

## NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 19/10/2016 9:38:25 AM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

### Filing and Hearing Details

Document Lodged:	Originating Application Starting a Representative Proceeding under Part IVA Federal Court of Australia Act 1976 - Form 19 - Rule 9.32
File Number:	QUD211/2013
File Title:	John Charles Lee & Anor v Westpac Banking Corporation ABN 33 007 457 141
Registry:	QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	Directions
Time and date for hearing:	05/12/2016, 10:15 AM
Place:	Court No. 1, Level 7, Harry Gibbs Commonwealth Law Courts Building Level 6, 119 North Quay, Brisbane



A handwritten signature in blue ink, reading 'Warwick Soden'.

Dated: 19/10/2016 12:27:45 PM AEST

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 19  
Rule 9.32

Federal Court of Australia  
District Registry: Queensland  
Division: General

No. QUD 211 of 2013

**Further Amended Originating Application**  
**starting a representative proceeding under Part IVA**  
**of the Federal Court of Australia Act 1976**

(Filed pursuant to the orders of the Honourable Dowsett J made on ~~30 August 2016~~ 18 October 2016)

**John Charles Lee and Anor**  
Applicants

**Westpac Banking Corporation (ABN 33 007 457 141)**  
Respondent

To the Respondent

The Applicants apply for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

**Time and date for hearing:**

**Place:** Federal Court of Australia, Commonwealth Law Courts, 119 North Quay,  
Brisbane QLD 4000

Filed on behalf of Applicants

Prepared by Stewart Alan Levitt

Law firm Levitt Robinson Solicitors,

Ref 90390

Tel (02) 9286 3133 Fax (02) 9283 0005 Email slevitt@levittrobinson.com

**Address for service** Level 6, 162 Goulburn Street, Sydney (East) NSW 2010

[Form approved 01/08/2011]



The Court ordered that the time for serving this application be abridged to

Date:

Signed by an officer acting with the authority  
of the District Registrar

### Details of claim

On the grounds stated in the accompanying Further Amended Statement of Claim (the "FASOC") the Applicants claim:

1. damages for breach of contract;
- ~~2.~~ an order pursuant to section 12GF and, or in the alternative, section 12GM of the *Australian Securities and Investments Commission Act 2001* (Cth) (the "ASIC Act") that the Respondent ("Westpac") pay damages to the Applicants in respect of:
  - ~~2.2.~~ Westpac's unconscionable conduct in breach of sections 12CA, 12CB and, or in the alternative, 12CC of the ASIC Act, ~~and, or alternatively~~
    - ~~a.~~ ~~Westpac being involved in, within the meaning of section 12GF of the ASIC Act, the contravention by Storm Financial Limited ("Storm") of section 12DA of the ASIC Act.~~
  - ~~4.3.~~ an order pursuant to section 73(1)(b) of the *Trade Practices Act 1974* (the "TPA") that Westpac pay damages to the Applicants on the grounds that Westpac and Storm are jointly and severally liable to the Applicants for the amount of loss or damage suffered by the Applicants as a result of the breaches of contract and misrepresentations by Storm pleaded in the FASOC;
  - ~~5.4.~~ an order pursuant to section 12GM of the ASIC Act that a mortgage over real property owned by the Applicants at 7 Mitchell Street, Kedron, Queensland 4031 in favour Westpac be set aside;
  - ~~4A.~~ ~~damages pursuant to section 1041I(1) of the *Corporations Act 2001* (Cth) for Westpac's involvement in the contravention by Storm of section 1041H of that Act;~~



4B. damages for negligence;

~~5.~~ interest;

~~6.~~ costs; and

~~7.~~ such further or other order as the Court thinks fit.

### Questions common to claims of Group Members

Adopting the terms defined in the FASOC (see Schedule 2 to the FASOC), the questions of law or fact common to the claims of the group members are:

1. whether the Applicants' Westpac Loans and the Group Home Loans -contained the Banking Code Term and the Implied Banking Code Term;

~~2.~~

~~2.~~ whether Westpac, by its officers Messrs Kelk, Deacon and McDonald, Ms Jude and Ms Barrie, knew the matters pleaded at paragraphs 37-46 of the FASOC.

~~3.~~ whether the Services provided by Storm to the Applicants and to each Group Member pursuant to each of their Storm Advice Retainers and Step Agreements were services acquired by the Applicants and the Group Members that were of a kind ordinarily acquired for personal, domestic or household use or consumption;

~~4.~~ whether the Services acquired by the Applicants and each Group Member pursuant to each of their Storm Advice Retainers and Step Agreements were acquired by each of the Applicants and the Group Members as "consumers" within the meaning of section 12BC of the ASIC Act;

~~5.~~ whether each of the Applicants' and Group Members' Storm Advice Retainers and Step Agreements included the Storm Due Care and Skill Term;

~~6.~~ whether each of the Applicants' and Group Members' Storm Advice Retainers and Step Agreements included the Storm Implied Warranty;

~~7.~~ whether the services and advice provided by Storm pursuant to each of the Storm Advice Retainers and the Step Agreements were provided to each of the Applicants and



the Group Members as “Retail Clients” within the meaning of section 761A of the *Corporations Act*;

- 9.8. whether each of the Applicants’ and Group Members’ Storm Advice Retainers and Step Agreements included the Storm 945A Term;
- 10.9. whether the breaches of contract by Storm alleged in the FASOC were breaches of contract in relation to the Applicants’ and the Group Members’ Storm Advice Retainers or Step Agreements for the purposes of section 73 of the TPA and in addition, or alternatively, were breaches of contract in relation to the Applicants’ Westpac Loans and the Group Home Loans for the purposes of section 73 of the TPA;
- 11.10. whether the Applicants’ Risk Representations, the Applicants’ Reasonable Grounds Representations, the Applicants’ SOA Representations and the Group Member Representations made by Storm to the Applicants and to the Group Members in the course of providing investment advice involved conduct:
  - (a) in trade or commerce;
  - (b) in relation to financial services (within the meaning of section 12DA(1) of the ASIC Act); or
  - (c) in relation to a financial product or financial service within the jurisdiction of the Corporations Act within the meaning of 1041H of the Corporations Act;
- 12.11. whether the misleading and deceptive conduct by Storm alleged in the FASOC constituted misrepresentations in relation to the Applicants’ and the Group Members’ Storm Advice Retainers or Step Agreements for the purposes of section 73 of the TPA and in addition, or alternatively, were misrepresentations in relation to the Applicants’ Westpac Loans and the Group Home Loans for the purposes of section 73 of the TPA;
- 13.12. whether at all material times during the Relevant Period, Westpac was a corporation, within the meaning of the TPA, which provided, in the course of carrying on a business by Westpac, credit to consumers in relation to the acquisition of goods and services;
- 14.13. whether at all material times during the Relevant Period, Storm and Westpac had ~~an~~ a contract, arrangement or understanding relating to the business carried on by Storm of



supplying financial services and the provision to Storm's clients of credit in respect of payment for the Services;

- ~~15~~14. whether at all material times during the Relevant Period Storm, by arrangement with Westpac, regularly referred persons to Westpac for the purposes of obtaining credit;
- ~~16~~15. whether at all material times during the Relevant Period, Storm, by arrangement with Westpac, made available to its clients Westpac's contracts, application forms and/or offers for credit;
- ~~17~~16. whether from at least 22 October 2004, by arrangement or understanding between Westpac and Storm, Westpac's contracts, application forms, and/or offers for credit could be signed by Storm's clients at the premises of Storm;
- ~~18~~17. whether at all material times during the Relevant Period Westpac was a "linked credit provider" in relation to Storm within the meaning of section 73(14) of the TPA;
- ~~19~~18. whether Westpac knew or ought reasonably to have known that the Applicants' Westpac Loans and some or all of the Group Home Loans were entered into partly for the purposes of payment for Storm's fees for the Services and therefore are tied loan contracts within the meaning of s73 of the TPA;
- ~~20~~19. whether at all material times during the Relevant Period, Storm operated its business in accordance with the Storm Model.

### **Representative action**

The Applicants bring this application as a representative party under Part IVA of the *Federal Court of Australia Act 1976*.

The Group Members to whom this proceeding relates are persons who were clients of Storm who:

- (a) borrowed money from the Westpac in the period between on or after 22 October 2004 and 31 October 2008 (the "**Relevant Period**"), or who increased their borrowings from Westpac during the Relevant Period, to invest in one or more of the Special Funds;
- (b) suffered loss and damage as a result of:



- (i) Storm's breaches of contract pleaded in paragraphs 73 and 74 of the FASOC, and, or alternatively;
- (ii) Storm's misrepresentations pleaded in paragraphs 83-88 of the FASOC; and
- (c) have not settled with Westpac the claims which are the subject of these proceedings.

### **Applicants' address**

The Applicants' address for service is: Levitt Robinson Solicitors  
161 Goulburn Street,  
SYDNEY (East) NSW 2010  
Tel: (02) 9286 3133  
Fax: (02) 9283 0005  
Email: [slevitt@levittrobinson.com](mailto:slevitt@levittrobinson.com)



## Service on the Respondent

It is intended to serve this application on the Respondent:

C/- King & Wood Mallesons  
Level 61 Governor Phillip Tower  
1 Farrer Place  
SYDNEY NSW 2000

Date: 19.10.16

A handwritten signature in black ink, appearing to be "S. Levitt", written over a horizontal line.

Signed by Stewart Alan Levitt  
Solicitor for the Applicants





## Schedule

No. QUD 211 of 2013

Federal Court of Australia  
District Registry: Queensland  
Division: General

### **Applicants**

Second Applicant: Glenda Marion Lee