

IN THE COUNTY COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL DIVISION  
BANKING AND FINANCE LIST

Revised  
Not Restricted  
Suitable for Publication

Case No. CI-14-00472

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED  
(ABN 11 005 357 522)

Plaintiff

v

BANKSEEA PTY LTD (ACN 106 550 430)

First Defendant

and

WAYNE JOHNSTONE (also known as WAYNE JOHN COLLINS)

Second Defendant

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JUDGE: HER HONOUR JUDGE MARKS  
WHERE HELD: Melbourne  
DATE OF HEARING: 1 August 2017; further affidavits and submissions filed on  
7, 14 and 31 August 2017  
DATE OF RULING: 13 December 2017  
CASE MAY BE CITED AS: ANZ Banking Group Ltd v Bankseea Pty Ltd & Anor  
MEDIUM NEUTRAL CITATION: [2017] VCC 1852

**REASONS FOR RULING**

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Catchwords: APPLICATION TO SET ASIDE JUDGMENT – where judgment was given in 2014 for possession of properties – where application made by non-parties to set aside the judgment – whether the non-parties have standing to make the application to set aside

JUDGMENT – SETTING ASIDE – FRAUD – where judgment for possession of properties – whether mortgagee has indefeasible title under s42(1) of the *Transfer of Land Act 1958* – where allegation judgment procured by fraud

NOTICE TO ATTORNEYS-GENERAL – whether matter arising under the constitution or involving its interpretation – whether clause 78B(1) of the *Judiciary Act 1903* precludes the proceeding from continuing until the Attorneys-General of the Commonwealth and States have indicated if they want to intervene

Legislation Cited: *Transfer of Land Act 1958*; *County Court Civil Procedure Rules 2008*; *Civil Procedure Act 2010*

Cases Cited: *Neil v Nott* (1994) 68 ALJR 509; *Raptis v City of Melbourne* [2017] VSC

488; *Permanent Custodians Ltd v Palmer* [2009] VSCA 80; *Hou and Kanakaridis v Westpac Banking Corporation Ltd* [2015] VSCA 57; *Kostakanellis v Allen* [1974] VR 596; *Lubura v Nezirevi* (2013) 42 VR 43; *Evans v Bartlam* [1937] AC 473; *Hou v Westpac* [2014] VSC 606; *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534; *Council of the City of Greater Wollongong v Cowan* (1955) 93 CLR 435; *Talacko v Talacko* 31 VR 340; *Commonwealth Bank of Australia v Quade & Ors* (1991) 178 CLR 134; *Monroe Schneider Associates (Inc) & Anor v No 1 Raberem Pty Ltd & Ors* (1992) 109 ALR 137; *Delmo v Merrigal Pty Ltd* (VSC, Murphy J No. 3416/87, 29 April 1988 unreported BC 8800726; *Krakowski v Eurolynx Properties Pty Ltd* (1995) 183 CLR 563; *Wallingford v Mutual Society* (1880) 5 App Cas 685; *Vassos v State Bank of Australia* (1993) 2 VR 316; *Pyramid Building Society (In Liquidation) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188; *Frazer v Walker* [1967] 1 AC 569; *Breskvar v Wall* (1971) 126 CLR 376; *Stuart v Kingston* (1923) 32 CLR 309; *Assets Co Ltd v Mere Roihi* [1905] AC 176; *Grgic v ANZ Banking Group Ltd* (1994) 33 NSWLR 202; *Bahr v Nicolay (No. 2)* (1988) 164 CLR 604; *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Ms Catherine Gobbo	Piper Alderman
For the First Defendant		Mr Paul Annesley, in person
For the Second Defendant		No appearance
For the Applicants		Mr Paul Annesley, in person and for Ms Sharlene Annesley

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HER HONOUR:

1 This ruling deals with two applications. One is an application by the first defendant, Bankseea Pty Ltd, to set aside a summary judgment entered in favour of the plaintiff, the Australia and New Zealand Banking Group Limited (**the bank**) in 2014 (**the 2014 judgment**). The other is an application by Mr Paul Annesley and Ms Sharlene Annesley (who are not parties to the action, but describe themselves as ‘aggrieved parties’) to strike out or dismiss the entire proceeding, including the 2014 judgment, as well as seeking other relief.

2 I will dismiss the applications for the reasons that follow.

## HOW THE BANK OBTAINED THE JUDGMENT

### Green Street

3 Ms Annesley owned a residential property in Green Street, Bulla (**Green Street**). She and Mr Annesley used to live there.

4 On 19 June 2013 Ms Annesley purportedly<sup>1</sup> entered a contract to sell the Green Street property to the second defendant, Mr Wayne Johnstone (**the Green Street contract**). Mr Johnstone took out a loan with the bank to complete the purchase. He gave the bank a mortgage over Green Street as security for the loan (**the Green Street mortgage**).

5 On 17 July 2013 settlement of the Green Street contract occurred. A transfer of ownership from Ms Annesley to Mr Johnstone was registered on title. Ms Annesley was paid the money Mr Johnstone owed her under the Green Street contract. The money to pay her came from the bank’s loan to Mr Johnstone. The existing mortgage over the property in favour of Central Victorian Investments Pty Ltd was discharged. The bank registered the Green Street mortgage.

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<sup>1</sup> I say purportedly because in her most recent affidavit material she disputes having signed the contracts for the sale of Green Street . See these Reasons for Ruling (**Reasons**) at [78].

## Wildwood

- 6 On 23 March 2007 Annesley Investments Pty Ltd (the trustee of the Annesley Super Fund) (**Annesley Investments**) became registered proprietor of a rural property at Wildwood Road, Bulla (**Wildwood Road**). Annesley Investments transferred Wildwood Road to Ms Annesley, who became registered proprietor on 15 June 2010.
- 7 Mr Annesley refers to Wildwood Road as the agricultural property of himself and Ms Annesley.
- 8 Ms Annesley purportedly entered a contract to sell Wildwood Road to Bankseea (**the Wildwood Road contract**) on 15 May 2013.<sup>2</sup> At that time, Wayne Johnstone was Bankseea's sole director and shareholder, and he signed the contract on Bankseea's behalf.
- 9 Bankseea took out a business loan with the bank in order to complete the purchase. Bankseea gave the bank a mortgage over Wildwood Road as security for the loan (**the Wildwood mortgage**).
- 10 On 23 September 2013, settlement of the Wildwood Road contract occurred. A transfer of ownership from Ms Annesley to Bankseea was registered. The existing mortgage to Central Victorian Investments Pty Ltd was discharged. The bank registered the Wildwood mortgage.
- 11 At settlement Ms Annesley was paid 65 or 70% of the money that Bankseea had agreed to pay her under the Wildwood Road contract. That money came from the business loan the bank gave Bankseea.
- 12 In his 19 July 2016 affidavit, Mr Annesley says that Ms Annesley was paid 65% of the agreed sum under the Wildwood Road contract.

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<sup>2</sup> I say 'purportedly' as in Ms Annesley's most recent affidavit material she disputes having signed the Wildwood contract. This differs from earlier assertions made by her. See Reasons at [75].

13 In an affidavit sworn 27 October 2015 in the related County Court caveat proceedings, Ms Annesley says that as Bankseea did not have the funds to settle the purchase of the property she was to take a second mortgage of the property to protect the balance of the monies owing to her, but this did not occur. She exhibits a notice of dispute she and Mr Annesley lodged with the Financial Ombudsman Service on 8 October 2015. It says that she sold Wildwood Road to Bankseea, who got finance for the property through the bank. It says the bank:

would only finance to about 70% of the then value of the property and the purchaser was unable to provide the funds to cover the shortfall. Therefore as a condition of the sale and finance for the property Sharlene had to leave about 30% equity in the property for the purpose of getting the loan from the bank across the line. The [bank] was very aware of the fact Sharlene had equity in the property and also requested her to allow the transaction to complete’.

14 The bank also provided Bankseea with an overdraft facility secured by the Wildwood mortgage.

**Wayne Johnstone (also known as Wayne Collins)**

15 The second defendant is described on the writ as being ‘Wayne Johnstone (also known as Wayne Collins’. As ‘Wayne Johnstone’ he signed the contracts with Ms Annesley and entered into the loans with the bank on his own behalf and on behalf of Bankseea.

16 Mr and Ms Annesley assert that Wayne Johnstone had previously borrowed money from the bank and owed it money, using the name ‘Wayne Collins’.

17 On 10 December 2013, the bank served default notices under the loans on Mr Johnstone and Bankseea. The defaults relied on were pleaded in the statement of claim in this proceeding. They were to the effect that, in breach of the terms on which each of the loans was provided, a representation or statement had been made, or information given in connection with the bank providing the loan, that was found to be false or misleading when it was made or given, in that Wayne

Johnstone (who in relation to Bankseea was its sole director) had 'provided [the bank] with a false identity, being that of Wayne Johnstone'.

### **The claim in this proceeding and the judgment**

18 On 3 February 2014 the bank issued this proceeding. It sued Bankseea for the debt due under the business loan and overdraft facility, and for possession of Wildwood Road. It sued Mr Johnstone for the debt due under his loan, and for possession of Green Street.

19 Bankseea and Mr Johnstone were each represented by Dinley Lawyers when they filed their defences to the statement of claim on 19 March 2014. Each admitted everything in the statement of claim.

20 Bankseea's defence also stated:

However [Bankseea] has sold the property which the [bank] holds as security and settlement is pending – contract of sale for the property to be approved and discharge to be approved by the [bank] to discharge the outstanding debt [sic] in full and final settlement of the [bank's] claim. [33]

[Bankseea] has deposited with the [bank] funds for the direct purpose to meet interest payments whereby the [bank] has direct instructions to debit. [34]

21 Mr Johnstone's defence reiterates the same two paragraphs, except where Bankseea refers to itself, Mr Johnstone refers to himself.

22 On 29 April 2014 Dinley Lawyers filed notices of ceasing to act for the defendants

23 The bank filed an application for summary judgment under Order 22 of the *County Court Civil Procedure Rules 2008 (County Court Rules)* and section 61 of the *Civil Procedure Act 2010 (CPA)* on 15 April 2014.

24 Neither defendant appeared at the summary judgment hearing on 16 May 2014.

25 The bank obtained summary judgment against the defendants. On 4 July 2014 the judgment was amended on the papers (following a request for amendment received

via email from the solicitors for the bank to include judgment for possession as against Bankseea of Wildwood Road and as against Mr Johnstone of Green Street.

26 It is that judgment that the applications seek to set aside.

### **THE CLAIMS MADE BY MR AND MS ANNESLEY AND BANKSEEA**

27 It is not easy to follow all that is asserted by Mr and Ms Annesley as their detailed affidavit material contains contradictory and confusing assertions and a number of their claims have differed over time. However, in broad terms, they assert that Ms Annesley is the rightful owner of both Green Street and Wildwood Road. Mr and Ms Annesley say that they have been the victims of a fraud perpetrated on them by Wayne Johnstone. They say he used his company Bankseea in perpetrating that fraud so far as Wildwood Road was concerned.

28 At various times they have claimed that Mr Johnstone also defrauded the bank in connection with the bank taking security over Wildwood Road and Green Street. In more recent affidavits and submissions they assert that the bank was involved in the fraud, and that it or its employees were 'involved in creating the fake documents upon which the [bank] is relying on for taking possession of the said properties'.

29 They say that based on fake contracts of sale and transfer of land documents, the bank fraudulently registered transfer of land documents and mortgages against the properties. Ms Annesley asserts she was defrauded by Mr Johnstone because he was really Mr Collins, and because he did not pay all the money he had promised to pay under the contract of sale between Ms Annesley and Mr Johnstone in relation to the Wildwood Road property.

30 She has also alleged on one occasion that because Mr Johnstone could not borrow enough money to pay her all of the agreed price for the Wildwood Road property under the Wildwood contract, she agreed with Mr Johnstone that she would accept immediate payment of 65%, and take a second mortgage over the property.<sup>3</sup> She

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<sup>3</sup> See footnote 2.



says she asked the bank about her mortgage being given priority, and implies it was agreed. No evidence of this is provided.

31 In his 6 August 2017 affidavit Mr Annesley details Mr and Ms Annesley's grievances with regards to this proceeding:

The [bank's] case was based on the presumption that it had provided a loan to either or all of the named defendants in this proceeding, and it appears that the plaintiff alleged that the loans to the defendants were for the purpose of refinancing the defendants' properties. [6]

The truth of the matter is that the [bank] has known the defendants, for quite some time and they have conducted a significant amount of business together. The defendants have been known to the [bank] by several different names and identities and the defendants had a number of outstanding defaults of money owing to the [bank] to the sum of several hundreds of thousands of dollars. The said defaults were still outstanding at the time when the [bank] purportedly lent money to the defendants. [8]

The defendants have admitted in their notices of defence, in this proceeding, that they have known and been known, to the plaintiff for quite some time and that they have conducted business with each other. [9]

The [bank] also made representation to the court that the defendants had defrauded the [bank] by providing the [bank] with false identification and as such, the defendant was entitled to terminate the loan facility abruptly and demand the recovery of money immediately on demand, failing which would be entitled to possession of the said properties. [10]

However, from the evidence which has been presented by the [bank] and from the evidence which the aggrieved parties have been able to discover and research, the [bank] had known of, and dealt with the defendants in all of their other names, aliases and identities, and the [bank] was aware that the other name, aliases and identities, were all linked to one and the same person. [11]

The real matter of concern, for the aggrieved parties however, is that the [bank] also relies on the fake contracts of sale and transfer of land documents with regard to the said properties from the aggrieved parties to the defendants. The aggrieved parties also have evidence which shows that the [bank] or its employees were involved in creating the fake documents upon which the [bank] is relying on for taking possession of the said properties. [12]

Based on the fake contracts of sale and transfer of land documents, the [bank] has fraudulently registered Transfer of Land Documents and mortgages against properties of the agreed properties. [13]

The plaintiff has subsequently sold the Green Street property to another party and the plaintiff also had evicted the aggrieved parties from their Wildwood Road property in preparation to sell that property also. [14]

Whilst the aggrieved parties have managed to re-enter the Wildwood Road property, and to hold physical possession of the property, they have done so by having to endure severe harassment, threats, arrests, intimidation and violence from the plaintiff and its agents, including Sheriff's Office and the Victoria Police. [18]

The aggrieved parties have discovered and they confirm, that all of the evidence which the [bank] relied on, in order to obtain judgement against the defendants in this proceeding, and possession of the aggrieved parties properties was false in its entirety. [19]

The aggrieved parties have lost their residential home as it had been transferred out of their name and sold by the plaintiff to another party. The aggrieved parties have almost lost their agricultural property which has been transferred out of their name by the [bank], however the aggrieved parties are still holding physical possession of that property by sheer will and determination, albeit at great cost and suffering, so as to stand their ground and fight the corruption and criminality of the [bank] and all of its associates. [20]

32 Following the 2014 judgment the bank took possession of Green Street. It has been sold to third parties. Mr and Ms Annesley have continued in physical possession of Wildwood Road despite the judgment for possession of it.

## **THE HEARING**

### **Appearances, affidavits and submissions**

33 The summonses came on for hearing before me on 1 August 2017. As detailed below, further written material was filed subsequently.

34 Ms Gobbo of Counsel appeared for the bank.

35 Mr Annesley appeared on his own behalf. He sought leave to appear for Ms Annesley. I gave Mr Annesley leave to act on behalf of Ms Annesley, after he provided a letter signed by her authorising him to act and speak on her behalf in relation to the proceeding.

36 Mr Annesley also sought leave to appear for Bankseea.

37 Rule 1.17 of the County Court Rules provides:

Except where otherwise provided by or under any Act or these Rules, a Corporation... shall not take any step in a proceeding save by a solicitor.

- 38 A company is usually required to be represented in legal proceedings. Bankseea has previously been represented at various times by solicitors and counsel in this proceeding and in related proceedings. However, Mr Annesley is presently Bankseea's sole director and shareholder. He said at the hearing that he was no longer retaining the solicitor who most recently acted for Bankseea at a mediation which occurred in June 2017, and had no intention of retaining any other solicitors for Bankseea in this proceeding. I gave the leave he sought.
- 39 Prior to the hearing, affidavits had been filed by or on behalf of Mr and Ms Annesley in support of the relief sought in the summonses. These include affidavits of Mr Annesley dated 19 July 2016, 12 December 2016, 29 June 2017, 30 June 2017 and 1 August 2017, and an affidavit of Ms Annesley sworn 26 October 2016.
- 40 The bank filed an affidavit of Michael Edward Lhuede sworn 15 August 2016. It details aspects of the history leading up to the summonses being issued. It exhibits various documents from related proceedings in the County and Supreme Courts, including some affidavits sworn by Mr Annesley and Ms Annesley, orders made, a statement of claim filed on behalf of Ms Annesley, and transcripts of hearings.
- 41 At the hearing, Mr Annesley made oral submissions in support of the relief sought in the two summonses. Counsel for the bank made oral submissions in opposition. One of Counsel's submissions related to the allegation made by Mr Annesley of fraud involving the bank. She referred to the need for an allegation of fraud to be clearly identified and articulated, and submitted that it had not been despite the many affidavits filed.
- 42 The day after the hearing, Mr Annesley emailed the Court requesting leave to file and serve a further affidavit to be considered in relation to the applications. The email said that the affidavit would 'clearly identify and articulate the fraud by the ANZ as against the rightful owners of the properties'. I gave leave for Bankseea to serve a further affidavit 'clearly identifying the fraud alleged'.

- 43 On 7 August 2017 Mr Annesley filed an affidavit dated 6 August 2017. The large folder of exhibits to that affidavit included all the documents discovered by the bank in the proceeding. (The discovery arose from an order of Judge Anderson made on 20 February 2017<sup>4</sup>). Mr Annesley also exhibited, as exhibit PDA-10, 'special notes' which consist of comments apparently made by him on what he says those documents show.
- 44 I gave leave for written submissions to be filed both by Bankseea and the bank regarding matters arising from Mr Annesley's 6 August 2017 affidavit. The bank filed submissions dated 14 August on 25 August 2017. On 31 August 2017 Mr Annesley filed an affidavit affirmed by Ms Annesley on 29 August 2017. It was described as an 'Affidavit in reply to the plaintiff's submissions of 14 August 2017'. It contained both submissions and further evidence.
- 45 Some of the affidavits filed on behalf of Mr and Ms Annesley state that they are filed on behalf of themselves as 'the aggrieved parties'. No affidavits have been filed formally on behalf of Bankseea (in the sense that Bankseea is described as the party filing the affidavit). In making his submissions, Mr Annesley did not differentiate between submissions he was making on behalf of Bankseea, and those he was making on behalf of himself and Ms Annesley.
- 46 I have considered all the affidavits filed by Mr and Ms Annesley and the submissions made by them in relation to the relief sought in both the Annesley summons and the Bankseea summons.
- 47 For the sake of completeness I note the involvement of Mr Savvas Kanakaridis in this matter. He is not a party, witness nor lawyer for any party. He is apparently assisting Mr and Ms Annesley. He has filed affidavits. He attended court with Mr Annesley at the hearing before me.

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<sup>4</sup> See Reasons [65].

48 The bank objects to his affidavits being considered. They are not relevant. I did not have regard to them. It seems the points in them were picked up in any event by later affidavits sworn by Mr and Ms Annesley.

### **Self-represented litigants**

49 The bank opposes the relief sought in the summonses. Amongst other things, it says the application to strike out the proceeding by Mr and Ms Annesley is an abuse of process and should be dismissed. It also says that much of the affidavit material filed by Mr and Ms Annesley should be struck out as it has a 'vast array of objectionable comments', is embarrassing and unintelligible in parts, and contains many assertions that are not supported by evidence, including relating to serious allegations of fraud.

50 Mr Annesley conducted the hearing before me as a litigant in person on behalf of himself, Ms Annesley and for Bankseea.

51 This matter has great significance for Mr and Ms Annesley. It relates to properties that Ms Annesley was previously registered proprietors of, and in relation to which they believe that they have been the victims of fraud.

52 However, the Court is required to decide whether the relief they seek in the summonses should be granted, and in doing so, to consider whether it should be granted on the basis of applicable law and the evidence filed. This task has been made significantly more difficult by the fact that the affidavits and submissions made by Mr and Ms Annesley were hard to follow in part, and contained many assertions that were unsupported by evidence. And by the fact that contradictory assertions on significant matters have been made by Mr and Ms Annesley in the course of this dispute. It is hard to decipher precisely what they say about some critical events (such as whether Ms Annesley entered into contracts of sale regarding Green Street and Wildwood Road) because what they have said has changed over time.

- 53 A frequent consequence of self-representation is that the Court must assume the burden of endeavouring to ascertain the rights of parties which are obfuscated by their own advocacy: see the High Court's comments in *Neil v Nott* (1994) 68 ALJR 509 at 510.
- 54 The Court must endeavour to ascertain the rights of Bankseea and Mr and Ms Annesley despite these issues with the material filed. However, this does not mean that the proceeding loses its adversarial quality. The Court does not have a duty to run the case for Bankseea or Mr and Ms Annesley: see Croft J in *Raptis v City of Melbourne* [2017] VSC 488 [15].
- 55 It is noteworthy that Mr and Ms Annesley have not always been self represented. They have had solicitors acting in the past in this matter. Koroneous Lawyers, on 24 March 2017 filed a notice of appearance for the Annesleys. On 7 June 2017 they filed a notice of ceasing to act. On 9 June 2017, a notice was filed by Hone Legal to act for the Annesleys. They remain on the record but did not appear at the hearing before me.
- 56 Further, in related proceedings detailed below, Ms Annesley was represented by Mr Anthony Schlict of Counsel during part of the County Court hearing before his Honour Judge Cosgrave. She was represented by Mr John Ribands of Counsel in the proceeding before Justice Riordan, most particularly when she filed a statement of claim in the Supreme Court seeking relief against the bank relating to Wildwood Road.

#### **Adjournment request - Notice of a Constitutional Matter**

- 57 At the outset of the hearing, Mr Annesley applied to adjourn the hearing relying on a 'notice of constitutional matter' which he and had sought to file at Court on 31 July 2017. The Court registry had not accepted the filing of the notice of constitutional matter. Mr Annesley referred to it and said that the nature of the constitutional

matter has to do with the unjust acquisition of property and deprivation of the said property by the plaintiff from him and Ms Annesley.

58 Mr Annesley referred to s78B(1) of the *Judiciary Act 1903*:

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.

59 The notice appears to rely on, and it was made clear by Mr Annesley that he seeks to rely on, an allegation that under s69E of the *Banking Act 1959*, where the Commonwealth would acquire property from a person otherwise than on just terms and that would be invalid due to paragraph 51(xxxi) of the Constitution of the Commonwealth, the Commonwealth is liable to pay that person compensation.

60 The notice is difficult to understand. However, at the hearing, Mr Annesley said that the acquisition by the bank of the Wildwood Road property amounts to an acquisition on unfair terms and that, as this is a constitutional point, the matter needs to be stayed until all the Attorneys-General have been notified and had the opportunity to indicate if they want to be heard.

61 This submission is based on a fundamental misconception. It is not the Commonwealth of Australia who is the plaintiff in this case. It is the bank. The Commonwealth does not acquire anything in this case. This case is not related to a cause pending in a federal court, nor does it involve a matter arising under the Constitution or involving its interpretation. Accordingly, I did not adjourn the hearing of the summonses as a result of the notice.

### **Further adjournment request - mid hearing**

62 Halfway through the hearing before me and after I had indicated that I would not adjourn due to the notice of constitutional matter, Mr Annesley asked for a four

week adjournment of the hearing for another reason. He said that various documents had been produced by the bank shortly prior to the mediation on 23 June 2017, but that he did not have them with him. He said that since the mediation, he had not been able to contact the solicitor who had been acting for Bankseea, and that the solicitor had some of the documents. Mr Annesley said he wanted a four week period to put together and consolidate the proof of the fraud of the bank. The bundle of documents he said included details of identification checks and information given to the bank before loans were advanced.

63 The bank opposed any further adjournment.

64 The Annesley summons was issued two years after the 2014 judgment, and over a year before the hearing. It had already been adjourned a number of times. The case that Mr and Ms Annesley assert has been detailed in numerous affidavits.

65 On 20 February 2017 Judge Anderson made orders, including an order that the bank to provide a list of documents prior to the mediation:

By 3 March 2017:

- i. Mr and Ms Annesley must have instructed solicitors to act on their behalf at the mediation;
- ii. provided solicitors have notified the plaintiff in writing that they have instructions to act on behalf of Mr and Ms Annesley at the proposed mediation, the plaintiff must provide to Mr and Ms Annesley's solicitors a list of documents which answer the description of documents relating to the plaintiff's knowledge that Mr Wayne Johnstone or Wayne Collins, the second defendant, had other names, aliases or identities, and the plaintiff's knowledge that the transfer of the properties at Bulla may have been executed on behalf of the transferor by a person other than Ms Annesley and without her consent. The list of documents must indicate whether legal professional privilege is claimed for any document and the basis on which privilege is claimed. At the request of Mr and Ms Annesley's solicitors, a copy of any document included on the list (except where privilege is claimed) must be provided to the solicitors;

66 Mr Annesley said in the hearing that the documents produced by the bank as a result of that order were provided to him on 31 May 2017 (two months before the hearing). The mediation took place on 23 June 2017.



67 At the hearing before me Mr Annesley said that he did not have all of the documents from the solicitor. I asked him what he said they stated in general terms. He said that the documents showed a serious discrepancy in the mortgage documents, and showed the background of the loan and the fraud carried out by Wayne Johnstone that he asserts the bank was involved in. He said that although in early 2014 he had believed there was fraud involved it was not until he got the documents on 31 May 2017 that he had a full description of how big the matter was, and how illegal all the dealings were, and that a search of the Court file had proven further evidence of fraud.

68 I did not make a decision about adjourning the matter but said I would do so after reviewing the evidence.

69 The day after the hearing Mr Annesley emailed the Court requesting leave to file a further affidavit. I gave leave for a further affidavit to be filed by Mr Annesley, which was done on 6 August 2017. In that affidavit (and in Exhibit PDA-10, which is his notes of what he says the bank documents show), Mr Annesley refers in detail to the documents provided by the bank on 31 May 2017 and exhibits all of them. Nothing is said in the affidavit or Ms Annesley's subsequent affidavit about any further documents still being with the solicitor.

70 Clearly, if Mr Annesley did not have all the discovered bank documents in his possession at the time of the hearing on 1 August 2017, he had them by the time of filing his 6 August affidavit and by the time of the filing of the later affidavit and submissions of Ms Annesley.

71 In the light of those matters, and in keeping with the need to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute, I will not adjourn the hearing of the applications. I am satisfied that Mr and Ms Annesley and Bankseea have had sufficient opportunity to put the facts and law on which they rely before the Court. It is time for these applications to be dealt with.

## THE FACTS RELATING TO THE MORTGAGES

- 72 I have considered all the affidavits and exhibits filed in this proceeding. Relevantly, they show the following.
- 73 On 23 March 2007 Annesley Investments Pty Ltd (the trustee of the Annesley Super Fund) (**Annesley Investments**) became registered proprietor of Wildwood Road.
- 74 On 15 June 2010 Annesley Investments Pty Ltd transferred Wildwood Road to Ms Annesley. That same day, a mortgage to Central Victorian Investments Pty Ltd was registered.
- 75 On 15 May 2013, Ms Annesley purportedly entered a contract of sale of Wildwood Road to Bankseea. Annesley Investments is named as vendor on the front page, but the contract is purportedly signed by Ms Annesley, who is named on the next page as vendor. She is referred to on that page as the 'owner'. It is also signed by Wayne Johnstone.
- 76 I say 'purportedly' as in Ms Annesley's most recent affidavit material she disputes having signed the Wildwood contract. However, assertions in her earlier affidavits, and in a statement of claim filed in the Supreme Court on her behalf are premised on her having signed this contract. She says she sold the property to Bankseea but complains that subsequently Wayne Johnstone as its director defrauded her of money due under it. In their latest affidavits Mr and Ms Annesley refer to their earlier admissions that she signed the Wildwood contract as an 'error'. No explanation of the circumstances leading to the 'error' is given.
- 77 Earlier evidence of Mr and Ms Annesley is that she was paid 65 or 70% of the sum due under the Wildwood contract.
- 78 On 19 June 2013 Ms Annesley purportedly entered a contract of sale of Green Street to Mr Johnstone. (Mr and Ms Annesley appear to now assert that she did

not sign it, but their previous evidence was premised on her having sold it to Mr Johnstone).

79 The settlement period in the Green Street contract is noted in handwriting as being 150 days. There is a term that gives a right to occupy by Ms Annesley for six months after settlement and longer by negotiation. Ms Annesley has previously sworn that she agreed with Mr Johnstone that she would sell the property to him on the basis she could keep living there for a long time, but that this was stymied by Mr Johnstone mortgaging the property to the bank, and the bank then calling up its loan.

80 On 24 June 2013, bank records show a PAYG verification worksheet was signed by 'Wayne', as part of a mortgage credit assessment carried out by the bank.

81 On 24 June 2013, Bankseea's financial statements for 2012 were provided to the bank. Those statements state that the public officer's name for Bankseea is Wayne Collins. The statements are not signed, and appear to be drafts.

82 On 26 June 2013, there is in the bank records a statement of financial position, and an applicant form signed by Wayne Johnstone. At about this time, there is a mortgagor's interview guide, with a credit assessment of Mr Johnstone signed by Mr Hui Zhao, the home and investment lending manager of the bank at Preston.

83 On 27 June 2013, there is an email from Mr Vu Tran of the bank to Mr Tom Nedinis (apparently a broker) and Mr Zhao regarding Wayne Johnstone. It records that Mr Johnstone has purchased a residential property at Green Street, and will have a home loan of \$1 million to assist in settlement, the property and debt are in his name; further he has purchased a rural property at Wildwood Road, the purchase price is \$2.1 million, the bank extends 70 per cent against this type of property, the client requires bank funding to assist with that purchase, and the property and debt will be in the name of Bankseea. The email chain includes within it a reference to

'To: Wayne Collins'. The subject line of that email chain is 'FW Wayne Johnstone – Hi Wayne'.

84 On 27 June 2013, the bank mortgage for Green Street was witnessed by Mr Hui Zhao. In an internal bank memo to him of that day, he was advised the application for Wayne Johnstone had been approved. There is a disbursement and settlement authority of \$1 million to Wayne Johnstone.

85 On 28 June 2013, Wayne Johnstone was sent a letter of offer for a \$1 million residential mortgage over Green Street.

86 There is an undated transfer of land of Green Street from Ms Annesley to Wayne Johnstone. It appears to be witnessed by a bank officer. She asserts that she did not sign it.

87 On 1 July 2013, there is an application for a different type of loan: a break free ANZ loan. There is then an email chain between Hui Zhao and Wayne regarding a loan approval. Mr Zhao states in an email to Wayne: 'I have great news for you here. Your loan has fully approved and I've got all the mortgage documents with me by escalating our teams.' The address in the email chain is still 'allstates@iPrimus.com' and the name 'Wayne Collins' appears in the 'to' box. An email introduces 'Wayne' to Mr Vu, 'the relationship manager of ANZ, he will look after your new commercial property'.

88 On 1 July 2013, there is a mortgagor identification document in which Hui Zhao says he has sighted identification documents.

89 On 4 July 2013 there is an email attaching a birth certificate and driver's licence in the name of Wayne Johnstone. The email is from Wayne Collins to Hui Zhao.

90 Also on 4 July 2013:

- There is an email from Wayne Johnstone to Hui Zhao, saying 'I believe there is some issues in the mortgage documents'. He refers to there being 'two names'.
- In a later email that day, Hui Zhao says: 'Hi Wayne: I have spoken to settlement team. They said to me that on the contract of sale, the purchaser was a company. And all the loan we did is under your name. They've contacted your solicitor to try to solve this issue.'
- Later again that day, the solicitor acting for Wayne Johnstone wrote saying: 'We confirm the purchaser will be Wayne Johnstone and not Bankseea', regarding Green Street.<sup>5</sup>

91 On 5 July 2013, Hui Zhao wrote to Wayne: 'The ANZ is ready to go now. I have advised your solicitor.'

92 There were then internal bank emails regarding Wayne Johnstone, forwarded to the Wayne Collins email address (which appears to have been the only one being used by the bank).

93 On 17 July 2013 the transfer of land of Green Street from Ms Annesley to Mr Johnstone was registered; the then existing mortgage over the property in favour of Central Victorian Investments Pty Ltd was discharged; and the relevant bank mortgage was registered.

94 On 1 August 2013, Mr Vu Tran sent an email to Mr McComas asking him to do a name search on Wayne Johnstone, date of birth 25 May 1966, and on Bankseea, as new potential business clients. An FID enquiry of that date says there is no match for either of those.

95 In a credit memo of 2 August 2013, it was noted that:

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<sup>5</sup> Mr Annesley asserts that this shows the bank's knowledge in making the loan that Wayne Johnstone is a 'fake person'. However, the issue with 'two names' established in this exchange was with the fact that the purchaser of Wildwood Road was Bankseea, whereas the loans that had been approved at that stage were both to Wayne Johnstone.)

Tom Nedinis has referred this group to the ANZ. The director, shareholder and secretary is Wayne Johnstone, date of birth 25 May 1966. Name, Veda, and FID checks have been completed. Wayne has recently taken out a \$1 million home loan to purchase an investment property at Green Street. The client seeks a 70 per cent funding for the purchase of rural residential property at Wildwood Road. The property will be held as a long-term investment and possibly developed later. It's essentially vacant land. Wayne has been in the building industry for 30 years and is a bricklayer.

- 96 On 5 August 2013, a letter of offer for \$1.47 million loan was sent to Bankseea.
- 97 On 14 August 2013, emails addressed to 'Wayne' at the email address 'allstates@iPrimus.com.au' or just to an email address noted as 'allstates' were sent from Matthew Cameron, saying: 'Hi Wayne. Nice meeting you the other day'.
- 98 On 15 August 2013, an ANZ one switch application form was completed.
- 99 There is an undated notice of disposition of land in relation to Wildwood Road. Mr and Ms Annesley say that it is not Ms Annesley's signature. The document is not witnessed.
- 100 On 20 August 2013, Bankseea lodged a PPSI debenture over Wildwood Road.
- 101 On 26 August 2013, a transfer of land was purportedly signed by Ms Annesley to transfer the land to Bankseea. Ms Annesley says she never signed it.
- 102 On 27 August 2013, the bank wrote to Bankseea, referring to an ANZ business loan of \$1.47 million being available. It said the total amount drawn was \$1,351,418.07, and the date of drawdown was 27 August 2013. There is a bank diary note that settlement was completed that day. It indicates the City of Hume received \$12,006.75 and others received money as well. Significantly, the diary notes records payment to 'Sharlene Annesley \$630,136.05'.
- 103 On 6 September 2013, there is a diary note of a meeting between Tran and Tom (the broker). It notes that Tom advised Tran that Wayne was looking at investing in a quarry business and wanted approximately \$500,000.

- 104 On 10 September 2013, a letter of offer was given that was in the same form as the one given on 5 August 2013, which offered Bankseea \$1.47 million. It now updated the interest rates and offered an overdraft facility of \$367,500.
- 105 On 19 September 2013, Bankseea gave the mortgage over the Wildwood Road property to the bank. Mr Wayne Johnstone signed the mortgage for Bankseea. A transfer of land dated 19 September 2013 was purportedly signed by Ms Annesley. She denies signing it. There was also a guarantee signed by Wayne Johnstone.
- 106 Ms Annesley has referred in a caveat lodged by her over the property to an agreement between her and Bankseea dated 19 September 2013. No written agreement of this date has ever been produced by Mr and Ms Annesley in this proceeding or any of the related proceedings.<sup>6</sup>
- 107 On 23 September 2013 a transfer from Ms Annesley to Bankseea was registered; the mortgage to Central Victorian Investments Pty Ltd was discharged; and the relevant mortgage to the bank was registered.
- 108 On 1 October 2013, the bank sent a letter to Bankseea indicating that an overdraft of \$367,500 was now available.
- 109 On 30 October 2013, Philip Bing, solicitor for Wayne Collins, wrote to him. The letter is exhibited to an affidavit of Ms Annesley sworn 26 October 2016. The letter states:
- You or more particularly Wayne Johnstone have properties registered in your name. The police have become involved and you have been charged or will be charged with obtaining a financial advantage by deception, this would be the benefit of a loan. You obtained a driver's licence in the name Wayne Johnstone. The bank is now aware the loans were obtained in a "fictitious name". There is little doubt it could call up the wrong loans.
- 110 The letter recommends that Wayne make enquiries to refinance the loans. It says it is hard to see how anyone could be misled if the company register was amended

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<sup>6</sup> But see Reasons [246]

to record Wayne Collins as the owner of shares and director of the company instead of Wayne Johnstone.

111 On 25 November 2013, there is an email from Philip Bing to Wayne, in which he says he has arranged a meeting with a bank officer on 3 December 2013. Mr Bing comments:

during my most recent conversation he said the bank knew you under three different names: Wayne Collins, Wayne Johnstone and Robert Collins. He was concerned the written authority to speak to me was referred to only one of the names. I guess there is no dispute you have used three names. ... As I understand the position, your preferred name is Wayne Collins.

112 The email attaches an authority to the bank for Mr Bing to talk on Wayne's behalf referring to the three names he has used.

113 On 3 December 2013, Philip Bing emailed Wayne. The email says that Mr Bing met with bank personnel that day. It goes on 'they allege you owe the bank \$253,000 from another loan ... \$14,000 in credit card debts'. It says they will be taking action to call in the loans secured by the mortgages.

114 Later in December 2013, the bank called up the full amount of the loans on the basis that Wayne Johnstone had provided misleading information in support of the loan applications.

115 The Bankseea ASIC records indicate that from 10 April 2007 until 1 July 2008, Wayne Collins (recorded there as born 25 March 1963) was a director of Bankseea. From 15 August 2012 until 8 January 2015, Wayne Johnstone (recorded there as born 25 May 1966) is listed as the sole director of Bankseea. Mr Annesley then became the sole director on 8 January 2015.

## **CAVEATS AND COURT PROCEEDINGS**

116 Various caveats have been put on the properties since the Wildwood mortgage and Green Street mortgage were given to the bank, and a number of court proceedings have followed.



- 117 On 17 December 2013, Mr Annesley lodged a caveat (**the 2013 caveat**) over the Wildwood Road property. The 2013 caveat stated that the estate or interest claimed was an interest charge. The basis for that claim was said to be 'part performance due to an agreement in writing' dated 19 September 2013 between Ms Annesley and Bankseea.
- 118 On 3 February 2014, the bank filed this proceeding claiming money due from Bankseea and Mr Johnstone, and seeking possession of the Wildwood Road property and the Green Street property. Mr Johnstone and Bankseea filed separate defences which admitted the entire statement of claim. Neither defendant appeared at the summary judgment application.
- 119 On 16 May 2014, his Honour Judge Cosgrave ordered summary judgment in favour of the bank against both Bankseea and Mr Johnstone. That judgment has not been appealed. On 4 July 2014 those orders were amended to expressly include a reference that the bank recover possession of the Wildwood Road property.
- 120 On 8 January 2015, Mr Annesley became the sole director of Bankseea.
- 121 On 21 October 2015, the bank filed an originating motion and summons in the County Court seeking to remove the 2013 caveat (proceeding No. CI-15-04970) (**the County Court caveat proceeding**). Ms Annesley swore an affidavit in that proceeding on 27 October 2015. The case was adjourned on 27 October 2015 to allow Ms Annesley to file a further affidavit properly detailing her alleged concerns.
- 122 On 28 October 2015, Ms Annesley filed a writ in the Supreme Court (proceeding number S CI 2015 05592) (**Ms Annesley's proceeding**), seeking damages and other relief from the bank and others. Part of the relief sought was to stop the bank selling the Wildwood Road property. On 20 November 2015, Ms Annesley filed a summons seeking default judgment. On 2 December 2015, the bank filed a summons seeking summary dismissal.

- 123 On 29 October 2015, Ms Annesley filed a further affidavit in the County Court caveat proceeding. His Honour Judge Cosgrave heard the application for removal of the 2013 caveat. His Honour reserved his decision.
- 124 On the same day as the County Court caveat application was determined, 29 October 2015, Mr Annesley lodged three more caveats (**the 2015 caveats**):
- A caveat lodged on behalf of Ms Annesley, in which Ms Annesley claims a freehold interest pursuant to an alleged agreement dated 19 September 2013 between Bankseea and herself.
  - A caveat lodged on behalf of Mr Annesley in which he claims a freehold interest pursuant to an alleged agreement dated 9 January 2015 between Bankseea and himself.
  - A caveat lodged on behalf of Carlton Ross & Associates Pty Ltd in which it claims a freehold interest pursuant to an alleged agreement dated 5 May 2014 between Carlton Ross and Bankseea.
- 125 On 6 November 2015, his Honour Judge Cosgrave ordered in the County Court caveat proceeding that the 2013 caveat should be removed.
- 126 On 1 December 2015 Ms Annesley filed submissions in Ms Annesley's proceeding. In the submissions she sought, as against the bank, that the bank make the title to Wildwood Road available so that she could register her mortgage against title. She sought that there be no transfer of Wildwood Road to anyone other than her. She also sought to have Mr Annesley, Wayne Johnstone and Bankseea pay her \$2.8m damages.
- 127 On 2 December 2015, the bank filed a proceeding in the Supreme Court (proceeding no. S CI 2015 06138) to remove the 2015 caveats. These were removed by order of Justice Riordan on 17 December 2015.

- 128 Also on 2 December 2015, the bank filed a summons to strike out Ms Annesley's proceeding. That proceeding was struck out on 17 December 2015 with a right to re-plead and to serve an amended claim by 22 January 2016.
- 129 On 22 December 2015 Justice Riordan made orders restraining the Registrar from recording any further caveats on Wildwood Road.
- 130 On 29 January 2016 the court was informed that Ms Annesley was meeting with lawyers later that day to seek assistance preparing an amended pleading. An extension of time was granted to 14 February 2016.
- 131 On 14 February 2016 Ms Annesley filed and served an amended statement of claim in Ms Annesley's proceeding (**Ms Annesley's statement of claim**). It was struck out on 21 March 2016 at a hearing before Justice Riordan. Ms Annesley was represented by Mr Ribands of Counsel at the time.
- 132 No appeal has been filed.
- 133 On 30 June 2017 the Bankseea summons in this proceeding was filed.
- 134 On 19 July 2016 the Annesley summons in this proceeding was filed.

## **BANKSEEA SUMMONS**

- 135 I will deal first with the Bankseea summons as Bankseea is a party to the proceeding. The Bankseea summons was prepared by Mr Annesley (by then the sole director and shareholder of Bankseea).
- 136 The Bankseea summons seeks to set aside the 2014 judgment and the order for possession of property made against Bankseea, on the basis that Bankseea did not attend and was not represented at the hearing on that day, and that the hearing was 'an application under section 61 of the Civil Procedure Act 2010 (Vic)'.
- 137 The Bankseea summons also states that Bankseea:

makes this application to the court, because the summary judgment and the orders that were made by the court on the 16th day of May 2014, against the First Defendant and the Property belonging to the First Defendant; were all obtained by fraud, and by the plaintiff intentionally misleading the court and withholding critical information from the court; in order to obtain property and financial advantage by fraudulent and deceptive means.

138 Mr Annesley also asserts that the proceeding has been invalid from the outset.

### **Rule 22.15**

139 As set out above, the bank applied for, and obtained the judgment under the summary judgment procedure set up in Order 22 of the County Court Rules 2008 and Section 61 of the CPA. The bank was granted summary judgment against the defendants on the grounds that 'the defendants' respective defences, each dated 19 March 2014, have no real prospect of success.'

140 Rule 22.15 of the County Court Rules provides:

The Court may set aside or vary any judgement given against a party who does not attend on the hearing of an application under section 61 of the *Civil Procedure Act 2010*.

141 At the time the 2014 judgment was entered Rule 22.15 provided:

The Court may set aside or vary any judgment given against a party who does not attend on the hearing of an application under Rule 22.02 or 22.08.

142 Bankseea was not present at the hearing when the 2014 judgment was obtained. It is therefore able to apply under Rule 22.15 for an order that the Court set aside the 2014 judgment.

### **Alleged invalid proceeding**

143 At paragraphs 21 to 26 of his 6 August 2017 affidavit, Mr Annesley asserts that this proceeding was invalid from the beginning. He says this is so because:

- Rule 1.17(1) of the County Court Rules provides:

Except where otherwise provided by under any Act or these Rules, a Corporation, whether or not a party, shall not take any step in a proceeding save by a solicitor.

- The bank's writ was filed by 'Piper Alderman' and Piper Alderman was acting for it in other steps up to judgment. The statement of claim, attached to the writ, was signed by Piper Alderman as solicitors for the plaintiff.
- Piper Alderman is not a solicitor.
- Piper Alderman is not an 'Australian lawyer who holds a current local practising certificate or a current interstate practising certificate': s1.2.3(a) of the *Legal Profession Act 2004* (**the LPA**).
- Piper Alderman is 'an incorporated legal practice' which 'is a corporation that engages in legal practice in this jurisdiction, whether or not it also provides services that are not legal services': s2.7.4(1) of the LPA.
- Piper Alderman is a corporation, and so is precluded from taking any steps in proceedings in the courts.
- Piper Alderman is even precluded from making representations of being a solicitor because that is a misrepresentation and 'an offence against the Commonwealth'.

144 This claim is misconceived.

145 The Court of Appeal has held that the reference to 'solicitor' in r1.17(1) of the *Supreme Court (General Civil Procedure) Rules 2015* (**the Supreme Court Rules**) also includes originating processes that are signed by a law firm. Whilst the Court of Appeal cases refer to the Supreme Court Rules, there is no relevant difference between them and the County Court Rules in this regard.

146 In *Permanent Custodians Ltd v Palmer* [2009] VSCA 80 (***Permanent Custodians***), Mr Palmer sought leave to appeal for several reasons, including that the initial proceeding filed against himself and Virgin Investments Pty Ltd was ‘fatally defective in that the statement of claim was signed in the name of Permanent’s firm of solicitors which is not a legal entity’: [9]. Kyrou AJA and Buchanan JA held that the reference to ‘solicitor’ in r1.17(1) of the Supreme Court Rules also includes originating processes that are signed by a law firm.

147 Kyrou AJA said at [13]:

Rule 5.11(2) of the Rules provides that where a party sues by a solicitor, the writ must be signed by the solicitor and r 13.01(3) provides that a pleading must be signed by the solicitor where it is not settled by counsel. The *Legal Profession Act 2004* (Vic) recognises that solicitors may practise as sole practitioners or as partners of a law firm and imposes a number of obligations on law firms notwithstanding that they are not separate legal entities. The Rules also recognise law firms. Accordingly, a writ and a statement of claim can be signed in the name of a law firm even though the firm is not a separate legal entity and there is no requirement to identify the person signing in the name of the firm. [footnotes omitted]

148 *Permanent Custodians* was referred to by the Court of Appeal in *Hou and Kanakaridis v Westpac Banking Corporation Ltd* [2015] VSCA 57. The applications sought leave to appeal for various reasons, including at [46] that:

The proceedings as commenced by the respondent were invalid from the beginning pursuant to s3 of the **SUPREME COURT ACT 1985 (Act)** and the rule 1.17 of the Supreme Court (General Civil Procedure) Rules 2005 (Rules), and s6 ‘Terms Relating to Legal Practitioners’ under the *Legal Profession Act 2004*, and s41(2) and s42(1) of the *Civil Procedures Act 2010*.

149 The Court of Appeal rejected this argument at [75], referring to *Permanent Custodians* which was cited with approval. I note that Mr Savvas Kanakaridis was a party to this case. He has filed affidavits for Mr and Ms Annesley in this matter and has sought to assist them in Court. He must have been aware that these arguments had already been the subject of a decision by the Court of Appeal.

150 If the proceeding were invalid then the 2014 judgment would have been irregular and should be set aside on that basis.

151 However, the proceeding was validly instituted.

### **The test to set aside a judgment where judgment is regularly entered**

152 Whether the 2014 judgment is set aside is a matter of the court's discretion, and in exercising the discretion the court has regard to the same factors as relevant to an application under Rule 21.07 to set aside a judgment entered or given in default of appearance or defence.

153 Under Rule 21.07, Bankseea must show grounds why the court's discretion should be exercised in its favour: *Kostakanellis v Allen* [1974] VR 596 at 603-5.

154 In *Lubura v Nezirevi* (2013) 42 VR 43 at [3], Warren CJ described the test for setting aside a default judgment as follows:

The test for setting aside a default judgment is set out in *Kostakanellis v Allen* where the Full Court held that a court should assess:

- Whether there is a defence on the merits;
- The reasons for the default;
- Whether the application to set aside the judgement was made promptly after the judgment came to the knowledge of the [defendant]; and
- Whether, if the judgment is set aside, a suitable award of costs and the giving of security would be adequate to cover the prejudice to the plaintiff in having the judgment set aside.

155 Bankseea has not established a defence on the merits, nor a reason for the default in attending the hearing, nor that it made an application to set aside promptly. Its application must fail.

### **No reason given for default**

156 Bankseea admitted the entirety of the statement of claim in its defence. It did not attend the summary judgment hearing. No reason has been given for it failing to appear.

### **No prompt application to set aside**

157 When Mr Johnstone was the sole director of Bankseea, no application was made to set aside the judgment. However, by 8 January 2015, Mr Annesley became the sole director in place of Mr Johnstone. He said he did this because he was aware of the 2014 judgment at that time, and wanted to do something about it. However, he did not cause Bankseea to file its summons to set aside the judgment until June 2017.

158 By no standards is that a prompt application, and there is no explanation given for the lateness.

### **No defence on the merits**

159 The main consideration in considering whether to set aside the judgment is whether Bankseea has a defence with merit: 'if merits are shown the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication': Lord Wright in *Evans v Bartlam* [1937] AC 473 at 489, applied in *Kostakanellis v Allen* [1974] VR 596 and *Lubura v Nezirevi* [2013] VSCA 215 at [4].

160 Bankseea has not established that it has any defence to the bank's claim in this proceeding.

### **Alleged payment by Bills of Exchange**

161 This somewhat absurd allegation is raised in the affidavit of Sharlene Annesley sworn 29 August 2017 and filed 31 August 2017: see [14]-[20]. It is to the effect that Ms Annesley claims that she has paid her debts by writing out and offering the bank a document that has no legal effect and does not in fact effect payment, which she calls a 'bill of exchange'.

162 Then Chief Justice Warren rejected a similar point at [55] of *Hou v Westpac* [2014] VSC 606.



163 Mr Savvas Kanakaridis who has been assisting Mr and Ms Annesley, was the second appellant in that case.

**Bankseea was not defrauded by the bank**

164 Counsel for the bank at the hearing made submissions about the need for the fraud to be clearly articulated where it is alleged. This is indeed required as discussed below.

165 After the hearing Mr Annesley sought leave to file a further affidavit to 'clearly annunciate' the alleged fraud. It does not clearly enunciate, or enunciate at all, a relevant fraud.

166 Mr and Ms Annesley assert that the Mr Johnstone defrauded them, and that false documentation (including transfers of land Ms Annesely now denies signing) was relied on by the bank in registering its mortgage.

167 However, at the relevant times, Mr Johnstone was the sole director and shareholder of Bankseea. It was under his control. It follows that to the extent that Mr Johnstone was involved in any fraud so too was Bankseea.

168 There is nothing in the evidence before me to suggest the bank defrauded Bankseea or was involved in any fraud against Bankseea.

169 It has no defence on the merits to the bank's claim against it based on the Wildwood mortgage.

170 Part of Bankseea's summons is to the effect that the 2014 judgment was obtained by fraud:

and by the plaintiff intentionally misleading the court and withholding critical information from the court; in order to obtain property and financial advantage by fraudulent and deceptive means.

171 The allegations that the bank misled the court in order to obtain property and financial advantage by fraudulent and deceptive means are not supported by any evidence.

172 To the extent that this assertion is based on the way the statement of claim was framed, the assertion is misconceived.

173 At [27] to [38] of his 6 August 2017 affidavit, Mr Annesley sets out various paragraphs of the statement of claim and makes comments about them, directed it seems to showing that they were false.

174 At [28] he refers to the allegation in paragraph 2 of the statement of claim that 'at all material times the first defendant was the sole registered proprietor of the Wildwood Road Property'. At [29] he refers to the allegation in paragraph 3 of the statement of claim that 'at all material times, the second defendant was the sole registered proprietor of the Green Street Property'. At [37] he says:

The Applicants reject the assertions of the Plaintiff in that neither the first defendant, or the Second Defendant, were at all material times, the sole registered proprietors of the properties because the sole registered proprietor of both properties was Sharlene Phyllis Annesley and she was not in any way whatsoever connected with either the first of [sic] the second defendants of [sic] the plaintiff.

175 However, this misunderstands the effect of what is pleaded at paragraphs 2 and 3 of the statement of claim. These reference to 'at all material times' is a fairly standard phrase used in pleadings. The only relevant material time when the defendants were sole registered proprietors of the properties was when the mortgages were registered on them.

176 At the second [37] in his affidavit, Mr Annesley refers to the assertion at the outset of the statement of claim that 'from time to time the plaintiff provided various financial facilities and accommodation to the First defendant' as being 'effectively an admission that the plaintiff knew the first defendant for quite some time prior to these facilities, and also by definition, the plaintiff would have known the directors of the first defendant'.

177 This does not follow from the phrase 'from time to time' which is a fairly loose phrase sometimes used in pleadings. In any event there is no evidence of prior knowledge of this sort.

178 At [39] of his 6 August 2017 affidavit, Mr Annesley says that the pleadings show that:

all parties had prior knowledge of each other and in fact a knowledge of each others business activities. And in fact to rather an alarming degree, a collusion by those parties to deceive and mislead the court and to disguise any evidence of a purported sale or transfer of the properties.

179 This is not what the pleading shows.

180 In any event, even if Mr Annesley were correct that Bankseea had colluded in an alleged deception of the court of this nature, it would not enable Bankseea to apply to set aside the judgment obtained. If it colluded, it was involved and party to the alleged fraud. It cannot rely on that to set aside the judgment.

181 Where it is alleged that a judgment was obtained by fraudulent conduct, it must be shown that the court was in ignorance of that actual fraud. The onus is on the person alleging that. A party must produce evidence of facts discovered since judgment which raise a reasonable probability of success.

182 Fraud must be alleged in a proposed statement of claim: see *Wentworth v Rogers* (No 5) (1986) 6 NSWLR 534 (**Wentworth**) at 539:

In summary [the applicant] must establish that the case is based on newly discovered facts; that the facts and material and such as to make it reasonably probable the case will succeed; that they go beyond mere allegations of perjury on the part of the witnesses at the trial; and that the opposing party who took advantage of the judgment is shown, by admissible evidence, to have been responsible for the fraud in such a way as to render it inequitable that such party should take the benefit of the judgment.

183 These points were summarised by Kirby P (as his Honour then was). The essence of this action is an allegation of fraud: see *Wentworth* at 539. The allegation must be properly particularised and established by the level of proof required of such an

allegation. The party impeaching the judgment must prove the recent discovery, of something material that either alone, or in conjunction with other facts already known, provides a reason to set aside the judgment. Evidence that a judgment is affected by fraud is ordinarily evidence discovered after judgment. Such evidence is subject to the principles governing the grant of a new trial on the ground of discovery of new evidence, as enunciated by the High Court in *Council of the City of Greater Wollongong v Cowan* (1955) 93 CLR 435.

184 Discovery of fresh evidence, as noted by the High Court at 444, is rarely a ground for a new trial unless well-known conditions are established:

It must be reasonably clear that if the evidence had been available at the first trial and had been adduced, an opposite result would have been produced, or if it is not reasonably clear that [an opposite result] would have been produced, it must have been so highly likely as to make it unreasonable to suppose the contrary.

Again, reasonable diligence must have been exercised to procure the evidence which the defeated party failed to adduce at the first trial.

185 These principles have been accepted in more recent authorities as accurately stating the law: *Talacko v Talacko* 31 VR 340; *Commonwealth Bank of Australia v Quade & Ors* (1991) 178 CLR 134; *Monroe Schneider Associates (Inc) & Anor v No 1 Raberem Pty Ltd & Ors* (1992) 109 ALR 137.

186 No evidence has been produced by Mr and Ms Annesley to show that the judgment against Bankseea was obtained by fraud. Rather, as discussed above, a case was pleaded against Bankseea (and admitted), and judgment was given. The evidence does not establish that the 2014 judgment against Bankseea was obtained by fraud or by the bank intentionally misleading the court and withholding critical information from the court.

187 I deal further below with the assertions made by Mr and Ms Annesley in relation to fraud in the context of the Annesley summons.

## **ANNESLEY SUMMONS**

188 Two years after the 2014 judgment was entered, Mr and Ms Annesley filed their summons in this proceeding.

189 The Annesley summons states:

To The Plaintiff;

AUSTRALIA & NEW ZEALAND BANKING GROUP LIMITED ABN 11  
005 357 552

Pursuant to rule 1.15 of the County Court Civil Procedure Rules 2008 (Vic) (**Rules**) You are summoned to attend before the Court on the hearing of an application by the Paul David Annesley and Sharlene Phyllis Annesley, to Dismiss your Originating Application and Claim in its entirety and to also dismiss any further or subsequent applications that may have been made by you or on your behalf, or any orders, judgments, warrants, that may have been made for you or on your behalf, by the court, as against the Defendants, or the applicants; Paul David Annesley and/or Sharlene Phyllis Annesley, their family, neighbours, associates, agents, servants or otherwise; and to restrain you from making any further such applications in the future or at any time, on the grounds that any such orders, judgments, or warrants, were obtained by fraud; and if such orders, judgments or warrants were to be relied on by the Plaintiff in seeking to enforce them, they would ultimately result in a denial of natural justice against the applicants.

The Applicants will be seeking the following orders:

1. That the originating application as filed on behalf of the Plaintiff in this proceeding on the 3<sup>rd</sup> of February 2014, by the Plaintiff by Piper Alderman Lawyers, be struck out and/or dismissed on the grounds that it is fraudulent, misleading, with the intention to deceive the court and as well as being frivolous, scandalous, vexatious and an abuse of process.
2. That any orders, judgments, warrants, made in this proceeding in favour of the Plaintiff, to be dismissed on the grounds that they were made and/or obtained by fraud.
3. That the Plaintiff be permanently restrained from making or filing any further applications in this proceeding or in related proceedings on the grounds that the Plaintiff has no lawful basis to bring any such applications or to make any claims against the defendants or the applicants because the Plaintiff is either the originator, or an active participant, in the fraud against the applicants, for the purpose of obtaining the property by fraud and deception and gaining a financial advantage by fraud and deception.
4. That criminal proceeding are to be commenced as against the Plaintiff, its agents, servants or otherwise, who have been exposed as having been active participant, accomplices, or accessories to the frauds against Applicants, or who otherwise may have incriminated themselves and or other parties with respect to the admissions of trespass, theft, harassment, perjury etc, by way of making depositions in the form of affidavit material in support of the

Plaintiff or the Plaintiff's applications, or those parties who have provided evidence by way of their own statements which are included as evidence in the affidavits as relied on by the Plaintiff.

5. That the Plaintiff, its associates, agents, servants, or otherwise be permanently restrained from interfering with the peaceful enjoyment by the applicants of the land and property situated at 325 Wildwood Road, Bulla 3428 in the State of Victoria (**property**)
6. That the Plaintiff pay to the Applicants and to any other of the Applicants' family members and associates, damages to be assessed with respect to their personal, psychological and financial damages that the applicants and their families and associates have suffered after the Plaintiff has unlawfully interfered in the affairs relating to the Applicants' property.
7. That the Plaintiff, pay the costs of the Applicants, their agents, servants, neighbours, or otherwise who may have been inconvenienced, or brought into these proceedings by the Plaintiff.
8. That the Plaintiff immediately remove, all and any registered securities or interests in relation to these proceedings including the Mortgage number AK607474L (**Mortgage**) as registered on the 23<sup>rd</sup> of September 2013 against title Volume 08861 Folio 856 (**Title**) as recorded by the Registrar of Titles, in the state of Victoria.
9. That the Plaintiff and/or its associates, agents, servants or otherwise, immediately cease all action and including and recovery action with regards to the mortgage, or against the property, or the land, or against the Defendants, and or the applicants.
10. That the Plaintiff and/or its associates, agents, servants or otherwise, be permanently restrained from taking any further action against the Defendants or the applicants in relation to any matters related to these proceedings or any related proceedings.
11. That the Plaintiff close off all accounts relating to any purported loan accounts as against the Defendants or however otherwise held by the Plaintiff, or any of the Plaintiff's associates, agents, servants, or by any affiliated entities or investors etc.

## Standing

190 The bank submits Mr and Ms Annesley do not have standing to bring the claims they have detailed in the Annesley summons in this proceeding which was between the bank and Bankseea before it culminated in judgment in 2014. Mr and Ms Annesley are not parties to the proceeding.

191 Mr and Ms Annesley say they have standing.

- 192 Many of the claims raised in the Annesley summons cannot be brought against the bank in the proceeding between the bank, Banksee and Johnstone, by way of their summons in any event (for example, criminal claims and their claim for injunctive relief). Mr and Mrs Annesley do not have standing to bring them.
- 193 There is no basis on which Mr Annesley has standing to intervene in this case at all. He was not even originally an owner of the properties, as Ms Annesley was.
- 194 I have considered whether Ms Annesley has standing to seek to set aside the 2014 judgment insofar as it relates to the order that the bank obtain possession of the Wildwood Road property. This is because she seeks to raise matters which she says mean that the bank should not be entitled to rely on its mortgage as against her, and says that she is the rightful owner of Wildwood Road.
- 195 Rule 1.14(2) of the County Court Rules provides that the Court may exercise any power under the Rules on the application of any person with a sufficient interest. As discussed above, applications to set aside judgment under Rule 22.15 raise the same considerations as under Rule 21.07
- 196 A person with sufficient interest can apply under r21.07 to set aside a judgment entered or given in default of appearance: *Delmo v Merrigal Pty Ltd (Delmo)* (VSC, Murphy J No. 3416/87, 29 April 1988 unreported BC 8800726). In *Delmo*, Murphy J held that a person who claimed an estate or interest in land the subject of a default judgment for the specific performance of a contract for the sale of the land made between the plaintiff and defendant had a sufficient interest to entitle that person to apply to have the judgment set aside. Although his comments about that may have been *obiter* (the judgment involved was irregularly entered), they are soundly based, have been followed in other matters, and I agree with them.
- 197 *Delmo* involved a judgment being entered in default of any defence being filed. There were three sets of related proceedings in circumstances where each of John Anthony Delmo and Bournian Pty Ltd (**Bournian**) separately claimed to have

purchased land under contracts of sale from Merrigal Pty Ltd (**Merrigal**), which was the beneficial owner of the land. In the case before Murphy J, judgment was entered for Delmo against Merrigal and Fairgate Investments Ltd (**Fairgate**), the registered owner of the property. He had sued them for specific performance of the contract he said he had to purchase the land.

198 Murphy J said that Bournian had standing to apply to set aside the default judgment as it 'had a real interest in the outcome of the action by Delmo against Merrigal and Fairgate. It claimed to have bought from Merrigal the land which Delmo alleged had been sold by Merrigal to him, the contract of sale of which he sought to have specifically performed.

199 Murphy J said the appropriate course would be for Bournian to be added as a defendant to Delmo's action, and that it was just and convenient that all the issues between those claiming the land be decided in the same proceeding. He decided that it was appropriate for the Court to exercise its discretion to allow Bournian leave to apply to set aside Delmo's judgment against Merrigal in default of defence: However, that leave was conditional on, or attended by an order, that Bournian be added as a defendant to the action, and its own writ stayed.

200 It is apparent that Bournian brought its own proceeding against Delmo and Merrigal clearly setting out its claims in relation to the land. It instituted those on 16 December 1987. It had made its application to set aside the judgment promptly (within 9 days of the judgment being granted on 9 March 1988, it made its application on 17 March 1988). The matters pleaded gave rise to a viable cause of action.

201 None of those matters are the case in relation to the Annesley summons. Ms Annesley does not assert as against another purchaser (in whose favour judgment had been entered) that she has purchased Wildwood Road. The evidence given by both her and Mr Annesley is that she had sold Wildwood Road to Bankseea, and been paid 65 or 70% for it. She cannot defeat the bank's indefeasible title (as



discussed below), and even if she could, she would have to account to the bank for the benefit she has obtained by the earlier mortgage being paid out and the payment to her.

202 I am not satisfied on the evidence that she is a person interested in the sense required.

203 If I am wrong about the question of standing, I would not in any event exercise my discretion to set aside the 2014 judgment on Ms Annesley's application, given these matters and the evidence in this case.

### **Green Street**

204 It is not clear from their affidavits and submissions whether Mr and Ms Annesley seek now to overturn the 2014 judgment so far as it was directed against Mr Johnstone for possession of Green Street. Their effort appears to be concentrated on trying to stay at Wildwood Road. However, to the extent they are seeking to overturn the judgment against Mr Johnstone for possession of Green Street, that application cannot be maintained.

205 The evidence is that subsequent to the 2014 judgment Green Street was sold to new owners.

206 The Court cannot make an order overturning the 2014 judgment so far as it concerns granting the bank possession of Green Street in circumstances where that property is now in the possession of third parties, and they are not party to either the proceeding or the summons.

207 No claim has been ventilated in this application by Mr and Ms Annesley against the new owners.

208 Mr Johnstone would have also been a necessary party to the summons also if that relief were to be pursued.

## **Rule 1.15**

209 The Annesley summons relies in part on Rule 1.15 of the County Court Rules. Rule 1.15 provides:

- (1) Where the manner or form of the procedure—
  - (a) for commencing, or for taking any step in, a proceeding; or
  - (b) by which the jurisdiction, power or authority of the Court is exercisable—

is not prescribed by these Rules or by or under any Act, or for any other reason there is doubt as to the manner or form of that procedure, the Court shall determine what procedure is to be adopted and may give directions.
- (2) An act done in accordance with a determination or direction under paragraph (1) is regular and sufficient.

210 The reliance on Rule 1.15 is misconceived. There is no proceeding on foot in relation to which the court is to determine what procedure is to be adopted or to give directions about it. Judgment has been granted in favour of the bank and unless it is set aside, the proceeding is at an end.

### **No prompt application to set aside**

211 Mr and Ms Annesley have known about the judgment since shortly after it was entered. Ms Annesley has already sued the bank in Ms Annesley's proceeding (subsequently dismissed) but did not make the claims of fraud against it that she now seeks to raise. She was represented by solicitors and counsel. She was involved in three different proceedings relating to Wildwood (County Court caveat proceedings, Supreme Court caveat proceedings and Ms Annesley's proceeding) and yet she did not seek to set aside the 2014 judgment until 2016.

212 There is no explanation given for this long delay.

### **No claim on the merits**

213 Even if Ms Annesley did have standing to apply to set aside the judgment for possession, the claim that she seeks to make is not a viable claim. That being the

case, I would not exercise my discretion to set aside the judgment for possession of Wildwood Road.

214 Mr and Ms Annesley assert repeatedly that fraud has occurred and that the bank is involved in it. As they are not parties, Counsel for the bank says that it was incumbent on Mr and Ms Annesley to have filed a statement of claim setting out their claims against the bank. I agree that this should have been done.

215 This is even more important where fraud allegations are made. Fraud must be pleaded specifically with full particulars (see *Krakowski v Eurolynx Properties Pty Ltd* (1995) 183 CLR 563 at 573).

216 In *Wallingford v Mutual Society* (1880) 5 App Cas 685 at page 701 it was held that:

the mere averment of fraud, in general terms, is not sufficient for any practical purpose in [a pleading]. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be matter of account, to point out a specific error, and bring evidence of that error, and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud without any definite character being given to those charges by stating the facts upon which they rest.

217 Mr and Ms Annesley have not articulated the alleged fraud clearly. As mentioned, previously, the allegations contained in their affidavits are difficult to understand, and go no further than to make assertions, some of which are contradictory. In addition, the allegations now sought to be advanced by Mr and Ms Annesley in their recent affidavits in this proceeding differ substantially to those advanced by Ms Annesley in sworn evidence previously. These inconsistencies remain wholly unexplained by Mr or Ms Annesley.

218 However, I have examined the evidence in any event in the light of the affidavit material and submissions of Mr Annesley to see if there is any basis on which Ms Annesley could defeat the bank's entitlement to possession of Wildwood Road on the basis of its registered mortgage. There is not.

219 There is no evidence before the Court to impugn the bank's mortgage. The bank was a bona fide mortgagor without notice of any fraud. It has an indefeasible interest in Wildwood Road.

220 The *Transfer of Land Act 1958 (TLA)* specifies that upon registration of an interest in land that title is indefeasible. Section 42(1) provides:

Notwithstanding the existence in any other person of any estate or interest (whether derived by grant from Her Majesty or otherwise) which but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, **except in case of fraud**, hold such land subject to such encumbrances as are recorded on the relevant folio of the Register but absolutely free from all other encumbrances whatsoever, except -

- (a) the estate or interest of a proprietor claiming the same land under a prior folio of the Register;
- (b) as regards any portion of the land that by wrong description of parcels or boundaries is included in the folio of the Register or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.' [Emphasis added]

221 In relation to the fraud exception, s 43 of the TLA provides:

**Except in the case of fraud** no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any land shall be required or in any manner concerned to inquire or ascertain the circumstances under or the consideration for which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; **and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.** [Emphasis added]

222 A mortgagee's title upon registration under the TLA cannot be defeated on the ground of fraud if the mortgagee was not a party to the fraud (see *Vassos v State Bank of Australia* (1993) 2 VR 316).

223 For the purpose of s42 of the Act fraud means actual dishonesty or moral turpitude. Proof of dishonesty is essential and must be brought home to the person whose registered title was impeached. The mere fact that a person may have found the

fraud if further enquiries had been made does not itself prove fraud (see *Pyramid Building Society (In Liquidation) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188).

224 In order for the mortgage to be set aside on the basis pleaded, the moving party must establish that they were defrauded out of their interest as registered proprietor and that the fraud was the bank's own, in the sense that it can be brought home to the bank: *Frazer v Walker* [1967] 1 AC 569; *Breskvar v Wall* (1971) 126 CLR 376.

225 If the moving party cannot establish that a consciously dishonest act can be brought home to the bank, as the registered proprietor of the interest, its title will be indefeasible: *Stuart v Kingston* (1923) 32 CLR 309.

226 As was held in *Assets Co Ltd v Mere Roihi* [1905] AC 176 at 210:

The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it can be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may properly be ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.

227 *Grgic v ANZ Banking Group Ltd* (1994) 33 NSWLR 202 concerned a forged attestation of a signature by an imposter, witnessed by the bank's officers. There the New South Wales Court of Appeal held that the attestation and certification by the bank's officers did not amount to fraud for the purposes of section 42 of the *Real Property Act*. Powell JA held at 222 that the attestation could not constitute fraud unless it could be shown either that the bank's officer knew that the imposter was not the true owner, or that, in signing the attestation, he was acting recklessly without caring whether or not the imposter was the true owner. His Honour said:

In the circumstances, it being well-established that a person who presents for registration a document which is forged or has been fraudulently or improperly obtained, is not guilty of "fraud" if he honestly believes it to be a genuine document which can be properly acted upon (*Assets Co Ltd v Mere Roihi* (at 210); *Mayer v Coe*) and that a less than meticulous practice as to the identification of persons purporting to deal with land registered under the provisions of the Act does not constitute a course of conduct so reckless as to be tantamount to fraud (*Ratcliffe v*

Watters (1969) 89 WN (Pt 1)(NSW) 496 at 500) this first ground of attack upon the ANZ's title as Mortgagee of the subject property must fail.

228 Mr and Ms Annesley assert as against the bank that it was involved in the fraud Wayne Johnstone perpetrated on them for various reasons.

229 Mr Annesley has variously submitted that Wayne Johnstone either misled the bank about who he was, or that the bank knew throughout the transaction that Wayne Johnstone was actually Wayne Collins. As discussed above, if the bank was misled too then a claim cannot be brought against it.

230 They assert that the bank facilitated the new 'fake identity' of Wayne Johnstone so that Vu Tran could write credit business, confident that if it failed the bank would be secured by way of registered mortgage. They assert that the bank was involved in the fraud and knowingly participated in it and created fraudulent documents for purpose of it. Mr Annesley asserts that the bank wanted to secure loans it had made to Mr Collins 'worth millions'. Ms Annesley asserts in her 26 October 2016 affidavit at [19] that the:

plaintiff participated in facilitated fraud to register the plaintiff's interest over the land with premeditated intention of calling up loans prematurely to recover unpaid debts being \$253,000 from another loan and \$14,000 in credit card debts...

231 There is no evidence of this being Mr Vu Tran's or the bank's intention. The bank did not sue for any loans other than those advanced to Wayne Johnstone at the same time as the Green Street mortgage was taken, and to Bankseea at the same time as the Wildwood mortgage. The 2014 judgment is only for those loans, and not anything else that may have been owing in relation to loans taken out in another alias of Mr Johnstone.

232 These very serious allegations are entirely unsupported by any evidence.

233 They assert that the bank accepted false documents supplied by Wayne Johnstone such as his driver's licence without doing proper checks. They say the bank chose to ignore the fact that Wayne Collins, as Wayne Johnstone, had supplied such false

documents including a false driver's licence to it. They say that one or more of the bank's officers knew, or should have known when the loans were entered into, that Wayne Johnstone was a 'false name' and a 'nonexistent person' because an email address for some emails sent by the bank in relation to the transactions relating to Wayne Johnstone went to an address initially associated with Wayne Collins and Hui Zhao initially emailed Wayne Collins at the outset of the transactions.

234 However, as discussed above, the fact that the bank might have discovered the fraud had it looked harder is not enough to make its title defeasible. There is no evidence to show its suspicions were aroused and it chose not to investigate.

235 They assert that the loans and mortgages are a nullity because the contracts of sale and transfers of land are invalid because Mr Johnstone is a 'non-existent person'. They describe them as fake documents, it seems partly because they were signed by Mr Wayne Johnstone under that name (when he was also known as Wayne Collins). Mr and Ms Annesley assert that this means the documents were signed by a fake person, and are void. However, some people use more than one name. This does not mean they are a 'fake person' or that the person is not bound by what they have signed. In this case Wayne Johnstone signed as purchaser of Green Street, signed for Bankseea to enable it to purchase Wildwood Road, and then entered the mortgages with the bank. Those transactions are not nullities merely because of the alias he used in doing so.

236 They also assert that some of the documents are fake because they assert Ms Annesley did not sign them. This includes the contract of sale of Wildwood Road to Bankseea and of Green Street to Wayne Johnstone (although in earlier affidavits both she and Mr Annesley deposed that she did sign these); and the transfers of land from her to Bankseea and Mr Johnstone of those properties. However, unless the bank knew she had not signed them, or had its suspicions aroused and did not investigate, it was entitled to rely on those documents presented to it. There is no evidence that its suspicions were aroused.

- 237 It may be being suggested (but this is not clear) by Mr and Ms Annesley that the bank was in some way acting fraudulently, in relying on the fact that Wayne Johnstone was also Wayne Collins as an excuse to issue the default notices and call up the loans, when they say the bank already knew.
- 238 The documents discovered do not show all the circumstances which led to the bank issuing notices of default.
- 239 However, even if I accept for the purposes of this analysis, that the bank, via one of its officers, knew that Mr Collins was also Mr Johnstone before lending the money, and later relied on this to call up the loans, this does not have the effect that Mr and Ms Annesley contend for, of establishing that the bank was involved in the fraud against them which Mr Johnstone perpetrated.
- 240 Had it chosen to at the time, a might have been able to raise by way of defence that the misrepresentation relied on in serving a notice of default had not in fact misled the bank at the time the loan was made.
- 241 However, Bankseea did not take that defence at the time despite the fact that Bankseea, by its sole director Mr Johnstone, knew about the email exchanges (as he was the one in the email exchanges with him). Bankseea cannot now raise this by way of defence.
- 242 And the circumstances of the calling up of the loan to Bankseea does not give rise to any claim that Mr or Ms Annesley could have against the bank.

### **Personal equity claim?**

- 243 The title obtained by the bank on registration is indefeasible once registered, unless there is a specific statutory basis for challenge the registered interest is subject to a 'claim *in personam*, founded in law or in equity, for such relief as a court acting *in personam* may grant': *Frazer v Walker* [1967] 1 AC 569 at 585.



244 I have considered above whether there was a statutory basis to challenge the registered interest. Mr and Ms Annesley have not referred to any personal equity they seek to raise as against the bank in their summons, and it was not argued at the hearing nor dealt with in written submissions. For the sake of completeness, and given that Mr and Ms Annesley are self represented, I have considered whether on the evidence they could have pleaded that the bank was bound by a personal equity such that it could not rely on the mortgage as against them.

245 Ms Annesley has asserted that she agreed with Mr Johnstone that as he could only pay 70% of the agreed price for Wildwood Road she would have a second mortgage over it. She has then asserted that the bank agreed to give her second mortgage priority over its own mortgage.

246 I considered whether this assertion might form any basis for a personal equity claim of the sort raised in *Bahr v Nicolay (No. 2)* (1988) 164 CLR 604. I do not consider that it does.

247 However, there is no evidence to support the allegation of this agreement by the bank other than the bare assertion of Ms Annesley.

248 In her 29 October 2015 affidavit in the County Court caveat proceedings Ms Annesley exhibits a curious document. It purports to be a mortgage of Wildwood Road by Bankseea to Ms Annesley dated 12 October 2015, referring to a loan agreement purportedly entered on 19 September 2013. It appears to be signed by Mr Annesley (who was by then the director of Bankseea) 'as director of the mortgagor'. It states:

The Mortgagor grants a Mortgage to the Mortgagee as security for the mortgagee; pursuant to a loan agreement between the mortgagee and the Mortgagor, which was executed between the Mortgagor and the mortgagee on the 19<sup>th</sup> day of September 2013, for the amount of \$800,000 ... Plus interest calculated at 10% per annum, payable monthly in advance. The Mortgagor grants to the mortgagee irrevocable power of possession and/or sale of the land if the Mortgagor defaults in its obligation to the mortgagee, and the mortgagee has irrevocable power of attorney to communicate with and to settle any other mortgages and/or encumbrances that the Mortgagor has granted or grants to any other parties who have any claim against the lined described in this document;

whether any such interest is registered or unregistered at the time of the agreement of 19 September 2013; thereby granting the Mortgagee a deed of priority ahead of all others who have any interest in the land as described here in this document.

249 Whatever effect Mr and Ms Annesley may have intended by lodging this mortgage two years or so after the bank had registered its mortgage on title for Wildwood Road, clearly it could not have the effect at law of giving Ms Annesley's mortgage priority over the bank's earlier mortgage or a deed of priority ahead of all others who have any interest in the land.

250 No details are given of when or how the agreement is said to have been made. It defies credulity that the bank would have agreed to loan its usual 70% against the security of rural property on the basis that Ms Annesley would be first in place as a mortgagee to secure the 30% or 35% she alleges she was owed. It also defies credulity that it would have agreed to do so without there being any documentation of that agreement.

251 I have also considered the allegations that the transfers of land were forged. However, even if the transfers of land were forged by Mr Johnstone, the mere fact of reliance on a forged instrument which is otherwise regular on its face will not suffice to give rise to a personal equity, even if the bank were guilty of some act of neglect: *Vassos v State Bank of South Australia* [1993] 2 VR 316. The transfers of land were regular on their face.

252 In *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133, a bank's carelessness in failing to check the attesting signatures affixed to a forged mortgage from a trust company was held not to give the trust company an *in personam* right to have the mortgage set aside. In reaching that conclusion Winneke P, at 136, said:

It is, I concede, logically attractive to argue that legitimate equitable claims should not be emasculated by setting the threshold level of conduct, short of statutory fraud, too high; on the other hand it is, in my view, an argument of equally compelling force that the threshold should not be set so low as to defeat the concept of indefeasibility which is entrenched in and central to the Torrens system of registration of interests in land; a system which itself recognises that the register is paramount and that, save in exceptional circumstances, those who have

suffered loss, without any fault on their own part, will have to content themselves with compensation out of the fund made available for the purpose.

253 Accordingly, an assertion of personal equity would not have given a basis to set aside the judgment.

## **ORDER**

254 I will order that the summonses be set aside.

255 I direct the parties to consider the costs orders that should be made as a result of this ruling and provide to me consent orders by 12pm on Monday 18 December. If the parties cannot agree, a costs hearing will be listed on Wednesday 20 December 2017 at 9:30am.

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### **Certificate**

I certify that these 48 pages are a true copy of the reasons for ruling of her Honour Judge Marks, delivered on 13 December 2017.

Dated: 13 December 2017

Samantha Marinic

Associate to Her Honour Judge Marks