FEDERAL COURT OF AUSTRALIA

Fokas v Mansfield as Trustee of the Bankrupt Estate of Maria Fokas [2019] FCA 1724

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| File number: |  |
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| Judge: | **WHEELAHAN J** |
|  |  |
| Date of judgment: | 21 October 2019 |
|  |  |
| Catchwords: | **PRACTICE AND PROCEDURE –** summary judgment – no reasonable prospect of successfully prosecuting proceeding.**BANKRUPTCY** – application seeking orders declaring bankruptcy invalid – validity of sequestration order challenged – no reasonable prospect of successfully prosecuting proceeding – application summarily dismissed.  |
|  |  |
| Legislation: | *Bankruptcy Act 1966* (Cth) s 27(1) s 30, s 31, s 43, s 58*Bankruptcy Amendment Act* *1992* (Cth) s 8*Federal Court of Australia Act 1976* (Cth)s 31A*Federal Magistrates Act* *1999* (Cth) s 47, s 48*Judiciary Act 1903* (Cth) s 78B*Federal Court Rules 2011* (Cth) r 39.31*Federal Magistrates Court (Bankruptcy) Rules 2006* (Cth) r 1.06, r 4.08*Federal Magistrates Court Rules 2001* (Cth) r 1.06, div 2.4, r 16.02, r 16.08  |
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| Cases cited: | *Amrit Lal Narain v Parnell* (1986) 9 FCR 479*Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (1999) 95 FCR 292*Bunnings Forest Products Pty Ltd v Bullen* (1994) 54 FCR 342*Cavanagh v Bank of New Zealand* (1990) 22 FCR 124*De Robillard v Carver* [2007] FCAFC 73; 159 FCR 38*Eastman v The Queen* (2008) 166 FCR 579*Osborne v Gangemi (No 2)* [2011] FCA 1278*Re an Application by the Public Service Association of New South Wales* (1947) 75 CLR 430*Scott v Bagshaw* (2000) 99 FCR 573*Spencer v The Commonwealth* (2010) 241 CLR 118 |
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| Date of hearing: | 21 October 2019 |
|  |  |
| Registry: |  |
|  |  |
| Division: |  |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | General and Personal Insolvency |
|  |  |
| Category: | Catchwords |
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| Number of paragraphs: | 50 |
|  |  |
| Counsel for the Applicant: | The applicant appeared in person |
|  |  |
| Counsel for the Respondent: | Ms A Carruthers |
|  |  |
| Solicitor for the Respondent: | Grace Lawyers |

ORDERS

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|  | VID 1669 of 2018 |
|   |
| BETWEEN: | MARIA FOKASApplicant |
| AND: | DAVID IAN MANSFIELD AS TRUSTEE OF THE BANKRUPT ESTATE OF MARIA FOKASRespondent |

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| --- | --- |
| JUDGE: | WHEELAHAN J |
| DATE OF ORDER: | 21 OCTOBER 2019 |

THE COURT ORDERS THAT:

1. Pursuant to s 31A of the *Federal Court of Australia Act 1976* (Cth)there be judgment for the respondent.
2. The costs of the respondent of and incidental to this proceeding be paid out of the estate of the applicant.
3. A hearing be fixed at 10.15 am on Friday 22 November on the question whether a vexatious proceedings order should be made in relation to the applicant.

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

REASONS FOR JUDGMENT

(Ex tempore)

WHEELAHAN J:

## Introduction

1. On 19 July 2012 the Kogarah City Council (as it was then known) filed a creditor’s petition in the Sydney Registry of the Federal Magistrates Court of Australia naming the applicant to this proceeding, Maria Fokas, as the respondent debtor. On 1 November 2012 a Registrar of the Federal Magistrates Court made a sequestration order against the estate of Mrs Fokas. A copy of the order as produced to this Court by the Federal Circuit Court of Australia is annexed to these reasons for judgment. The applicant remains an undischarged bankrupt.
2. On 27 December 2018, the applicant filed a handwritten application in the Melbourne Registry of this Court titled “Application – no Respondents”. By her application, the applicant sought orders declaring that her bankruptcy never existed, and that consequently it be declared void. As the title to the application indicated, no respondent to the proceeding was named. In her application the applicant stated that her claim for relief was supported by 10,516 persons, which was a reference to a petition that the applicant had procured, and that she relied upon s 39B(1A) of the *Judiciary Act 1903* (Cth).
3. At a case management hearing on 31 May 2019 the Court of its own motion ordered that the applicant’s trustee in bankruptcy (**the Trustee**) be joined as a respondent to the proceeding, and fixed the proceeding for a hearing for the purpose of determining whether the proceeding should be dismissed summarily. The hearing was initially listed on 23 September 2019, together with an interlocutory application filed by Mrs Fokas on 1 August 2019, to which I shall refer later. At the hearing on 23 September 2019, Mrs Fokas gave evidence that she had not received affidavit material that had been filed by the Trustee. There was evidence that the affidavit material had been sent by email and by post. Mrs Fokas gave evidence that, although she has an email address, she does not have an internet service, or any electronic devices, and used the computer at a municipal library to operate her email account. She gave evidence that she did not have any notice that she should check her email account in the relevant period. Mrs Fokas also denied receiving the affidavit material by post. After hearing evidence, I was not satisfied that Mrs Fokas had received the affidavit material, and I therefore adjourned the hearing to 21 October 2019, that is today. Today, counsel for the respondent informed the Court that about a week after the hearing on 23 September 2019, the affidavit material which had been sent to Mrs Fokas by registered post was returned to her instructing solicitors undelivered.

## Background

1. The creditor’s petition of the Kogarah City Council was founded upon a debt of $28,980.80, being the amount due under four final judgments obtained by the Council in the Local Court of New South Wales, together with interest. The act of bankruptcy relied upon was the failure of the applicant to comply with a bankruptcy notice that had been served upon her on 1 June 2012. The judgment debts resulted from the registration of costs certificates following the assessment of the Council’s costs of proceedings that the applicant had been ordered to pay: see, *Legal Profession Act 2004* (NSW), s 368(5).

### Land and Environment Court

1. Over the course of a number of years, the applicant and the Council were parties to several proceedings in the New South Wales Land and Environment Court relating to the applicant’s use of her property at 14 English Street, Kogarah, and to objections taken by the applicant to proposals by other occupiers of land in her neighbourhood. One of those cases was *Kogarah Municipal Council v Fokas* [1999] NSWLEC 188. In that case, the Council had alleged that Mrs Fokas, or somebody on her behalf, had kept one rooster, one peacock, three ducks, and 22 chickens on her property when no more than 5 chickens could be kept, and roosters were not permitted. As to the conduct of the proceedings before the Land and Environment Court, Sheahan J recorded at [9] –

As on the two previous occasions, today the Court has allowed Mrs Fokas substantial latitude in the presentation of her case. I allowed her to bring her rooster into the Court, to rely during submissions on a document upon which she said during evidence she would not rely, and to mix evidence and submissions throughout her presentation.

1. Sheahan J made orders, including that the applicant remove any rooster from her premises. A number of other proceedings were brought by Mrs Fokas against the Council, which included –
2. *Fokas v Kogarah Council* [2005] NSWLEC 626: where Mrs Fokas challenged the validity of development consents of two adjoining properties granted by the Council. On 7 October 2005, Cowdroy J dismissed the proceeding with costs.
3. *Fokas v Kogarah Council* [2007] NSWLEC 735: where Mrs Fokas challenged the validity of a development consent granted by the Council regarding a residential building. On 8 November 2007, Sheahan J summarily dismissed the proceeding with costs.
4. *Fokas v Kogarah Council & Energy Australia* [2008] NSWLEC 74: where Mrs Fokas filed a notice of motion seeking a declaration that a development consent granted by the Council for the construction of an electricity zone substation and associated infrastructure be stayed. On 1 February 2008, Lloyd J found that no reasonable cause of action was disclosed, and dismissed the proceeding with costs.
5. *Fokas v Kogarah Council* [2008] NSWLEC 98: where Mrs Fokas filed a notice of motion seeking to have the decision of Lloyd J of 1 February 2008, set aside. On 3 March 2008, Pain J dismissed the notice of motion.
6. *Fokas v Kogarah Council* [2008] NSWCA 145: where Mrs Fokas sought leave to appeal the order of Pain J of 3 March 2008, and on 26 June 2008, Allsop P and Tobias JA dismissed the application with costs.
7. *Fokas v Kogarah RSL Club Ltd (No 2)* [2012] NSWLEC 185: where the Council as third respondent to the proceeding applied for orders under the *Vexatious Proceedings Act 2008* (NSW) that Mrs Fokas be prohibited from instituting proceedings in the Land and Environment Court against the Council. On 9 August 2012 Biscoe J made the orders that were sought. In his reasons for judgment Biscoe J referred to orders that had been previously made by the Supreme Court of New South Wales in *Fokas v Stack* [2010] NSWSC 571 by which Mrs Fokas was prohibited from commencing proceedings against the defendants to that proceeding without leave under s 14 of the *Vexatious Proceedings Act*.

### Federal Magistrates Court

1. On 1 November 2012, a Registrar of the Federal Magistrates Court made the sequestration order against the estate of Mrs Fokas to which I referred at [1] above. The validity of this order is challenged by Mrs Fokas.
2. Mrs Fokas has not lodged a statement of affairs and her bankruptcy period therefore continues.

### Supreme Court of New South Wales

1. On 20 March 2013, the respondent was appointed trustee of the applicant’s bankrupt estate. The Trustee took proceedings in the Supreme Court of New South Wales against Mrs Fokas to obtain possession of her property at 14 English St Kogarah for the purposes of sale. The Trustee sold the property by public auction on 20 December 2017 for the sum of $1,850,000, and completion occurred on 6 April 2018. The Trustee’s endeavours to take possession, sell, and complete the sale of the property gave rise to the following proceedings in the Supreme Court of New South Wales –
2. *Mansfield v Fokas* (NSW Supreme Court, 2016/00213128): on 14 November 2016, judgment for possession was given to the Trustee, together with costs. Subsequently, the Court issued a writ for possession, which was executed by the Sherriff on 30 January 2017.
3. *Mansfield v Fokas* (unreported, Wilson J, 9 August 2017): the Court struck out a motion filed by Mrs Fokas which sought orders that appeared to traverse the orders that had been made in the proceeding.
4. *Fokas v Mansfield* [2017] NSWCA 231: on 4 September 2017 White JA refused an application by Mrs Fokas for orders restraining persons from acting upon the writ of possession, and to have the orders of Wilson J set aside. White JA held that the primary judge was not arguably wrong, and expressed serious doubts as to whether in any event the Court had jurisdiction to restrain the Trustee from exercising his powers, having regard to s 27 of the *Bankruptcy Act 1966* (Cth).
5. *Fokas v Mansfield (No 2)* [2017] NSWCA 261: on 9 October 2017 White JA dismissed an application by Mrs Fokas for recovery of possession of the property and that the orders of Wilson J should be set aside. White JA held that the application and the amended notice of appeal were incompetent, and alternatively that Mrs Fokas had not demonstrated any arguable basis for setting aside the order.
6. *Fokas v Mansfield (No 3)* [2018] NSWCA 315: on 7 December 2017 the Court of Appeal (Basten JA, Meagher and Payne JJA) dismissed an application for review of the orders of White JA, holding that White JA was correct to conclude that the amended notice of appeal was incompetent, and that there was no arguable basis to restrain the Trustee from exercising his power as trustee in bankruptcy.
7. *Mansfield v Fokas* [2018] NSWSC 249: on 28 February 2018 Fagan J dismissed with costs five notices of motion that had been filed by Mrs Fokas, and pursuant to s 8(7) of the *Vexatious Proceedings Act* orderedthat Mrs Fokas was prohibited from instituting proceedings in New South Wales.
8. *Mansfield v Fokas* (NSW Supreme Court, 2018/00099701): on 8 March 2018, Mrs Fokas lodged a caveat over the title to the property. On 5 April 2018, Darke J ordered that Mrs Fokas withdraw the caveat, and ordered that she be permanently restrained from lodging a caveat and that the Registrar-General be restrained from accepting any further caveats or dealings from Mrs Fokas in respect of the property. Mrs Fokas was ordered to pay costs.

### Federal Circuit Court

1. On 10 April 2018, Mrs Fokas lodged an application in the Federal Circuit Court seeking review of orders of a Registrar of the Federal Magistrates Court that were made on 3 October 2012 authorising substituted service of the creditor’s petition, and of the sequestration order that was made on 1 November 2012. Mrs Fokas filed two affidavits in support of that application. On 11 April 2018, Mrs Fokas discontinued the application.
2. On 12 April 2018, Mrs Fokas filed a second application in the Federal Circuit Court seeking review of the orders referred to above, and filed five affidavits. On 4 May 2018, Mrs Fokas discontinued the second application.
3. On 24 January 2019, His Honour Judge Street of the Federal Circuit Court made orders in consequence of the failure of Mrs Fokas to file a statement of affairs as follows –

The Applicant distribute the dividends of the bankrupt estate of Maria Fokas amongst the creditors who have proved their debt in accordance with Part IV Division 5 of the *Bankruptcy Act 1966* (Cth), as if the bankrupt had filed a Statement of Affairs, and those creditors had been declared as creditors therein on the following conditions:-

(i) The Applicant proceed with the annulment of the bankruptcy under s 153A of the *Bankruptcy Act 1966* (Cth).

(ii) The surplus that would otherwise be paid to the former bankrupt on annulment is to be paid to the Official Receiver to be held by the Official Receiver on behalf of the bankrupt until the bankrupt completes, signs and provides to the Official Receiver a Statement of Affairs in accordance with the requirements of s 54 of the *Bankruptcy Act 1966* (Cth) or until further order by the Court.

1. In this Court, the applicant disputes that a valid sequestration order was made against her estate, and therefore disputes that she was required to file a statement of affairs.

## The application by Mrs Fokas in this Court

1. By her application to this Court which I referred at [2] above, Mrs Fokas seeks the following relief, which I set out *verbatim* –

RELIEF:

In relation to a matter Court file No SYG 1570 2012 Date filed/presented: 19 Jul. 2012. Federal Magistrates Court then, Sydney Registry. NSW.

Relief:

(as it is refer on three Petitions. The Petition 3 is from 14 June to 25 August 2018).

“2.

RECOGNISE AND DECLARE a Bankruptcy never existed against Maria Fokas”.

and

concequently

Declair void from the start of the title of the “Trustee” to my property. To my life Estate: Lot 58/2013, known as 14 English Street Kogarah 2217 NSW Sydney.

(section 31(1)(f), Part III, Div. 2 Bankruptcy Act 1966).

The operation of the “Order” 1st Nov. 2012, if it was entered on time, needed

a further Order.

### Interlocutory application

1. As I have mentioned, Mrs Fokas filed an interlocutory application on 1 August 2019. By that application Mrs Fokas seeks a range of orders, which again I set out *verbatim* –

INTERLOCUTORY ORDERS SOUGHT

On the base of fraud, - of deception, that followed by an adverce possession of my home and also by an Application File No SYG3606/2018, in the Federal Circuit Court of Australia NSW, and an Order BEFORE Justice Street 24 January 2019.

As for the fraud please see paragraph 21 on the Supporting Affidavit that on the last line I refer:

..” as such Order did not exist.”

and on paragraph 26, that I refer:

“On this Statement of Claim by Mr Mansfield, does not refer to a Bankruptcy Order **made**, as such order was not made.

INTERLOCUTORY ORDERS SOUGHT

1. A Declaration:

An order BEFORE Justice Street (Order includes Direction), made (made includes give) on 24 January 2019 in the Federal Circuit Cout of Australia Sydney NSW **is** stay.

2. **is** declared invalid.

please continue

3. The Total amount a purchaser paid to the Respondent(s) for my **home**, for my estate 14 English Street Kogarah NSW known as: Lot 58/2013, to be paid immediately by the Respondent(s) to Maria Fokas, including 10% or more interest since 20 December 2017.

4. The full Court fees paid by the Applicant since 26 July 2017, starting from the Supreme Court NSW.

and

5. The age pension savings over $10.000.00 plus interest on it to also be paid immediately.

6. Other expenses result of adverse possession of my home.

and

7. The work done by me consequently to this including work done by my children and the work I missed out of doing;

8. To be paid by the Respondent(s) on time fixed by the Court.

and

9. Enforce these Orders

and

10. To make an Order to be a Party to the proceeding Deloitte financial Advisory Services Pty Ltd Company, 60 Station street Eclipsy Tower Levels 16 to 19 Parramatta 2050 NSW or second address:

Grosvenor Place 225 George Street Sydney ACN 6117 19841.

and

11. Enforce these Orders

and

12. To correct the DATE of the NOTICE of filing for my Application file No VID 1669/2018

and

13. If necessary make rules appropriate.

and

14. TRUNSFER this Application and Application File No: VID1669/2018, to Sydney Registry NSW

and

15. The hearing of this Application and the matters in it to be on a different date to the VID1669/2018 application.

### The affidavits filed in this proceeding

1. I received all of the affidavits filed by the applicant and the respondent into evidence. The applicant filed the following affidavits, which were sworn by Mrs Fokas, unless otherwise indicated –
2. an affidavit sworn 21 December 2018;
3. an affidavit sworn 4 March 2019;
4. a second affidavit sworn 4 March 2019;
5. an affidavit sworn 12 March 2019;
6. an affidavit of her son, Panagiotis Fokas, sworn 21 March 2019;
7. an affidavit sworn 27 March 2019;
8. an affidavit sworn 9 May 2019;
9. an affidavit sworn 10 May 2019;
10. an affidavit sworn 20 May 2019;
11. an affidavit sworn 29 May 2019;
12. an affidavit of the applicant’s son, Panagiotis Fokas, sworn 29 May 2019
13. an affidavit sworn 30 May 2019;
14. an affidavit of the applicant’s daughter, Irene Fokas, sworn 30 May 2019;
15. an affidavit of the applicant’s son, Panagiotis Fokas, sworn 30 May 2019;
16. an affidavit sworn 18 June 2019;
17. an affidavit sworn 25 July 2019;
18. an affidavit sworn 29 July 2019;
19. a second affidavit sworn 29 July 2019;
20. a third affidavit sworn 29 July 2019;
21. an affidavit sworn 20 September 2019;
22. an affidavit sworn 17 October 2019 deposing to service on the respondent of an application for removal to the High Court under s 40 of the *Judiciary Act;*
23. a second affidavit sworn 17 October 2019 deposing to service on the Commonwealth Attorney-General of the application for removal to the High Court;
24. a third affidavit sworn 17 October 2019 deposing to service on the New South Wales Attorney-General of the application for removal to the High Court.
25. Much of the contents of the affidavits filed by Mrs Fokas is argumentative and difficult to follow, but I have considered all of the affidavits.
26. Two affidavits were filed on behalf of the respondent –
27. an affidavit of the Trustee affirmed 24 April 2019, which set out some of the background relevant to the applicant’s claims, and which annexed some relevant documents; and
28. an affidavit of the Trustee’s solicitor affirmed 10 September 2019 which annexed documents produced by the Federal Circuit Court pursuant to a subpoena issued to it by this Court on 25 July 2019.

### Documents handed up in this proceeding

1. During the course of the hearing today, Mrs Fokas handed up to the Court a number of documents. Mrs Fokas noted that while she had attempted to file some of these documents, none of them had yet been stamped or officially received by the Court. The respondent did not press any objections to the Court receiving the documents. The documents handed up are set out below and were marked as exhibits –
2. A letter dated 13 September 2019 from the Crown Solicitor of New South Wales to Mrs Fokas in response to a notice by Mrs Fokas under s 78B of the *Judiciary Act* to the Attorney General of New South Wales, indicating that the Attorney General had decided not to intervene in the proceeding (Exhibit A1).
3. An affidavit of Mrs Fokas sworn 18 October 2019 relating to an application for the matter to be removed to the High Court (Exhibit A2).
4. An affidavit of Mrs Fokas sworn 9 October 2019 without exhibits (as Mrs Fokas did not have copies of the exhibits available to provide to the Court), asserting that her bankruptcy had been improperly or inadequately investigated and that that issue had not come before a court previously (Exhibit A3).
5. A letter to the registry of the High Court of Australia seeking an explanation should her application for removal of the present proceeding to the High Court of Australia be refused for filing (Exhibit A4).
6. A document titled “Australian Government, Australian Financial Security Authority, National Personal Insolvency Index” extracted in Canberra at 4.06pm, 31 July 2017, of the respondent Mr David Ian Mansfield (Exhibit A5).
7. A document titled “Application for Review” in the Federal Circuit Court dated 20 March 2018 and signed by Mrs Fokas, which Mrs Fokas informed the Court had not been accepted for filing (Exhibit A6).
8. A document titled “Originating application a step FOR REVIEW” in the Federal Court of Australia dated 21 May 2018 and signed by Mrs Fokas, which Mrs Fokas informed the Court was not accepted for filing (Exhibit A7).
9. In addition, the Court received a copy of an application for removal of this proceeding to the High Court of Australia dated 9 October 2019. This document was unstamped, and whilst Mrs Fokas informed the Court that she had attended upon a registrar of the High Court in Sydney with the application, there is no evidence that the High Court has accepted any such application for filing.

### Notice under s 78B of the Judiciary Act

1. Mrs Fokas also filed two handwritten notices of a constitutional matter under s 78B of the *Judiciary Act*. The first notice is dated 24 June 2019 and names the Commonwealth and New South Wales Attorneys-General as respondents. In the body of the notice Mrs Fokas states (inter alia) –

NATURE OF CONSTITUTIONAL MATTER:

The Commonwealth of Australia constitution (the Constitution) section 51 refer:

“The Parliament shall subject to this Constitution … make laws … with respect to ….

- - - - -

(xxiv) the … execution throughout the Commonwealth of the Civil … process and the Judgments of the Courts … “

FACTS SHOWING THAT SECTION 78B

Judiciary Act 1903 applies:

There was **NO** EVIDENCE indicating that a Sequestration Order **is** made against the estate of Maria Fokas:

So that Justice Wheelahan to make/give Order 1 and Order 2.

Thus his Judgment, (Judgment include Orders) did NOT have Justice.

There was NO EVIDENCE that there was control of my Estate: 14 English Street Kogarah Sydney NSW Known as: Land Lot 58 IN DEPOSITED PLAN 2013 LOCAL GOVERNMENT AREA KOGARAH PARISH OF ST GEORGR COUNTY OF CUMBERLAND. TITLE DIAGRAM D.P. 2013. NSW.

The document relevant to the Constitutional matter **is** the Orders made on 31 May 2019 by Justice Wheelahan. (Order also mean direction).

and

Annexure “A” in my Affidavit 21 Dec 2018 that on the Order, in other words, on the direction Paragraph 1, Registrar Tesoriero indicate:

“1. A Sequestration Order **be** made against the estate of Maria Fokas”

Registrar Tesoriero in his direction 1., DID NOT STATE:

A Sequestration Order **is** made against the estate of Maria Fokas.

(Please see my Affidavit 18 June 2019 in support)

1. The second notice is dated 23 August 2019 and also names the Commonwealth and New South Wales Attorneys-General as respondents. In the body of the second notice the applicant states (inter alia) –

NATURE OF CONSTITUTIONAL MATTER

The Commonwealth of Australia Constitution (the Constitution)

Section 51 refer:

“The Parliament shall subject to this Constitution … make Laws … With respect to … …

(xxiv) the … execution throughout the Commonwealth of the Civil … prosess and the Judgments of the Courts …”

Facts Showing THAT SECTION 78B

Judiciary Act 1903 applies:

There was NO EVIDENCE indicating that a Sequestration Order **is** made against the Estate of Maria Fokas;

So that Justice Street on 24 January 2019 **be** allowed to make/give Orders under the Bankruptcy Act 1966!;

in the Federal Circuit Court NSW Court file No: SYG3606/2018.

The document relevant to the Constitutional matter **is** the Orders made that were in front of Justice Street. (order also mean Direction).

1. Section 78B(1) of the *Judiciary Act* provides –

Where a cause pending in a federal court including the High Court or in a court of a State or Territory involves a matter arising under the Constitution or involving its interpretation, it is the duty of the court not to proceed in the cause unless and until the court is satisfied that notice of the cause, specifying the nature of the matter has been given to the Attorneys-General of the Commonwealth and of the States, and a reasonable time has elapsed since the giving of the notice for consideration by the Attorneys-General, of the question of intervention in the proceedings or removal of the cause to the High Court.

1. In order for a proceeding to involve a matter arising under the Constitution or its interpretation for the purposes of s 78B(1) of the *Judiciary Act*, the proceeding must “*really and substantially*” involve the matter: *Amrit Lal Narain v Parnell* (1986) 9 FCR 479 at p 489 (Burchett J), citing *Re an Application by the Public Service Association of New South Wales* (1947) 75 CLR 430 at p 433 (Williams J). Section 78B does not impose on the Court a duty not to proceed pending the issue of a notice no matter how trivial, unarguable or concluded the constitutional point may be. If the asserted constitutional point is frivolous or vexatious or raised as an abuse of process it will not attach, to the matter in which it is raised, the character of a matter arising under the Constitution or involving its interpretation: *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (1999) 95 FCR 292 at [13]-[14] (French J).
2. No matter involving the Constitution or its interpretation really and substantially arises in this proceeding. The notices that Mrs Fokas has filed proceed on an assumption that the sequestration order made against her on 1 November 2012 was invalid. No constitutional matter arises in relation to the validity of that order, or in relation to any other issue that is before the Court. Accordingly, s 78B(1) of the *Judiciary Act* is not engaged, and the Court does not need to concern itself with whether notice of a constitutional matter has been given to the Attorneys-General of the Commonwealth and the States.

### Application for removal to the High Court

1. As I have stated at [20] above, there is no evidence that the High Court has accepted for filing the application of Mrs Fokas for removal of the proceeding to that Court under s 40 of the *Judiciary Act*. The proposed application does not appear to raise any real and substantial matter arising under the Constitution or involving its interpretation. In the circumstances, the production of a copy of a proposed application, which has occurred at the eleventh hour, is not a reason not to proceed and determine the issues that are before the Court. There is no irremediable prejudice caused to Mrs Fokas by the Court proceeding with the hearing fixed for today and determining the matter, and the promotion of the overarching purpose of civil practice in s 37M of the *Federal Court of Australia Act* *1976* (Cth) requires that the matter not be further adjourned.

## Consideration of the issues in this proceeding

1. During the course of the case management hearing on 31 May 2019 Mrs Fokas informed the Court that the issue that she wanted to press was whether the sequestration order was in fact made, and whether it was a valid order.
2. Mrs Fokas’s application (see [14] above) essentially seeks declarations of invalidity in relation to her bankruptcy. The matter which Mrs Fokas has raised by her application concerns the validity of the sequestration order, and the Trustee’s title to her property. I shall assume, without deciding, that it is reasonably arguable that the Court has jurisdiction to hear the matter to which Mrs Fokas’s application gives rise in the exercise of the concurrent jurisdiction in bankruptcy conferred on the Court by s 27(1) of the *Bankruptcy Act*, and which is subject to elaboration in s 30 and s 31. Under s 30 of the Act, the Court –

(a) has full power to decide all questions, whether of law or of fact, in any case of bankruptcy or any matter under Part IX, X or XI coming within the cognizance of the Court; and

(b) may make such orders (including declaratory orders and orders granting injunctions or other equitable remedies) as the Court considers necessary for the purposes of carrying out or giving effect to this Act in any such case or matter.

1. And under s 31(1)(f) of the Act, an application to declare for or against the title of the trustee to any property must be heard in open court, and is therefore to be taken to be within the concept of a proceeding in bankruptcy: *Scott v Bagshaw* (2000) 99 FCR 573 at [18].
2. On 31 May 2019, the Court fixed the hearing for the purpose of determining whether the proceeding should be summarily dismissed. At the hearing which was adjourned on 23 September 2019 the Court directed Mrs Fokas’s attention to s 31A of the *Federal Court of Australia Act*. Section 31A empowers the Court to give judgment in a proceeding if it is satisfied that an applicant has no reasonable prospect of prosecuting the proceeding. Section 31A(3) provides that a proceeding need not be hopeless or bound to fail for it to have no reasonable prospect of success. The inquiry required by s 31A is whether there is a reasonable prospect of prosecuting the proceeding, and not whether the proceeding would necessarily fail: *Spencer v The Commonwealth* (2010) 241 CLR 118 at [52] (Hayne, Crennan, Kiefel and Bell JJ).

### The first issue – was the order entered?

1. In her affidavit sworn 21 December 2018 Mrs Fokas stated that a copy of the sequestration order that she was given on 4 March 2013 by a Court employee was not stamped, did not have a seal, and was not signed, and alleged that therefore the order had not been validly entered. Mrs Fokas annexed to her affidavit a copy of the order of the Federal Magistrates Court dated 1 November 2012 which stated that it was prepared in the Sydney Registry of the Court. The copy of the order which Mrs Fokas annexed was in the same terms as the order annexed to these reasons, but was not stamped, sealed, or signed. Mrs Fokas submitted that if the order was not entered, it could not have been an “order”, but merely a “direction”, and referred to r 39.31(b) of the *Federal Court Rules 2011* which provides that an order in this Court need not be entered if the order merely gives directions about a proceeding.
2. There is a distinction between the making of an order, and its entry: see, *Eastman v The Queen* (2008) 166 FCR 579. Rule 16.02 of the *Federal Magistrates Court Rules 2001* (Cth) provided as follows –

**16.02 Date of effect**

Unless the Court otherwise orders, a judgment or order takes effect on the day when it is given or made.

1. The distinction between the making and entry of an order may be material to the operation of rules such as r 16.05 of the *Federal Magistrates Court Rules*, which provided that the Court could vary or set aside a judgment or order before it is entered. In relation to entry of sequestration orders, r 4.08 of the *Federal Magistrates Court (Bankruptcy) Rules 2006* (Cth), which were in force at the relevant time, provided –

**4.08 Notification and entry of sequestration order**

(1) A sequestration order must be in accordance with Form 7.

(2) If the Court makes a sequestration order against the estate of a debtor, the applicant creditor must:

(a) on the same day as the order is made, notify the trustee, in writing, of his or her appointment; and

(b) within 2 days after the order is made, give a copy of the sequestration order to any person who has consented to act as a trustee.

(3) If the order is not entered at the time the order is made, the applicant creditor must, as soon as practicable, request entry of the order in accordance with rule 16.08 of the *Federal Magistrates Court Rules 2001*.

1. Section 43(2) of the *Bankruptcy Act* provides that a debtor becomes bankrupt upon the *making* of a sequestration order –

(2) Upon the making of a sequestration order against the estate of a debtor, the debtor becomes a bankrupt, and continues to be a bankrupt until: (a) he or she is discharged by force of subsection 149(1); or (b) his or her bankruptcy is annulled by force of subsection 74(5) or 153A(1) or under section 153B.

1. In *Cavanagh v Bank of New Zealand* (1990) 22 FCR 124 von Doussa J stated –

On a literal reading of s 43(2) of the *Bankruptcy Act*, the words “Upon the making of a sequestration order against the estate of a debtor, the debtor becomes a bankrupt …” would suggest that the order is to operate immediately upon pronouncement.

1. Von Doussa J supported this construction by reference to the terms of s 37 of the *Bankruptcy Act*, as then in force, which empowered the Court to rescind or suspend the operation of a sequestration order before it was signed and sealed, and held that this implied that the order was in operation from the time it was pronounced. Section 37 was repealed and substituted by s 8 of the *Bankruptcy Amendment Act* *1992* (Cth), and the substituted section excluded sequestration orders from its operation. Nonetheless, the decision of von Doussa J in *Cavanagh* has been followed by the Full Court: *De Robillard v Carver* [2007] FCAFC 73; 159 FCR 38 at [129] (Buchanan J, Moore and Conti JJ agreeing).See also: *Bunnings Forest Products Pty Ltd v Bullen* (1994) 54 FCR 342 at p 347 (Carr J); *Osborne v Gangemi (No 2)* [2011] FCA 1278 at [1] (Bromberg J).
2. Rule 16.08 of the *Federal Magistrates Court Rules* provided for the entry of orders –

**16.08 Entry of orders**

(1) An order may be entered:

(a) under an arrangement under section 90 of the Act; or

(b) under the seal of the Court signed by:

(i) a Federal Magistrate; or

(ii) a Registrar; or

(iii) an officer of the Court acting with the authority of the Chief Executive Officer.

(1A) For paragraph (1) (b), an order may be signed by electronic means.

(2) An order may be entered, in accordance with subrule (1):

(a) in the registry; or

(b) in court; or

(c) in chambers.

1. Sections 47 and 48 of the *Federal Magistrates Act* *1999* (Cth) made provision for the seal of the Federal Magistrates Court, and for Federal Magistrates Court stamps –

**47 Seal of the Federal Magistrates Court**

(1) The Federal Magistrates Court is to have a seal, and the design of the seal is to be determined by the Minister.

(2) The seal of the Federal Magistrates Court must be kept in such custody as the Chief Federal Magistrate directs.

(3) The seal of the Federal Magistrates Court must be affixed to documents as provided by this or any other Act or by the Rules of Court.

**48 Federal Magistrates Court stamps**

(1) There are to be one or more Federal Magistrates Court stamps. For this purpose, a Federal Magistrates Court stamp is a stamp the design of which is, as nearly as practicable, the same as the design of the seal of the Federal Magistrates Court.

(2) A document or a copy of a document marked with a Federal Magistrates Court stamp is as valid and effectual as if it had been sealed with a seal of the Federal Magistrates Court.

(3) A Federal Magistrates Court stamp must be affixed to documents as provided by this or any other Act or by the Rules of Court.

1. Division 2.4 of the *Federal Magistrates Rules* made provision for the attachment to documents of the seal and stamp of the Court –

**2.09 Use of seal of Court**

The seal of the Court must be attached to:

(a) Rules of Court; and

(b) any other documents the Court or a Federal Magistrate directs or the law requires.

*Note 1* The seal must be attached to all writs, commissions and process issued from the Court: see subsection 49(1) of the Act. It may also be used to enter an order: see rule 16.08.

*Note 2* The design of the seal is decided by the Minister and the seal is kept in custody as directed by the Chief Federal Magistrate: see section 47 of the Act.

**2.10 Stamp of Court**

(1) The Registrar must keep in his or her custody a stamp designed, as nearly as practicable, to be the same as the design of the seal of the Court.

(2) The stamp of the Court must be attached to all process filed in the Court and orders entered and to other documents as directed by the Court.

*Note* Documents marked with the stamp are as valid and effectual as if sealed with the seal of the Court: see subsection 48(2) of the Act.

**2.11 Methods of attaching the seal or stamp**

The seal or stamp of the Court may be attached to a document:

(a) by hand; or

(b) by electronic means; or

(c) in another way.

1. Mrs Fokas’s allegation that the order was not stamped, sealed, or signed is answered by the contents of the file that was produced by the Federal Circuit Court. The file contains a copy of the original order, which is annexed to these reasons. The order states that it was prepared by the Federal Magistrates Court at its Sydney Registry, and shows that it was stamped and signed by a Registrar. By operation of s 48(2) of the *Federal Magistrates Act* (set out at [38] above)*,* the fact that the order is marked with a stamp renders it as valid and effectual as if it had been sealed. There is no reason to doubt that the sequestration order was validly made on 1 November 2012 and entered on that day in accordance with r 16.08 of the *Federal Magistrates Court Rules*. The making of the order is confirmed by an entry in the National Insolvency Index made on 5 November 2012, which records the date of bankruptcy as 1 November 2012.
2. Even if, contrary to my conclusion, the sequestration had not been entered in compliance with the Rules, that would not affect the validity of the sequestration order, which by operation of r 16.02 of the *Federal Magistrates Court Rules* and s 43(2) of the *Bankruptcy Act* took effect when it was made. Furthermore, if there were any non-compliance with the Rules in the entry of the sequestration order (and none is apparent), the Federal Circuit Court (as the Federal Magistrates Court now is) has power under r 1.06 of its Rules to dispense with compliance.

### The second issue – the terms of the order

1. Mrs Fokas claims, in substance, that by the terms of the sequestration order, no bankruptcy has become effective. Mrs Fokas relies on the first paragraph of the order –

A Sequestration Order ***be*** made against the estate of Maria Fokas.

(emphasis added)

1. As her notices under s 78B of the *Judiciary Act* foreshadow, Mrs Fokas claims that the order was not effective because it stated that a sequestration order “*be”* made, indicating a future event, rather than stating that a sequestration order “*is*” made.
2. There is no merit in this claim. The word “*be*” in the order was an auxiliary verb that was used to express the making of the sequestration order in the passive tense. Furthermore, the first paragraph of the orders was in accordance with the form of sequestration order in Form 7 that at the time was prescribed by r 4.08(1) of the *Federal Magistrates Court (Bankruptcy) Rules 2006*, which is set out at [33] above. An order in that form had originally been prescribed by Form 12 to the *Bankruptcy Rules* and was introduced by an amendment effected by SR 40 of 1981. In this statutory context, there is no scope to interpret the order in any way other than as a sequestration order that attracted the consequences provided for by s 43 and s 58 of the *Bankruptcy Act*.

### Sundry issues

1. Mrs Fokas made a number of other submissions, including that the extract from the Australian National Personal Insolvency Index which she tendered did not show that the respondent had renewed his qualifications as a trustee. I reject this submission. The extract shows that the start date for the respondent’s registration was 7 February 2005. There is no reason to infer that the registration did not continue, and Mrs Fokas offered no evidence to suggest otherwise.
2. Mrs Fokas also made some miscellaneous submissions about the form of the creditor’s petition, and submitted that it had not complied with Form 6 of the *Federal Magistrates Court (Bankruptcy) Rules 2006* because it did not contain a statement of reasons for, and details of, the debt, including details of any judgment debt. There is no merit to this claim. The creditor’s petition identified the judgment debts, and described the claimed act of bankruptcy as being the failure to comply with a bankruptcy notice served on Mrs Fokas on 1 June 2012. In any event, r 1.06(2) of the *Federal Magistrates Court (Bankruptcy) Rules* provided that there was sufficient compliance with the rules in relation to a document that is required to be in accordance with a form if the document was substantially in accordance with the form. Furthermore, non-compliance with the form for a creditor’s petition prescribed by the rules does not affect the legal force of the sequestration order that was made. Mrs Fokas did not pursue any application for review of the sequestration order pursuant to r 7.06 of the *Federal Magistrates Court (Bankruptcy) Rules* and s 104(2) of the *Federal Magistrates Act*, or otherwise apply to annul the bankruptcy, or appeal the sequestration order.

### The interlocutory application

1. The orders that Mrs Fokas sought in her interlocutory application (see [15] above) are premised on the sequestration order being invalid. As there is no reason to doubt the validity of the sequestration order, the interlocutory application will be dismissed.

## Conclusions

1. For the foregoing reasons, Mrs Fokas has no reasonable prospect of successfully prosecuting this proceeding. There will therefore be judgment for the respondent pursuant to s 31A(2) of the *Federal Court of Australia Act*.

## Vexatious proceedings order

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 a person not commence proceedings in the Court. The power may be engaged if the Court is satisfied that the person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals. 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.
2. The current proceeding is but one of many endeavours by Mrs Fokas to challenge the Trustee’s title to her property. She has been declared a vexatious litigant by the Supreme Court of New South Wales following her unsuccessful proceedings in that Court. And as I have noted, Mrs Fokas was declared a vexatious litigant by the New South Wales Land and Environment Court. I will make directions to allow Mrs Fokas to be heard on the question whether a vexatious proceedings order should be made against her by this Court.

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| I certify that the preceding fifty (50) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wheelahan. |

Associate:

Dated: 21 October 2019

**ANNEXURE**

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