SUPREME COURT OF QUEENSLAND

CITATION:	*Westpac Banking Corporation & Anor v Heslop & Anor* [2020] QSC 121
PARTIES:	**WESTPAC BANKING CORPORATION** ACN 007 457 141 (first plaintiff) **JULIE ANN WILLIAMS** (second plaintiff) **v** **GRAHAM JOHN HESLOP** (first defendant) **PATRICIA MARGARET HARPER** (second defendant)
FILE NO/S:	BS No 9751 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGE:	Bradley J
ORDER:	**The plaintiffs' application for leave to re-open their case in reply is refused.**
CATCHWORDS:	EVIDENCE – ADDUCING EVIDENCE – COURSE OF EVIDENCE – RE-OPENING CASE – BY PARTY – where the plaintiffs claim against the first defendant and the first defendant counterclaims against the plaintiffs – where the plaintiffs closed their case as defendants to the counterclaim on the final day of the trial – where written closing submissions were to be filed within one week of the final day of the trial – where, shortly before the plaintiffs filed their written closing submissions, the plaintiffs applied for leave to re-open their case as defendants to the counterclaim – whether the justice of the case favours the grant of the plaintiffs' application *Uniform Civil Procedure Rules* 1999 (Qld), r 5 *Davies v Davies & Anor* [2019] QSC 293, cited *Inspector-General in Bankruptcy v Bradshaw* [2006] FCA 22, cited *Ladd v Marshall* [1954] 1 WLR 1489, applied

Mackellar Mining Equipment Pty Ltd v Thornton (2019) 367 ALR 171, cited
Murray v Figge (1974) 4 ALR 612, applied

COUNSEL: G Handran for the plaintiffs
The first defendant appeared on his own behalf

SOLICITORS: Gadens for the plaintiffs
The first defendant appeared on his own behalf

Background

[1] This proceeding involves a claim by the first plaintiff (the **Bank**) and the second plaintiff (the **Receiver**) against the first defendant (**Mr Heslop**), who is alleged to be a guarantor for the Bank's loans to a customer.[1] Mr Heslop has a counterclaim against the Bank and the Receiver for conduct including alleged breaches of the Code of Banking Practice (the **Code**).

[2] The trial of the claim and the counterclaim was heard over six days, from 10 to 14 February 2020 and on 1 May 2020. The plaintiffs were represented by a common firm of solicitors and the same counsel. Mr Heslop was not legally represented.

[3] On 10 February 2020, the plaintiffs opened their case on their claim against Mr Heslop. The plaintiffs adduced evidence from one witness, in the form of an affidavit, and tendered 174 documents. With the court's leave and Mr Heslop's agreement, the plaintiffs did not lead evidence in defence of the counterclaim, on the basis that they would do so, to the extent they wished, after Mr Heslop had closed his case against them on the counterclaim.

[4] On 11 February 2020, Mr Heslop opened his case, both as a defendant to the plaintiffs' claim and as to his counterclaim against the plaintiffs. He adduced evidence over the following two days, calling four witnesses and tendering one document. On 13 February 2020, the plaintiffs interposed a witness who gave evidence in their defence to the counterclaim.

[5] On 14 February 2020, when it was anticipated the trial would conclude, Mr Heslop failed to appear. The plaintiffs sought an adjournment of the trial (part-heard) to a later date. Given the uncertainty as to Mr Heslop's position, the trial was adjourned to 1 May 2020.

[6] On 17 April 2020, the court made an order (the **Order**) providing for the filing and service of various documents related to the trial, due to resume on 1 May 2020.

[7] On 1 May 2020, the trial resumed. Mr Heslop did not appear. The plaintiffs tendered two affidavits and a further 110 documents as evidence in their defence to the counterclaim. They then closed their case as defendants to the counterclaim. By the Order, the parties were directed to file written closing submissions by 8 May 2020 for the court to consider in formulating the reserved judgment.

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1 The Bank's claim against the second defendant was resolved by entry of default judgment on 21 December 2016.

[8] On 8 May 2020, the solicitors for the plaintiffs sent an email to my associate, which contained the following excerpt:

> "In the course of finalising the Plaintiffs' submissions, it has come to the Plaintiffs' attention that neither party has tendered evidence which demonstrates when the Bank adopted each version of the Code of Banking Practice (the **Code**).
>
> The Plaintiffs have sought Mr Heslop's consent to the tender of a short document in order to address this. Mr Heslop has not consented.
>
> In those circumstances, we are instructed to humbly apply for leave for the Plaintiffs to re-open their case in reply …"

[9] On 11 May 2020, the plaintiffs filed an outline of argument and two affidavits, one sworn by Ms O'Connor and one sworn by Mr Meager, in support of their application. The outline stated: "The plaintiffs apply for leave to re-open their case in reply". The affidavit of Ms O'Connor makes good the information set out in the plaintiffs' solicitors' email and explains that the omission of the proposed evidence was the result of an inadvertent error. The affidavit of Mr Meager is the evidence that the plaintiffs would adduce, if leave were granted.

[10] Mr Heslop has declined to consent to the re-opening.

The law

[11] An inadvertent error is one of "four recognised classes of case in which a court may grant leave to re-open".[2] The court's approach to an application to re-open was stated concisely by Sofronoff P in *Mackellar Mining Equipment Pty Ltd v Thornton*:[3]

> "The circumstances must be exceptional before a court may allow a case, having been closed and judgment reserved, to be reopened. The overriding principle is that the court must consider whether, taken as a whole, the justice of the case favours the grant of leave to reopen."

[12] The considerations identified in recent authorities were summarised in *Davies v Davies & Anor*.[4] The requirement of exceptional circumstances may be understood, given the public interest in the finality of litigation and in it being conducted efficiently and expeditiously.[5]

Consideration

[13] The proposed evidence deals with whether the Bank adopted any version of the Code and, if so, the date or dates on which it did so. During the trial, the plaintiffs put the *Modified Code of Banking Practice 2004* (the **2004 Code**) and the *Code of*

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2 *Inspector-General in Bankruptcy v Bradshaw* [2006] FCA 22 at [24], citing *Brown v Petranker* (1991) 22 NSWLR 717 at 728 (Clarke JA, Handley JA and Waddell AJA agreeing), *Murray v Figge* (1974) 4 ALR 612 at 614 (Muirhead J) and *Henning v Lynch* [1974] 2 NSWLR 254 at 259 (Jeffrey J).

3 (2019) 367 ALR 171 at 185 [58] (Morrison JA and Boddice J agreeing), citing *Spotlight Pty Ltd v NCON Australia Ltd* (2012) 46 VR 1 at 5 [17], 7 [26] (Harper and Tate JJA and Beach AJA).

4 [2019] QSC 293 at [10] (Bradley J).

5 *Bendigo and Adelaide Bank Ltd v Clout (No 2)* [2016] FCA 561 at [24] (White J).

Banking Practice 2013 (the **2013 Code**) into evidence. The plaintiffs seek leave to adduce evidence from Mr Meager to the effect that he has searched the Bank's records and "has been unable to find any record of when the Bank adopted any of the various Codes of Banking Practice".

[14] The other evidence the plaintiffs would now adduce, through Mr Meager, is that drawn by him from reading the website of the Australian Banking Association (**ABA**), which Mr Meager believes to be true. Mr Meager is not said to be an officer of the ABA or to be able to vouch for the source or accuracy of whatever appears on the ABA website. This proposed evidence is plainly hearsay. He is no more able to offer it than any member of the public who could access the website.

[15] The proposed evidence is not uncomplicated. It would be to the effect the Bank did not adopt the revised *Code of Banking Practice 2003* (the **2003 Code**), that it did adopt the 2004 Code on or about 1 June 2004, and also adopted the 2013 Code on or about 1 February 2014.

[16] If Mr Heslop did not object to the admission of this evidence, the court could receive it and accord it whatever weight might be appropriate. However, he does object. Mr Heslop has not framed his objection by reference to the rule against hearsay or relevance. He is self-represented, so the precision with which he might formulate his objection must be taken into account.

[17] The plaintiffs' written submissions for leave to re-open deal with the hearsay topic in this way:

> "[7] Although his evidence is hearsay, the source of the information is the Australian Banking Association (the **ABA**). Each Code records that the participating banks (referred to as "we") require the ABA to clearly make public which banks subscribe to the Code. The ABA does that through its website. It is an extract of that website containing the banks that have adopted versions of the Code, and their dates of adoption, that forms the foundation of the additional evidence.
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> [8] In the circumstances, if leave were granted, the evidence should be admitted under s. 129A(b) of the *Evidence Act 1977* (Qld). Given Mr Heslop's conduct of the trial, the facts as to the dates of adoption of the Code are not seriously in dispute. Apart, strict proof of those facts, in the circumstances of the ABA's publication of those matters as contemplated by the Code, would cause unnecessary or unreasonable expense, or inconvenience in the proceeding."

[18] With respect, Mr Heslop's conduct at the trial did not indicate that whether or not the Bank adopted each version of the Code was not seriously in dispute. The counterclaim asserts alleged beaches of the Code, including of the 2003 Code. In response to the plaintiffs' request that he agree to them tendering Mr Meager's affidavit, Mr Heslop asserted:

> "I have established that all Versions of your Code of Conduct apply to the loan agreement. As all versions were updated when / as subsequent versions of the loan agreement were signed. So that at

> any time the Contract/loan agreement was updated which each Code of Conduct."

[19] There is other evidence in the form of the Bank's own references to the Code in the terms of the agreements, on which it sues.[6]

[20] There is no evidence of the expense or inconvenience that might be caused by calling an officer of the ABA or of the extent to which it would exceed that involved in Mr Meager giving evidence.

[21] Without doubting Mr Meager's sincerity, it is extraordinary that the Bank would not have any record of whether it adopted any version of the Code at any time.[7] If those are the circumstances, it is remarkable that the Bank would resort to an internet search to "fill the gap". As a member of the ABA, one might assume the Bank could have made enquiries of that body as to the source of the information posted on the ABA website, with a view to identifying its basis and therefore its reliability.

[22] If the court were to grant the plaintiffs leave to re-open, Mr Heslop's objection to the proposed evidence might be upheld. It certainly could not be concluded that the evidence of Mr Meager was "clearly admissible".[8] If it were admitted, it would be of little weight.

[23] If the plaintiffs were permitted to re-open and the proposed evidence were to be admitted, Mr Heslop would be entitled to cross-examine Mr Meager. As his proposed evidence is based on information and belief, any cross-examination of Mr Meager would be of limited utility in testing the accuracy of the underlying evidence the plaintiffs seek to adduce through him. That would be the case even if Mr Heslop were to be legally represented. Arranging a date for the trial to resume, for the objection to Mr Meager's evidence to be made and determined, and for Mr Meager to be cross-examined would further delay the proceeding, which the plaintiffs commenced in 2015.

[24] The evidence could not be regarded as having "an important influence on the result of the case",[9] as it does not appear the adoption of any particular version of the Code on any date will have any significance for the real issues in the proceeding.

[25] In the counterclaim, Mr Heslop pleads that:

> "the terms and provisions of the Code of Banking Practice [commencing April 2003] (the **Banking Code**) were incorporated as contractual terms of [the guarantee] when it was signed by the [Guarantor] in June 2004."

[26] Mr Heslop provided particulars of this allegation, including that "The first sentence on page 4 of [the guarantee] states: 'The Code of Banking Practice applies to this Guarantee and Indemnity'."

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6 See paragraphs [28] and [29] below.

7 The Code was a key topic of evidence and recommendations at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, which concluded and reported only last year.

8 *Murray v Figge* (1974) 4 ALR 612 at 614 (Muirhead J).

9 *Ladd v Marshall* [1954] 1 WLR 1489 at 1491 (Denning LJ), cited with approval by Thomas J in *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404 at 408 (Campbell CJ and Andrews SPJ agreeing).

[27] He also pleads that:

> "the terms and provisions of the Code of Banking Practice [commencing February 2014] (the **Updated Banking Code**) were incorporated as contractual terms of [the guarantee] upon the Updated Banking Code commencing operation; and current version 2019."

[28] In their reply, the plaintiffs admit that the first page of the guarantee states:

> "The relevant provisions of the Code of Banking Practice apply to this Guarantee & Indemnity."

[29] They also admit that the first sentence on page 4 of the guarantee states that:

> "The Code of Banking Practice applies to this Guarantee and Indemnity."

[30] Nonetheless, the plaintiff's reply includes a denial that the terms and provisions of the 2003 Code were incorporated as contractual terms of the guarantee because the Bank "did not adopt the 2003 Banking Code".

[31] Nothing in either admitted statement required that the Bank "adopt" a particular version of the Code in order for the statement to be correct or to be adhered to by the Bank or to be relied upon by Mr Heslop. As it appears the Bank does not know whether and when it adopted any version of the Code, the Bank could not have expected a borrower or guarantor to have such knowledge.

[32] The plaintiffs deny the terms of the 2004 Code or the 2013 Code were incorporated as contractual terms of the guarantee, explaining the basis for the denial as "neither applied to the conduct alleged" by Mr Heslop. To the extent this denial is intelligible, it does not depend upon the adoption of any version of the Code on any date.

[33] In the circumstances, a refusal of leave will not cause an injustice to the plaintiffs, because the proposed evidence, if admissible, is not significant to the determination of the real issues in the proceeding and would be of little weight. Mr Heslop would suffer no specific prejudice if leave were granted. He would suffer the general prejudice caused by the delay and expense that would be occasioned by a re-opening.

[34] Other questions about the Bank's conduct might arise if it were contended that the Bank's documents operated so that the neither the Bank nor Mr Heslop knew the effect or meaning of the statements in the guarantee. If the proposed evidence were admitted, Mr Heslop might wish to explore those questions and amend his pleadings to incorporate further grounds of defence or bases for his counterclaim.

Disposition

[35] Given the hearsay nature of the proposed evidence, its doubtful admissibility, its lack of weight, and its limited relevance to the real matters in issue in the proceeding, and the delay and additional expense re-opening would occasion, I am not satisfied that the justice of the case favours the grant of leave to re-open the

plaintiffs' case. A refusal of leave would avoid further delay and expense and facilitate the just and expeditious resolution of the real issues in the proceeding at a minimum expense.[10]

[36] The plaintiffs' application for leave to re-open should be refused.

[10] *Uniform Civil Procedure Rules* 1999 (Qld), rr 5(1)-(2).