

## FEDERAL COURT OF AUSTRALIA

### SHERWOOD & MCARDLE STORM CLASS ACTION

#### 1. Why is this notice important?

A class action has been commenced in the Federal Court of Australia by Leslie and Julianne Sherwood and Sean and Paula McArdle against Commonwealth Bank of Australia ("CBA") and Colonial First State Investments Limited ("CFS").

Mr and Mrs Sherwood and Mr and Mrs McArdle are former clients of Storm Financial Limited ("**Storm**"). They borrowed money from CBA in accordance with margin loan agreements entered into with CBA. They then invested the money borrowed from CBA in funds or other securities approved by CBA. Certain of the approved funds in which Mr and Mrs Sherwood and Mr and Mrs McArdle were able to invest were funds managed by CFS, a wholly-owned subsidiary of CBA. The proceedings seek damages from CBA and CFS for losses suffered by Mr and Mrs Sherwood and Mr and Mrs McArdle. The proceedings are explained in more detail below. Importantly, the proceedings are brought by Mr and Mrs Sherwood and Mr and Mrs McArdle on their own behalf and also on behalf of members of a particular class of persons.

The Federal Court has ordered that this notice be published for the information of persons who might be members of the class on whose behalf the action is brought and may be affected by the action. You have been identified as a potential class member. **You should read this notice carefully. Any questions you have concerning the matters contained in this notice should not be directed to the court.** If there is anything in it that you do not understand, you should seek legal advice.

#### 2. What is a class action?

A class action is an action that is brought by one or more than one person (the "**Applicant**" or the "**Applicants**") on his or her own behalf and on behalf of a group of people ("**class members**") against another person or persons (the "**Respondent**" or the "**Respondents**"), where the Applicant and the class members have similar claims against the Respondent.

Class members in a class action **are not** individually responsible for the legal costs associated with bringing the class action. In a class action, only the Applicant is responsible for the costs.

Class members are bound by any judgment or settlement entered into in the class action unless they have opted out of the proceeding. This means that:

- a) if the class action is successful, class members may be eligible for a share of any settlement monies or Court-awarded damages,
- b) if the class action is unsuccessful, class members are bound by that result, and
- c) regardless of the outcome of the class action, class members will not be able to pursue their claims against the Respondent in separate legal proceedings unless they have opted out.

3. **What is Opt Out?**

The Applicant in a class action does not need to seek the consent of class members to commence a class action on their behalf or to identify a specific class member. However, class members can cease to be class members by opting out of the class action. An explanation of how class members are able to opt out is found below in the section headed "How can you opt out of the proceeding?"

4. **What is this class action?**

This class action, the Sherwood and McArdle Storm Class Action is brought by Leslie and Julieanne Sherwood and Sean and Paula McArdle ("the **Applicants**") on their own behalf and on behalf of all persons who are "**class members**" as defined in the proceeding. In general terms the Applicants make four kinds of claim in the proceedings.

First, the Applicants allege in the further amended statement of claim in Federal Court proceeding *Sherwood & Ors v Commonwealth Bank of Australia & Anor* NSD 811 of 2010, that from 18 May 2007, CBA and Storm operated together an unregistered managed investment scheme in breach of the *Corporations Act* 2001. The Applicants also allege in the alternative that Storm alone operated the unregistered managed investment scheme but that CBA was involved in the operation of that scheme. The Applicants claim also that CFS, a wholly-owned subsidiary of CBA, was aware that CBA and Storm were operating the unregistered managed investment scheme and, therefore, that CFS was involved in the scheme and also breached the *Corporations Act* 2001. This claim is the "**unregistered managed investment scheme**" claim (see paragraphs 6 ó 32 of the further amended statement of claim).

Second, the Applicants claim that CBA breached various terms of the margin loan agreements the Applicants entered into with CBA and in accordance with which CBA lent money to the Applicants. This relates to conduct which occurred during the period September 2008 to December 2008. This claim is the "**breach of contract**" claim (see paragraphs 84 ó 98 of the further amended statement of claim). The breach of contract claim is made against CBA only and not against CFS.

Third, the Applicants make further claims, namely that CBA breached terms implied in the margin loan agreements by the Banking Code and implied terms requiring it to exercise reasonable care and skill (see paragraphs 141 ó 150 of the further amended statement of claim) engaged in misleading and deceptive and unconscionable conduct which resulted in breaches of the *Trade Practices Act 1974*(Cth) and/or the *Australian Securities and Investments Commission Act 2001* (Cth) (see paragraphs 115 ó 124 and 170 ó 178 of the further amended statement of claim).

Fourth, the Applicants claim that if the Australian Securities and Investments Commission (ASIC) is successful in the action which it has brought against CBA and certain other parties (which is referred to in the next section below), the Applicants and the class members will be entitled to claim compensation or other relief from CBA. This claim is the ASIC Proceeding claim (see paragraph 32A of the further amended statement of claim). However the Applicants do not plead as a cause of action the same unregistered managed investment scheme which is alleged in the ASIC proceeding.

The respondents to the class action are CBA and CFS. The respondents deny the above claims and are defending the class action.

In a class action, it is only those issues that are alleged to be common as between the Applicants and the class members that are determined on behalf of the class members. If those issues do not resolve the claims of the class members, then it may be necessary for further individual trials to take place.

This class action is currently listed for hearing at some stage during the period from 10 September 2012 to 21 December 2012. The issues to be determined during that trial have not yet been specified by the Court.

5. **This class action is separate from proceedings commenced by ASIC**

You may be aware that ASIC has brought proceedings in the Federal Court against Storm, CBA, Bank of Queensland Limited (öBOQö) and Macquarie Bank Limited (öMBLö) in which it alleges that Storm operated an unregistered managed investment scheme from 1 July 2000, in breach of the *Corporations Act* and that each of CBA, BOQ and MBL were knowingly concerned in that breach (öASIC Proceedingsö). The claim commenced by ASIC does not make any allegations against CFS.

**The ASIC Proceedings are different from the class action.**

The claims in this class action and the ASIC Proceedings are not exactly the same. Both proceedings allege that Storm operated an unregistered managed investment scheme in breach of the *Corporations Act*. In the class action it is also alleged that CBA and Storm operated the unregistered managed investment scheme together.

The primary current purpose of the ASIC Proceedings is for ASIC to exercise its role as a regulator in seeking a finding that Storm and CBA breached the *Corporations Act*. Unlike the class action, which seeks compensation for individual claimants, the ASIC Proceeding does not seek compensation on behalf of any individual claimants (although ASIC has said it intends to make later claims for individual compensation if findings are finally made as sought by it in the ASIC proceedings).

Since the class action is different from the ASIC Proceedings, the outcome of the class action may not be the same as the outcome of the ASIC Proceedings. In particular, in this class action as mentioned above the Applicants claim that if ASIC is successful in the ASIC Proceedings, then the Applicants and the class members will be entitled to compensation or other relief from CBA. CBA does not accept that class members will be entitled to that relief. CBA contends that if ASIC is successful in the ASIC Proceedings but the Applicants fail in this class action, the Applicants and class members will be precluded from claiming relief on the basis of the findings in the ASIC Proceeding. The Applicants disagree.

**Class members are encouraged to seek legal advice concerning the connection between the class action and the ASIC Proceedings and whether the ASIC Proceedings affect the class member's decision as to whether to opt out of the class action.**

6. **Are you a class member?**

You are a class member if:

- a) you were a client of Storm;
- b) you:
  - i. borrowed money from CBA on or after 18 May 2007 pursuant to a margin loan agreement entered into with the division of the CBA known as "Colonial Margin Lending" or "Colonial Geared Investment" ("**CGI Margin Loan**");
  - ii. entered into a CGI Margin Loan before 18 May 2007 and at any time after 18 May 2007 increased the total amount of money which you borrowed from CBA pursuant to your CGI Margin Loan.
- c) invested the money borrowed from CBA in any one or more of the funds or other securities nominated or otherwise authorized or approved by CBA including investing in any one or more of the "Special Funds" set out below;
- d) had your investments caused to be redeemed or sold by CBA between about October 2008 and December 2008; and
- e) have not duly agreed with CBA to settle the claims the subject of the class action.

The Special Funds referred to in paragraph (c) above are:

Challenger Australian Broadmarket Indexed Trust;

Challenger Australian Industrials Indexed Trust;

Challenger Australian Resources Indexed Trust;

Challenger Australian Technology Indexed Trust;

Storm Financial Australian Sharemarket Index Fund;

Storm Financial Australian Industrials Index Fund;

Storm Financial Australian Resources Index Fund;

Storm Financial Australian Technology Index Fund;

MLC-Vanguard Australian Shares Index Fund; and  
 Barclays Australian Equity Index Fund.

To be a class member you do not need to have invested the money borrowed from CBA in each of the Special Funds. Provided you have invested the money borrowed in one or more of the Special Funds after 18 May 2007, you will be a class member (provided the other definitions apply to you).

Paragraph (d) above is "you have not duly agreed with CBA to settle the claims the subject of the class action". You will **not** satisfy this condition if you have already entered into a legally enforceable agreement with CBA to settle any claim you may have against CBA. This includes a legally enforceable agreement entered into with CBA through CBA's "Storm Resolution Scheme" or otherwise. Further, if in the future you subsequently enter into a legally enforceable agreement with CBA to settle any claim you may have against CBA, you will **cease** to be a class member. Accordingly, if in the future you enter into a legally enforceable agreement with CBA in accordance with CBA's "Storm Resolution Scheme" or otherwise, you will cease to be a class member.

If you are unsure whether or not you are a class member, you should contact Stephanie Carmichael or Louise Cassar at Levitt Robinson Solicitors & Attorneys by telephone on (02) 9286 3133 or by email on [scarmichael@levittrobinson.com](mailto:scarmichael@levittrobinson.com) or [lcassar@levittrobinson.com](mailto:lcassar@levittrobinson.com) or seek your own legal advice without delay.

## 7. **Will you be liable for legal costs?**

- 7.1 You will **not become liable for any legal costs** simply by remaining as a class member for the determination of the common questions. However:
- (a) if the preparation or finalisation of your personal claim requires work to be done in relation to issues that are specific to your claim, you can engage Levitt Robinson Solicitors & Attorneys, or other lawyers to do that work for you. A copy of the terms on which Levitt Robinson Solicitors & Attorneys are acting in the class action may be obtained from them on the numbers shown below;
  - (b) if any compensation becomes payable to you as a result of any order, judgment or settlement in the class action, the Court may make an order that some of that compensation be used to help pay a share of the costs which are incurred by the Applicants in running the class action but which are not able to be recovered from the respondents; and

- (c) class actions are often settled out of court. If this occurs in the class action, you may be able to claim from the settlement amount without retaining a lawyer.

8. **What will happen if you choose to remain a class member?**

Unless you opt out, you will be bound by the outcome of the class action. If the class action is successful, you will be entitled to share in the benefit of any order, judgment or settlement in favour of the Applicants and the group members. (In some cases you may have to satisfy certain conditions before your entitlement arises.) If the action is unsuccessful or is not as successful as you might have wished, you will not be able to sue on the same claim in any other proceedings.

9. **How can you remain a class member?**

**If you wish to remain** a class member there is **nothing you need to do** at the present time. The Applicants will continue to bring the proceeding on your behalf up to the point where the Court determines those questions that are common to the claims of the Applicants and the class members. However, you are invited to contact the Applicants' solicitors, Levitt Robinson Solicitors & Attorneys, on the number below and register as a group member so that future notices about the class action can be sent to your preferred address.

10. **How can you opt out of the class action?**

**If you do not wish to remain** a group member you must opt out of the class action. If you opt out you will not be bound by or entitled to share in the benefit of any order, judgment or settlement in the class action, but you will be at liberty to bring your own claim against the respondent/s, provided that you issue Court proceedings within the time limit applicable to your claim. If you wish to bring your own claim against the respondent/s, you should seek your own legal advice about your claim and the applicable time limit **prior** to opting out.

**If you wish to opt out** of the class action you **must** do so by completing a "Notice of opting out by class member" in the form shown below (Form 21 of the Court's approved forms), then returning it to the Registrar of the Federal Court of Australia at the address on the form. **IMPORTANT: the Notice must reach the Registrar by no later than [time and date],** otherwise it will not be effective.

You should submit the Notice of opting out by class member if:

- (a) you qualify as a class member and you wish to opt out of the class action; or

- (b) you believe that you have been incorrectly identified as a class member, because you do not meet the criteria set out in the section headed "Are you a class member" above.

Each class member should fill out a separate form. If you are opting out on behalf of a company or business please provide your name, the name of the company or business and your position within the company or business (e.g. director or partner).

11. **Where can you obtain copies of relevant documents?**

Copies of relevant documents, including the application, the statement of claim, and the defences, may be obtained by:

- a) downloading them from Levitt Robinson's website [www.levittrobinson.com](http://www.levittrobinson.com);
- b) inspecting them between 9.00am and 5.00pm at the offices of Levitt Robinson Solicitors & Attorneys Level 6, 162 Goulburn Street, Sydney (East), NSW,
- c) inspecting them on the Federal Court website: [www.fedcourt.gov.au](http://www.fedcourt.gov.au). or by visiting a District Registry of the Federal Court in Sydney, Canberra, Melbourne, Brisbane, Adelaide, Perth, Hobart or Darwin. The addresses for these registries are available at [www.fedcourt.gov.au](http://www.fedcourt.gov.au) or by calling the Queensland Registry on (07) 3248 1100.

Please consider the above matters carefully. If there is anything of which you are unsure, you should contact Stephanie Carmichael or Louise Cassar at Levitt Robinson Solicitors & Attorneys by telephone on (02) 9286 3133 or by email on [scarmichael@levittrobinson.com](mailto:scarmichael@levittrobinson.com) or [lcassar@levittrobinson.com](mailto:lcassar@levittrobinson.com) or seek your own legal advice. You should not delay in making your decision

Dated: December 2011

Form 21

Rule 9.34

**Opt out notice  
Form A**

No. NSD 811 of 2011

Federal Court of Australia

District Registry: Queensland

Division: Commercial

**Leslie James Sherwood & Ors**

Applicants

**Commonwealth Bank of Australia & Anor**

Respondents

[Name of group member], a group member in this representative proceeding, give notice under section 33J of the *Federal Court of Australia Act 1976*, that [Name of group member] is opting out of the representative proceeding.

Date: .....

Signed by

group member / Lawyer for the group member]

Filed on behalf of (name & role of party) .....

Prepared by (name of person/lawyer) .....

Law firm (if applicable) .....

Tel ..... Fax .....

Email .....

**Address for service** .....

(include state and postcode) .....

