

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D181/2004

APPLICANT	Arrow International Australia Limited (ACN 081 136 352)
FIRST RESPONDENT	Indevelco Pty Ltd (ACN 061 216 635)(in liquidation)
SECOND RESPONDENT	Perpetual Nominees Ltd (ACN 000 733 700)
JOINED PARTY	John Zervos
INTERVENER	Darren Noble
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Application by Intervener for Declaration
DATE OF HEARING	17 October 2008
DATE OF ORDER	18 November 2008
CITATION	Arrow International Australia Limited v Indevelco Pty Ltd (Domestic Building) [2008] VCAT 2343

ORDER

1. Declare that Darren Noble of Noble Lawyers, Level 2, 167 Queen Street, Melbourne, has a lien over the sum of \$50,000 paid into the Domestic Builders Fund pursuant to the Tribunal's order of 24 September 2008.
2. Direct the Registrar to pay forthwith out of the said sum held in the Fund the sum of \$30,340.00, comprising \$22,200.00 due to the Intervener pursuant to the agreement entered into by him with the Joined Party on or about 7 May 2008 and the disbursement of \$8,140.00 incurred by the Intervener with respect to the costs consultant.

3. Direct that the balance of the moneys held in the Fund be retained until further order, pending the assessment of the most recent bill of costs rendered to the Joined Party by the Intervener and the determination of the Intervener's foreshadowed application for costs.
4. The Intervener's costs are reserved for further argument.
5. Liberty to apply for such further or other orders or directions as may be necessary or appropriate to give effect to this determination.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	No appearance
For the First Respondent	No appearance
For the Second Respondent	No appearance
For the Joined Party	In person
For the Intervener	Mr McLean of Counsel

REASONS

Background

- 1 The Joined Party Mr Zervos was at all material times a director of the First Respondent ("Indevelco") which is now in liquidation. Indevelco was formerly a property developer which carried out a development of 25 apartments in Yarraville. The builder of the development was the Applicant ("Arrow") and finance was provided by the Second Respondent ("Perpetual").
- 2 A dispute ensued between Arrow, Indevelco and Perpetual and these proceedings were issued.
- 3 In or about September 2005, the Intervener Mr Noble, who is a solicitor with an extensive practice in domestic building disputes, agreed with Mr Zervos and Indevelco to act as solicitor for Indevelco in the proceeding. A costs disclosure

statement and a retainer agreement were sent to Mr Zervos in which the client is identified as “Indevelco Pty Ltd and John Zervos”. Although the title to the action is misdescribed in that document it is clear from the reference to Perpetual that it applies to this litigation and I do not accept any suggestion by Mr Zervos to the contrary. It is also clear from this document that the retainer was not just by Indevelco but also by Mr Zervos.

- 4 On 26 April 2005 Mr Zervos was joined to the proceeding as a Joined Party on the application of Perpetual, which claimed indemnity against Mr Zervos pursuant to a number of documents that had been executed.
- 5 On 1 August 2007 Indevelco was wound up by order of the Supreme Court and all proceedings against it were consequently stayed.
- 6 The other claims came before me for hearing of 22 October 2007 with 10 days allocated. Arrow’s claim against Perpetual was settled on the morning of the first day and consent orders were made. Since the claim against Indevelco was stayed by reason of it being a company in liquidation all that remained of the action was the claim by Perpetual against Mr Zervos.
- 7 Following a short hearing that claim was dismissed and costs were reserved. Mr Noble acted for Mr Zervos throughout and briefed Counsel, Mr Craig, who appeared on Mr Zervos’ behalf.

Mr Zervos’ costs

- 8 Mr Zervos’ application for costs came before me on 17 December 2007. After hearing submissions I ordered that Perpetual pay Mr Zervos’s costs of the application up to and including that day, including reserved costs and the costs of that application, provided that, for the period from the date of his joinder until 1 August 2007 (that being the date on which Indevelco was wound up), those costs should be taken to be all of the costs incurred by his legal practitioners solely with respect to the case against him plus one half of the common costs incurred during that period with respect to both the claim against him and the claim against Indevelco. The orders did not include any costs incurred solely with respect to the claim by Perpetual against Indevelco.
- 9 Following the making of that order, a substantial bill of Mr Zervos’ costs was prepared by a costs consultant, Miss Cloonan, for assessment by the Registrar. The matter came before the Registrar for assessment on 12 August 2008. Mr Zervos was represented by Mr Noble and Miss Cloonan and Perpetual was represented by Mr Frenkel of Counsel and a costs consultant. During the assessment, a question arose as to the proper interpretation of my order and that question was then set down for determination by me.

The hearing on 25 September

- 10 When the matter came before me on 24 September 2008 for determination of that question, I was informed that Mr Zervos had terminated Mr Noble’s retainer and had separately entered into an agreement with Perpetual to accept the sum of \$50,000.00 in full satisfaction of the order for costs in his favour. At the hearing on 24 September 2008 he was represented by Ms Sotiropoulos of Counsel.

- 11 Mr Noble sought leave to intervene in order to assert a claim that he had a lien over the said sum of \$50,000.00 for the costs and disbursements owed to him by Mr Zervos. The principal disbursement is an amount of \$8,140.00 owed to him by Miss Cloonan for fees for preparation of the taxable bill and representing Mr Zervos at the assessment.
- 12 Mr McLean of Counsel, appearing on behalf of Mr Noble, relied upon on an affidavit of Mr Noble sworn 24 September 2008 setting out the history of the matter and exhibiting correspondence addressed to Perpetual asserting the lien.
- 13 Counsel for Perpetual, Mr Frenkel, was concerned that his client should not face conflicting claims by Mr Zervos and Mr Noble and sought directions from me.
- 14 After hearing argument from the parties I granted Mr Noble leave to intervene in order to assert his claim for a lien. I ordered Perpetual to pay the said sum of \$50,000.00 into the Domestic Builders' Fund within 14 days to be disbursed as the Tribunal should thereafter order. Perpetual was excused any further attendance upon payment of the said sum into the Fund. I then gave directions for the filing and service of material in regard to Mr Noble's claim for a lien over the money and the hearing of that dispute was fixed for hearing on 17 October 2008.

The hearing of the claim for a lien

- 15 At the hearing on 17 October 2008, Mr Noble was again represented by Mr McLean of Counsel and Mr Zervos appeared in person.
- 16 The evidentiary material consisted of Mr Noble's affidavit of 24 September, an affidavit of Mr Zervos sworn 8 October 2008 and an affidavit in reply by Mr Noble sworn 16 October 2008.
- 17 Both Mr Zervos' affidavit and Mr Noble's affidavit were filed and served late, Mr Zervos' by two days and Mr Noble's by a greater length of time. Mr Zervos objected to the affidavit in reply by Mr Noble being received. However it was an affidavit in reply dealing essentially with matters raised by Mr Zervos and when I indicated that I did not propose to exclude it Mr Zervos did not seek to have the matter adjourned although I raised that as a possible course of action.
- 18 Both deponents were cross examined. Mr Noble is an experienced solicitor and gave clear factual responses to the questions asked and his evidence was supported by the documents he produced. On the other hand Mr Zervos was a less impressive witness who appeared to have kept no records or at least brought none with him and it was very difficult to make out from his evidence and the material that he had filed just what his case was. My understanding of his evidence was not assisted by the fact that his affidavit was a rather rough reworking of an earlier affidavit taken from other, related proceedings and was more directed to arguments that he had with Mr Noble than with the matters I had to consider.
- 19 I have no hesitation in accepting Mr Noble's evidence over that of Mr Zervos.

The law

20 The legal principles to be applied on this application are conveniently summarised by Weinberg J in *Color Point Pty Ltd v Markby's Communication Group Pty Ltd and Others* [1998] FCA 1516. In that case, after referring to the various authorities the learned judge summarised the relevant principles as follows (at p.20 of the judgement):

“The authorities seem to recognise that there are, in effect, two forms of solicitors' "lien" over costs.

(a) The first is the common law "general" or "possessory" lien which enables a solicitor to retain all papers or other chattels of the client which have come into his possession as his client's solicitor until all his costs and charges as solicitor are paid: *Barratt v Gough-Thomas* [1951] Ch 242 at 250 per Evershed MR. This right depends upon an implied agreement. It is merely passive and possessory: that is to say the solicitor has no right of actively enforcing his demand. He may merely withhold possession of the documents or other property of his client until he is paid his legal costs.

(b) The second is what is often described, though inaccurately, as a "non-possessory lien" over any property, other than real property (*Shaw v Neale* (1858) 6 HLC 581), recovered or preserved, or any judgment obtained, for the client by the solicitor's exertions in the litigation. This "lien" is equitable, and gives to the solicitor a charge upon the property in question. It does not depend upon the funds being in the possession of the solicitor.

While it has been recognised that the term "lien" may be inappropriate to describe the nature of the solicitor's equitable interest in the fruits of the litigation, the terminology is less important than the nature of the particular interest, and its incidents. That interest arises when a solicitor undertakes professional services on behalf of a client in the course of litigation. It confers upon the solicitor an equitable interest in the fruits of that litigation, provided that those fruits are gained, at least in part, as a result of the solicitor's exertions on behalf of the client. It is a "particular" lien, rather than a "general" lien because it extends only to the costs of the proceedings in which the personal property is recovered, and not to all costs incurred on behalf of a client by the solicitor.

Though in England there is some suggestion that the lien arises at common law (*Re Born* [1900] 2 Ch 433 at 435 per Farwell J), the position in Australia is that it is equitable in nature. It attaches to property which has been obtained for the client by the solicitor, either pursuant to a judgment, or a compromise of judicial proceedings which have been instituted.

Though it has been said that the "so-called" lien is really only a right to ask for the intervention of the court to protect the solicitor when he finds that there is a probability of the client depriving him of his costs, and though it is correct to say that the solicitor can enforce the lien only by taking court action to prevent the property recovered from being paid or transferred to the client, the "lien" attaches by the

recovery of the property. It is not dependent for its existence upon the judgment of the court.”

Application of the principles

- 21 It is quite clear that the amount recovered namely the \$50,000.00 relates directly to the work done and the disbursements incurred by Mr Noble. The taxable bill relates only to his costs for the work that he did and to the disbursements that he has incurred. One would expect that Mr Zervos would receive such of those costs as he had already paid to Mr Noble less any difference between the party/party costs and solicitor/client costs but Mr Zervos wants much more than that.
- 22 Before considering Mr Zervos’s submissions in detail I should refer to two highly significant documents in evidence.
- 23 The first of these is a handwritten memorandum dated 7 May 2008 signed by Mr Noble and Mr Zervos. This contains some notations of Counsel’s fees and then records the following agreement at the bottom:

“DJN \$22,200.00 (Inc. R. Craig \$2,805.00 and Paul D \$2,200.00
Mary \$4,810.00 – Zervos to pay
Summons for – John to pay
No further fees to DN provided I don’t have to do much work
JZ to pay Mary Cloonan ... she is required and for a ...
Balance due to JZ will be paid forthwith upon clearance from trust”
Down the side of these words is written:
“Bill is approx. \$65K. DN to review and see if can be amended”.

The omissions in the text quoted above are the words that I cannot decipher but notwithstanding the absence of those the meaning of the most important parts of the document seems to be clear. Mr Noble is to receive \$22,200.00, from which he is to pay the two Counsel, Mr Craig and Mr Duggan. Mr Zervos is to be responsible for paying Mary Cloonan and the balance of the amount received is to be paid to Mr Zervos upon clearance from trust. Mr Noble is also to review the bill to see if it can be amended. It was acknowledged by both sides that the intention was to see whether it could be amended upwards.

- 24 The other highly significant document is dated the following week, 14 May 2008. This document was produced in order to allay concerns that had been expressed by both Mr Noble and Miss Cloonan that, if the bill of costs that she had prepared were handed over to Mr Zervos, he would be in a position to negotiate directly with Perpetual and she might not be paid for the bill and Mr Noble might not receive payment of his costs. As things turned out, those were real concerns. The document reads as follows:

“I, John Zervos, in consideration of Mary Cloonan providing my lawyers Noble Lawyers with a bill of costs drawn by her prior to payment and to Noble Lawyers agreeing to negotiate with Gadens Lawyers for Perpetual

Nominees and/or for prosecuting a taxation of the said bill of costs as expeditiously and reasonably possible, I undertake to Mary Cloonan and Noble Lawyers that I will:

- Not seek to negotiate a resolution of the costs with either Perpetual Nominees or any person(s) on their behalf;
- Not otherwise conduct any dealings in relation to the bill of costs with Perpetual Nominees or any person(s) on its behalf; and
- Not seek the advice of any other firm of solicitors or anybody else in relation to the bill of costs nor retain any other solicitor or firm of solicitors or any other person to act on my behalf in relation to the bill of costs;
- If I should breach any of the aforementioned undertakings, I hereby give my consent to an injunction being made against me or restraining me and any servant or agent of mine from dealing with the proceeds of any agreement or taxation in relation to the bill of costs without first having paid all fees outstanding by me to Noble Lawyers (including disbursements) and Mary Cloonan.
- I otherwise reserve all of my rights should there be any undue delay on the part of Noble Lawyers in negotiating or prosecuting a taxation of the bill of costs.

(Signed)

John Zervos”

Mr Noble’s claim

- 25 Mr Noble seeks payment from the amount in the Fund of the agreed sum of \$22,200.00 that he was to receive from which he is to pay the two members of Counsel named. It should be noted that the Counsels’ fees in question appear in the taxable bill. He also seeks payment of the sum of \$8,140.00 outstanding to Miss Cloonan which, I find, he has incurred as a disbursement. It was clear during his evidence that it was a disbursement. In addition, Mr Noble claims his most recent account dated 19 August 2008 for \$861.40. Of that sum, \$650.00 relates to the assessment of costs and \$146.40 is the fee that he paid to the Tribunal on the filing of the bill of costs. It appears that Mr Zervos wishes to have this bill assessed so it is in a different category to the other sum of \$22,200.00 where the bills represented by that figure were not asked to be assessed.
- 26 Much of Mr Zervos’ affidavit relates to complaints concerning the work that Mr Noble did for him and for Indevelco. In particular, a great deal of the material is taken up by a complaint concerning a failure by Mr Noble to file the contents of an appeal book in the Supreme Court in time which, he says resulted in a loss to Indevelco of \$45,000.00.
- 27 When one looks further into the matter on the limited material that I have, it is much more complicated than that. The document in question was filed only two days late and it appears that the real concern of the Court of Appeal was whether

there was any merit in the appeal in any event but that is another matter. That allegation relates to work done by Mr Noble for Indevelco and although Mr Zervos was a party to the retainer he did not personally suffer any loss.

- 28 Mr Zervos alleges that following that alleged loss Mr Noble agreed that he would “act for to make up that loss, without billing until that loss was determined and recovered”. When I questioned him about that he seemed to have no idea how such an arrangement would work. There was no quantification of work done for him by Mr Noble or Indevelco apart from the bills that were rendered and the fact that those bills were rendered is inconsistent with the agreement that he asserts.
- 29 In any case the existence of such an agreement as that asserted is quite inconsistent with the document Mr Zervos signed acknowledging his indebtedness to Mr Noble for \$22,200.00 plus the monies owed to Miss Cloonan. Further, Mr Noble denies that such an agreement was entered into and I prefer his evidence to that of Mr Zervos.
- 30 Mr Zervos claims that Mr Noble delayed in delivering the file to Miss Cloonan for the preparation of the bill until mid February, which appears to be accepted, although Mr Noble offered an explanation, and it is unclear what conclusions Mr Zervos is seeking to have me draw from that. He does not suggest that this in itself resulted in any loss to him.
- 31 Mr Zervos says that for some time he did not receive any invoices from Mr Noble but the invoices are exhibited to Mr Noble’s affidavit and I accept his evidence that they were rendered.
- 32 Mr Zervos says that Mr Noble quoted him \$20,000.00 for the hearing based on a 7 day trial. Mr Noble denies that and says that he wanted \$20,000.00 on account of costs before the commencement of the trial. He denies having given a quotation or any undertaking that the trial would only cost that amount. Since the Counsel whom Mr Zervos asked Mr Noble to brief quoted a fee which, with preparation, would have absorbed three quarters of that sum, I prefer Mr Noble’s evidence.
- 33 Mr Zervos says that Mr Noble is seeking to charge him for fees incurred with respect to Perpetual. I think there are two answers to that. In the first case, the fee disclosure agreement supports Mr Noble’s evidence that the client was both Perpetual and Mr Zervos. In addition, Mr Zervos and Mr Noble agreed in writing that Mr Noble was to receive \$22,200.00.
- 34 Mr Zervos argued that the \$22,200.00 related to “common costs”, so that in accordance with my order Mr Noble should only receive \$11,000.00. I am unable to understand this logic at all. The bill of costs, which was for \$65,000.00, only relates to work done for Mr Zervos and includes only his one half share of the common costs. The agreement Mr Zervos signed was to deduct the whole of the \$22,200.00 from the amount recovered and pay the balance to Mr Zervos. What he is now asserting is quite inconsistent with that.

Conclusion

- 35 I am not prepared to go behind the documents that Mr Zervos has signed. He has openly and admittedly breached the undertaking he gave to both Mr Noble and Miss Cloonan and there is no justification whatsoever in not giving effect to the agreements that they had. It was, after all, in reliance upon those agreements that they allowed Mr Zervos to have possession of the bill of costs which equipped him to negotiate the settlement of the claim for costs against Perpetual.
- 36 By its very nature, the money in the Tribunal represents the fruits of the labours of both Mr Noble and Miss Cloonan and the monies owed to them ought to be paid from it. As to the final bill, the amount of that will remain in the Fund for 30 days to enable Mr Zervos to seek to have the bill assessed failing which it will be paid out to Mr Noble. The remainder of the money will remain there until such time as the question of costs of this application have been dealt with.

SENIOR MEMBER R. WALKER

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