under a bill of sale, mortgage, charge, lien, pledge, other security interest or preferential arrangement (including retention of title), trust or power or otherwise by way of, or having similar commercial effect to, security for the payment of a debt, any other monetary obligation or the performance of any other obligation.”

- [11] For the purposes of this definition, “Personal Property” was given the meaning for that term in s 10 of the PPSA. That is, property (including a licence) other than land or certain rights, entitlements or authorities which are not presently material.
- [12] The term “after-acquired property” is not specifically defined in the Secured Debenture Deed for the purposes of the definition of “Secured Property” given in clause 1.1. However, the term is defined in s 10 of the PPSA as meaning “personal property acquired by the grantor after a security agreement is made”. Inferentially, that definition should be regarded as applying for the purposes of the Secured Debenture Deed. The Secured Debenture Deed is obviously drafted to harmonise with the terms of the PPSA and, in any event, the definition corresponds with the ordinary meaning of the term “after-acquired property”.

Assignment Deed

- [13] On 10 June 2020, administrators were appointed to Moreton Resources and four subsidiaries. The administrators were appointed as liquidators on 15 July 2020.
- [14] On 9 April 2021, Moreton Resources (as assignor) and its liquidators entered an Assignment Deed with Elks Co (as assignee). By this Assignment Deed, Elks Co paid \$100,000 to Moreton Resources. Moreton Resources agreed to accept the \$100,000 in consideration for:
- “(1) assigning, and the Assignee agrees to take an assignment of, all of the Assignor’s interest in the Proceeding and the Subsequent Years’ R&D Activities with effect from the Assignment Date; and
 - (2) agreeing that the Assignee is entitled to the amount of any Refund received by the Assignor.”
- [15] The term “Proceeding” was defined in cl 1.1 of the Assignment Deed to mean the causes of action arising out of or connected with Administrative Appeals Tribunal (now the Administrative Review Tribunal) proceeding number 2016/06 commenced by the Assignor against Innovation and Science Australia.
- [16] The term “Subsequent Years’ R&D Activities” was also defined in cl 1.1 to mean any causes of action arising out of or connected with the activities registered by the Assignor as “R&D Activities within the meaning of section 355-20 of the *Income Tax Assessment Act 1997* (Cth) for the income years ended 30 June 2015 and 30 June 2016”.

- [17] The term “Refund” was defined in cl 1.1 to mean any amount paid to the Assignor by the Interested Party [which term was defined to be the Australian Taxation Office] (including any interest on that amount) in relation to any decision or assessment issued by the Interested Party to the Assignor arising out of or connected with the activities registered by the Assignor as “R&D activities” within the meaning of section 355-20 of the *Income Tax Assessment Act 1997* (Cth) for the income years ended 30 June 2012, 30 June 2013, 30 June 2014, 30 June 2015 and 30 June 2016.
- [18] By cl 9 of the Assignment Deed, Moreton Resources was obliged to execute and deliver notices of assignment annexed to the Deed to Innovation and Science Australia and to the Australian Taxation Office.

Further Matters

- [19] In 2022, Mr Elks proposed that Moreton Resources, and certain other related companies, should have voluntary administrators appointed. The creditors of the relevant companies voted in favour of this proposal on 21 April 2022.
- [20] On 25 May 2022, Melgear appointed the appellant and another person as receivers of Moreton Resources. The appellant’s co-receiver retired on 8 November 2024, leaving the appellant as the sole receiver since that date.
- [21] On 7 June 2022, creditors of the companies to which the voluntary administrators had been appointed voted in favour of them adopting a DOCA proposed by Mr Elks. This was executed on 8 June 2022.
- [22] Melgear did not lodge any proof of debt under the DOCA.
- [23] On 21 September 2022, the Supreme Court of Queensland granted leave for all of the shares in Moreton Resources to be transferred to Elks Co, in accordance with the DOCA.
- [24] On 2 December 2022, the Supreme Court of Queensland declared that the DOCA had been wholly effectuated, and made an order terminating the windings up of the companies subject to the DOCA.

Material terms of DOCA

- [25] Clause 3.1(b) of the DOCA provided that the DOCA was binding upon all creditors of Moreton Resources “but for a secured creditor’s ability to exercise its rights under its security documents with” Moreton Resources.
- [26] Clause 3.5 provided that, subject to clauses 4 and 5, all persons having a Claim must accept their entitlements under the DOCA in full satisfaction and complete discharge of all Claims which they have or claim to have against Moreton Resources; and that upon effectuation of the DOCA, Moreton Resources would be released from all Claims, and all Claims will be extinguished.
- [27] Clause 4 provided that, subject to s 444F(2) of the *Corporations Act*, nothing in the DOCA should compromise or prejudice the Security Interest held by a Secured Creditor.
- [28] The term “Secured Creditor” was defined in cl 1.1 of the DOCA to mean “a Creditor with a Security Interest, including any creditor who has purchased a secured debt by

assignment”. The term “Security Interest” was defined to mean any interest held as security for the payment of a monetary obligation or the performance of any other obligation, including a mortgage, security interest, charge, encumbrance, lien, pledge or hypothecation; and a bill of sale, assignment, title retention arrangement, trust or power held as security.

Primary Judge’s Reasoning

- [29] The primary judge only addressed the assignment issue. As she considered that Melgear has no claim to the refunded amounts, the primary judge said that this disposed of the dispute and that she did not need to consider the DOCA issue.
- [30] The primary judge distinguished between after-acquired property and a mere expectancy. The primary judge said that, while it may be correct to say that there is no distinction between an expectancy and future property, it was incorrect to say that there is no distinction between an expectancy and after-acquired property.¹
- [31] The distinction contemplated by the primary judge was that an “assignment of an expectancy operates in a completely different manner to the assignment of property”.² Her Honour said that the assignment of a mere expectancy represents a special example of the equitable maxim that “equity regards as done that which ought to be done”; and that the right of an assignee of a mere expectancy is “a right of a higher or different kind from a mere contractual right”.³ These comments were based upon the discussion of *Re Lind*,⁴ in *Meagher, Gummow & Lehane’s Equity: Doctrines and Remedies*.⁵
- [32] The primary judge considered that the prospect of a refund was an expectancy. She said that Melgear could have, but did not, obtain “an equitable assignment of, or security over, any expectancies (as distinct from property) of Moreton [Resources] under the security documents”.⁶ She went on to say:⁷
- “Had Melgear done so in this case, it is likely that its earlier equitable interest by way of an assignment or charge would take priority to the interest obtained by Elks Co under the Deed of Assignment in accordance with the ordinary principles concerning equitable priority, namely that where the equities are equal, the first in time shall prevail.
- However, ... the debenture holders did not strike such a bargain.”
- [33] As a consequence, the primary judge said that the Secured Debenture Deed could only be effective in accordance with its terms. Her Honour said that all the debenture holders bargained for, and all they obtained, was a security interest in Moreton Resources’ secured property, which did not contemplate expectancies.⁸
- [34] In these circumstances, the primary judge considered that if the expectancy ever produced property for Moreton Resources, this property would be instantly assigned

¹ [2026] QSC 66 (**Reasons**) [106].

² Reasons [106].

³ Reasons [106].

⁴ [1915] 2 Ch 345.

⁵ At [6-320].

⁶ Reasons [85].

⁷ Reasons [86]-[87].

⁸ Reasons [90].

to Elks Co, which would become the 100% beneficial owner of the property; and to the extent necessary, Moreton Resources would hold the property on bare trust for the sole purpose of completing the legal transfer to Elks Co.⁹ Her Honour said that, due to the assignment, to the extent that the refund ever came into existence it would never become the property of Moreton resources¹⁰ (even for a fragment of time).¹¹

- [35] In effect, the primary judge considered that the Assignment Deed operated so that it assigned any refund which came into existence to Elks Co, and that Elks Co obtained equitable rights to the refund at a point before the refund was ever acquired by Moreton Resources. The refund could therefore never become after-acquired property of Moreton Resources.

Appeal grounds

- [36] The appeal grounds are lengthy. It is unnecessary to repeat them.
- [37] In substance, ground 1 challenges the step in the primary judge’s analysis to the effect that Melgear’s security does not extend to a refund, if a refund is obtained as a result of the proceedings in the Administrative Review Tribunal. In particular, ground 1(b) challenges the finding that the security interest created by the Secured Debenture Deed “would not attach to property coming into existence upon an expectancy of Moreton [Resources] materializing”. Ground 1(e) also specifically challenges the primary judge in not finding that a refund, were it to materialize, would not be “after-acquired property” for the purposes of the PPSA and the Secured Debenture Deed. Similarly, ground 5(c) alleges that the primary judge erred by failing to find that, if the refund were to materialize, Melgear’s security interest would attach to the refund.
- [38] The appellant makes various other criticisms of the primary judge in appeal grounds 1 to 5. I do not regard it as necessary to go into these. That is because they allege errors which are incidental to the main issue.
- [39] Ground 6 is directed to the DOCA issue. The true basis of the ground is contained in ground 6(c), which alleges that the primary judge erred by not finding that, notwithstanding the effectuation of the DOCA, Melgear should be treated or deemed as having its debt still in existence for the purpose of enabling it to realize or otherwise deal with its security interest; and in not finding that if the refund were to materialize, the security interest of Melgear would attach to the refund, enabling Melgear then to enforce that security interest against the refund.
- [40] As part of ground 6, the appellant urges this Court not to adopt the correctness of the reasoning of Black J in the New South Wales Supreme Court in *Re Bluenergy Group Ltd*.¹²

First issue: Competition to refund between Melgear and Elks Co

- [41] In addressing the question of priority as between Melgear and Elks Co, the first issue is to consider the scope of the Secured Debenture Deed, and the extent of property which forms “Secured Property”. For these purposes, it is convenient to leave to one side any issue to do with the Assignment Deed.

⁹ Reasons [109]. See also at [112]-[114], [119].

¹⁰ Reasons [112].

¹¹ The parenthetical statement may be inferred from her Honour’s approval at [111] of *Re Anroma Pty Ltd* [1987] 2 Qd R 134, 152-154.

¹² [2015] NSWSC 977; (2015) 300 FLR 155.

- [42] As I understand the primary judge's reasons, a critical aspect of these is her Honour's view that the debenture holders "did not obtain an equitable assignment of, or security over, any expectations (as distinct from property) of Moreton [Resources] under the security documents".¹³
- [43] I do not consider this to be correct. If the proceedings brought by Moreton Resources led to the refunds becoming payable to Moreton Resources, Moreton Resources would obtain an enforceable right to payment, which would be property. Once paid the refunds, Moreton Resources would then have the payments, which would constitute property in its possession.
- [44] I see no reason why the right to be paid the refunds, and the actual refunds once paid, would not be "Secured Property" in terms of the Secured Debenture Deed. These pieces of property would be "personal property acquired by the grantor after a security agreement is made", and therefore within the definition of "after-acquired property". The distinction between an expectancy and after-acquired property does not seem to me to bear upon this conclusion. If an expectancy produces property which belongs to Moreton Resources, then at the point of production, the property becomes property of Moreton Resources which falls within the description of "property acquired ... after the" Secured Debenture Deed is made.
- [45] The next issue is to consider how the Secured Debenture Deed would operate upon a refund as "after-acquired property", still leaving aside any questions related to the Assignment Deed.
- [46] Section 18(1) of the PPSA provides that a security agreement is effective according to its terms. Section 18(2) expressly acknowledges that a security agreement may provide for security interests in after-acquired property. Section 18(3) provides that a security interest in after-acquired property attaches without specific appropriation by the grantor. By virtue of these provisions, read in conjunction with the attachment rules in ss 19 and 20 of the PPSA, a security interest in after-acquired property takes effect automatically when the grantor of the security acquires rights in the collateral. In other words, leaving aside the Assignment Deed, the effect of s 18 of the PPSA, subject to the attachment rules in ss 19 and 20, is that Melgear would obtain a security interest in any refund at the time when Moreton Resources becomes entitled to the refund.
- [47] The point at which a security interest in after-acquired property attaches to that property is prescribed by s 19 of the PPSA. Section 19(1) provides that a security interest is enforceable against a grantor of security in respect of particular collateral only if the security interest has attached to the collateral. In accordance with s 19(2), a security interest attaches to collateral when the grantor has rights in the collateral, or the power to transfer rights in the collateral to the secured party; and value is given for the security interest. In the present case, these conditions will be satisfied, and attachment will occur, when any refund is payable or paid.
- [48] The security interest will be enforceable against a third party, such as Elks Co, when the rules in s 20 are satisfied.¹⁴ Relevantly, a security interest is enforceable against a third party in respect of particular collateral if:

(a) the security interest is attached to the collateral: s 20(1)(a); and

¹³ Reasons [85].

¹⁴ *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (in liq) (receivers and managers appointed)* [2017] WASC 152; (2017) 52 WAR 90 [331]-[335]; *Re Antqip Hire Pty Ltd (in liq)* [2021] NSWSC 1122 [49].

- (b) a written security agreement contains a statement that a security interest is taken in all of the grantor's present and after-acquired property: s 20(1)(b)(iii), s 20(2)(a)(i) and (b)(ii).

- [49] It follows that, leaving aside the Assignment Deed, Moreton Resources would obtain an enforceable security interest under the PPSA in respect of any refund which was payable or paid to it, immediately when the refund became payable and the proceeds were paid.
- [50] The third issue is to consider whether the existence of the Assignment Deed makes any difference to the conclusion that refunds might become Secured Property for the purposes of the Secured Debenture Deed. That is, does the Assignment Deed prevent any refund becoming after-acquired property of Moreton Resources, because the Assignment Deed operates to capture the refund before the Secured Debenture Deed comes into play?
- [51] To apply the words of Phillimore LJ from **Re Lind**,¹⁵ the argument here is that, as a result of the Assignment Deed, the right of Elks Co as assignee under the Assignment Deed "is a higher right than the right to have specific performance of a contract". Elks and Elks Co contend that the assignment will create a bare trust in favour of Elks Co at the instant any refund comes into existence, thereby preventing the refund from ever becoming regarded as property of Moreton resources, and that this prevents the Secured Debenture Trust from operating to apply to any refund as "after-acquired property".
- [52] In **Re Anroma Pty Ltd**,¹⁶ a company granted mortgages over mining leases which were yet to be granted in return for the immediate advance to it of substantial sums by the mortgagee. By the time the tenements were granted, the company had been placed into liquidation. However, when the tenements were granted, the mortgagee (acting as the company's attorney under a deed of undertaking to execute security) executed mortgages over the mining leases and obtained registration of these. The liquidators of the company sought a declaration that the mortgages were void, or void as against them, as dispositions of corporate property made after the commencement of winding up.
- [53] The majority of the Full Court (comprising McPherson J and Derrington J) refused the declaration sought, taking the view that the mortgages were valid. This was upon the basis that equity regarded the contract to grant the mortgage, given for value, as binding upon the conscience of the company, and so binding the subject matter of the contract when it came into existence.¹⁷ Consequently, there was never an instant after the company was placed into liquidation when the company beneficially owned the mining leases; and there could never be a disposition of property in those leases.
- [54] In reaching this decision, McPherson J in particular drew support from **Re Lind**. In that case, Lind had an expectation of receiving an inheritance from his mother, who was incapacitated from making a will due to unsoundness of mind. Lind twice mortgaged the interest which he expected to obtain in his mother's estate upon her death for advances of £800 and £1,500 from two different financiers. He was then adjudicated bankrupt, but later discharged. The first and second financiers did not

¹⁵ [1915] 2 Ch 345, 365-366.

¹⁶ [1987] 2 Qd R 134.

¹⁷ **Re Anroma Pty Ltd** 152-153, 159-160.

prove in the bankruptcy. Lind then assigned his expectancy to a third financier. Following the death of Lind's mother, and a further assignment to the third financier, the third financier brought proceedings contending that it was entitled to Lind's share of his mother's estate free of any mortgage in favour of the first or second financiers.

[55] The Court of Appeal rejected the position of the third financier, and considered that the first and second financiers maintained their securities.

[56] Swinfen Eady LJ said:¹⁸

"It is clear ... that an assignment for value of future property actually binds the property itself directly that it is acquired – automatically on the happening of the event, and without any further act on the part of the assignor – and does not merely rest in, and amount to, a right in contract, giving rise to an action. The assignor, having received the consideration, becomes in equity, on the happening of the event, trustee for the assignee of the property devolving upon or acquired by him, and which he had previously sold and been paid for."

[57] Phillimore LJ said:¹⁹

"... it is I think well and long settled that the right of the assignee is a higher right than the right to have specific performance of a contract, that the assignment creates an equitable charge which arises immediately upon the property coming into existence."

[58] Bankes LJ said:²⁰

"It appears to me to be manifest ... that equity regarded an assignment for value of future acquired property as containing an enforceable security as against the property assigned quite independent of the personal obligation of the assignor arising out of his imported covenant to assign. It is true that the security was not enforceable until the property came into existence, but nevertheless the security was there, the assignor was the bare trustee of the assignee to receive and hold the property for him when it came into existence."

[59] These cases are consistent with the proposition that an assignment or mortgage of property to be acquired in the future takes immediate effect when the property comes into existence.²¹ Further, in *Re Lind* there were competing claims by secured creditors to the property at the instant when the property came into existence. The ordinary priority rule in equity applied, and the first in time took priority. Consequently, the competing claims of the first and second financiers took priority over the third financier at the instant when the property came into existence.

[60] In the present case, the competing claims of Melgear, as a secured creditor, and Elks Co, as an outright assignee, both arise at the instant when Moreton Resources' right to be paid the refunds comes into existence, and the instant when payment is made. However, the critical issue is which claim takes effect first?

¹⁸ At 360.

¹⁹ At 365-366.

²⁰ At 373-374.

²¹ See also *Holroyd v Marshall* (1862) 10 HL Cas 191 at 211, *Palette Shoes Pty Ltd v Krohn* (1937) 58 CLR 1 at 27.

- [61] The respondents contended that, as a matter of law, the outright assignment of any right to the refunds meant that whenever these rights might come into existence, they would be held by Moreton Resources on a bare trust for Elks Co, and never become the property of Moreton Resources, so that the claim of Melgear could never take priority over Elks Co. The respondents emphasised that s 254(1)(c) of the PPSA permitted the doctrines of equity to apply, to the extent that they were capable of operating concurrently with the PPSA. The respondents also said that a security interest under the PPSA will only attach to after-acquired property when the grantor acquires the property.²² They also pointed out that the Secured Debenture Deed was only intended to apply to assets to which Moreton Resources had some beneficial entitlement, because under that Deed (cl 6.1(g)), Moreton Resources warranted that it was the legal and beneficial owner of its assets. In these circumstances, the respondents submitted that if the doctrines of equity applied, Moreton Resources would never beneficially own any rights in respect of the refunds, but would always be a bare trustee of such rights.²³ Consequently, Melgear's security would never capture any rights to the refunds as after-acquired property.
- [62] In a competition between the rights of a company, and the rights of a secured creditor, this analysis is correct. That is the effect of *Re Anroma Pty Ltd*. As McPherson J said in that case, when discussing the effect of the agreement (entered on 1 November 1984) to grant mortgages over the mining leases when granted (on 1 December 1985):
- “In the ordinary course, and, apart from the transaction here in question, the leasehold interest would have passed from the Crown to the Company at its commencement on 1 December 1985. In consequence of cl.7 of the deed of 1 November 1984 and of consideration advanced by Elders [the financier] under it, equity intercepted that interest so that at the instant it arrived, if not before, the Comany[sic] was transformed into a trustee of the term quoad the equitable interest of the mortgage. To that extent the equitable interest was diverted to Elders, never vesting in the Company at all, or vesting in it legally but not beneficially. On that footing it was never ‘property of’ the Company that attracted s.368(1).”
- [63] However, the analysis of the majority in *Re Anroma Pty Ltd* is not specifically concerned with a competition between two third parties, both claiming an interest in the after-acquired property of the company at the instant which it arises. Where the question is whether the right of Melgear or Elks Co should be recognised first, at the very instant when the property comes into existence, the context is somewhat different from the question where the competition is between the right of general creditors of a company (through the company) to property, and the right of a secured creditor which has provided value for an equitable claim.
- [64] In my view, the majority approach in *Re Anroma Pty Ltd* does not present an inevitably correct legal conclusion which must be adopted as a matter of legal principle. That is because the instant at which equity intervenes, as after-acquired property comes into existence, is a product of legal policy. It is well-established that equity creates and protects equitable rights and interests in property “only where their

²² *Re Antip Hire Pty Ltd (in liq)* [2021] NSWSC 1122 at [51]; *Re Forge Group Ltd* [2017] FCA 170; (2017) 118 ACSR 434 [156]. See PPSA, s 267, s 267A; Corporations Act, s 588FL.

²³ Reference was made to *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* [2019] HCA 20; (2019) 268 CLR 524 [64], [66], [157].

recognition has been found to be required in order to give effect to its doctrines”.²⁴ As I have said, in *Re Lind*, where the competition was between equitable interests of the same nature, the first in time priority rule applied.

- [65] Here, the PPSA has effect by statutory force. It is not simply a matter of competing equities. The effect of the contentions by Elks and Elks Co is to interfere with the statutory effect of the PPSA. In my view, this statutory policy favours Melgear having priority over the equitable claims advanced by Elks Co. That is for at least three reasons.
- [66] First, the PPSA manifests a specific statutory policy that a security with effect under that statute should be effective according to its terms: s 18(1). That includes providing for security interests in after-acquired property: s 18(2). Moreover, where the security provider has a security interest in particular “collateral”, the security interest attaches to the “collateral”, ie the whole of the collateral. “Collateral” is the personal property to which a security interest attaches: s 10. Consequently, where after-acquired property is the collateral, the security interest attaches to the whole of the after-acquired property. In substance, it would be contrary to this statutory effect for a subsequent equitable interest to remove the “collateral” from the scope of “after-acquired property” at the instant where the property comes into existence and is about to become “after-acquired property”. That would be a specific intervention by equity to prevent the security interest taking effect according to its terms.
- [67] Secondly, the equitable right upon which Elks Co depends may be regarded as a special application of the maxim that “equity regards as done that which ought to be done”.²⁵ What equity regards as ought to be done is to give effect to a right to future property for which valuable consideration has been provided. However, where the legislature has provided a statutory imperative concerning the rights which should be regarded as arising at the instant where the property comes into existence, I do not think that equity should be taken to say that what ought to be done is to interfere with, and alter the effect of, a specific legislative policy laid down by Parliament.
- [68] Thirdly, if the contention of Elks Co is correct, it would mean that a secured interest in after-acquired property could generally be defeated by a subsequent outright assignment of the after-acquired property, because the outright assignment would be to remove the after-acquired property from the scope of a prior security. That result would have significant commercial implications for the efficacy of securities over after-acquired property. Somewhat paradoxically, this would be to create a “last in time” priority rule in a competition for after-acquired property between a security and an outright assignment. I do not see any good legal or commercial reason which compels this result.
- [69] For these reasons, I consider that the primary judge erred in respect of her decision regarding the first issue. I consider that grounds 1(b), 1(e) and 5(c) are established.

Second issue: Effect of DOCA

- [70] The DOCA issue arises due to the terms of s 444D(1) and (2) of the *Corporations Act 2001* (Cth). These provisions state as follows:

²⁴ *Commissioner of Stamp Duties (Qld) v Livingston* (1964) 112 CLR 12 at 22 approved in *Commissioner of State Taxation (SA) v Cyril Henschke Pty Ltd* (2010) 242 CLR 508 at [25] and *Commissioner of State Revenue (WA) v Rojoda Pty Ltd* [2020] HCA 7; (2020) 268 CLR 281 at [47].

²⁵ *Meagher, Gummow & Lehane’s Equity: Doctrines and Remedies* [6-320].

- “(1) A deed of company arrangement binds all creditors of the company, so far as concerns claims arising on or before the day specified in the deed under paragraph 444A(4)(i).
- (2) Subsection (1) does not prevent a secured creditor from realising or otherwise dealing with the security interest, except so far as:
 - (a) the deed so provides in relation to a secured creditor who voted in favour of the resolution of creditors because of which the company executed the deed; or
 - (b) the Court orders under subsection 444F(2).”

[71] There are three cases about this provision which require consideration.

[72] The first is the decision of the Court of Appeal of Western Australia in **Australian Gypsum Industries Pty Ltd v Dalesun Holdings Pty Ltd**.²⁶ This involved a majority decision of Newnes and Murphy JJA, while Buss JA dissented.

[73] The situation in that case was conveniently summarised by Newnes and Murphy JJA:²⁷

“In summary, the appellants (the creditor) supplied goods on credit to a principal debtor. A related company of the principal debtor guaranteed the debtor’s obligations to the creditor, and the guarantee was supported by a charge over the surety’s land. The surety went into administration and, subsequently, entered into a deed of company arrangement. The deed of company arrangement released all claims against the surety, including contingent claims. The surety was financially rehabilitated and the deed of company arrangement was terminated following the effectuation of its purposes. Thereafter, the creditor supplied further goods on credit to the debtor. The debtor defaulted in repayment, and the creditor sought to recover those unpaid sums from the surety under the guarantee, including by enforcement of the charge over the land that the surety had granted.”

[74] It should be added that when the creditor supplied further goods on credit to the debtor, the creditor was unaware that a deed of company arrangement had been approved for the surety.²⁸

[75] The situation which arose in **Australian Gypsum** was succinctly described by the appellant in the present case as a situation of “after-acquired debt”, not of “after-acquired property”. The question in **Australian Gypsum** concerned whether the creditor could enforce a claim against the surety, in relation to debts incurred after the deed of company arrangement had been effectuated, against land which the creditor had charged prior to the surety entering administration. At the point when administrators were appointed, the creditor’s contingent claims against the surety in respect of goods which might be supplied in the future by the creditor to the debtor, had a nil value.²⁹ That situation is substantially different from the question in this

²⁶ [2015] WASCA 95; (2015) 297 FLR 1.

²⁷ [2015] WASCA 95; (2015) 297 FLR 1 [115].

²⁸ [2015] WASCA 95; (2015) 297 FLR 1 [244].

²⁹ [2015] WASCA 95; (2015) 297 FLR 1 [236]. See also [232].

case. Here, the debt due when the debtor company entered administration had an outstanding principal of \$1,283,382.78. The question here is whether security for that outstanding amount (plus interest) may be enforced against after-acquired property (ie any rights to the refunds) after the debtor has come out of administration.

[76] The majority in *Australian Gypsum* upheld the decision of the primary judge that the appellant's claims were precluded by operation of the surety's deed of company arrangement. At the point when the deed of company arrangement was effectuated, the contingent claims against the surety in respect of goods which might be supplied in the future by the creditor to the debtor, had a nil value. After that, no new liabilities could arise under the guarantee. It was released by the surety's deed of company arrangement, and the charge supporting the guarantee could not be exercised in respect of debts incurred by the debtor after termination of the surety's deed of company arrangement. Consequently, the security could not be used for the purpose of enforcing such liabilities.

[77] Newnes and Murphy JJA said that it was implicit in the statutory scheme of Pt 5.3A of the *Corporations Act* that its purpose was to provide an insolvent company with a "fresh start".³⁰ They then went on to make the following observations about the operation of s 444D:³¹

"[225] Section 444D(1) is to be read on the basis, inter alia, that under the statutory scheme in div 10 of pt 5.3A, a deed of company arrangement will typically provide that all creditors must accept their entitlements under the deed in full satisfaction of all debts or claims against the company arising on or before the specified date. (These claims may be described for present purposes as 'provable claims'.) The legislature has not required that all provable claims be released by a deed of company arrangement, although it has recognised that a deed of company arrangement may contain terms to that effect. It is s 444H which deals in terms with the question of release.

[226] Section 444D(2) provides that subsection (1) of s 444D "does not prevent" a secured creditor from realising or otherwise dealing with its security (subject to the exceptions in subsections (a) and (b) of s 444D(2)) in respect of its provable claims. The language of "does not prevent" in this context connotes the preservation of existing rights against the property of the company to satisfy claims at the specified date which would otherwise only be enforceable through the operation of the deed of company arrangement to which statutory effect is given under s 444D(1).

[227] The realisation of (or otherwise dealing with) a security involves exercising a right of action against the property of the company. The right to take action against the property of the company is, however, only exercisable where there exists a payment obligation of the company for the satisfaction of which the right may be exercised.

³⁰ [2015] WASCA 95; (2015) 297 FLR 1 [218].

³¹ [2015] WASCA 95; (2015) 297 FLR 1 [225]-[229].

[228] Insofar as a secured creditor has a claim against the company which is provable under the deed of company arrangement, but which is also capable of being satisfied by recourse to the security instead, the secured creditor is entitled to ‘stand outside’ the deed and realise (or otherwise deal with) the security under s 444D(2).

[229] Insofar as a secured creditor has a claim which although provable under a deed of company arrangement, provides no basis for recourse to the property of the company for its satisfaction, it is not the statutory force given to the deed of company arrangement under s 444D(1) which prevents the creditor from realising or otherwise dealing with the security, but rather the nature of its provable claim.” (citations omitted)

[78] The majority also said:³²

“While s 444D(2) preserves property rights, it says nothing about reinstating provable claims that have been released by the statutory effect given to the provisions of the deed of company arrangement. Nor could those claims be “deemed” not to be released for the purposes of the appellants continuing to exercise their security rights after the termination of the [surety’s] DOCA because their security rights were not exercisable prior to then.” (citations omitted)

[79] The next case which needs to be considered is **Re Bluenergy Group Ltd.**³³ This is a decision of Black J in the New South Wales Supreme Court. The appellant accepts that it is directly contrary to the position which it adopts, but says that this Court should not adopt the reasoning in **Bluenergy**.

[80] In **Bluenergy**, the company had deed administrators appointed, and was subject to a deed of company administration. The administrators proposed a recapitalisation of the company. A secured creditor of the company (Keybridge) did not vote on this proposal. Subsequently, Keybridge purported to appoint its own administrator for the purposes of a second administration. The existing administrators applied for orders that Keybridge was not entitled to appoint its own administrator, because Keybridge was not a person entitled to enforce a security interest in the whole or substantially the whole of the company’s property within the meaning of s 436C of the *Corporations Act*. That was upon the basis that Keybridge’s debt as a secured creditor had been extinguished by the first deed of company arrangement. Keybridge argued that it had not voted in favour of the creditor’s resolution in respect of the deed of company arrangement at the second creditor’s meeting, and argued that s 444D(1) did not apply to it or its security interest. Keybridge contended that it could enforce its security against the company unless the Court otherwise ordered.

[81] Black J held that Keybridge’s debt was extinguished by the deed of company arrangement, but its rights to realise or otherwise deal with its security were preserved under the deed and by s 444D(2). Consequently, Black J said that Keybridge was not a creditor at the time it appointed its administrator, and was not a creditor in the second administration.³⁴ However, Black J also held that, to the extent that s 444D(2)

³² [2015] WASCA 95; (2015) 297 FLR 1 [237].

³³ [2015] NSWSC 977; (2015) 300 FLR 155.

³⁴ [2015] NSWSC 977; (2015) 300 FLR 155 [68].

preserved the right to realise a security interest, it also preserved the right to appoint an administrator under s 436C. It followed that Keybridge had been entitled to appoint its own administrator.³⁵

[82] In reaching these conclusions, Black J considered the reasoning in *Australian Gypsum*. In doing so, he particularly considered submissions that:³⁶

- (a) even if the underlying secured debt was released by the combined effect of a deed of company administration and s 444H, s 444D(2) operated so as to preserve a secured creditor's right to realise or otherwise deal with its security interest, even against after-acquired property not held at the date of the deed but acquired subsequent to it, and notwithstanding the terms of the release, for any debt owing at the relevant date under the deed; and
- (b) s 444D(2) preserved what was necessary for the secured creditor to realise or otherwise deal with the "security interest" in whatever form the security might take and, where the security interest extended to not only present but future property, it preserved the relevant debt to the extent necessary to enable the secured creditor to realise its "secured interest" in the future property.

[83] Black J rejected these submissions and said:³⁷

"I do not accept these submissions. It seems to me that s 444D(2) of the *Corporations Act* can be given effect, in accordance with its terms, by preserving the secured creditor's property right in its security interest, ***in respect of the property to which it was capable of attaching at the date a release under a deed of company arrangement would take effect, without recognising a preservation of rights over after-acquired property extending indefinitely into a company's future.*** The former reading of the section is broadly consistent with the fact that the amount of a secured creditor's claim would be determined at a point in time in a liquidation or deed of company arrangement, to the extent that future debts or claims that are not due and payable at the relevant date are still provable under s 553 of the *Corporations Act* and under a deed of company arrangement reflecting the same structure. ***The latter reading of the section seems to me to be inconsistent with the reasoning in Australian Gypsum, and also with any practical prospect of rehabilitation of a company, or a "fresh start" in the language of Australian Gypsum. The existence of a continuing security extending indefinitely into the future over a company's after-acquired property, and notwithstanding that a deed of company arrangement had provided for the release of the secured creditor's debt, would place a very significant practical obstacle in the way of any future operation of a company that emerged after a deed of company arrangement, including potentially preventing its obtaining new secured finance without the cooperation of its former secured creditor.***" (emphasis added)

[84] At the hearing of the appeal, the appellant accepted that the last comment in this paragraph stood in the way of it succeeding, but urged the Court not to follow what

³⁵ [2015] NSWSC 977; (2015) 300 FLR 155 [72]-[73].

³⁶ [2015] NSWSC 977; (2015) 300 FLR 155 [65].

³⁷ [2015] NSWSC 977; (2015) 300 FLR 155 [66].

was said by Black J. This was upon the basis that if this was the intended effect of s 444D(2), it could have been made plain by the legislation. As well, it was submitted that the comment was not justified by the majority reasoning in *Australian Gypsum*, when understood in context. I will return to these matters, after addressing the third relevant decision.

- [85] The circumstances of *Blackbird First Mortgage Corporation Pty Ltd v Jacobs*,³⁸ a decision of the Full Federal Court, considered the operation of s 444D(2) in yet another situation. There a company (SWA) executed a deed of company arrangement on 7 November 2022. Mr Grono was a secured creditor of the company. He had entered a Loan Agreement with SWA, secured by a General Security Agreement. He voted in favour of the resolution of creditors resulting in the execution of the DOCA. Subsequently, after the DOCA was executed, Mr Grono advanced further sums of money to SWA. These sums were advanced pursuant to the terms of the Loan Agreement as varied by a Deed of Variation. SWA did not repay the full amount of the additional advances. Mr Grono appointed receivers and managers pursuant to the General Security Agreement. The appellant, Blackbird, was also a secured creditor which had appointed its own receivers.
- [86] Blackbird challenged the appointment of Mr Grono's receivers. This was on the grounds that:
- (a) the terms of the DOCA, and ss 444D(1) and s 444D(2) operated to extinguish the security interests granted under the Loan Agreement and General Security Agreement, because Mr Grono had voted in favour of the resolution to approve the DOCA;
 - (b) the additional advances fell within the meaning of "Claims" and were released by operation of the DOCA and s 444D(1) and s 444H of the *Corporations Act*, because the additional advances were taken to have been made on 16 August 2022 under the terms of the Loan Agreement, as varied by the Deed of Variation; alternatively, because the obligation to repay the Debt arose out of cl 3 of the Loan Agreement and that obligation included a contingent liability to repay additional advances as they fell within the meaning of "Further Moneys" and that, in turn, fell within the meaning of "Debt" in the Loan Agreement.
- [87] Blackbird failed in opposing the appointment of the receivers by Mr Grono. Essentially, on a proper understanding of the basis for the additional advances, they were made pursuant to a fresh agreement after the operation of the DOCA and the *Corporations Act* to release claims which existed on 7 November 2022; and they were not to be regarded as somehow made retroactively before 7 November. Further, the effect of the DOCA and s 444D(2) of the *Corporations Act* was not to extinguish the security interests of Mr Grono under the General Security Agreement. Section 444D(2) preserved property rights, and did not interfere with them. Consequently, the General Security Agreement could operate to secure the additional advances, which had been made using the mechanism of the Loan Agreement.
- [88] The way in which s 444D(1) and s 444D(2) operate was set out in some detail in the judgment of Feutrill and Longbottom JJ. They said:³⁹

³⁸ [2025] FCAFC 136.

³⁹ [2025] FCAFC 136 [45]-[46].

- “[45] A secured creditor of a company has a proprietary right (that is, a right of action against the property of the company the subject of the security interest) and a personal right of action against the company for repayment of the debt. Personal claims are the subject of s 444D(1). Generally speaking, personal claims are released and discharged by operation of s 444D(1) and s 444H and replaced with, in effect, proof in collective proceedings against a deed fund. Claims against property in which a company has an interest are the subject of s 444D(2). Section 444D(2) reflects the longstanding principle in insolvency law that secured creditors are not required (but may on certain terms) participate in the relevant statutory scheme. Consequently, a secured creditor who has not voted in favour of the resolution that the company execute the deed of company arrangement is treated or deemed as having debts (despite release or discharge of personal claims) for the purpose of enabling that secured creditor to continue to exercise property rights. The right of action against the property of the company is, however, only exercisable where there exists a payment obligation of the company for the satisfaction of which the right may be exercised. ‘Section 444D(2) is not a provision which interferes with property rights. It is concerned with the preservation of property rights.’: *Australian Gypsum Industries* at [239]. Where a secured creditor has voted in favour of the deed and the deed provides that such a secured creditor is prevented from realising or dealing with the security interest, the property right otherwise preserved by s 444D(2) is not able to be exercised. However, that does not mean that the security agreement by which the security interest was granted is extinguished or otherwise does not operate or have effect according to its terms.
- [46] Nonetheless, the release of personal claims and inability to enforce a security interest with respect to such claims resulting from the terms of a deed of company arrangement and ss 444D(1), 444D(2) and 444H of the Act may have an effect on the secured creditor’s right to enforce the security interest. In general, upon releasing the debt secured, the security for the debt is also released. In that circumstance, the debtor may take such steps as are necessary to obtain a formal release where one is necessary: Tyler ELG, Young PW AO QC and Croft CE, *Fisher and Lightwood’s Law of Mortgage* (3rd Australian ed, LexisNexis, 2013) at [34.1]-[34.5]; *The Law of Securities* at pp 10-11, 67. In the case of personal property, there is a mechanism for requiring the secured party, in substance, to register an amended financing statement recording that no collateral (property) described in the registration secures any obligation owed to the secured party: Pt 5.6 of the Personal Property Securities Act. It follows that, subject to the terms of the security agreement, where by operation of the terms of a deed of company arrangement and ss 444D(1), 444D(2) and 444H, a company is released from a debt secured by a security

interest, the effect of releasing the debt may also be to release the security interest. However, a release from the debt may not release the security interest if other liabilities falling outside the scope of the deed of company arrangement and claims for the purposes of s 444D(1) remain subject to the security agreement and security interest.”

- [89] The Court did not consider **Bluenergy**, and whether s 444D prevented the security under the General Security Agreement capturing after-acquired property. That issue was not raised in the proceeding.
- [90] Having considered these cases, I think the following points may deduced:
- (a) s 444D(1) operates to ensure that a secured creditor is bound by the terms of a deed of company arrangement, and thus is bound by any releases of debts owed to the secured creditor by the company subject to the deed of company arrangement;
 - (b) however, a release of the secured debt does not release the security interest of a secured creditor in the company’s property;
 - (c) the secured creditor’s remaining security interest may still be exercised to recover the released amount. As Newnes and Murphy JJA said in **Australian Gypsum**: “s 444D ‘does not prevent’ a secured creditor from realising or otherwise dealing with its security (subject to the exceptions in subsections (a) and (b) of s 444D(2)) in respect of its provable claims”;⁴⁰
 - (d) further, as Feutrill and Longbottom JJ explained in **Blackbird**, the security may be enforced in respect of: “other liabilities falling outside the scope of the deed of company arrangement and claims for the purposes of s 444D(1)”;⁴¹
 - (e) subject to these points, the effect of releasing all debts which are secured may mean that the security interest is of no enduring significance. In that case, as Feutrill and Longbottom JJ say in **Blackbird**: “where by operation of the terms of a deed of company arrangement and ss 444D(1), 444D(2) and 444H, a company is released from a debt secured by a security interest, the effect of releasing the debt may also be to release the security interest”.⁴²
- [91] In this context, I have carefully considered the comments of Black J in **Bluenergy** set out above. These are to the effect that:
- (a) the existence of a continuing security extending indefinitely into the future over a company’s after-acquired property, and notwithstanding that a deed of company arrangement has provided for the release of the secured creditor’s debt, would place a very significant practical obstacle in the way of any future operation of a company that emerged after a deed of company arrangement, including potentially preventing its obtaining new secured finance without the cooperation of its former secured creditor;
 - (b) therefore, s 444D(2) should be given effect, in accordance with its terms, by preserving the secured creditor’s property right in its security interest, in respect of the property to which it was capable of attaching at the date of release

⁴⁰ [2015] WASCA 95; (2015) 297 FLR 1 [226].

⁴¹ [2025] FCAFC 136 [46].

⁴² [2025] FCAFC 136 [46].

under a deed of company arrangement, without recognising a preservation of rights over after-acquired property extending indefinitely into a company's future.

[92] I appreciate the force of the commercial practicality stated by Black J. However, I consider that the way in which s 444D has been drafted by Parliament has been accurately understood in the comments in *Australian Gypsum* and *Blackbird*. Section 444D(2) is not a provision which interferes with property rights. It is concerned with the preservation of property rights. That means that there is a difficulty in concluding, as Black J does, that s 444D(2) should be given effect to prevent it applying to after-acquired property. That interpretation interferes with the property rights which have been agreed between the parties. Of course, though, the property rights in after-acquired property will only be exigible to recover the amount of the secured debt released by the DOCA, and any debts which stand outside the DOCA. To some extent that consideration is likely to reduce the prospect identified by Black J of "[t]he existence of a continuing security extending indefinitely into the future over a company's after-acquired property".⁴³

[93] For these reasons, I consider that:

- (a) this is a situation where s 444D(1) and the deed of company administration release the amount of Melgear's secured debt (ie \$1,283,382.78 plus interest);
- (b) however, s 444D(2) "does not prevent" Melgear from realising or otherwise dealing with its security in respect of this claim;
- (c) Melgear's security extends to after-acquired property including any right to the refunds and the refunds when paid.

Conclusion

[94] For the reasons I set out, I consider that the assignment issue and the DOCA issue should be resolved in favour of the appellant. I would allow the appeal. As a result, I would make the declarations sought by the appellant before the primary judge, which the respondents opposed. The orders should be:

1. Appeal allowed.
2. Order 2 made by the Honourable Justice Wilson on 5 May 2026 be set aside.
3. It be declared that the appellant is entitled henceforth to:
 - (i) maintain, conduct and carry on Proceedings numbers 2024/5627 and 2024/11109 in the Administrative Review Tribunal for and on behalf of the first respondent; and
 - (ii) commence, maintain, conduct and carry on any proceedings for and on behalf of the first respondent in relation to the first respondent's taxation liability for the financial year ended 30 June 2014, and do all other things that the first respondent could do or otherwise have done in relation to that liability.
4. The first second and fourth respondents pay the appellant's costs of the appeal, and the proceedings below, to be assessed on a standard basis.

[95] **CROWLEY J:** I agree with the reasons and proposed orders of Thomson AJA.

⁴³ [2015] NSWSC 977; (2015) 300 FLR 155 [66].