

REPLY TO DEFENCE OF THE SECOND DEFENDANT

COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	Equity General
Registry	Supreme Court Sydney
Case number	2016/35575

TITLE OF PROCEEDINGS

First plaintiff	Diana Leonie O'Dea
Second plaintiff	Thomas Vaarzon-Morel
First defendant	Anthony Samuel Famularo
Second defendant	Westpac Banking Corporation (ABN 33 007 457 141)

FILING DETAILS

Filed for	Diana Leonie O'Dea and Thomas Vaarzon-Morel (plaintiffs)
Filed in relation to	Plaintiffs' claim
Legal representative	Stewart A Levitt Levitt Robinson Solicitors
Legal representative reference	SAL:SC:DMK:140078
Contact name and telephone	Stephanie Carmichael 02 9286 3133
Contact email	scarmichael@levittrobinson.com

PLEADINGS AND PARTICULARS

- 1 The plaintiffs join issue with each of the allegations in the Defence filed by the Second Defendant on 27 October 2016 (*Defence*) save for the admissions made by the Second Defendant in its Defence and any admissions made by the Plaintiffs below.
- 2 For ease of reference, this Reply adopts defined terms as they appear in the Amended Statement of Claim or in the Defence.
- 3 In reply to **sub-paragraph 3(e)** of the Defence, the plaintiffs:
 - (a) say that the dispute determined by FOS in case numbers 297443 and 297444 (the *FOS Dispute*) relevantly concerned a claim that SGB did not act as a prudent and responsible lender in approving the Kangaroo Island Mortgage, because it should have realised that the second plaintiff could not afford to repay that loan;
 - (b) say that FOS, in the FOS Dispute, determined that SGB engaged in maladministration in lending as it did not act as a prudent and responsible lender when it approved the loan to the second plaintiff, because a prudent and responsible lender would have realised that the second plaintiff could not afford to repay that loan;
 - (c) otherwise admit the allegations in sub-paragraph 3(e).
- 4 In reply to **sub-paragraph 3(h)** of the Defence, the plaintiffs:
 - (a) repeat and rely on the matters pleaded above in reply to sub-paragraph 3(e) of the Defence;
 - (b) say that the matters pleaded in paragraphs 55-71 and 181-185 of the Amended Statement of Claim do not concern a claim that SGB did not act as a prudent and responsible lender in approving the Kangaroo Island Mortgage, because it should have realised that the second plaintiff could not afford to repay that loan;
 - (c) say that FOS did not consider or make any determination in relation to the matters pleaded in paragraphs 55-71 and 181-185 of the Amended Statement of Claim;
 - (d) otherwise deny sub-paragraph 3(h).
- 5 In reply to **paragraph 196** of the Defence, the plaintiffs:
 - (a) as to sub-paragraph 196(a):
 - (i) deny the sub-paragraph; and

- (ii) further say that the plaintiffs' cause of action:
 - (A) for the reasons pleaded below in paragraph 6 of this Reply, did not arise before 3 February 2010; or, in the alternative
 - (B) for the reasons pleaded below in paragraph 7 of this Reply, arose on 30 July 2010;
- (b) admit sub-paragraph 196(b);
- (c) admit sub-paragraph 196(c);
- (d) as to sub-paragraph 196(d):
 - (i) admit that the second defendant produced documents to the plaintiffs' solicitors pursuant to those preliminary discovery orders on 2 March 2015;
 - (ii) say that the second defendant also produced further documents to the plaintiffs' solicitors pursuant to the preliminary discovery orders on 9 July 2015;
 - (iii) say that the second defendant also produced further documents to the plaintiffs' solicitors pursuant to the preliminary discovery orders on 31 July 2015;
- (e) as to sub-paragraph 196(e):
 - (i) say that whether or not Erutuf Pty Limited and the prospective Group Members, including the plaintiffs, required preliminary discovery in order to decide whether to commence this proceeding was, in the application for preliminary discovery referred to in sub-paragraph 196(b)-(d) of the Defence (the *Preliminary Discovery Application*):
 - (A) the sole ultimate issue in the proceeding;
 - (B) fully litigated between the parties; and
 - (C) finally determined by the Court;
 - (ii) say that it is an abuse of the Court's process for the second defendant to seek to relitigate the issue of whether the plaintiffs required preliminary discovery in order to commence this proceeding;
 - (iii) otherwise deny sub-paragraph 196(e);
- (f) admit sub-paragraph 196(f);
- (g) admit sub-paragraph 196(g);

- (h) as to sub-paragraph 196(h):
 - (i) admit that Mr Famularo is not personally defending the allegations made against him in the Amended Statement of Claim;
 - (ii) admit that Mr Famularo is no longer available as a witness and is not available to give evidence concerning the Famularo Strategy and the Famularo Scheme;
 - (iii) admit that Mr Famularo personally is not available to provide information and documents relating to the accounts of the plaintiffs and group members of conversations and events involving Mr Famularo, the Famularo Strategy, and the Famularo Scheme, but deny that such information and documents are no longer available;
 - (iv) otherwise deny sub-paragraph 196(h);
- (i) as to sub-paragraph 196(i):
 - (i) deny sub-paragraph 196(i);
 - (ii) say that if (which is denied) the plaintiffs' claims for relief under s 1325 of the Corporations Act would otherwise be barred by s 1325(10), then the Court should make an order pursuant to s 1322(4) of that Act extending the period for the plaintiffs to bring such applications, and such an order would be an appropriate exercise of the Court's discretion and would be in the interests of justice by reason of the matters pleaded below in paragraphs 6 to 8 of this Reply;
 - (iii) say that if (which is denied) s 14 of the Limitation Act applies by analogy to the plaintiffs' equitable claims and, or alternatively, if (which is denied) the plaintiffs' claims should otherwise be barred on grounds of laches, in the particular circumstances of this case, the Court ought not to apply s 14 of the Limitation Act by analogy or to bar the plaintiffs' claims on grounds of laches because, by reason of the matters pleaded below in paragraphs 6 to 8 of this Reply, it would be unconscionable for the defendant to rely on that statutory bar to defeat the plaintiffs' claims.

Date when plaintiffs' cause of action arose

6 For the following reasons, the plaintiffs' cause of action did not arise before 3 February 2010:

- (a) the plaintiffs repeat the matters pleaded at paragraphs 79-90 of the Amended Statement of Claim;

- (b) on or about 30 May 2008, Mr Famularo made a payment of \$6,972.67 into the plaintiffs' CBA account;
- (c) on or about 1 June 2008, Mr Famularo gave to the plaintiffs a statement of their account with Sharequity, which statement indicated that:
 - (i) on 29 April 2008, an amount of \$200,000 had been paid from the plaintiffs' Sharequity account into the plaintiffs' CBA account; and
 - (ii) on 30 May 2008, the balance of the plaintiffs' Sharequity account, being an amount of \$843,840.52, had been transferred to Sharevest;
- (d) on or about 1 July 2008, Mr Famularo sent a letter to the plaintiffs on the letterhead of Sharevest which said:

Dear Thomas & Diana

Have received the sum of \$ 843,840.52 for deposit into Sharevest (Aust) Pty Ltd with conditions as set out below -

FUNDS DEPOSITED	\$843,840.52
DATE OF DEPOSIT	1 st July 2008
INTEREST RATE	13.00% per annum ((Interest rate calculations are based on market Conditions)
INTEREST PAYMENTS	Compounded or Paid Monthly
REPAYMENT OF FUNDS ON DEPOSIT	By Special arrangement

- (e) on or about 1 July 2008, Mr Famularo also:
 - (i) made a payment of \$6,972.67 into the plaintiffs' CBA account; and
 - (ii) provided the plaintiffs with a statement of account with Sharevest showing an amount of \$843,840.52 being deposited into an account with Sharevest and a payment of \$6,972.67 being made from that account "into CBA Bank";
- (f) On or about 10 July 2008, Mr Famularo made a payment of \$8,639.30 into the plaintiffs' CBA account;
- (g) on or about 1 October 2008, Mr Famularo gave to the plaintiffs a statement of their account with Sharevest, which statement indicated that the account had, since 1 July 2008, accrued interest in an amount of \$27,502;
- (h) between about July and October 2008, each of the plaintiffs had several telephone conversations with Mr Famularo, during which conversations Mr Famularo represented to the plaintiffs that:

- (i) the plaintiffs' money was safe and in an account with SGB;
 - (ii) SGB had frozen Mr Famularo's accounts because of the widely publicised legal dispute between Mr Famularo and the administrator of Lift Capital Partners Pty Limited (*Lift Capital*); and
 - (iii) if the plaintiffs "stood by" Mr Famularo then they would be "looked after";
- (i) after about October 2008, Mr Famularo ceased communicating with the plaintiffs directly;
 - (j) on or about 31 October 2008, Mr Famularo made a payment of \$5,000 into the plaintiffs' CBA account;
 - (k) on or about 12 November 2008, the administrators of Lift Capital were appointed as liquidators of Lift Capital pursuant to a creditors' voluntary winding up;
 - (l) on or about 2 December 2008, Mr Famularo made a payment of \$5,000 into the plaintiffs' CBA account;
 - (m) during the course of 2009, the plaintiffs had multiple communications with each of Mr Jock Murray, Mr Athol Halvorsen, and Mr Graeme Dodd, all of whom worked closely with Mr Famularo, during which communications Mr Murray, Mr Halvorsen and Mr Dodd represented to the plaintiffs that:
 - (i) the plaintiffs' money was safe and in an account with SGB;
 - (ii) SGB had frozen Mr Famularo's accounts because of Mr Famularo's dispute with Lift Capital;
 - (iii) Mr Famularo was working full time to regain control over his accounts and to recover his money from Lift Capital; and
 - (iv) if the plaintiffs "stood by" Mr Famularo then they would be "looked after";
 - (n) in about December 2009, the plaintiffs became aware, as was the fact, that Mr Famularo was involved in litigation in the Federal Court of Australia against the liquidators of Lift Capital, attempting to recover his money from Lift Capital;

Particulars

Federal Court of Australia proceedings NSD 1308/2009 (*Re Lift Capital Partners Pty Limited (In Liq)*).

- (o) on 3 February 2010, a hearing commenced in the Federal Court of Australia before Emmett J in relation to Mr Famularo's dispute with the liquidators of Lift Capital;

Particulars

Federal Court of Australia proceedings NSD 1308/2009 (*Re Lift Capital Partners Pty Limited (In Liq)*); NSD 57/2010 (*Tony Saad Pty Limited v Lift Capital Partners Pty Limited (In Liq) & Ors*); and NSD 58/2010 (*Bacnet Pty Limited & Ors v Lift Capital Partners Pty Limited (In Liq) & Ors*).

- (p) in the premises, until at least 3 February 2010:
- (i) by reason of the matters pleaded at sub-paragraphs 6(a) to 6(o) of this Reply and paragraphs 160 to 163 of the Amended Statement of Claim, the plaintiffs' claims in this proceeding were fraudulently concealed from them by the first defendant;

Particulars pursuant to UCPR 15.3

The plaintiffs rely on the whole of the circumstances pleaded at paragraph 6 of this Reply and paragraphs 160-163 of the Amended Statement of Claim, and say that the representations made by Mr Famularo that the plaintiffs' money was safe and in an account with SGB were false and were known by Mr Famularo to be false.

- (ii) the plaintiffs had not discovered the fact of their loss the subject of this proceeding; and
- (iii) the plaintiffs could not, with reasonable diligence, have discovered the fact of their loss the subject of this proceeding.

7 In the alternative to paragraph 6, the plaintiffs' cause of action arose on 30 July 2010 because of the matters pleaded above in sub-paragraphs 6(a)-6(o) of this Reply and the following further matters:

- (a) on 8 February 2010, Emmett J handed down judgment in *Re Lift Capital Partners Pty Limited (In Liq) (No 2)* [2010] FCA 84, finding against Mr Famularo's companies;
- (b) on or about 24 February 2010, Mr Famularo caused his companies to file appeals to the Full Court of the Federal Court of Australia from Emmett J's judgment;

Particulars

Federal Court of Australia proceedings NSD 173/2010 (*Bacnet Pty Ltd & Ors v Lift Capital Partners Pty Ltd (In Liq) & Ors*); NSD 174/2010 (*Tony Saad Pty Limited v Lift Capital Partners Pty Limited (In Liq) & Ors*); and NSD 175/2010 (*Bacnet Pty Ltd & Ors v Lift Capital Partners Pty Ltd (In Liq) & Ors*).

- (c) on 4 May 2010, Keane CJ, Finkelstein and Jacobson JJ handed down judgment in *Bacnet Pty Ltd & Ors v Lift Capital Partners Pty Ltd (In Liq) & Ors* [2010] FCAFC 36, dismissing the appeals filed by Mr Famularo's companies;
- (d) on or about 3 June 2010, Mr Famularo caused applications to be filed for Special Leave to appeal to the High Court of Australia from the judgment of Keane CJ, Finkelstein and Jacobson JJ;

Particulars

High Court of Australia proceedings S131/2010 (Tony Saad Pty Limited v Lift Capital Partners Pty Limited (In Liq) & Ors); S132/2010 (Bacnet Pty Limited & Ors v Lift Capital Partners Pty Limited (In Liq) & Ors); and S133/2010 (Bacnet Pty Limited & Ors v Lift Capital Partners Pty Limited (In Liq) & Ors).

- (e) on 30 July 2010, Gummow and Heydon JJ dismissed the applications by Mr Famularo's companies for Special Leave to appeal to the High Court of Australia;

Particulars

Tony Saad Pty Limited; Bacnet Pty Limited & Ors v Lift Capital Partners Pty Limited & Ors (In Liq) [2010] HCATrans 199.

- (f) had Mr Famularo succeeded in his dispute with the liquidators of Lift Capital, then:
 - (i) Mr Famularo would have been in a position to repay to the plaintiffs the monies which they had invested with him, inclusive of interest; and
 - (ii) Mr Famularo would have at the plaintiffs' request, repaid to the plaintiffs the monies which they had invested with him, inclusive of interest;
- (g) in the premises:
 - (i) the plaintiffs' loss was prospective until such time as Mr Famularo's legal dispute with the liquidators of Lift Capital was finally determined; and
 - (ii) Mr Famularo's legal dispute with the liquidators of Lift Capital was finally determined on 30 July 2010.

8 In addition to the matters pleaded at paragraphs 6 and 7 of this Reply, the plaintiffs did not commence this proceeding earlier than 3 February 2016 for the following reasons:

Need for preliminary discovery

- (a) the plaintiffs required certain documents that were in the sole possession of the second defendant in order to determine whether to commence this proceeding against the second defendant;
- (b) by letter dated 18 June 2014, the solicitors for the plaintiffs, acting on behalf of the plaintiffs and of various other Group Members, requested certain documents from the second defendant;
- (c) by letter dated 15 July 2014, the second defendant, through its solicitors, declined to provide the documents requested by the plaintiffs' solicitors;
- (d) the Preliminary Discovery Application was commenced on 31 July 2014;
- (e) the second defendant opposed the Preliminary Discovery Application;
- (f) on 17 December 2014, the Preliminary Discovery Application was granted by this Court;
- (g) the plaintiffs also repeat and rely on the matters pleaded in sub-paragraphs 5(d) -5(e) of this Reply;

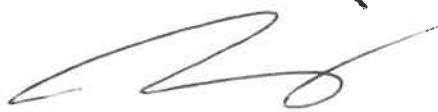
Impecuniosity of plaintiffs and Group Members

- (h) the actions of Mr Famularo and of SGB the subject of the claims of the plaintiffs and the Group Members in this proceeding caused the plaintiffs and the Group Members to become impecunious;
- (i) the plaintiffs and the Group Members were not able to obtain third party litigation funding for their claims the subject of this proceeding;
- (j) in order to commence this proceeding, the plaintiffs and the Group Members were required to organise a group of Group Members who together were ready, willing and able to fund the plaintiffs' legal fees;
- (k) the plaintiffs and the Group Members were not able to organise a group of Group Members who together were ready, willing and able to fund the plaintiffs' legal fees until sufficient time had passed since the plaintiffs and the Group Members had suffered the losses the subject of their claims in this proceeding for the plaintiffs and some of the Group Members to have repaired their financial positions such that they had monies available to contribute to the funding of this proceeding.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the Legal Profession Uniform Law Application Act 2014 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in this reply has reasonable prospects of success.

Signature



Capacity

Solicitor on the record

STEWART ALAN LEVITT

Date of signature

9/12/16.

AFFIDAVIT VERIFYING

Name DIANA LEONIE O'DEA

Address 30 Headland Parade, Barrack Point NSW 2528

Occupation Retired

Date 9 December 2016

I affirm:

- 1 I am the first plaintiff.
- 2 I believe that the allegations of fact contained in the reply are true.
- 3 I believe that the allegations of fact that are denied in the reply are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the reply are true.

AFFIRMED at Sydney

Signature of deponent *Diana L O'Dea*

Name of witness Daniel Meyerowitz - Katz

Address of witness Levitt Robinson, solicitors, Ground Floor, 162 Goulburn Street, Sydney East NSW 2010

Capacity of witness Solicitor

And as a witness, I certify the following matters concerning the person who made this affidavit (the deponent):

- 1 I saw the face of the deponent.
- 2 I have known the deponent for at least 12 months.

Identification document relied on (may be original or certified copy) †

Signature of witness

D.A. - S

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

AFFIDAVIT VERIFYING

Name THOMAS VAARZON-MOREL
 Address 1 Boronia Road, Bullaburra NSW 2784
 Occupation Owner-operator truck driver
 Date 9 December 2016

I affirm:

- 1 I am the second plaintiff.
- 2 I believe that the allegations of fact contained in the reply are true.
- 3 I believe that the allegations of fact that are denied in the reply are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the reply are true.

AFFIRMED at

Signature of deponent

Name of witness

Address of witness

Capacity of witness

Sydney

Thomas A Vaarzon-Morel

Daniel Meyerowitz-Katz

Levitt Robinson, solicitors, Ground Floor, 162
 Goulburn Street, Sydney East NSW 2010

Solicitor

And as a witness, I certify the following matters concerning the person who made this affidavit (the deponent):

- 1 I saw the face of the deponent.
- 2 I have known the deponent for at least 12 months.

Identification document relied on (may be original or certified copy) †

Signature of witness

[Handwritten signature]

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.