FEDERAL COURT OF AUSTRALIA

Papas v Westpac Banking Corporation [2014] FCA 290

|  |  |
| --- | --- |
| Citation: | Papas v Westpac Banking Corporation [2014] FCA 290 |
|  |  |
| Appeal from: | Commonwealth Bank of Australia & Anor v Papas [2013] FCCA 1261 |
|  |  |
| Parties: | **JOHN PAPAS v WESTPAC BANKING CORPORATION ABN 33 007 457 141** |
|  |  |
| File number: | QUD 556 of 2013 |
|  |  |
| Judge: | **RANGIAH J** |
|  |  |
| Date of judgment: | 28 March 2014 |
|  |  |
| Catchwords: | **BANKRUPTCY** **AND INSOLVENCY** – appeal from decision of primary judge to grant a sequestration order against the estate of the appellant – original petitioning creditor obtained compromise with appellant – respondent applied to be substituted as petitioning creditor – where proceedings pending in Supreme Court of Queensland in relation to outstanding debt – whether appellant established sufficient evidentiary basis for a defence of estoppel – whether genuine dispute in relation to debt  **PRACTICE AND PROCEDURE** – primary judge refused to grant adjournment to enable appellant to obtain legal representation – where appellant objected to hearing of sequestration application without it having been set down for hearing – whether leave to appeal required from interlocutory decision to refuse adjournment – whether appellant denied procedural fairness – where appellant failed to adduce evidence on appeal demonstrating a genuine dispute in relation to the debt – whether a substantial wrong or miscarriage of justice need be demonstrated to enable a new trial to be ordered |
|  |  |
| Legislation: | *Bankruptcy Act 1966* s. 52(2)(b)  *Federal Court of Australia Act 1976 (Cth)* ss 27*,*28(1A) and 24(1E)  *Federal Court Rules 2011* (Cth) r 36.24 |
|  |  |
| Cases cited: | *Adamopoulos v Olympic Airways SA* (1990) 95 ALR 525 cited  *Ahern v DCT (Qld)* (1987) 76 ALR 137 cited  *August v Commissioner of Taxation* [2013] FCAFC 85 at [119] cited  *Bodenstein v Minister for Immigration and Citizenship* [2009] FCA 50 cited  *Cameron v Cole* (1944) 68 CLR 571 cited  *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 applied  *House v The King* (1936) 55 CLR 499 cited  *McGibbon v Linkenbagh* (1996) 41 ALD 219 cited  *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 cited  *Moussa v Commonwealth Bank* [2011] FCA 067 cited  *New South Wales v Canellis* (1994) 181 CLR 309 applied  *Nguyen v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 20 cited  *R v Thames Magistrates’ Court, ex parte Polemis* [1974] 1 WLR 1371 applied  *Rogers v Law Coast Mortgages Pty Ltd* [2002] FCA 181 applied  *Stead v State Government Insurance Commission* (1986) 161 CLR 141 distinguished  Sullivan v Department of Transport (1978) 20 ALR 323 cited  *SZOTK v Minister for Immigration and Citizenship* [2011] FCA 1461 cited  *SZRVR v Minister for Immigration and Border Protection* [2013] FCAFC 915 cited |
|  |  | |
| Date of hearing: | 13 February 2014 | |
|  |  | |
| Place: | Brisbane | |
|  |  | |
| Division: | GENERAL DIVISION | |
|  |  | |
| Category: | Catchwords | |
|  |  | |
| Number of paragraphs: | 81 | |
|  |  | |
| Counsel for the Appellant: | Mr L Boccabella | |
|  |  | |
| Solicitor for the Appellant: | Dowd and Company Lawyers | |
|  |  | |
| Counsel for the Respondent: | Mr T Sullivan QC | |
|  |  | |
| Solicitor for the Respondent: | Thomsons Lawyers | |

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 556 of 2013 |

|  |
| --- |
| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

|  |  |
| --- | --- |
| BETWEEN: | JOHN PAPAS  Appellant |
| AND: | WESTPAC BANKING CORPORATION ABN 33 007 457 141  Respondent |

|  |  |
| --- | --- |
| JUDGE: | RANGIAH J |
| DATE OF ORDER: | 28 MARCH 2014 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellant pay the respondent’s costs of the appeal.

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

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 556 of 2013 |

|  |
| --- |
| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

|  |  |
| --- | --- |
| BETWEEN: | JOHN PAPAS  Appellant |
| AND: | WESTPAC BANKING CORPORATION ABN 33 007 457 141  Respondent |

|  |  |
| --- | --- |
| JUDGE: | RANGIAH J |
| DATE: | 28 MARCH 2014 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

1. On 2 August 2013, the Federal Circuit Court of Australia made a sequestration order against the estate of the appellant, John Papas. The petitioning creditor was the respondent, Westpac Banking Corporation.
2. Mr Papas has appealed against the judgment of the Federal Circuit Court. The grounds of appeal pressed by Mr Papas are, firstly, that the primary judge erred in refusing to grant an adjournment and, secondly, that the primary judge erred in failing to appreciate his case which, properly understood, raised a genuine dispute in respect of the debt alleged by Westpac to be owing.

## Background

1. In August 2007 Mr Papas and his wife entered into an agreement with Westpac to borrow an amount of over $2.6 million pursuant to a 12 month bill facility. The debt was secured by a registered mortgage over land at Newmarket in Brisbane.
2. The date for repayment under the facility was 30 August 2008, but Mr and Mrs Papas obtained a variation of the facility on 30 March 2009 extending the repayment date by 10 months to 30 June 2009. They obtained a further variation on 29 September 2009 which extended the repayment date by 6 months to 31 December 2009. They did not repay the loan.
3. Mr and Mrs Papas subsequently made partial repayments of about $742,000 on 1 February 2010 and $300,000 on 9 April 2010. The circumstances under which Mr Papas claims these payments were made, which will be discussed later, have some significance.
4. Westpac issued a notice of exercise of its power of sale on 22 June 2011 requiring repayment of some $1.6 million and a second notice on 7 September 2011 requiring repayment of some $1.7 million. On 26 September 2011, Westpac sold the Newmarket property for $762,500. The proceeds were insufficient to meet the whole of the remaining debt.
5. On 18 April 2013, Westpac commenced proceedings in the Supreme Court of Queensland in respect of the balance of the debt. Mr and Mrs Papas have filed a defence. Westpac has not applied for summary judgment and those proceedings are ongoing. Westpac alleges that it is now owed over $1.3 million.
6. The Commonwealth Bank of Australia obtained a judgment against Mr and Mrs Papas in respect of another debt and served bankruptcy notices on each of them. When they failed to comply with the requirements of that notice, the Commonwealth Bank presented a creditor’s petition against Mr and Mrs Papas on 8 April 2013. Westpac and Bank of Queensland entered appearances as supporting creditors.
7. The Commonwealth Bank eventually reached a compromise with Mr and Mrs Papas and was granted leave to withdraw on 12 June 2013. Both Westpac and the Bank of Queensland each filed an interim application seeking to be substituted as the petitioning creditor.
8. On 26 June 2013, the creditor’s petition was listed for directions before the primary judge. Westpac decided not to proceed against Mrs Papas but intended to continue against Mr Papas. The legal representatives for Bank of Queensland and Westpac made it clear that there was to be a contest between them as to which one should be substituted as the petitioning creditor. Westpac’s counsel submitted that the Court should hear the creditor’s petition on the same day that the application for substitution was heard. His Honour asked Mr Papas whether he understood that on the return date, “What they propose to do is to proceed with the application for sequestration.”
9. His Honour ordered that the interim applications, that is the applications for substitution, be adjourned to 31 July 2013. His Honour also ordered that Mr Papas file and serve any affidavits to be relied on in response to the principal application. His Honour then said:

So, Mr Papas, what that means is you are to file and serve on each of the solicitors for the Bank of Queensland and Westpac all the material you intend to rely upon in response to the sequestration application.

And I can then review it when we come back to determine the application for substitution on 31 July. It’s not to say that you will succeed, but I need to see what it is you say and how strong this case is. It might be that, irrespective of your responses to the proceedings that have been instituted in the Supreme Court, you may not have – even if you have a defence, it may not be one – or counter-claim may not be one which gives rise to a sufficient prospect of resisting the sequestration application, because what you hope to recover won’t satisfy the debt, in any event. So we will work that out on 31 July. So I will adjourn the application.”

1. While his Honour made an order that the applications by Bank of Queensland and Westpac for substitution as the petitioning creditor be adjourned to 31 July 2013, he made no order that the creditor’s petition also be heard on the same date. Neither did his Honour make any ruling upon Westpac’s submission that the creditor’s petition should be heard on that day. His Honour made no order for the filing and service of material relevant to the creditor’s petition by Westpac. His Honour went no further than stating that he would conduct a “review” of that application.
2. It is apparent that at the hearing on 31 July 2013, the parties were confused as to what was to be heard. The Bank of Queensland withdrew its application for substitution at that hearing and then counsel for Westpac sought, “to clarify whether your Honour is intending to deal with both the substitution application as well as the creditor’s petition”.
3. The primary judge asked Mr Papas whether he understood that Westpac wished to proceed to have the creditor’s petition determined that day. Mr Papas opposed that course, “So I can get funds to get legal representation”. His Honour responded that the creditor’s petition had been filed on 8 April 2013, so that Mr Papas had four months to get access to funds. Mr Papas replied that, “I just haven’t been in a position to get funds, your Honour, but I’ve secured a third party that can help me.”
4. In response to a question about how many lawyers he had spoken to, Mr Papas said that he had spoken to five lawyers, but they had all wanted money paid before they would give him legal advice. The primary judge said:

I will just see what material there is first and then I will consider whether or not I will adjourn the substantive application. I am not inclined to, I have to say, Mr Papas. You’ve had four months to get legal representation.

…

I understand if you can’t afford it but that’s a matter that, unfortunately, I’ve got no control over. And it’s not a matter that ought delay the prosecution of the application.

1. His Honour then proceeded to hear Westpac’s application for substitution, and ordered that Westpac be substituted as the petitioning creditor. His Honour also ordered that Westpac have leave to amend the creditor’s petition.
2. His Honour asked Westpac’s counsel whether he wished to proceed with the hearing of the amended creditor’s petition. Counsel indicated that he did not then have evidence to deal with an argument that Mr Papas wished to make about his bank statement showing a zero balance. His Honour offered to stand the matter down so Westpac could obtain the evidence it needed. Even after Westpac accepted that offer, it was uncertain whether Westpac wished to proceed with the hearing of the amended creditor’s petition, its counsel saying, “If it goes ahead, we will certainly ask your Honour to look carefully at the defence.”
3. Upon the resumption, Westpac’s counsel indicated that his client wished to proceed with the amended creditor’s petition and sought and obtained leave to file and read four affidavits. Those affidavits, together with Westpac’s outline of submissions, had been served on Mr Papas only minutes earlier.
4. The primary judge then indicated that he intended to hear the amended creditor’s petition, saying:

Now, Mr Papas, earlier this morning, I indicated that I would formally reserve the question of whether or not I would allow you an adjournment. I’ve now looked at the application and the material. I don’t see any reason why the matter should be adjourned again. So I’m going to formally refuse any application for an adjournment. Now, I’m going to invite you to make submissions as to why I ought not determine the application in favour of the applicant.

1. Mr Papas responded:

All I can say, your Honour, is that we believe we’ve got a genuine argument in the Supreme Court and we’ve got that application brewing. The applicant hasn’t responded to our counterclaim and, if we were given the opportunity – I’ve now secured services of a legal firm today to take on the claim – and if I was given that opportunity, I know that we can bring justice because, again, when a third party tells me to pay $300,000, and we made the payment – we wouldn’t have made it if the bank never gave me an undertaking.

…

In my view, it would be – and I say this with all due respect, your Honour – it would be very un-Australian not to give someone an opportunity to demonstrate that fight and give us an opportunity to get that legal representation and take the fight to the applicant on solid grounds. It’s not as if I’ve put a defence in that has got no merit. There’s merit there and there’s – you know, as you can see from the statements that I’ve tendered today, there’s substantial payments made and undertakings were given and reneged against.

1. Earlier Mr Papas had said:

I was given undertakings, by Westpac, via a regional manager and the business banking manager, that if I paid certain sums, which I’ve got statements to tender today, that nothing will happen. You know, he was chasing me for further business.

1. The material placed by Mr Papas before the Federal Circuit Court explaining his defence to Westpac’s claim that he owed it a debt in the order of $1.3 million was very limited.
2. In an affidavit Mr Papas said, “Westpac were misleading and deceptive as they did not roll over [the] facility as promised after large amounts of money was paid off the facility”. Mr Papas claimed that the “large amounts” were the $742,000 and $300,000 he paid on 1 February 2010 and 9 April 2010 respectively.
3. Mr Papas’ defence in the Supreme Court proceedings was tendered without objection. That defence said, relevantly:

1. The first defandant John Papas had various meetings, phone conversations with Paul Nesbit Business bank manager Westpac and Regional manager Michael Robinson Westpac who advised on numerous occasions that the subject facility will be rolled over on the back of a large transaction being paid off the facility, which was made.

2. The first defendant and 2nd defendants want subject large deposits totallying circa 1.2m paid back and reversed. As Paul Nesbit business banker and Michael Robinson regional manager gave undertaking to roll over facility, otherwise deposits would not have been made.

…

5. Westpac was unthecial, unconscionable conduct and in major breach of banking codes and practises by tricking the first and 2nd defendants to make large deposits.

…

9. Westpac had unlawfully taken possession and killed the opportunity for Suncorp to refianance existing debt and pay for construction of new dewling which was to be sold off and maximise views and sale price.

[Transcribed as it appears in the original]

1. The primary judge reserved his judgment and handed it down on 2 August 2013.

## The judgment below

1. Section 52 of the *Bankruptcy Act 1966* (Cth) provides, relevantly:

(1) At the hearing of a creditor’s petition, the Court shall require proof of:

(a) the matters stated in the petition (for which purpose the Court may accept the affidavit verifying the petition as sufficient);

(b) service of the petition; and

(c) the fact that the debt or debts on which the petitioning creditor relies is or are still owing;

and, if it is satisfied with the proof of those matters, may make a sequestration order against the estate of the debtor.

…

(2) If the Court is not satisfied with the proof of any of those matters, or is satisfied by the debtor:

(a) that he or she is able to pay his or her debts; or

(b) that for other sufficient cause a sequestration order ought not to be made;

it may dismiss the petition.

1. Mr Papas asserted that there was “other sufficient cause [why] a sequestration order ought not to be made”. That sufficient cause was said to be the fact that the proceedings in the Supreme Court for the same debt, in which Mr Papas denied that he was indebted to Westpac, were yet to be determined.
2. In his reasons, the primary judge said:

[13] The role of this court in considering the debtor’s complaints about the substituted creditor’s conduct is not to determine or second guess the outcome of Supreme Court proceedings, but is really to determine whether or not, by reason of the material and the complaints made, there is a realistic prospect that the cause of action contended for is such that the debtor ought to be permitted an opportunity to pursue his action before the substituted creditor has the relief it claims under the Act. That is there should be a plausible contention requiring investigation: *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785 and *Menzies v Paccar Financial Pty Ltd* [2011] FCA 460

1. In the appeal, Mr Papas did not take issue with his Honour’s statement of the issue that he had to decide.
2. The primary judge identified Mr Papas’ grounds of opposition to the amended creditor’s petition as follows:

a) That Westpac, the present substituted creditor, engaged in misleading and deceptive conduct in that it did not roll over a facility as promised after large amounts of money were paid off the facility;

b) That Westpac sold the subject property at a significant undervalue;

c) That there was a failure of due process in Westpac repossessing the property, because, as he says, *“flawed notices were sent to the wrong addresses”*; and

d) That the substituted creditor has just served documents [the Supreme Court proceedings]… and that he intends to lodge a defence and counterclaim in respect of that claim.

1. His Honour rejected all four grounds. The first and fourth grounds are related and his Honour’s conclusions in relation to them are challenged in this appeal. Mr Papas has not challenged his Honour’s rulings upon the grounds that the property was sold at an undervalue and that notices were flawed and sent to the wrong address.
2. His Honour’s reasoning in relation to the misleading or deceptive conduct ground is contained in the following passage:

[15] As I have earlier noted, there were two principal matters alleged by the debtor. The first relates to promises in respect of early payments for preserving the facility. In a defence filed to the substituted creditors claim for money owing issues in the Supreme Court the defence stated that Westpac said they would roll over the facility [if] a large amount of the facility was paid out. Accordingly the director made a deposit. The allegation was devoid of any particulars. It begs the question of what advantage the bank would enjoy from this or any arrangement in a debtor/creditor relationship. Irrespective of the truth of those matters, the fact remains that the debtor would have remained indebted to the bank in terms of the facilities, and would have continued to be in breach of his obligations to repay the funds by the due date provided for by the term that had been agreed between them. It follows, in my view, that that particular claim contended for in his defence has little, if any, real prospects.

1. It is apparent that his Honour was prepared to assume that the allegations contained in the defence were true for the purposes of deciding the application for a sequestration order. Upon that assumption, His Honour’s reasoning seems to have proceeded in the following way:
2. Employees of Westpac had represented that the facility would be rolled over if a large amount of the debt was paid off.
3. Acting in reliance upon the representation, Mr Papas did pay off a large amount of the debt.
4. The debt was not rolled over, contrary to what had been represented.
5. However, if the debt had been rolled over, it would have been rolled over to a date that had now passed.
6. Mr Papas had not paid off the remainder of the debt.
7. Therefore, even if the representation had been honoured, Mr Papas would now still be in breach of his obligation to repay the debt.
8. Therefore, Mr Papas had little or no prospect of successfully defending the proceedings for the debt brought by Westpac in the Supreme Court.

## The Submissions

1. Although there are five grounds set out in Mr Papas’ supplementary notice of appeal, his case, as argued, seemed to rely substantially on only two of them. They are:

1. In refusing an adjournment to allow the appellant to obtain legal advice, the primary judge’s discretion miscarried;

2. The primary judge failed to appreciate the appellant’s case, namely that the appellant had a defence of estoppel (of the species identified in *Waltons Stores v Maher* (1987-8) 164 CLR 387) in that the respondent had undertaken to rollover a long standing facility based on previous practice between the parties and on the strength of that undertaking, the appellant did not take up other finance available to him, hence the debt in law was not ‘still owing’ for the purposes of s. 52(1)(c) of the *Bankruptcy Act 1966* and the primary judge erred in finding that s 52(1)(c) of the Act had been met.

1. As to the first ground, Mr Papas, who was legally represented in the appeal, argued that the decision to refuse him an adjournment involved both a miscarriage of discretion and a denial of procedural fairness. Westpac submitted that no error had been demonstrated that would warrant interference with the exercise of that discretion. It argued that there was no denial of procedural fairness. It also argued that Mr Papas’ appeal against the refusal of the adjournment was incompetent because he had not sought and obtained leave to appeal.
2. As to the second ground, Mr Papas’ argument was that his Honour erred in failing to find that he had raised a genuine dispute about the debt. His counsel accepted in oral argument that the period of time for which the facility was to be rolled over would have been consistent with the earlier extensions of the dates for repayment. The first extension was for 10 months and the second for 6 months. On this basis, Mr Papas seemed to accept that even if the representations had been honoured, the date for repayment would have expired long before the date on which the sequestration order was made.
3. Mr Papas’ argument in relation to the second ground, as I understood it, was that the primary judge misunderstood the case he was putting in two respects.
4. Firstly, the judge had not appreciated that Mr Papas had raised a defence of estoppel in the Supreme Court proceedings.
5. Secondly, the primary judge had not appreciated the factual basis for Mr Papas’ defence. His case started with the proposition that, if the false representation had not been made, he would not have repaid the amounts of $742,000 and $300,000 on 1 February 2010 and 9 April 2010 respectively. The argument proceeded that if he had not repaid those amounts, he would have had more cash, which would have induced Suncorp to refinance the loan. If the loan had been refinanced, Mr Papas would have used the money borrowed to construct a dwelling on the mortgaged land and the amount realised from a subsequent sale would have been sufficient to pay off his debts. Instead, contrary to its representation, Westpac exercised its power of sale over the vacant land and the amount realised was insufficient to allow the debt to be repaid. Mr Papas argued that his Honour had failed to understand that this was the basis of his defence.
6. Westpac submitted that there was no evidence before the Federal Circuit Court, or this Court, to support many of the factual premises that Mr Papas relies upon. It argued that the primary judge was correct to conclude, on the basis of the limited material and submissions before him, that Mr Papas’ argument had little or no prospects of success. It argued that it is demonstrable that the estoppel argument has no merit.
7. Westpac also sought to uphold the judgment on a ground other than the grounds relied upon by the primary judge. It argued that even assuming the truth of Mr Papas’ allegation of misrepresentations, the subsequent issuing of a notice of exercise of power of sale by Bank of Queensland meant that there was a “default event” which separately entitled Westpac under the terms of its agreement to exercise its power of sale.
8. Rule 36.24 of the *Federal Court Rules 2011* (Cth) requires a respondent who contends that a judgment should be affirmed on grounds other than those relied on by the court appealed from to file a notice of contention. Westpac failed to file any notice of contention. Mr Papas indicated that if leave to file a notice of contention were to be sought, he would seek leave to adduce further evidence. Westpac then did not seek leave to file a notice of contention. I consider that Westpac was required by r 36.24 of the *Federal Court Rules* to file a notice of contention in order to pursue its further ground. No application was made for dispensation from compliance with the rule. In these circumstances, I decline to deal with that ground.

## Consideration

1. The two grounds of appeal, that the primary judge was in error in refusing an adjournment and failing to appreciate Mr Papas’ case, are closely related. Mr Papas submits that, properly understood, his case demonstrated a genuine dispute, but, even if not, he should have been granted an adjournment so that he could obtain legal advice and have the opportunity to obtain evidence and properly articulate his defence.
2. It is convenient to deal with the grounds of appeal in reverse order.

### The second ground: Whether the primary judge failed to appreciate the debtor’s case

1. Section 52(2)(b) of the *Bankruptcy Act* requires the debtor to satisfy the Court that “for other sufficient cause” a sequestration order ought not to be made. On the state of the evidence and submissions, the primary judge concluded that Mr Papas had not satisfied his onus of demonstrating that there was “a plausible contention requiring investigation”. Mr Papas submitted that this conclusion was erroneous because he had raised a sufficient evidentiary basis to demonstrate an arguable defence of estoppel in the proceedings brought by Westpac in the Supreme Court.
2. In his reasons, the primary judge specifically identified one of Mr Papas’ grounds of opposition to the amended creditor’s petition as being that Westpac had engaged in misleading or deceptive conduct in that it did not roll over the facility as promised after large amounts of money were paid off the facility. There is no reason to think that his Honour failed to appreciate that these allegations potentially raised a defence of estoppel, as well as founding a case of breach of s 52 of the *Trade Practices Act* *1974* (Cth) (repealed) and common law misrepresentation. I therefore reject Mr Papas’ submission that his Honour failed to appreciate that he had raised a defence of estoppel. In any event, it was never made clear how estoppel would confer some greater advantage to Mr Papas than reliance on breach of s 52.
3. Mr Papas’ next submission was that the primary judge misunderstood the basis of his defence to the Supreme Court proceedings. His Honour decided the case on the basis that Mr Papas was asserting that the debt had not been rolled over as represented; but even if it had been rolled over Mr Papas would still have been indebted to Westpac because he had not repaid the debt by the roll-over date. Mr Papas argued that his Honour should have appreciated that the detriment he alleged was that if the misrepresentations had not been made, he would not then have paid down his debt to Westpac. He could then have obtained refinancing from Suncorp and would then have been able to develop the land and realise a price that was sufficient to pay out the debt.
4. It is not obvious from the material before his Honour that this was the detriment asserted by Mr Papas. Even if it was, the assertion was wholly unparticularised and unsupported by evidence. The defence did contain a reference to Westpac “killing” the opportunity for Suncorp to refinance the debt and pay for the construction of a new dwelling which would maximise the sale price. However, there was no evidence, or even assertion, that Suncorp had agreed to refinance the debt. Neither was there any assertion that steps had been taken, or would have been taken, to seek refinancing or that there was a realistic prospect that it would have been obtained. There was no assertion that a profit might be realised that would have been sufficient to pay off the debt. In his oral submissions before the primary judge, Mr Papas said nothing about obtaining refinancing from Suncorp. There was no error on the part of the primary judge in acting upon the content of Mr Papas’ oral submissions when the written material did not apparently articulate an alternative case. For these reasons, the appellant’s second ground of appeal must fail.

### The first ground: Refusal to grant an “adjournment”

1. Before hearing the amended creditor’s petition, the primary judge stated that he refused “any application for an adjournment”. The parties adopted the judge’s characterisation of what the judge had done.
2. In truth, Mr Papas made no application for an adjournment. There was no application for an adjournment capable of being refused.
3. That is because the primary judge had not made any order setting down the creditor’s petition for hearing. Westpac had submitted at the directions hearing held on 26 June 2012 that the Court should proceed to hear both the application for substitution and the creditor’s petition on the same date. His Honour told Mr Papas that Bank of Queensland and Westpac proposed to proceed with the application for sequestration on the same date as the application for substitution, but did not make any ruling as to whether they would be permitted to do so. His Honour made an order that the interim applications, the applications for substitution, be adjourned to 31 July 2013, but made no order that the hearing of the application for creditor’s petition also be heard on the same date. His Honour did no more than say that he would “review” the application for a sequestration order on that date.
4. Although his Honour ordered that Mr Papas file and serve the affidavits to be relied on in response to the application for a sequestration order, that was not an indication that the application would be heard on 31 July 2013. There was to be a contested hearing as to whether Bank of Queensland or Westpac ought to be substituted as the petitioning creditor. The strength and complexity of Mr Papas’ defence to each of their cases was relevant to their applications for substitution: see *Menzies v Paccar Financial Pty Ltd* [2011] FCA 460 at [36] – [48], per Bromberg J.
5. At the hearing on 31 July 2013, Westpac’s counsel sought to clarify whether the primary judge intended to deal with both the substitution application and the creditor’s petition. His Honour asked Mr Papas whether he understood that Westpac wished to proceed to have the creditor’s petition determined on that day. Mr Papas opposed that course on the basis that he wanted to obtain legal assistance and had now secured the means to do so. Later in the hearing, Westpac’s counsel indicated that it was uncertain whether his client would proceed with the amended creditor’s petition that day and the matter was stood down to give Westpac the opportunity to seek further evidence and consider whether it would proceed. None of this is consistent with any clear view by either of the parties that the hearing of the creditor’s petition had been set down for hearing on that day.
6. There was no request by Mr Papas for any adjournment. What Mr Papas was opposing was the peremptory hearing of the application for a sequestration order. His Honour’s decision was not to refuse an application for an adjournment, but to summarily hear an application that had not been set down for hearing.
7. Procedural fairness requires that each party must be given a reasonable opportunity to present his or her case: *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [40] per Gaudron and Gummow JJ; *Cameron v Cole* (1944) 68 CLR 571 at 589 per Rich J; *Sullivan v Department of Transport* (1978) 20 ALR 323 at 343 per Deane J. Such an opportunity requires that a litigant be given reasonable notice of a hearing: *R v Thames Magistrates’ Court, ex parte Polemis* [1974] 1 WLR 1371.
8. It is not a necessary requirement of procedural fairness that the hearing of a civil proceeding not take place until a party is able to obtain legal representation: *New South Wales v Canellis* (1994) 181 CLR 309 at 329-320; *Nguyen v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 20 at [24], per Full Court; *McGibbon v Linkenbagh* (1996) 41 ALD 219 at 228 per Kiefel J; *Moussa v Commonwealth Bank* [2011] FCA 67; *SZOTK v Minister for Immigration & Citizenship* [2011] FCA 1461 at [33] per Katzmann J; *Bodenstein v Minister for Immigration and Citizenship* [2009] FCA 50 at [17] per Perram J. However, the content of procedural fairness depends upon the circumstances of the particular case: *Canellis* at 329.
9. In a number of the cases, litigants in person have been held not to have been denied procedural fairness where they sought an adjournment in order to obtain legal representation despite having had adequate opportunity to do so earlier. But, there was no application for an adjournment in this case. Mr Papas was merely resisting a summary hearing of the application. His resistance to that course on the basis that he wished to obtain legal representation fell to be considered in quite a different context to a situation where a party belatedly seeks an adjournment for that purpose.
10. The present case has some resemblance to *Rogers v Law Coast Mortgages Pty Ltd* [2002] FCA 181. That case involved an appeal against an order of a Federal Magistrate dismissing a debtor’s application to set aside a bankruptcy notice. The Registrar of the Court wrote to the debtor indicating that the matter had been listed for hearing, but later wrote another letter stating that the matter was listed for directions. At the hearing, the debtor explained that he thought that there was to be a directions hearing and that he was not ready for a final hearing. The Magistrate was only prepared to stand the matter down for a couple of hours and, after conducting a final hearing, dismissed the debtor’s application. Finn J considered that the Magistrate’s discretion had miscarried when he proceeded with the final hearing in circumstances where the debtor had been misled into believing he was attending a directions hearing and taking into account the disadvantage the debtor experienced as a litigant in person without prior access to the respondent’s written submissions.
11. I consider that Mr Papas’ objection to the creditor’s petition being heard that day was entirely reasonable. He was not given reasonable notice of the fact that there was to be a final hearing and he did not have a reasonable opportunity to present his case. Mr Papas was denied procedural fairness.
12. Mr Papas also submitted that the primary judge’s reasons contained errors that resulted in the miscarriage of his discretion. His Honour refused what he described as “any application for an adjournment” without giving reasons of any substance. His Honour said, “I’ve now looked at the application and the material. I don’t see any reason why the matter should be adjourned again”. That passage suggests that his Honour took into account two considerations when deciding to proceed with the hearing of the amended creditor’s petition that day, namely his mistaken view that Mr Papas was applying for an adjournment, and the content of the application and the material. A third consideration emerges from the discussion that had taken place earlier that day when his Honour said that he was not inclined to adjourn the application because Mr Papas had four months since the creditor’s petition had been filed to obtain legal representation.
13. Mr Papas explained to the primary judge that he had been unable to afford legal assistance, but had now secured the assistance of a third party to obtain such assistance. His Honour’s response was, relevantly, “I understand if you can’t afford [legal representation] but that’s a matter that, unfortunately, I’ve got no control over.” That response indicates that his Honour thought that Mr Papas was saying that he was still unable to afford legal representation, whereas Mr Papas was in fact asserting that he was now in a position to obtain such representation. Westpac’s counsel submitted in the appeal that the primary judge was not obliged to take into account this and other assertions made by Papas from the bar table. However, it is apparent from the transcript that his Honour did not require sworn evidence from Mr Papas and was prepared to treat his assertions as evidence. If his Honour had not taken that stance, the requirements of procedural fairness would have required that he tell Mr Papas that it was necessary for him to give sworn evidence: cf *SZRVR v Minister for Immigration and Border Protection* [2013] FCAFC 915 at [39], [53], [59].
14. Although the original creditor’s petition had been filed some four months earlier, Mr Papas had been able to reach a compromise with the Commonwealth Bank. Westpac’s application for substitution had only been filed a month earlier. Westpac’s amended creditor’s petition was quite different because it alleged a debt that was the subject of contested proceedings in the Supreme Court, whereas the Commonwealth Bank had obtained a judgment. His Honour did not take into account that Mr Papas had only one month, not four, to obtain legal representation in respect of Westpac’s creditor’s petition.
15. The primary judge indicated that, having “looked at the application and the material”, he did not see any reason why the matter should be adjourned. The material before his Honour consisted of the submissions and affidavits read by Westpac and Mr Papas’ notice stating his grounds of opposition, his affidavit and his bundle of documents. His Honour apparently considered that the merits of the case, disclosed by that material, was relevant to the refusal of “any application for an adjournment”. I infer that his Honour must have concluded that Mr Papas’ case for resisting a sequestration order was so hopelessly weak that adjourning the matter to enable Mr Papas could obtain legal representation would be futile.
16. That conclusion was not one reasonably open to his Honour. Mr Papas’ material had raised the kernel of a defence to Westpac’s claim. His Honour was required to assume, for the purpose of deciding whether he would proceed to hear the creditor’s petition, that Westpac had engaged in misleading or deceptive conduct by representing that it would roll over the facility if Mr Papas paid off a large amount of the debt, but not honouring that representation. That raised at least the prospect of establishing a breach of s 52 of the *Trade Practices Act*. The real issue was what relief, if any, Mr Papas might be able to obtain. His Honour could not reasonably exclude the possibility that Mr Papas, with the assistance of a lawyer, might have been able to bring together a case for relief that could demonstrate a genuine dispute about the debt.
17. I conclude that the primary judge made several errors. His Honour was wrong to treat Mr Papas as having made an application for an adjournment, when, in truth, he was objecting to the summary hearing of the amended creditor’s petition in circumstances where it had not been set down for hearing. His Honour also failed to take into account that the circumstances had changed when Westpac filed an application to be substituted as the petitioning creditor one month earlier. In addition, his Honour did not apparently take into account Mr Papas’ assertion that he had now reached an arrangement that enabled him to obtain legal representation. Further, his Honour seems to have reached a conclusion, on the basis of the material before him, that it would be pointless to “adjourn” the matter to allow Mr Papas to obtain legal advice because his case was futile. That conclusion was not open to his Honour. These errors are sufficient to require the conclusion that the exercise of his Honour’s discretion to proceed to hear the creditor’s petition that day miscarried: cf *House v The King* (1936) 55 CLR 499 at 505; *Ahern v DCT (Qld)* (1987) 76 ALR 137 at 146; *Adamopoulos v Olympic Airways SA* (1990) 95 ALR 525 at 532.
18. There is a complication that stands in the way of a grant of relief to Mr Papas.
19. His Honour decided to “refuse any application for an adjournment”. That judgment was interlocutory, because it did not finally determine the rights of the parties.
20. Section 24(1A) of the *Federal Court of Australia Act* *1976* (Cth) provides that an appeal shall not be brought from an interlocutory judgment without the grant of leave to appeal. Mr Papas has not applied for leave to appeal.
21. It is not always necessary to obtain leave to appeal from an interlocutory judgment. Section 24(1E) of the *Federal Court of Australia Act* provides:

The fact that there has been, or can be, no appeal from an interlocutory judgment of the Court in a proceeding does not prevent:

(a) a party from founding an appeal from a final judgment in the proceeding on the interlocutory judgment; or

(b) the Court from taking account of the interlocutory judgment in determining an appeal from a final judgment in the proceeding.

1. Mr Papas has appealed from the final judgment, that is, the making of the sequestration order. He submits that the final judgment was affected by the interlocutory judgment.
2. In *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478, an intermediate appellate court had set aside a judgment on the basis that an interlocutory order dispensing with a jury should not have been made and ordered a new trial. By majority, the High Court decided that a new trial should not have been ordered because to warrant a new trial, a substantial wrong to a party or miscarriage of justice had to be demonstrated. The majority said at 483 – 484:

6 The proposition that any interlocutory order can be challenged in an appeal against the final judgment in the matter is often stated in unqualified terms. The better view, however, is reflected in the formulation adopted in Spencer Bower, Turner and Handley where it is said that “on an appeal from the final order an appellate court can correct any interlocutory order *which affected the final result*” (emphasis added).

7 It is necessary to make the qualification, “which affected the final result”, at least to reflect the well-established principle that a new trial is not ordered where an error of law, fact, misdirection or other wrong has not resulted in any miscarriage of justice.

1. The majority concluded that it could not be said that the conduct of the trial by judge alone, as opposed to trial by judge and jury, could amount, without more, to a substantial wrong or miscarriage of justice. In other words, the mere possibility that the result had been affected was not enough.
2. The minority considered that the possibility that the interlocutory decision had affected the result could not be excluded, saying:

56 It would then be a bold assertion to suggest that the Judge’s decision did not affect the outcome of the trial. Who could ever know?

1. The minority applied *Stead v State Government Insurance Commission* (1986) 161 CLR 141. In that case, the High Court held that a departure from the rules of natural justice will not entitle the aggrieved party to a new trial if the new trial would inevitably result in the making of the same order. An order for a new trial in such a case would be futile. However, the Court continued at 147:

All that the appellant needed to show was that the denial of natural justice deprived him of the possibility of a successful outcome. In order to negate that possibility it was, as we have said, necessary for the Full Court to find that a properly conducted trial could not have possibly have produced a different result.

1. The majority in *Clifton Bricks* did not apply *Stead*. The reasoning of the majority indicates a difference in approach to an appeal from a final judgment brought on the basis that error in an interlocutory judgment affected the final judgment, compared to an appeal from a final judgment which asserts error in the final judgment itself. Where error is demonstrated in the final judgment itself, the appellant need only show the possibility that he or she was deprived of the possibility of a successful outcome. However, in an appeal from a final judgment on the basis of error in an interlocutory judgment, in order to obtain a retrial the appellant must demonstrate that some substantial wrong or miscarriage of justice, in the sense of affecting the final result, has been occasioned by the error.
2. I have said that it was not open to his Honour to conclude that granting an adjournment so that Mr Papas could obtain legal assistance would be futile. However, Mr Papas now has legal representation. Despite securing that representation, he has not attempted to place before the Court any further material upon which he could have relied if the application had not been summarily determined. Such material might have included evidence that Suncorp was likely to have refinanced the loan if Mr Papas had the cash available and that the land would have been developed and sold for an amount that was sufficient to clear the debt.
3. I am left, then, only with the submissions of Mr Papas’ counsel as to the case that would have been articulated if he had been represented by lawyers, and the assertion that those lawyers would have obtained some unspecified further evidence to support that case, or might be able to do so in the future.
4. Mr Papas’ counsel submitted that no affidavits containing further evidence could be placed before this Court because they would be inadmissible in the appeal. That submission overlooks the Court’s discretion to receive further evidence under s 27 of the *Federal Court of Australia Act.* An important consideration in the exercise of the discretion is whether the further evidence would have produced a different result had it been available at the trial, or, at least, was likely to have produced a different result: *August v Commissioner of Taxation* [2013] FCAFC 85 at [119].
5. Mr Papas’ counsel also submitted that it is unnecessary to adduce such evidence in the appeal and that, in this vacuum of evidence, the Court could not conclude it would be futile to allow a retrial. The submission reflects the approach taken by the minority in *Clifton Bricks*, not the majority. The majority considered that it is necessary for an appellant to demonstrate that the error affected the final judgment if a new trial is to be ordered.
6. In the absence of further evidence capable of demonstrating that there is a genuine dispute about the debt, I am not satisfied that Mr Papas has shown that the primary judge’s errors in making the interlocutory judgment affected the outcome of the final judgment. Therefore, there is no basis upon which a retrial can be ordered.
7. The appeal must be dismissed with costs.

|  |
| --- |
| I certify that the preceding eighty-one (81) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah. |

Associate:

Dated: 28 March 2014