

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

No. 100 of 1986

BETWEEN:

WAYNE EDWARD SELLERS
Plaintiff

AND:

RICHARD DARRAN AND RONALD HAY
(PARTNERS)
First Defendant

AND:

BARCLAY BROS. PTY LTD
Second Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 25 November 1994)

By summons filed 23 August 1994, the Second Defendant seeks the following orders:

1. That the Plaintiff pay the Second Defendant the sum of \$115,431.46.

By letter dated 8 September 1994, solicitor for the Second Defendant advised that the Department of Social Security have refunded \$20,692.91 to the Territory Insurance Office. Accordingly, the amount sought is reduced to \$94,738.55.

2. That the Second Defendant pay the Plaintiff's costs up to and including 19 November 1992.
3. That the Plaintiff pay the Second Defendant's costs from 20 November 1992.

4. That the Certificate of Title with respect to land purchased by the Plaintiff and held by the Plaintiff's solicitors be lodged with the Supreme Court pending resolution of the Plaintiff and Second Defendant's costs and funds to be paid by the Plaintiff to the Second Defendant.
5. The Plaintiff pay the Second Defendant's costs of this application.

The amount sought in paragraph 1 represents the difference between the judgment of the Court of Appeal being the sum of \$143,104 and the amount actually paid out to or on behalf of the Plaintiff.

The brief background to this matter is that on the 12th day of March 1993 this court awarded judgment in favour of the Plaintiff in the sum of \$330,477.94.

On 6 April 1993 the Second Defendant lodged a Notice of Appeal against this assessment.

On 8 April 1993, the court made certain orders by consent. These orders included payment of certain monies to the Plaintiff pending the appeal. There was an undertaking by solicitors for the Plaintiff to hold the sum of \$85,000 in their Trust Account in accordance with the agreement between the solicitors for the parties until further order or agreement.

On 16 June 1994, the Court of Appeal ordered that the assessment of damages in the sum of \$330,477.94 be set aside and an award in favour of the respondent in the sum of \$143,104 be substituted therefore.

By summons dated 23 August 1994, the Second Defendant made application for five orders as set out above.

Counsel for the Plaintiff opposed the order sought in paragraph 1 of summons dated 23 August 1994, because at the date this

application was heard, being 25 August 1994, it was still to be determined what amount was to be paid by the Department of Social Security to the insurer.

I do not accept this as a reason to refuse to make an order for a refund to the Second Defendant of an amount paid out to the Plaintiff which exceeds the amount ordered by the Court of Appeal. It is a reimbursement to which the Second Defendant is entitled.

Accordingly, I propose to make the order sought by the Plaintiff in paragraph 1 of the summons dated 23 August 1994, as amended by letter from the Second Defendant's solicitors dated 8 September 1994, i.e. \$94,738.55.

With respect to the application in paragraph 4 of summons dated 23 August 1994, this order is opposed.

It is common ground between the parties that Mr Sellers used part of the proceeds of the judgment to purchase a property. His solicitor, Mr Stirk, is in possession of the Certificate of Title. The property is registered in the name of the Plaintiff and is unencumbered. Mr Stirk stated he conceded that he had agreed with solicitors for Barclay Bros. Pty Ltd that the property would not be dealt with in any way adverse to the interests of the Second Defendant.

Mr Stirk, solicitor for the Plaintiff, claims he is entitled to hold the Certificate of Title under a possessory lien awaiting payment of his fees.

Mr Farquar, solicitor for the Second Defendant, seeks an order that the Certificate of Title be delivered into the possession of the court pending the resolution of outstanding matters between the parties.

Mr Stirk does not dispute that the court has power to make such an order. His reason for resisting such an order is that he

has a possessory lien for his costs and understandably does not wish to abandon his right to a possessory lien.

The lien is enforceable against all persons who have no higher right than the client, for instance, it is available against the trustee in bankruptcy of the client (Edward I. Sykes "The Law of Securities" Law Book Company, 1986 4th Edition P. 663). Mr Stirk argues the insurer is on the same plain as Mr Sellers and has no higher title right than Mr Sellers held.

I do not accept this argument. I prefer the argument put forward by Mr Farquar, counsel for Barclay Bros. Pty Ltd. Mr Farquar referred to the following statement in *Cordery on Solicitors*, FT Horne, Butterworths, 1988 8th edition at 240:

"It is a general rule that no one can create a lien beyond his own interest. Since a solicitor can have no better right to retain a document than his client would have if in possession of it, if the client is bound to produce a document for the benefit of a third person e.g. for a creditor or under a subpoena duces tecum, so too is the solicitor."

I have had the opportunity of reading the authority referred to in *Cordery* for this statement, *Re Hawkes, Ackerman v Lockhart* (1898) 2 Ch. 1. I adopt with respect the statement of Lindley M.R. @ 6-7:

"A solicitor's lien is simply a right to retain his client's documents as against the client and persons representing him. As between the solicitor and third parties, the solicitor has no greater right to refuse production of documents on which he has a lien than his client would have if he had the document in his own possession."

Mr Sellers used the proceeds of the judgment to purchase a property. Following the decision of the Court of Appeal, Barclay Bros. Pty Ltd are entitled to take steps to recover the amount of the difference between monies paid to Mr Sellers and the amount of the verdict awarded by the Court of Appeal. There is no application at this time before this court for orders in respect of the property Certificate of Title for which is held by Mr Stirk. Any such application will have to be dealt with on its merits at

a later time. In the meantime, I accept the right of the Second Defendant to have the Certificate of Title lodged with the court.

I accept the argument of Mr Farquar for the Second Defendant, that the court has a duty to try and put the parties back where they were prior to payment out to the Plaintiff of monies exceeding the judgment of the Court of Appeal. An order that the Certificate of Title be delivered to the court pending resolution of the matters would go some way to achieving this.

I consider Barclay Bros. Pty Ltd who were the successful appellants before the Court of Appeal, are entitled to an order that solicitors for Mr Sellers deliver to the court the relevant Certificate of Title.

I propose to make the orders sought by the Second Defendant. In making the orders I note that the application for orders (1) and (4) were opposed. However, there was no dispute in respect of orders (2) and (3).

Accordingly I make the following orders:

1. That the Plaintiff pay the Second Defendant the sum of \$94,738.55. As requested by Mr Farquar for the Second Defendant, I direct that the Second Defendant credit to the Plaintiff any reimbursement made by the Department of Social Security back to the Insurer.

2. That the Second Defendant pay the Plaintiff's costs up to and including 19 November 1992.

3. That the Plaintiff pay the Second Defendant's costs from 20 November 1992.

4. That the Certificate of Title with respect to land purchased by the Plaintiff and held by the Plaintiff's solicitors be lodged with the Supreme Court pending resolution of the Plaintiff

and Second Defendant's costs and funds to be paid by the Plaintiff to the Second Defendant.

5. The Plaintiff pay the Second Defendant's costs of this application.