FEDERAL COURT OF AUSTRALIA

Macatangay v State of New South Wales [2016] FCA 1390

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| Appeal from: | *State of New South Wales v Macatangay* [2016] FCCA 1226 |
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| File number: |  |
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| Judge: | **KATZMANN J** |
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| Date of judgment: | 23 November 2016 |
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| Catchwords: | **BANKRUPTCY** — appeal from making of sequestration order — whether primary judge erred in failing to go behind judgment debt where bankrupt alleged without evidence that judgment procured by fraud — whether primary judge erred in finding no other sufficient cause not to make sequestration order — where bankrupt asserted claim against petitioning creditor that she was held to have been estopped from making and after orders had been made barring her from bringing such a claim |
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| Legislation: | *Bankruptcy Act 1966* (Cth) ss s 40(1), 43(1), 52  *Legal Profession Act 2004* (NSW) ss 368(5) and 369(7) |
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| Cases cited: | *Cain v Whyte* (1933) 48 CLR 639  *Corney v Brien* (1951) 84 CLR 343  *Ling v Enrobook Pty Ltd* (1997) 74 FCR 19  *Macatangay v State of New South Wales* (unreported, NSWCA, Beazley and Ipp JJA, 8 November 2007)  *Macatangay v State of New South Wales* (unreported*,* NSWSC,Harrison AsJ, 22 November 2007)  *Macatangay v State of New South Wales* (unreported, NSWCA, Mason P and Handley AJA, 1 May 2008)  *Macatangay v State of New South Wales* (unreported, NSWSC, RS Hulme J, 20 May 2010)  *Macatangay v State of New South Wales* (unreported, NSWCA, Handley and Sackville AJJA, 20 September 2010)  *Macatangay v State of New South Wales* [2008] HCASL 432  *Macatangay v State of New South Wales* [2009] NSWCA 81  *Macatangay v State of New South Wales (No 2)* [2009] NSWCA 272  *Macatangay v State of New South Wales* [2010] HCASL 42  *Macatangay v State of New South Wales* [2011] HCASL 15  *Macatangay v State of New South Wales* [2012] NSWCA 108  *Macatangay v State of New South Wales* [2012] NSWCA 305  *Macatangay v State of New South Wales* [2012] NSWCA 341  *Macatangay v State of New South Wales* [2012] NSWCA 374  *Macatangay v State of New South Wales* [2013] NSWCA 237  *Macatangay v State of New South Wales* [2015] NSWSC 1745  *Miller v University of New South Wales* [2002] FCA 882  *Miller v University of New South Wales* [2003] FCAFC 180  Re Schmidt; Ex parte Anglewood Pty Ltd (1968) 13 FLR 111  *Rejfek v McElroy* (1965) 112 CLR 517  *Totev v Sfar* [2006] FCA 470; 230 ALR 236  *Wren v Mahony* (1972) 126 CLR 212 |
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| Date of hearing: | 4 November 2016 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | General and Personal Insolvency |
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| Category: | Catchwords |
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| Number of paragraphs: | 56 |
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| Counsel for the Appellant: | The appellant appeared in person |
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| Counsel for the Respondent: | Mr M Minehan |
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| Solicitor for the Respondent: | Hicksons Lawyers |

ORDERS

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|  | | NSD 871 of 2016 |
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| BETWEEN: | MIGUELA ALVAREZ MACATANGAY  Appellant | |
| AND: | STATE OF NEW SOUTH WALES  Respondent | |

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| JUDGE: | KATZMANN J |
| DATE OF ORDER: | 23 NOVEMBER 2016 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the respondent’s costs in the amount of $36,518.64, those costs to be paid from her bankrupt estate.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

KATZMANN J:

1. Ms Macatangay is a former teacher with the New South Wales Department of Education (“Department”). In September 2002, she was threatened with dismissal from her employment and sought relief in respect of the threatened dismissal in the Industrial Relations Commission of New South Wales (“Commission”). Three days before the application was due to be heard, however, the Commissioner before whom it was listed was informed that the case had settled. Ms Macatangay later denied that there was a settlement, but the Department insisted that there had been and successfully applied to the Commissioner to have the proceedings dismissed on that account. Ms Macatangay did not accept the decision. Rather, she appealed from the order to dismiss the proceedings. Although a Full Bench of the Commission concluded that the Commissioner was correct and refused her leave to appeal, she has repeatedly tried and failed to bring the original dispute to trial through an action for damages in tort in the Supreme Court of New South Wales. Since then, faced with the prospect of bankruptcy after she failed to discharge costs orders generated by the Supreme Court litigation, she contended, in effect, that she still has a cause of action against the State which affords a sufficient basis first, for setting aside the bankruptcy notice and, when she failed in that endeavour, for the Federal Circuit Court not making a sequestration order against her estate. This latest attempt was equally unsuccessful. Now she appeals against the Federal Circuit Court’s orders. For the following reasons, the appeal must be dismissed.

## The power to make a sequestration order

1. The power to make a sequestration order is conferred by s 43(1) of the *Bankruptcy Act 1966* (Cth), which provides that:

Subject to this Act, where:

(a) a debtor has committed an act of bankruptcy; and

(b) at the time when the act of bankruptcy was committed, the debtor:

(i) was personally present or ordinarily resident in Australia;

(ii) had a dwelling-house or place of business in Australia;

(iii) was carrying on business in Australia, either personally or by means of an agent or manager; or

(iv) was a member of a firm or partnership carrying on business in Australia by means of a partner or partners or of an agent or manager;

the Court may, on a petition presented by a creditor, make a sequestration order against the estate of the debtor.

1. Section 52 of the Act relevantly provides:

(1) At the hearing of a creditor’s petition, the Court shall require proof of:

(a) the matters stated in the petition (for which purpose the Court may accept the affidavit verifying the petition as sufficient);

(b) service of the petition; and

(c) the fact that the debt or debts on which the petitioning creditor relies is or are still owing;

and, if it is satisfied with the proof of those matters, may make a sequestration order against the estate of the debtor.

…

(2) If the Court is not satisfied with the proof of any of those matters, or is satisfied by the debtor:

(a) that he or she is able to pay his or her debts; or

(b) that for other sufficient cause a sequestration order ought not to be made;

it may dismiss the petition.

...

1. A debtor commits an act of bankruptcy in each of the cases set out in s 40(1) of the Act. The act of bankruptcy alleged to have occurred in the present case is one of the kind described in para 40(1)(g):

(g) if a creditor who has obtained against the debtor a final judgment or final order, being a judgment or order the execution of which has not been stayed, has served on the debtor in Australia or, by leave of the Court, elsewhere, a bankruptcy notice under this Act and the debtor does not:

(i) where the notice was served in Australia—within the time specified in the notice; or

(ii) where the notice was served elsewhere—within the time fixed for the purpose by the order giving leave to effect the service;

comply with the requirements of the notice or satisfy the Court that he or she has a counter-claim, set-off or cross demand equal to or exceeding the amount of the judgment debt or sum payable under the final order, as the case may be, being a counter-claim, set-off or cross demand that he or she could not have set up in the action or proceeding in which the judgment or order was obtained[.]

## The background facts

1. On 22 July 2011 the State obtained a judgment against Ms Macatangay in the Supreme Court of New South Wales in the amount of $73,055.97.
2. The judgment was based on certificates issued by a costs assessor. The costs which were assessed were generated by orders made against Ms Macatangay in some nine actions she had brought against the State in the Supreme Court and Court of Appeal. Filed cost assessment certificates are taken to be a judgment of the court for the amount of unpaid costs: *Legal Profession Act 2004* (NSW), ss 368(5) and 369(7). No application was made either to review the decision of the costs assessor or to have the judgment arising from the costs assessment set aside.
3. Ms Macatangay did not pay the amount of the judgment (or, indeed, any portion of it) and interest started to run.
4. On 11 December 2014 the State issued a bankruptcy notice in the amount of $96,052.39, comprising the judgment debt of $73,055.97 together with interest of $22,996.42.
5. The bankruptcy notice required Ms Macatangay within 21 days of service either to pay the State the amount of the debt claimed or to make arrangements to the satisfaction of the State for settlement of the debt. Ms Macatangay did neither. Instead, she applied to set aside the notice. That application was dismissed by Jagot J on 25 May 2015 and, as the debt remained unpaid, the State filed a creditor’s petition. Interest continued to accrue on the debt and by the time the petition came on for hearing the total debt had climbed to $100,679.39.

## History of the Supreme Court litigation

1. On 4 September 2002 Ms Macatangay began proceedings in the Commission for unfair dismissal, a term defined in the *Industrial Relations Act 1966* (NSW) to include the threat of dismissal. On 6 December 2002 her employment was in fact terminated and in the written notice of termination she was advised that her name was to be placed on “the confidential list of persons not to be employed in NSW government schools or TAFE without reference to the Director of Personnel Services”.
2. The unfair dismissal action was listed for a five-day hearing commencing on 24 March 2003. In the meantime, attempts were made to explore settlement and on 20 March 2003, through its solicitor, the Department made a written offer, the effect of which was to enable Ms Macatangay to resign and to undertake in writing not to seek employment as a teacher with the Department, in exchange for which the Department would not take action to place her name on the confidential list. The Department also offered, if requested, to issue Ms Macatangay with a standard statement of service which would include the words “ceased employment with the Department whilst services were under review”. The offer was expressed to be conditional on the parties “confirming [the] agreement in a Deed of Release”. Early the following day, John Capsanis, Ms Macatangay’s then solicitor, sent a fax to the Department’s solicitor in the following terms:

I acknowledge receipt of amended offer of settlement per your facsimile letter of 20/3/03.

I note from our discussions that the proposed Deed of Release is to contain a recital to cover the words/expression ‘under review’ in the standard statement of service & which recital will be excluded from the confidentiality provision in the Deed of Release.

On the above basis, the matter is settled & I’ll proceed accordingly to notify the Commissioner’s associate.

1. A deed of release was sent to Mr Capsanis on 8 April 2003 but no deed was ultimately signed and in May 2002 Ms Macatangay personally contacted the Commission, asserting that the matter had not been settled. The Department then moved for dismissal of the proceedings.
2. At the hearing of the notice of motion evidence was given by Ms Macatangay, Beverley Charlton (a Departmental legal officer) and Mr Capsanis.
3. According to the reasons for decision published by Commissioner Macdonald on 25 June 2004, Ms Macatangay contended that there was no binding agreement between the parties because:

* what was contained in the proposed deed of release did not reflect the matters contained in the offer of settlement; and
* any agreement to settle was made without her instructions.

1. The evidence of both lawyers, however, supported the existence of an agreement. Mr Capsanis said that Ms Macatangay had instructed him to settle the matter on the basis of an offer from the Department and that he had advised both the Department and the Commission accordingly. He added that about four or five weeks later, Ms Macatangay informed him that she no longer required his services.
2. The Department argued that this was a case which fell within the second category described in *Masters v Cameron* (1954) 91 CLR 353 at 360 where “the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document”.
3. In such a case the High Court held there is a binding contract. Ms Macatangay argued, however, that the case fell within the third category, namely, “one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract”. If this were the case, there would be no binding contract.
4. Commissioner Macdonald concluded that the conduct of the parties was such that a binding agreement was made on 20 March 2002 in a telephone conversation between Mr Capsanis and Ms Charlton, confirmed by Mr Capsanis’s fax, and that there was no evidence to show that the proposed deed of release contained new terms inconsistent with the terms of settlement, as Ms Macatangay had alleged. Accordingly, he dismissed the unfair dismissal application. Ms Macatangay appealed against this decision but the appeal was dismissed: *Macatangay v New South Wales Department of Education and Training* [2005] NSWIRComm 69. The Full Bench held at [28]:

In our view, the findings that Mr Capsanis had acted for the appellant and under her instructions in reaching an agreement to settle the proceedings at first instance were open to the Commissioner on the evidence and should not be disturbed on appeal. Indeed, having heard the appellant today and having reviewed the evidence at first instance, we have no doubt the Commissioner was correct in finding that Mr Capsanis had acted as the appellant’s agent (either through her solicitor or directly) and in that capacity had received instructions from the appellant resulting in him negotiating an agreement approved by her. It is reasonably clear that the agreement, and Mr Capsanis’ authority, was only later sought to be impugned when the deed of release was produced (and where the appellant seemed to take issue with some elements of the recital which touched on the earlier issues as to her probationary status).

1. Undeterred, Ms Macatangay then filed a statement of claim in the Supreme Court seeking damages against the Department (and then an amended statement of claim). The Department did not file a defence for some time and in the meantime Ms Macatangay applied for summary judgment. The Department retaliated by filing a motion of its own seeking orders, among others, that the proceedings be dismissed or stayed generally or alternatively that the statement of claim be struck out, and also that she be required to perform her obligations under the settlement reached in the Commission. Ms Macatangay’s motion for summary judgment was dismissed and her statement of claim was struck out but she was given permission to replead: *Macatangay v New South Wales Department of Education & Training* [2006] NSWSC 214.
2. Ms Macatangay duly amended her pleading. In summary, in this further amended statement of claim (filed on 28 March 2006) she alleged that she had been employed by the Department as a permanent officer but that the Department had “negligently assessed” her as a probationary teacher, and had breached its duty of care to her by failing to “assist, support and develop [her] to reach a level of teaching performance that was satisfactory” to the Department and, instead, treated her unfairly, placing her name on the confidential list, thereby destroying her career. She sought damages for past and future loss of income, loss of superannuation entitlements, loss of the opportunity of advancement, and aggravated and exemplary damages.
3. The Department filed a defence to the amended statement of claim in which it pleaded, amongst other things, that she was “estopped from maintaining proceedings in relation to her employment and the termination of her employment by the [Department] by reason of having brought proceedings in the [Commission] which arose out of the same facts and circumstances as pleaded in [the Supreme Court] proceedings and which were settled and subsequently dismissed”. The Department then filed a notice of motion seeking an order for the separate determination of a number of questions, including the estoppel point, contending that it was an abuse of process for Ms Macatangay to pursue her action.
4. Grove J heard the Department’s notice of motion. In her submissions Ms Macatangay maintained that the unfair dismissal action had not been settled and, for that reason, she should be permitted to proceed with her claim in tort. His Honour was unmoved. He upheld the estoppel plea, holding that the action sought to relitigate what was finalised by the settlement in the Commission, and proceeded to dismiss Ms Macatangay’s proceedings as an abuse of process, ordering Ms Macatangay to pay the Department’s costs: *Macatangay v State of New South Wales* [2007] NSWSC 57.
5. Ms Macatangay filed a notice of appeal but the appeal was struck out by the Registrar as incompetent. She then filed a summons for leave to appeal but her application was dismissed with costs: *Macatangay v State of New South Wales* (unreported, NSWCA, Beazley and Ipp JJA, 8 November 2007). Despite this, Ms Macatangay continued to challenge the judgment of Grove J. First, she filed a notice of motion in the Common Law Division seeking an order to set aside the judgment for fraud committed by agents of the State. That application was dismissed by Harrison AsJ on 22 November 2007: *Macatangay v State of New South Wales* (unreported*,* NSWSC,22 November 2007). Ms Macatangay filed a summons for leave to appeal from that judgment but the summons was also dismissed: *Macatangay v State of New South Wales* (unreported, NSWCA, Mason P and Handley AJA 1 May 2008). She applied for special leave to appeal to the High Court but her application was refused: *Macatangay v State of New South Wales* [2008] HCASL 432.
6. Then Ms Macatangay tried a different tack. She moved to challenge the Registrar’s order striking out the appeal as incompetent. Basten JA extended the time to enable her to do so, the effect of which was to reinstate her purported appeal as of right: *Macatangay v State of New South Wales* [2009] NSWCA 81. This prompted the State to file a notice of motion to dismiss the reinstated appeal as incompetent. Ms Macatangay filed a cross-motion opposing the State’s motion and, subsequently, a further summons for leave to appeal from the judgment of Grove J. Ultimately, the issues raised by these various applications were heard by a bench of three in the Court of Appeal. It is unnecessary for present purposes to refer to this judgment in any detail. It is sufficient at this point to note that the Court (Allsop P, Tobias JA and Handley AJA) held that the purported appeal as of right was incompetent, the new application for leave to appeal was competent, but that leave to appeal should not be granted, and that Ms Macatangay should pay the State’s costs of the appeal, the motions, and the summons: *Macatangay v State of New South Wales (No 2)* [2009] NSWCA 272. I shall return to this judgment later in these reasons as some of the arguments raised by Ms Macatangay on the appeal were also raised in that case. On 30 March 2010 the High Court refused Ms Macatangay special leave to appeal from the Court of Appeal’s orders, on the ground that such an appeal would enjoy insufficient prospects of success: *Macatangay v State of New South Wales* [2010] HCASL 42.
7. Ms Macatangay then returned to the Supreme Court with a notice of motion seeking orders reopening the original matter, which was dismissed by Grove J. That application was dismissed by RS Hulme J on 20 May 2010 (unreported, NSWSC) and leave to appeal that judgment was refused on 20 September 2010 (unreported, NSWCA, Handley AJA and Sackville AJA). Special leave to appeal from that judgment was also refused: *Macatangay v State of New South Wales* [2011] HCASL 15.
8. It was at this point, it seems, that the State arranged to have its costs assessed and judgment was entered in the State’s favour against Ms Macatangay in the amount of the assessed costs on 22 July 2011.
9. Two months later, on 27 September 2011, Ms Macatangay filed a notice of motion in the Court of Appeal seeking once again to have the original matter reopened. The State then filed a notice of motion seeking the dismissal of Ms Macatangay’s notice of motion and an order that she be restrained from making further applications in the same matter without the leave of the Court. Ms Macatangay responded with a notice of motion seeking a stay of the costs determination and an order that the court correct various “wrong decisions” made by various judges of the Supreme Court and the High Court in relation to the original Supreme Court action. All three were heard on 16 April 2012. The court dismissed Ms Macatangay’s notices of motion and ordered her to pay the State’s costs on an indemnity basis. Pursuant to the State’s notice of motion the court made an order restraining Ms Macatangay from making any further applications in the 2005 matter without the leave of the court. See *Macatangay v State of New South Wales* [2012] NSWCA 108. By notice of motion Ms Macatangay made such an application on 24 August 2012, but the motion was dismissed on the papers: *Macatangay v State of New South Wales* [2012] NSWCA 305. She filed another on 8 October 2012 which was also dismissed on the papers: *Macatangay v State of New South Wales* [2012] NSWCA 341. On that occasion the court invited her to show cause why a vexatious proceedings order should not be made against her under s 8 of the *Vexatious Proceedings Act 2008* (NSW). On 15 November 2012 the court made such an order, staying all extant proceedings in the Grove J matter and another matter, and prohibiting her from “instituting any further proceedings in New South Wales relating to any of the claims or complaints made by her in those matters”.
10. On 14 March 2013, however, Ms Macatangay filed a notice of motion seeking to set aside the vexatious proceedings order and seeking leave “to institute proceedings in relation to the claim for relief for the damage and loss suffered as a consequence of the wrongful prohibition to be employed in any capacity”. The motion was dismissed. In his reasons for judgment Sackville AJA (with whom Macfarlan and Leeming JJA agreed) described the succession of applications brought in the court as “groundless” and held that Ms Macatangay had shown no prima facie ground for initiating any further proceeding in relation to the matter: *Macatangay v State of New South Wales* [2013] NSWCA 237. One further attempt to revive the action against the State was made last year when Ms Macatangay filed a summons in the Supreme Court seeking leave to commence proceedings by statement of claim against the State. This time she cast her claim as an action in tort for abuse of process, alleging that the State’s proceedings in the Court of Appeal were for the “ulterior” purpose of stopping her from pursuing her case. Campbell J dismissed the summons, holding, amongst other things, that there was no prima facie case for the proposed action (at [13]), and holding (at [12]) that:

[the] proceedings are vexatious in that they seek to agitate again the very point that was decided against her in the Industrial Relations Commission at first instance, and on appeal, which formed the basis of Grove J’s decision upheld by the Court of Appeal on 4th September 2009. Her collateral challenge to facts conclusively decided against her, as the Court of Appeal decided in its decision of 15th November 2012 (at [9]), is clearly vexatious …

See *Macatangay v State of New South Wales* [2015] NSWSC 1745.

## The creditor’s petition

1. A creditor’s petition was filed on 19 October 2015. Its terms were verified on oath by Peter Paul McGhee, a senior legal officer with the Department of Education. The petition recited:
2. the amount owed, including its component parts, as well as the basis for the debt;
3. that the State does not hold security over Ms Macatangay’s property;
4. that at the time the act of bankruptcy was committed Ms Macatangay was ordinarily resident in Australia;
5. that she had committed the following act of bankruptcy within six months before the petition had been presented:

The respondent debtor failed to comply on or before 30 April 2015 with the requirements of the bankruptcy notice served on her on 5 January 2015 or to satisfy the Court that she had a counter‑claim, set-off or cross demand equal to or more than the sum claimed in the bankruptcy notice, being a counter‑claim, set‑off or cross demand that she could not have set up in the action in which the judgment referred to in the bankruptcy notice was obtained.

## The hearing of the creditor’s petition

1. There was never a dispute that the court below had the power to make a sequestration order against Ms Macatangay’s estate. The State adduced affidavit evidence of the so-called formal matters, being those listed in s 52(1) of the Act, and the primary judge was satisfied with this proof. Nor did Ms Macatangay contend that she was solvent when the orders were made.
2. Ms Macatangay put forward three grounds of opposition, namely that:
3. the State, by its Department of Education, “wrongfully/unlawfully put [her] on the confidential register of people prohibited to be employed in any capacity”;
4. the costs order in favour of the State, which is the basis of the judgment debt, was obtained by “fraud, collusion or miscarriage of justice”; and
5. she is not indebted to the State.
6. The primary judge considered each of these grounds in order.
7. As to the first, his Honour said that there was no evidence or legal basis for the allegation. He continued:

It cannot reasonably be contended that there was any restriction on the right of the Department as an employer to place on the Confidential List persons it did not wish to employ or had found unsuitable as an employee. But for the respondent’s continued refusal to accept the settlement she could have had herself removed from the Confidential List by tendering her resignation and otherwise complying with the terms of the settlement with the Department found to have been entered into by Commissioner McDonald on or about 21 March 2005.

1. As to the second, his Honour said that there was “not a skerrick of evidence” to justify a finding to this effect.
2. As to the third, his Honour said that on the evidence before the Court it was clear that Ms Macatangay does owe the money claimed by the State; it was a judgment debt.
3. Having disposed of the three grounds of opposition his Honour went on to say that he saw no other ground or basis for going behind any of the impugned judgments. He said that he was fortified in this opinion by the decision of Jagot J and, in particular, her Honour’s conclusion that it would be contrary to the interests of justice to do so. He considered that there was no “other sufficient cause” for not making a sequestration order. He also made the following observation (at [37]):

It should be recorded that the respondent asserted that she had a cause of action against the Department of Education resulting from her placement on the Confidential List which would result in damages exceeding the amount of the debt alleged to be owing in the Petition. However, she made no attempt to establish that the quantum of such damages, as at the date of the hearing before me or at any other particular time, would exceed the amount of $100,679.39: *Patane v Asteron Life Ltd (formerly Royal & Sun Alliance Financial Services Ltd)* [2004] FCA 232 at ([74]–[76]). Such a claim also, far from being one that she could not have set up in the proceeding dismissed by Grove J, was in fact a claim made by her as part of that dismissed proceeding.

## The appeal

1. In this appeal Ms Macatangay alleges that the orders should be set aside on the grounds that the primary judge:

(1) ignored the evidence she provided to the Court and, instead, relied on:

* 1. “the false information submitted to the Court by the NSW Department of Education …”;
  2. “the judgment of Grove J that has relied on the decision that was held erroneous by the Full Bench of the Federal Court of Australia”;
  3. “the Determination of Macdonald C that is superseded by s 87 of the *Industrial Relations Act 1996*”;
  4. “judgments based on the false information provided to the Court by the NSW Department of Education”;
  5. “the Supreme Court judgments that did not have any trial of the employment prohibition issue”; and
  6. “the Supreme Court judgments that did ignore the principles of offer, acceptance and agreement”.

(2) ignored “the principles and application of” s 52(2)(b) of the *Bankruptcy Act 1966* (Cth); and

(3) ignored and failed to consider “the arguments and issues [she] submitted”.

1. Ms Macatangay seeks orders, not only setting aside the judgment of the primary judge, but also some 18 other judgments “that … relied on the false information provided by the NSW Department of Education”. Those judgments, which are listed in the notice of appeal, include Jagot J’s judgment refusing to set aside the bankruptcy notice, the two decisions of the Commission, and 15 judgments of the Supreme Court and Court of Appeal in which she was unsuccessful, only some of which account for the costs orders giving rise to the costs assessments underpinning the bankruptcy notice.
2. In her written submissions Ms Macatangay identified the issues on the appeal as follows:
3. whether the primary judge erred by rejecting ground 1 of the Notice of Opposition for lack of evidence and because his Honour’s decision was “based on the false information” that there was a settlement of the unfair dismissal proceedings on 21 March 2003;
4. whether the primary judge erred in concluding that there was no “other sufficient cause” within s 52(2)(b) of the Act;
5. whether the primary judge erred in rejecting ground 2 of the Notice of Opposition for lack of evidence;
6. whether the primary judge erred by adhering to the judgment of Jagot J (in failing to go behind any of the impugned judgments); and
7. whether both the primary judge and the judgments of the Supreme Court were erroneous because they relied on “the false information/statements provided by the [State]”.
8. The issues are inter-related. In order to avoid unnecessary repetition I shall deal with them together.
9. It will be recalled that in the first ground of the Notice of Opposition Ms Macatangay alleged that the Department “wrongfully/unlawfully” put her name on the confidential register. Ms Macatangay submitted that there was evidence before the court to support the proposition that this action was “wrongful, very harsh and unreasonable”. In both her written and oral submissions she maintained that there had been no settlement of the unfair dismissal claim and that the Department’s attempts to establish otherwise were dishonest. She took the Court to numerous documents in a painstaking effort to demonstrate the correctness of these propositions.
10. These submissions apparently proceed on the assumption that as long as the decisions of the Commission and the Supreme Court remain in place the primary judge’s conclusions are irrefutable. Yet this Court has no jurisdiction to set aside a judgment of any other court or a decision of the Commission in circumstances where there is no power to appeal to or seek judicial review from the court or the Commission to this Court. As for Jagot J’s judgment, Ms Macatangay did not appeal from it and, once the creditor’s petition was disposed of, it was too late to do so.
11. That said, however, a court in bankruptcy does have jurisdiction to go behind a judgment in certain circumstances. Fraud is one such circumstance: *Corney v Brien* (1951) 84 CLR 343. As Barwick CJ observed in *Wren v Mahony* (1972) 126 CLR 212 at 224–5, under the general law a prior existing debt merges in a judgment and a bankruptcy court may accept the judgment as satisfactory proof of the petitioning creditor’s debt. But “where reason is shown for questioning whether behind the judgment or as it is said, as the consideration for it, there was in truth and reality a debt due to the petitioning creditor”, the court is obliged to go behind the judgment. The discretion to accept the debt is “not well exercised where substantial reasons are given for questioning whether behind that judgment there was in truth and reality a debt due to the petitioner”.
12. Here, however, there are no substantial reasons for questioning whether there is in truth or reality a debt due to the petitioning creditor. The debt is made up of outstanding costs orders. Those costs orders remain in place. As the general rule is that costs follow the event and Ms Macatangay failed in every instance, the costs orders are unremarkable. The challenge to the costs orders, which underpinned ground 2 of the Notice of Opposition, was that the judgment based on the costs assessment was obtained by fraud, collusion or a miscarriage of justice. The primary judge was undoubtedly correct to hold that there was “not a skerrick of evidence” to support this challenge.
13. On the assumption that it is permissible to look behind the antecedent judgments, Ms Macatangay has failed to show that there is reason to question any of them. The premise for Ms Macatagay’s entire case — that she had not settled the action in the Commission — is undermined by the conclusion of Grove J (upheld more than once in the Court of Appeal) that she was estopped from arguing that there had been no settlement.
14. In this appeal the only argument that Ms Macatangay advanced against that conclusion was that Grove J had “erred in applying the reasoning of Branson J” in *Miller v University of New South Wales* [2002] FCA 882, because her Honour’s decision was reversed on appeal (*Miller v University of New South Wales* [2003] FCAFC 180). This very argument, however, was considered and comprehensively rejected by the Court of Appeal in *Macatangay v State of New South Wales (No 2)* [2009] NSWCA 272 at [26]. The Court observed that the decision of the Full Court in *Miller* depended on the constitutionally limited powers of a Commonwealth tribunal, and had no application to the decision of the Commission in Ms Macatangay’s case. At [25] the Court held:

The Industrial Relations Commission decided that this settlement was binding after hearing evidence and legal argument. Its decision, affirmed on appeal, that the settlement was binding created an estoppel binding on the parties and properly recognised by Grove J and the Court.

1. It follows that the primary judge did not err in failing to look behind the judgment of Grove J or the several judgments thereafter which declined to interfere with it. In these circumstances, since the evidence and arguments Ms Macatangay claimed the primary judge ignored (and which were the subject of her extensive written and oral submissions in this appeal) went to the question of whether the Commission had correctly decided that her unfair dismissal action had been settled, there can be no error in disregarding them.
2. Ms Macatangay nevertheless contended that the State deliberately misled the various courts by making knowingly false statements or providing false information to the effect that there was a binding settlement. That contention should also be rejected.
3. A mere assertion, no matter how frequently it is repeated or with what force it is put, is insufficient to support a finding of this nature. Clear and cogent evidence is required before a court can reach the requisite state of satisfaction: *Rejfek v McElroy* (1965) 112 CLR 517. Evidence answering this description was not provided to the primary judge. In *Macatangay v State of New South Wales* [2012] NSWCA 108at [10] Tobias AJA rejected Ms Macatangay’s assertions to like effect, holding that “there is not a jot or tittle of evidence to support such an allegation, particularly bearing in mind its serious nature”. Nothing has changed since then.
4. Ms Macatangay submitted that there was “other sufficient cause” not to make a sequestration order because she had a claim in tort for damages “in relation to the unreasonable and unconscionable act of the [State] in putting her in the List of people not to be employed in any capacity”. The onus was upon her to establish the existence of sufficient cause: *Cain v Whyte* (1933) 48 CLR 639 at 645–6; *Ling v Enrobook Pty Ltd* (1997) 74 FCR 19at 24. That required that she satisfy the court that the claim she was relying upon was “a real claim” which was “likely to succeed” and in which the amount she would recover would be likely to equal or exceed the debt owing to the State: Re Schmidt; Ex parte Anglewood Pty Ltd (1968) 13 FLR 111 at 115–16 (Gibbs J). Certainly, a claim by a debtor against a creditor will not be “other sufficient cause” within s 52(2)(b) of the Act if it has no prospect of success: *Totev v Sfar* [[2006] FCA 470](http://www.lexisnexis.com/au/legal/search/enhRunRemoteLink.do?A=0.3513933851243023&service=citation&langcountry=AU&backKey=20_T25036996020&linkInfo=F%23AU%23FCA%23sel1%252006%25page%25470%25year%252006%25&ersKey=23_T25036996011); 230 ALR 236 at [58] (Allsop J). Ms Macatangay boldly submitted that the claim she was propounding, however, was “strong” and “very likely to succeed”. She described it as a claim which had never been litigated because of the erroneous decision of Grove J that she had settled her unfair dismissal action and those of the appellate courts refusing to disturb it. She also disputed the correctness of the primary judge’s finding that she had made no attempt to establish that the quantum of damages she would recover in such an action would exceed the amount of the judgment debt.
5. These submissions must be rejected.
6. The claim which Ms Macatangay sought to litigate is the very claim she instituted in the Supreme Court. Yet such a claim has absolutely no prospect of success for the simple reason that she is precluded from ever bringing it.
7. As Handley AJA observed in *Macatangay v State of New South Wales* (unreported, NSWCA, 20 September 2010, Sackville AJA agreeing):

The applicant has long since exhausted all reasonable avenues for challenging the decisions of the Industrial Relations Commission and of Grove J. The proceedings in the Commission and in this Court have finally established that the applicant’s dismissal by the Department of Education and Training on 6 December 2002 did not give her a cause of action for damages against the State.

1. Moreover, the effect of the Court of Appeal’s order in *Macatangay v State of New South Wales* [2012] NSWCA 374 is that she is prohibited from instituting the very proceedings upon which she relied in order to defeat the creditor’s petition. Any such proceedings would be vexatious.
2. In these circumstances, the primary judge’s conclusion that there was no “other sufficient cause” not to make a sequestration order is not affected by error. Indeed, it is impossible to see how he could have come to any other conclusion.

## Conclusion

1. None of the grounds of appeal has merit. The appeal must be dismissed. Costs should follow the event. There will be orders accordingly.

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| I certify that the preceding fifty-six (56) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Katzmann. |

Associate:

Dated: 23 November 2016