

FEDERAL COURT OF AUSTRALIA

Wilmink (Trustee) v Westpac Banking Corporation [2014] FCA 1184

Citation: Wilmink (Trustee) v Westpac Banking Corporation [2014] FCA 1184

Appeal from: Wilmink v Westpac [2014] FCA 872

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: NSD 922 of 2014

Judge: **FOSTER J**

Date of judgment: 5 November 2014

Legislation: *Federal Court Rules 2011*, r 36.01(1)(c) and r 36.01(2)

Cases cited: *Moussalli v Western Power* [2010] FCA 1120

Date of hearing: 5 November 2014

Place: Sydney

Division: GENERAL DIVISION

Category: No Catchwords

Number of paragraphs: 16

Solicitor for the Appellants: There was no appearance by or on behalf of the putative Appellant

Counsel for the Respondent: Mr SB Docker

Solicitor for the Respondent: Kemp Strang

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

NSD 922 of 2014

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

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

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

JUDGE: FOSTER J

DATE OF ORDER: 5 NOVEMBER 2014

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The Notice of Appeal filed in the name of Bangarra Trust on 9 September 2014 be struck out.
2. Leave be granted to Kevin Wilmink and Peter Paalvast to file and serve an Amended Notice of Appeal in proper form by which they challenge the judgment and orders of the primary judge, such Amended Notice of Appeal to be filed and served by 12 November 2014.
3. By 12 November 2014, Kevin Wilmink and Peter Paalvast file and serve any affidavits upon which they intend to rely at the hearing of the Interlocutory Application filed by the respondent on 3 November 2014.
4. The said Interlocutory Application filed by the respondent on 3 November 2014 be listed for hearing at 10.15 am on 14 November 2014 before Foster J.
5. The costs of this proceeding to date be reserved.
6. By 12 noon on 6 November 2014, the solicitors for the respondent notify Mr Paalvast of the Orders made this day (5 November 2014).

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

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

NSD 922 of 2014

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

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

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

JUDGE: FOSTER J

DATE: 5 NOVEMBER 2014

PLACE: SYDNEY

REASONS FOR JUDGMENT

1 On 9 September 2014, Mr Peter Paalvast filed a Notice of Appeal from a judgment of
a judge of this Court (*Wilmink v Westpac Banking Corporation* [2014] FCA 872) naming the
appellant as “*Bangarra Trust*”. The respondent to the appeal is Westpac Banking
Corporation (**Westpac**).

2 In the proceeding below, the applicants were Kevin Wilmink, as trustee for the
Bangarra Trust, and Peter Paalvast, as trustee for the Bangarra Trust. The respondent was
Westpac. Bangarra Trust has no separate legal status. If the applicants below (Messrs
Wilmink and Paalvast) wish to appeal from her Honour’s decision, they must do so by
constituting the appeal in the proper fashion. That requires that both of them be named as
appellants. Because Mr Wilmink has not been named as a party to the appeal, I propose to
strike out the Notice of Appeal filed on 9 September 2014.

3 In addition, there are serious difficulties with the form of the Notice of Appeal which
has been filed.

4 The grounds of appeal specified in the document are vague and generally expressed.
What is required is that the appellants set out with precision the findings of fact or holdings

of law or holdings of mixed fact and law which are sought to be challenged on appeal and, in very brief terms, the basis upon which those challenges are sought to be advanced (as to which, see r 36.01(1)(c) and r 36.01(2) of the *Federal Court Rules 2011 (Rules)* and Form 122 of the Federal Court forms. See also *Moussalli v Western Power* [2010] FCA 1120 at [47]–[49] and the cases cited therein). The current Notice of Appeal does not meet any of these requirements.

5 This is an additional reason for striking out the Notice of Appeal.

6 Mr Paalvast also apparently wishes to seek a stay of all action proposed by Westpac under its mortgage pending the determination of the appeal which he has sought to institute. Expressed in those terms, this is an unusual order. However, he has not appeared this morning to press for that order and he has not filed any evidence in support of his claim for that order. He has taken no steps to have his application for a stay heard by the Court. At this stage, I do not need to entertain his application for a stay.

7 On Monday last, 3 November 2014, Westpac filed an Interlocutory Application in which it sought the following relief:

1. An order that the Notice of Appeal is summarily dismissed.
2. In the alternative, an order that the Notice of Appeal is struck out.
3. An order that the Appellants are to pay the Respondent's costs of the Notice of Appeal.
4. An order that the Appellants are to pay the Respondent's costs of this Interlocutory Application.
5. Such further or other order as the Court deems fit.

8 That Interlocutory Application was served either on Monday of this week or yesterday (4 November 2014), well inside the period of time for service required under the Rules.

9 Late yesterday afternoon, Mr Paalvast communicated with the solicitors for Westpac and with the Court Registry by way of email. In that email he complained about lack of notice in respect of the hearing of Westpac's Interlocutory Application.

10 I do not propose to deal with Westpac's Interlocutory Application this morning. However, it does need to be dealt with promptly and I propose to fix it for hearing before me at 10.15 am on Friday 14 November 2014.

11 In light of the above observations, I intend to give Mr Paalvast one further
opportunity to regularise his Notice of Appeal. The first matter that will be required to be
attended to is that both parties who were applicants in the proceeding below will need to be
appellants. The second matter that will need to be attended to is the form of the Notice of
Appeal which must conform with the relevant Rules and the general principles governing the
form of such documents. I have given a brief explanation of what is required at [4] above.

12 For all of the above reasons, I order that the Notice of Appeal filed by Mr Paalvast in
the name of Bangarra Trust on 9 September 2014 be struck out.

13 Nonetheless, I propose to grant leave to Messrs Wilmlink and Paalvast to file and
serve an Amended Notice of Appeal by which both of them seek to appeal from the judgment
of the primary judge and in which the grounds of appeal are appropriately specified. They
must file that Amended Notice of Appeal by no later than 12 November 2014.

14 I will also order that the putative appellants file and serve any evidence upon which
they propose to rely at the hearing of Westpac's Interlocutory Application by 12 November
2014.

15 I order the solicitors for the respondents to notify Mr Paalvast of the orders which I
have made this day and to do so by no later than 12 noon tomorrow, 6 November 2014.

16 I reserve the question of costs of this proceeding to date.

I certify that the preceding sixteen
(16) numbered paragraphs are a true
copy of the Reasons for Judgment
herein of the Honourable Justice
Foster.

Associate:

Dated: 5 November 2014