



Equity Division Supreme Court New South Wales

Case Name:	Macura v Sarasevic (No 2)
Medium Neutral Citation:	[2019] NSWSC 1621
Hearing Date(s):	6 November 2019
Date of Decision:	6 November 2019
Jurisdiction:	Equity
Before:	Ward CJ in Eq
Decision:	<ol style="list-style-type: none">1. In relation to the VC Lawyers amended notice of motion filed on 18 October 2019, order that \$52,500 be paid from \$98,420 paid into court by the defendants pursuant to the orders of 18 October 2019 in satisfaction of the equitable lien.2. Order that the motion be otherwise dismissed with no order as to costs.3. In relation to the balance of the moneys, order that:<ol style="list-style-type: none">(a) \$9,185.55 in relation to the unpaid rent by the plaintiff be paid to the defendants;(b) \$36,734.45 held in court be paid to the defendants on account of the costs payable by the plaintiff pursuant to the orders of 5 February 2019 and 18 October 2019.
Catchwords:	CIVIL PROCEDURE – Notice of Motion – Application by law firm seeking declaratory relief and claiming an equitable lien over a settlement sum that had been paid into court – where the applicant was the law firm acting for the plaintiff – where the applicant’s legal fees remain outstanding – where motion dealt with after determination of the substantive issue in the proceedings – whether the applicant had standing – whether an equitable lien had arisen in the present case – whether the applicant was instrumental in obtaining the settlement result – held there was a sufficient causal link between the applicant’s efforts and the settlement result – equitable lien established.

Cases Cited: Akki Pty Ltd v Martin Hall Pty Ltd (1994) 35 NSWLR 470
Australian Beverage Distributors Pty Ltd v Evans & Tate Premium Wines Pty Ltd [2006] NSWSC 560
Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation Ltd (No 2) (1991) 28 FCR 308
Caboolture Park Shopping Centre Pty Ltd (In Liq) v White Industries (Qld) Pty Ltd (1993) 45 FCR 224; [1993] FCA 667
Canatan Holdings Pty Ltd v Audori Pty Ltd (Federal Court, Einfeld J, 22 February 1995, unrep)
Doyles Construction Lawyers v Harsands Pty Ltd (Supreme Court (NSW), McLelland CJ in Eq, 24 December 1996, unrep)
Ex Parte Patience; Makinson v The Minister (1940) 40 SR (NSW) 96
Kison v Papasian (1994) 61 SASR 567
Macura v Sarasevic [2019] NSWSC 1409
Roam Australia Pty Ltd v Telstra Corporation Ltd t/as Telecom Australia [1997] FCA 980
Twigg v Keady (1996) FLC 92-712
Worrell v Power & Power (1993) 46 FCR 214

Category: Procedural and other rulings

Parties: Branco David Macura (Plaintiff)
Dragan Sarasevic (First Defendant)
Milena Mijatovich (Second Defendant)
Vertzayas Lawyers Pty Ltd (Applicant on motion)

Representation: Counsel:
K Young (Applicant on motion)
J Bartos (Defendants/respondents on motion)
L Myers (as tutor for plaintiff/respondent on motion)

Solicitors:
AA Tees (Plaintiff/respondent on motion)
Jordan's Law Practice (Defendants)
Vertzayas Lawyers Pty Ltd (Applicant on motion)

File Number(s): 2017/00336881

Publication Restriction: Nil

JUDGMENT

- 1 **HER HONOUR:** Before me for hearing this morning is an application, by amended notice of motion dated 17 October 2019 by the applicant (a firm of lawyers, Vertzayas Lawyers Pty Ltd trading as VC Lawyers) (VC Lawyers) seeking declaratory and other relief, in effect, in claiming an equitable lien over a settlement sum that has been paid into court.
- 2 The settlement that led to the settlement sum being paid into court was the subject of proceedings that were heard before me in April and May this year, in which I published reasons for judgment on 18 October 2019 (*Macura v Sarasevic* [2019] NSWSC 1409). I declared that the parties (the plaintiff, Mr Macura, and the defendants, being the executors of the Will of the late Mr Milorad Adzic (the deceased), namely, Fr Dragan Sarasevic and Ms Milena Mijatovich) had reached a settlement agreement as set out in short minutes of order signed by the parties on 20 March 2018 (and formalised in short minutes of order signed by the parties' solicitors on 23 March 2018). I made consequential orders to give effect to the settlement set out in the short minutes of order.
- 3 The present application by VC Lawyers is supported by two affidavits affirmed by Mr Dion Vertzayas, the solicitor formerly acting for Mr Macura, the plaintiff in the proceedings, on 1 July 2019 and on 5 November 2019, respectively.
- 4 There is an appearance at the hearing of this amended notice of motion by the tutor appointed for Mr Macura in the proceedings (Mr Lawrence Myers) but no evidence was filed or submissions made on behalf of Mr Macura in relation to this application.
- 5 The background to the application is largely set out in my earlier judgment and I do not propose here to restate it.
- 6 In evidence before me (marked as Exhibit A) are two certificates: a certificate of determination of costs dated 25 September 2019 assessing the costs of VC Lawyers at \$100,116.54 and a certificate of determination of the manager's

assessment of costs dated 25 September 2019 in the sum of \$2,602.05.

Judgment has been entered in relation to those costs by the filing of the cost certificates. The total amount of the judgment debt in favour of VC Lawyers is \$102,718.59.

- 7 On the application, two issues were raised for the applicant. The first was as to whether there was standing for VC Lawyers (which was not a party to the proceedings) to seek relief in the proceedings after final orders as between the parties to the proceedings had been made. In that regard, it should be noted that the amended notice of motion on which the applicant now moves was initially filed, prior to its amendment, on 2 July 2019. The motion came before me for directions at or about the time it was filed and I indicated that it would be dealt with after the determination of the substantive issue in the proceedings. It was thus an extant notice of motion at the time that my final judgment in the dispute as between Mr Macura and the executors was handed down. In those circumstances, I do not see that any issue as to standing (or as to the power to deal with this application) arises.
- 8 Counsel for the applicant has referred to authorities as to the power to make orders after the entry of final orders which do not alter but are supplemental to the final orders and that such orders may be made against persons who are not parties to the proceeding; and refers in this regard to *Caboolture Park Shopping Centre Pty Ltd (In Liq) v White Industries (Qld) Pty Ltd* (1993) 45 FCR 224 at 234-236; [1993] FCA 667, that being a case where, by supplemental order, solicitors who had acted for an applicant in the proceeding were ordered to pay costs for which under the orders previously made the applicant was liable.
- 9 Reference is also made to other authority in support of the proposition that, if relief sought by a non-party may properly be regarded as supplemental to or arising out of the final disposition of a proceeding, there is no reason in principle why such relief should not be sought or granted after final orders have been made. I refer in that regard to the decision of Einfeld J in *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation Ltd*

(No 2) (1991) 28 FCR 308. Reference is made by Counsel for the applicant to *Canatan Holdings Pty Ltd v Audori Pty Ltd* (Federal Court, Einfeld J, 22 February 1995, unrep).

- 10 Turning to the second issue that was raised on this application, this was whether or not an equitable lien, commonly referred to as a fruits of the litigation lien, has arisen in the present case. The general principle is set out in *Ex parte Patience; Makinson v The Minister* (1940) 40 SR (NSW) 96 at 100 per Jordan CJ:

A solicitor has no lien for his costs over any property which has not come into his possession. If, however, as the result of legal proceedings in which the solicitor has acted for the client, the client obtains a judgment or award or compromise for the payment of money, although the solicitor acquires no common law title to his client's rights to receive the money or to any part of that right, he acquires a right to have his costs paid out of the money, which is analogous to the right which would be created by an equitable assignment of a corresponding part of the money by the client to the solicitor. That is to say, the solicitor has an equitable right to be paid his costs out of the money; and if he gives notice of his right to the person who is liable to pay it, only the solicitor and not the client can give a good discharge to that person for an amount of the money equivalent to the solicitor's costs

If the person liable to pay refuses, after notice, to pay the costs of the solicitor, the solicitor may obtain a rule of Court directing that the amount of his costs be paid to him and not to the client; and payment by the judgment debtor to the client after notice of the solicitor's claim is no answer to an application for such a rule ... Further, if the client and a judgment debtor made a collusive arrangement for the purpose of defeating the solicitor's rights, the Court will enforce that right against the judgment debtor notwithstanding the arrangement and notwithstanding that no notice of the solicitor's claim had been given to the judgment debtor prior to the arrangement. [citations omitted]

- 11 It is noted by Counsel for the applicant that this decision has been applied in several later decisions, including *Worrell v Power & Power* (1993) 46 FCR 214 at 223-224; *Akki Pty Ltd v Martin Hall Pty Ltd* (1994) 35 NSWLR 470 at 474; *Kison v Papasian* (1994) 61 SASR 567; *Twigg v Keady* (1996) FLC 92-712; *Doyles Construction Lawyers v Harsands Pty Ltd* (Supreme Court (NSW), McLelland CJ in Eq, 24 December 1996, unrep) (*Doyles*).
- 12 In *Roam Australia Pty Ltd v Telstra Corporation Ltd t/as Telecom Australia* [1997] FCA 980, Lehane J stated that the relevant questions were: first,

whether the proceeding resulted in a judgment award or compromise under which moneys payable to the party for whom the solicitors acted; and, second, whether the part played by the solicitors was sufficient to justify the conclusion that there is a sufficient causal link between the solicitors' efforts and the result, so that the solicitors may be regarded as having been instrumental in obtaining the result.

- 13 In *Doyles*, it was said that it is sufficient to give rise to the equitable right that the settlement resulting in payment to the client came about as a result of that legal proceeding and that the solicitor had acted for the client in those proceedings as being treated as a sufficient causal link.
- 14 In the present case, there is no doubt that the proceeding resulted in a compromise under which money was payable to Mr Macura. There is also, in my opinion, no doubt that the applicant has established that there was a sufficient causal link between the solicitors' efforts and the result so that the solicitors may be regarded as having been instrumental in obtaining the result.
- 15 The relevant facts in that regard, which are set out in the affidavits relied upon on the motion, are that: VC Lawyers originally received instructions from Mr Macura on or about 18 November 2016, shortly following the death of the deceased, to lodge a caveat over the deceased's unit block in Liverpool, in respect of which Mr Macura claimed an ownership interest; and further instructions were provided in April 2017 in relation to the commencement of legal proceedings. A costs agreement, a copy of which is in evidence annexed to the affidavit affirmed 1 July 2019 of Mr Vertzayas, was entered into on 20 April 2017.
- 16 VC Lawyers briefed counsel, drafted pleadings, corresponded with other parties in the proceedings, attended directions hearings, obtained affidavit evidence and acted in the matter for some 11 months, including attendance at the court-annexed mediation which occurred on 20 March 2018 and which resulted in the settlement that was later sought to be impugned by Mr Macura

in the proceedings determined by me. VC Lawyers ceased to act some six days after the mediation, when Mr Macura terminated their retainer.

- 17 A detailed bill of costs has been prepared and referred to costs assessment and a costs judgment obtained in the sum of over \$100,000. This sufficiently establishes that there has been causal interest in the obtaining of the settlement that was obtained as a result of the court-annexed mediation as a result of VC Lawyers' efforts.
- 18 I am satisfied that there has been a sufficient causal link established and that an equitable lien has arisen. Accordingly, I consider that it is appropriate to make the declaration sought in relation to the existence of the equitable lien.
- 19 The balance of the orders that are sought today relate to the issues that now are the subject of agreement as between the applicant and the defendants, relating to the relative priority (as between the lien and the costs and other orders in favour of the defendants) in relation to the sum presently held in court (see below). There has now been an agreement reached between those parties in relation to how the question of priority should be dealt with. As noted above, Mr Macura is represented by his tutor today at the hearing of this motion and, as already noted, no evidence or submissions have been filed on Mr Macura's behalf notwithstanding that he was on notice of the timetable within which evidence or submissions could have been filed if he wished to resist this application.
- 20 Turning to the second matter before me for hearing today, this is the application by the defendants in the proceedings, who are the executors of the deceased's estate, by amended notice of motion filed 23 April 2019, relevantly, seeking orders for the costs payable to the defendants pursuant to the orders made in the proceedings to be offset against the settlement sum payable to the plaintiff pursuant to the settlement agreement and also seeking that the occupation fee of \$200 per week payable by the plaintiff from 5 February 2019 in accordance with my orders (but unpaid as at the time of vacating the premises) be deducted from the settlement sum.

- 21 Reference is made in submissions for the defendants to the inherent power to set off the costs due to a party in proceedings against the judgment sum due to the opposing party (see *Australian Beverage Distributors Pty Ltd v Evans & Tate Premium Wines Pty Ltd* [2006] NSWSC 560 at [68]-[70]).
- 22 The amount of unpaid rent has been calculated up to and including the date on which Mr Macura has been ordered to vacate the premises, which is 17 November 2019. He has not yet vacated the premises.
- 23 The balance of the amount that is sought to be paid out is said to be on account of the costs payable pursuant to the orders which have not yet been assessed. Ms Mijatovic's affidavit affirmed 24 October 2019 annexes the various tax invoices that have been issued in relation to this matter. The total costs of the proceedings are in the order of \$184,000. A proportion of those (costs referable to counsel's fees and disbursements) one would assume would, on a cost assessment process, likely be recoverable in full. It is clear on the face of these invoices that any costs assessment of the defendants' costs will likely well exceed the balance of the sum that would otherwise be held in court were the moneys to be retained.
- 24 In those circumstances, it is, in my view, appropriate that the money be released to the defendants on account of the amount of costs payable by the plaintiff pursuant to the orders of 5 February 2019 and 18 October 2019. Quite properly, the plaintiff's tutor does not suggest otherwise.
- 25 Accordingly, for the above reasons, I make the following orders (as stated in the short minutes of order handed up):
- (1) In relation to the VC Lawyers amended notice of motion filed on 18 October 2019, order that \$52,500 be paid from \$98,420 paid into court by the defendants pursuant to the orders of 18 October 2019 in satisfaction of the equitable lien.
 - (2) Order that the motion be otherwise dismissed with no order as to costs.

- (3) In relation to the balance of the moneys, order that:
- (a) \$9,185.55 in relation to the unpaid rent by the plaintiff be paid to the defendants;
 - (b) \$36,734.45 held in court be paid to the defendants on account of the costs payable by the plaintiff pursuant to the orders of 5 February 2019 and 18 October 2019.

I certify that the preceding ²⁵ paragraphs are a true copy of the reasons for judgment herein of the Honourable Justice Ward.

Date: 27 November 2019

Associate: 