

**Further amended originating application starting a representative proceeding under Part IVA of the Federal Court of Australia Act 1976**  
(Filed pursuant to the order of Reeves J made on 16 December 2011)

No. NSD 811 of 2010

Federal Court of Australia  
District Registry: Queensland  
Division: General

**Leslie James Sherwood** and others named in the schedule

Applicants

**Commonwealth Bank of Australia ABN 48 123 123 124** and another named in the schedule

Respondents

To the Respondents

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 Building, 119 North Quay, Brisbane, QLD, 4000

The Court ordered that the time for serving this application be abridged to: Not applicable.

Date: 16 December 2011

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

Filed on behalf of (name & role of party)	Applicants
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**Details of claim**

On the grounds stated in the accompanying Further Amended Statement of Claim the Applicants claim:

## 1. The Applicants claim:

- (a) a declaration that the Scheme (as defined in paragraph 11 of the Further Amended Statement of Claim) constituted a managed investment scheme within the meaning of section 9 of the Corporations Act 2001 (Cth) ("**Corporations Act**") that was required be registered under section 601EB of the Corporations Act but was not so registered;
- (b) a declaration that the First Respondent ("**CBA**") has contravened section 601ED(5) of the Corporations Act (as alleged in paragraph 28 of the Further Amended Statement of Claim);
- (c) a declaration that for the purposes of section 1325 of the Corporations Act, the Second Respondent ("**CFS**") was a person involved in CBA's contravention of section 601ED(5) of the Corporations Act;
- (d) in the alternative to paragraphs (b) and (c) a declaration that for the purposes of section 1325(1) of the Corporations Act, CBA was a person involved in the contravention by Storm Financial Limited ("**Storm**") of section 601ED of the Corporations Act (as alleged in paragraph 30E of the Further Amended Statement of Claim);
- (e) in the further alternative to paragraphs (b) and (c) a declaration that for the purposes of section 1325(1) of the Corporations Act, CFS was a person involved in the contravention by Storm of section 601ED of the Corporations Act (as alleged in paragraph 30E of the Further Amended Statement of Claim);
- (f) a declaration that CBA breached the Sherwood Margin Loan Agreement (as defined in paragraph 33 of the Further Amended Statement of Claim), the McArdle Margin Loan Agreement (as defined in paragraph 43 of the Further Amended Statement of Claim) and the Group Margin Loan Agreements (as defined in paragraph 7 of the Statement of Claim) by not giving any notice of "margin call" that the current loan-to-security ratios of the Applicants' and the Group Members' CGI Margin Loans (as that term is defined in paragraph 3(e) of the Further Amended Statement of Claim) were equal to or exceeded the agreed margin call loan-to-security ratios;

- (g) alternatively, a declaration that CBA breached the Sherwood Margin Loan Agreement, the McArdle Margin Loan Agreement and the Group Margin Loan Agreements by:
- (i) not giving the Applicants or the Group Members notice that the current loan-to-security ratios for the Applicants' and the Group Members' CGI Margin Loans were equal to or exceed the agreed margin call loan-to-security ratios; and
  - (ii) thereby not affording the Applicants or the Group Members the period set out in the Applicants' and the Group Members' Margin Loan Agreements within which they could act so as to ensure that the current loan-to-security ratio did not exceed the agreed base loan-to-security ratio;
- (h) alternatively, a declaration that CBA breached the Sherwood Good Faith Term (as defined in paragraph 40 of the Further Amended Statement of Claim), the McArdle Good Faith Term (as defined in paragraph 50 of the Further Amended Statement of Claim) and the Group Members' Good Faith Term (as defined in paragraph 85(b) of the Statement of Claim) by reason of the matters set out in paragraphs 77 to 82 and 93 to 95 of the Further Amended Statement of Claim;
- (i) an order pursuant to section 1325(1) of the Corporations Act that CBA and CFS compensate the Applicants and the Group Members for the loss and damage suffered by reason of CBA's contravention, and CFS's involvement in CBA's contravention, of section 601ED of the Corporations Act (as alleged in paragraph 28 of the Further Amended Statement of Claim) or alternatively, by reason of the involvement of CBA and CFS in Storm's contravention of section 601ED of the Corporations Act (as alleged in paragraph 30E of the Further Amended Statement of Claim);
- (i1) in the alternative to paragraph (i) above, on the grounds pleaded in paragraphs 2, 6 and 32A of the Further Amended Statement of Claim and the grounds pleaded against CBA in paragraphs 1 to 53 of the further amended statement of claim in proceedings no. QUD 577 of 2010 (ASIC v Storm Financial Limited (receivers and managers appointed) (in liquidation) and Ors) (the "ASIC FASOC") orders:
- (i) pursuant to section 1325(2) and section 1325(5)(e) of the Corporations Act that CBA compensate the Applicants and the Group Members for the loss and damage suffered by reason of CBA's involvement in Storm's contravention of section 601ED of the Corporations Act as alleged in the ASIC FASOC (the "ASIC CBA Conduct");

(ii) pursuant to section 1325(2) and section 1325(5)(d) that CBA pay to the Applicants and the Group Members the equity contributed by the Applicants and each Group Member (as referred to in paragraph 13(e) of the Further Amended Statement of Claim) by reason of the ASIC CBA Conduct;

- (j) damages for breach of contract;
- (k) 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 CBA pay damages to the Applicants in respect of CBA’s unconscionable conduct in breach of sections 12CA, 12CB and, or in the alternative, 12CC of the ASIC Act;
- (l) an order pursuant to section 82 and, or in the alternative, section 87 of the *Trade Practices Act 1974* (Cth) (the “TPA”) that CBA pay damages to the Applicants in respect of CBA unconscionable conduct in breach of sections 51AA, 51AB and, or in the alternative, 51AC of the TPA;
- (m) an order pursuant to:
  - (i) section 12GF and, or in the alternative, section 12GM of the ASIC Act;
  - (ii) section 82 and, or in the alternative, section 87 of the TPA;
  - (iii) section 1041I of the Corporations Act;
  - (iv) section 99 and, or in the alternative, section 100 of the *Fair Trading Act 1989* (Qld) (the “FTA Qld”); and, or in the alternative
  - (v) section 68 and, or in the alternative, section 72 of the Fair Trading Act 1987 (NSW) (the “FTA NSW”),

that CBA pay damages to the Applicants in respect of CBA misleading and deceptive conduct in breach of:

- (i) section 12DA of the ASIC Act;
- (ii) section 52 of the TPA;
- (iii) section 1041H of the Corporations Act;
- (iv) section 38 of FTA QLD; and, or in the alternative
- (v) section 42 of the FTA NSW;
- (n) interest;
- (o) costs;

- (p) such further or other order as the Court thinks fit.

**Questions common to claims of group members**

2. The questions of law or fact common to the claims of the Group Members are:

***Operation of an unregistered managed investment scheme***

- (a) whether CBA and Storm agreed upon the Special Terms alleged in paragraph 8 of the Further Amended Statement of Claim;
- (b) whether CBA and Storm carried on the Scheme alleged in paragraph 11 of the Further Amended Statement of Claim;
- (c) whether the Scheme (as defined in paragraph 11 of the Further Amended Statement of Claim) constituted a managed investment scheme within the meaning of section 9 of the Corporations Act;
- (d) whether the Scheme was required to be registered under section 601EB of the Corporations Act but was not so registered;
- (e) whether CBA was a person who, within Australia, operated a managed investment scheme which was required to be registered under section 601EB of the Corporations Act but was not so registered in contravention of section 601ED of the Corporations Act (as alleged in paragraphs 27 and 28 of the Further Amended Statement of Claim);
- (f) whether CFS was involved in CBA's contravention of section 601ED of the Corporations Act;
- (g) in the alternative to (e) and (f), whether Storm was a person who, within Australia, operated a managed investment scheme which was required to be registered under section 601EB of the Corporations Act but was not so registered in contravention of section 601ED of the Corporations Act (as alleged in paragraphs 30D and 30E of the Further Amended Statement of Claim);
- (h) in the further alternative to (e) and (f), whether CBA and CFS were involved in the contravention by Storm of section 601ED of the Corporations Act;
- (h1) whether the Applicants and Group Members are entitled to claim compensation or other relief from CBA pursuant to section 1325(2) of the Corporations Act by reason of the ASIC CBA Conduct as alleged in the ASIC FASOC;

***Breach of CGI Margin Loan Agreements entered into by Group Members***

- (i) whether on or from 16 October 2008 Storm instructed Fund Managers, as approved by CBA, to redeem certain investments of their clients on the basis that the resulting cash proceeds from the redemptions:
  - (i) would be deposited and retained in each client's CBA Accelerator Cash Account rather than being used to pay down each client's CGI Margin Loan; and, consequently
  - (ii) would be available to be reinvested in the Investment Funds when there were or were likely to be, improvements in the global financial markets **(the Strategy)**;
- (j) whether on or about 16 October 2008 CBA advised Storm that it agreed with and would implement the Strategy;
- (k) whether by 31 October 2008 CBA knew or ought reasonably to have known that Storm was unable or unwilling to take any or adequate steps:
  - (i) to prevent the current loan-to-security ratios for the Group Members' CGI Margin Loans from becoming equal to or exceeding the margin call loan-to-security ratios, as agreed between the Group Members and CBA; and
  - (ii) If the current loan-to-security ratios were equal to or exceeded the margin call loan-to-security ratios, to act so as to ensure that the current loan-to-security ratios did not exceed the base loan-to-security ratios;
- (l) whether on or about 25 November 2008 CBA gave notice to Storm that it had ceased to agree with and was no longer intending to implement the Strategy and was intending to use the proceeds of the redemption of Storm clients' investments in the Investment Funds to pay down each clients CGI margin loans;
- (m) whether CBA failed to give notice to any Group Member that the current loan-to-security ratio for each Group Member's CGI Margin Loan was equal to or exceeded the margin call loan-to-security ratio, as agreed between each Group Member and CBA;
- (n) whether the Group Margin Loan Agreement entered into by each Group Member included a term to the effect that CBA had a duty to act in good faith and reasonably in performing its obligations and exercising its rights pursuant to the express terms and conditions of the Group Margin Loan Agreement;

***Misleading and deceptive conduct***

- (o) whether CBA failed to give notice to any Group Member that the current loan-to-security ratios for each Group Member's CGI Margin Loan was equal to or exceeded the margin call loan-to-security ratio, as agreed between each Group Member and CBA;
- (p) whether between at or about late September 2008 to at or about early December 2008 CBA did not have a system in place to enable CBA to sell or redeem any or all of the securities in the Investment Funds held by the Group Members within a reasonable time of the current loan-to-security ratio equalling or exceeding the margin call loan-to-security ratio;
- (q) whether between at or about late September 2008 to at or about early December 2008 CBA did not provide, directly or indirectly, the Group Members with a means of monitoring their investments so as to enable the Group Members to determine when the current loan-to-security ratio equalled or exceeded the margin call loan-to-security ratio for the CGI Margin loans and, thereby, enable the Group Members to act so as to reduce the current loan-to-security ratio within the time periods provided in the Group Members' CGI Margin loan agreements;
- (r) whether for the purposes of section 12DA of the *ASIC Act* CBA was engaged in conduct in relation to the supply or possible supply of a "financial service" to a person as that expression is defined in section 12BAB of the *ASIC Act*;
- (s) whether for the purposes of section 1041H of the *Corporations Act* CBA was engaged in conduct in relation to a financial product or a financial service;

***Breach of Banking Code Terms and Care and Skill Terms***

- (t) whether the Group Margin Loan Agreement entered into by each Group Member included a term to the effect that before CBA lent money to a Group Member pursuant to the Group Margin Agreement, CBA would exercise the care and skill of a diligent and prudent banker in:
  - (i) electing and applying CBA's credit assessment method; and
  - (ii) forming CBA's opinion about the Group Member's ability to repay the money lent;
- (u) whether the Group Margin Loan Agreement entered into by each Group Member included an implied term that CBA would exercise due care and skill in lending money pursuant to the Group Margin Loan Agreement.

***Unconscionable conduct***

- (v) whether at all material times after March 2007, CBA knew that:
- (i) the Group Members were exposed to significantly increased risk of loss of their investments in the foreseeable event of a margin call being made pursuant to the Group Margin Loan Agreements as a result of the Special Terms agreed between CBA and Storm;
  - (ii) Storm provided standardised statements of advice, and statements of additional advice to its clients;
  - (iii) all statements of advice, and statements of additional advice, issued by Storm to the Group Members were generated centrally at Storm's head office;
  - (iv) the joint chief executives of Storm, Emmanuel Cassimatis and Julie Cassimatis, controlled or in the alternative had a controlling influence over the form and content of advice generated centrally at Storm's head office;
  - (v) Storm financial planners/advisers acted as a conduit for Storm advice and collected financial data from the Group Members for Storm, rather than provide individually-tailored financial planning advice;
  - (vi) by reason of the matters pleaded in (ii) to (v) above, the advice given by Storm to Group Members was unlikely to be suited to their specific circumstances and financial goals and was likely to have been provided to some or all of the Group Members in contravention of Storm's obligations pursuant to Part 7 of the Corporations Act including section 945A of the Corporations Act;
  - (vii) Storm advised clients to maintain funds, including borrowed funds, in an interest-bearing account for the purpose of meeting interest payments, paying fees associated with loans, living expenses and possible margin calls;
  - (viii) Storm received commissions which were dependent upon the value of the investments of the Group Members in the Special Funds, and as a result Storm had an incentive to encourage clients, including the Group Members, to maximise the amount and frequency of their investments in the Special Funds and not to redeem investments without reinvesting;
  - (ix) that in the circumstances referred to in the previous subparagraph (viii) above, there was a risk that Storm would not give independent or adequate advice to the Group Members including on whether to enter into

Double Geared Investments (as defined in subparagraph (x) below) or whether to invest in the Special Funds or whether to redeem investments;

- (x) Storm advised its clients to borrow funds for the purpose of double geared investments, being investments in the Special Funds that:
  - A. were, in whole or a substantial part, purchased using funds advanced under a loan secured against the investor's home, proceeds of the sale of their home and, or alternatively, from the investor's other liquid assets;
  - B. the funds referred to in (A) above, or the securities purchased with those funds, were used as an equity contribution for the CGI Margin Loan; and
  - C. CBA took security over the whole investment, including that portion of the investment purchased using the investor's equity contribution,

("Double Geared Investments");

- (xi) Storm advised its clients to increase their margin loan borrowings in response to increases in the value of the securities over which the margin loans were secured (based on the additional equity available as a result of the rise in the market) and in response to decreases in the value of the securities over which the margin loan was secured (based on advice to the effect that the fall in the price of the securities presented a buying opportunity) ("Storm's Step Investment Strategy");
- (xii) Storm advised its clients that the maximum permissible ratio of total liabilities to total assets for self-funded retirees was 50%, and the maximum permissible ratio of total liabilities to total assets for income earners or self-employed people was 60% ("Storm's Recommended Maximum LVRs");
- (xiii) that for the purposes of ascertaining the loan-to-security ratio of the Group Members from time-to-time, and despite the allegation pleaded in subparagraph (xii) above concerning Storm's Recommended Maximum LVRs, Storm calculated the value of the Group Members' CGI Margin Loans (as the numerator) against the value of the Group Members' investment in the Special Funds, plus the Group Members' acceptable cash securities (as the denominator) (and did the same in relation to all of the Group Members), but did not take into account whether the Group

Members had followed the Double Gearing Strategy including by raising the equity contribution by borrowing against their homes, or by selling them;

- (xiv) by reason of the matters alleged in paragraphs (xi) to (xiii) above, Storm's business model resulted, or was likely to result, in the Group Members being highly leveraged;
  - (xv) the Group Members had received, or were likely to have received, Storm's standard form advice to undertake Double Geared Investments and Storm's Step Investment Strategy; and
  - (xvi) the Group Members were double-gearred, or in the alternative CBA was not in a position to know, and did not know, the extent to which the Group Members were leveraged by reason of having followed the Double Gearing Strategy and/or Storm's Step Investment Strategy.
- (w) By no later than March 2007 CBA knew that:
- (i) many Storm clients were retirees;
  - (ii) Storm clients typically did not have any significant income or funds available to service the interest repayments on their margin or other (home investment) loans, other than the income from their Storm investments and, or alternatively, by capitalisation of the interest on their margin loan;
  - (iii) for those borrowers relying on investment income to service their borrowings, there was an increased probability of default in the event of a foreseeable significant market downturn and an increased probability of significant losses for such persons; and
  - (iv) because Storm clients invested in similar index funds, a foreseeable significant market downturn would result in margin calls being made on a mass scale and, therefore, cause potential consequential mass defaults.
- (x) By no later than March 2007 CBA knew that Storm had failed to ensure that its clients were geared conservatively and had cash reserves sufficient to meet interest repayments and/or margin calls on margin loan facilities.

***Loss and damage***

- (y) in the event that a Group Member has suffered loss and damage by reason of
  - (i) CBA's contravention of, and CFS's involvement in CBA's contravention of, section 601ED of the Corporations Act;

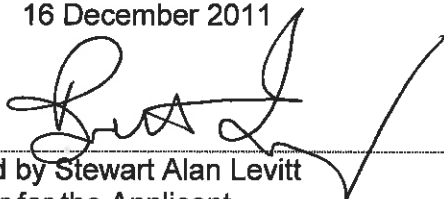
- (ii) CBA and CFS's involvement in Storm's contravention of section 601ED of the Corporations Act;
  - (iii) CBA having engaged in the ASIC CBA Conduct;
  - (iv) CBA's breaches of the Group Margin Loan Agreements;
  - (v) CBA's misleading and deceptive conduct;
  - (vi) CBA's breaches of the Banking Code terms and Care and Skill terms; or
  - (vi) CBA's unconscionable conduct,
- the proper measure of that loss and damage.

### Representative action

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

3. The group members to whom this proceeding relates ("**Group Members**") are persons:
- (a) who were clients of Storm; and
  - (b) who:
    - (i) borrowed money from the CBA pursuant to CGI Margin Loans (as defined in paragraph 3(e) of the Further Amended Statement of Claim) entered into in on or after 18 May 2007, or who increased their borrowings from CBA on or after 18 May 2007 pursuant to CGI Margin Loans entered into before 18 May 2007; and
    - (ii) invested the money borrowed in any one or more of the Investment Funds (as defined in paragraph 6 of the Further Amended Statement of Claim);
  - (c) had their investments caused to be redeemed or sold by CBA between in or about October 2008 to in or about December 2008; and
  - (d) have not agreed with CBA to settle the claims the subject of these proceedings.

Date: 16 December 2011



Signed by Stewart Alan Levitt  
Lawyer for the Applicant  
By his senior associate  
Brett Richard Imlay

**Schedule**

No. NSD 811 of 2010

Federal Court of Australia  
District Registry: Queensland  
Division: General

**Applicants**

First Applicant:	Leslie James Sherwood
Second Applicant:	Julianne Sherwood
Third Applicant:	SEAN PATRICK JUDE McArdle
Fourth Applicant:	PAULA JOANNE McArdle

**Respondents**

First Respondent:	Commonwealth Bank of Australia ABN 48 123 123 124
Second Respondent:	Colonial First State Investments Ltd ABN 98 002 348 352

Date: 16 December 2011