IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

S CI 2009 06947

NOEL BATROUNEY and ANDREW LYLE (in their capacity as receivers of the law practice known as Hollows Lawyers ABN 840 058 016) — Applicants

v

DAVID FORSTER — First Respondent

and

MAIRE PHILOMENA FORSTER — Second Respondent

JUDGE:	KEOGH J
WHERE HELD:	Melbourne
DATE OF HEARING:	16 June 2016
DATE OF JUDGMENT:	14 July 2016
CASE MAY BE CITED AS:	Batrouney & Anor v Forster & Anor
MEDIUM NEUTRAL CITATION:	[2016] VSC 393

PRACTICE AND PROCEDURE – Freezing order – Application to vary – Freezing order made against entirety of superannuation fund containing separate accounts for each respondent – Second respondent seeking to vary freezing order in respect of the funds in her name only – Arguable case established that a portion of the funds in the account in the second respondent's name were 'tainted funds' – Requisite risk of dissipation shown – 'Just and convenient' that a freezing order be made against that portion of the funds in the account only – Freezing order varied.

APPEARANCES:	Counsel	Solicitors
For the Applicants	Mr C Caleo QC	Hall & Wilcox
For the First Respondent	No appearance	
For the Second Respondent	Mr A P Trichardt	Charles Fice Lawyers

HIS HONOUR:

Introduction

1 By order made by Emerton J on 12 April 2010, the applicants were appointed receivers to Hollows Lawyers (the 'legal practice') under the *Legal Profession Act 2004*.[1] Subsequently, on 21 May 2010, Emerton J made an order sought by the applicants and the Legal Services Board to restrain the first respondent, the principal of the legal practice, '… from disposing of, dissipating or otherwise dealing with, the net proceeds of the sale of the land and the improvements known as Suite 13, 395 Nepean Highway, Frankston, Victoria.'

2 In a separate proceeding commenced on 13 February 2012, the applicants sought to recover from the first respondent an amount of just under $7 million (the 'recovery proceeding'). The claims against the first respondent related to the conduct by him of the legal practice and included allegations that money held in trust for certain clients was transferred for double payment of disbursements (the 'double disbursement claims'), and allegations that trust money was transferred for payment of accounts for professional fees rendered otherwise than in accordance with the terms of relevant fee agreements (the 'fee agreement claims').

3 On 27 May 2015, Robson J delivered judgment dismissing the applicants' claims in the recovery proceeding.[2] Those orders were successfully appealed by the applicants in respect of both the double disbursement claims and the fee agreement claims. The initial judgment of the Court of Appeal was delivered on 27 April 2016.[3]

4 Following delivery of the Court of Appeal judgment, the applicants sought information from the first respondent as to his assets, as well as various undertakings from him not to dispose of, deal with or diminish assets, including assets of the Forster Superannuation Fund (the 'super fund'). As a consequence of what they considered to be an inadequate response by the first respondent, the applicants made this application for an order restraining the respondents from dealing with the assets of the first respondent and the assets of the super fund. I made that ex parte order on 6 May 2016.

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[1] *Legal Services Board v Forster* [2010] VSC 102.
[2] *Batrouney v Forster* [2015] VSC 230.
[3] *Batrouney v Forster* [2016] VSCA 80.

5 On 6 June 2016, the Court of Appeal made further orders on the appeal in the recovery proceeding, which relevantly provide that:

(a) the first respondent pay to the applicants the amount of $2,034,563.44; and

(b) the proceeding be otherwise remitted to the Trial Division for the purpose of calculating what (if any) further amount the first respondent is to pay to the applicants in respect of the double disbursement claims and the fee agreement claims.[4]

The court declined the first respondent's application for a stay pending the hearing and determination of any special leave application to the High Court.

6 At the request of the second respondent, the freezing order application was brought back before the court to allow the second respondent to argue that, insofar as the order restrained her from dealing with the portion of the super fund represented by the accrued benefit in the fund account in her name, it should be discharged. The first respondent did not appear at the hearing, and was not represented.

7 The evidence before the court on this application is:

(a) affidavits of Jacob Paul Uljans (a solicitor in the employ of Hall & Wilcox, who act for the receivers in this matter) affirmed 6 May 2016, 13 May 2016 and 15 June 2016;

(b) affidavit of the first respondent sworn 6 June 2016; and

(c) affidavit of the second respondent sworn 8 June 2016.

8 For the second respondent it was submitted that the court should not admit the third of Mr Uljans' affidavits into evidence, because it was not filed in accordance with the timetable previously set by the court. That timetable was made in contemplation of an application by the first respondent to discharge the freezing order at some later date. Mr Uljans' third affidavit was actually filed in response to the second respondent's urgent application to discharge the freezing order. In the circumstances, I determined to accept the affidavit into evidence.

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[4] *Batrouney v Forster (No 2)* [2016] VSCA 131.

9 The affidavit of the second respondent and the exhibits to that affidavit demonstrate that separate accounts were held in the super fund for each of the two respondents at least for the period for which accounts were made available, that is the financial years from 2005 to 2015. The 2015 financial statements for the super fund demonstrate that as at 30 June 2015 there were net assets available to pay benefits of $5,410,634.00. This was represented by accrued benefits in the account of the first respondent of $1,905,553.00, and in the account in the name of the second respondent of $3,505,081.00. The Court of Appeal has already made an order in favour of the applicants against the first respondent in the recovery proceeding in the amount of $2,034,563.44. The applicants argue that the final judgement in their favour against the first respondent once the trial in respect of the recovery proceeding concludes will likely be an amount in excess of $6,700,000.00. The first respondent deposes that he has few assets other than his interest in the super fund. If this is so, then the first respondent's assets will clearly be insufficient to meet the judgement which the applicants anticipate obtaining in the recovery proceeding.

10 For the applicants it is submitted that the evidence on this application establishes an arguable case that contributions made to the super fund in the years 2007 to 2010 originate from or are related to the double disbursement claims and the fee agreement claims transactions (the 'impugned transactions') and represent tainted funds (the 'tainted funds'). Further, it was submitted that it was arguable that, to the extent that tainted funds were paid into the account of the second respondent in the super fund, the second respondent was a volunteer in that it was not her money that was paid directly into her account. In those circumstances, the applicants submitted that they will ultimately be entitled to recover at least part of the judgment debt in their favour against the first respondent from the second respondent's account in the super fund.

11 For the second respondent, it was submitted that the applicants had not discharged the onus of establishing these matters on the evidence and that insofar as contributions to the second respondent's account in the super fund originated from the legal practice, the evidence established that she had provided value for those contributions, and that she had no notice of the impugned transactions or the possibility that the funds were tainted. These factual

disputes were the real issue of substance between the parties. The other issues on the application were:

(a) the timing of the application, and whether there had been delay on the part of the applicants;

(b) whether there was justification for the application being brought ex parte, as against the second respondent, on 6 May 2016;

(c) whether proper and adequate disclosure had been made by the applicants;

(d) whether there was evidence to establish a 'good arguable case'[5] for the amount claimed as the likely judgment debt of the first respondent;

(e) whether the applicants had sufficiently established a risk of dissipation of assets;

(f) what, if any, part of the funds in the account in the second respondent's name in the super fund should be subjected to restraint; and

(g) whether the lack of any affidavit evidence as to the capacity of the applicants to meet the undertaking given by them is relevant or determinative on the freezing order application.

I will deal with these issues in turn.

Right to recovery

12 The super fund was established by trust deed dated 29 June 1995. The first and second respondents are trustees of the fund. The first respondent and the second respondent are members of the fund, and a member account is maintained for each.

13 From 1994 the second respondent worked for the legal practice, performing various administrative and other tasks. Up to 1998 the second respondent also worked from time to time as a nurse.

[5] *Choice Planning Pty Ltd v Mider @ Franklin Street Pty Ltd & Ors* [2015] VSC 59, [11].

14 The second respondent's affidavit evidence as to contributions she paid into her account in the super fund over the 20 years from 1995 to 2015 is as follows:

> When contributing funds to my Fund account over a period of 20 years, the funds I paid in came from the following sources:
>
> (a) My superannuation paid (and accretions from the investment of those payments) for working as a nursing sister;
>
> (b) contributions from my own funds, including from sales of properties before 2005 and shares, realisation of term deposits, and from loan repayments made to me by Mr Forster;
>
> (c) superannuation contributions made to me as an employee of the firm.
>
> In making contributions to the Fund over the years, and in the administration and management of the Fund, Mr Forster and I have each relied upon the advice and guidance of professional advisers. We have not sought to administer or manage the Fund ourselves, except as legally required.

15 From around 2000 until 2010 the legal practice represented, on a 'no win no fee' basis, 86 sailors seeking compensation for injuries suffered as a result of the collision between the 'HMAS Melbourne' and the 'HMAS Voyager' which occurred on 10 February 1964. A report commissioned by the applicants from Deloitte Touche Tohmatsu and authored by Campbell Jackson dated 28 October 2010 (the Deloitte report) establishes that a significant increase in the revenue of the legal practice in the financial years 2007 to 2009 is consistent with most of the Voyager proceedings settling in that period. The double disbursement claims and the fee agreement claims relate to transactions involving trust funds held by the legal practice for the benefit of various Voyager clients during the period from 2007 to 2009.

16 Tax returns and financial statements for the super fund for the financial years 2005 to 2015 have been exhibited to the affidavit of the second respondent. The statement of financial position of the super fund as at 30 June 2006 confirms net assets available to pay benefits of $1,121,045.56, which is represented by accrued benefits in the account of the first respondent of $145,137.56, and accrued benefits in the account of the second respondent of $975,908.00. Those benefits were accumulated prior to the date of the impugned transactions and therefore cannot include any tainted funds. Initially, counsel for the applicants argued that the trust deed provided the trustees discretion to shift amounts between member accounts in the super fund arbitrarily so that funds properly standing to the credit of the second respondent as at 30 June 2006 might subsequently have been mixed with amounts paid into the super fund

emanating from the impugned transactions so as to justify restraint in relation to the whole of the amount standing to the credit of the second respondent in her super fund account. However, ultimately counsel conceded that the position of the applicants in respect of amounts standing to the credit of the second respondent as at 30 June 2006 was substantially weaker than as regards later payments into the super fund.

17 According to the super fund tax returns and financial statements, contributions made to the fund in the four years from 2007 to 2010 are as follows:

	FIRST RESPONDENT		**SECOND RESPONDENT**	
Financial Year	**Employer Contributions $**	**Member/Personal Contributions $**	**Employer Contributions $**	**Member/Personal Contributions $**
2007	105,113.00	846,768.37	105,113.00	846,768.36
2008	100,000.00	5,113.00	100,000.00	14,112.00
2009	-	100,000.00	98,144.87	–
2010	-	87,788.00	49,999.88	37,788.00

18 The Deloitte report deals, in part, with payments from the legal practice to the super fund in the 2007 financial year. The author of the report notes, '… that in 2007, an amount of $1,320,884.00 was recorded as an expense in account 2575 entitled "David Forster Superannuation"'. Later, the report makes reference to a series of transactions relating, at least in part, to a Voyager client, resulting in an amount of $469,884.00 being transferred, on 29 June 2007, from the legal practice trust account to the office account and then to the super fund. The report notes that in September 2008, in two transactions totalling $303,631.00, funds were transferred back to the credit of that Voyager client in the legal practice trust account likely from the second respondent's account in the Super Fund.

19 Counsel for the applicants noted that the first two amounts referred to in the previous paragraph total approximately $1.79 million, and argued that there was a 'strong basis' for concluding that that amount was a contribution from the legal practice to the super fund in that year allocated in part to the second respondent as part of the trustees' discretion, so that

the second respondent was a 'volunteer' in respect of those contributions. This conclusion was said to be supported by the evidence given by the first respondent on an examination conducted by Associate Justice Mukhtar on 10 April 2015, in particular the extracts contained in the first and third of Mr Uljans' affidavits. No allegation was made by the applicants of any knowing participation by the second respondent in relation to the impugned transactions and the tainted funds.

20 In oral submissions counsel for the applicants referred to *Allianz Australia Insurance Limited & Anor v Rose Marie Lo-Giudice* in which Pembroke J stated:

> Where a trustee places trust funds in an account and then, in breach of duty, uses moneys withdrawn from the account to purchase an asset, the beneficiary is entitled to claim either:
>
> (a) a charge over the asset for the amount of the misapplied money; or
>
> (b) a proportionate beneficial interest in the asset to the extent to which trust moneys were used to provide part of the cost of acquiring the asset. [6]

It was argued that the particular asset in this case was investment into the super fund. Counsel continued, relying on two further decisions of *Fistar v Riverwood Legion and Community Club Ltd*[7] and *Great Investments Ltd v Warner,*[8] to argue that '…even when a person receives the trust property, who is innocent, a constructive trust may nevertheless be imposed by the court, binding the person in conscience to account for it.' The second respondent is not a party to the recovery proceeding. She is, for the purposes of this application, a third party. In relation to the principle applicable to restraining orders in those circumstances the applicants placed reliance upon the judgement of Hargrave J in *Choice Planning Pty Ltd v Mider @ Franklin Street Pty Ltd & Ors*, in which his Honour stated:

> Where the freezing order or ancillary order is sought against a third party, the applicant for the freezing order must establish 'a good arguable case' that the third party holds, is using, or is controlling assets of the judgment debtor or prospective judgment debtor, or that the third party may be obliged to disgorge assets or contribute towards satisfying the judgment or prospective judgment. [9]

The second respondent took no issue with those statements of principle.

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[6] [2012] NSWSC 145, [32].
[7] [2016] NSWCA 81, [45]–[47].
[8] [2016] FCAFC 85, [52]–[55].
[9] [2015] VSC 59, [11].

21 Counsel for the second respondent submitted that:

(a) the only evidence as to contributions to the account of the second respondent in the super fund was that contained in the affidavit of the second respondent and the tax returns and financial statements of the super fund;

(b) in her affidavit, the second respondent gave sworn evidence as to the source of contributions to the Super Fund from time to time;

(c) there was no evidence that the second respondent had knowledge of the fact or nature of the impugned transactions at the time of those transactions and until much more recent times;

(d) in the circumstances, those contributions were made without notice and for value, relevantly being repayment of loans made to the first respondent, superannuation contributions made by the legal practice to her as an employee or contributions from her own funds; and

(e) a freezing order 'lies at the extremity of [the] court's jurisdiction'[10] and the general rule is that a person should not be prohibited from dealing with his or her own assets unless there is an indication that the person will dissipate his or her own assets in order to avoid making good the judgment and that the applicants' case fails to put a good arguable case as to the risk of dissipation or as to the assets for the interest in the fund.[11]

Counsel for the second respondent submitted that the amount in the second respondent's account in the super fund could therefore not be subject to any recovery action by the applicants in respect of the amount of any judgment ultimately entered against the first respondent. The applicants bear the onus of establishing an arguable case. They had failed to do so, and in the circumstances the freezing order should be discharged to the extent that it restrained the second respondent's account balance in the super fund.

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[10] *Her Majesty's Revenue & Customs v John Paul Cozens, Toby Price and 35 Other Defendants* [2011] EWHC 2782 (Ch), [46].
[11] *Gill and others v Flightwise Travel Service Ltd and another* [2003] EWHC 3082 (Ch), [31]–[32].

22 For the following reasons, in respect of the contributions made to the second respondent's account in the super fund for the years 2007 to 2009 as detailed in the above table, I do not agree. The above extract of the second respondent's affidavit deals only with the source of funds which she paid into her account in the super fund from year to year. I accept the argument made for the applicants that, even accepting the evidence of the second respondents, it is not inconsistent with that evidence to find that there have been contributions made to the second respondent's account from time to time otherwise than by her.

23 Second, the amounts of the contributions, particularly in the 2007 year, have the appearance of being set by reference to financial and tax considerations rather than by reference to any value said to have been given by the second respondent in respect of those contributions. For instance, in 2007 the total contribution between the two respondents was $1,903,762.73. The difference between the amounts flowing into the accounts of the two respondents is $0.01. In the above extract of her affidavit, the second respondent confirms that, in respect of contributions, she and the first respondent relied on advice and guidance of professional advisers. This evidence supports the conclusion that contributions to the second respondent's account in the super fund for those years have been made by the legal practice, and were not for value.

24 Third, the transactions relating to the super fund detailed in the Deloitte report raise a very real issue as to the source and nature of contributions to the super fund.

25 Fourth, the very significant contributions to the super fund coincide with the period during which the impugned transactions occurred. The amount of those impugned transactions is substantial in the context of the financial affairs of the legal practice. The super fund transactions identified in the Deloitte report fall within this period. This all raises an arguable case, or a 'real case to be investigated',[12] as to the question of whether, at least in part, contributions to the second respondent's account in the super fund for those years are related to or are sourced from impugned transactions' funds.

26 On this question the applicants sought to place reliance upon evidence given by the first

[12] *Robmatjus Pty Ltd v Violet Home Loans Pty Ltd* [2007] VSC 165, [59] (Hargrave J).

respondent on the examination conducted by Associate Justice Mukhtar on 10 April 2015. At the very end of the oral argument before me, counsel for the second respondent advanced the submission that evidence given by the first respondent on that examination was not admissible in the current application. I will deal with that argument briefly later in this judgment. However, I consider that even without placing reliance upon that evidence of the first respondent, the applicants have discharged the onus they bear to establish on the evidence an arguable case as to the source of amounts contributed to the account of the second respondent in the super fund in the years 2007 to 2010.

Timing and delay

27 For the second respondent it was argued that there had been delay by the applicants in bringing the application before the court, and that this was a discretionary consideration which militated against the granting of the freezing order. The second respondent relied on the fact that the applicants had, on 1 April 2011, made an application against the second respondent for production of documents relating relevantly to any superannuation fund of which the second respondent was a member or to which she had made contributions. At the same time the applicants applied to examine the second respondent pursuant to s 5.5.10 of the *Legal Profession Act 2004*.

28 There are a number of facts which are relevant to the issue of whether there was any material delay:

a) The second respondent opposed the application made on 1 April 2011;

b) That application was refused by Emerton J;

c) The recovery proceeding, commenced on 13 February 2012, was initially unsuccessful when Robson J made an order dismissing the applicants' claims with costs on 27 May 2015;

d) The applicants had little information in relation to the Super Fund until evidence was given on the examination conducted by Associate Justice Mukhtar in April 2015; and

e) It was not until the Court of Appeal judgment in the recovery proceeding, delivered

27 April 2016, that the applicants had further reason, particularly having regard to the evidence given by the first respondent on the examination to the effect that his only asset of substance was his entitlement in the super fund, to pursue the issue of restraint of the super fund.

29 In effect, all the facts material to the timing of this application coalesced following the Court of Appeal judgment of 27 April 2016. In all the circumstances, there was no material delay on the part of the applicants in the making of this application.

Ex parte application on 6 May 2016

30 Initially, it appeared from the written submissions of the second respondent that there was some relevant criticism of the applicants for proceeding ex parte against the second respondent on 6 May. In oral submissions, her counsel did not argue that the fact that the applicants proceeded ex parte was relevant to the exercise of the discretion as to whether or not to continue the freezing order.

31 The applicants proceeded on the basis that there was a relevant risk in relation to the entire fund. The first respondent's response to approaches made by the applicants following the Court of Appeal judgment, particularly when appreciated in the context of certain earlier actions of his, (including those which were found to justify the earlier freezing order made in this proceeding, and his failure to disclose his asset position at various times), justified the applicants in proceeding ex parte in respect of the super fund to which he had access. I see no basis for criticising the applicants for proceeding ex parte.

Proper and adequate disclosure

32 The second respondent criticised as being 'partial and disingenuous' the applicants' written submissions in support of the freezing order which stated that they did not know 'what if any interest the second respondent has in the assets of the super fund',. There was further criticism on the basis that the applicants failed to draw to the court's attention the application by them made 1 April 2011 that the second respondent produce documents and attend for examination.

33 However, it is clear from the affidavit of Mr Uljans, sworn 6 May 2016, and the exhibits to that affidavit, that the applicants put before the court all material in their possession relevant to the super fund and the potential interest of the second respondent in that fund. I do not regard the earlier application, made in April 2011, as being a material matter which the applicants were required to disclose. That application was refused, and no facts or material relevant to the super fund became known to the applicants at that stage.

34 The exhibits to Mr Uljans' affidavit of 6 May included the transcript of the 10 April 2015 oral examination of the first respondent. In written submissions relied upon in the ex parte application, the applicants specifically drew the court's attention to the first respondent's evidence as to the entitlement of each of him and the second respondent to the assets of the super fund. The first respondent had provided no basis for this evidence, other than his assertion that it was what he had been told.

35 It was not a matter for the applicants to interpret the evidence and express conclusions as to the reliability and effect of that evidence. It was important that the applicants disclose the relevant evidence in their possession. The applicants proceeded in this fashion, and accordingly they cannot be criticised for any material non-disclosure.

Evidence — good arguable case for the amount claimed

36 In the recovery proceeding the applicants sought to recover from the first respondent the sum of $1,507,750.45 for the double disbursement claims and $5,250,683.35 for the fee agreement claims.

37 In defence of these claims, the first respondent did not argue that the payments which formed the basis of the amount of claims had not been made from trust to the legal practice's office account. Rather the first respondent argued that the relevant trust transfers did not give rise to a debt or a liability of the first respondent or the legal practice to the particular client. In respect of the double disbursement claims, the Court of Appeal concluded that the first respondent '…held the funds that he had transferred to himself on trust for his client and was liable to account to the client for them'[13] and that the first respondent was liable to restore the

[13] *Batrouney v Forster* [2016] VSCA 80, [115].

double disbursement to the trust account where it was to be held 'exclusively' for the client subject to the respective rights of client and solicitor under the Act.[14] Similarly, in relation to the fee agreement claims, the Court of Appeal concluded '[t]hus, upon withdrawing funds without authority from the trust account, the [first] respondent came under an immediate liability to account to his clients. For the reasons already given, that liability was not affected by the existence of any debt said to be owed by the client to the solicitor.'[15] In the Court of Appeal the first respondent conceded the partial judgement in the sum of $2,034,563.44, and argued that the matter should otherwise be remitted to the Trial Division for determination of arguments raised by the first respondent to reduce the amounts claimed.

38 The material before me is clearly sufficient to establish that the applicants have a good arguable case for recovery of an amount just in excess of $6.7 million from the first respondent in respect of the double disbursement claims and the fee agreement claims. The issue of substance which remains in the recovery proceeding is the extent to which those claims might be reduced as a consequence of further arguments raised by the first respondent.

Risk of dissipation of assets

39 The first affidavit of Mr Uljans and the written submissions for the applicants, dated 6 May 2016, focused on the response of the first respondent to approaches made by the applicants following the Court of Appeal judgment in combination with past actions of the first respondent, particularly those which were found to justify the earlier freezing order made in this proceeding, and failures by the first respondent to disclose his asset position at various times. At the hearing on 6 May 2016, I considered that the evidence established a danger or risk of dissipation of assets sufficient to justify the making of the freezing order.

40 The second respondent now argues that there is no evidence of any risk that she will dissipate part or all of her account in the super fund in a way that might frustrate recovery of the prospective judgment debt against the first respondent.

41 The applicants do not make any allegation against the second respondent that she has

[14] Ibid [127].
[15] Ibid [258].

engaged, or is likely to engage, in conduct with the positive intention of frustrating recovery of the judgment against the second respondent. However, that is not the end of the matter. For the following reasons, I consider that a risk of dissipation is established in relation to that part of the account in the name of the second respondent in the super fund, that will be subject to the freezing order to be made in accordance with these reasons.

(a) The trust deed provides for the arbitrary movement of funds between the accounts;

(b) The first respondent, as a trustee of the super fund, has the power to act, albeit together with the second respondent, to transfer amounts between accounts in the super fund, to transfer amounts out of the Super Fund, and to otherwise deal with the super fund;

(c) As was noted by Robson J in relation to the March 2015 application by the first respondent to vary the earlier freezing order, each respondent is now entitled to unfettered access to his or her superannuation benefits held in the Super Fund;[16] and

(d) The second respondent has deposed to her intention to withdraw amounts from the super fund and to apply those amounts for various purposes. To the extent that amounts withdrawn are amounts which should arguably be available for recovery in respect of a judgment debt owed by the first respondent, such innocent actions of the second respondent would 'frustrate the judgment'.[17]

42 In combination, these matters sufficiently establish the requisite risk of dissipation. In my view, the applicants have shown that it is 'just and convenient' that the freezing order be made.[18]

What part of the second respondent's account should be subject to restraint?

43 The impugned transactions did not commence until after 1 July 2006. Clearly, the accrued benefits in the second respondent's account in the fund as at 30 June 2006 should not be

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16 *Local Services Board v Forster* [2015] VSC 136, [69].

17 *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH & Co KG* [1984] 1 All ER 398; *Choice Planning Pty Ltd v Mider @ Franklin Street Pty Ltd & Ors* [2015] VSC 59.

18 *Robmatjus Pty Ltd v Violet Home Loans Australia Pty Ltd* [2007] VSC 165.

subject to restraint.

44 I have detailed above the contributions recorded in the second respondent's account in the Super Fund for the years 2007 to 2009. There is an arguable case, or a 'real case to be investigated', that all of those contributions originate from or are related to impugned transactions and represent tainted funds. I do not accept, for instance, the oral submissions made by counsel for the second respondent, when referring to the 2007 year, that the only contribution in respect of which the second respondent might be a volunteer rather than a recipient of funds for value was the member/personal contribution of $846,768.36. Arguably, the employer contributions do not represent 'for value' payments. The evidence of payments, and the 2008 reversal of payment, in the Deloitte report, is evidence supporting the argument that the funds were not 'for value' payments. The amount of the recorded employer contribution is large, and does not appear to relate to the sort of wage said to be payable to the second respondent by the legal practice from time to time. Clearly, the amounts recorded bear greater relationship to the employer contributions recorded as being made into the first respondent's account in the super fund in each year, in that they are extremely similar in amount to those recorded contributions. As I understand it, the impugned transactions occurred prior to 1 July 2009. I consider that the applicants have established a good arguable case in relation to the amount of all of the contributions recorded as being paid into the second respondent's account in the super fund in the financial years 2007 to 2009. The aggregate amount of those payments is $1,164,138.03.

45 There have been changes in the value of the account since 30 June 2009 because of the 2010 contributions, investment returns and losses, payments of tax and other expenses, and payments out to the second respondent. Over time, the value of the account in the name of the second respondent in the super fund has increased, which seems to reflect returns on investments made by the fund managers.

46 I consider it appropriate to restrain a proportion of the current value of the second respondent's account in the super fund as is reflected by the amount of contributions recorded as having been made to that account in the years 2007 to 2009. The balance of the second respondent's account in the Super Fund as at 30 June 2010 was $2,262,064.04. The 2007 to

2009 contributions represent just over 51 percent of the account balance as at that date.

47 The accrued benefit in the second respondent's account in the super fund as at 30 June 2015 was $3,505,081.00. According to the second respondent's affidavit there have been movements in the super fund since that date, which have likely led to some increase in the value of the super fund. Because of uncertainty as to the extent to which the value of the super fund has increased I will not take those movements into account.

48 Fifty-one percent of the account balance as at 30 June 2015 is $1,787,591. I conclude that the freezing order should be varied to restrain that part of the second respondent's account in the Super Fund.

Lack of affidavit evidence as to the applicants' capacity to meet the undertaking

49 I do not consider there is any merit in this complaint made by the second respondent. I accept the submissions of counsel for the applicants that the lack of such affidavit evidence is not determinative. I also note the effect of s 5.6.10 of the *Legal Profession Act 2004*, which provides that the plaintiff in this proceeding, the Legal Services Board, may reimburse the applicants for the potentially relevant damages and costs. That provision is particularly relevant because the Legal Services Board appeared on the initial ex parte application made by the applicants, and supported the application.

Admissibility on this application of evidence given by the first respondent on examination

50 At the very conclusion of argument before me, counsel for the second respondent submitted that evidence given by the first respondent on the examination conducted by Associate Justice Mukhtar on 10 April 2015 was not admissible evidence against the second respondent on this application. I allowed applicants' counsel some further time to provide brief written submissions in relation to this point. Those written submissions were received by the court on 22 June 2016. In brief, it was argued that (a) the second respondent's objection proceeded upon a false premise that the provisions of Part 5.9 Div 1 of the *Corporations Act 2001* (Cth), which relate to the use of a 'written record' of a public examination by an eligible applicant about a corporation's examinable affairs, applied so as to render the transcript inadmissible;

(b) the *Supreme Court (General Civil Procedure) Rules 2015* (pursuant to which the examination was conducted) do not impose any limitation as to the use or admissibility of transcripts of examinations conducted pursuant to Order 67; and (c) that the transcript of the examination is *prima facie* admissible, as it is relevant to the facts in issue in the proceeding, and no exclusionary rule of evidence applies.

51 I accept the submissions of counsel for the applicants as to the admissibility of the examination evidence. I am supported in this conclusion by the fact that the substantive written submissions made for the second respondent on this application place some reliance on the examination evidence.

Conclusion

52 For the reasons given, I consider that the freezing order should be varied in its effect on the second respondent such that it is limited to the amount of $1,787,591.31 of the amount standing to the credit of the second respondent in her account in the super fund. I will hear from the parties as to the form the order should take, and as to any other issues which arise.