FEDERAL COURT OF AUSTRALIA

Fokas v Mansfield as Trustee of the Bankrupt Estate of Maria Fokas (No 2) [2020] FCA 30

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| File number: |  |
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| Judge: | **WHEELAHAN J** |
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| Date of judgment: | 30 January 2020 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – vexatious litigant – making of a vexatious proceedings order under s 37AO of the *Federal Court of Australia Act 1976* (Cth) –whether the applicant has frequently instituted or conducted vexations proceedings – held that the applicant has frequently instituted or conducted vexatious proceedings in Australian courts – vexatious proceedings order made.  **EVIDENCE** - whether s 91 of the *Evidence Act 1995* (Cth) precludes consideration of decisions in other proceedings in the assessment of whether a litigant has frequently instituted or conducted vexatious proceedings in Australian courts – field of inquiry framed by s 37AO(6) of the *Federal Court of Australia Act* – the question whether other proceedings were vexatious is a question for the Court considering an application under s 37AO, and s 37AO(6) permits that regard may be had to those other proceedings, including any reasons for judgment. |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) s 25C  *Bankruptcy Act 1966* (Cth) ss 54, 153B  *Evidence Act 1995* (NSW) s 91  *Evidence Act 2008* (Vic) ss 91, 93, 190  *Evidence (National Uniform Legislation) Act 2011* (NT)  *Federal Court of Australia Act 1976* (Cth)ss 4, 24, 31A, 37AM, 37AO, 37AQ(1)(a), 37AT(4), 37M  *Federal Magistrates Act 1999* (Cth) s 104  *Legislation Act 2003* (Cth) s 13(1)(a)  *Vexatious Proceedings Act 2006* (NT) s 7  *Vexatious Proceedings Act 2008* (NSW) s 8(2)  *Vexatious Proceedings Act 2014* (Vic) s 29  *Federal Court Rules 2011* (Cth) r 39.05  *Federal Court Rules 1979* (Cth) r 21.1(1) |
|  |  |
| Cases cited: | *Attorney-General (NSW) v Bar Mordecai* [2005] NSWSC 142  *Attorney-General (NSW) v Chan* [2011] NSWSC 1315  *Attorney-General (NSW) v Croker* [2010] NSWSC 942  *Attorney-General (NSW) v Mahmoud* [2015] NSWSC 899  *Attorney-General (NSW) v Martin* [2015] NSWSC 1372  *Attorney-General (NSW) v Mohareb* [2016] NSWSC 1823  *Attorney-General (NSW) v Potier* [2014] NSWSC 118  *Attorney-General (NSW) v Wilson* [2010] NSWSC 1008  *Attorney-General (Vic) v Garrett* (2017) 51 VR 777  *Attorney-General (Vic) v Horvath, Senior* [2001] VSC 269  *Attorney-General v Reid* [2012] 3 NZLR 630  *Davis v Insolvency and Trustee Service Australia* [2010] FCAFC 141  *Dudzinski v Centrelink* [2003] FCA 308  *Fokas v Kogarah Council* [2005] NSWLEC 626  *Fokas v Kogarah Council* [2007] NSWLEC 735  *Fokas v Kogarah Council* [2008] NSWLEC 98  *Fokas v Kogarah Council* [2008] NSWCA 145  *Fokas v Kogarah Council & Energy Australia* [2008] NSWLEC 74  *Fokas v Kogarah RSL Club Ltd* [2012] NSWLEC 136  *Fokas v Kogarah RSL Club Ltd (No 2)* [2012] NSWLEC 185  *Fokas v Mansfield* [2017] NSWCA 231  *Fokas v Mansfield (No 2)* [2017] NSWCA 261  *Fokas v Mansfield (No 3)* [2017] NSWCA 315  *Fokas v Mansfield as Trustee of the Bankrupt Estate of Maria Fokas* [2019] FCA 1724  *Fokas v Stack* [2010] NSWSC 571  *Fuller v Toms* [2015] FCAFC 91; 234 FCR 535  *Gallo v Attorney-General (Vic)* (unreported, 4 September 1984)  *Garrett v Commissioner of Taxation* [2015] FCA 117; 147 ALD 342  *HWY Rent Pty Ltd v HWY Rentals (in liq) (No 2)* [2014] FCA 449  *In re Vernazza* [1960] 1 QB 197  *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd* [2008] FCAFC 60; 167 FCR 372  *Jones v Cusack* (1992) 109 ALR 313  *Jones v Skyring* (1992) 109 ALR 303  *Kay v Attorney-General (Vic)* (2000) 2 VR 436  *King v Muriniti* [2018] NSWCA 98;97 NSWLR 991  *Kogarah Municipal Council v Fokas* [1999] NSWLEC 188  *Kowalski v MMAL Staff Superannuation Fund Pty Ltd* [2009] FCAFC 117; 178 FCR 401  *Kuligowski v Metrobus* [2004] HCA 34; 220 CLR 363  *Luck v University of Southern Queensland* [2009] FCAFC 73; 176 FCR 268  *Macatangay v New South Wales (No 2)* [2009] NSWCA 272  *Mansfield as Trustee of the Bankrupt Estate of Maria Fokas v Fokas* [2019] FCCA 134  *Mansfield as Trustee of the Bankrupt Estate of Maria Fokas v Maria Fokas* [2018] NSWSC 249  *Mansfield v Fokas* (unreported), Wilson J, Supreme Court of New South Wales, 9 August 2017  *Mathews v State of Queensland* [2015] FCA 1488  *Mulhern v Bank of Queensland Ltd (No 3)* [2015] FCA 927  *Norbis v Norbis* [1986] HCA 17; 161 CLR 513  *Official Trustee in Bankruptcy v Gargan (No 2)* [2009] FCA 398  *Papakosmas v The Queen* [1999] HCA 37; 196 CLR 297  *Pham v Secretary, Department of Employment and Workplace Relations* [2007] FCAFC 179  *Professional Administration Service Centres Pty Ltd v Commissioner of Taxation* [2012] FCAFC 180; 295 ALR 52  *Simundic v University of Newcastle* [2007] FCAFC 144  *Singh v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011] FCA 833; 282 ALR 56  *Soden v Kowalski* [2011] FCA 318  *Teoh v Hunters Hill Council (No 8)* [2014] NSWCA 125  *Wati v Minister for Immigration and Multicultural Affairs* (1997) 78 FCR 543  *Wills v Australian Broadcasting Corporation* [2009] FCAFC 6; 173 FCR 284  *Zoia v Commonwealth Ombudsman* [2007] FCAFC 143; 240 ALR 624 |
|  |  |
| Dates of hearing: | 22 November, 16 December 2019 |
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| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | General and Personal Insolvency |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 102 |
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| Counsel for the Applicant: | The applicant appeared in person. |
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| Solicitor advocate for the Respondent: | Ms S Heimanis |
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| Solicitor for the Respondent: | Grace Lawyers |

ORDERS

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|  | | VID 1669 of 2018 |
|  | | |
| BETWEEN: | MARIA FOKAS  Applicant | |
| AND: | DAVID IAN MANSFIELD AS TRUSTEE OF THE BANKRUPT ESTATE OF MARIA FOKAS  Respondent | |

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| JUDGE: | WHEELAHAN J |
| DATE OF ORDER: | 30 JANUARY 2020 |

THE COURT ORDERS THAT:

1. The applicant’s interlocutory application filed 15 November 2019, and her application for additional orders set out in the short minutes of order handed up in court on 16 December 2019, are dismissed.
2. Pursuant to s 37AO(2) of the *Federal Court of Australia Act 1976* (Cth), Maria Fokas, the applicant in this proceeding, must not institute any proceeding in this Court without the leave of the Court.
3. Any extant proceeding instituted in this Court by Maria Fokas prior to this order shall not be continued without the leave of the Court.
4. The costs of the respondent of and incidental to the interlocutory applications and of and incidental to the hearings relating to the vexatious proceedings order be paid out of the bankrupt estate of the applicant.

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

REASONS FOR JUDGMENT

WHEELAHAN J:

## Introduction

1. On 21 October 2019, I gave summary judgment for the respondent against the applicant, Maria Fokas, pursuant to s 31A of the *Federal Court of Australia Act 1976* (Cth) on the ground that the applicant did not have reasonable prospects of successfully prosecuting the proceeding: *Fokas v Mansfield as Trustee of the Bankrupt Estate of Maria Fokas* [2019] FCA 1724 (***Fokas v Mansfield (No 1)***).
2. The Court on its own initiative listed a hearing to give Mrs Fokas the opportunity to be heard as to why a vexatious proceedings order should not be made against her under s 37AO of the *Federal Court of Australia Act*. For the following reasons, I have determined to make a vexatious proceedings order against Mrs Fokas. I have also determined to dismiss an interlocutory application filed by Mrs Fokas on 15 November 2019, and to dismiss further interlocutory applications which Mrs Fokas made orally on the second day of the hearing on 16 December 2019.

## The power to make orders concerning vexatious litigants

1. Section 37AO of the *Federal Court of Australia Act* empowers the Court to make a vexatious proceedings order against a person, including an order that the person not commence proceedings in the Court. The Court may make a vexatious proceedings order on its own initiative, but must not make such an order without hearing the person or giving the person an opportunity to be heard. As I have mentioned, the hearing was fixed by the Court on its own initiative following the judgment of 21 October 2019 in *Fokas v Mansfield (No 1).* The Trustee appeared at the hearing and made submissions in support of the making of an order.
2. Section 37AO provides as follows –

**37AO Making vexatious proceedings orders**

(1) This section applies if the Court is satisfied:

(a) a person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals; or

(b) a person, acting in concert with another person who is subject to a vexatious proceedings order or who is covered by paragraph (a), has instituted or conducted a vexatious proceeding in an Australian court or tribunal.

(2) The Court may make any or all of the following orders:

(a) an order staying or dismissing all or part of any proceedings in the Court already instituted by the person;

(b) an order prohibiting the person from instituting proceedings, or proceedings of a particular type, in the Court;

(c) any other order the Court considers appropriate in relation to the person.

Note: Examples of an order under paragraph (c) are an order directing that the person may only file documents by mail, an order to give security for costs and an order for costs.

(3) The Court may make a vexatious proceedings order on its own initiative or on the application of any of the following:

(a) the Attorney‑General of the Commonwealth or of a State or Territory;

(b) the Chief Executive Officer;

(c) a person against whom another person has instituted or conducted a vexatious proceeding;

(d) a person who has a sufficient interest in the matter.

(4) The Court must not make a vexatious proceedings order in relation to a person without hearing the person or giving the person an opportunity of being heard.

(5) An order made under paragraph (2)(a) or (b) is a final order.

(6) For the purposes of subsection (1), the Court may have regard to:

(a) proceedings instituted (or attempted to be instituted) or conducted in any Australian court or tribunal; and

(b) orders made by any Australian court or tribunal; and

(c) the person’s overall conduct in proceedings conducted in any Australian court or tribunal (including the person’s compliance with orders made by that court or tribunal);

including proceedings instituted (or attempted to be instituted) or conducted, and orders made, before the commencement of this section.

1. A number of terms used in s 37AO are defined by s 37AM(1) as follows –

***Australian court or tribunal*** means a court or tribunal of the Commonwealth, a State or a Territory.

***institute***, in relation to proceedings, includes:

(a) for civil proceedings—the taking of a step or the making of an application that may be necessary before proceedings can be started against a party; and

(b) for proceedings before a tribunal—the taking of a step or the making of an application that may be necessary before proceedings can be started before the tribunal; and

(c) for criminal proceedings—the making of a complaint or the obtaining of a warrant for the arrest of an alleged offender; and

(d) for civil or criminal proceedings or proceedings before a tribunal—the taking of a step or the making of an application that may be necessary to start an appeal in relation to the proceedings or to a decision made in the course of the proceedings.

***proceeding***:

(a) in relation to a court—has the meaning given by section 4; and

(b) in relation to a tribunal—means a proceeding in the tribunal, whether between parties or not, and includes an incidental proceeding in the course of, or in connection with, a proceeding.

***proceedings of a particular type*** includes:

(a) proceedings in relation to a particular matter; and

(b) proceedings against a particular person.

***vexatious proceeding*** includes:

(a) a proceeding that is an abuse of the process of a court or tribunal; and

(b) a proceeding instituted in a court or tribunal to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and

(c) a proceeding instituted or pursued in a court or tribunal without reasonable ground; and

(d) a proceeding conducted in a court or tribunal in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

***vexatious proceedings order*** means an order made under subsection 37AO(2).

1. The consequences of a vexatious proceedings order may include that the person the subject of the order is precluded from instituting proceedings, or proceedings of a particular type, without the leave of the Court: s 37AQ(1)(a). The Court’s power to grant such leave is fettered, because leave may be granted only if the Court is satisfied that the proceeding is not a vexatious proceeding: s 37AT(4).

## Background

1. Mrs Fokas is an undischarged bankrupt. The respondent is the trustee of her estate. By this proceeding, Mrs Fokas sought to challenge the validity of a sequestration order that had been made by the Federal Magistrates Court (as it then was) on 1 November 2012. The sequestration order was made on the application of the Kogarah City Council as petitioning creditor. The act of bankruptcy was the failure of Mrs Fokas to comply with a bankruptcy notice that was served upon her on 1 June 2012. The foundation of the bankruptcy notice was a debt of $28,980.80 arising from four final judgments against Mrs Fokas in respect of the Council’s costs that Mrs Fokas was ordered to pay in other proceedings.
2. In *Fokas v Mansfield (No 1),* I observed at [50] that the current proceeding was but one of many endeavours by Mrs Fokas to challenge the Trustee’s title to her former residential property. The Court set out the background to this proceeding in *Fokas v Mansfield (No 1)* at [1] to [26], with which these reasons for judgment should be read. As indicated in those reasons, Mrs Fokas is already the subject of the following vexatious proceedings orders made by other courts –
3. on 1 June 2010, by the Supreme Court of New South Wales - *Fokas v Stack* [2010] NSWSC 571;
4. on 9 August 2012, by the Land and Environment Court of New South Wales - *Fokas v Kogarah RSL Club Ltd (No 2)* [2012] NSWLEC 185; and
5. on 28 February 2018, by the Supreme Court of New South Wales - *Mansfield as Trustee of the Bankrupt Estate of Maria Fokas v Maria Fokas* [2018] NSWSC 249.
6. On the first day of the hearing on 22 November 2019, the Court provided each of the parties with a folder containing copies of the reasons for judgment in 12 cases involving Mrs Fokas that were referred to in *Fokas v Mansfield (No 1)* at [6] and [9], and to which I shall return. The Court informed Mrs Fokas that the cases were the basis upon which the Court was likely to consider whether or not to make a vexatious proceedings order, and that she would be given an opportunity to respond, as she requested. For that purpose, at the conclusion of the first day, the hearing was adjourned part-heard to 16 December 2019, and the Court made directions for Mrs Fokas to file further affidavit material and written submissions.
7. The Trustee submitted that there were 20 applications that Mrs Fokas had filed or attempted to file since mid-2017 upon which the Trustee relied to support the making of a vexatious proceedings order. Some of those applications were within the 12 cases to which the Court referred. During the hearing on 22 November 2019, Mrs Fokas was provided with a typed list prepared by the solicitor for the Trustee which identified the following applications, and which was annotated so as to cross-reference the applications to the evidence that was before the Court –

(1) *Supreme Court of New South Wales*–

* 1. notice of motion, dismissed; *Mansfield v Fokas* 2016/213128, Wilson J, 9 August 2017;
  2. notice of motion filed 22 August 2017, dismissed; *Fokas v Mansfield* [2017] NSWCA 231;
  3. notice of motion filed 11 September 2017, dismissed; *Fokas v Mansfield (No 2)* [2017] NSWCA 261;
  4. *Fokas v Mansfield (No 3)* [2017] NSWCA 315 –
     1. notice of motion filed 9 October 2017, dismissed;
     2. notice of motion filed 16 October 2017, dismissed;
  5. *Mansfield v Fokas* 2016/213128 –
     1. notice of motion filed 12 December 2017, dismissed;
     2. notice of motion filed 13 December 2017, dismissed;
     3. notice of motion filed 21 December 2017, dismissed;
     4. notice of motion filed 27 December 2017, dismissed;
     5. notice of motion filed 28 December 2017, dismissed.

(2) Federal Circuit Court –

* 1. application for review in the Federal Circuit Court dated 20 March 2018 but not accepted for filing;
  2. application for review of sequestration order filed 10 April 2018;
  3. application for review of sequestration order filed 12 April 2018.

(3) Federal Court of Australia –

* 1. originating application a step for review in the Federal Court of Australia dated 21 May 2018 and signed by the applicant but not accepted for filing;
  2. originating application filed 27 December 2018;
  3. notice of a constitutional matter under s 78B of the *Judiciary Act 1903* (Cth) filed 28 June 2019;
  4. interlocutory application filed 1 August 2019;
  5. notice of a constitutional matter under s 78B of the *Judiciary Act* filed 29 August 2019;
  6. interlocutory application filed 15 November 2019.

(4) *High Court of Australia*, application for removal to High Court of Australia dated 9 October 2019.

### Further interlocutory applications by Mrs Fokas

#### Interlocutory application filed 15 November 2019

1. On 15 November 2019, and after I had given summary judgment on 21 October 2019, Mrs Fokas filed an interlocutory application in this proceeding which was made returnable on 22 November 2019. By that application, Mrs Fokas sought the following orders, which I set out *verbatim* –
2. Stay of a decision of an Authority that is: That the Court made me bankrupt. In other words that the Court made a Sequestration order against my residency, 14 English Street Kogarah 2217 Sydney NSW.

B That Justice Wheelahan directs that the further hearing coming before the Court on Friday 22 November 2019 be heard by the full Court Federal Court of Australia.

C Set aside his decision as to costs.

#### The applicant’s short minutes of order

1. At the commencement of the resumption of the hearing on 16 December 2019, Mrs Fokas handed to the Court a document titled “Short Minutes of Order” which sought the following, which again I set out *verbatim* –

1. Leave to amend the Interlocutory Application date 15 November 2019.

2. Dispense with any requirement to file and serve an amended Interlocutory Application.

3. Stay a Creditors Petition filed 19 July 2012, in the Federal Magistrates Court NSW then.

4. A proposed vexatious proceedings order be set aside. Made new orders instead.

5. The courts order made/given on 21 October 2019 be made void.

6. Order 4. By Fagan J Supreme Court NSW, made on 28 February 2018 file No: 2016/213128 be made void.

7. Order 2. and 3. Made on 5th April 2018 at the Supreme Court NSW. File No: 2018/00099701, be made void.

1. Order 5 seeks to re-litigate the orders that I made on 21 October 2018. Mrs Fokas confirmed during the hearing that by proposed orders 6 and 7 set out above, she sought an order from this Court declaring the orders of the Supreme Court of New South Wales of 28 February 2018 and 5 April 2018 to be void. As to the orders made by that Court on 28 February 2018, Fagan J had by order 4 prohibited Mrs Fokas pursuant to the *Vexatious Proceedings Act 2008* (NSW) from instituting proceedings in New South Wales: *Mansfield as Trustee of the Bankrupt Estate of Maria Fokas v Maria Fokas* [2018] NSWSC 249. And as to the orders made on 5 April 2018, Darke J had ordered that Mrs Fokas be permanently restrained from lodging or registering any further caveats or dealings over her former property, and ordered that the Registrar-General be restrained from accepting any such caveats or dealings from Mrs Fokas.
2. I determined to treat the orders sought by Mrs Fokas in the short minutes of order as part of her interlocutory application filed 15 November 2019, and I dispensed with any requirement that Mrs Fokas file an amended interlocutory application.

### Affidavit material filed by Mrs Fokas

1. The interlocutory application filed 15 November 2019 was supported by an affidavit of Mrs Fokas dated 15 November 2019 of ten pages, together with an additional 162 pages of annexures. In her affidavit, Mrs Fokas stated her occupation was “managing court issues”. By her affidavit, Mrs Fokas raised arguments by which she sought to re-litigate the validity of the sequestration order, and by extension, the order of this Court made on 21 October 2019 that there be judgment for the Trustee as respondent. This is indicated by the introductory passages in the affidavit, which I set out below –

The Authority, (the Council), decided that a Sequestration Order was made against me. **EXHIBIT “A1”.**

**There are questions:**

A. Did the Application to make a Sequestration Order comply with requirements in the FMCB Rules 2006? **EXHIBITS: “A2”, “A3”**.

B. Did the ‘Order, the form before the Registrar to sign and seal on 1st November 2012 have a title?

C. Did it specify by whom it was filed?

D. Was it required to be entered (to be signed and sealed) if in addition to any provisions as to costs the ‘Order’ made a direction on the hearing day of the ‘Creditors’ petition?

E. Was it a Direction? **EXHIBIT “A4”.**

F. Was it a Judgment/order?

G. **WAS IT A VALID ORDER?**

H. Did the verb **‘be’** have the same meaning if the Order was a direction? **EXHIBIT “A5”.**

I. Did Goce or George Andonoski make me aware that he was serving me a Bankruptcy Notice?

J. Did the Certificates of Determination of Costs Assessments that were filed in the local Court Kogarah include the Statements of Reasons for?

1. At the hearing on 22 November 2019, Mrs Fokas asked that paragraph G above be understood as follows –

Was it a valid order or, as I understand it, a valid paper. Does a signature or a stamp make a paper as if order.

1. Some of the matters raised by Mrs Fokas in her affidavit were raised previously in other affidavits filed by Mrs Fokas in this proceeding, but were abandoned. Other matters, such as whether the sequestration order was sealed, whether the sequestration order complied with the *Federal Magistrates Court (Bankruptcy) Rules 2006* (Cth)¸ the validity of the sequestration order, and the meaning of the word “be”in the sequestration order, were determined adversely to Mrs Fokas in *Fokas v Mansfield (No 1)*. Other features of the affidavit of Mrs Fokas of 15 November 2019 included –
2. an implicit challenge to the validity of the service of the bankruptcy notice (paras [2]-[4]);
3. a challenge to the validity of the judgments of the New South Wales Land and Environment Court and a denial that she was liable for the costs that she was ordered to pay (paras [8]-[9]);
4. a denial that she was liable to the Council for the costs the subject of orders made by the Land and Environment Court on the ground that in opposing a development application on safety grounds she was acting as a good Samaritan, and that pursuant to s 57 of the *Civil Liability Act 2002* (NSW), good Samaritans do not incur civil liability (para [10]);
5. a denial that she was liable for the Council’s costs in the Land and Environment Court on the ground that she had acted in the public interest, citing the *Land and Environment Court Rules 2007* (NSW), r 4.2 (para [10]);
6. a repetition of her assertion that the Federal Magistrates Court had not made a sequestration order (para [17]);
7. a four page response to written submissions of the Trustee filed 20 September 2019 which related to the question of summary judgment, which was given on 21 October 2019 in *Fokas v Mansfield (No 1)*;
8. the production of a travel itinerary for Mrs Fokas dated 2 July 2012, which recorded that she was due to fly from Sydney to Athens on 20 August 2012, returning on 6 June 2013, and a statement by Mrs Fokas in the body of her affidavit that the hearing of the creditor’s petition took place on 1 November 2012 while she was overseas, and that she returned from her trip at the end of February 2013 (para [12]);
9. Mrs Fokas claimed that upon her return from her trip at the end of February 2013, she could not withdraw money from her bank, and she was directed to obtain papers from the Federal Magistrates Court, and upon being given a piece of paper by a clerk of the Court, she noticed that it was not sealed or signed, and so she ignored it (para [12]); and
10. Mrs Fokas claimed that she thereafter had no contact with “a person claiming to be my ‘trustee’”, and then recounted what I infer to be an occasion when officers of the sheriff took possession of her property on 30 January 2017, trespass proceedings brought against her that were dismissed on 17 September 2017 upon no evidence being presented, and various proceedings that she brought in the Supreme Court of New South Wales to prevent the sale of the property.
11. As to Mrs Fokas’s claim that she was overseas at the time of the hearing of the creditor’s petition, an order for substituted service of the petition was made by a Registrar of the Federal Magistrates Court on 3 October 2012, and there were affidavits filed in the Federal Magistrates Court attesting to the substituted means of service on Mrs Fokas by leaving the documents on the front veranda of her property, and by sending them by ordinary pre-paid post to her address.
12. Amongst the annexures to Mrs Fokas’s affidavit of 15 November 2019 was Annexure 7, which comprised 56 pages of planning objections to the Council relating to a property development dating from 2006. Annexure 17 to the affidavit was an extract from a petition to the Commonwealth Houses of Parliament, apparently signed by 10,519 people, which stated (inter alia) –

PETITION:

FOR RELIEF:

1. WITHDRAW a Petition 19/7/2012 against Maria Fokas (Court File SYG 15702012 Federal Circuit Court previous name: Federal Magistrate Court of Australia)

2. Recognise and or declare THAT NEVER EXISTED A BANKRUPTCY against Maria Fokas.

…

Maria is NOT INSOLVENT. Did not sign a Bankruptcy, did not authorise any one as Trustee neither as Administrator of her residence. Additional information is on her Affidavit 9 September 2016 to the AUSTRALIAN GOVERNMENT Insolvency and Trustee Service Australia, (new name - Australian Financial Security Authority).

1. Further, at the adjourned hearing on 16 December 2019, Mrs Fokas brought into the courtroom in a green shopping bag another petition which she said contained about 5,500 signatures. This petition was directed to the Supreme Court of New South Wales. I received a pro-forma page of the petition into evidence, which stated (inter alia) –

SUPREME COURT OF NSW and to whom it may concern PETITION

Your Petitioners ASK:

1. The Supreme Court NSW to accept forthwith Maria Fokas to institute any type of proceedings, in a NSW Court.

2. Restraining Orders have been made on 28 February 2018 Case No.2016/0021312 and on 5th April 2018 case No. 2018/00099701 that these Orders must be made void: These Orders are against Maria Fokas and also restrain the Registrar-General in some way, and caused serious grievance to Maria.

…

1. Upon adjourning the hearing on 22 November 2019 to 16 December 2019, I made an order that Mrs Fokas file and serve by 4.00pm on 9 December 2019 any further affidavits or written submissions on which she wished to rely. At the hearing on 22 November 2019, Mrs Fokas stated that she preferred to state her responses in an affidavit rather than in written submissions. I informed Mrs Fokas that I would consider any submissions that she wished to put in an affidavit. Subsequently, Mrs Fokas filed an 11-page affidavit dated 9 December 2019, and a short affidavit dated 10 December 2019 making a small correction to her affidavit of 15 November 2019.
2. In her affidavit dated 9 December 2019, Mrs Fokas addressed the merits of local court proceedings in 1996 between her and the Kogarah RSL Club. She also addressed the question of what poultry she kept at her property in 1996 and 1997. In *Fokas v Mansfield (No 1),* I referred at [5] by way of background to proceedings between Mrs Fokas and the Kogarah Municipal Council in the Land and Environment Court, and I referred to the decision of Sheahan J in *Kogarah Municipal Council v Fokas* [1999] NSWLEC 188. That case concerned the question whether Mrs Fokas was keeping a rooster on her property in contravention of local laws. Sheahan J summarised Mrs Fokas’s response to these claims at [15]-[16] –

15. The evidence on behalf of Mrs Fokas is directed to her assertion that she disposed of the rooster, which was in her possession at relevant times in late 1997 and in early-to-mid 1998, straight after my judgment was given on 25 June 1998, and that the rooster now at the premises, and present with her today at Court, is a different rooster which is much quieter than the other one, which is or was its father. She says the Council order can refer only to whatever rooster was on the property at the time of the order or orders of the Council, and/or the order or orders of the Court.

16. There are before the Court several photographs (including *Exhibit F1*). With my untrained eye I am unable to distinguish between the roosters depicted in those photographs, despite Mrs Fokas’s best efforts, assisted by the unprecedented step I took in allowing her to bring a rooster into the Court room during her submissions.

1. Sheahan J held at [21] that the rooster on Mrs Fokas’s property was the same rooster that was the subject of the proceedings taken by the Council in 1997 and 1998. By her affidavit filed in this Court and dated 9 December 2019, Mrs Fokas continues to dispute the allegations in relation to her rooster, and disputes that her rooster, which she claimed was kept inside her house in a box, could be heard by any complainant. Mrs Fokas stated in her affidavit that she kept a peacock which made its resting place in a tree outside her bedroom window. She claimed that the noise that was heard and attributed to her rooster was in fact caused purposely by an unidentified person pulling feathers from a kookaburra, which disturbed her peacock causing it to make some noise, and that the noise was not caused by her rooster.
2. Mrs Fokas also referred to the merits of other proceedings to which she was a party in the Land and Environment Court, which concerned objections that she had to various developments in her area, and claimed that these proceedings were not vexatious or frivolous.

### Evidence tendered by the Trustee

1. The Trustee relied on his affidavit dated 24 April 2019, and an affidavit of the Trustee’s solicitor dated 10 September 2019, together with the annexures to those affidavits. In addition, the Trustee tendered –
2. the folder of 12 cases to which I referred earlier;
3. an application for review in the Federal Circuit Court dated 20 March 2018 and signed by Mrs Fokas;
4. an originating application in the Federal Circuit Court dated 21 May 2018 and signed by Mrs Fokas; and
5. two notices of a constitutional matter under s 78B of the *Judiciary Act* in this proceeding given by Mrs Fokas.

### The submissions of Mrs Fokas

1. The submissions made by a litigant in response to an application for a vexatious proceedings order may be relevant to the question whether an order should be made: *Attorney-General (NSW) v Mahmoud* [2015] NSWSC 899 at [21] (Rothman J). In this case, Mrs Fokas instituted and conducted the further interlocutory applications to which I have referred at [11] to [12] above, which may themselves may be regarded as “proceedings” for the purposes of s 4 and s 37AM of the *Federal Court of Australia Act.* The manner in which Mrs Fokas conducted those applications is relevant to whether they are vexatious, as paragraph (d) of the definition of “vexatious proceeding” in s 37AM(1) indicates: *Attorney-General (NSW) v Wilson* [2010] NSWSC 1008 at [16] (Davies J). I have also had the benefit of observing Mrs Fokas over a number of days of hearings in this proceeding. She presented as determined, if not obstinate. However, she was not aggressive, and she was respectful to the Court. She appeared to have some knowledge of some legal concepts, and had obviously spent time researching legislation applicable to the circumstances of her bankruptcy, and developing the submissions that she presented.
2. In her submissions, Mrs Fokas continued to challenge the very existence of the sequestration order that was made against her estate by the Federal Magistrates Court on 1 November 2012. Mrs Fokas stated to the Court, “*I do not pursue the validity of a sequestration order. I simply say there is no sequestration order*” (16 December 2019, T24/32-33). She advanced arguments as follows –
3. At the hearing on 22 November 2019, Mrs Fokas claimed that the sequestration order did not comply with r 4.08 and Form 7 of the *Federal Magistrates Court (Bankruptcy) Rules 2006* (Cth) because it did not have the title “Sequestration Order” at the top of the page. During the course of the hearing, the Court provided Mrs Fokas with a copy of s 25C of the *Acts Interpretation Act 1901* (Cth) which provides –

**25C Compliance with forms**

Where an Act prescribes a form, then strict compliance with the form is not required and substantial compliance is sufficient.

Section 25C applies also to legislative instruments: *Legislation Act 2003* (Cth), s 13(1)(a). Mrs Fokas then submitted that the non-compliance with Form 7 was substantial. Mrs Fokas claimed that the absence of a title on the sequestration order was her main point. She submitted in relation to the sequestration order that “*It was nothing. It was a piece of paper*” (22 November 2019, T26/27), and that it was “*…a piece of paper without having a title, and without being sealed or signed*” (16 December 2019, T9/45-46). In *Mansfield v Fokas (No 1)*, I rejected Mrs Fokas’s claim that the sequestration order had not been signed or sealed, and I annexed a copy of the signed and stamped sequestration order to my reasons.

1. It became apparent that because Mrs Fokas did not accept that a sequestration order had been made against her estate, that she had refused to sign a statement of affairs, as required by s 54 of the *Bankruptcy Act 1966* (Cth). She stated to the Court, “*I’m not bankrupt. The Court has not made me bankrupt…*. *I don’t have a liability to the petitioning creditor”* (22 November 2019, T34/25-28)*.* Her failure to sign a statement of affairs has prevented the time for automatic discharge from bankruptcy under s 149(4) of the *Bankruptcy Act* from commencing. See further, *Mansfield as Trustee of the Bankrupt Estate of Maria Fokas v Fokas* [2019] FCCA 134.
2. Mrs Fokas took the Court to an extract from the National Personal Insolvency Index at p 338 of the bundle of annexures to the affidavit of the Trustee’s solicitor dated 10 September 2019. That extract recorded that no data were held as to the discharge date. Mrs Fokas submitted (inter alia) that there was no discharge date because a sequestration order had not been made. The Court observed to Mrs Fokas that a much more obvious reason for the entry was that she had not signed a statement of affairs, and the period for automatic discharge under s 149 of the *Bankruptcy Act* had not commenced to run.
3. Mrs Fokas submitted that the Court’s decision to give summary judgment on 21 October 2019 was based upon the incorrect assumption that the sequestration order was made.
4. Mrs Fokas repeated the substance of a submission concerning the status of the Trustee’s registration that she made during the hearing of the application for summary judgment and which the Court rejected in *Mansfield v Fokas (No 1)* at [45].
5. Mrs Fokas challenged the circumstances in which she was served with the bankruptcy notice, claiming that the person who served the notice did not introduce himself, and did not make her aware that he was serving her with a document, or what it was.
6. Mrs Fokas claimed that the creditor’s petition was invalid because it did not include the reasons of the costs assessor responsible for the assessments of costs that resulted in the orders of the Local Court, which formed the foundation of the bankruptcy notice.
7. Mrs Fokas drew attention to the fact that the date typed on the affidavit verifying the creditor’s petition was 1 June 2012, and that this was the same date on which the deponent stated that he had served Mrs Fokas with a bankruptcy notice, and therefore the deponent could not have sworn to her failure to comply with the bankruptcy notice by 22 June 2012, as the petition alleged. Mrs Fokas also drew attention to the fact that the affidavit of service of the bankruptcy notice, which was referred to in the affidavit verifying the creditor’s petition was dated 6 July 2012, which post-dated the typed date on the affidavit verifying the creditor’s petition by 35 days. These features of the affidavit verifying the creditor’s petition were also referred to by Mrs Fokas in her affidavit of 15 November 2019. At the hearing on 22 November 2019, the Court drew Mrs Fokas’s attention to the affidavit of final debt made by the same deponent dated 31 October 2012, which stated that the debt the subject of the bankruptcy notice had not been paid, and was still owing in full. Mrs Fokas accepted that she had not paid the amount the subject of the bankruptcy notice, and stated that, “*I don’t have a debt, and I would never pay anything*” (T25/25).
8. Mrs Fokas referred to her evidence of the circumstances in which she was served with the bankruptcy notice, which I understood to be some sort of challenge to the validity of that service.
9. Mrs Fokas submitted that the two proceedings that she commenced in the Federal Circuit Court in March and April 2018 should not be taken into account in determining whether to make a vexatious proceedings order, because she discontinued them.
10. Mrs Fokas questioned whether her notice under s 78B of the *Judiciary Act* is to be regarded as a “proceeding” for the purposes of s 37AM(1) and s 4 of the *Federal Court of Australia Act*.
11. Mrs Fokas submitted that the matters that she now wished to put before the Court had not previously been decided “*in the Supreme Courts below*”.

## The interlocutory applications of Mrs Fokas

1. The interlocutory applications by Mrs Fokas to which I have referred at [11]-[12] above seek (inter alia) orders setting aside the Court’s decision of 21 October 2019 in *Fokas v Mansfield (No 1)*. The orders made by the Court on 21 October 2019 have been entered. A question arises as to the power of the Court to set aside those orders. Under r 39.05(c) of the *Federal Court Rules 2011* (Cth), the Court may vary or set aside a judgment or order after it is entered if it is interlocutory.
2. For the purposes of appeal, a judgment given under s 31A of the *Federal Court of Australia Act* is taken to be interlocutory, with the consequence that leave to appeal is required: *Federal Court of Australia Act*, ss 24(1A) and (1D)(b). Independently of those provisions, summary judgment of the Court under s 31A has been held to be interlocutory: *Zoia v Commonwealth Ombudsman* [2007] FCAFC 143; 240 ALR 624 (Spender J at [19] by way of *obiter*, French J and Gilmour J agreeing); *Simundic v University of Newcastle* [2007] FCAFC 144 at [12] (Allsop, Lander and Siopis JJ); *Pham v Secretary, Department of Employment and Workplace Relations* [2007] FCAFC 179 at [15] (French, Lindgren and Jacobsen JJ); *Wills v Australian Broadcasting Corporation* [2009] FCAFC 6; 173 FCR 284 (Rares J at [28] by way of *obiter*, Emmett J agreeing, North J not deciding); *Luck v University of Southern Queensland* [2009] FCAFC 73; 176 FCR 268 (Graham J and Rares J, North J not deciding). A contrary view was expressed by Finkelstein J (dissenting as to the result) and Gordon J (by way of *obiter*) in relation to summary judgment disposing of the entire proceeding in *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd* [2008] FCAFC 60; 167 FCR 372. Rares J, who otherwise formed part of the majority with Gordon J in *Jefferson Ford*, considered that a judgment under s 31A of the *Federal Court of Australia Act* was interlocutory. In *Macatangay v New South Wales (No 2)* [2009] NSWCA 272, the New South Wales Court of Appeal (Allsop P, Tobias JA and Handley AJA) held at [11]-[12] that an order summarily dismissing a proceeding because it is frivolous, vexatious, an abuse of the process of the court, or does not disclose a reasonable cause of action, was interlocutory because of its legal effect: there was no triable issue and the order therefore did not finally determine the rights of the parties or create *res judicata* estoppels. In *Kowalski v MMAL Staff Superannuation Fund Pty Ltd* [2009] FCAFC 117; 178 FCR 401, at [32]-[44], the Full Court (Spender, Graham and Gilmour JJ) respectfully disagreed with the views of Finkelstein J and Gordon J in *Jefferson Ford*, and agreed with the views of Rares J in *Luck*, and held that summary judgment under s 31A(2) of the *Federal Court of Australia Act* is interlocutory. In *Davis v Insolvency and Trustee Service Australia* [2010] FCAFC 141 at [11], the Full Court (Keane CJ, Besanko and Perram JJ) referred to *Jefferson Ford* and *Kowalski* and held that it was unnecessary to consider the question as to whether judgment under s 31A was interlocutory or final, because the purpose of the introduction of s 24(1D)(b) of the *Federal Court of Australia Act* was to put an end to the debate.
3. The reasons for judgment of Finkelstein J in *Jefferson Ford* were dissenting reasons, and the observations of Gordon J to the extent they related to orders disposing of the whole proceeding were *obiter*. On the other hand, in *Kowalski*,the question whether the decision of the primary judge was interlocutory or final was a necessary issue for the Full Court to decide, and the Court at [32] described the issue as an important one for consideration. For these reasons, I shall follow the decision of the Full Court in *Kowalski* and regard the judgment given against Mrs Fokas under s 31A of the *Federal Court of Australia Act* as interlocutory. That has the consequence that there is power under r 39.05 to set aside or vary the judgment.
4. Although the discretionary power conferred by r 39.05 does not contain any express fetters, the power should be exercised in a way that is consistent with the overarching purpose in s 37M of the *Federal Court of Australia Act*, and consistently with the judicial guidance that has been given by the authorities in relation to its exercise: *Norbis v Norbis* [1986] HCA 17; 161 CLR 513 at 519 (Mason and Deane JJ), and 536 (Brennan J). The power under r 39.05 to set aside interlocutory orders once entered should be exercised in a judicial manner, and only in exceptional circumstances: *Professional Administration Service Centres Pty Ltd v Commissioner of Taxation* [2012] FCAFC 180; 295 ALR 52 at [53] (Edmonds, McKerracher and Nicholas JJ). Rule 39.05 is not an alternative to appellate procedures in respect of interlocutory judgments: *Dudzinski v Centrelink* [2003] FCA 308 at [11] (Spender J). And the principle of finality of litigation requires the Court to exercise great caution when considering whether special circumstances exist that warrant the variation of orders: *Wati v Minister for Immigration and Multicultural Affairs* (1997) 78 FCR 543 at 549–553 (von Doussa, Moore and Sackville JJ).
5. I am not persuaded that there is any reason to set aside or vary the orders of the Court made 21 October 2019. By her originating application in this proceeding, Mrs Fokas essentially sought a declaration that she was not bankrupt; in her words, “*a bankruptcy never existed against Maria Fokas*”: *Fokas v Mansfield (No 1)* at [14]. Following the making of the sequestration order on 1 November 2012, Mrs Fokas did not pursue any application for an annulment of her bankruptcy under s 153B of the *Bankruptcy Act*, or any application under s 104 of the *Federal Magistrates Act 1999* (Cth)for review of the sequestration order made by the Registrar, or any appeal to this Court. Mrs Fokas’s approach has been to deny the existence of an effective sequestration order, and that denial has manifested itself in (inter alia) her failure to co-operate with the Trustee, her failure to sign a statement of affairs, and the litigation in the Supreme Court of New South Wales concerning her former residential property.
6. Mrs Fokas’s interlocutory application, to the extent that it seeks to set aside the decision of 21 October 2019, invites re-litigation of issues that have been determined adversely to her. To the extent that Mrs Fokas seeks to introduce a new argument that the sequestration order did not exist because of the absence of the title “Sequestration Order” in the form of order made by the Federal Magistrates Court on 1 November 2012, that argument is devoid of any merit. Only substantial compliance with Form 7 prescribed by the *Federal Magistrates Court (Bankruptcy) Rules* was required: *Acts Interpretation Act*, s 25C; *Legislation Act*, s 13(1)(a). I regard as hopeless any argument that the omission of the title at the top of the page of the order had the effect that there was not substantial compliance with the prescribed form. Moreover, I regard as hopeless any submission that the exercise of power by the Federal Magistrates Court to make a sequestration order was conditioned on entering the order in the correct form. As the Court held in *Fokas v Mansfield (No 1)* at [41], the sequestration order was valid when it was made. Finally, the challenges made by Mrs Fokas to the affidavit in support of the petition, and to the circumstances in which she was served with the bankruptcy notice do not arguably affect the validity of the sequestration order.
7. As to the other orders that Mrs Fokas sought –
8. there is no arguable basis on which the sequestration order should be stayed by this Court;
9. there is no reason to refer the hearing of these applications to a Full Court;
10. Mrs Fokas advanced no specific reason why the order for costs made on 21 October 2019 should be set aside;
11. there is no arguable basis on which the creditor’s petition, which was acted on by the Federal Magistrates Court in making the sequestration order, should be stayed; and
12. there is no arguable basis on which this Court could grant Mrs Fokas the relief that she sought in relation to the orders made by the Supreme Court of New South Wales on 28 February 2018 (Fagan J), and on 5 April 2018 (Darke J).
13. I shall therefore dismiss Mrs Fokas’s interlocutory application filed 15 November 2019, including her application for the orders set out in her short minutes of order. I further hold that by reason of the attempts to re-litigate issues that have been decided already by this Court and by the Supreme Court of New South Wales, and by reason of the absence of any merit to the applications, that they are vexatious and an abuse of process.

## Vexatious proceedings orders

1. A vexatious proceedings order is an extreme measure and should not be made lightly: *Soden v Kowalski* [2011] FCA 318at [35] (Stone J). However, the nature of the relief is not to bar litigation by a vexatious litigant entirely, but to control it by imposing a requirement for leave. By allowing for such control, the relief authorised by the legislation reinforces the power of the Court to protect its own processes against unwarranted usurpation of its time and resources and to avoid loss caused to those who have to face proceedings that lack substance: *Jones v Skyring* (1992) 109 ALR 303 at 312 (Toohey J). As the Full Court (Besanko, Logan and McKerrracher JJ) stated in *Fuller v Toms* [2015] FCAFC 91; 234 FCR 535 at [31] –

Section 37AO of the Federal Court Act empowers a court to balance the right of one individual of access to justice with other rights namely, a correlative right on the part of the present respondents to finality and the separate right of other individuals also to access this Court. It is for this Court, the present manifestation of a recognition by the Australian Parliament, the origins of which may be traced to an earlier recognition by the United Kingdom Parliament, via the *Vexatious Actions Act 1896* (UK) (59 & 60 Vict. C. 51), of a need for a power to effect just such a balance.

1. In *Mathews v State of Queensland* [2015] FCA 1488, at [81], Reeves J identified the conditions necessary to engage s 37AO(1)(a) as being that the person has –
2. frequently;
3. instituted or conducted;
4. vexatious proceedings;
5. in Australian courts or tribunals.
6. The meaning of the word “frequently” is relative, and must be viewed in context: *Jones v Cusack* (1992) 109 ALR 313 at 315 (Toohey J); *Teoh v Hunters Hill Council (No 8)* [2014] NSWCA 125 at [46]-[49] (Beazley P, Emmett JA and Sackville AJA). The number of proceedings instituted need not be large in order for it to be considered frequent. The number of proceedings may be small if a litigant attempts to re-litigate or re-agitate an issue previously determined by the Court: *HWY Rent Pty Ltd v HWY Rentals (in liq) (No 2)* [2014] FCA 449 at [111]-[114] (Perry J), approved by the Full Court in *Fuller v Toms* at [33]-[34].
7. The terms “institute” and “vexatious proceeding” are the subject of the inclusive definitions referred to at [5] above. The re-litigation of matters that have been decided previously, or seeking to institute further proceedings in relation to matters that have been raised, or should have been raised more appropriately in other proceedings, have been held to constitute vexatious proceedings within the terms of the expression. So, too, has the institution or pursuit of proceedings without reasonable grounds: *Mathews* at [90], citing *Garrett v Commissioner of Taxation* [2015] FCA 117; 147 ALD 342 at [23] (Pagone J), and *Mulhern v Bank of Queensland Ltd (No 3)* [2015] FCA 927 at [9] (Gleeson J).
8. A proceeding includes an incidental proceeding in the course of, and in connection with a proceeding, and an appeal: *Federal Court of Australia Act*, s 4. Therefore, an interlocutory proceeding may be a “proceeding”: *Mathews* at [92].

## Evidence Act 1995 (Cth), s 91

1. The terms of s 37AO(1)(a) of the *Federal Court of Australia Act* direct attention to whether a person has frequently instituted or conducted vexatious proceedings. The question is whether a proceeding is in fact a “vexatious proceeding” which is inclusively defined in s 37AM(1), and is a question for the Court to decide: see *In re Vernazza* [1960] 1 QB 197 at 208 (Ormerod LJ). In evaluating whether the Court is satisfied that a person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals, the Court may have regard to orders of courts or tribunals in other proceedings, and the conduct of those proceedings, as s 37AO(6) expressly permits: *Mathews* at [103]; *HWY* at [102].
2. In *Attorney-General (NSW) v Bar Mordecai* [2005] NSWSC 142, which concerned an application under s 84(1) (since repealed) of the *Supreme Court Act 1970* (NSW), Patten AJ stated at [5] –

It seems to me that I will need to form my own view about each piece of litigation relied upon by the Attorney General. In doing so, however, I believe that I am entitled to have regard to the result of the proceedings and, where appropriate, the findings of, and views expressed, by the various judicial officers who dealt with them.

1. For this proposition, Patten AJ cited a decision of the Victorian Full Court in *Gallo v Attorney-General (Vic)* (unreported, 4 September 1984) in which Starke J (Crockett J and Beach J agreeing), referring to the reasons of the primary judge (Gray J), stated –

I return then to the learned judge’s findings in regard to this matter. He started by saying, at page 35 of the appeal book, this: “The gist of what the respondent submits is that, in each instance, the proceeding in question is a genuine proceeding brought to redress a genuine grievance or wrong. I was invited to make some investigation in detail of the cases, the subject matter of the application. However, I do not feel it necessary to do so on an application of this sort. It is sufficient for my purposes that in a large number of instances various judges and Masters of this Court have expressed opinions as to the vexatious character of the particular proceeding before them. It is perhaps desirable to make some detailed reference to the cases which fall into category one.” He then dealt with those.

I might say, in parenthesis, that I agree with the learned judge that where an order has been made by a Judge or a Master dismissing an action as frivolous or vexatious, or striking a pleading out, it is not to go behind that order and, as it were, go into the merits of the argument as a court of appeal would.

1. The statement of Patten AJ in *Bar Mordecai* has been cited a number of times, including in *Attorney-General (NSW) v Croker* [2010] NSWSC 942 at [125] (Fullerton J), *Attorney-General (NSW) v Wilson* [2010] NSWSC 1008 at [22] (Davies J) and *Teoh* *v Hunters Hill Council (No 8)* at [50] (Beazley P, Emmett JA and Sackville AJA). In *Teoh,* the New South Wales Court of Appeal stated at [52]-[53] –

52. Section 6 [of the *Vexatious Proceedings Act 2008* (NSW)] does not specify the matters that the court dealing with the application under the VP Act should take into account in determining whether particular proceedings were, for example, an abuse of the process of the court (s 6(a)) or instituted without reasonable ground (s 6(c)). There is nothing in the language of s 6 to indicate that a finding by the court in the earlier proceedings that they were an abuse of process or instituted without reasonable grounds is determinative on an application under the VP Act. Equally, there is nothing to indicate that a finding made or view expressed by the court in the earlier proceedings is to carry no weight on an application under the VP Act.

53. Ordinarily, the court that heard and decided the earlier proceedings will have been best placed to determine whether they were an abuse of process or instituted without reasonable grounds. It would be an odd result if such a determination simply has to be ignored by a court hearing an application under the [Vexatious Proceedings] Act. The oddity of the result is reinforced by the likelihood that an application under the [Vexatious Proceedings] Act would be prolonged if the findings made and views expressed in the earlier proceedings could not be taken into account. Indeed there would be a real risk that the court would be burdened with re-litigation of issues of the very kind that the legislation is designed to avoid

1. However, in *Attorney-General (New South Wales) v Martin* [2015] NSWSC 1372, Simpson J observed that the above passage in *Teoh* did not take account of s 91 of the *Evidence Act 1995* (NSW)*,* which is in the following terms –

Evidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.

1. Simpson J held at [20] that whether judgments in other cases can be used to support an application for a vexatious proceedings order will depend upon an analysis of the facts that were in issue in the proceedings giving rise to each judgment and the findings of fact made in the judgments. Her Honour admitted into evidence and relied on several judgments where there was no fact in issue concerning the nature of the proceedings. However, her Honour concluded that several judgments in proceedings that were struck out as an abuse of process, or as failing to disclose any cause of action were, by reason of s 91, inadmissible to prove those facts, as they were regarded as facts in issue. On the other hand, Simpson J held that some judgments were admissible as evidence from which inferences might be drawn concerning the conduct of litigation, and reached her own conclusions in several instances that previous proceedings were vexatious. At [132]-[133] Simpson J stated –

132 Section 91 [of the *Evidence Act*] constitutes a considerable fetter on proof of the matters necessary to be proved in order to establish that proceedings are vexatious. Given that the *Vexatious Proceedings Act* has three important objectives - (i) to protect potential defendants against unwarranted litigation; (ii) to protect courts against abuse of their processes; and (iii) to ensure that valuable court time is available for litigation and resolution of genuine disputes, applications thereunder should not be impeded by fetters on the admissible evidence. In its application to the *Vexatious Proceedings Act*, s 91 is antithetical to those objects.

133 This is, in my opinion, a clear case for legislative reform. A simple amendment to the *Vexatious Proceedings Act* could exclude the operation of s 91 for the purposes of proof of the matters necessary to the making of orders.

1. In *Attorney-General (New South Wales) v Mohareb* [2016] NSWSC 1823 at [25], Schmidt J disagreed with the approach to the construction of s 91 adopted by Simpson J in *Martin*. Her Honour stated at [26]-[32] –

26 The term “finding of fact” is not defined in the *Evidence Act*. While issues which arise for resolution in particular proceedings will very frequently depend on findings of fact made on the evidence, not every finding made, or conclusion reached on matters in issue involves a finding of fact. In some cases they involve the resolution of questions of law and often, the resolution of questions of mixed fact and law.

27 As discussed in *Collector of Customs v Agfa Gevaert Ltd* (1996) 186 CLR 389; [1996] HCA 36 at 395 whether “facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law”. So, too, I consider, are questions which arise under Rule 13.4 of the UCPR, as to whether particular proceedings either generally, or in relation to any particular claim, are “frivolous or vexatious”, or disclose “no reasonable cause of action”, or involve “an abuse of the process of the court”. If not questions of law they are at least mixed questions of law and fact.

28 The judgment which her Honour refused to admit was one where in issue was the question of whether proceedings brought in the Land and Environment Court were vexatious and frivolous, had no reasonable cause of action and were an abuse of process. The conclusion which the Commissioner came to, rested on facts found, but the decision was not sought to be tendered in the vexatious proceedings in order to prove the existence of facts that were in issue in the Land and Environment Court proceedings.

29 Rather, the decision was tendered to prove that Mr Martin was a party to the proceedings; that they had been dismissed; that this had been the result of the conclusions reached by the Commissioner, that the proceedings would be vexatious and frivolous if they were to proceed further; that there was no reasonable cause of action; and that they involved an abuse of process.

30 As found in *Teoh*, decisions of that kind are admissible in proceedings brought under the *Vexatious Proceedings Act*. Views expressed in such decisions are not binding, but they are relevant to what arises to be decided in proceedings under that Act, not because they are tendered in order to prove the existence of a fact that was in issue in the earlier proceedings, but rather, to establish the fact that the earlier proceedings existed, that the defendant was a party to them, how they were resolved and in some cases, the views the presiding judge expressed on matters which also fall within the definition of “vexatious proceedings”. That term is defined in s 6 of the *Vexatious Proceedings Act* to include:

“(a) proceedings that are an abuse of the process of a court or tribunal, and

(b) proceedings instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose, and

(c) proceedings instituted or pursued without reasonable ground, and

(d) proceedings conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.”

31 All of those matters also involve questions of law. They must certainly be decided on facts found, but conclusions reached in the earlier proceedings on those questions are not themselves “findings of fact”. Nowadays, given obligations such as those imposed by s 56 of the *Civil Procedure Act 2005* (NSW), conclusions that particular proceedings, or an aspect of them, involve an abuse of process; were instituted or conducted in a way so as to harass or annoy, to cause delay or detriment, or for another wrongful purpose; or were instituted or pursued without reasonable ground, are not infrequently reached in judgments given both at interlocutory and final stages of the proceedings.

32 That does not render such judgments inadmissible under s 91 of the *Evidence Act*, in later proceedings, including those brought under the *Vexatious Proceedings Act*, unless the judgment is sought to be tendered to prove the existence of a fact that was in issue in the earlier proceeding. If tendered to establish the existence of the proceedings, who the parties were and how a question of law, or a question of mixed fact and law, was resolved in those proceedings, s 91 does not render the judgment inadmissible.

1. Any division of opinion between Simpson J in *Martin*, and Schmidt J in *Mohareb* is no longer an issue in New South Wales, because as Simpson J had suggested in *Martin* at [133], s 8(2) of the *Vexatious Proceedings Act 2008* (NSW) was amended with effect from 20 February 2018 by the addition of paragraph (c), so that s 8(2) of the New South Wales Act now provides –

For the purposes of subsection (1), an authorised court may have regard to:

(a)  proceedings instituted or conducted in any Australian court or tribunal (including proceedings instituted or conducted before the commencement of this section), and

(b) orders made by any Australian court or tribunal (including orders made before the commencement of this section), and

(c) evidence of the decision, or a finding of fact, of any Australian court or tribunal hearing such proceedings or making such orders, even if that evidence would otherwise not be admissible by virtue of section 91 of the [*Evidence Act 1995*](https://www.legislation.nsw.gov.au/#/view/act/1995/25).

1. No corresponding amendment has been made to s 37AO(6) of the *Federal Court of Australia Act*, which is set out at [4] above.
2. In *Attorney-General (Victoria) v Garrett* (2017) 51 VR 777, McDonald J considered the applicability of s 91 of the *Evidence Act 2008* (Vic) to the admissibility of evidence to be relied upon in an application for a general litigation restraint order under the *Vexatious Proceedings Act 2014* (Vic). The Supreme Court of Victoria is empowered by s 29(1) of the Victorian Act to make a general litigation restraint order against a person if it is satisfied that “the person has persistently and without reasonable grounds commenced or conducted vexatious proceedings”. Section 29(2) of the Victorian Act is in the following terms –

(2) In determining whether it is satisfied of the matters specified in subsection (1), the Supreme Court may take into account any matter it considers relevant, including but not limited to any of the following—

(a) any proceeding commenced or conducted by the person, or an entity controlled by the person, in any Australian court or tribunal;

(b) the existence of any order made by an Australian court or tribunal against the person, or an entity controlled by the person, including—

(i) a litigation restraint order; or

(ii) an acting in concert order; or

(iii) a vexatious proceeding order;

(c) any other matter relating to the way in which the person conducts or has conducted litigation.

1. McDonald J referred to many of the New South Wales authorities: *Attorney-General (NSW) v Chan* [2011] NSWSC 1315 (Adamson J); *Attorney-General (NSW) v Martin* [2015] NSWSC 1372(Simpson J); *Attorney-General (NSW) v Potier* [2014] NSWSC 118 (McCallum J); and *Attorney-General (NSW) v Mohareb* [2016] NSWSC 1823 (Schmidt J). McDonald J also cited Victorian authority that preceded the commencement of the *Evidence Act 2008* (Vic). In *Kay v Attorney-General (Vic)* (2000) 2 VR 436, which concerned an application under the now-repealed provisions of the *Supreme Court Act 1986* (Vic), Ormiston JA stated at 437-8 –

... but I would not wish it to be thought that, in every application of this kind under s 21 of the *Supreme Court Act 1986*, it was necessary to re-examine the circumstances of each proceeding upon which the Attorney-General might seek to rely to support the making of an order. If the proceedings relied upon are frivolous, vexatious or otherwise of a kind which would support the making of the order, then that ordinarily should be apparent upon a reading of the reasons and orders and, if it is not, there will be usually no sensible basis for relying upon them, except to the extent that they may form part of a relevant chain of events. The learned judge, primarily I would gather from a sense of fairness and in an attempt to discover why the applicant said that the order should not be made, went somewhat further into the reasons for the various orders, the circumstances that lay behind them and what may now be thought to be the applicant’s unreasonable attacks upon them. On other occasions, therefore, examination in such detail may properly be seen to be unnecessary, for the procedure is not to be treated as the opportunity for a second line of appeal against judgments or orders upon which reliance is placed for the making of an order under s 21.

1. McDonald J accepted that the approach of Ormiston JA had been followed in subsequent Victorian cases, including by Ashley J in *Attorney-General (Vic) v Horvath, Senior* [2001] VSC 269, where Ashley J held at [28] that the “critical evidence” is to be found in court files –

It is one thing to know what the word “vexatious” means. It is another thing to apply s 21(2) [of the *Supreme Court Act 1986* (Vic)] to the circumstances of a particular case. In the latter task the following matters are, according to the authorities, relevant: first, where an order has been made dismissing an action as frivolous or vexatious, or striking a pleading out, it is not for a court considering a s 21 application to go behind the order and go into the merits of the argument as a court of appeal would do. Second, findings which are required do not depend on viva voce evidence or credibility of witnesses. The critical evidence is to be found in court files – documents, judgments, orders and reasons. For that reason, any hearsay material contained in an affidavit in support of an application, even though objectionable, should be treated simply as a distraction, and ignored. Third, the question is not whether the manner in which a proceeding is conducted is vexatious; it is whether, having regard to its nature and substance, it should be so characterised. Fourth, and this is a more general proposition with respect to s 21, in determining whether the Attorney-General has made out a case, the court is not concerned with a minute individual examination of each proceeding. It must consider the overall impression created by the number of proceedings, their general character and their results.

[Citations omitted]

1. In this Court, the above passage has been cited by Stone J in *Soden v Kowalski* [2011] FCA 318 at [51], by Bromberg J in *Singh v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011] FCA 833; 282 ALR 56 at [16], and by Pagone J in *Garrett v Commissioner of Taxation* [2015] FCA 117; 147 ALD 342 at [7], who stated that the passage was “a useful reminder of the focus of attention”. The passage was also cited by the Full Court (Besanko, Logan and McKerracher JJ) in *Fuller v Toms* [2015] FCAFC 91; 234 FCR 535 at [29], where the Full Court held that a vexatious proceedings order precluded the applicant from appealing the vexatious proceedings order itself without leave of the Court, which leave the Court refused. At first instance, Barker J had made the following three orders –

1. The statement of claim filed in this proceeding be entirely struck out.

2. The proceeding be dismissed.

3. Pursuant to s 37AO(2) of the *Federal Court of Australia Act 1976* (Cth), the applicant must not start or continue any other proceeding in the Court against any of the respondents without the leave of the Court.

1. The Full Court stated that orders 1 and 2 were part of a “given” against which any challenge to order 3 had to be decided –

29 Though it was necessary, for the purpose of dealing with the apprehended bias ground, that we make some observations in relation to the reasons for the making of Orders 1 and 2, it is neither necessary nor appropriate for us, in the context of a challenge to Order 3, further to descend into the merits in respect of the making of those orders: *Attorney-General (Vic) v Horvath* [2001] VSC 269 at [28] per Ashley J, recently applied by analogy by Pagone J in *Garrett v Federal Commissioner of Taxation* (2015) 147 ALD 342 at [7] …. Rather, they form part of a given against which must be decided whether or not there was occasion, as the primary judge found, for the making of the order under s 37AO of the Federal Court Act.

1. Returning to *Attorney-General (Victoria) v* *Garrett,* at [22]-[23], McDonald J concluded that s 91(1) of the *Evidence Act* was a codification of the common law principles which underlay the statements of Ormiston JA in *Kay*, and of Ashley J in *Horvath*, and that s 91(1) of the *Evidence Act* did not preclude the admission into evidence of judgments and orders as being relevant to the question whether, for the purposes of the Victorian legislation, a person had persistently and without reasonable grounds conducted vexatious proceedings*–*

22 I have concluded that the judgments of Ormiston JA in *Kay* and Ashley J in *Attorney-General (Vic) v Horvath, Senior* although preceding the enactment of s 91 of the *Evidence Act*, correctly state the test for the admissibility of evidence to be relied upon in an application for a general litigation restraint order. A judge hearing a general litigation restraint order application must make an independent determination of whether an individual has commenced and/or conducted vexatious proceedings. In doing so, a judge is entitled to have regard to court orders and reasons for judgment in proceedings which are relied upon by the applicant for the order. Insofar as judgments and court orders record findings as to the nature of proceedings (such as whether the proceedings should be dismissed as an abuse of process), this is a finding of mixed fact and law. Section 91 does not operate to preclude reasons for judgment and orders in respect of such proceedings from being admitted into evidence in support of an application for a general litigation restraint order.

23 Section 91(1) of the *Evidence Act* codifies a long-standing common law principle that findings of fact in one judgment are inadmissible in a subsequent proceeding as against a non-party to the prior proceeding, except, where relevant, to ascertain the parties to those proceedings and the issues raised in the litigation as disclosed in the reasons for judgment. The judgments in *Kay* and *Horvath* preceded the enactment of s 91 of the *Evidence* *Act*. However, the admissibility of the judgments and orders relied upon in those proceedings was subject to a common law principle relevantly indistinguishable from the terms of s 91(1). Further, there is a substantial body of authority in respect of s 21(2) of the *Supreme Court Act 1986* which has applied the reasoning of Ashley J in *Horvath* subsequent to the enactment of s 91 of the *Evidence Act 2008*. These judgments include the judgment of the Court of Appeal in *Slaveski v Attorney-General (Vic)* [2013] VSCA 165 [29].

24. Further, when the *Vexatious Proceedings Act 2014* was enacted, s 21(2) of the *Supreme Court Act 1986* was of long standing. There is nothing in the terms of the *Vexatious Proceedings Act*, nor the parliamentary materials accompanying its enactment, which supports the conclusion that Parliament intended that the threshold for declaring an individual a vexatious litigant would be more onerous under the *Vexatious Proceedings Act* than under s 21 of the *Supreme Court Act 1986*. To the contrary, s 29(2) broadens the range of matters to which the court may have regard for the purposes of being satisfied whether a general litigation restraint order should be made. The court may take into account any matter it considers relevant. The legislative intention to broaden the material which may be taken into account by the court is reflected in the second reading speech which accompanied the passage of the *Vexatious Proceedings Act* through Parliament.

1. I pause to observe that one must be careful before treating any provision of the *Evidence Act* as a codification of a corresponding common law principle. In *Papakosmas v The Queen* [1999] HCA 37; 196 CLR 297, at [10], Gleeson CJ and Hayne J observed inrelation to the New South Wales *Evidence Act* –

It is clear from the language of the Act, and from its legislative history, that it was intended to make, and that it has made, substantial changes to the law of evidence in New South Wales. Similar legislation has been enacted by the Parliament of the Commonwealth. Section 9 of the Act provides that it does not affect the operation of the common law except so far as the Act provides otherwise expressly or by necessary intendment. Even so, the sections of the Act relevant to this case undoubtedly make express provision different from the common law. It is the language of the statute which now determines the manner in which evidence of the kind presently in question is to be treated …

1. In *Attorney-General (Victoria) v* *Garrett,* McDonald J then set out a passage from the second reading speech of the Attorney-General in the Legislative Assembly of the Victorian Parliament and concluded as follows at [26] –

26 My conclusion that:

* section 91(1) codiﬁed a long-standing common law principle;
* there was a long history of the Supreme Court having regard to judgments and orders when determining vexatious litigation applications, including applications heard subsequent to the enactment of s 91(1); and
* that the *Vexatious Proceedings Act* and the materials accompanying its passage through Parliament manifest a clear legislative intention to expand the range of matters which can be taken into account by a court informing the requisite satisfaction that an individual has commenced and/or conducted vexatious proceedings

supports a ﬁnding that the Court is not precluded by s 91(1) of the *Evidence Act* from admitting into evidence, judgments and orders relevant to the question of whether a person has persistently and without reasonable ducted vexatious proceedings.

1. In *King v Muriniti* [2018] NSWCA 98;97 NSWLR 991, the question before the New South Wales Court of Appeal was whether a finding in a proceeding between parties that an appeal was hopeless could be relied upon in an application for a personal costs order against the legal practitioners for the unsuccessful appellant, or whether s 91 of the *Evidence Act* precluded such reliance. Basten JA, with whom Gleeson JA agreed, held that s 91 was not engaged in those circumstances, principally on the ground that the jurisdiction to award costs against the legal practitioners was exercised in the proceeding between the original parties, and that the power is engaged upon it appearing to the Court that costs were incurred on a particular basis, and that there was no need to rely upon findings in the judgment, which could simply be repeated in the costs ruling (see [37]-[39]). In the course of his Honour’s reasons, Basten JA considered the potential application of s 91 of the *Evidence Act* to judgments of another court that were sought to be tendered in applications for vexatious proceedings orders. At [30], Basten JA referred to the decision of Simpson J in *Martin*, and then cited *Teoh* at [53] (set out at [44] above), before stating at [31]-[32] –

31. What might well have been divined from that (undoubtedly accurate) statement was that the purpose and structure of the *Vexatious Proceedings Act*, to say nothing of the language of s 8(2) as it then stood, was inconsistent with the operation of s 91 of the *Evidence Act*, in relation to applications for vexatious proceedings orders. It was an available conclusion that that level of inconsistency could properly be resolved by treating the later statute (the *Vexatious Proceedings Act*), which also had a specific operation with respect to a defined class of proceedings, as impliedly repealing (or, more precisely, withdrawing the operation of) the *Evidence Act*, s 91, in relation to those proceedings. Such an approach to statutory construction would be consistent with that adopted in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 24; [2018] HCA 4.

32. In the later decision of *Attorney General for the State of New South Wales v Mohareb*, Schmidt J disagreed with Simpson J in *Martin*, stating that s 91 was not engaged at all. In the view of Schmidt J, the decision of the Commissioner of the Land and Environment Court, rejected in *Martin*, was not tendered “to prove the existence of facts that were in issue in the Land and Environment Court proceedings”, but rather to prove that the defendant was a party to the proceedings, that they had been dismissed, and “that this had been the result of the conclusions reached by the Commissioner, that the proceedings would be vexatious and frivolous if they were to proceed further”. However, that view disregards the extent to which s 91 is based on the exclusion of hearsay and opinion evidence.

1. In addition to referring to the possible inconsistency between s 91 of the *Evidence Act* and the *Vexatious Proceedings Act,* Basten JA identified two other considerations that should be mentioned. *First*, s 93 of the *Evidence Act* provides that Part 3.5, of which s 91 forms part, does not affect the operation of the law relating to *res judicata* or issue estoppel. In litigation between the same parties, an issue estoppel may arise in relation to a finding of fact or law upon a final judicial decision: *Kuligowski v Metrobus* [2004] HCA 34; 220 CLR 363 at [21]-[22]. The decision of the New South Wales Court of Appeal comprising Allsop P, Tobias JA and Handley AJA in *Macatangay v New South Wales (No 2)* [2009] NSWCA 272 supports the view that a decision to dismiss a proceeding as an abuse of process is not a final decision for the purposes of the doctrine of issue estoppel. This decision has particular weight, noting that Handley AJA was the author of Spencer Bower and Handley, *Res Judicata* (4th edition, LexisNexis, 2009).
2. *Second*, s 91 of the *Evidence Act* is qualified by s 190, which provides (inter alia) –

…

(3) In a civil proceeding, the court may order that any one or more of the provisions mentioned in subsection (1) do not apply in relation to evidence if:

(a) the matter to which the evidence relates is not genuinely in dispute, or

(b) the application of those provisions would cause or involve unnecessary expense or delay.

(4) Without limiting the matters that the court may take into account in deciding whether to exercise the power conferred by subsection (3), it is to take into account:

(a) the importance of the evidence in the proceeding; and

(b) the nature of the cause of action or defence and the nature of the subject matter of the proceeding; and

(c) the probative value of the evidence; and

(d) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

1. As to the discretion in s 190(3)(b) of the *Evidence Act*, in *Martin,* Simpson J at [21]-[22] declined to exercise it on the ground that the facts sought to be proved by the evidence were fundamental to the issues to be determined, and that the considerations referred to in s 190(4)(b), (c) and (d) militated against the use of s 190(3)(b). In *King v Muriniti*, Basten JA observed at [22] that in the case before the Court, if the legal practitioner’s argument in reliance on s 91 were accepted, he would be entitled to reopen the whole of the proceedings recently determined by the Court with the possible consequence of inconsistent findings. Basten JA stated that although that event did not appear to be contemplated by s 190(3), it would be surprising if the rules of evidence, as set out in the *Evidence Act*, were to be read as undermining the inherent power of a court to prevent an abuse of its processes.
2. A related point arises in circumstances such as those of the present case. One emanation of frivolous, vexatious litigation amounting to an abuse of process which is often found is attempted relitigation: *Official Trustee in Bankruptcy v Gargan (No 2)* [2009] FCA 398 at [7] (Perram J). It would be a surprising result if, in the context of an application for a vexatious proceedings order, the respondent to the application could relitigate those proceedings forming the foundation for the application. It would be even more surprising if a respondent to an application for a vexatious proceedings order could relitigate an earlier finding of attempted relitigation.
3. The question of the effect of the cognate Northern Territory provision, s 91 of the *Evidence (National Uniform Legislation) Act 2011* (NT), arose in *Registrar of the Supreme Court (NT) v Jenkins* [2019] NTSC 51, which concerned an application for a vexatious proceedings order under s 7 of the *Vexatious Proceedings Act 2006* (NT). Section 7(2) of the *Northern Territory Act* provides that for the purposes of satisfying the criterion in s 7(1) that a person has “frequently instituted or conducted vexatious proceedings in Australia” –

… the Court may have regard to:

(a) proceedings in any court or tribunal, including proceedings instituted before the commencement of this section; and

(b) orders made by any court or tribunal, including orders made before the commencement of this section.

1. Southwood J held that all of the reasons for judgment, and orders, and transcripts of other proceedings involving the respondent to the application that were annexed to the affidavits that were before the Court were admissible. Southwood J cited the decision of Simpson J in *Attorney-General (NSW) v Martin*, the decision of Schmidt J in *Attorney-General (NSW) v Mohareb*, and the decision of McDonald J in *Attorney-General (Victoria) v Garrett*. At [35], Southwood J expressed agreement with the approach of McDonald J in *Garrett*, and stated that it was supported by s 7(2)(b) of the *Northern Territory Act*, which I have set out above.

## Consideration

1. The power to make a vexatious proceedings order under s 37AO of the *Federal Court of Australia Act* is engaged if the Court is satisfied that a person has frequently instituted or conducted vexatious proceedings in Australian courts or Tribunals. The text of s 37AO(1), which refers to a person “frequently” instituting or conducting vexatious proceedings provides for a lower threshold for the making of a vexatious proceedings order than was formerly the case under O 21, r 1(1) of the *Federal Court Rules 1979* (Cth), which was engaged where a person instituted a vexatious proceeding and the Court was satisfied that the person “has habitually, persistently and without reasonable grounds” instituted other vexatious proceedings.
2. The Court’s evaluation of whether s 37AO(1) is engaged is framed by s 37AO(6), which expressly authorises the Court to have regard to other proceedings, to orders made in other proceedings, and to the conduct of those proceedings. In my view, the field of inquiry authorised by s 37AO(6) is no different from the approach adopted by Patten AJ in *Bar Mordecai*, by the New South Wales Court of Appeal in *Teoh*, by McDonald J in *Garrett,* by Starke J in *Gallo*, by Ormiston JA in *Kay*, by Ashley J in *Horvath*, and by Southwood J in *Jenkins*. The reference to “proceedings” in s 37AO(6)(a) is to be construed as permitting the Court to have regard to reasons for judgment given in those proceedings. To give the reference to “proceedings” in s 37AO(6)(a) a narrow construction that does not permit regard to reasons for judgment in other proceedings would tend to undermine the effectiveness and therefore the purpose of s 37AO. Were a narrow construction adopted, s 37AO would permit a more limited area of inquiry, and there would be the potential for some of the surprising consequences to which I referred at [62] above. These include the prospect of the consumption of resources of the Court and the parties if, upon an application under s 37AO, there was further relitigation because the Court could not take into account relevant findings made in previous proceedings in determining whether those proceedings are to be characterised as vexatious. The position therefore remains that the question whether other proceedings were vexatious is a question for the Court considering an application under s 37AO, but that s 37AO(6) permits that regard may be had to those other proceedings, including any reasons for judgment in those proceedings, largely in the way explained by Ormiston JA in *Kay*, and by Ashley J in *Horvath*. Section 91 of the *Evidence Act* is not infringed by relying on orders and reasons for judgment in other proceedings for the purposes of considering whether s 37AO(1) of the *Federal Court of Australia Act* is engaged. That is because the judgments and orders are not relied upon to prove a fact in issue in those proceedings. Rather, as s 37AO(6) expressly authorises, the judgments and orders may be relied upon to show the outcome of the proceedings, and the course they had taken, and to record the person’s conduct of those proceedings for the purposes of characterising those proceedings in order to evaluate whether s 37AO(1) is engaged: see, *Attorney-General (NSW) v Chan* at [46]-[47] (Fullerton J). On this view, no question of any implied suppression of s 91(1) arises, but if it did, I would respectfully agree with the analysis of Basten JA in *King v Muriniti* at [31], set out at [58] above.
3. I consider that Mrs Fokas has instituted and conducted the following proceedings which are to be characterised as vexatious proceedings.
4. *Fokas v Kogarah Council* [2005] NSWLEC 626.
5. In this proceeding, Mrs Fokas sought to challenge the validity of development consents for two properties which authorised the erection of an awning that was to span the two properties, which were currently operated as a hospital. The awning was designed to protect the patients of the hospital as they moved from one building to another. The reasons for judgment of Cowdroy J record that Mrs Fokas addressed the Court extensively and made claims in four affidavits. The Court stated that Mrs Fokas was not entitled to bring proceedings to review the merits only of the Council’s decision, save for a challenge based upon legal unreasonableness, which had not been made. At [18], Cowdroy J held –

Having heard lengthy submissions from the applicant, the Court is unable to find in the applicant’s affidavits any issue upon which the Court could properly adjudicate if this matter were to proceed to trial. The Court is conscious of the heavy onus which is imposed upon a court in an application for summary judgment, and the Court is naturally cautious before taking the step or striking out proceedings. However in this case the Court is satisfied that there is no merit in the application. The claim of the applicant has no prospects whatsoever of success. To allow it to proceed in the Court would be a waste of the time and resources of the parties.

1. The Court ordered that the proceedings be dismissed.
2. *Fokas v Kogarah Council* [2007] NSWLEC 735.
3. In this proceeding, Mrs Fokas challenged the validity of a development consent granted by the Council in respect of a residential flat to be erected some 100m from Mrs Fokas’s home. Sheahan J recorded that Mrs Fokas had filed a series of affidavits, however, upon the hearing of a motion by the Council for summary dismissal of the proceeding, Mrs Fokas did not stay and argue her case. Sheahan J nonetheless considered the contents of her affidavits as submissions on her behalf in her absence. His Honour held that the material filed by Mrs Fokas dealt entirely with issues relating to the merits of the development, and noted that the Court could not review the merits of the development. Sheahan J held that there was no legal failure in the Council’s discharge of its statutory duties, and that there was nothing amongst the materials which carried even a vague hint of a *Wednesbury* unreasonableness point. At [11], Sheahan J held –

To allow this challenge to proceed any further would waste the time and resources of the parties and the Court. On all the material presented by Mrs Fokas, admissible, or not, there is no prospect of her success and I am comfortable that she could not have rescued her case had she remained to argue it today.

1. The Court ordered that the proceedings be dismissed pursuant to part 13, rule 5 of the *Supreme Court Rules 1970* (NSW).
2. *Fokas v Kogarah Council & Energy Australia* [2008] NSWLEC 74.
3. In this proceeding, Mrs Fokas sought a declaration that a development consent granted by the Council for the construction of an electricity zone substation be stayed until the land was rezoned. Lloyd J held that it was clear that the proposed development was permissible with consent, and that a rezoning of the land was not required. Lloyd J held at [10] –

It is clear, therefore, that the grounds disclosed in the affidavits in support of Mrs Fokas’ application do not disclose a cause of action; *firstly*,there is no need for the land to be rezoned and, *secondly*, there is no right on the part of Mrs Fokas to seek an amendment.

1. Lloyd J went on to hold that no reasonable cause of action was disclosed, and dismissed the application.
2. *Fokas v Kogarah Council* [2008] NSWLEC 98.
3. In this proceeding, Mrs Fokas filed a notice of motion seeking orders that the decision of Lloyd J, referred to above, be set aside. Pain J held that the relevant rules of procedure did not permit him to entertain Mrs Fokas’s application to set aside the order of Lloyd J.
4. *Fokas v Kogarah Council* [2008] NSWCA 145.
5. Following the dismissal of her application to Pain J to set aside the orders of Lloyd J, Mrs Fokas sought leave to appeal in the New South Wales Court of Appeal. The application was determined on the papers by Allsop P and Tobias JA. The Court of Appeal held that Pain J had erred in her construction of rule 36.16 of the *Uniform Civil Procedure Rules 2005* (NSW) and that the Land and Environment Court did have the power to set aside the order of Lloyd J. However, the Court held that there was no utility in granting leave to appeal because even though Pain J erred in finding that she did not have power to determine Mrs Fokas’s notice of motion, the notice of motion would inevitably have failed because there was nothing that revealed any substance in any of the grounds which Mrs Fokas sought to litigate with respect to the validity of the Council’s consent. Although the Court of Appeal identified error in the reasons of Pain J, I regard the application for leave to appeal as a continuation of the matter that was before Lloyd J, who held that there was no reasonable cause of action.
6. *Fokas v Kogarah RSL Club Ltd* [2012] NSWLEC 136; *(No 2)* [2012] NSWLEC 185.
7. By this proceeding, Mrs Fokas challenged the validity of a condition of a development consent granted by the Kogarah Council. The condition provided for the creation of an easement for access and parking over land adjacent to Mrs Fokas’s home. She was able to bring the proceedings under the open standing provisions of s 123 of the *Environmental Planning and Assessment Act* *1979* (NSW).
8. Biscoe J gave judgment in the proceeding, holding at [14] that although some orders were made rectifying errors and drafting slips in the conditions of a development consent granted by the Council, the great majority of the hearing time was taken up with grounds which were without merit. The Council sought a vexatious proceedings order, which Biscoe J made, holding at [17] –

The extent of the costs and inconvenience of Mrs Fokas foraging in the courts has been substantial for the Council and, no doubt, for other respondents to her proceedings. Over the years she has failed to comply with costs orders made against her in favour of the Council. She has displayed no apparent insight into her previous litigious history. Nor has she advanced any defence to the application for a vexatious proceedings order. A vexatious proceedings order would provide a measure of future protection for the Council, which I think is warranted, in that there would be a threshold screening process, i.e. leave of the Court under s 14 of the *Vexatious Proceedings Act*, before she could again bring proceedings against the Council in this Court.

1. *Mansfield v Fokas* (unreported), Wilson J, Supreme Court of New South Wales, 9 August 2017.
2. In this proceeding, a notice of motion that had been filed by Mrs Fokas was struck out on the ground that it was not properly before the Court. Wilson J recorded that on 14 December 2016, a judgment for possession of property in Kogarah, which Mrs Fokas owned, was obtained from the Court and the Court issued a writ of possession. On 30 January 2017, the Office of the Sheriff of New South Wales executed the writ of possession and Mr Mansfield, as the trustee, was in possession of the property. Wilson J stated that it seemed to her Honour that the Court was, with respect of the proceedings, effectively *functus*.
3. *Fokas v Mansfield* [2017] NSWCA 231.
4. In this proceeding, White JA recorded that Mrs Fokas had filed a notice of motion on 22 August 2017 seeking the following order –

The Court to stop [immediately] the exercising of the power of a `WRIT OF POSSESSION’ issued 14 December 2016 by the Supreme Court Sydney for the case number bellow 2016/00213128/

As it has NO LEGAL POWER. [sic]

1. White JA also referred to a notice of motion filed by Mrs Fokas on 26 July 2017 in which she sought to restrain anyone from taking further action pursuant to the writ of possession, and sought the following orders –

3. Vary in TOTAL a judgment given or made on 14 December 2017 [sic] or on 14 November 2017 [sic] or at any other time that I am not aware of, as THERE ARE SPECIAL CIRCUMSTANCES.

4. To be wiped off the conditions imposed on me by the Kogarah Police on the 8th May 2017, that one is: Prohibiting me to go to my residence!

…

6. I, to be free in my home. No restrictions on me or on my premises as it is an exempt asset.

1. White JA also recorded in paragraph [9] that Mrs Fokas had by a notice of motion also claimed damages in respect of items destroyed or taken, and sought the return of household possessions. She also sought payment of an aged pension income from August 2012 to March 2013 and sought an order that the trustee pay the costs of a new passport. White JA commented that it appeared that the relief claimed in paragraph 4 set out at [80] above was relief to alter bail conditions that were imposed by the police when they took steps at the behest of the Trustee to remove her from the premises.
2. At [10], White JA set out the contentions by Mrs Fokas as follows –

(a) her house was an exempt asset that did not pass to her trustee in bankruptcy;

(b) the sequestration order had no “reckoning as time” and was an order to be made some time in the future. The grounds for this contention are not intelligible;

(c) the plaintiff in the possession proceedings, Mr Mansfield, did not ask for sequestration of her land. This was true but irrelevant;

(d) she did not receive the statement of claim that sought possession; and

(e) she had lived on the property up to 8 May 2017 when she was removed by police and allowed out on bail on conditions that she not approach the property;

(f) she was capable of looking after her house and did not consent to the appointment of the plaintiff as her trustee;

(g) the facts alleged in the petition leading to her bankruptcy were untrue;

(h) she did not owe the debt or debts to Kogarah Council on which she was purportedly made bankrupt and that a re-hearing of a costs assessment would have established that she was not liable to pay costs (apparently costs that were ordered against her by orders made by the Land and Environment Court);

(i) she did not attend on the hearing of the bankruptcy petition because she was ill; and

(j) exceptional circumstances justify this Court’s intervention.

1. White JA summarised the substance of Mrs Fokas’s argument at [11] as follows –

11. The substance of the applicant’s argument is that she is not bankrupt because there were no proper grounds upon which a sequestration order could have been made against her and that the order for possession was made in her absence and without proper evidence of service or service of an affidavit disclosing who was in possession of the English Street property.

1. At [16], White JA expressed the prima facie view that the appeal by Mrs Fokas against the orders of Wilson J was not competent, because the orders were interlocutory. However, in considering Mrs Fokas’s claim for interim injunctive relief, White JA proceeded on an assumption favourable to Mrs Fokas that she would in due course bring an application for leave to appeal and that the application might have reasonable prospects of success having regard to what might be some important underlying issues concerning the course the primary judge ultimately took of dismissing the notice of motion of 26 July 2017, rather than transferring the application to the Federal Court pursuant to s 6 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth).
2. In relation to the order giving judgment for possession made on 14 December 2016, White JA held that Mrs Fokas had not shown an arguable defence. His Honour stated at [18] –

Although the applicant does not recognise it, the fact is that a sequestration order has been made in respect of her estate and Mr Mansfield has been appointed as her trustee in bankruptcy. By reason of s 58(1) of the *Bankruptcy Act 1966* (Cth) her property has become vested in her trustee in bankruptcy. The question is not, as the applicant would have it, whether there were sufficient grounds for the making of a sequestration order, which it should be noted was made as long ago as 1 November 2012. Rather the question on an application to set aside the order for possession is whether the applicant was or was not bankrupt. If she was, then her trustee in bankruptcy was entitled to possession of the property by reason of its having vested in him. He has become registered as proprietor of the property. …

1. White JA held at [19], that –

…the primary judge was not arguably wrong in concluding that the order giving judgment for possession had been spent. Possession has been given. It does not appear that her Honour treated the notice of motion that was before her as extending to a claim to set aside the orders of 14 December 2016. That is quite understandable, having regard to the prolixity and ambiguity of the relief sought in the notice of motion, and it may well be that it is the better understanding of the relief claimed in that document. If however, her Honour were wrong in not treating the notice of motion as extending to a claim to set aside the orders of 14 December 2016, nonetheless for the reasons I have given, any such application would not enjoy any reasonable prospect of success. In these circumstances I see no basis for staying the writ of possession or interfering with anything done by reason of the first respondent’s [sic] having obtained possession.

1. In conclusion, White JA stated that the only substantive relief that could be given would be an order restraining the Trustee from exercising his powers as the trustee in bankruptcy of Mrs Fokas’s estate, and that he had serious doubts as to whether he would have the power to grant such relief. White JA dismissed the notice of motion filed 22 August 2017 and ordered Mrs Fokas to pay the costs of the first and second respondents, being the Trustee, and his firm, Deloitte Pty Ltd.
2. *Fokas v Mansfield (No 2)* [2017] NSWCA 261.
3. Following the decision of White JA on 4 September 2017 dismissing Mrs Fokas’s notice of motion filed 22 August 2017, Mrs Fokas filed a further notice of motion on 11 September 2017 in which she sought “an order for recovery of possession of land”, being her former property in English Street, Kogarah. Mrs Fokas was given leave to file an amended notice of appeal by which she sought to set aside the order of Wilson J of 9 August 2017 and an order for “release and recover possession of land”. White JA recorded in [7] of his Honour’s reasons that in an affidavit dated 15 September 2017, Mrs Fokas repeated her contention that she had made at the hearing on 4 September 2017 that she was not insolvent, and had not been declared to be a bankrupt. White JA held that the orders of Wilson J were interlocutory, and that Mrs Fokas required leave to appeal, which she had not sought. In any event, White JA held that even if he had concluded that the appeal was competent, he would not have granted the relief sought by Mrs Fokas in her notice of motion. Mrs Fokas had not demonstrated an arguable basis for setting aside the order for possession made on 14 December 2016. At [18], White JA stated –

Although she denies it, it is clear that the applicant is a bankrupt, the property did become vested in her trustee in bankruptcy, and the first respondent is the registered proprietor of the property. No application, it seems, was ever made to set aside the sequestration order made as long ago as 1 November 2012.

1. White JA ordered that the amended notice of appeal be dismissed and that Mrs Fokas’s notice of motion filed 11 September 2017 also be dismissed.
2. *Fokas v Mansfield (No 3)* [2017] NSWCA 315.
3. Following the second decision of White JA delivered on 9 October 2017, Mrs Fokas sought review of that decision pursuant to s 46(4) of the *Supreme Court Act 1970* (NSW). The review was heard by a panel of three Judges: Basten JA, Meagher JA and Payne JA. The Court of Appeal on review confirmed that the order made by Wilson J was interlocutory, and that the decision of White JA that the appeal from the decision of Wilson J was incompetent was correct. The Court also held that White JA was correct to decline to extend an interlocutory order that had been made by a Registrar on 18 September 2017, which restrained the Trustee from entering into an agreement for the sale of the property.
4. *Mansfield v Fokas* [2018] NSWSC 249.
5. Following the decision of the New South Wales Court of Appeal on review in *Fokas v Mansfield (No 3)*, Mrs Fokas filed five notices of motion seeking what Fagan J described at [3] as, “an array of orders to give effect to her contention that she is not a bankrupt and that the plaintiff is not entitled to sell the property”. Fagan J set out the dates of filing of the notices of motion and the orders sought in them as follows –

(1) 12 December 2017, seeking an order that “the person acting as Registrar- General to correct the name of the registered proprietor on the computer folio Certificate of Title 58/2013 [being the title reference of the property]”.

(2) 13 December 2017, order that the “Australian Government Australian Financial Security Authority (as its new name) to delete information entered in the National Personal Insolvency Index about Maria Fokas (about me)”.

(3) 21 December 2017, order that “the real estate Raine and Horne 25 Regent Street Kogarah 2217 to return the deposit made on 20 December 2017 for the sale of my property at 14 English Street Kogarah New South Wales 2217”.

(4) 27 December 2017, order that “the contract for the sale and purchase of land 2017 edition land 14 English Street Kogarah NSW 2217 sale date Wednesday 20 December 2017 to be made void or cancelled”.

(5) 28 February 2018, orders that the first four motions be dealt with individually in the order filed, with separate reasons for decision being given, and that this Court “wave [sic] away the need for leave to appeal in case of a requirement of appeal” and grant a stay of any order made. Further that any “irregularities to be disregarded”.

1. Fagan J then set out the course of the various proceedings that Mrs Fokas had taken in the New South Wales Supreme Court, and in the Court of Appeal, commencing with her notice of motion filed 26 July 2017. At [14] and [15], Fagan J recorded –

14 In support of the notices of motion now before the Court, Ms Fokas has read seven affidavits, plus a number of additional affidavits of service. Her first affidavit of 6 December 2017 contains extracts from legislation, argument, conclusions (such as “I am not a bankrupt”) and other material which is not admissible. Without cataloguing all of the inadmissible aspects, I will simply disregard those parts of that affidavit which are not evidence of facts in issue. I will treat those matters as submissions so far as appropriate.

15 Most of the other affidavits are quite short. However the affidavit of 23 February 2018 has attached to it a large number of annexures concerning proceedings to which Ms Fokas was a party in the Land and Environment Court and also concerning the bankruptcy proceedings against her. It appears that she contested a planning decision of Kogarah Council in proceedings which were heard in the Land and Environment Court on various dates between 2005 and 2008. She was unsuccessful in those proceedings and the Council obtained orders against her for costs. A bankruptcy notice was eventually served upon her claiming a debt totalling $29,980 for these costs. The petitioning creditor in the Federal Magistrate’s Court was Kogarah City Council, relying upon noncompliance with the bankruptcy notice.

1. Fagan J held that because the principal underlying proceedings were at an end, there was, for the reasons given by the Court of Appeal, no basis upon which to entertain any of the applications that were before his Honour. Fagan J then proceeded to give more detailed and specific reasons as to why Mrs Fokas’s applications could not possibly succeed and had to be dismissed at the threshold. At [17], Fagan J stated –

17. Ms Fokas attempted to argue that she has not effectively been made a bankrupt on the grounds there was an irregularity in the bankruptcy notice, that it was not properly served, that there was a failure of the petitioning creditor to enter the sequestration order and that there was a failure to serve the sequestration order on the trustee. All such matters are within the exclusive jurisdiction of the Federal Court and what is now the Federal Circuit Court, by force of section 27 of the *Bankruptcy Act*. Even if this application were brought in a fresh proceeding, it could not be entertained in the Supreme Court of New South Wales. Because of the procedural impossibility of dealing with such an application on notice of motion in the proceeding in this Court which is at an end, there is no occasion to contemplate transferring this aspect of what Ms Fokas claims to the Federal Court or the Federal Circuit Court. The application for the order that the Registrar-General amend the register of titles must be dismissed.

1. At [22] and [23], Fagan J recorded –

22 In the course of her submissions before me Ms Fokas dilated at great length upon errors that were made, as she perceives it, in Kogarah City Council's determination of a planning matter over 10 years ago. I stopped her in making those submissions because I found them completely irrelevant. It would be beyond the power of this Court to enquire into the rights or wrongs of a planning decision which has apparently been resolved and settled by judgments of the Land and Environment Court.

23 What happened in the Land and Environment Court is of no consequence except so far as it resulted in orders for costs being issued and those costs being the basis of a bankruptcy notice and eventually a sequestration order made upon non-compliance with the notice. It is not open to the Court to entertain argument over these much earlier stages in the history which has led to Ms Fokas being declared bankrupt, in circumstances where the trustee has become registered proprietor pursuant to vesting and where an order of this Court has been made for him to have possession of the property, that order having been executed long ago.

1. Fagan J concluded that all of the notices of motion that his Honour considered constituted an abuse of process of the Court, and that none of them was viable for the reasons that his Honour had given. Fagan J dismissed the notices of motion and, further, made an order under the *Vexatious Proceedings Act 2008* (NSW) that Mrs Fokas was prohibited from instituting proceedings in New South Wales.
2. *Fokas v Mansfield as Trustee of the Bankrupt Estate of Maria Fokas* [2019] FCA 1724.
3. In this proceeding, the Court determined that there should be summary judgment for the Trustee on the ground that there were no reasonable prosects of Mrs Fokas successfully prosecuting the proceeding. I find that the proceeding as a whole was instituted and pursued by Mrs Fokas without reasonable grounds, and was premised on unmeritorious arguments by Mrs Fokas directed to the validity of the sequestration order made against her estate. Mrs Fokas’s conduct of the proceeding involved taking steps without reasonable cause. Those steps included –

* the service of notices under s 78B of the *Judiciary Act*; and
* an application to remove the proceeding to the High Court.

1. This application.
2. For the reasons I have given at [28] to [35] above, the interlocutory applications that Mrs Fokas made in this proceeding, and which I shall dismiss, are to be characterised as vexatious.
3. *Fokas v Stack* [2010] NSWSC 571.
4. I have also examined the reasons of Fullerton J in *Fokas v Stack* [2010] NSWSC 571, but I do not take them into account, as they do not record any substantive finding in *Fokas v Stack* itself, other than the decision to make a vexatious proceedings order. I record the following by way of background only. Fullerton J set out in a schedule to her Honour’s reasons for judgment 14 proceedings in which Mrs Fokas had been unsuccessful as a plaintiff, or as an applicant. Mrs Fokas had commenced three sets of proceedings against a number of the defendants in the District Court of New South Wales between October 2007 and May 2009. Fullerton J stated at [12] that by October 2009 each of those proceedings was dismissed either as a result of a persistent or continuing failure on the part of Mrs Fokas to comply with the *Uniform Civil Procedure Rules* under the Court’s direction, or because it was ultimately determined to be “frivolous, vexatious and without a reasonable basis”. Fullerton J continued –

In respect of instituting and pursuing each proceeding the plaintiff’s conduct is demonstrative of a pattern of conduct where she persistently filed motions that were either incompetent or designed to challenge or seek leave to have set aside interlocutory decisions that issued for the orderly preparation and conduct of the proceedings.

1. Fullerton J set out under [13] a table containing a chronology of the course of proceedings in the District Court, and concluded at [14] –

On the evidence tendered before me I am satisfied that the plaintiff has frequently instituted vexatious proceedings (in particular against each of the defendants in the District Court and more recently in this Court) such as to justify the orders sought by them.

## Conclusions

1. The proceedings that Mrs Fokas has instituted or pursued and which I find are to be characterised as vexatious for the purposes of s 37AO(1) of the *Federal Court of Australia Act* fall into two categories: (1) the various proceedings in the Land and Environment Court that were dismissed; and (2) the proceedings in the Supreme Court of New South Wales and this proceeding, by which Mrs Fokas has challenged the Trustee’s title to her former residential property, and by which she has challenged the validity of the sequestration order made on 1 November 2012. The proceedings are factually linked, because the Kogarah Council, which was a party to the proceedings in the Land and Environment Court was the petitioning creditor in the proceeding in the Federal Magistrates Court, and the bankruptcy notice was founded upon judgments obtained by the Council in respect of costs orders made against Mrs Fokas. There are other links, including Mrs Fokas’s denial that she was liable for the Council’s costs. In evaluating whether Mrs Fokas has instituted and conducted vexatious proceedings frequently, I have had regard to the connections between the proceedings.
2. Mrs Fokas has developed a pattern of behaviour by which she does not accept the validity of orders that have been made against her, whether they be those in the Land and Environment Court, the Federal Magistrates Court, the Supreme Court of New South Wales, or this Court. Her challenges in this Court have been accompanied by highly creative but extravagant arguments that had no reasonable prospects of success. One can observe these features in Mrs Fokas’s most recent interlocutory application, namely the proposed minutes of orders of 16 December 2019, which I set out at [12] above.
3. For the above reasons, I am satisfied that Mrs Fokas has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals. I am also satisfied that the Court should make a vexatious proceedings order against Mrs Fokas that precludes her from commencing any proceeding in this Court without leave. I am mindful that such an order would preclude any appeal without leave: *Fuller v Toms* [2015] FCAFC 91; 234 FCR 535. A vexatious proceedings order is reasonably necessary to give finality to the dispute between Mrs Fokas and the Trustee as to the validity of the sequestration order. An order is also reasonably necessary to protect Court resources so that they are available to other litigants. And an order is reasonably necessary to protect Mrs Fokas from the consequences of her own actions: see, *Attorney-General v Reid* [2012] 3 NZLR 630 at [25] (Keane and Woodhouse JJ). Mrs Fokas has likely incurred sizeable costs and out-of-pocket expenses in conducting this and other litigation against the Trustee. The Trustee’s costs will likely be paid from the funds held in the estate. But this will reduce any sum to which Mrs Fokas would be entitled should a surplus of the estate be distributed. Distribution has been hindered because Mrs Fokas refuses to sign a statement of affairs (see [27] above). Finality might cause Mrs Fokas to turn her attention to whether her interests are best served by signing the statement of affairs, thereby permitting the administration of her bankrupt estate to run its course, which may result in payment to Mrs Fokas of the surplus in accordance with the orders of the Federal Circuit Court made on 24 January 2019: see, *Mansfield as Trustee of the Bankrupt Estate of Maria Fokas v Fokas* [2019] FCCA 134.

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| I certify that the preceding one hundred and two (102) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wheelahan. |

Associate:

Dated: 30 January 2020