

FEDERAL COURT OF AUSTRALIA

Wilmink as Trustee for the Bangarra Trust v Westpac Banking Corporation

(No 2) [2014] FCA 889

Citation: Wilmink as Trustee for the Bangarra Trust v Westpac Banking Corporation (No 2) [2014] FCA 889

Parties: **KEVIN WILMINK AS TRUSTEE FOR THE BANGARRA TRUST and PETER PAALVAST AS TRUSTEE FOR THE BANGARRA TRUST v WESTPAC BANKING CORPORATION ABN 33 007 457 141**

File number(s): NSD 2580 of 2013

Judge(s): **BENNETT J**

Date of judgment: 19 August 2014

Date of hearing: 19 August 2014

Place: Sydney

Division: GENERAL DIVISION

Category: No catchwords

Number of paragraphs: 7

Counsel for the Applicants: The applicants appeared in person

Counsel for the Respondent: Sean Docker

Solicitor for the Respondent: Kemp Strang Lawyers

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 2580 of 2013

**BETWEEN: KEVIN WILMINK AS TRUSTEE FOR THE BANGARRA
TRUST
First Applicant**

**PETER PAALVAST AS TRUSTEE FOR THE BANGARRA
TRUST
Second Applicant**

**AND: WESTPAC BANKING CORPORATION ABN 33 007 457 141
Respondent**

JUDGE: BENNETT J

DATE OF ORDER: 19 AUGUST 2014

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The applicants' application for an extension of time to file their written submissions in reply be refused.

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

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PLACE: SYDNEY

REASONS FOR JUDGMENT

1 By consent of the parties, it was decided that I would determine this matter on the papers, that is, on the basis of written submissions. Accordingly, by consent, I gave directions for the filing of submissions. The applicants had until 10 July 2014 to file submissions, which they did. The respondent filed submissions in accordance with the directions, by 25 July 2014. The applicants were directed to file any reply submissions, to be of no more than two pages, by 1 August 2014. None were received. No application was made to extend time. On 18 August 2014, I gave notice that I would be delivering judgment on 19 August 2014.

2 An email (**the email**) was sent to the NSW District Registry at 2.15am on the morning of 19 August 2014 from one of the applicants, Mr Paalvast, stating that he expected to have “*a detailed set of submissions*” by the end of the week. He asserted that the respondent filed submissions late and that the “*squeeze*” in the timetable denied him procedural fairness. The assertion is not correct. The respondent filed submissions by the directed date. The email says that Mr Paalvast only received the submissions on 13 August 2014 when he collected them. This is not asserted to be the fault of the respondent. The applicants did not, as I have said, seek an extension of time in which to file reply submissions.

3 The respondent has filed in court an affidavit of Ian Richard Marsden, sworn 19 August 2014. Mr Marsden is a solicitor for the respondent and he sets out a number of matters, including the fact that Westpac did indicate to the applicants at one stage that it might want an extension of time for the filing of its submissions. In fact, Westpac did not avail itself of that extension. The affidavit also annexes some correspondence to and from the applicants as to the timing of the submissions, including:

- An email from Mr Marsden to Mr Paalvast on 22 July 2014 at 1:58pm requesting a short extension of time for the respondent to file and serve its submissions. Mr Marsden's evidence is that no response to this email was ever received;
- An email from Mr Marsden to Mr Paalvast on 25 July 2014 at 11:36am attaching, by way of service, the respondent's submissions;
- A letter from Kemp Strang Lawyers dated 28 July 2014 addressed to the applicants' address for service enclosing a hard copy of the respondent's submissions;
- A print out from the Australia Post "Track your item" web page showing that the hard copy submissions were delivered to the applicants' address for service on 28 July 2014 at 15:55;
- An email from Mr Paalvast to Mr Marsden on 8 August at 8:04pm saying that: *"I have only just become aware of this email copy of you/r client's submissions as they were in my Junk Mail folder. I cannot explain how or why it ended up there, however I have not seen the document before now. We were of the belief that you/r client had exercised the extension of time granted to you and we are still awaiting receipt of same"*; and
- An email from Mr Marsden to Mr Paalvast on 11 August at 3:33pm, setting out the orders and the applicants' (non) compliance with them. Mr Marsden notes that *"your submissions in reply were due to be served by 1 August 2014"*;

4 There was, apparently, no reply to the 11 August 2014 email. I note that, in that regard, the applicants had sufficient time in which to apply to the Court for an extension of time if that is what they wished.

5 Mr Paalvast also says in the email that:

On reflection, I would appreciate the opportunity to be present in court when and before judgment is due and hopefully to be able to make some final oral submissions.

6 I note that the email does not state that Mr Paalvast will be unable to attend this morning. The matter has been called outside the Court and there is no appearance from the applicants. While the respondent does not consent or oppose any extension of time being granted, the Court has prepared judgment and notified the parties that it intends to deliver judgment today. Bearing in mind that the subject of this informal application for extension of time is in relation to a two-page reply submission, that the applicants did file extensive submissions in support of their application initially and that they agreed that the matter would be determined on the papers, in the circumstances I do not intend to accede to an application for an extension of time in which to file the reply submissions, nor, if it to be viewed that way, an application by Mr Paalvast to be present. No reason has been given as to why he has not appeared. Had he been present, I would have afforded him the opportunity to make oral submissions, as he suggested in the email. However, Mr Paalvast is not present.

7 The application for an extension of time, to the extent that the email constitutes such an application, is refused.

I certify that the preceding seven (7) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bennett.

Associate:

Dated: 19 August 2014