SUPREME COURT OF QUEENSLAND

CITATION:	*Bayly v Westpac Banking Corporation* [2020] QCA 148
PARTIES:	**DALLAS HENRY BAYLY** (appellant) **v** **WESTPAC BANKING CORPORATION** ABN 33 007 457 141 (respondent)
FILE NO/S:	Appeal No 1892 of 2020 DC No 1030 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – Unreported, 29 January 2020 (Koppenol DCJ)
DELIVERED ON:	14 July 2020
DELIVERED AT:	Brisbane
HEARING DATE:	2 June 2020
JUDGES:	Sofronoff P and Fraser JA and Bradley J
ORDER:	**The appeal is dismissed with costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – FOR DEBT OR LIQUIDATED DEMAND OR FOR POSSESSION OF LAND – where the respondent sued the appellant under a mortgage and successfully applied for summary judgment – where the appellant had delivered a promissory note to the respondent – where the respondent did not agree to accept the promissory note in satisfaction of the debts secured by the mortgage – where the appellant nonetheless claimed he had discharged his liability to the respondent under the mortgage by delivering the promissory note – whether the learned primary Judge erred in finding the appellant had no real prospect of succeeding in his defence based on the contention that his debt to the respondent had been extinguished as a result of the delivery of the promissory note PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – FOR DEBT OR LIQUIDATED DEMAND OR FOR POSSESSION OF LAND – where the respondent sued the appellant under

a mortgage and successfully applied for summary judgment – where the appellant entered into the mortgage with the respondent's predecessor in law – where all of the assets and liabilities of the respondent's predecessor in law became the assets and liabilities of the respondent without any transfer, conveyance or assignment on 1 March 2010, pursuant to the *Financial Sector (Business Transfer and Group Restructure) Act* 1999 (Cth) – where the appellant nonetheless claimed the respondent was not entitled to enforce the mortgage because he had not entered into any contract with the respondent – whether the learned primary Judge erred in finding the appellant had no real prospect of succeeding in his defence based on his challenge to the standing of the respondent

Financial Sector (Business Transfer and Group Restructure) Act 1999 (Cth), s 20, s 22

Byrne v Javelin Asset Management Pty Ltd [2016] VSCA 214, cited
Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd (1988) 14 NSWLR 523, applied
Fielding & Platt Ltd v Najjar [1969] 1 WLR 357, distinguished

COUNSEL: The appellant appeared on his own behalf
D M Turner for the respondent

SOLICITORS: The appellant appeared on his own behalf
Minter Ellison for the respondent

[1] **SOFRONOFF P:** I agree with Bradley J.

[2] **FRASER JA:** I agree with the reasons for judgment of Bradley J and the order proposed by his Honour.

[3] **BRADLEY J:** The appellant (**Mr Bayly**) appeals against the order of the District Court giving summary judgment for the respondent (**Westpac**) for the recovery of possession of a unit at First Avenue, Broadbeach (the **unit**). The court also ordered that Westpac's costs of the application and the proceeding be treated as reasonable enforcement expenses under the mortgage over the unit granted by Mr Bayly in 2006 (the **Mortgage**).

[4] Before considering the written and oral submissions about the appeal, it is convenient to set out the background facts.

Background

[5] On 14 August 2006, Mr Bayly accepted two written offers from St George Bank Limited (**St George**).

[6] The first was an offer to lend $128,400 to Mr Bayly as a residential investment loan for a business purpose, secured by a first priority registered mortgage over the unit. The offer provided for the interest on the loan to be 0.7% per annum below the "residential investment Low Doc Variable Rate".

[7] The other offer was also to lend $128,400 to Mr Bayly as a residential investment loan for a business purpose, secured by a first priority registered mortgage over the unit. It provided for the interest on the loan to be a fixed interest rate of 7.19% per annum for three years from the settlement date and afterwards at the "residential investment Low Doc Variable Rate".

[8] Each of the two loans offered would require Mr Bayly to make 360 repayments over a loan term of 30 years.

[9] Mr Bayly signed each of the offers and returned them to St George. By signing them, he entered into two loan agreements with St George.

[10] Also on 14 August 2006, Mr Bayly executed the Mortgage charging his estate in the unit with the repayment or payment to St George of the amount owing from time to time.

[11] On 21 August 2006, St George advanced $128,400 to Mr Bayly pursuant to the first loan agreement and the same amount pursuant to the second loan agreement. These amounts are shown on the two home loan account statements issued to Mr Bayly by St George on 26 August 2006.

[12] On 20 January 2010, St George and Westpac provided a statement (the **section 20 statement**) to the Australian Prudential Regulation Authority (**APRA**) under s 20(1) of the then *Financial Sector (Business Transfer and Group Restructure) Act* 1999 (Cth) (the **Transfer Act**), which recorded agreements about matters connected with the transfer of the business of St George to Westpac.

[13] On 18 February 2010, APRA issued a certificate of transfer recording the voluntary transfer approval under the Transfer Act in respect of the total transfer of business from St George to Westpac, stating that the transfer was to take effect on 1 March 2010. The same day, APRA also approved the section 20 statement.

[14] From 16 September 2016, Mr Bayly ceased making repayments of the loans.

[15] By 11 December 2018, Mr Bayly was in arrears: $21,932 under the first loan agreement; and $24,863 under the second loan agreement.

[16] On 12 December 2018, Westpac, by its solicitors, gave Mr Bayly a notice. The solicitors signed the notice as solicitors and agents for "St George Bank Ltd – a division of Westpac Banking Corporation". It was both a notice of exercise of power of sale under s 84 of the *Property Law Act* 1974 (Qld) (the **PLA**) and a default notice under s 88 of the *National Credit Code*.[1] It gave notice to Mr Bayly that he was in default and that if he did not remedy the default within 31 days, the whole of the amount owing under each of the loan agreements would become immediately due and payable. It notified him that, amongst other things, Westpac could commence enforcement proceedings against him, repossess the unit and exercise the powers conferred by the Mortgage, the PLA and the *Land Title Act* 1994 (Qld).

[17] Mr Bayly did not pay the arrears.

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1 Schedule 1 to the *National Consumer Credit Protection Act* 2009 (Cth).

[18] On 27 March 2019, Westpac commenced the proceeding below in the District Court. Mr Bayly filed three defences, on 30 April 2019, 24 September 2019 and 28 October 2019.

[19] On 29 January 2020, Westpac succeeded in its application for summary judgment against Mr Bayly, which is the subject of this appeal.

Matters raised in the appeal

[20] In the notice of appeal, Mr Bayly raised two grounds:

> "1. **Lack of jurisdiction of District Court:** The District Court of Queensland lacks jurisdiction to hear matters of fact and law concerning interpretation of Commonwealth Acts and the Constitution, and
>
> 2. **Errors of law and facts:** Errors of law and facts pertaining to Commonwealth legislation, errors of interpretation/misinterpretation of legal definitions of words and errors of fact and jurisdiction pertaining to valid cause of action, valid claim and jurisdiction to proceed, by the Judge of the Primary Court."

[21] Mr Bayly filed a written outline of argument.[2] In it, he set out the "Principal Issues Giving Rise to an Appeal". These he arranged as "Errors of Fact and Law", "Obstructions", "Promissory Note Proceedings Settled Privately or Discontinuance" and "Erred Assertions and/or Presumptions". Each of them is an alleged error of law or of fact, and so relates to his second ground of appeal.

[22] On 2 June 2020, at the hearing of the appeal, the court gave leave for Mr Andrews to appear for Mr Bayly. Mr Andrews raised no additional issues in his oral submissions.

[23] So Mr Bayly put no submission, written or oral, about the first ground of appeal concerning the jurisdiction of the District Court. The topic was not raised before the learned primary Judge. In his defence to Westpac's claim, Mr Bayly had admitted that Westpac's cause of action "arose … within the jurisdiction of the District Court".[3]

[24] The District Court has jurisdiction to hear and determine actions to recover possession of any land, where the value of the land does not exceed $750,000.[4] Subject to certain limitations, for the purpose of exercising this jurisdiction, the District Court has all the powers and authorities conferred on the Supreme Court by Queensland legislation.[5]

[25] The first ground of appeal is unsupported and without merit.

[26] The submissions on the second ground – "Errors of law and facts" – are numerous. It is convenient to consider them under the following subjects: the promissory note;

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2 Appellant's outline of argument filed 14 April 2020 (**Appellant's outline**).
3 Amended defence at [1].
4 *District Court of Queensland Act* 1967 (Qld), ss 68(1)(b)(xi), (2).
5 Ibid, s 69(1).

Westpac's standing; Westpac's proof of its claim; the signing of the claim and statement of claim; and obstruction.

Promissory note

[27] At the hearing of the appeal, the only topic of Mr Andrews' oral submissions was a promissory note Mr Bayly delivered to Westpac's solicitors on 23 August 2019. Mr Andrews described it as "the first and probably most singularly important" of the appeal points.

[28] According to the text of the promissory note, Mr Bayly offered to pay Westpac:

> "**The Sum of Seven Hundred Thousand Dollars Australian Only**
>
> Redeemable at:
> First Avenue Tavern, At the Crown Plaza Hotel, at the entrance to the First Avenue Entrance in First Avenue, Broadbeach, Queensland, Australia
>
> At **10.30 am hours** without; *let, delay, hindrance or ado on*
> The **Fifth** day of September, AD 2019"

[29] In his written submissions, Mr Bayly identified the provisions of the *Bills of Exchange Act* 1909 (Cth), which codify the former common law of negotiable instruments, including promissory notes. In particular he referred to s 89(1) of that Act, which provides:

> "A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person, or to bearer."

[30] In his address, Mr Andrews referred to s 93(1) of that Act:

> "Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable."

[31] Mr Andrews relied on this provision to submit that "the liability was discharged against the maker" i.e. Mr Bayly. It is not clear how this could be the case. Mr Bayly's note was made payable at a particular place, the First Avenue Tavern. It is common ground that the promissory note signed by Mr Bayly was never presented for payment. It follows that Mr Bayly was never liable to honour his note.

[32] Mr Andrews relied on a statement of Lord Denning MR in *Fielding & Platt Ltd v Najjar*,[6] that "a bill of exchange or a promissory note is to be treated as cash". This, according to Mr Andrews, meant that the tender of a promissory note was the same as a payment of cash. In that decision, the plaintiff, based in Gloucester, had agreed to make and sell industrial machinery to a company based in Lebanon. By the terms of the written agreement, the plaintiff was to be paid by six promissory notes given personally by the defendant, Mr Najjar, who was the managing director of the

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6 [1969] 1 WLR 357 at 361B.

buyer. The notes were payable at intervals during the progress of the work. When the first note fell due, it was presented, but not paid. In due course, each of the notes was presented and none was paid. The plaintiff sought and obtained summary judgment against Mr Najjar for failing to honour the promissory notes. The reported decision, to which Mr Andrews referred, was an appeal by Mr Najjar against a decision refusing him leave to defend. In the passage from which Mr Andrews drew his quote, Lord Denning MR explained:

> "Stopping there, it is quite plain to me that Mr Najjar was liable to pay the first of the promissory notes. We have repeatedly said in this court that a bill of exchange or a promissory note is to be treated as cash. It is to be honoured unless there is some good reason to the contrary. It is suggested that … there was a failure of consideration. That suggestion is quite unfounded. The English company were getting on with their part of the contract. They were, they say, ordering goods from their suppliers and getting on with the work. At any rate, there is no evidence to the contrary; and, unless they were themselves in default, they were clearly entitled to payment of the first note."

[33] The import of the passage is that a person who draws a promissory note must honour it when it is due; so there was little scope to defend a claim for the amount of the note. Mr Andrews seemed to think it meant Mr Bayly could write out his own promissory note and it would be "as good as cash" to settle any debt. He was quite wrong.

[34] Neither Mr Bayly in his written outline nor Mr Andrews in oral submissions identified any provision of either loan agreement or the Mortgage which bound Westpac to accept a promissory note from Mr Bayly in satisfaction of any amount owing. Each loan agreement included the term that "[r]egular repayments should be made by automatic transfer" from a St George transaction account nominated by Mr Bayly. Other options mentioned were the use of "*phone and internet banking* to … credit (funds transfers) your loan account" and Mr Bayly authorising St George "to meet your repayment by debiting an account".

[35] No agreement to accept a promissory note was alleged by Mr Bayly in his defences and none was asserted in his written or in Mr Andrews' oral submissions. In the absence of agreement, Westpac did not have to accept Mr Bayly's promissory note as payment for the outstanding debt.

[36] It follows that Mr Bayly could not discharge his debt to Westpac by delivering the promissory note to Westpac's solicitors. Put simply, he could not affect his or Westpac's existing legal rights by promising in writing he would pay Westpac at the local pub at 10.30 am on a Thursday.

[37] The language on the reverse of the promissory note described it as "for the Settlement of St George Bank Fully Drawn Advance Mortgage Loans". It appears from this and from Mr Andrews' oral submissions that, by delivering the note to Westpac's solicitors, Mr Bayly was proposing that Westpac accept the note in discharge of his obligations in respect of six listed loan accounts. There was no evidence that Westpac accepted the note in this fashion. On the contrary, the evidence was that Westpac, through its solicitors, wrote to Mr Bayly advising "for the avoidance of any doubt, Westpac does not accept the Promissory Note as a

method of payment". This communication was sent by email on 12 September 2019.

[38] According to Mr Andrews, because Westpac received the promissory note and took possession of it, they accepted the note. As well, Mr Andrews contended that Westpac's "silence" for the period between 23 August and 12 September 2019 meant that Westpac had accepted the promissory note. He submitted that according to "contractual principles" Westpac's failure to reject the note within 72 hours meant Westpac was bound by Mr Bayly's offer and his debt to Westpac was extinguished. There is no such contractual principle.

[39] In *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd*,[7] the New South Wales Court of Appeal considered a submission that a contract had been created by an offer followed by a period of silence. Kirby P observed:

> "The starting point for the legal classification of the facts which I have set out is that an offeror may not impose a contractual obligation upon an offeree by stating, that if the latter does not expressly reject the offer as made, it will be taken to have accepted it. This general principle is accepted throughout the common law world.
>
> Various explanations may be offered for this principle. One is that it derives from the disinclination of the common law to impose legal liability upon individuals for omissions. Another is that it is a consequence of the common law's protective attitude towards liberty of conduct and its resistance to the unilateral imposition of obligations. Still another is that it derives from the contractual theory of the common law that a binding and legally enforceable agreement must be *mutually* achieved by offer and acceptance. Whatever the history of and reasons for the general rule, its existence is not in doubt."[8]

[40] McHugh JA, with whom Samuels JA agreed, explained:

> "Under the common law theory of contract, the silent acceptance of an offer is generally insufficient to create any contract. The objective theory of contract requires an external manifestation of assent to an offer. Convenience, and especially commercial convenience, has given rise to the rule that the acceptance of the offer should be communicated to the offeror. After a reasonable period has elapsed, silence is seen as a rejection and not a[n] acceptance of the offer. Nevertheless, communication of acceptance is not always necessary. The offeror will be bound if he dispenses with the need to communicate the acceptance of his offer. However, an offeror cannot erect a contract between himself and the offeree by the device of stating that unless he hears from the offeree he will consider the offeree bound. He cannot assert that he will regard silence as acceptance. The common law's concern with the protection of freedom is opposed to the notion that a person must

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7 (1988) 14 NSWLR 523 (***Empirnall Holdings***).

8 *Empirnall Holdings* at 527F-528A.

> take action to reject an uninvited offer or be bound by contractual obligations."[9]

[41] His Honour concluded his analysis of the law by stating:

> "The ultimate issue is whether a reasonable bystander would regard the conduct of the offeree, including his silence, as signalling to the offeror that his offer has been accepted."[10]

[42] The conduct of Westpac could not reasonably be regarded as an acceptance of an offer put by Mr Bayly to pay his debt by the promissory note. No step was taken by Westpac to show acceptance, in particular, the promissory note was not presented for payment.

[43] Mr Bayly included in the appeal record excerpts of the Commonwealth Constitution and five Commonwealth statutes, in addition to the *Bills of Exchange Act*. These may be considered briefly.

(a) The power of the Commonwealth Parliament to make laws with respect to currency, conferred by s 51(xii) of the *Constitution*, and its power to make laws with respect to promissory notes, conferred by s 51(xvi), were not in issue in the court below or in this appeal.

(b) The definition of "money" in s 195-1 of the *A New Tax System (Goods and Services Tax) Act* 1999 as including "promissory notes" has the effect that, for the purpose of the Act: the supply of a promissory note is not a "supply"; the acquisition of a promissory note is not an "acquisition"; the importation of a promissory note is not a "taxable importation"; and a "settlement amount" (and related insurance obligations in respect of legal claims) may be calculated by adding the sum of payments, including by promissory notes.

(c) The definition of "Australian currency" in s 39(8) of the *Banking Act* 1959 as including "promissory notes" has the effect that the authorisation of the Governor-General to make regulations providing for or in relation to the control or prohibition of transactions involving dealings with Australian currency includes such dealings with promissory notes denominated in Australian dollars.

(d) The dollar is designated as the monetary unit or unit of currency in Australia, and the dollar and the cent as the denominations of money, by s 8 of the *Currency Act* 1965. The requirement in s 9(1) of that Act is that every promissory note be made according to the currency of Australia, unless it is made according to the currency of some country other than Australia.

(e) A person who pays a tax-related liability had to do so in Australian currency, under s 18(1) of the repealed *Taxation Administration Regulations* 1976 and their successor.[11]

(f) The definition of "money" as including "negotiable instruments", in s 131.7(4) of the *Criminal Code Act* 1995, has the effect that, for the purpose

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9 *Empirnall Holdings* at 534D-F (citations omitted).

10 *Empirnall Holdings* at 535E (citations omitted).

11 Section 21(1) of the currently in force *Taxation Administration Regulations* 2017 is in the same terms.

> of the offence of theft of Commonwealth property, property belongs to the Commonwealth even if a person obtained it by another person's mistake about the amount of money (including negotiable instruments) being paid.

[44] None of these provisions has any relevant effect on the matters in issue between Westpac and Mr Bayly below or in this appeal. None makes a promissory note "money" for any broader general purpose.

[45] Mr Bayly had no real prospect of succeeding in his defence based on the contention that his debt to Westpac had been extinguished as a result of the delivery of the promissory note. The learned primary Judge was not in error in this respect.

Westpac's standing

[46] In his written outline, Mr Bayly submitted Westpac lacked "standing to prosecute the claim from the basis there is no contract between" Westpac and Mr Bayly.[12]

[47] In the proceeding below, Westpac pleaded:

> "By operation of [s 22 of the Transfer Act] and on and with effect from 1 March 2010, all of the assets and liabilities of St George … became the assets and liabilities of [Westpac] without any transfer, conveyance, assignment and the duties, obligations, immunities, rights and privileges applying to St George apply to [Westpac], which has become the successor in law of St George."[13]

[48] In his defence, Mr Bayly denied this allegation "by reason there is no document that establishes a contract between" Mr Bayly and Westpac. In his particulars of this denial, Mr Bayly again asserted that no document established a contract between him and Westpac, before stating that he has never consented or assented to conducting business with Westpac, and that "[a]ny claim of implied contract is denied immediately, and in the alternative is revoked immediately".

[49] Mr Bayly's explanation seems to proceed on a misunderstanding of Westpac's allegation.

[50] The statutory provision pleaded by Westpac relevantly provided:

> "**22 Time and effect of voluntary transfer**
>
> (1) When the certificate of transfer comes into force, the receiving body becomes the successor in law of the transferring body, to the extent of the transfer. In particular:
>
> (a) if the transfer is a total transfer—all the assets and liabilities of the transferring body, wherever those assets and liabilities are located, become (respectively) assets and liabilities of the receiving body without any transfer, conveyance or assignment; and
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> …

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12 Applicant's outline at [8].

13 Amended statement of claim at [3].

(c) to the extent of the transfer, the duties, obligations, immunities, rights and privileges applying to the transferring body apply to the receiving body.

…

(5) Subject to subsection (2), if the transfer is a total transfer, on and after the day when the certificate comes into force, each translated instrument continues to have effect, according to its tenor, as if a reference in the instrument to the transferring body were a reference to the receiving body."

[51] The Transfer Act also relevantly included the following provision:

"**20 Agreements about matters connected with the transfer**

(1) The transferring body or the receiving body, or both of those bodies, may provide APRA with a written statement specifying, or specifying a mechanism for determining, things that are to happen, or that are taken to be the case, in relation to assets and liabilities that are to be transferred, or in relation to the transfer of business that is to be effected.

(2) APRA may, in writing, approve the statement before issuing the certificate of transfer if APRA is satisfied that:

(a) the statement has been agreed to by the transferring body and the receiving body; and

(b) the matters specified in the statement are appropriate."

[52] Westpac put the section 20 statement before the learned primary Judge. It included the following:

"*Timing*

(b) Westpac and St George agree that each of the paragraphs set out below will take effect at 12.01am (Sydney time) on 1 March 2010.

Consequences of certificate of transfer

(c) With effect on and from the time when this paragraph comes into force in accordance with paragraph (b), Westpac becomes the successor in law of St George and is for all purposes a continuation of and the same legal entity as St George.

Assets and liabilities

(d) With effect on and from the time when this paragraph comes into force in accordance with paragraph (b):

(i) all assets of St George, wherever located, vest in, or are otherwise available for the use of, Westpac without the need for any conveyance, transfer, assignment or assurance and without the need for any prior notice or further act;

…

For the avoidance of doubt, the assets and liabilities of St George include, without limitation, the following:

(iii) all customer relationships relating to each customer that has been or is liable, or owed an obligation, in respect of one or more of the assets or liabilities of St George, or that otherwise has acquired any services from St George immediately before the time when this paragraph comes into force in accordance with paragraph (b);

…

In this paragraph (d):

(vi) ***customer relationship*** means, in relation to a customer:

(A) the relationship (including all legal incidents of that relationship) between St George and the customer in relation to any product or service issued or provided by St George;

…

(C) all contracts, instruments, documents and information relating to any of the relationships referred to in sub-paragraphs (A) and (B), including security interests …

Translated Instruments

(g) On and after the time when this paragraph comes into force in accordance with paragraph (b), each translated instrument continues to have effect, according to its tenor, as if a reference in the instrument to St George were a reference to Westpac. For this purpose:

(i) ***translated instrument*** means a document, agreement, instrument, notification or quotation of any kind … which is subsisting immediately before the time when this paragraph comes into force in accordance with paragraph (b):

(A) to which St George is a party; or

(B) that was given to, by or in favour of, or issued by, St George; or

(C) that refers to St George …; or

(D) under which money is, or may become, payable, or other property is, or may become, liable to be transferred, to or by St George; and

without limiting any other respect in which a translated instrument is ***subsisting*** at a time if it is physically in existence at that time (whether in paper, electronic or any other form);

…

Relationships with customers and depositors

(q) The relationship between St George and a customer or depositor at an office or branch or agency of St George is, on and after the time when this paragraph comes into force in accordance with paragraph (b), between Westpac and that customer or depositor, and gives rise to the same rights and duties (including rights of set-off) as would have existed before that time if that relationship had always been between Westpac and the customer or depositor.

…

Interests in land

(w) If, immediately before the time when this paragraph comes into force in accordance with paragraph (b), St George is, or is taken to be, the registered proprietor of an interest in land, with effect on and from the time when this paragraph comes into force in accordance with paragraph (b):

(i) Westpac is taken to be the registered proprietor of that interest in land; and

(ii) Westpac has the same rights and remedies in respect of that interest as St George had."

[53] Westpac put before the learned primary Judge the APRA instrument by which a delegate of APRA approved the section 20 statement. Westpac also put into evidence the certificate of transfer issued by the delegate and authorised officer of APRA. The certificate states that the total transfer of business from St George to Westpac is to take effect and that the certificate comes into force on 1 March 2010.

[54] It follows that, with effect from 12.01 am on 1 March 2010, all of the assets and liabilities of St George became assets and liabilities of Westpac, and all of the rights and privileges applying to St George applied to Westpac. This included the interest of St George in the unit, as a registered mortgagee, and all of the rights of St George pursuant to the Mortgage and each of the loan agreements with Mr Bayly, being choses in action.

[55] Mr Bayly adduced no evidence about these matters. He did not dispute that Westpac was the successor in law to St George and he did not dispute the effect of the APRA certificate. He submitted to the learned primary Judge that Westpac had failed to prove it was "in fact in possession of all the assets" and "in possession of the securities", by which it appears he meant the original copy of each loan agreement.[14]

[56] A creditor must prove that a debtor agreed on any particular terms for the repayment of the debt, upon which the creditor relies. However, it is not an element of a cause of action for the debt that the creditor must possess or produce an original of the loan agreement.

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14 Mr Bayly cannot have meant the original Mortgage, as that was lodged with the registrar of titles.

[57] Westpac's standing to pursue its claim against Mr Bayly was not affected by the fact that Mr Bayly did not sign any contract or agreement with Westpac or that Mr Bayly had never consented or assented to conducting business with Westpac. No "implied contract" was involved in Westpac's claim. Westpac proceeded against Mr Bayly as the successor in law of St George and the person entitled to exercise the rights of St George under the Mortgage and the loan agreements.

[58] The learned primary Judge did not err in concluding with the requisite degree of certainty that Mr Bayly had no real prospect of succeeding in his defence based on his challenge to the standing of Westpac.

Westpac's proof of its claim

[59] In his written outline, Mr Bayly contended that Westpac had failed to prove the loan agreements and the advances made under them.

[60] In his defence, Mr Bayly had admitted that on 12 December 2018 he was in arrears of repayments of $21,932 owing under the first loan account and so in default under the Mortgage and in arrears of repayments of $24,863 under the second loan account and also in default under the Mortgage on that basis.

[61] Before the learned primary Judge, Westpac read an affidavit of Amanda Payne.[15] Ms Payne exhibited copies of documents used in the ordinary course of Westpac's business to record its financial transactions. Ms Payne deposed that these were true copies of the ordinary books of account of Westpac and the entries were made in the usual and ordinary course of Westpac's business. Ms Payne also exhibited a copy of the Mortgage and each of the loan agreements.

[62] Ms Payne gave evidence, based upon her access to Westpac's books of account, that Mr Bayly borrowed $128,400 pursuant to the first loan agreement and $128,400 pursuant to the second loan agreement. She exhibited copies of the St George home loan account statements issued to Mr Bayly recording the advances at that time. Ms Payne also deposed that Mr Bayly had failed to pay moneys due and owing under each of the loan agreements and, as at 11 December 2018, was in arrears in the amount of $21,932 in respect of the first loan agreement and $24,863 in respect of the second loan agreement. Drawing on the business records of Westpac, Ms Payne deposed that there had been no deposits by way of reduction of the debt balance of either loan since 16 September 2016.

[63] It follows that there was evidence before the learned primary Judge of the loan agreements and of the advances made under them. This evidence was admissible.[16] It was sufficient to prove Westpac's allegation that it had made financial accommodation available to Mr Bayly pursuant to the two loan accounts, and his default.

[64] In a separate affidavit read below, Ms Payne certified that, as at 23 January 2020, the amount payable by Mr Bayly pursuant to the Mortgage was $323,701.18.[17]

[65] In each loan agreement, Mr Bayly had agreed that St George may give him a certificate about an amount payable in connection with the loan agreement and that the certificate would be sufficient evidence of the amount, unless it is proved to be

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15 Filed on 2 October 2019.

16 See s 84 of the *Evidence Act* 1977 (Qld).

17 Ms Payne certified that this was the total of $172,169.03 in respect of the first loan account and $151,532.15 in respect of the second loan account.

incorrect. The relevant clause is a plain English version of that considered by the High Court in *Dobbs v National Bank of Australasia Ltd*.[18] As the Victorian Court of Appeal observed of a similarly drawn clause in *Byrne v Javelin Asset Management Pty Ltd*,[19] it facilitates proof of the existence and the amount of a person's indebtedness. The clause provides a means by which Westpac could establish the legal existence and the amount of Mr Bayly's debt, unless it is proved that the matter or sum referred to in the certificate is false.[20]

[66] As a separate matter, Mr Bayly asserted that Westpac had failed to prove it advanced the loan moneys because it had not revealed "the source of the funds". This is not a defence. Mr Bayly could not avoid his own debts by arguing that his creditors might or might not owe money to others.

[67] In the circumstances, there was no error by the learned primary Judge in concluding that Mr Bayly had no real prospects of defending against Westpac's claim on the basis that Westpac had failed to prove the facts upon which its claim was based.

The signing of the claim and statement of claim

[68] Next, in his written outline, Mr Bayly contended that the claim, the statement of claim and amended statement of claim were not "properly and validly signed".

[69] This argument was not put to the learned primary Judge. At the hearing below, Mr Bayly and Mr Andrews submitted that Westpac had not properly signed an affidavit. They were unable to identify the affidavit in question. The learned primary Judge examined a number of affidavits read by Westpac and concluded, with respect correctly, that there was no impropriety in their execution.

[70] In this appeal, Mr Bayly submitted that errors had been made by Mr Andrews below and that, rather than an affidavit, he and Mr Andrews should have submitted that Westpac had not validly or properly signed the claim and the pleadings.

[71] Rule 19 requires that Westpac (as plaintiff) or its solicitor must sign the originating process, which in this instance is the claim. The claim was not included in the appeal record. The only pleading by Westpac in the record is the amended statement of claim filed on 30 September 2019. It is signed by Westpac's solicitors, both on its final page and in the endorsement of the amendment notice under r 378. Mr Bayly (and Mr Andrews) were simply wrong in this respect.

[72] There was no error by the learned primary Judge. No issue about signing the claim or the statement of claim was raised before his Honour. The decision is not to be set aside on the basis that Westpac's solicitors signed the claim and the statement of claim. Mr Bayly's contentions to that effect have no real prospects of success.

Obstruction

[73] In his written outline, Mr Bayly complains of obstruction by the learned primary Judge.

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18 (1935) 53 CLR 643 at 651 (Rich, Dixon, Evatt and McTiernan JJ).

19 [2016] VSCA 214 at [39] – [42] (Hansen, Ferguson and McLeish JJA).

20 *Permanent Trustee Co Ltd v Gulf Import & Export Co* [2008] VSC 162 [85] (Hansen J), cited with approval in *Byrne v Javelin Asset Management* at [41].

[74] I have read carefully the transcript of the hearing, which was included in the appeal record. It records that the learned primary Judge interacted directly and courteously with Mr Bayly and Mr Andrews. During the 90 minute hearing, his Honour took each of the matters raised at the hearing in turn, clarified with Mr Bayly and Mr Andrews the true nature of their submission on the matter, indicated his initial view of any difficulty with their submission and invited them to address it, before his Honour indicated a final position and then moved to the next matter. In this way, the learned primary Judge explained his conclusion on each point raised by Westpac and by Mr Bayly and Mr Andrews.

[75] With respect, this approach was appropriate. Mr Bayly needed to raise only one defence with a real prospect of success to deny Westpac summary judgment. Mr Bayly was not legally represented.[21] The approach adopted by the learned primary Judge may have assisted Mr Bayly to understand the issues raised by Westpac at the hearing and any difficulties his Honour saw with submissions put by Mr Bayly and Mr Andrews.

[76] In Mr Bayly's written outline, the learned primary Judge's rejection of a number of submissions put by Mr Bayly or Mr Andrews is characterised as his Honour having "avoided, ignored or circumvented taking into consideration" what was put. These assertions are not borne out by the transcript of the hearing. The submissions, identified by Mr Bayly in his outline, are a variety of factually false, legally wrong or nonsensical propositions. They are matters considered under the other topics above, with one exception.

[77] The exception is Mr Bayly's submission that the learned primary Judge incorrectly asserted that Mr Bayly's denial of paragraphs 3, 5, 7, 13, 14 and 15 of the statement of claim was a bare denial. His Honour did read the unexplained denials in paragraph 2 of the amended defence as "effectively admissions", as indeed they are. However, within minutes Mr Turner, counsel for Westpac, drew his Honour's attention to paragraph 5 of the amended defence where Mr Bayly gave reasons for his denial of paragraph 3 of the statement of claim. That explanation, and the related and similar explanations, in paragraphs 6 and 7 of the amended defence, for the denial of paragraphs 5 and 7 of the statement of claim, were then the subject of submissions and exchanges between his Honour, Mr Bayly and Mr Andrews. I am satisfied that the initial impression, created by Mr Bayly's manner of pleading, did not persist and had no effect on his Honour's decision to order summary judgment for Westpac.

[78] Mr Bayly and Mr Andrews had a proper opportunity to present Mr Bayly's case against summary judgement for Westpac before the learned primary Judge. Mr Bayly re-presented his case in his outline for this appeal, which was elaborated upon by Mr Andrews at the hearing. His submissions were to no avail. The decision of the learned primary Judge should not to be set aside on the basis that there was any obstruction at the hearing.

Disposition of the appeal

[79] Neither of the two grounds of appeal raised by Mr Bayly has merit. The appeal should be dismissed with costs.

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[21] Although Mr Bayly introduced Mr Andrews as his "counsel", the learned primary Judge quickly discerned that Mr Andrews was not a barrister. Nonetheless, his Honour allowed Mr Andrews to appear to assist Mr Bayly.