

FEDERAL COURT OF AUSTRALIA

Bertola v Australian and New Zealand Banking Corporation [2014] FCA 609

Citation: Bertola v Australian and New Zealand Banking Corporation [2014] FCA 609

Parties: **FRANCIS PETER BERTOLA v AUSTRALIAN AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522), MCGRATH NICOL & PARTNERS PTY LTD TRADING AS MCGRATHNICOL+PARTNERS AS RECEIVER MANAGERS FOR OLAWA PTY LTD (ACN 008 992 130) (IN LIQUIDATION) and BRI FERRIER AS LIQUIDATORS FOR OLAWA PTY LTD (ACN 008 992 130) (IN LIQUIDATION)**

File number: WAD 129 of 2014

Judge: **BARKER J**

Date of judgment: 28 May 2014

Catchwords: **PRACTICE AND PROCEDURE** – application for interlocutory injunction – application dismissed – reliance on *Bills of Exchange Act 1909* (Cth) – summary dismissal of proceeding

Legislation: *Bills of Exchange Act 1909* (Cth) s 25

Date of hearing: 28 May 2014

Place: Perth

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 18

Counsel for the Applicant: The Applicant appeared in person

Counsel for the First Respondent: Mr DW John

Solicitor for the First Respondent: Herbert Smith Freehills

**IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION**

WAD 129 of 2014

**BETWEEN: FRANCIS PETER BERTOLA
Applicant**

**AND: AUSTRALIAN AND NEW ZEALAND BANKING GROUP
LIMITED (ACN 005 357 522)
First Respondent**

**MCGRATH NICOL & PARTNERS PTY LTD TRADING AS
MCGRATHNICOL+PARTNERS AS RECEIVER
MANAGERS FOR OLAWA PTY LTD (ACN 008 992 130) (IN
LIQUIDATION)
Second Respondent**

**BRI FERRIER AS LIQUIDATORS FOR OLAWA PTY LTD
(ACN 008 992 130) (IN LIQUIDATION)
Third Respondent**

JUDGE: BARKER J

DATE OF ORDER: 28 MAY 2014

WHERE MADE: PERTH

THE COURT ORDERS THAT:

1. The applicants' application for interlocutory relief filed on 26 May 2014 be dismissed.
2. Summary judgment be given in favour of the respondents and the applicants' claim be struck out.

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

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
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WAD 129 of 2014

BETWEEN: FRANCIS PETER BERTOLA
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(ACN 008 992 130) (IN LIQUIDATION)
Third Respondent

JUDGE: BARKER J

DATE: 28 MAY 2014

PLACE: PERTH

REASONS FOR JUDGMENT

1 On 26 May 2014, *Mr and Mrs Bertola*, upon payment of a filing fee of \$1080, filed an originating *application* in the Court seeking to prevent the sale by the Australian and New Zealand Banking Group Limited (*Bank*) and the receivers and the liquidator of Olawa Pty Ltd (in liquidation) (*the company*) of any assets belonging to them or the company.

2 The application and statement of claim filed with it sought to challenge the enforceability of securities instruments Mr and Mrs Bertola and the company, which was associated with them, had given the Bank over their respective farming and certain other assets.

3 It also sought an interlocutory injunction, pending hearing of the application, to halt the imminent sale of the assets.

4 The subject matter of the proceeding had previously been the subject of proceedings
in the Supreme Court of Western Australia, in which orders had been made facilitating the
sale of the assets on behalf of the Bank.

5 The hearing of the interlocutory application for injunction was listed before me on
Wednesday 28 May 2014. Before the Court for the purpose of the injunction application
were the application and the statement of claim, but no other materials such as an affidavit by
Mr or Mrs Bertola supporting the interlocutory application and setting out relevant facts.

6 Mr Bertola appeared as a self-represented party at the hearing and requested that the
Court allow him to be assisted by a Mr P Paalvast, who, as it transpired, was not a lawyer but
a person to whom Mr and Mrs Bertola had apparently been directed as someone who might
be able to assist them in their quest to prevent the imminent sale of assets.

7 As the subsequent transcript of the hearing set out below explains, I allowed
Mr Paalvast to speak on behalf of Mr Bertola. I did this because Mr Bertola conveyed an
inability to explain what his and his wife's cause of action entailed.

8 I should also note that on 8 May 2014, Mr and Mrs Bertola and another party had
appeared before me as self-represented parties on a not dissimilar application seeking to upset
the process by which the Bank was proceeding to sell their relevant assets. On that occasion I
refused any relief and pointed out a range of deficiencies with the proceedings, not the least
being that there did not appear to be any relevant jurisdiction in this Court to entertain the
proceeding.

9 On the hearing of the application on 28 May 2014, I noted the statement of claim filed
by Mr and Mrs Bertola purported to rely on the *Bills of Exchange Act 1909* (Cth) in order to
attract the jurisdiction of this Court.

10 While neither Mr nor Mrs Bertola had provided any evidence by affidavit to support
the application for an interlocutory injunction, in the course of statements from the bar table
made by Mr Paalvast, reference was made to an affidavit that Mr Bertola had apparently
made and filed or attempted to file quite recently in the Supreme Court of Western Australia
– albeit apparently in relation to an already concluded proceeding in that Court. Without any
objection from, and indeed with the support of counsel appearing for the Bank before me, a
copy of this affidavit was provided to me.

11 It then became apparent that Mr and Mrs Bertola sought to attract the operation of the
Bills of Exchange Act by the following process. First, they had made a copy of the relevant
judgment of the Master of the Supreme Court of Western Australia facilitating the sale of
assets. Secondly, they had made various annotations to that copied document and attached to
it other documents exhibiting various stamps and seals and a fingerprint of Mr Bertola.
Thirdly, they had recently delivered this new document, comprising some four pages, to the
Bank.

12 The apparent expectation of Mr and Mrs Bertola, which I infer was created by
Mr Paalvast, was that upon receipt of this new document the Bank would be obliged to
respond and, if it did not, would be taken as having accepted the document in “accord and
satisfaction” of all monies due to the Bank under the securities that underpinned the Supreme
Court order facilitating the sale of assets. I may not have fully represented the complete
scope of the argument outlined by Mr Paalvast before me, but this was how I understood its
substance.

13 Mr Paalvast made a particular submission concerning the operation of s 25 of the *Bills
of Exchange Act* in relation to the documents served on the Bank. He also made suggestions
that there was some contract, as a result of the delivery of this new document to the Bank,
between the Bank and Mr and Mrs Bertola, and presumably the company too (albeit a
company to which receivers had been appointed by the Bank and which was also in
liquidation).

14 The arguments put on behalf of Mr and Mrs Bertola relying on s 25 of the *Bills of
Exchange Act* and other provisions of that Act made little sense to me at the time Mr Paalvast
sought to articulate them, as I then sought to convey to him and to Mr Bertola.

15 After hearing briefly from counsel for the Bank, I not only dismissed the application
for interlocutory injunction, but also invited and entertained an application made on behalf of
the Bank that there should be summary dismissal of the proceeding, and ordered that the
proceeding be dismissed.

16 I incorporate in this judgment the transcript of the hearing at which I made these
orders. I do so for a number of reasons. First, it is, in my judgement, the most convenient
way to attempt to outline the apparent cause of action advanced by Mr Paalvast on behalf of
Mr and Mrs Bertola at the hearing, and to demonstrate that it was not only hopeless but

nonsense, and should not be allowed to take up any further time of the Court or indeed the parties.

17 Secondly, to disclose how a self-represented party in difficult financial circumstances may be inclined, like a drowning man clutching at a straw, to rely on a stranger's advice and commence a hopeless proceeding at a real financial cost to them. In this case, the filing of the application has cost Mr and Mrs Bertola at least the filing fee of \$1080, a sum which I apprehend they can little afford.

18 The transcript which follows is uncorrected and there are some obvious grammatical or typographical errors within it, but generally it adequately communicates the way in which Mr and Mrs Bertola, through Mr Paalvast, sought to advance the spurious argument put, and the ultimate disposition of the proceeding and the reasons for it.

HIS HONOUR: Mr Bertola.

MR F.P. BERTOLA: Yes, your Honour.

HIS HONOUR: You are again self represented?

MR BERTOLA: I am self represented today, your Honour.

HIS HONOUR: Now, you have someone sitting next to you. They're here to assist you, I take it?

MR BERTOLA: Yes, your Honour. As you remember from last time, I was – my hearing is a bit poor and so on and so forth, and I've been – to save any embarrassment and so forth

HIS HONOUR: All right.

MR BERTOLA: I've asked for my

HIS HONOUR: Well, that's fine.

MR BERTOLA: And had this person recommended to.

HIS HONOUR: Yes. Yes. If it's

MR BERTOLA: If that's okay.

HIS HONOUR: appropriate for you to do so, you can converse. What – the name of the person with you?

MR BERTOLA: Peter Paalvast.

HIS HONOUR: All right. Well, at this stage we will proceed on that basis. You can consult as appropriate. And I will just note

MR BERTOLA: Thank you, your Honour.

HIS HONOUR: appearances for – for the respondent.

MR D.W. JOHN: It's Mr John for the respondents.

HIS HONOUR: Yes.

MR JOHN: I haven't had – I only got these papers late yesterday and haven't formally filed an appearance.

HIS HONOUR: All right. So you appear for – I think there was three respondents? Yes.

MR JOHN: Actually, I only have formal instructions on behalf of ANZ, the first respondent.

HIS HONOUR: All right. Thank you very much. Yes, Mr Bertola?

MR BERTOLA: Yes, your Honour.

HIS HONOUR: Now, I have the following documents in front of me. I have an originating application.

MR BERTOLA: Yes, your Honour.

HIS HONOUR: Can you hear me okay at the moment?

MR BERTOLA: Pardon?

HIS HONOUR: Can you hear me okay?

MR BERTOLA: Yes.

HIS HONOUR: Okay. So I have an originating application and it contains what's called a claim for interlocutory relief, and that's the order that you want for an injunction to stop the sale of property belonging to or previously held by Olawa – O l a w a – Proprietary Limited or the applicants.

MR BERTOLA: Correct, your Honour.

HIS HONOUR: All right. And that application is signed by you and, I think, your wife.

MR BERTOLA: Yes, your Honour.

HIS HONOUR: Yes. And then you've filed with that, I think, a statement of claim.

MR BERTOLA: Yes, your Honour.

HIS HONOUR: And in that document, which is a document with 14 paragraphs, you basically seek to set out why you say an injunction should be granted at this point, I think, as well as what you say your claim is generally in the proceeding; is

that right?

MR BERTOLA: Yes, your Honour. That's correct. Yes, your Honour.

HIS HONOUR: Yes. And it seems to me that your statement of claim is probably meant to be something more than a statement of claim. It's signed by you and as I understand it you probably mean it to be in the nature of an affidavit to support your application for an interlocutory injunction. Would that be right?

MR P. PAALVAST: May I speak to assist him, sir?

HIS HONOUR: You can speak to Mr Bertola. Yes.

MR PAALVAST: We did that. We believed had to file an affidavit to start with just to get this provisional interim injunction and then would get the time to put out all the facts before the court. Okay.

MR BERTOLA: Yes.

MR PAALVAST: Yes. We just haven't had the time to – you haven't had the time to do that yet.

MR BERTOLA: Yes, your Honour.

MR PAALVAST: than that

MR BERTOLA: Your Honour, we didn't have the time, but this – that statement was made in view of getting this interlocutory interim injunction

HIS HONOUR: Yes. So

MR BERTOLA: to outline on the facts so that then we could prepare.

HIS HONOUR: Yes. Typically what would happen is that when you seek interim orders or interlocutory orders like an injunction, you need to put up some evidence, and the way to give evidence is to make an affidavit. But as I understand it, you personally adopt what's in the statement of claim in order to support the injunction application.

MR BERTOLA: Yes, your Honour. Could I ask for – for Peter to explain that for me, please.

HIS HONOUR: I see. So Mr Paalvast has been assisting you in trying to formulate your claim?

MR BERTOLA: Yes, your Honour.

HIS HONOUR: All right.

MR BERTOLA: Because it's not – it's not a simple – simple issue, and it's a little bit beyond my capacity to prepare.

HIS HONOUR: Yes. Now, Mr John, I'm at this stage just proceeding on the basis

that one way or the other what's in the statement of claim is – is sort of the evidentiary basis for a claim for an injunction. Do you have a different view about that at all? I don't have an affidavit as such in front of me.

MR JOHN: No. The only affidavit I've seen is one filed in the Supreme Court, or which purports to be filed in the Supreme Court. Was that

HIS HONOUR: Well, that's

MR JOHN: That wasn't

HIS HONOUR: That's not here.

MR JOHN: Right. Okay.

HIS HONOUR: Yes. I mean, one could, in various ways, deal with it simply by putting Mr Bertola in the witness box

MR JOHN: Yes.

HIS HONOUR: and asking him whether he adopts what's in the statement of claim.

MR JOHN: For current purposes, I have no difficulty with the court treating it – the statement of claim

HIS HONOUR: Treating it as

MR JOHN: like that.

HIS HONOUR: As if it were an affidavit

MR JOHN: Yes.

HIS HONOUR: for the purpose of dealing with the application today. All right. Thank you. Mr Bertola, I've read the statement of claim and it would help me if you can tell me very briefly what's at the centre of the claim you make now. Now, it looks like you've got some documents there, have you, that you want to use or

MR BERTOLA: Well, your Honour.

HIS HONOUR: Do I apprehend that you're not quite sure about all of these matters and it's – it's Mr Paalvast who is really

MR BERTOLA: That's right. Yes, your

HIS HONOUR: the person you're relying on to articulate

MR BERTOLA: Yes, your Honour. If it's

HIS HONOUR: the point. All right.

MR BERTOLA: If it was possible, I would

HIS HONOUR: Yes.

MR BERTOLA: rely on Peter.

HIS HONOUR: All right. Mr Paalvast, I'm – I will ask you to stand for a moment, Mr Paalvast.

MR PAALVAST: Sure.

HIS HONOUR: I'm reluctant in any proceeding to just have anyone else come in and speak for someone, particularly if they're not legally trained. And I apprehend you're not a licensed lawyer?

MR PAALVAST: No, sir. I make no claim to be a lawyer or a professional as an accountant.

HIS HONOUR: Yes.

MR PAALVAST: My only claim is that I have assisted many people, I'm familiar with court procedure.

HIS HONOUR: All right.

MR PAALVAST: Well, more than most, perhaps. But I don't profess to have

HIS HONOUR: All right.

MR PAALVAST: the best knowledge.

HIS HONOUR: Can you tell me very briefly what the key point is that you understand Mr Bertola wants to advance.

MR PAALVAST: What – my understanding from what Mr Bertola wishes to advance, sir, is that he has received documents from the Federal Court granting – unsigned, actually. And in fact, the associate judges' names are struck off it. Sorry. The Supreme Court.

HIS HONOUR: Yes.

MR PAALVAST: And his documents, he has had some advice to do certain things to them and convert that into a bill of exchange, which he has had endorsed in a certain manner and then issued to the bank and he at this point, from my understanding, sincerely believes that to be a discharge by the doctrine of accordant satisfaction and negotiation. The bill of exchange, my understanding, was tendered to the bank and accepted last Monday or Tuesday. There was a statutory obligation for the bank to appear at a private notarial protest meeting to allow them to negotiate further or express opinions or whatever. Demand further payment. Whatever. Their failure to appear is clear and plain in statute as to the discharge of the drawer and endorser of everything in there.

I don't think there's any argument about whether Mr Bertola as director, or former director, and his wife as former director, are stopped from proceeding or doing what

they did. I don't believe – sorry – I believe that Helena and Frank, as personal guarantors, are not estopped from assigning the debt or redeeming the debt with the bank by any lawful means possible, which is what seems to be included in this rather novel approach that they've taken. I've had sufficient things explained to me that I would tend to agree with the principle, but I'm not a lawyer or a judge, and the referee in case of need as appointed by the drawer and/or drawee is to be a justice of the Supreme Court, which I understand you hold that position, sir.

HIS HONOUR: No. I don't.

MR PAALVAST: Sorry. Federal Court.

HIS HONOUR: Yes.

MR PAALVAST: Or Supreme Court was allowed, but it has been decided that the Federal Court is the more proper jurisdiction to deal with matters of bills of exchange rather than an associate judge

HIS HONOUR: Well, you've – I have to say at this point, Mr Paalvast, you've provided some explanation of what you say the

MR PAALVAST: And

HIS HONOUR: critical or key point here is at my request, but it's not making a lot of sense to me.

MR PAALVAST: Okay.

HIS HONOUR: I'm reading the statement of claim. Did you have some hand in

MR PAALVAST: I

HIS HONOUR: crafting this document?

MR PAALVAST: Not the statement of claim. And that is not my hand or

HIS HONOUR: It's just that paragraph

MR PAALVAST: I've read it and

HIS HONOUR: Paragraph 7 – you've read it.

MR PAALVAST: Yes. I've read – and I

HIS HONOUR: But – so what appears in it from paragraph 7 onwards, which you've read, is intended to reflect what you've just been telling me about

MR PAALVAST: Yes. That's what I've had conveyed to me.

HIS HONOUR: the bills of exchange.

MR PAALVAST: Yes.

HIS HONOUR: So just tell me this: what's the bill of exchange in this transaction

that you are relying on?

MR PAALVAST: It is the valuable consideration sufficient

HIS HONOUR: Well, a bill of exchange will be a thing.

MR PAALVAST: Yes, sir.

HIS HONOUR: What's the instrument? Which is

MR PAALVAST: It's the bill of exchange itself.

HIS HONOUR: Which is it? What is it?

MR PAALVAST: There is an affidavit.

HIS HONOUR: I don't have an affidavit.

MR PAALVAST: No, but the one in the Supreme Court and I thought do something. Do you mind if we just get that

HIS HONOUR: Mr John, you're holding a document as well.

MR JOHN: Yes. I have a copy of what I understand is the document.

MR PAALVAST: I believe that's – but I, well

HIS HONOUR: You have a look at it, the two of you

MR PAALVAST: Yes, sir.

HIS HONOUR: Mr Bertola and Mr Paalvast. Is this the document that you are saying is in the Supreme Court?

MR PAALVAST: Someone has got an affidavit that – I think you might have The other file I put was case.

HIS HONOUR: Well, that document can be handed to me. That's Mr John's, which he is providing to the court for its assistance.

MR PAALVAST: Yes, yes.

HIS HONOUR: I'm assuming that you recognise that document, do you?

MR PAALVAST: Yes, I do.

HIS HONOUR: So that's the one you want to refer to.

MR PAALVAST: Yes, and

HIS HONOUR: And you're waiting on someone else to give you a copy of a similar document.

MR PAALVAST: Yes. No, that's it there. I recognise that.

HIS HONOUR: Well, you can take it. So this is an affidavit of Peter – sorry, Francis Peter Bertola sworn 23 May 2014 in the Supreme Court of Western Australia in proceeding CIV2674 of 2012.

MR PAALVAST: Yes, sir.

HIS HONOUR: And it's this document which you say identifies an instrument which is a bill of exchange.

MR PAALVAST: Yes, sir.

HIS HONOUR: Where does it do that?

MR PAALVAST: That is – there is two exhibits in this affidavit.

HIS HONOUR: One is exhibit A.

MR PAALVAST: Exhibit A.

HIS HONOUR: Which is a judgment before Master Sanderson of 21 November 2013.

MR PAALVAST: Yes. And that

HIS HONOUR: Is that the document that you're wanting to rely on?

MR PAALVAST: No, that's not the bill of exchange, sir. That is not

HIS HONOUR: The next document is exhibit B.

MR PAALVAST: Yes, sir. Now

HIS HONOUR: Now, what's that?

MR PAALVAST: What that is – my understanding of this process is that the judgment from Master Sanderson has been accepted as an inchoate instrument.

HIS HONOUR: Sorry, I just have to give a little intervention just so that I can understand what you're telling. This document that I'm looking at, first page, commences at the top:

From –

colon, blank –

by: Francis Peter Bertola, party 1. I have authorised representative 4, Mr F.P. and Mrs H.G. Bertola, party 2 of their address dated Monday, 19 May, AD 2014.

And it's to "Roland Andrew Davis or nominee, party 4".

MR PAALVAST: Yes, that's the cover letter that went with the

HIS HONOUR: This is the cover letter to the ANZ Bank.

MR PAALVAST: Yes, sir.

HIS HONOUR: reference Olawa, that's the company I mentioned earlier.

MR PAALVAST: Yes.

HIS HONOUR: And it's about a matter described as "personal guarantor's right of redemption of adjudicated debt before sale".

MR PAALVAST: That's correct, sir.

HIS HONOUR: All right. And it's

MR PAALVAST: It's a cover letter for Mr Davis. And I hope that name is spelt correctly, sir.

HIS HONOUR: So let me just look at this. Well, about the third paragraph in, it says:

I trust you will forgive any transgression on our part for not issuing this sooner. However, I promise to honour whatever debt is agreed, bargained or negotiated between us at the rate of 100 cents in the dollar or whatever sum certain is owing.

And that seems to be the substance of that document. And then attached to it

MR PAALVAST: Yes.

HIS HONOUR: is the document which is exhibit A, Judgment Before Master Sanderson, of 21 November 2013 but with a lot of writing on it.

MR PAALVAST: A lot of endorsements, sir.

HIS HONOUR: This is a copy of such a document.

MR PAALVAST: Yes, because the original was returned back to the ANZ at the time of the tenure of the bill of exchange.

HIS HONOUR: So you gave – Mr Bertola gave this document with that writing on it, with that covering letter to the bank

MR PAALVAST: Yes.

HIS HONOUR: and you say that has some legal effect in terms of the Bill of Exchange Act.

MR PAALVAST: Yes, sir.

HIS HONOUR: And what's the legal effect, you say, the giving of this document is?

MR PAALVAST: We have made a summary here of everything which due to the shortness between application and hearing was prepared this morning.

HIS HONOUR: So you got a summary of your, if you like

MR PAALVAST: Yes, which

HIS HONOUR: argument as how the Bills of Exchange Act operates on this document

MR PAALVAST: Yes. Yes.

HIS HONOUR: and this dealing in this transaction.

MR PAALVAST: Yes.

HIS HONOUR: Do you want to hand that to me?

MR PAALVAST: Yes, sir.

HIS HONOUR: All right.

MR PAALVAST: At this point

HIS HONOUR: Has Mr John seen this document?

MR PAALVAST: Yes, well we only had

HIS HONOUR: He has just got it as well, has he?

MR PAALVAST: Yes, everybody got it before court and

HIS HONOUR: When you before court, I'm assuming pretty much like me just now.

MR PAALVAST: Before we arrived - well, okay.

HIS HONOUR: Recently.

MR PAALVAST: Before 2.15.

HIS HONOUR: Just before 2.15?

MR PAALVAST: Yes.

HIS HONOUR: All right.

MR PAALVAST: At 2 o'clock, somewhere around there.

HIS HONOUR: No, no, he wasn't given it this morning.

MR PAALVAST: No.

HIS HONOUR: No.

MR PAALVAST: Because it wasn't printed.

HIS HONOUR: All right.

MR PAALVAST: And I

HIS HONOUR: Let me just – let me just, very briefly, read it.

MR PAALVAST: Sir, yes.

HIS HONOUR: Take a seat for a moment. All right. Well, I've looked at the document very quickly and one or the other it may be taken to reflect an understanding that interlocutory or inter-injunctions are not granted by a court like this unless a party can show a serious issue to be tried and make some assessment about where the balance of convenience lies, whether one party is going to be seriously prejudiced as against another and whether damages can't be an appropriate compensatory remedy if an injunction is granted and that in the end parties – the court's trying to do justice. The very first question that I need to understand is, what's the serious issue to be tried in relation to this matter. I'm looking at page 2 under a heading The Factual Matrix which then reads:

The applicant being a husband and wife partnership who have been successful farmers for decades whilst they reared a family of 11 children discharged any asserted indebtedness to the first respondent bank at 3.15 pm on 19 May by delivery of a bill of exchange and associated documentation sufficient to constitute a simple contract between the parties.

Now, that seems to me from what you already told me, annexure B to this affidavit

MR PAALVAST: Yes, sir.

HIS HONOUR: not filed here but previously filed in the Supreme Court on 23 May – I'm not sure what that's actually in relation to, but leave that aside for the moment. You're saying that the delivery of this marked up judgment has legal effect such as to discharge any indebtedness that Mr and Mrs Bertola have, or the company has – even though they're not a party to this proceeding – to the bank, that's the proposition.

MR PAALVAST: In part, sir, but not quite.

HIS HONOUR: Well, what part haven't I got?

MR PAALVAST: My understanding is, is that the

HIS HONOUR: Well

MR PAALVAST: shall we call it the black and white writing of the judgment, was an inchoate instrument and under the authority of section in the Bills of Exchange Act

HIS HONOUR: So section 25 of the Bills of Exchange Act.

MR PAALVAST: Yes, sir.

HIS HONOUR: Which is headed Inchoate Instruments

MR PAALVAST: Yes, sir.

HIS HONOUR: and which subsection to you rely on?

MR PAALVAST: Effectively, (1) and (2) from memory.

HIS HONOUR: Let me read them.

Where a simple signature on a blank stamped paper stamped with an impress duty stamp is delivered by the signer in order that it may be converted into a bill, it operates as a prima facie authority to fill it up as a complete bill for any amount the stamp will cover using the signature for that of the drawer or the acceptor of an indorser.

And then subsection (2):

And in like manner when a bill is wanting in any material particular, the person in possession of it has a prima facie authority to fill up the omission in any way he thinks.

And you're relying those provisions to say that there's a bill of exchange in operation here?

MR PAALVAST: No, an instrument, sir

HIS HONOUR: An instrument.

MR PAALVAST: an inchoate instrument. My understanding is subsection (2) more particularly refers to the bill and subsection (1) refers to any legal or formal document in writing to be executed in technical form – that has begun but not yet completed.

HIS HONOUR: But inchoate instruments are referring to an inchoate, that is to say an incomplete bill, the bill being a bill of exchange.

MR PAALVAST: Sir, I

HIS HONOUR: Not just any document floating, this is all about bills of exchange this Act.

MR PAALVAST: The Bill of Exchange Act quite clearly differentiates in the sections, from my advice, over writings, instruments and bills – meaning bill of exchange specific.

HIS HONOUR: But you just can't write something on any document and somehow say that it becomes a bill of exchange.

MR PAALVAST: No, sir.

HIS HONOUR: You see section 8 defines a bill of exchange

MR PAALVAST: Absolutely. I

HIS HONOUR: and subsection (1) says:

A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money or to the order of a specified person or to the bearer.

So, I mean, a cheque is a bill of exchange.

MR PAALVAST: Drawn on a bank and payable on demand, I agree.

HIS HONOUR: And if something is not complete

MR PAALVAST: Yes.

HIS HONOUR: but it has been stamped and it suggests that it can therefore operate up to a certain sum, then what the inchoate instruments provision in section 25, as I would understand it, does is enable that apparent bill of exchange properly called to still be effective. But this isn't a document that can be described as a bill of exchange.

MR PAALVAST: I agree, sir, that's not in dispute.

HIS HONOUR: But what

MR PAALVAST: What I'm suggesting

HIS HONOUR: has the Bill of Exchange Act got to with this then?

MR PAALVAST: Well, sir, my understanding of 25 sub (1), refers to any document or writing, not specifically a bill of exchange.

HIS HONOUR: But you can't – you can't read section 25 subsection (1) of the Bills of Exchange Act as though it's in an independent statute having general application throughout the Commonwealth of Australia.

MR PAALVAST: I

HIS HONOUR: It's to do with bills of exchange that's why it's commonwealth legislation.

MR PAALVAST: Okay. I agree – I agree with that, sir. What's the interpretation of section (1) is saying that that instrument – incomplete as you more generally call them – is entitled to be converted into a bill of exchange and if you look at section 8(3) – and just trying to paraphrase – in order to pay out of a particular fund is not unconditional, but – and then if you read that next line which is

HIS HONOUR: So what does this say at the top – mine is partly obscured – this is the top of exhibit B, handwritten.

MR PAALVAST: Yes, sir.

HIS HONOUR: It looks like – not sure what it says there.

MR PAALVAST: Well, my – having seen

HIS HONOUR: This is something, I can't read that bit.

MR PAALVAST: This is acknowledge an offer

HIS HONOUR: This – sorry, I just

MR PAALVAST: notice

HIS HONOUR: I'm just going to write this on the top page here. This

MR PAALVAST: This is acknowledged

HIS HONOUR: is acknowledged – this bit you see all referring – acknowledged

MR PAALVAST: The bank has got the original, sir, and

HIS HONOUR: That's all right, I'm working off this one though.

MR PAALVAST: Yes.

HIS HONOUR: This is acknowledged as a

MR PAALVAST: As an – I think it was an

HIS HONOUR: as an

MR PAALVAST: offer or inducement to contract a demand – is that the word?

HIS HONOUR: What does it say? As a demand?

MR PAALVAST: Yes, sir, my copy is the same as yours.

HIS HONOUR: Demand inducement.

MR PAALVAST: Demand or inducement or entreatment

HIS HONOUR: This – This is acknowledged as a demand or inducement – entreatment

MR PAALVAST: entreatment and/or offer to contract.

HIS HONOUR: and/or offer to contract between all parties named herein.

MR PAALVAST: Named – yes.

HIS HONOUR: It is a statement of the transaction giving rise to payment required to be executed between them all. I will have to say if – if this were a commercial

legal document submitted to be for confirmation, I would ask someone go away and re-draft it so I knew what they were talking about because it doesn't mean anything. It's liable to be called gobbledygook.

MR PAALVAST: Well, sir, people are allowed to hold their opinion, but I am not a lawyer, but I understand

HIS HONOUR: No, no, I'm expressing – I'm expressing a judge's opinion reading a form of words which doesn't make any sense to me. It doesn't make grammatical sense. But, in any event, if it were an offer to be construed as some sort of offer to settle

MR PAALVAST: No, offer to pay.

HIS HONOUR: then there's no contract for – unless someone is going to tell me the bank has accepted some offer.

MR PAALVAST: Well, sir, my understanding of how it was explained to me is that this two pages, 1 and 2 of four

HIS HONOUR: We're talking about this judgment which has been written over

MR PAALVAST: From Master Sanderson which has crossed his names out.

HIS HONOUR: together with the – together with the other documents that are attached

MR PAALVAST: Yes, 3 and 4.

HIS HONOUR: which aren't part of Master Sanderson's judgment but are under the heading

MR PAALVAST: Default

HIS HONOUR: Default and Liability Clause and Notice.

MR PAALVAST: Yes, sir.

HIS HONOUR: Which has two pages to it.

MR PAALVAST: Yes, sir.

HIS HONOUR: The second page having a whole lot of figures culminating in \$5 million being a sum certain of A\$10 exactly and so and so forth. And then a third page which has got bill of exchange and stamps and things on it.

MR PAALVAST: Yes, sir.

HIS HONOUR: Talking about \$5 million and sealed. What's this sealed – what's that? Is that Mr Bertola's personal seal?

MR PAALVAST: Yes. That's what he is professing it to be.

HIS HONOUR: And that's his fingerprint.

MR PAALVAST: It's his fingerprint and his signature under it as a drawer

HIS HONOUR: I have never seen

MR PAALVAST: of that

HIS HONOUR: I have never seen anything so extraordinary, I have to tell you. But you say that – that this by force of section 25 subsection (1) of the Bills of Exchange Act comes to operate as what? As a bill of sale?

MR PAALVAST: No, sir. My understanding is, is that 1 and 2 of 4 are an inchoate instrument where Mr Bertola as personal guarantor rather than an estopped party was – and I think that's further outlined in more detail in this outline of

HIS HONOUR: Yes, but you go on and tell me, it might be easier and for you just

MR PAALVAST: Well, if I explain it, it's probably easier for me, and then we can – if we need to refer later, I prefer to though.

HIS HONOUR: No, just tell me – just tell me as concisely as you can.

MR PAALVAST: Okay.

HIS HONOUR: It's an inchoate instrument.

MR PAALVAST: Yes. And he accepted it

HIS HONOUR: Who accepted it?

MR PAALVAST: Frank.

HIS HONOUR: What do you mean he accepted it, he drafted it.

MR PAALVAST: No – no, he accepted, I believe, the judgment

HIS HONOUR: Who – who drafted it?

MR PAALVAST: The judgment was drafted by the court.

HIS HONOUR: No, this document, exhibit B, is partly a document or a copy of a document being a judgment

MR PAALVAST: Yes.

HIS HONOUR: and the rest of it has got nothing to do with the judgment, these next three pages, they've all been attached to it and seals have been put on. They're pages 1, 2, 3 4 of 4 and then there's another page, as I said, called Bill of Exchange and another page called Drawees Endorsements. I mean, they're not the bank's documents.

MR PAALVAST: We agree. I agree with you.

HIS HONOUR: Whose documents are they?

MR PAALVAST: They – what if

HIS HONOUR: Who have they been created by?

MR PAALVAST: They – the – page 1 and 2 were

HIS HONOUR: Did Mr – Mr Bertola, did you create these documents?

MR PAALVAST: Yes.

HIS HONOUR: No, did Mr Bertola create them?

MR BERTOLA: Yes, your Honour.

HIS HONOUR: You draw these up – drew these up?

MR BERTOLA: With assistance, yes.

HIS HONOUR: You've had assistance. All right. So tell me what you say the effect is, very briefly.

MR PAALVAST: All right. Page 1 and 2 unendorsed has been accepted as an inchoate instrument with the authority of section 25, Mr Bertola has accepted as an incomplete instrument and filled it up as he saw fit.

HIS HONOUR: Well, he hasn't accepted; he has created it.

MR PAALVAST: Well, he said he has accepted it by notice.

HIS HONOUR: No, he has created the document. He just told me so.

MR PAALVAST: I believe he endorsed the document. He didn't create it.

HIS HONOUR: You endorsed the document that he prepared.

MR PAALVAST: He didn't prepare that, sir. That came from the court.

HIS HONOUR: No, it didn't.

MR PAALVAST: One, two – with all due respect, sir

HIS HONOUR: It's a copy of a court document which has been amended.

MR PAALVAST: I agree. We've all got copies. I believe the original was returned to the bank with Frank's endorsement, sir.

HIS HONOUR: Look, I've been informed enough, I think, to understand the nature of the proposition being put but I will give you another minute or two where I won't interrupt you just to tell me how you finally conclude the argument.

MR PAALVAST: Thank you, sir. My understanding is that page 1 and 2 were, with authority of section 25, filled up as Frank saw fit. Certain material particulars

were missing and he chose to endorse that inchoate instrument and then convert it into a bill of exchange by being a statement of the transaction giving rise to payment as now, for want of a better word, more complete. He then drew up, I agree, the bill of exchange in his own standing as Frank, okay, and he said – he agrees that by his accounting that sort of up to \$5 million in figures is owing and \$10 in words and has relied on some other provision of the Bills of Exchange Act, which I think was section 14 or 15, about sum payable and then tendered to the drawee, sir, which he has named as Olawa and basically the corporate personas or his business personas, to pay as per the instructions. The drawee has then held the same belief and then been ordered to pay \$10 exactly, in figures and words, to the bank in accord and satisfaction of all the terms, provisions and endorsements and tenor of acceptance as per the Bills of Exchange provisions elsewhere, also endorsed, probably requiring far more comprehensive detailing to determine, and I believe that's where the substantive points of law will come out.

HIS HONOUR: Sorry, what's the substantive point in law?

MR PAALVAST: Basically, that adequacy of consideration is not important. It has been negotiated.

HIS HONOUR: Absence of or adequacy of consideration in relation to what?

MR PAALVAST: To the amount paid.

HIS HONOUR: What's the transaction in respect of which we're talking about?

MR PAALVAST: The transaction to constitute that is the \$10. If I'm

HIS HONOUR: There's no – you're not alleging some contract between people to which consideration is relevant?

MR PAALVAST: I'm suggesting that this bill of exchange is coupled to pages 1, 2, 3 and 4 and that constitutes, in its own right, a simple contract of

HIS HONOUR: Between whom?

MR PAALVAST: Between ANZ

HIS HONOUR: You're not a party to it. You can't make someone a party to a contract. The contract is

MR PAALVAST: Well, one moment, sir. One moment, sir.

HIS HONOUR: A contract is something that two willing parties negotiate for which there's consideration.

MR PAALVAST: I accept that in a contract but the Bills of Exchange Act only requires sufficient consideration to constitute a simple contract between the parties.

HIS HONOUR: This is why I ask, though.

MR PAALVAST: That's

HIS HONOUR: This is why I ask. What's the contract? But you're saying it's not

a contract; it's a bill of exchange.

MR PAALVAST: No, I'm saying the statement of the transaction is the contract and the bill of exchange

HIS HONOUR: Sorry, what's the contract?

MR PAALVAST: The completed inchoate instrument of four pages

HIS HONOUR: Is a contract.

MR PAALVAST: is a separate financial contract.

HIS HONOUR: Between whom?

MR PAALVAST: Between the named parties, Australia and New Zealand Bank, Olawa and the two Bertolas named thereon as first and second defendant.

HIS HONOUR: All right. You've got 45 seconds to go.

MR PAALVAST: Thank you. I think we're getting close to the end. And then the bill of exchange, having a consideration of \$10, which is provisioned for under the inchoate instruments, fill it up to any amount the stamp will cover – it's the wording I'm trying to paraphrase – and that has then gone to the bank under the same rights and provisions in there – sorry – gone to the bank – the originals office – and then the bank has had a duty by other provisions in there to appear at a negotiation meeting where, if they don't appear, the Bills of Exchange Act, by payment being tendered by a bill of exchange, discharges the drawer and drawee and that's, I think, section 50 which is outlined in this document here.

HIS HONOUR: All right.

MR PAALVAST: Okay. And

HIS HONOUR: Have you run this argument yourself or assisted anyone else to run this precise argument in any other court?

MR PAALVAST: No, sir, not this way.

HIS HONOUR: You dreamt it all up yourself?

MR PAALVAST: I haven't dreamt this up myself.

HIS HONOUR: Well, you found it

MR PAALVAST: It's all there in statute.

HIS HONOUR: But have you seen this argument that you've written into the document you've given me anywhere else?

MR PAALVAST: I haven't seen the argument with anyone – not off the internet, if that's what you're suggesting.

HIS HONOUR: You've devised this by reading the Bills of Exchange Act.

MR PAALVAST: I'm aware of what it is. I didn't devise it.

HIS HONOUR: I mean – yes, the Parliament made the Bills of Exchange Act but you've come up with an argument as to how the Bills of Exchange Act applies in relation to a case like this. I'm just wondering – you've obviously devised that argument that you've been putting to me.

MR PAALVAST: No, sir, I've just done my own due diligence on it to – because it looked pretty far out, as you probably are seeing things at the moment.

HIS HONOUR: The argument is certainly very far out. I agree with that. It's the most incredible argument and I have to say, Mr Paalvast, that it really is nonsense.

MR PAALVAST: Well, with due respect, sir, there is the law of contract of Australia which quite clearly states:

Valuable consideration was defined in *Currie v Misa*.

HIS HONOUR: Don't start quoting me extracts from things like that. All right. Your time is up. Thanks very much. Mr John, you're here on behalf of the bank. You may not have a long time to consider this. Are you able to tell me why I've been handed a copy of a document for the sake of this hearing which has been filed in the Supreme Court? Is there something else going on there that I should know about?

MR JOHN: As I understand it, an application has been filed in the Supreme Court also to stay pending these proceedings happening. There's a chamber summons. That affidavit was filed in support of it. It's problematic because those proceedings are the proceedings which went on appeal and where the appeal has been dismissed so those proceedings

HIS HONOUR: All right. So as an attempt to raise something along these lines in the Supreme Court in relation to proceedings that may be at an end.

MR JOHN: Yes.

HIS HONOUR: All right.

MR JOHN: I think it's to try and stay the Supreme Court – whatever is happening in the Supreme Court while this runs its course.

HIS HONOUR: All right. Now, have you been able to give any consideration to the bills of exchange argument that has been advanced?

MR JOHN: My issue, with respect, is the same as yours as to how a party can endorse a document under which they have an obligation to pay money, deliver it to that party and say that the debt is thereby discharged. It's commercially ridiculous. As to how that can be discerned from the provisions of the Bills of Exchange Act escapes me. To the extent that it's relevant, upon receiving the document, the ANZ wrote to Mr Bertola saying that it couldn't make any sense of the document. To the extent that it was an offer, it was rejected and to the extent it was an allegation, it was denied, and I can show you that document to the extent that you might think it's helpful.

HIS HONOUR: Well, no, I accept that from the bar table.

MR JOHN: Yes.

HIS HONOUR: All right. Yes. Thank you very much. The application for an interlocutory injunction is refused, Mr Bertola. The basis upon which the claim is made, relying on the provisions of the Bills of Exchange Act which are said to work on documentation which are endorsed and provided to the bank, is not merely to be described as hopeless, it is utter nonsense and it is a pity that you haven't been able to obtain proper legal advice as to what your rights are. I said to you when you were appearing on another matter before me not long ago that it really would be good if you could obtain proper legal advice.

I know it is very difficult in the circumstances in which you find yourself, but the sort of arguments that have been outlined on your behalf by Mr Paalvast today are just, as I say, nonsense. And I use the word very deliberately and it is not a word I use in a court very often, in fact, I can not really remember ever having done so before, but people in your position are accorded a considerable disservice to be enticed to believe that such an argument can be run in a court. It is wasting the court's time and even more importantly, I think, it is perhaps offering straws to a drowning man which should not be offered.

I am dismissing the application for the interlocutory injunction and, in fact, if there were a move by the bank to strike the whole claim out on the basis that it is totally untenable, I would give summary judgment and dismiss the proceeding altogether.

MR JOHN: If I could seek that order.

HIS HONOUR: Yes. I don't need to hear any further argument because really I've heard all the argument about the substance of the claim.

(1) I give summary judgment to the bank to strike the entire claim out. It is a complete nonsense.

(2) I will require the transcript of today's proceedings to be distributed to the parties. They comprise my reasons for dismissing the application for the interlocutory injunction and the summary dismissal of the proceedings.

Thank you. That completes the proceeding before the court. Please adjourn.

MATTER ADJOURNED at 2.59 pm INDEFINITELY

I certify that the preceding eighteen (18) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Barker.

Associate:

Dated: 10 June 2014