

Form 19
Rule 9.32

FURTHER AMENDED APPLICATION UNDER PART IVA OF THE FEDERAL COURT OF AUSTRALIA ACT 1976

(Amended on 16 December 2011 pursuant to the order of Reeves J made on 14 December 2011)

Federal Court of Australia
District Registry: Queensland
Division: General

No. QUD 590 of 2010

TRACEY RICHARDS
Applicant

MACQUARIE BANK LIMITED ABN 46 008 583 542
Respondent

STORM FINANCIAL LIMITED (IN LIQUIDATION) ACN 064 804 691
Second Respondent

To the Respondents.

The Applicant applies 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

The Court ordered that the time for serving this application be abridged to: NOT APPLICABLE

Filed on behalf of	Applicant
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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 (FASOC),
the Applicant claims:

1. This application is brought by the Applicant on her own behalf and as a representative party.
2. The Applicant claims:
 - (a) a declaration that the Scheme (as defined in paragraph 10 of the FASOC) constituted a managed investment scheme within the meaning of section 9 of the Corporations Act 2001 (Cth) ("**Corporations Act**") that was required to be registered under section 601ED(1) of the Corporations Act but was not so registered;
 - (b) a declaration that MBL has contravened section 601ED(5) of the Corporations Act;
 - (c) alternatively, a declaration that MBL was 'a person involved' (within the meaning of s 79 of the Corporations Act) in the contravention of s 601ED(5) by Storm;
 - (d) an order pursuant to section 1325(1) and 1325(5)(e) of the Corporations Act that MBL compensate the Applicant and the Group Members for damage suffered by reason of the Conduct (as defined in paragraph 24 of the FASOC) in contravention of section 601ED(5) of the Corporations Act;
 - (e) ~~further and~~ in the alternative to the order sought in 3(d):
 - (i). an order pursuant to sections 1325(1) and 1325(5)(a) that Applicant's Margin Loan Agreement (as that term is defined in paragraph 41 of the FASOC) and the Group Margin Loan Agreements (as that term is defined in paragraph 6 of the FASOC) be declared void ab initio as a result of the Conduct;

- (ii). an order, pursuant to sections 1325(1) and 1325(5)(d) of the Corporations Act directing MBL to pay to the Applicant and the Group Members their Equity Contributions (as defined in paragraph 12(e) of the FASOC) by reason of the Conduct; or
 - (iii). restitution of the Applicant's Equity Contribution and that of the Group Members by MBL by reason of the Conduct;
- (f) in the alternative to the orders sought in 3(e):
- (i). a declaration pursuant to section 601MB of the Corporations Act that the Applicant's Margin Loan Agreement (as that term is defined in paragraph 42 of the FASOC) and the Group Margin Loan Agreements of those Group Members who have given proper notice pursuant to section 601MB of the Corporations Act are void as a result of the matters pleaded in paragraph 32B of the FASOC;
 - (ii). an order, pursuant to sections 1325(1) and 1325(5)(d) of the Corporations Act directing MBL to pay to the Applicant and those Group Members who have given proper notice pursuant to section 601MB of the Corporations Act their Equity Contributions, by reason of the Conduct; or
- (g) ~~further and in the alternative;~~
- (i). damages from MBL payable to the Applicant and some or all of the Group Members for breach of contract; and/or
 - (ii). in relation to MBL's alleged unconscionable conduct in breach of sections 12CA, 12CB, and/or 12CC of the ASIC Act, orders pursuant to section 12GF and/or 12GM of the ASIC Act that MBL pay damages to the applicant and some or all of the Group Members arising from its contravention of those provisions; and/or
 - (iii). ~~further and in the alternative,~~ in relation to MBL's alleged unconscionable conduct in breach of section 51AA, 51AB and/or 51AC of the *Trade Practices Act 1974* (Cth) (TPA), orders pursuant to section 82 and/or 87 of the ASIC Act that MBL pay damages to the a-Applicant and some or all of

the Group Members arising from its contraventions of those provisions; and/or

- (iv). an order pursuant to section 73(1)(b) of the TPA that MBL pay damages to the Applicant (in the amount claimed at paragraphs 94 of the FASOC) on the grounds that MBL and Storm are jointly and severally liable to the Applicant for the amount of loss or damage suffered by the Applicant as a result of the breaches of contract and misrepresentations by Storm pleaded in the FASOC in so far as such loss and damage arises from the Applicant's entry into:
- A. the Post-MBL Storm Contracts (as defined in paragraph 66 of the FASOC); or
 - B. the June 2006 Storm Contract (as defined in subparagraph 92(b) of the FASOC) and each of the Post-MBL Storm Contracts; or
- (v). in the alternative to 2(g)(iv), an order pursuant to section 73(1)(b) of the TPA that MBL pay damages to the Applicant (in the amount claimed at paragraph 95 of the FASOC) on the grounds that MBL and Storm are jointly and severally liable to the Applicant for the amount of loss or damage suffered by the Applicant as a result of the breaches of contract and misrepresentations by Storm pleaded in the FASOC; and
- (vi). Further or in the alternative to 2(g)(i), 2(g)(ii) and 2(g)(iii) (in so far as they seek relief on behalf of Group Members) orders pursuant to section 73(1)(b) of the TPA that MBL pay damages to some or all of the Group Members on the grounds that MBL and Storm are jointly and severally liable to those Group Members for the amount of loss or damage suffered by them as a result of the breaches of contract and misrepresentations by Storm;
- (h) in the alternative to 2(a) to 2(g) above, on the grounds set out in paragraphs 2, 5 and 32A of the FASOC and the matters pleaded against MBL in the amended statement of claim in proceedings no. QUD 577 of 2010 (ASIC v

Storm Financial Limited (receivers and managers appointed) (in liquidation)
(ASIC ASOC), orders:

- (i). pursuant to section 1325(2) and section 1325(5)(e) of the Corporations Act, that MBL compensate the Applicant and the Group Members for damage suffered by reason of MBL's involvement in Storm's contravention of section 601ED(5) of the Corporations Act as alleged in that proceeding (the ASIC Conduct):
 - (ii). pursuant to section 1325(2) and section 1325(5)(a), that the Applicant's Margin Loan Agreement and each of the Group Member Margin Loan Agreements be declared void ab initio as a result of the ASIC Conduct; and/or
 - (iii). pursuant to section 1325(2) and section 1325(5)(d) that MBL pay to the Applicant and the Group Members their Equity Contributions (as defined in paragraph 12(e) of the FASOC) by reason of the ASIC Conduct:
- (i) interest;
 - (j) costs;
 - (k) such further or other order as the Court thinks fit.

Questions common to claims of group members

~~The questions of law or fact common to the claims of the group members are:~~

3. The questions of law or fact common to the claims of the Group Members are:
- (a) whether MBL and Storm agreed upon the Special Terms alleged in paragraph 7 of the Statement of Claim;
 - (b) whether MBL and Storm carried on the Scheme alleged in paragraph 10 of the Statement of Claim;
 - (c) whether the Scheme (as defined in paragraph 10 of the 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 601ED of the Corporations Act but was not so registered;
- (e) whether MBL was a person who, within Australia, operated a managed investment scheme which was required to be registered under section 601ED(1) of the Corporations Act but was not so registered in contravention of section 601ED of the Corporations Act;
- (f) whether MBL was a person involved in the contravention of section 601ED by Storm;
- (g) whether the Group Members are persons who suffered loss and damage by reason of MBL's contravention of section 601ED of the Corporations Act, alternatively by reason of MBL's involvement in the contravention by Storm of section 601ED of the Corporations Act and, if so, the proper measure of that loss and damage;
- (h) whether MBL engaged in the ASIC Conduct as alleged in the ASIC ASOC;
- (i) whether the Group Members are entitled to relief (and if so, the form of that relief) as a result of MBL having engaged in the ASIC Conduct.
- ~~(j) whether each of the Group Margin Loan Agreements (as that term is defined in paragraph 6 of the ASOC) contained the contractual terms pleaded and particularised in paragraph 38 of the FASOC;~~
- ~~(k) whether at all material times after 15 February 2005, MBL was aware of the matters pleaded in paragraph 53 of the FASOC (other than those pleaded in subparagraphs 50(o) and 50(p));~~

3A. The questions of fact or law which are partly common between the Applicant and sub-groups of the Group Members:

(Claims pursuant to section 601MB of the Corporations Act)

- (a) include, in relation to the Applicant and those Group Members who have or will provide a notice of rescission to MBL pursuant to section 601MB of the Corporations Act:

- (i). whether, by offering the Applicant and Group Members finance to invest in the Special Funds (as defined in subparagraph 7(c) of the FASOC), MBL offered the Applicant and the Group Members an interest in the Scheme (as defined in paragraph 10 of the FASOC) (FASOC, [10], [32B(a))];
- (ii). whether the Applicant's Margin Loan Agreement (defined in paragraph 42 of the FASOC) and the Group Margin Loan Agreements (defined in paragraph 6 of the FASOC) were each contracts to subscribe to an interest in the Scheme (FASOC [32B(b))];

(Breach of contract claims)

- (b) include, in relation to the Applicant and those Group Members who acquired credit from MBL wholly and exclusively for private or domestic use and intend to pursue claims for breach of contract against MBL for breach of:
 - (i). the Banking Code Term (defined in paragraph 39(b) of the FASOC), whether each of the Group Margin Loan Agreements (as that term is defined in paragraph 6 of the ASOC) contained that term (FASOC, [39(a)], [39(b))];
 - (ii). the Implied Banking Code Term (defined in paragraph 39(c) of the FASOC), whether each of the Group Margin Loan Agreements contained that term;
 - (iii). the Implied Warranty (defined in paragraph 39(d) of the FASOC), whether each of the Group Margin Loan Agreements contained that term;

(Unconscionable conduct claims)

- (c) include, in relation to the Applicant and those Group Members who intend to pursue unconscionable conduct claims against MBL, whether at all material times after 15 February 2005, MBL was aware of the matters pleaded in paragraph 53 of the FASOC;
- (d) include, in relation to the Applicant and those Group Members who intend to pursue unconscionable conduct claims against MBL arising from MBL's conduct after November 2006, whether, by no later than November 2006, MBL was aware of the matters pleaded in paragraph 54 of the FASOC;
- (e) include, in relation to the Applicant and those Group Members who intend to pursue unconscionability claims against MBL arising from MBL's conduct after March 2008, whether, by no later than March 2008, MBL was aware of the matters pleaded in paragraph 55 of the FASOC;

(Linked credit provider claims – Storm's breaches of contract)

- (f) include, in relation to the Applicant and those Group Members who intend to pursue "linked credit provider" claims against MBL based on Storm's breaches of the Due Care and Skill Term pleaded at paragraph 64N(a) of the FASOC, whether that term was an implied term of each of the Storm Advice Retainers and Step Agreements;
- (g) include, in relation to the Applicant and those Group Members who intend to pursue "linked credit provider" claims against MBL based on Storm's breaches of the Storm Implied Warranty pleaded at paragraph 64N(c) of the FASOC, whether that term was an implied term of each of the Storm Advice Retainers and Step Agreements in which the Storm customer made their investment purposes known to Storm and reasonably relied on Storm's skill and judgment in the provision of that advice;
- (h) include, in relation to the Applicant and those Group Members who acquired Storm's services as retail clients within the meaning of section 761A of the Corporations Act and intend to pursue "linked credit provider" claims against MBL based on Storm's breaches of the 945A Term pleaded at paragraph

640 of the FASOC, whether the Storm Advice Retainers and Step Agreements of the Group Members contained a term to the effect of the 945A Term:

- (i) include, in relation to the Applicant and all Group Members who intend to pursue "linked credit provider" claims against MBL based on Storm's breaches of contract, whether such breaches of contract by Storm involved breaches of contract in relation to the Storm Advice Retainers, Step Agreements and/or Group Margin Loans for the purposes of section 73 of the TPA (FASOC, [92], [93], [99], [100]):

Linked credit provider claims – Storm's misleading and deceptive conduct

- (j) include, in relation to the Applicant and those Group Members who intend to pursue "linked credit provider" claims against MBL based on Storm's alleged misleading and deceptive conduct in breach of statutory norms:
- (iv). whether Storm's representations to the Applicant and 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 (FASOC [81]):
- (v). whether Storm's misleading and deceptive conduct to the Applicant and the Group Members in the course of providing investment advice involved misrepresentations in relation to the Storm Advice Retainers, Step Agreements and/or Group Margin Loans for the purposes of section 73 of the TPA (FASOC, [92], [93], [99], [100]):

Linked credit provider claims – general

- (k) include, in relation to the Applicant and all Group Members who intend to pursue "linked credit provider" claims against MBL:
- (i). whether the services provided to Group Members pursuant to the Storm Advice Retainers (defined in paragraph 64J(a) of the FASOC) and Step Agreements (defined in paragraph 64J(b) of the FASOC) were services of a kind ordinarily acquired for personal domestic or household use such that they were acquired by Group Members as "consumers" within the meaning of section 12BC of the ASIC Act (FASOC, [64KA], [97]):
 - (ii). whether, at all material times, MBL was a corporation, within the meaning of the TPA which provided, the course of carrying on a business by MBL, credit to consumers in relation to the acquisition of goods and services (FASOC, [85]):
 - (iii). whether, at all material times and from at least 17 February 2005:
 - A. Storm and MBL had a contract, arrangement or understanding relating to the business carried on by Storm of supplying financial services on the Special Terms.
 - B. Storm, by arrangement with MBL, regularly referred persons to MBL for the purposes of obtaining credit;
 - C. Storm by arrangement with MBL, made available to its clients MBL's contracts, application forms and offers for credit;
 - D. by arrangement or understanding between MBL and Storm, MBL's contracts, application forms and offers for credit could be signed by Storm's clients at the premises of Storm (FASOC, [86]).

- (iv). whether, at all material times during the Relevant Period, MBL was a "linked credit provider" of Storm within the meaning of section 73(14) of the TPA (FASOC, [94], [95], [101]).

Representative action

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

The group members to whom this proceedings relates are:

4. The group members to whom this proceeding relates are persons (the "**Group Members**"):
- (a) who were clients of Storm Financial Limited ("**Storm**");
 - (b) who borrowed money from the Respondent ("**MBL**") on or after 15 February 2005, or who increased their borrowings from MBL on or after 15 February 2005, to invest in one or more of the Special Funds (defined in paragraph 7(b) of the Further Amended Statement of Claim (FASOC));
 - (c) whose investments were redeemed or sold in or after October 2008; and
 - (d) have not duly agreed with MBL to settle the claims the subject of these proceedings.

Applicant's address

The Applicant's address is:

Place: **467 North Beach Road
Gwelup WA 6018**

Applicant's Address for Service:

**Levitt Robinson
Solicitors & Attorneys
Level 6, 162 Goulburn Street
Sydney (East) NSW 2010
DX 11563 Sydney Downtown
Tel: (02) 9283 3133
Fax: (02) 9283 0005
Email: slevitt@levittrobinson.com**


Service on the Respondents

It is intended to serve this application on the following Respondent:

First Respondent: **Macquarie Bank Limited
ABN 46 008 583 542**

Address: **1 Martin Place, Sydney NSW 2000**

Dated: **16** December 2011



**Stewart Alan Levitt
Principal, Levitt Robinson,
Solicitors for the Applicant**

By his Senior Associate