

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 30/08/2016 3:59:28 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)
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



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 30/08/2016 4:49:43 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 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 17
Rule 8.05(1)(a)

Federal Court of Australia
District Registry: Queensland
Division: General

No. QUD 211 of 2013

Further Amended Statement of Claim

(Filed pursuant to the orders of the Honourable Dowsett J dated 30 August 2016)

JOHN CHARLES LEE and Another
Applicants

WESTPAC BANKING CORPORATION (ABN 33 007 457 141)
Respondent

CONTENTS

A. INTRODUCTION	2
B. APPLICANTS' CONTRACTUAL CLAIMS AGAINST WESTPAC	8
C. GROUP MEMBERS' CONTRACTUAL CLAIMS AGAINST WESTPAC	64
D. APPLICANTS' UNCONSCIONABLE CONDUCT CLAIM AGAINST WESTPAC	68
E. GROUP MEMBERS' UNCONSCIONABLE CONDUCT CLAIM AGAINST WESTPAC	71
F. APPLICANTS AND GROUP MEMBERS' LINKED CREDIT PROVIDER CLAIMS AGAINST WESTPAC	74
G. NEGLIGENCE	97
SCHEDULE 1: FINANCIAL PROFILE	100
SCHEDULE 2: DEFINED TERMS	101

Filed on behalf of: the Applicants

Prepared by: Stewart Alan Levitt and Daniel Meyerowitz-Katz

Law firm: Levitt Robinson Solicitors Ref: SAL:DMK:90390:3089

Tel (02) 9286 3133 Fax (02) 9283 0005

Email dmkatz@levittrobinson.com

Address for service 162 Goulburn Street, SYDNEY (East) NSW 2010
(include state and postcode)

A. Introduction

1. The Applicants commence these proceedings as representative parties pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) (“FCA”).
2. The Applicants and the persons they represent in these proceedings pursuant to Part IVA of the FCA were clients of Storm Financial Limited (“Storm”) who:
 - (1) borrowed money from the Respondent (“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 (as defined in paragraph 6 below); and
 - (2) suffered loss and damage as a result of:
 - (a) Storm’s breaches of contract pleaded in paragraphs 73 and 74 below; and, or alternatively
 - (b) Storm’s misrepresentations pleaded in paragraphs 83-88 below; and
 - (3) have not settled with Westpac the claims the subject of these proceedings.

(The persons whom the Applicants represent in these proceedings will be referred to independently of the Applicants as the “Group Members”. Unless otherwise evident from the context, a reference to “Storm clients” or “Storm’s clients” includes the Applicants and the Group Members.)
3. Westpac, at all material times, was a corporation within the meaning of the *Trade Practices Act 1974* (Cth) (TPA) and capable of being sued in its own name.
4. Throughout the Relevant Period, Emmanuel and Julie Cassimatis were joint executive directors and the sole beneficial shareholders of Storm.
5. Throughout the Relevant Period, Storm carried on the business of providing, for reward, financial advice and financial planning services.
6. From at least 1999 until placed in liquidation, Storm developed and applied the “Storm Model” of standardised financial advice and financial planning services, which was applied to all, or nearly all, of its clients (including the Applicants and some or all of the Group Members) which entailed five distinct steps:
 - (1) first, clients and potential clients went through an “Intensive Education Program” which involved:

- (a) meeting with Storm representatives and attending education seminars at which the Storm Model was explained;
- (b) advising clients at this time that if they invested pursuant to the Storm Model, including using the Dam Account (as defined in this paragraph below), there was no risk of the client losing the money invested, including the client's Equity Contribution, being in default of their loans or of their properties (including the family home) being at risk of a forced sale (the "**Storm No Risk Representation**");
- (c) clients completing a "**Confidential Financial Profile**" which asked clients to state which of four options represented the client's views on investment and clients were encouraged to adopt, and nearly all clients adopted, the third option, which stated:

I am prepared to accept instability if in the medium term to the long term the investment return is higher and the risks over that term are minimal or eliminated

- (d) clients being given a cash flow presentation where recommended borrowings were to be serviced from a combination of dividends on the investments, predicted at approximately 4% per annum and capital growth, predicted at approximately 6% per annum.
- (2) second, the "**Equity Contribution**", in which clients would be advised to borrow from nominated lenders, including Westpac, as much cash as possible against any assets they owned, including the family home and other real property, in order to make an Initial Investment (as defined in this paragraph below), to seek loan quotations from such lenders, and to then be referred to one or more lenders, including Westpac, to borrow such cash;
 - (3) third, the "**Initial Investment**", whereby the Equity Contribution would be pooled with any additional funds available to the clients and then disbursed as follows:
 - (a) from the borrowings, paying Storm's fees on a percentage of funds invested, usually 7%, for providing financial advice;
 - (b) an amount, constituting a small cash deposit into an interest bearing account (the "**Dam Account**"), in respect of which:
 - (i) Storm would advise its clients that if the value of the Special Funds (as defined in this paragraph below) declined, the Dam Account provided a sufficient capital "buffer" in order to shore-up the client's global loan to value ratio ("**LVR**") and represented an acceptable form of collateral security to the client's margin lender to assist in preventing a margin call;

- (ii) the clients would be encouraged to make regular contributions into the Dam Account, including all dividends received from Storm investments;
 - (iii) the clients would pay interest payments on their various loans from the Dam Account, and would use the Dam Account for regular living expenses;
 - (c) where relevant, an amount to refinance existing debt; and
 - (d) the remainder of the funds to purchase units in specified index share funds (the “**Special Funds**”).
- (4) fourth, make an initial step investment in accordance with the “**Step Investment Strategy**”, whereby the clients would be advised to:
- (a) first, leverage their units in the Special Funds, and any other equity available, in order to borrow additional money by way of margin loan from nominated lenders and in fact borrow from such margin lenders; then
 - (b) use the monies from the margin loan to purchase additional units in the Special Funds and pay Storm’s fees; then
 - (c) borrow further monies by way of a further margin loan to purchase more units in the special funds,
- until the client’s LVR including the family home and all other assets owned by the client was within the optimal range of 40% to 60%;
- (5) fifth, to make “**Additional Step Investments**” in accordance with the Step Investment Strategy, wherever:
- (a) the market rose substantially, such that the value of the client’s units in the Special Funds increased sufficiently to permit the client to draw down their existing margin loan against the units (“**Build Step**”);
 - (b) the market fell substantially (“**Recovery Step**”) drawing on any available cash or undrawn loan facilities and Storm represented to its clients that this permitted the client to take advantage of a temporary decline in the market in order to increase the value of its portfolio;
 - (c) the client’s assets increased in value; or
 - (d) the client otherwise acquired additional funds.
7. Storm’s clients, who were advised to invest according to the Storm Model and who did invest according to the Storm Model covered a range of diverse persons including:

- (1) retirees without income beyond that generated by the Storm Model;
 - (2) older persons nearing retirement;
 - (3) persons without prior experience with margin loans or share investing and who had a large equity in the family home before coming to Storm which could be geared for the Equity Contribution;
 - (4) persons who nearly always needed to rely upon the return produced by the investments to service the loans; and
 - (5) otherwise a wide diversity of people by ages, occupations, education, income and wealth.
8. In order for the client not to lose money on the investment made under the Storm Model and not to default under the loans, the Storm Model, in all cases, or nearly all cases, including in the cases of the Applicants and some or all of the Group Members, relied on the investments made (after expenses, Storm's fees and holding costs incurred in connection with the acquisition of the Storm investments) producing a sufficiently high return and at a rate consistently higher than the loan interest payable over the life of the loans and the investment plan.
9. In the premises pleaded in paragraphs 6 to 8 above; and
- (1) because it was reasonably foreseeable at the time of Storm's advice to clients, including the Applicants and the Group Members, and at the time of the loans taken out on such advice, including the Applicants' Westpac Loans (defined at paragraph 24 below) and the Group Home Loans (defined at paragraph 50 below) that there may occur in the future:
 - (a) a protracted flat market or low returning market where returns are insufficient to service the loans;
 - (b) a large increase in interest rates; and/or
 - (c) a significant or prolonged market downturn; and
 - (d) one or more of such events were likely to occur over the life of the Storm investments and loans;
 - (2) because Storm's clients or nearly all of Storm's clients, including the Applicants and Group Members, who invested in accordance with the Storm Model faced the following risks which were substantial, appreciable and/or real:
 - (a) losing some or all of the money invested;
 - (b) being forced to sell the units in the Special Funds to service or repay the margin loans, leading to the units no longer being able to generate returns to service the loans;

- (c) being unable to service and/or repay, and therefore defaulting on, their loans;
 - (d) being forced to sell the secured properties, including the clients' family homes, to repay the secured loans; and
 - (e) losing all of their units in the Special Funds, their entire Equity Contributions, and the properties, including the clients' family homes, against which their loans were secured
- (the "**Risks**"),

the Storm No Risk Representation was:

- (3) false;
 - (4) misleading and deceptive, or likely to mislead and deceive; and
 - (5) made without reasonable care and skill and, to the extent it involved a statement of future events, did not have reasonable grounds.
10. In the premises pleaded at paragraphs 6-9 above, Storm, in and about its advice to clients pursuant to the Storm Model:
- (1) having regard to the information obtained from the client, failed to give such consideration to, and conduct such investigation of, the subject matter of the advice as was reasonable in all of the circumstances, in that it failed reasonably to consider and investigate any alternative investment strategy or gearing levels that might be appropriate or more appropriate to the clients' personal circumstances such as their age, assets, income, health, risk profile, individual financial objectives, dependants, retirement goals, living expenses, income sources, or employability; and/or
 - (2) failed to give advice that was appropriate to the clients, or nearly all of the clients, in that:
 - (a) the Storm Model was not appropriate for clients who agreed with option 3 in the Confidential Financial Profile;
 - (b) the Storm Model was not appropriate for clients unless they were fully advised upon and were made to understand and appreciate the Risks, which had not occurred;
 - (c) the Storm Model was not appropriate for retirees, older persons approaching retirement or persons who needed to rely upon the investment's return to service the loans, because of the substantial risk of default on the loans;
 - (d) the Storm Model was not appropriate for retirees who relied upon the return from the investments for their living expenses, be-

cause such income could not be relied upon over the medium to long term given the vicissitudes of the market;

- (e) the Storm Model was not appropriate for clients who may need or want access to additional cash, beyond their regular expenses, to fund any necessary or unforeseen future outlays, because such cash could not be relied upon as being there over the medium to long term given the vicissitudes of the market.

B. Applicants' Contractual Claims Against Westpac

11. Between 21 May 2007 and 25 July 2007, the Applicants underwent the Intensive Education Program, as pleaded in paragraph 6(1), through Storm's authorised representatives Messrs Terry Webb and Stuart Drummond, in the course of which they completed a Confidential Financial Profile and selected the third option, as pleaded in paragraph 6(1)(c).
12. On or about 13 August 2007, Storm sent to Ms Alba Barrie of Westpac, by way of facsimile, a bank submission ("**Applicants' Westpac Submission**"), including:
 - (1) a pro forma authority signed by the Applicants authorising responses to be sent to Storm;
 - (2) a request for a quotation from Westpac for a loan of \$1,020,000.00 to the Applicants to be used for investment with Storm; and
 - (3) the Applicants' "**Financial Profile**", a copy of which is attached as **Schedule 1**.
13. On or about 14 August 2007, Storm received by facsimile a loan quotation for the Applicants' loan requests from Mr Michael MacDonald of Westpac.
14. On or about 17 August 2007, 29 August 2007 and, or alternatively, 10 September 2007, Storm, by Messrs Webb and Drummond, presented the Applicants with an initial Statement of Advice ("**Applicants' SOA**"), which the Applicants approved.

Particulars

The Applicants repeat paragraph 76 and say further that the Applicants' SOA represented:

- (a) on page 2 that:
 - (i) the SOA had been prepared following investigation into the needs of the Applicants;
 - (ii) Storm had made recommendations to address the needs of the Applicants based on the assumptions set out in the SOA; and
 - (iii) Storm had recommended a process that would help the Applicants to achieve their goals "for the Now, Middle and End of your life";
- (b) on page 21 that:

- (i) the Applicants had provided Storm with information about their current financial position and any other relevant circumstances; and
 - (ii) Storm had used that information to evaluate the existing financial profile of the Applicants and to prepare the recommendations in the SOA;
 - (c) on page 29, that Storm suggested that the Applicants' portfolio should be reviewed if the indices on the Australian share market were to rise or fall by approximately 10% or 20%, in order that they make a "build step" or a "recovery step".

- 15. On page 50 of the Applicants' SOA, Storm recommended that the Applicants:
 - (1) borrow \$1,020,000 as a mortgage from the CBA (Equity Contribution);
 - (2) borrow \$1,700,000 as a margin loan from Macquarie Margin Lending;
 - (3) pool the borrowed funds together with \$1,800,000 of their own funds and disburse as follows (Initial Investment):
 - (a) \$435,000 plus any residual cash reserves to an account in the Macquarie Investment Management Limited Cash Management Trust (Dam Account);
 - (b) \$287,343 to pay Storm's fee; and
 - (c) the balance in the Special Funds.

- 16. On page 55 of the Applicants' SOA, Storm provided a recommendation as an "Interim Step" in case the Applicants did not want to wait for their mortgage to be arranged. This involved the Applicants doing as follows:
 - (1) immediately borrow \$1,100,000 as a margin loan from Macquarie Margin Lending;
 - (2) pool the borrowed funds together with \$1,800,000 of their own funds and disburse as follows (Initial Investment):
 - (a) \$300,000 plus any residual cash reserves to an account in Macquarie Investment Management Limited Cash Management Trust (Dam Account);
 - (b) \$191,958 to pay Storm's fee;
 - (c) the balance in Special Funds; and
 - (3) when the Applicants succeeded in obtaining a mortgage over their properties, complete the balance of the previous recommendation.

17. On about 11 September 2007, Storm began implementing the recommendations in the Applicants' SOA as follows:
 - (1) By letter dated 13 September 2007, Macquarie Margin Lending approved a margin loan to the Applicants with a facility limit of \$3,000,000 (the "**Applicants' Margin Loan**").
 - (2) On about 11 September 2007, Storm forwarded cheques from the Applicants, each in the amount of \$650,000, for investment in the Special Funds.
 - (3) The Applicants borrowed the sum of \$1,291,958 on the Applicants' Margin Loan, which was disbursed as follows:
 - (a) \$1,100,000 to purchase units in the Special Funds; and
 - (b) \$191,958 to pay Storm's fee.
18. On a date which the Applicants cannot now recall, but between 29 August 2007 and 19 September 2007, the Applicants told Mr Webb that, if they could get the same loan offer from Westpac as made by the CBA, they would prefer to borrow money from Westpac as they had, which was the fact, an established relationship with the Lutwyche Branch of Westpac.
19. Following this conversation, on dates not currently known to the Applicants but between about 17 August and 19 September 2007, Mr Webb telephoned Mr Alan Kelk, Westpac Business Manager at Lutwyche, and several meetings were held between the Applicants, Mr Webb and Mr Kelk at the Applicants' home ("**Webb/Kelk Meetings**"). In that telephone conversation and at those meetings Mr Kelk was informed that:
 - (1) the Applicants wished to borrow money against their home and an investment property;
 - (2) the purpose of these loans was to invest through Storm in accordance with Storm's usual procedures;
 - (3) Storm had sought quotes for loans from Westpac, the CBA and the Bank of Queensland;
 - (4) the CBA was offering a better interest rate than Westpac on such loans, but the Applicants would prefer to go with Westpac (if it could meet the CBA's quote) because of the pre-existing relationship between the Applicants and Westpac;
 - (5) Westpac had a dedicated officer who was responsible for the relationship with Storm, Ms Alba Barrie, who understood how Storm operated and could facilitate the loan application with Westpac's credit assessment department.
20. During one of the Webb/Kelk Meetings, the Applicants provided Mr Kelk with:

- (1) a copy of the Applicants' Westpac Submission;
 - (2) a copy of the CBA's response to the Bank Submission of 13 August 2007;
 - (3) a copy of Westpac's response, from Mr Macdonald, to the Applicants' Westpac Submission; and
 - (4) the Applicants' SOA.
21. During one of the Webb/Kelk Meetings, in response to a question from the Second Applicant as to whether she was "doing the right thing" by investing through Storm, Mr Kelk represented to one or both of the Applicants that:
- (1) he had had other clients with Storm who had never complained about their investments with Storm;
 - (2) the recommendations in the Applicants' SOA seemed to him like a sound investment;
 - (3) if he had sufficient equity in his home, he would invest with Storm;
 - (4) referring to Appendix F of the Applicants' SOA, because the Special Funds were invested in ASX top 200 companies, the investment was sound; and
 - (5) by implication from the above, that Storm's recommendations and advice in the Applicants SOA was appropriate for the Applicants and was reasonable financial advice from a financial planner exercising reasonable care and skill (the "**Kelk Advice**").
22. The Applicants informed Mr Webb and, or alternatively, Mr Drummond, during meetings on or about 30 April 2007, 21 May 2007, 14 June 2007, 28 June 2007, 18 July 2007, 25 July 2007, 17 August 2007, 29 August 2007 and, or alternatively, 10 September 2007, and, further, in the course of the Webb/Kelk Meetings, the Applicants informed Mr Webb and Mr Kelk the following, which was the fact and true:
- (1) the First Applicant:
 - (a) was 55 years old
 - (b) was a bricklayer having worked as such since he was 16 years old;
 - (c) had a taxable income for the year ending 2006 of \$62,634;
 - (d) had retired in about March 2007;
 - (2) the Second Applicant:
 - (a) was 52 years old;

- (b) had been suffering from a serious respiratory disease;
 - (c) had recently retired from her business, Brisbane Salon Suppliers Pty Limited trading as Beaute Internationale, which she sold in or about January 2007; and
 - (d) had a taxable income for the year ending 2006 of \$170,008, referable to the operation of her said business, which she had sold.
- (3) the Applicants collectively:
- (a) had limited financial or commercial education or experience;
 - (b) had no prior experience investing in shares or borrowing to invest in shares;
 - (c) were seeking an investment which would provide an income stream for the Applicants going forward and in retirement;
 - (d) considered security of capital as being of paramount importance to their investment strategy;
 - (e) were not prepared to take any risks with their investments which might lead to the loss of the Applicants' equity built up over their working lives, their homes or other assets;
 - (f) had no or little understanding or appreciation of what was involved in undertaking an investment pursuant to the Storm Model, including having a margin loan or implementing a risk management strategy to protect their home and other assets in relation to such an investment; and
 - (g) had no significant appreciation of the risks associated with an investment pursuant to the Storm Model, and in particular the risk of loss of the Applicants' home or other assets in the event of foreseeable significant market downturns.
- (4) The Applicants had the following assets:
- (a) their home at 7 Mitchell Street, Kedron, Queensland 4031 (the "**Kedron Property**"), the value of which was stated to be \$800,000 in the Loan Application (as defined in paragraph 23 below);
 - (b) a half share of a residential property (with the Applicants' daughter owning the other half share) being a property located at 11 Heston Street, Stafford Heights, Queensland 4053 ("**Stafford Heights Property**") the value of which half share was stated to be \$285,000 in the Loan Application;
 - (c) a half share of a residential unit (with the First Applicant's brother and sister-in-law jointly owning the other half share) be-

ing a unit located at Points North, 407/44 Queen Street Caloundra 4551 (“**Caloundra Unit**”) the value of which half share was stated to be \$250,000 in the Loan Application;

- (d) a property at 21 Bishop Street, Kelvin Grove, Queensland 4059 (“**Kelvin Grove Property**”), the value of which was stated to be \$900,000 in the Loan Application, this being the premises from which the Second Applicant ran her former business;
- (e) approximately \$1,750,000 in cash following the sale by the Second Applicant of her business in January 2007;
- (f) two motor vehicles the combined value of which was stated in the Loan Application to be approximately \$94,000;
- (g) approximately \$700,000 in superannuation being approximately \$100,000 in respect of the First Applicant and approximately \$600,000 in respect of the Second Applicant; and
- (h) approximately \$175,000 in home contents, personal effects, jewellery and other assets.

(5) The Applicants had liabilities of:

- (a) a loan from Westpac in the sum of \$470,000 (which also was in the name of the First Applicants’ brother and sister-in-law) which was secured by mortgages over the Caloundra Unit and the Kedron Property;
- (b) a loan from Westpac in the sum of approximately \$265,000 (which was also in the name of the Applicants’ daughter) in relation to the Stafford Heights Property; and
- (c) a business loan from Westpac in the sum of \$190,000.

23. On or about 19 September 2007, the Applicants submitted a loan application to Mr Kelk for a loan from Westpac (“**Loan Application**”).

Particulars

- (a) The Applicants’ Loan Application indicated that:
 - (i) the purpose of the loan was to assist with investments;
 - (ii) the occupation of the Second Applicant was “Investor”;
 - (iii) the occupation of the First Applicant was “Investor/Bricklayer”;
 - (iv) the Second Applicant had an income of \$224,990.

- (b) The Second Applicant's income of \$224,990 was calculated by Mr Kelk based on the information contained in the Financial Profile, including the anticipated \$200,000 return from investments made through Storm with, in part, the proceeds of the loan from Westpac and the Macquarie Margin Loan.
 - (c) The figure of \$224,990 did not reflect the Second Applicant's actual income as at the date of the form.
- 24. On or about 15 October 2007, Westpac granted to the Applicants two loans in the combined sum of \$1,210,000 ("**Applicants' Westpac Loans**") as follows:
 - (1) a Westpac Home Loan, in the sum of \$450,000 secured over the Kedron, Property (the "**\$450,000 Loan**");
 - (2) the express terms and conditions of the \$450,000 Loan included a "Booklet of Standard Terms and Conditions, version wpac.028" (the "**Home Loan General Conditions**");
 - (3) a Westpac business loan in the sum of \$760,000 secured over the Kelvin Grove Property (the "**\$760,000 Loan**");
 - (4) the express terms and conditions of the \$760,000 Loan included the Business Finance Agreement enclosed with letter from Westpac to the Applicants dated 3 October 2007.
- 25. In accordance with the recommendations in the Applicants' SOA, on or about 22 October 2007, the Applicants applied the proceeds of the Applicants' Westpac Loans, together with \$31,703 of the Applicants' existing cash, as follows:
 - (1) \$925,000 to purchase units in the Special Funds;
 - (2) \$126,703 to Storm for Storm's fees; and
 - (3) \$190,000 to pay off an existing loan with Westpac.
- 26. On 1 June 2004 Westpac adopted the revised 2004 Code of Banking Practice (the "**Banking Code**"), which, by Clause 1.1, was applicable to the Applicants either as individual or as small business customers of Westpac.
- 27. Clause 23 of the Home Loan General Conditions and page 8 of the Business Finance Agreement incorporated the terms of the Banking Code.
- 28. Clause 25.1 of the Banking Code ("**Banking Code Term**") provided:

"Before we offer or give you a credit facility (or increase an existing credit facility), we will exercise the care and skill of a diligent and prudent banker in selecting and applying our credit assessment methods and in forming our opinion about your ability to repay it."

29. The Banking Code Term impliedly required Westpac to:
- (1) have in place the type of credit assessment methods used by a diligent and prudent banker when considering the Applicants' Loan Application and in forming an opinion about the Applicants' ability to repay loans;
 - (2) form its own opinion about the Applicants' ability to repay the money lent, and to exercise the care and skill of a diligent and prudent banker in:
 - (a) selecting and applying Westpac's credit assessment method; and
 - (b) forming Westpac's opinion about the Applicants' ability to repay the money lent,
 before lending money to the Applicants ("**Implied Banking Code Term**").
30. On or about 22 January 2008, Storm provided to the Applicants further written advice ("**Applicants' SOAA**") in which Storm recommended that the Applicants borrow an additional \$322,312 from their existing margin loan, to be used to purchase units in Special Funds and to pay Storm's fee of \$22,312.
31. On or about 29 January 2008, Storm, on the Applicants' instructions, effected the recommendations in the Applicants' SOAA.
32. The Applicants borrowed a total of \$2,719,888.02 from Macquarie, pursuant to the Applicants' Margin Loan, to invest in the Special Funds and to make interest payments due on the Applicants' loans, which was consistent with Storm's advice contained in the Applicants' SOA.

Particulars

- (a) On or about 11 September, the sum of \$1,291,958, described at paragraph 17(3) above.
- (b) On or about 30 September 2007, the sum of \$675,000 which the Applicants invested in the Special Funds.
- (c) On or about 22 November 2007, the sum of \$50,000 for the Applicants' personal expenses.
- (d) On or about 29 January 2008, pursuant to the recommendations in the Applicants' SOAA, the sum of \$322,212 of which the Applicants invested \$300,000 in the Special Funds and used \$22,312 to pay for fees to Storm.
- (e) On or about 25 June 2008, the sum of \$239,656.62 to pre-pay the interest on the Applicants' Margin Loan.

- (f) Other monthly interest payments totalling \$141,061.40 which were capitalised on to the Applicants' Margin Loan.

33. At the time that the Applicants' Westpac Loans were entered into:
- (1) the Applicants had to meet the following financial obligations:
 - (a) their reasonable living expenses;
 - (b) the servicing of their existing borrowings;
 - (c) the servicing of their borrowings under the Applicants' Westpac Loans; and
 - (d) the servicing of their borrowings under the Applicants' Margin Loan; and
 - (2) owing to the Applicants' Prior Position, the Applicants did not have, or were not likely to have had, sufficient income to meet those obligations unless a sufficient return was generated by their investments in the Special Funds ("**Applicants' Storm Position**").
34. In the premises pleaded in paragraph 33 above, and because it was reasonably foreseeable at the time of the Applicants' Westpac Loans that there may occur in the future: a protracted flat or low returning market where returns were insufficient to service the loans; a large increase in interest rates; and/or a significant or prolonged market downturn, and one or more of such events were likely to occur over the life of the Storm investments and the Westpac loans, the Applicants faced the following risks which were substantial, appreciable and/or real:
- (1) losing some or all of the money invested;
 - (2) being forced to sell the units in the Special Funds to service or repay the margin loans, leading to the units no longer being able to generate returns to service their loans, including the Applicants' Westpac Loans;
 - (3) being unable to service and/or repay, and therefore defaulting on, their loans, including the Applicants' Westpac Loans;
 - (4) being forced to sell the secured properties including the Applicants' family homes to repay the secured loans; and
 - (5) losing all of their units in the Special Funds, their entire Equity Contributions, and the properties including the Applicants' family homes against which their loans were secured (the "**Applicants' Risks**").
35. Westpac breached the Banking Code Term and the Implied Banking Code Term in that:

- (1) it failed to exercise the care and skill of a diligent and prudent banker in the position of Westpac as pleaded at paragraph 36 (the “**Position of Westpac**”), in that such a banker would have had in place and/or selected a credit assessment method which would have declined to offer loans to clients of Storm for the purpose of investment pursuant to the Storm Model or to the Applicants for the purposes set out in the Applicants’ SOA and such credit assessment method would have required a diligent and prudent banker in the Position of Westpac:
 - (a) to give the reasons for such refusal, including that Westpac had concerns about:
 - (i) the appropriateness of the Kelk Advice;
 - (ii) the appropriateness of Storm’s advice and Storm’s compliance with its lawful obligations to clients, including in the Applicants’ SOA; and
 - (iii) the ability of the Applicants to service the Westpac Loans over the life of such loans;
 - (b) to advise the Applicants that:
 - (i) it could provide no advice or recommendation on the Applicants’ SOA or Storm’s investments or the Storm Model; and
 - (ii) it recommends that the Applicants seek financial advice independent of Storm before investing pursuant to the Storm Model or the Applicants’ SOA;
- (2) it failed to exercise the care and skill of a diligent and prudent banker in applying its credit assessment methods in that a diligent and prudent banker in the Position of Westpac in applying its credit assessment methods would have declined to offer the Applicants’ Westpac Loans and taken the steps pleaded at paragraph 35(1); and
- (3) it failed to exercise the care and skill of a diligent and prudent banker in forming its opinion about the Applicants’ ability to repay in that a diligent and prudent banker in the Position of Westpac would have formed the opinion that the Applicants did not have the ability to service the loans and would have declined the loans.

Particulars

- (a) The Applicants repeat the matters pleaded at paragraphs 6-23, 25, 32, 33, 34, 55, 71, 79, 96 and 102.
- (b) Westpac’s credit assessment methods (see pp. 28.30, 87-92 and 176 of Westpac’s 2007 Annual Report and further particulars may be provided after discovery) required it to ascertain the risk of impairment of an individual loan through examining all rele-

vant considerations that may have a bearing on expected future cash flows, including:

- (i) the business prospects of the customer;
- (ii) the realisable value of collateral; and
- (iii) the reliability of information obtained by Westpac concerning the customer,

and make a reasonable and prudent decision based upon the resulting ascertainment of the risk of impairment.

- (c) Westpac's credit assessment method ought to have led to enquiries and a full understanding of the Applicants' existing and future possible indebtedness under any margin loans (if unknown) and the matters pleaded at paragraph 32 as being reasonably foreseeable (if not actually foreseen).
- (d) The assessment of the risk of impairment ought to have included the extent to which Westpac was aware or ought to have been aware of Storm likely acting contrary to their legal obligations to the Applicants and clients who were seeking Westpac loans under the Storm Model and the inappropriateness of both Storm's advice and the Kelk Advice to the Applicants because of the potential for claims to be made by such persons against Westpac or for reputational damage being suffered by Westpac.
- (e) The assessment of the risk of impairment ought to have led to enquiries being made and a full understanding reached as to the inappropriateness of the Kelk Advice and/or the Applicants' SOA for the Applicants and of the Storm Model (if unknown) and of the matters pleaded at paragraphs 6-10, 33, 34 55, 71, 75, 79, 80, 84, 91, 96 and 102 and the likelihood of Westpac acting unconscionably and/or being knowingly involved, contrary to law, in Storm's contraventions of law if Westpac made loans to Storm clients for investment pursuant to the Storm Model as pleaded at paragraphs 57, 62, **Error! Reference source not found.** and **Error! Reference source not found.** (if unknown).
- (f) The Applicants' Westpac loans exceeded Westpac's usual LVR limits (as advised by Mr Kelk at the Webb/Kelk meetings and further particulars may be provided after discovery) and a prudent and diligent banker in the Position of Westpac ought not to have permitted those usual limits to be exceeded.

- (g) A prudent and diligent banker would not have assumed and allowed for an income of \$200,000 from the Storm investments for the purposes of servicing the Westpac Loans.

36. The Position of Westpac included Westpac's possession of the knowledge of the following Westpac officers:

- (a) Mr Alan Kelk;
- (b) Ms Alba Barrie;
- (c) Mr Michael MacDonald;
- (d) Ms Belinda Jude;
- (e) Mr Bernie Deacon

(collectively, the "Westpac Representatives", as defined in paragraph 91(2)(a)(i) below).

(2) The Westpac Representatives were under an "**Implied Duty**":

- (a) to act in the course of their duties towards individual or small businesses customers to whom the Banking Code applied, with the care and skill of a diligent and prudent banker;
- (b) to act with reasonable care and skill;
- (c) to act with fidelity and good faith, including by not acting in the course of their duties contrary to existing Westpac policies, and to take such reasonable steps as may be available to them to prevent Westpac acting contrary to law or suffering reputational damage or making imprudent loans of which they were aware in the course of their duties;

Particulars

The duties pleaded in (a) to (c) above are implied by law and by virtue of Westpac's adoption of the Banking Code and/or its Protocols as set out at pp. 28.30, 87-92 and 176 of the 2007 Annual Report and the matters pleaded at paragraphs 37 to 46.

- (d) arising out of the duties pleaded in (a) to (c) above:
 - (i) to make reasonable enquiries in the course of their duties about matters relevant to whether Westpac may have been engaging in conduct which was contrary to law or existing Westpac policies, or may have caused Westpac to make an imprudent loan or suffer reputational damage;

- (ii) to report and make recommendations to any Relevant Decision Maker (defined in paragraph 38 below), where they had any knowledge or concerns arising in the course of their duties that Westpac may have been engaging in conduct which was contrary to law or existing Westpac policies, or may have caused it to make an imprudent loan or suffer reputational damage;
- (3) In respect of the Westpac Representatives, the Applicants allege that the persons, respectively, had actual knowledge of the matters pleaded at paragraphs 37, 39, 41, 43 and 45 below, or, alternatively, the Applicants allege, on the facts pleaded and particularised at paragraphs 37, 39, 41, 43 and 45, that to the extent such person in question did not have actual knowledge of each of those matters alleged therein, that was only because such persons:
- (a) were wilfully shutting their eyes to the obvious;
 - (b) were wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make; or
 - (c) had knowledge of circumstances which would indicate the matters pleaded at paragraphs 37, 39, 41, 43 and 45 below to an honest and reasonable person.

Particulars

The Applicants repeat the matters pleaded at paragraphs 37, 39, 41, 43 and 45 below.

37. Mr Kelk had knowledge of:

- (1) the matters pleaded at paragraphs 11, 14-16, 76, and 77 (in so far as the Applicants' SOA was concerned) and, hence, that the Applicants' SOA Representations, including as to there being no or minimal risk in investing in the Storm Model, had been made, were of continuing effect for the Applicants, and were likely to be relied upon by the Applicants from the time made until at least the end of the Relevant Period, which was Mr Kelk's belief, and:
 - (a) the relevant knowledge is actual knowledge and is to be inferred from the facts pleaded at paragraphs 20, 21(2), and 21(4) and it is inferred that Mr Kelk read the documents referred to in those paragraphs; or
 - (b) in the circumstances pleaded at paragraphs 20, 21(2), and 21(4), if Mr Kelk did not have actual knowledge, then:
 - (i) the matters pleaded at paragraph 37(1) above were there to be seen by Mr Kelk following receipt of the Applicants' SOA, and he must have read the Applicants' SOA and wilfully shut his eyes to those matters or wilfully

shut his eyes to those matters by deliberately not reading the Applicants' SOA; or

- (ii) in those circumstances Mr Kelk must have suspected the existence of the matters pleaded at paragraph 37(1) above and must have failed to make inquiries with the Storm representatives or the Applicants or by reading the Applicants' SOA as to the existence of the matters pleaded at paragraph 37(1) above to remove his suspicions, and that was a wilful and reckless failure given the position of Mr Kelk (being a banker with the title Business Manager and with the experience and responsibilities pleaded at paragraphs 38 and 96) ("**Mr Kelk's Position**"), and an honest and reasonable person in Mr Kelk's Position would have made such inquiries, and if Mr Kelk had made such inquiries the matters pleaded at paragraph 37(1) above would have been revealed to him; or
 - (iii) in those circumstances, Mr Kelk had knowledge that would have indicated the matters pleaded at paragraph 37(1) above to an honest and reasonable person in Mr Kelk's Position;
- (2) the matters pleaded at paragraphs 21, 22, 23 and 96, based upon the facts pleaded therein and, hence, that the Applicants were not prepared to take risks with their assets and equity in their properties, which they told Mr Webb from Storm, and:
- (a) the relevant knowledge is actual knowledge and is to be inferred from the facts pleaded at paragraphs 21, 22, 23 and 96 and it is inferred that Mr Kelk read the documents referred to in those paragraphs; or
 - (b) in the circumstances pleaded at paragraphs 21, 22, 23 and 96, if Mr Kelk did not have actual knowledge, then:
 - (i) the matters pleaded at paragraph 37(2) above were there to be seen by Mr Kelk following the receipt of information that the Applicants were not prepared to take risks with their assets and equity in their properties, and he must have wilfully shut his eyes to those matters; or
 - (ii) in those circumstances Mr Kelk must have suspected the existence of the matters pleaded at paragraph 37(2) above and must have failed to make inquiries with the Storm representatives or the Applicants or by reading the Applicants' Loan Application as to the existence of the matters pleaded at paragraph 37(2) above to remove those suspicions, and that was a wilful and reckless failure given Mr Kelk's Position, and an honest and reasonable person in Mr Kelk's Position would have made such

inquiries, and if Mr Kelk had made such inquiries the matters pleaded at paragraph 37(2) above would have been revealed to him; or

- (iii) in those circumstances, Mr Kelk had knowledge that would have indicated the matters pleaded at paragraph 37(2) above to an honest and reasonable person in Mr Kelk's Position;
- (3) from at least 1 May 2007, of the matters pleaded at paragraphs 6-7 and the likelihood of: (a) representations to the effect of the Storm No Risk Representations and those pleaded at 75 to 77 being made, having a continuing effect, and being relied upon in the case of the Applicants, as well as other Storm clients such as some or all of the Group Members, from the time made until at least the end of the Relevant Period; and (b) the Applicants, as well as other Storm clients such as some or all of the Group Members, desiring no or minimal risk for their investments or assets, which was reported to Storm and which was Mr Kelk's belief, and:
- (a) the relevant knowledge is actual knowledge and from the matters pleaded at paragraphs 20 and 21 it may be inferred that Mr Kelk was knowledgeable of the Storm Model and had reports from clients as to their experience with Storm and Storm's standard advices to clients. Mr Kelk was told Storm's usual procedures would apply to the Applicants, as pleaded at paragraph 19, and the alleged representations are consistent with the representations in the Applicants' SOA, which Mr Kelk had at the time and in fact read; or
 - (b) in the circumstances pleaded at paragraphs 19, 20 and 21, if Mr Kelk did not have actual knowledge, then:
 - (i) the matters pleaded at paragraph 37(3) above were there to be seen by Mr Kelk following him receiving information about the Storm Model in reports from clients, being told that Storm's usual procedures would apply to the Applicants, and receiving the Applicants' SOA, and he must have read the Applicants' SOA and wilfully shut his eyes to those matters or wilfully shut his eyes to those matters including by deliberately not reading the Applicants' SOA; or
 - (ii) in those circumstances Mr Kelk must have suspected the existence of the matters pleaded at paragraph 37(3) above, and Mr Kelk must have failed to make inquiries with the Storm representatives or the Applicants or other Storm clients such as some or all of the Group Members or by reading the Applicants' SOA as to the existence of the matters pleaded at paragraph 37(3) above to remove his suspicions, and that was a wilful and reckless failure

given Mr Kelk's Position, and an honest and reasonable person in Mr Kelk's Position would have made such inquiries, and if Mr Kelk had made such inquiries the matters pleaded at paragraph 37(3) above would have been revealed to him; or

- (iii) in those circumstances, Mr Kelk had knowledge that would have indicated the matters pleaded at paragraph 37(3) above to an honest and reasonable person in Mr Kelk's Position;
- (4) the likelihood of the matters pleaded at paragraphs 17, 25 and 30-32 occurring as they were in accordance with the Applicants' SOA, which Mr Kelk had, as pleaded at paragraph 20, and such investments were consistent with the Storm Model, and the Applicants repeat the matters pleaded in the above sub-paragraphs as to Mr Kelk's knowledge of the Applicants' circumstances, the Applicants' SOA and the Storm Model;
- (5) the matters pleaded at paragraphs 8 (from at least 1 May 2007), 9 (from at least 1 May 2007), 33 and 34 and that Storm clients, such as the Group Members, including some or all of the Group Members known to him at the time, and the Applicants, faced the Risks and the Applicants' Risks, and:
- (a) the Applicants repeat the matters pleaded in the above sub-paragraphs regarding Mr Kelk's knowledge of the underlying facts as to the Applicants' (and other Storm clients') intended loans and their financial circumstances, along with knowledge that the Applicants and some of the Group Members (with whom Mr Kelk had dealings on behalf of Westpac, as stated by Mr Kelk at paragraph 21(1)) were relying upon returns from the Storm investments to service the loans (the "**Kelk Matters**"), and say that the Kelk Matters give rise to a natural inference that a banker in Mr Kelk's Position would have actual knowledge that Storm clients including the Applicants faced the Risks and the Applicants' Risks in that:
 - (i) Mr Kelk allowed for an anticipated return of \$200,000 from the Storm investments, as pleaded at paragraph 23;
 - (ii) it can be inferred from his title and experience that he would have previously considered the extent to which sharemarket returns should be relied upon for servicing of loans;
 - (iii) it can be inferred from the above that Mr Kelk would have considered the reliability of such estimate of investment returns based on previous performance of the sharemarket and reasonable forecasts of the future performance of the sharemarket;

- (iv) the previous history of the sharemarket and financial market have included periods where there have been:
 - A. a protracted flat market or low returning market where returns would have been insufficient to service the loans if repeated in the future;
 - B. a large increase in interest rates which also would have meant the loans could not be serviced; and/or
 - C. a significant or prolonged market downturn which would have led to a margin call and the units in the Special Funds having to be sold to repay the Applicants' Margin Loan and the margin loans of Group Members resulting in there being no investment return to service the Applicants' Westpac Loans and the Group Home Loans if such conditions emerged after the grant of the Applicants' Westpac Loans and the Group Home Loans (the "**Previous History**"); and
 - D. such Previous History was well known at the time of the Applicants' Loan Applications and the Group Home Loans as it was commonly reported in the press, in the media, and in the public domain generally, and it can be inferred that such previous performance would be the subject of reporting to or consideration by a banker in Mr Kelk's Position who was required to consider the reliability of investment returns for the servicing of bank loans; or
- (b) in the alternative to (a), in the circumstances of the Kelk Matters, if Mr Kelk did not have actual knowledge that Storm clients including the Applicants faced the Risks and the Applicants' Risks, then:
 - (i) the matters pleaded at paragraph 37(5) above were there to be seen by Mr Kelk following him receiving information about the Applicants' (and other Storm clients') intended loans and financial circumstances, receiving information that the Applicants and some of the Group Members were relying on returns from the Storm investments to service the loans, and receiving information and reports about the Previous History, and he must have wilfully shut his eyes to those matters; or
 - (ii) in those circumstances, Mr Kelk must have suspected the existence of the matters pleaded at paragraph 37(5) above, and Mr Kelk must have failed to make inquiries

as to the existence of the matters pleaded at paragraph 37(5) above with the Storm representatives or the Applicants or other Storm clients such as some or all of the Group Members or by reading the Applicants' SOA and the Applicants' Loan Application or by reading or listening to reports regarding the Previous History to remove those suspicions, and that was a wilful and reckless failure given Mr Kelk's Position, and an honest and reasonable person in Mr Kelk's Position would have made such inquiries, and if Mr Kelk had made such inquiries the matters pleaded at paragraph 37(5) above would have been revealed to him; or

- (iii) in those circumstances, Mr Kelk had knowledge that would have indicated the matters pleaded at paragraph 37(5) above to an honest and reasonable person in Mr Kelk's Position;
- (6) the matters pleaded at paragraphs 9, 10 (from at least 1 May 2007), 73 and 79 and that Storm's advice to the Applicants, and other Storm clients, such as the Group Members, including some or all of the Group Members known to him at the time, likely, was not appropriate to their personal circumstances, and Storm's advice as to the risks involved was not correct, reasonable or appropriate, and that such advice would have a continuing effect on such persons after it was first made until at least the end of the Relevant Period, which was Mr Kelk's belief, and:
- (a) knowledge of the Storm Model and the underlying facts as to the Applicants' personal circumstances, including that the Applicants (and likely other Storm clients) did not want to risk the assets they owned, combined with knowledge that the Risks and the Applicants' Risks applied to the Applicants and Storm clients' intended investments and loans as pleaded in 37(5) above, meant Mr Kelk had actual knowledge that Storm's advice as to the risks was wrong and that the recommended Storm investments for the Applicants were not appropriate or in line with the Applicants' stated desire not to risk the assets they owned; or
 - (b) in circumstances where Mr Kelk had knowledge of the Storm Model and the underlying facts as to the Applicants' personal circumstances, including that the Applicants (and likely other Storm clients) did not want to risk the assets they owned, as well as knowledge that the Risks and the Applicants' Risks applied to the Applicants and Storm clients' intended investments and loans as pleaded in 37(5) above, then if Mr Kelk did not have actual knowledge that Storm's advice as to the risks was wrong and that the recommended Storm investments for the Applicants were not appropriate or in line with the Applicants' stated desire not to risk the assets they owned, then:

- (i) the matters pleaded at paragraph 37(6) above were there to be seen by Mr Kelk following him receiving information about the Applicants' personal circumstances, and receiving information that the Risks and the Applicants' Risks applied to the Applicants and Storm clients' intended investments and loans, and he must have wilfully shut his eyes to those matters; or
 - (ii) in those circumstances, Mr Kelk must have suspected the existence of the matters pleaded at paragraph 37(6) above, and Mr Kelk must have failed to make inquiries as to the existence of the matters pleaded at paragraph 37(6) above with the Storm representatives or the Applicants or other Storm clients such as some or all of the Group Members or by reading the Applicants' SOA or by reading the Applicants' Loan History or by reading or listening to reports regarding the Previous History to remove his suspicions, and that was a wilful and reckless failure given Mr Kelk's Position, and an honest and reasonable person in Mr Kelk's Position would have made such inquiries, and if Mr Kelk had made such inquiries the matters pleaded at 37(6) above would have been revealed to him; or
 - (iii) in those circumstances, Mr Kelk had knowledge that would have indicated the matters pleaded at paragraph 37(6) above to an honest and reasonable person in Mr Kelk's Position; and
- (7) the likelihood that Storm, in its advice to the Applicants and to many other Storm clients, some of whom became Westpac borrowers, such as the Group Members, was acting contrary to its legal obligations, and to provide the loans to the Applicants and Group Members would assist Storm in effecting its incorrect, inappropriate and unreasonable advice as pleaded above, which may have meant that Westpac could have been acting contrary to law or could have suffered reputational damage, and:
 - (a) the Applicants repeat the matters pleaded at paragraph 37(6) above regarding Mr Kelk's knowledge that the Storm advice to the Applicants and, likely other clients based upon his dealings with other clients who were Westpac borrowers, was incorrect, unreasonable or inappropriate advice, and the Applicants say that it may be naturally inferred from such matters that a person in Mr Kelk's Position had actual knowledge that Storm was under a legal obligation not to provide advice to its clients, particularly as to the risks flowing from its recommended investments, that was incorrect, unreasonable or inappropriate; or
 - (b) if as a result of the matters pleaded at paragraph 37(6) above Mr Kelk did not have actual knowledge that Storm was under a le-

gal obligation not to provide advice to its clients, particularly as to the risks flowing from its recommended investments, that was incorrect, unreasonable or inappropriate, then:

- (i) the matters pleaded at paragraph 37(7) above were there to be seen by Mr Kelk following him receiving information about the Applicants' personal circumstances, and receiving information that the Risks and the Applicants' Risks applied to the Applicants and Storm clients' intended investments and loans, and he must have wilfully shut his eyes to those matters; or
- (ii) in those circumstances Mr Kelk must have suspected the existence of the matters pleaded at paragraph 37(7) above, and Mr Kelk must have failed to make inquiries as to the existence of the matters pleaded at paragraph 37(7) above with the Storm representatives or the Applicants or other Storm clients such as some or all of the Group Members or by reading the Applicants' SOA or by reading the Applicants' Loan Application or by reading or listening to reports regarding the Previous History to remove his suspicions, and that was a wilful and reckless failure given Mr Kelk's Position, and an honest and reasonable person in Mr Kelk's Position would have made such inquiries, and if Mr Kelk had made such inquiries the matters pleaded at paragraph 37(7) above would have been revealed to him; or
- (iii) by reason of those matters, Mr Kelk had knowledge that would have indicated the matters pleaded at paragraph 37(7) above to an honest and reasonable person in Mr Kelk's Position.

38. Mr Kelk's knowledge pleaded above is to be attributed to Westpac in respect of the Applicants' Westpac Loans and the Group Home Loans because he:

- (1) was an agent of Westpac with the title Westpac Business Manager, which included functions, duties and responsibilities involving managing on behalf of Westpac the accounts of Westpac's business customers, including their business, personal and loan accounts, which included:
 - (a) receiving and reading loan applications from such customers, declining such applications if contrary to bank policy, and advising the customers of the outcome of such applications;
 - (b) advising such customers about the bank's products, policies and services;
 - (c) being the point of contact between such customers and the bank in respect of all of the bank's available services;

- (d) implementing the bank's policies, including by advising customers of such policies and the unavailability of loans if contrary to such policies; and
- (e) reporting and making recommendations to credit officers responsible for making decisions on such customer's loan applications;

Particulars pursuant to Rule 16.43

The Applicants repeat the matters pleaded at paragraph 96. The Applicants infer the above functions, duties and responsibilities from the practice of the relationship between Mr Kelk and the Applicants and Mr Kelk's title. The Applicants currently do not know the extent of Mr Kelk's authority to approve or decline loan applications. Further particulars may be provided after discovery.

- (2) was Westpac's nominated representative or bank/customer relationship manager with responsibility for the Applicants' accounts, including in respect of the Applicants' Loan Application;
- (3) in the course of his duties, conferred with the Applicants on behalf of Westpac over the Loan Application and the Applicants' Westpac Loans as pleaded at paragraphs 19 to 22;
- (4) was under the Implied Duty to make reasonable enquiries about, and report to any person(s) with authority to make decisions with respect to the Applicants' Westpac Loans, those supervising such persons and any person(s) with authority to determine and implement Westpac's policy for approving or not approving loans for the purpose of investment pursuant to the Storm Model (herein after referred to as a "**Relevant Decision Maker**"), any knowledge or concerns he may have in respect of:
 - (a) the Loan Application which may affect the credit risk of the loans, Westpac's legal obligations with respect to the Applicants or cause reputational damage to Westpac; or
 - (b) any credit risk arising from lending to Storm's clients for the purpose of investment pursuant to the Storm Model, or Westpac acting contrary to law or suffering reputational damage arising out of Westpac lending to Storm's clients for the purpose of investment pursuant to the Storm Model;
- (5) in the premises pleaded at paragraph 37, was under the Implied Duty:
 - (a) to report and recommend to any Relevant Decision Maker that Westpac not lend to Storm-referred clients who were borrowing for the purposes of investing pursuant to the Storm Model, including in the case of the Applicants' Westpac Loans and the Group Home Loans;

- (b) to report and recommend to any Relevant Decision Maker that the Group Members, in respect of the Group Home Loans, be advised of the matters pleaded at paragraph 52(1);
- (c) to cause the Applicants' Westpac Loans to be declined and the Applicants to be advised of the matters pleaded at paragraph 35(1) and to report and recommend to any Relevant Decision Maker that the Applicants' Westpac Loans be declined and that the Applicants be advised of the matters pleaded at paragraph 35(1).

39. Ms Barrie, during the Relevant Period, had knowledge of:

- (1) the matters pleaded at paragraph 12 based upon the facts pleaded therein, and:
 - (a) the relevant knowledge is actual knowledge and is to be inferred from the matters pleaded at paragraph 12, and it is inferred that Ms Barrie read the documents referred to in that paragraph; or
 - (b) in the circumstances pleaded at paragraph 12, if Ms Barrie did not have actual knowledge, then:
 - (i) the matters pleaded at paragraph 39(1) above were there to be seen by Ms Barrie following receipt of the Applicants' Westpac Submission, and she must have read the Applicants' Westpac Submission and wilfully shut her eyes to such matters or wilfully shut her eyes to those matters, including by deliberately not reading the Applicants' Westpac Submission; or
 - (ii) in those circumstances Ms Barrie must have suspected the existence of the matters pleaded at paragraph 39(1) above, and Ms Barrie must have failed to make inquiries by reading the Applicants' Westpac Submission as to the existence of the matters pleaded at paragraph 39(1) above to remove her suspicions, and that was a wilful and reckless failure given the position of Ms Barrie (being a banker with the title Home Finance Manager and with the experience and responsibilities pleaded at paragraphs 40 and 91) ("**Ms Barrie's Position**"), and an honest and reasonable person in Ms Barrie's Position would have made such inquiries, and if Ms Barrie had made such inquiries the matters pleaded at paragraph 39(1) above would have been revealed to her; or
 - (iii) in those circumstances, Ms Barrie had knowledge that would have indicated the matters pleaded at paragraph 39(1) above to an honest and reasonable person in Ms Barrie's Position;

- (2) the matters pleaded at paragraphs 6-7 and the likelihood of: (a) representations to the effect of the Storm No Risk Representations and those pleaded at 75 to 77 being made, having continuing effect, and being relied upon in the case of the Applicants, as well as other Storm clients such as some or all of the Group Members, from the time made until at least the end of the Relevant Period; and (b) the Applicants, as well as other Storm clients such as some or all of the Group Members, desiring no or minimal risk for their investments or assets, which was reported to Storm and which was Ms Barrie's belief, and:
- (a) the relevant knowledge is actual knowledge. Ms Barrie was told the matters in paragraphs 6-7 in the Standard Bank Presentation and the Education Seminars, as pleaded at paragraph 91(4)(o). She was Storm's Westpac Representative and the Applicants rely upon the facts pleaded at paragraph 91 and the fact that she received read, and responded to many of Storm's clients' loan quotations and loan applications, to support the inference that she was aware of the Storm Model and the matters pleaded at paragraphs 6-7. She was aware the Applicants were Storm clients and, hence, they would likely have the standard risk profile, which they likely reported to Storm, and they would likely have received Storm's standard advice; or
- (b) in the circumstances pleaded at paragraphs 6-7 and 91, if Ms Barrie did not have actual knowledge, then:
- (i) the matters pleaded at paragraph 39(2) above were there to be seen by Ms Barrie following her receiving information in the Standard Bank Presentation and the Education Seminars, receiving many of Storm's clients' loan quotations and loan applications, and receiving information that the Applicants were Storm clients, and she must have read those loan quotations and loan applications and wilfully shut her eyes to those matters or wilfully shut her eyes to those matters, including by deliberately not reading those loan quotations and loan applications; or
- (ii) in those circumstance Ms Barrie must have suspected the existence of the matters pleaded at paragraph 39(2) above, and Ms Barrie must have failed to make inquiries with the Storm representatives or the Applicants or other Storm clients such as some or all of the Group Members as to the existence of the matters pleaded at paragraph 39(2) above to remove her suspicions, and that was a wilful and reckless failure given Ms Barrie's Position, and an honest and reasonable person in Ms Barrie's Position would have made such inquiries, and if Ms Barrie had made such inquiries the matters pleaded at paragraph 39(2) above would have been revealed to her; or

- (iii) in those circumstances, Ms Barrie had knowledge that would have indicated the matters pleaded at paragraph 39(2) above to an honest and reasonable person in Ms Barrie's Position;
- (3) the likelihood of the Applicants making investments and loans as pleaded at paragraphs 17, 25 and 30-32 because they were Storm clients and such investments were consistent with the Financial Profile and the Storm Model, and the Applicants repeat the matters in the sub-paragraphs above as to Ms Barrie's knowledge of the Applicants' circumstances and the Storm Model;
- (4) the matters pleaded at paragraphs 8, 9, 33 and 34 and that Storm clients, such as the Group Members, including some or all of the Group Members known to her at the time, and the Applicants, faced the Risks and the Applicants' Risks, and:
 - (a) Ms Barrie was told the matters in paragraph 8 in the Standard Bank Presentation and the Education Seminars, as pleaded at paragraph 91(4)(o). She was Storm's Westpac Representative and the Applicants rely upon the facts pleaded at paragraph 91 and the fact that she received, read, and responded to many Storm clients and Group Members' loan quotations and loan applications, to support the inference that she was aware of the Storm Model, and the matters pleaded at paragraph 8. The Applicants repeat Ms Barrie's knowledge of the matters pleaded above, including of the Financial Profile and the intended investments and loans, along with knowledge that the Applicants (and other Storm clients) were relying upon returns from the Storm investments to service the loans (together with each of the matters set out in this sub-paragraph, the "**Barrie Matters**"), and the Applicants say that the Barrie Matters give rise to a natural inference that a banker in Ms Barrie's Position would have actual knowledge that Storm clients including the Applicants faced the Risks and the Applicants' Risks in that:
 - (i) the Financial Profile (which she read) allowed for an anticipated return of \$200,000 from the Storm investments, as pleaded at paragraph 12;
 - (ii) she had previously received and read other financial profiles and loan applications from other Storm-referred clients which sought to rely upon investment returns for servicing the loans, as pleaded in paragraph 91;
 - (iii) she participated in negotiations with Storm about the extent to which returns from Storm investments would be taken into account for loan servicing purposes, as pleaded in paragraph 91;

- (iv) it can be inferred from the above that Ms Barrie would have considered the reliability of such returns based on previous performance of the sharemarket and reasonable forecasts of the future performance of the sharemarket;
 - (v) the Previous History of the sharemarket and financial market; and
 - (vi) such Previous History was well known at the time of the Applicants' Loan Applications and the Group Home Loans as it was commonly reported in the press, in the media, and in the public domain generally, and it can be inferred such previous performance would be the subject of reporting to or consideration by a banker in the position of Ms Barrie who was required to consider the reliability of investment returns for the servicing of bank loans; or
- (b) in the alternative to (a), in the circumstances of the Barrie Matters, if Ms Barrie did not have actual knowledge that Storm clients including the Applicants faced the Risks and the Applicants' Risks, then:
- (i) the matters pleaded at 39(4) above were there to be seen by Ms Barrie following her receiving information in the Standard Bank Presentation and Education Seminars, receiving many Storm clients and Group Members' loan quotations and loan applications, receiving the Applicants' Westpac Submission including the Financial Profile, receiving information that the Applicants (and other Storm clients) were relying upon the returns from the Storm investments to service the loans, receiving information in the circumstances pleaded at paragraph 91, and receiving information and reports about the Previous History, and she must have read those documents and wilfully shut her eyes to those matters or wilfully shut her eyes to those matters by deliberately not reading those documents;
 - (ii) in those circumstances Ms Barrie must have suspected the existence of the matters pleaded at paragraph 39(4) above, and Ms Barrie must have failed to make inquiries as to the existence of the matters pleaded at paragraph 39(4) above with the Storm representatives or the Applicants or other Storm clients such as some or all of the Group Members or by reading the Applicants' Westpac Submission including the Financial Profile or by reading or listening to reports regarding the Previous History to remove her suspicions, and that was a wilful and reckless failure given Ms Barrie's Position, and an honest and reasonable person in Ms Barrie's Position would have

made such inquiries, and if Ms Barrie had made such inquiries the matters pleaded at paragraph 39(4) would have been revealed to her; or

- (iii) in those circumstances, Ms Barrie had knowledge that would have indicated the matters pleaded at paragraph 39(4) to an honest and reasonable person in Ms Barrie's Position;
- (5) the matters pleaded at paragraphs 9, 10, 73 and 79 and that Storm's advice to the Applicants and other Storm clients, such as the Group Members, including some or all of the Group Members known to her at the time, likely, was not appropriate to their personal circumstances, and Storm's advice as to the risks involved was not correct, reasonable or appropriate, and that such advice would have a continuing effect on such persons after it was first made until at least the end of the Relevant Period, which was Ms Barrie's belief, and:
- (a) knowledge of the Storm Model and the underlying facts as to the Applicants' personal circumstances as revealed in the Financial Profile (which she read), and the personal circumstances for many Storm clients and some or all of the Group Members as revealed in their loan quotations and loan applications (which she read), including that the Applicants and other Storm clients, including the Group Members, likely advised Storm that they did not want to risk the assets they owned, combined with knowledge that the Risks and the Applicants' Risks applied to the Applicants' and Storm clients' intended investments and loans, as pleaded in 39(5) above, meant Ms Barrie had actual knowledge that Storm's advice as to the risks was wrong; or
 - (b) in circumstances where Ms Barrie had knowledge of the Storm Model and the underlying facts as to the Applicants' personal circumstances as revealed in the Financial Profile, and the personal circumstances for many Storm clients and some or all of the Group Members as revealed in their loan quotations and loan applications, including that the Applicants and other Storm clients, including the Group Members, likely advised Storm that they did not want to risk the assets they owned, as well as knowledge that the Risks and the Applicants' Risks applied to the Applicants' and Storm clients' intended investments and loans, as pleaded in 39(5) above, then if Ms Barrie did not have actual knowledge that Storm's advice as to the risks was wrong, then:
 - (i) the matters pleaded at paragraphs 39(5) above were there to be seen by Ms Barrie following her receiving information about the Storm Model, receiving the Financial Profile, receiving loan quotations and loan applications for many Storm clients, and receiving information that the Risks and the Applicants' Risks applied to the

Applicants and Storm clients' intended investments and loans, and she must have read those documents and wilfully shut her eyes to those matters, or wilfully shut her eyes to those matters including by deliberately not reading those documents; or

- (ii) in those circumstances Ms Barrie must have suspected the existence of the matters pleaded at paragraph 39(5) above, and Ms Barrie must have failed to make inquiries as to the existence of the matters pleaded at paragraph 39(5) above with the Storm representatives or the Applicants or other Storm clients such as some or all of the Group Members or by reading the Financial Profile or by reading the loan quotations and loan applications for other Storm clients or by reading or listening to reports regarding the Previous History to remove her suspicions, and that was a wilful and reckless failure given Ms Barrie's Position, and an honest and reasonable person in Ms Barrie's Position would have made such inquiries, and if Ms Barrie had made such inquiries the matters pleaded at 39(5) above would have been revealed to her; or
 - (iii) in those circumstances, Ms Barrie had knowledge that would have indicated the matters pleaded at paragraph 39(5) above to an honest and reasonable person in Ms Barrie's Position;
- (6) the likelihood that Storm, in its advice to the Applicants and to other Storm clients, such as the Group Members, including some or all of the Group Members known to her at the time, was acting contrary to its legal obligations, and:
- (a) the Applicants repeat the matters pleaded at paragraph 39(5) above regarding Ms Barrie's knowledge that the Storm advice to the Applicants and to other Storm clients, such as the Group Members, was incorrect, unreasonable or inappropriate advice as pleaded above, and the Applicants say that it may be naturally inferred from such matters that a person in Ms Barrie's Position had actual knowledge that Storm was under a legal obligation not to provide advice to its clients, particularly as to the risks flowing from its recommended investments, that was incorrect, unreasonable or inappropriate; or
 - (b) if as a result of the matters pleaded at paragraph 39(5) above Ms Barrie did not have actual knowledge that Storm was under a legal obligation not to provide advice to its clients, particularly as to the risks flowing from its recommended investments, that was incorrect, unreasonable or inappropriate, then:

- (i) the matters pleaded at paragraph 39(6) above were there to be seen by Ms Barrie following her receiving information about the Storm Model, receiving the Financial Profile, receiving loan quotations and loan applications for many Storm clients, and receiving information that the Risks and the Applicants' Risks applied to the Applicants and Storm clients' intended investments and loans, and she must have read those documents and wilfully shut her eyes to those matters, or wilfully shut her eyes to those matters including by deliberately not reading those documents; or
 - (ii) in those circumstances Ms Barrie must have suspected the existence of the matters pleaded at paragraph 39(6) above, and Ms Barrie must have failed to make inquiries as to the existence of the matters pleaded at paragraph 39(6) above with the Storm representatives or the Applicants or other Storm clients such as some or all of the Group Members or by reading the Financial Profile or by reading the loan quotations and loan applications for other Storm clients or by reading or listening to reports regarding the Previous History to remove her suspicions, and that was a wilful and reckless failure given Ms Barrie's Position, and an honest and reasonable person in Ms Barrie's Position would have made such inquiries, and if Ms Barrie had made such inquiries the matters pleaded at paragraph 39(6) above would have been revealed to her; or
 - (iii) by reason of those matters, Ms Barrie had knowledge that would have indicated the matters pleaded at paragraph 39(6) above to an honest and reasonable person in Ms Barrie's Position; and
- (7) Westpac had a policy of encouraging and facilitating the referral of Storm clients to Westpac for loans. Westpac lent money to Storm clients, such as the Applicants and the Group Members, following referral from Storm, and the providing of such loans assisted Storm in effecting its incorrect, inappropriate and unreasonable advice as pleaded above, which may have meant that Westpac could have been acting contrary to law or that it could have suffered reputational damage; and:
 - (a) the relevant knowledge is actual knowledge and is to be inferred from the matters pleaded at paragraph 91; or
 - (b) in the circumstances pleaded at paragraph 91, if Ms Barrie did not have actual knowledge, then:
 - (i) the matters pleaded at paragraph 39(7) above were there to be seen by Ms Barrie in the circumstances pleaded at

paragraph 91, and she must have wilfully shut her eyes to such matters; or

- (ii) in those circumstances Ms Barrie must have suspected the existence of the matters pleaded at paragraph 39(7) above, and Ms Barrie must have failed to make inquiries with the Storm representatives or the Applicants or other Storm clients such as some or all of the Group Members as to the existence of the matters pleaded at paragraph 39(7) above to remove her suspicions, and that was a wilful and reckless failure given Ms Barrie's Position, and an honest and reasonable person in Ms Barrie's Position would have made such inquiries, and if Ms Barrie had made such inquiries the matters pleaded at paragraph 39(7) above would have been revealed to her; or
- (iii) in those circumstances, Ms Barrie had knowledge that would have indicated the matters pleaded at paragraph 39(7) above to an honest and reasonable person in Ms Barrie's Position.

40. Ms Barrie's knowledge pleaded above is to be attributed to Westpac in respect of the Applicants' Westpac Loans and the Group Home Loans because she:

- (1) was Westpac's agent with the title, Home Finance Manager;
- (2) had the following functions, duties and responsibilities:
 - (a) being the point of contact for customers with respect to home and property loans, which included:
 - (i) advising customers as to Westpac's home and property loans including the bank's products, policies and services with respect to such loans;
 - (ii) implementing the bank's policies with respect to home and property loans, including by advising customers of such policies and the unavailability of loans if contrary to such policies;
 - (iii) receiving, reading, and responding to customers' loan applications and declining such applications if contrary to bank policy;
 - (iv) reporting and making recommendations to credit officers responsible for making decisions on such customer's loan applications;

Particulars pursuant to Rule 16.43

To be inferred from her title and the matters pleaded at paragraph 91.

- (b) acted as Storm's Westpac Representative (as defined at paragraph 91) which included:
 - (i) attending the Standard Bank Presentation and Education Seminars;
 - (ii) negotiating with Storm over Storm's request for Concessions and Westpac's policy towards Storm-referred loans;
 - (iii) reporting and making recommendations to any Relevant Decision Maker about what Westpac's policy should be towards Storm-referred loans and the risks to Westpac involved in making such loans or granting the Concessions;
 - (iv) receiving, reading, and responding to Storm-referred loan quotations and loan applications and declining such quotations and applications if contrary to bank policy;
 - (v) reporting and making recommendations to credit officers responsible for making decisions on such customer's loan applications;

Particulars pursuant to Rule 16.43

The Applicants repeat the matters pleaded at paragraph 91.

- (3) acquired the knowledge pleaded above in the course of her duties as Storm's Westpac Representative, including for the Purpose as pleaded at paragraph 91;
- (4) received the Applicants' Westpac Submission in the course of her duties as Storm's Westpac Representative;
- (5) had an Implied Duty to make reasonable enquiries and report to any Relevant Decision Maker any knowledge or concerns she may have had about:
 - (a) the referral relationship between Storm and Westpac, the Storm Model, any credit risk arising from Storm-referred loans, or Westpac acting contrary to law or suffering reputational damage arising out of the relationship between Storm and Westpac; or
 - (b) any credit risk arising out of granting any loan as set out in the Applicants' loan quotation, or Westpac acting contrary to law or suffering reputational damage arising out of granting a loan as requested; and
- (6) in the premises pleaded at paragraph 39, had an Implied Duty:
 - (a) to report and recommend to any Relevant Decision Maker that Westpac not lend to Storm-referred clients who were borrowing

for the purposes of investing pursuant to the Storm Model, including in the case of the Applicants' Westpac Loans and the Group Home Loans;

- (b) to report and recommend to any Relevant Decision Maker that the Group Members, in respect of the Group Home Loans, be advised of the matters pleaded at paragraph 52(1); and
- (c) to cause the Applicants' loan quotation to be declined and the Applicants to be advised of the matters pleaded at paragraph 35(1) (other than in respect of the Kelk Advice) and to report and recommend to any Relevant Decision Maker that the Applicants' loan quotation and Westpac Loans (if applied for) be declined and that the Applicants be advised of the matters pleaded at paragraph 35(1) (other than in respect of the Kelk Advice).

41. Mr MacDonald, during the Relevant Period, had knowledge of:

- (1) the matters pleaded at paragraph 12, based upon the facts pleaded at paragraph 13, and:
 - (a) the relevant knowledge is actual knowledge and is to be inferred from the matters pleaded at paragraphs 12 and 13 and it is inferred that Mr MacDonald read the documents referred to in those paragraphs; or
 - (b) in the circumstances pleaded at paragraphs 12 and 13, if Mr MacDonald did not have actual knowledge, then:
 - (i) the matters pleaded at paragraph 41(1) above were there to be seen by Mr MacDonald following receipt of the Applicants' Westpac Submission, and he must have read that document and wilfully shut his eyes to such matters or wilfully shut his eyes to those matters, including by deliberately not reading that document; or
 - (ii) in those circumstances Mr MacDonald must have suspected the existence of the matters pleaded at paragraph 41(1) above, and Mr MacDonald must have failed to make inquiries by reading the Applicants' Westpac Submission as to the existence of the matters pleaded at paragraph 41(1) above to remove his suspicions, and that was a wilful and reckless failure given the position of Mr MacDonald (being a banker with the title Home Finance Manager and with the experience and responsibilities pleaded at paragraphs 42 and 91) ("**Mr MacDonald's Position**"), and an honest and reasonable person in Mr MacDonald's Position would have made such inquiries, and if Mr MacDonald had made such inquiries the matters pleaded at paragraph 41(1) above would have been revealed to him; or

- (iii) in those circumstances, Mr MacDonald had knowledge that would have indicated the matters pleaded at paragraph 41(1) above to an honest and reasonable person in Mr MacDonald's Position;
- (2) the matters pleaded at paragraphs 6-7 and the likelihood of: (a) representations to the effect of the Storm No Risk Representations and those pleaded at paragraphs 75 to 77 being made, having a continuing effect, and being relied upon in the case of the Applicants, as well as other Storm clients such as some or all of the Group Members, from the time made until at least the end of the Relevant Period; and (b) the Applicants, as well as other Storm clients, such as some or all of the Group Members, desiring no or minimal risk for their investments or assets, which was reported to Storm and which was Mr MacDonald's belief, and:
 - (a) the relevant knowledge is actual knowledge. Mr MacDonald was told the matters in paragraphs 6-7 in the Standard Bank Presentation and the Education Seminars, as pleaded at paragraph 91(4)(k). He was Storm's Westpac Representative and the Applicants rely upon the facts pleaded at paragraph 91 and the fact that he received, read, and responded to many Storm clients' loan quotations and loan applications, to support the inference that he was aware of the Storm Model and the matters pleaded at paragraphs 6-7. He was aware the Applicants were Storm clients and, hence, they would likely have the standard risk profile, which they likely reported to Storm, and they would likely have received Storm's standard advice; or
 - (b) in the circumstances pleaded at paragraphs 6-7 and 91, if Mr MacDonald did not have actual knowledge, then:
 - (i) the matters pleaded at paragraph 41(2) above were there to be seen by Mr MacDonald following him receiving information in the Standard Bank Presentation and the Education Seminars, receiving many of Storm's clients' loan quotations and loan applications, and receiving information that the Applicants were Storm clients, and he must have read those documents and wilfully shut his eyes to those matters or wilfully shut his eyes to those matters, including by deliberately not reading those documents; or
 - (ii) in those circumstances Mr MacDonald must have suspected the existence of the matters pleaded at paragraph 41(2) above, and Mr MacDonald must have failed to make inquiries with the Storm representatives or the Applicants or other Storm clients such as some or all of the Group Members as to the existence of the matters pleaded at paragraph 41(2) above to remove his suspicions, and that was a wilful and reckless failure given Mr

MacDonald's Position, and an honest and reasonable person in Mr MacDonald's Position would have made such inquiries, and if Mr MacDonald had made such inquiries the matters pleaded at paragraph 41(2) above would have been revealed to him; or

- (iii) in those circumstances, Mr MacDonald had knowledge that would have indicated the matters pleaded at paragraph 41(2) above to an honest and reasonable person in Mr MacDonald's Position;
- (3) the likelihood of the Applicants making investments and loans, as pleaded at paragraphs 17, 25 and 30-32, because they were Storm clients and such investments were consistent with the Storm Model and the Financial Profile, and the Applicants repeat the matters in the sub-paragraphs above as to Mr MacDonald's knowledge of the Applicants' circumstances and the Storm Model;
- (4) the matters pleaded at paragraphs 8, 9, 33 and 34 and that Storm clients, such as the Group Members, including some or all of the Group Members known to him at the time, and the Applicants, faced the Risks and the Applicants' Risks, and:
- (a) Mr MacDonald was told the matters in paragraph 8 in the Standard Bank Presentation and the Education Seminars, as pleaded at paragraph 91(4)(k). He was Storm's Westpac Representative and the Applicants rely upon the facts pleaded at paragraph 91 and the fact that he received, read, and responded to many Storm clients' and Group Members' loan quotations and loan applications to support the inference that he was aware of the Storm Model and the matters pleaded at paragraph 8. The Applicants repeat Mr MacDonald's knowledge of the matters pleaded above, including of the Financial Profile and the intended investments and loans, along with knowledge that the Applicants (and other Storm clients) were relying upon returns from the Storm investments to service the loans (together with each of the other matters set out in this sub-paragraph, the "**MacDonald Matters**"). The Applicants say that the MacDonald Matters give rise to a natural inference that a banker in Mr MacDonald's Position would have actual knowledge that Storm clients including the Applicants faced the Risks and the Applicants' Risks in that:
 - (i) the Financial Profile, which Mr MacDonald read, allowed for an anticipated return of \$200,000 from the Storm investments, as pleaded at paragraphs 12 and 13;
 - (ii) he had previously received and read other financial profiles and loan applications from other Storm-referred clients which sought to rely upon investment returns for servicing the loans, as pleaded in paragraph 91;

- (iii) he participated in negotiations with Storm about the extent to which returns from Storm investments would be taken into account for loan servicing purposes, as pleaded in paragraph 91;
 - (iv) it can be inferred from the above that Mr MacDonald would have considered the reliability of such estimates of investment returns based on previous performance of the sharemarket and reasonable forecasts of the future performance of the sharemarket;
 - (v) the Previous History of the sharemarket and financial market; and
 - (vi) such Previous History was well known at the time of the Applicants' Loan Applications and the loans of the Group Members as it was commonly reported in the press, in the media, and in the public domain generally, and it can be inferred that such previous performance would be the subject of reporting to or consideration by a banker in the position of Mr MacDonald who was required to consider the reliability of investment returns for the servicing of bank loans; or
- (b) in the alternative to (a), in the circumstances of the MacDonald Matters, if Mr MacDonald did not have actual knowledge that Storm clients including the Applicants faced the Risks and the Applicants' Risks, then:
- (i) the matters pleaded at 41(4) above were there to be seen by Mr MacDonald following him receiving information in the Standard Bank Presentation and Education Seminars, receiving many Storm clients and Group Members' loan quotations and loan applications, receiving the Applicants' Westpac Submission including the Financial Profile, receiving information that the Applicants (and other Storm clients) were relying upon the returns from the Storm investments to service the loans, receiving information in the circumstances pleaded at paragraph 91, and receiving information and reports about the Previous History, and he must have read those documents and wilfully shut his eyes to those matters or wilfully shut his eyes to those matters by deliberately not reading those documents;
 - (ii) in those circumstances Mr MacDonald must have suspected the existence of the matters pleaded at paragraph 41(4) above, and Mr MacDonald must have failed to make inquiries as to the existence of the matters pleaded at paragraph 41(4) above with the Storm representatives or the Applicants or other Storm clients such as some or

all of the Group Members or by reading the Applicants' Westpac Submission including the Financial Profile or by reading or listening to reports regarding the Previous History to remove his suspicions, and that was a wilful and reckless failure given Mr MacDonald's Position, and an honest and reasonable person in Mr MacDonald's Position would have made such inquiries, and if Mr MacDonald had made such inquiries the matters pleaded at paragraph 41(4) above would have been revealed to him; or

- (iii) in those circumstances, Mr MacDonald had knowledge that would have indicated the matters pleaded at paragraph 41(4) above to an honest and reasonable person in Mr MacDonald's Position;
- (5) the matters pleaded at paragraphs 9, 10, 73 and 79 and that Storm's advice to the Applicants and other Storm clients, such as the Group Members, likely, was not appropriate to their personal circumstances, and Storm's advice as to the risks involved was not correct, reasonable or appropriate, and that such advice would have a continuing effect on such persons after it was first made until at least the end of the Relevant Period, which was Mr MacDonald's belief, and:
- (a) knowledge of the Storm Model and the underlying facts as to the Applicants' personal circumstances revealed in the Financial Profile (which he read), and the personal circumstances from many Storm clients and some or all of the Group Members as revealed in their loan quotations and loan applications (which he read), including that the Applicants and other Storm clients, including the Group Members, likely advised Storm that they did not want to risk the assets they owned, combined with knowledge that the Risks and the Applicants' Risks applied to the Applicants' and Storm clients' intended investments and loans, as pleaded in 41(5) above, meant Mr MacDonald had actual knowledge that Storm's advice as to the risks was wrong; or
 - (b) in circumstances where Mr MacDonald had knowledge of the Storm Model and the underlying facts as to the Applicants' personal circumstances as revealed in the Financial Profile, and the personal circumstances for many Storm clients and some or all of the Group Members as revealed in their loan quotations and loan applications, including that the Applicants and other Storm clients, including the Group Members, likely advised Storm that they did not want to risk the assets they owned, as well as knowledge that the Risks and the Applicants' Risks applied to the Applicants' and Storm clients' intended investments and loans, as pleaded in 41(5) above, then if Mr MacDonald did not have actual knowledge that Storm's advice as to the risks was wrong, then:

- (i) the matters pleaded at paragraphs 41(5) above were there to be seen by Mr MacDonald following him receiving information about the Storm Model, receiving the Financial Profile, receiving loan quotations and loan applications for many Storm clients, and receiving information that the Risks and the Applicants' Risks applied to the Applicants and Storm clients' intended investments and loans, and he must have read those documents and wilfully shut his eyes to those matters or wilfully shut his eyes to those matters, including by deliberately not reading those documents; or
 - (ii) in those circumstances Mr MacDonald must have suspected the existence of the matters pleaded at paragraph 41(5) above, and Mr MacDonald must have failed to make inquiries as to the existence of the matters pleaded at paragraph 41(5) above with the Storm representatives or the Applicants or other Storm clients such as some or all of the Group Members or by reading the Financial Profile or by reading the loan quotations and loan applications for other Storm clients or by reading or listening to reports regarding the Previous History to remove his suspicions, and that was a wilful and reckless failure given Mr MacDonald's Position, and an honest and reasonable person in Mr MacDonald's Position would have made such inquiries, and if Mr MacDonald had made such inquiries the matters pleaded at 41(5) above would have been revealed to him; or
 - (iii) in those circumstances, Mr MacDonald had knowledge that would have indicated the matters pleaded at paragraph 41(5) above to an honest and reasonable person in Mr MacDonald's Position;
- (6) the likelihood that Storm in its advice to the Applicants and to many other Storm clients, such as some or all of the Group Members, was acting contrary to its legal obligations, and:
- (a) the Applicants repeat the matters pleaded at paragraph 41(5) above regarding Mr MacDonald's knowledge that the Storm advice to the Applicants and to other Storm clients, such as the Group Members, was incorrect, unreasonable or inappropriate advice, and the Applicants say that it may be naturally inferred from such matters that a person in Mr MacDonald's Position had actual knowledge that Storm was under a legal obligation not to provide advice to its clients, particularly as to the risks flowing from its recommended investments, that was incorrect, unreasonable or inappropriate; or
 - (b) if as a result of the matters pleaded at paragraph 41(5) above Mr MacDonald did not have actual knowledge that Storm was un-

der a legal obligation not to provide advice to its clients, particularly as to the risks flowing from its recommended investments, that was incorrect, unreasonable or inappropriate, then:

- (i) the matters pleaded at paragraph 41(6) above were there to be seen by Mr MacDonald following him receiving information about the Storm Model, receiving the Financial Profile, receiving loan quotations and loan applications for many Storm clients, and receiving information that the Risks and the Applicants' Risks applied to the Applicants and Storm clients' intended investments and loans, and he must have read those documents and wilfully shut his eyes to those matters or wilfully shut his eyes to those matters, including by deliberately not reading those documents; or
 - (ii) in those circumstances Mr MacDonald must have suspected the existence of the matters pleaded at paragraph 41(6) above, and Mr MacDonald must have failed to make inquiries as to the existence of the matters pleaded at paragraph 41(6) above with the Storm representatives or the Applicants or other Storm clients such as some or all of the Group Members or by reading the Financial Profile or by reading the loan quotations and loan applications for other Storm clients or by reading or listening to reports regarding the Previous History to remove his suspicions, and that was a wilful and reckless failure given Mr MacDonald's Position, and an honest and reasonable person in Mr MacDonald's Position would have made such inquiries, and if Mr MacDonald had made such inquiries the matters pleaded at paragraph 41(6) above would have been revealed to him; or
 - (iii) by reason of those matters, Mr MacDonald had knowledge that would have indicated the matters pleaded at paragraph 41(6) above to an honest and reasonable person in Mr MacDonald's Position; and
- (7) Westpac had a policy of encouraging and facilitating the referral of Storm clients to Westpac for loans. Westpac lent money to Storm clients, such as the Applicants and Group Members, following referral from Storm, and the providing of such loans assisted Storm in effecting its incorrect, unreasonable or inappropriate advice, as pleaded above, which may have meant that Westpac could have been acting contrary to law or could have suffered reputational damage, and:
- (a) the relevant knowledge is actual knowledge and is to be inferred from the matters pleaded at paragraph 91; or
 - (b) in the circumstances pleaded at paragraph 91, if Mr MacDonald did not have actual knowledge, then:

- (i) the matters pleaded at paragraph 41(7) above were there to be seen by Mr MacDonald in the circumstances pleaded at paragraph 91, and he must have wilfully shut his eyes to such matters; or
 - (ii) in those circumstances Mr MacDonald must have suspected the existence of the matters pleaded at paragraph 41(7) above, and Mr MacDonald must have failed to make inquiries with the Storm representatives or the Applicants or other Storm clients such as some or all of the Group Members as to the existence of the matters pleaded at paragraph 41(7) above to remove his suspicions, and that was a wilful and reckless failure given Mr MacDonald's Position, and an honest and reasonable person in Mr MacDonald's Position would have made such inquiries, and if Mr MacDonald had made such inquiries the matters pleaded at paragraph 41(7) above would have been revealed to him; or
 - (iii) in those circumstances, Mr MacDonald had knowledge that would have indicated the matters pleaded at paragraph 41(7) above to an honest and reasonable person in Mr MacDonald's Position.
42. Mr MacDonald's knowledge pleaded above is to be attributed to Westpac in respect of the Applicants' Westpac Loans and the Group Home Loans because he:
- (1) was Westpac's agent with the title, Home Finance Manager and later was responsible for business banking customers throughout Queensland, as pleaded at paragraph 91;
 - (2) had the following functions, duties and responsibilities:
 - (a) being the point of contact for customers with respect to home and property loans and, later, customers who wished to apply for finance in a business name or to use a commercial or rural property as security for a loan, which included:
 - (i) advising such customers as to Westpac's home and property loans and business loans, including the bank's products, policies and services with respect to such loans;
 - (ii) implementing the bank's policies with respect to such loans, including by advising customers of such policies and the unavailability of loans if contrary to such policies;
 - (iii) receiving, reading, and responding to customers' loan applications and declining such applications if contrary to bank policy;

- (iv) reporting and making recommendations to credit officers responsible for making decisions on such customers' loan applications;

Particulars pursuant to Rule 16.43

To be inferred from his title and the matters pleaded at paragraph 91.

- (b) acting as Storm's Westpac Representative (as defined at paragraph 91), which included:
 - (i) attending the Standard Bank Presentation and Education Seminars;
 - (ii) negotiating with Storm over Storm's request for Concessions and Westpac's policy towards Storm-referred loans;
 - (iii) reporting and making recommendations to any Relevant Decision Maker about what Westpac's policy should be towards Storm-referred loans and the risks to Westpac involved in making such loans or granting the Concessions;
 - (iv) receiving, reading, and responding to Storm-referred loan quotations and loan applications, and declining such quotations and applications if contrary to bank policy;
 - (v) reporting and making recommendations to credit officers responsible for making decisions on such customer's loan applications;

Particulars pursuant to Rule 16.43

The Applicants repeat the matters pleaded at paragraph 91.

- (3) acquired the knowledge pleaded above in the course of his duties as Storm's Westpac Representative and for the Purpose as pleaded at paragraph 91;
- (4) received the Applicants' Westpac Submission and issued a quotation in the course of his duties for Westpac;
- (5) had an Implied Duty to make reasonable enquiries and report to any Relevant Decision Maker any knowledge or concerns he may have had about:
 - (a) the referral relationship between Storm and Westpac; the Storm Model; any credit risk arising from Storm-referred loans; or Westpac acting contrary to law or suffering reputational damage arising out of the relationship between Storm and Westpac; or

- (b) any credit risk arising out of granting any loan as set out in the Applicants' loan quotation; or Westpac acting contrary to law or suffering reputational damage arising out of granting a loan as requested;
- (6) in the premises pleaded at paragraph 41, had an Implied Duty:
- (a) to report and recommend to any Relevant Decision Maker that Westpac not lend to Storm-referred clients who were borrowing for the purposes of investing pursuant to the Storm Model, including in the case of the Group Home Loans;
 - (b) to report and recommend to any Relevant Decision Maker that the Group Members, in respect of the Group Home Loans, be advised of the matters pleaded at paragraph 52(1); and
 - (c) to cause the Applicants' loan quotation to be declined and the Applicants to be advised of the matters pleaded at paragraph 35(1) (other than in respect of the Kelk Advice) and to report and recommend to any Relevant Decision Maker that the Applicants' loan quotation and Westpac Loans (if applied for) be declined and that the Applicants be advised of the matters pleaded at paragraph 35(1) (other than in respect of the Kelk Advice).
43. Ms Jude, during the Relevant Period, had knowledge of:
- (1) the matters pleaded at paragraphs 6-7 and the likelihood of: (a) representations to the effect of the Storm No Risk Representations and those pleaded at 75 to 77 being made, having a continuing effect, and being relied upon in the case of Storm clients, such as the Applicants and the Group Members; and (b) Storm clients, such as the Applicants and Group Members, desiring no or minimal risk for their investments or assets, which was reported to Storm and which was Ms Jude's belief, and:
 - (a) the relevant knowledge is actual knowledge. Ms Jude was told the matters in paragraphs 6-7 in the Standard Bank Presentation and the Education Seminars, as pleaded at paragraph 91(4)(o). She was Storm's Westpac Representative and the Applicants rely upon the facts pleaded at paragraph 91 to support the inference that she was aware of the Storm Model and the matters pleaded at paragraphs 6-7; or
 - (b) in the circumstances pleaded at paragraphs 6-7 and 91, if Ms Jude did not have actual knowledge, then:
 - (i) the matters pleaded at paragraph 43(1) above were there to be seen by Ms Jude following her receiving information in the Standard Bank Presentation and the Education Seminars, and she must have wilfully shut her eyes to those matters; or

- (ii) in those circumstances Ms Jude must have suspected the existence of the matters pleaded at paragraph 43(1) above, and Ms Jude must have failed to make inquiries with the Storm representatives or Storm clients (such as some or all of the Group Members) as to the existence of the matters pleaded at paragraph 43(1) above, and that was a wilful and reckless failure given the position of Ms Jude (being a banker with the title Regional Manager, Home Finance, North and Far North Queensland, and with the experience and responsibilities pleaded at paragraphs 44 and 91) (“**Ms Jude’s Position**”), and an honest and reasonable person in Ms Jude’s Position would have made such inquiries, and if Ms Jude had made such inquiries the matters pleaded at paragraph 43(1) above would have been revealed to her; or
 - (iii) in those circumstances, Ms Jude had knowledge that would have indicated the matters pleaded at paragraph 43(1) above to an honest and reasonable person in Ms Jude’s Position;
- (2) the matters pleaded at paragraphs 8 and 9, and that Storm clients, such as the Group Members, including some or all of the Group Members known to her at the time, and the Applicants, faced the Risks and the Applicants’ Risks, and:
 - (a) Ms Jude was told the matters in paragraph 8 in the Standard Bank Presentation and the Education Seminars, as pleaded at paragraph 91(4)(o). She was Storm’s Westpac Representative and the Applicants rely upon the facts pleaded at paragraph 91 to support the inference that she was aware of the Storm Model and the matters pleaded at paragraph 8. The Applicants repeat Ms Jude’s knowledge of the matters pleaded in paragraph 8 above, along with knowledge that the Applicants (and other Storm clients) were relying upon returns from the Storm investments to service the loans (together with each of the matters set out in this sub-paragraph, the “**Jude Matters**”), and the Applicants say that the Jude Matters give rise to a natural inference that a banker in Ms Jude’s Position would have actual knowledge that Storm clients and the Applicants faced the Risks and the Applicants’ Risks, in that:
 - (i) she had previously received and read other financial profiles and loan applications from other Storm-referred clients which sought to rely upon investment returns for servicing the loans, as pleaded in paragraph 91;
 - (ii) she participated in negotiations with Storm about the extent to which returns from Storm investments would be taken into account for loan servicing purposes, as pleaded in paragraph 91;

- (iii) it can be inferred from the above that Ms Jude would have considered the reliability of such returns based on previous performance of the sharemarket and reasonable forecasts of the future performance of the sharemarket;
 - (iv) the Previous History of the sharemarket and financial market; and
 - (v) such Previous History was well known at the time of the Applicants' Loan Applications and the loans of the Group Members as it was commonly reported in the press, in the media, and in the public domain generally, and it can be inferred such previous performance would be the subject of reporting to or consideration by a banker in the position of Ms Jude, who was required to consider the reliability of investment returns for the servicing of bank loans; or
- (b) in the alternative to (a), in the circumstances of the Jude Matters, if Ms Jude did not have actual knowledge that Storm clients including the Applicants faced the Risks and the Applicants' Risks, then:
- (i) the matters pleaded at paragraph 43(2) above were there to be seen by Ms Jude following her receiving information in the Standard Bank Presentation and Education Seminars, receiving information that the Storm clients were relying upon the returns from the Storm investments to service the loans, receiving information in the circumstances pleaded at paragraph 91, and receiving information and reports about the Previous History, and she must have wilfully shut her eyes to those matters; or
 - (ii) in those circumstances Ms Jude must have suspected the matters pleaded at paragraph 43(2) above, and Ms Jude must have failed to make inquiries as to the existence of the matters pleaded at paragraph 43(2) above with Storm representatives or Storm clients (such as some or all of the Group Members) or by reading or listening to reports regarding the Previous History, and that was a wilful and reckless failure given Ms Jude's Position, and an honest and reasonable person in Ms Jude's Position would have made such inquiries, and if Ms Jude had made such inquiries the matters pleaded at paragraph 43(2) above would have been revealed to her; or
 - (iii) in those circumstances, Ms Jude had knowledge that would have indicated the matters pleaded at paragraph 43(2) above to an honest and reasonable person in Ms Jude's Position;

- (3) the matters pleaded at paragraphs 9 and 10 and that Storm's standard advice to its clients, such as to the Applicants and Group Members, likely, was not appropriate to their personal circumstances, and Storm's advice as to the risks involved was not correct, reasonable or appropriate, and that such advice would have a continuing effect on such persons after it was first made until at least the end of the Relevant Period, which was Ms Jude's belief, and:
- (a) knowledge of the underlying facts as to the Storm Model as pleaded above, including that Storm clients, such as the Applicants and the Group Members, likely did not want to risk the assets they owned and this was reported to Storm, combined with knowledge that the Risks applied to Storm clients' intended investments and loans, as pleaded in 43(2) above, meant Ms Jude had actual knowledge that Storm's advice as to the Risks was wrong; or
 - (b) in circumstances where Ms Jude had knowledge of the underlying facts as to the Storm Model as pleaded above, including that Storm clients, such as the Applicants and the Group Members, likely did not want to risk the assets they owned and this was reported to Storm, combined with knowledge that the Risks applied to Storm clients' intended investments and loans, as pleaded in 43(2) above, then if Ms Jude did not have actual knowledge that Storm's advice as to the risks was wrong, then:
 - (i) the matters pleaded at paragraph 43(3) above were there to be seen by Ms Jude following her receiving information about the Storm Model and receiving information that the Risks applied to the Storm clients' intended investments and loans, and she must have wilfully shut her eyes to those matters; or
 - (ii) in those circumstances Ms Jude must have suspected the existence of the matters pleaded at paragraph 43(3) above, and Ms Jude must have failed to make inquiries as to the existence of the matters pleaded at paragraph 43(3) above with the Storm representatives or Storm clients (such as some or all of the Group Members) or by reading or listening to reports regarding the Previous History to remove her suspicions, and that was a wilful and reckless failure given Ms Jude's Position, and an honest and reasonable person in Ms Jude's Position would have made such inquiries, and if Ms Jude had made such inquiries the matters pleaded at 43(3) above would have been revealed to her; or
 - (iii) in those circumstances, Ms Jude had knowledge that would have indicated the matters pleaded at paragraph 43(3) above to an honest and reasonable person in Ms Jude's Position;

- (4) the likelihood that Storm, in its advice to its clients, such as the Applicants and the Group Members, was acting contrary to its legal obligations, and:
- (a) the Applicants repeat the matters pleaded at paragraph 43(3) above regarding Ms Jude's knowledge that the Storm advice to the Applicants and to other Storm clients, such as the Group Members, was incorrect, unreasonable or inappropriate advice, and the Applicants say that it may be naturally inferred that a person in Ms Jude's Position had actual knowledge that Storm was under a legal obligation not to provide advice to its clients, particularly as to the risks flowing from its recommended investments, that was incorrect, unreasonable or inappropriate; or
 - (b) if as a result of the matters pleaded at paragraph 43(3) above Ms Jude did not have actual knowledge that Storm was under a legal obligation not to provide advice to its clients, particularly as to the risks flowing from its recommended investments, that was incorrect, unreasonable or inappropriate, then:
 - (i) the matters pleaded at paragraph 43(4) above were there to be seen by Ms Jude following her receiving information about the Storm Model, and receiving information that the Risks and the Applicants' Risks applied to the Applicants and Storm clients' intended investments and loans, and she must have wilfully shut her eyes to those matters; or
 - (ii) in those circumstance Ms Jude must have suspected the existence of the matters pleaded at paragraph 43(4) above, and Ms Jude must have failed to make inquiries as to the existence of the matters pleaded at paragraph 43(4) above with the Storm representatives or the Storm clients (such as some or all of the Group Members) or by reading or listening to reports regarding the Previous History to remove her suspicions, and that was a wilful and reckless failure given Ms Jude's Position, and an honest and reasonable person in Ms Jude's Position would have made such inquiries, and if Ms Jude had made such inquiries the matters pleaded at paragraph 43(4) above would have been revealed to her; or
 - (iii) by reason of those matters, Ms Jude had knowledge that would have indicated the matters pleaded at paragraph 43(4) above to an honest and reasonable person in Ms Jude's Position; and
- (5) Westpac had a policy of encouraging and facilitating the referral of Storm clients to Westpac for loans. Westpac lent money to Storm clients, such as the Applicants and Group Members, following referral from Storm, and the providing of such loans assisted Storm in effect-

ing its incorrect, unreasonable or inappropriate advice, as pleaded above, which may have meant that Westpac could have been acting contrary to law or could have suffered reputational damage, and:

- (a) the relevant knowledge is actual knowledge and it is to be inferred from the matters pleaded at paragraph 91; or
 - (b) in the circumstances pleaded at paragraph 91, if Ms Jude did not have actual knowledge, then:
 - (i) the matters pleaded at paragraph 43(5) above were there to be seen by Ms Jude in the circumstances pleaded at paragraph 91, and she must have wilfully shut her eyes to such matters; or
 - (ii) in those circumstance Ms Jude must have suspected the existence of the matters pleaded at paragraph 43(5) above, and Ms Jude must have failed to make inquiries with the Storm representatives or the Storm clients (such as some or all of the Group Members) as to the existence of the matters pleaded at paragraph 43(5) above to remove her suspicions, and that was a wilful and reckless failure given Ms Jude's Position, and an honest and reasonable person in Ms Jude's Position would have made such inquiries, and if Ms Jude had made such inquiries the matters pleaded at paragraph 43(5) above would have been revealed to her; or
 - (iii) in those circumstances, Ms Jude had knowledge that would have indicated the matters pleaded at paragraph 43(5) above to an honest and reasonable person in Ms Jude's Position.
44. Ms Jude's knowledge pleaded above is to be attributed to Westpac in respect of the Applicants' Westpac Loans and the Group Home Loans because she:
- (1) was Westpac's agent with the title Regional Manager, Home Finance, North and Far North Queensland;
 - (2) had the following functions, duties and responsibilities:
 - (a) she was responsible for implementing Westpac's home and property lending policies and procedures across all of Westpac's branches in the north and far north areas of Queensland;
 - (b) her duties included assessing the risk to Westpac involved in the bank's policies, practices and procedures for the making of home and property loans and to report, along with any recommendations, any concerns she may have had arising out of Westpac's home and property loans in her area;

- (c) supervising all of Westpac's staff in her area involved in making home and property loans on behalf of the bank;

Particulars

This can be inferred from her title and the matters pleaded at paragraph 91.

- (d) she was appointed Storm's Westpac Representative with functions, duties and responsibilities including:
 - (i) attending the Standard Bank Presentation and Education Seminars;
 - (ii) negotiating with Storm about the Concessions and Storm-referred loans and Westpac's policy concerning Storm-referred loans;
 - (iii) supervising the work of Ms Barrie and other Westpac officers in receiving, reading, and responding to Storm-referred loan quotations and loan applications;
 - (iv) reporting and making recommendations to any Relevant Decision Maker about what Westpac's policy should be towards Storm-referred loans and the risks to Westpac involved in making such loans or granting the Concessions;

Particulars

The Applicants repeat the matters pleaded at paragraph 91.

- (3) acquired the knowledge pleaded above in the course of her duties as Storm's Westpac Representative and Regional Manager, including for the Purpose as pleaded at paragraph 91;
- (4) had an Implied Duty to make reasonable enquiries and report to any Relevant Decision Maker any knowledge or concerns she may have had about:
 - (a) the referral relationship between Storm and Westpac; the Storm Model; any credit risk arising from Storm-referred loans; or Westpac acting contrary to law or suffering reputational damage arising out of the relationship between Storm and Westpac;
 - (b) any credit risk arising out of granting any loan to a Storm client, such as to the Applicants and Group Members, or Westpac acting contrary to law or suffering reputational damage arising out of granting such a loan; and
- (5) in the premises pleaded at paragraph 43, had an Implied Duty:

- (a) to cause Westpac not to lend to Storm-referred clients such as the Applicants and Group Members who were borrowing for the purposes of investing pursuant to the Storm Model in respect of loans in north and far north Queensland;
- (b) to report and recommend to any Relevant Decision Maker that Westpac not lend to Storm-referred clients such as the Applicants and Group Members who were borrowing for the purposes of investing pursuant to the Storm Model;
- (c) to report and recommend to any Relevant Decision Maker that Storm-referred clients such as the Applicants and Group Members be advised of the matters pleaded at paragraphs 35(1) and 52(1) (other than in respect of the Kelk Advice).

45. Mr Deacon, from about early 2005, had knowledge of:

- (1) the matters pleaded at paragraphs 6-7 and, hence, the likelihood of: (a) representations to the effect of the Storm No Risk Representations and those pleaded at paragraphs 75 to 77 being made, having a continuing effect, and being relied upon in the case of Storm clients such as the Applicants and the Group Members; and (b) Storm clients, such as the Applicants and Group Members, desiring no or minimal risk for their investments or assets, which was reported to Storm, and which was Mr Deacon's belief, and:
 - (a) the relevant knowledge is actual knowledge. Mr Deacon was told the matters in paragraphs 6-7 in the Standard Bank Presentation and the Education Seminars, as pleaded at paragraph 91(4)(o). The Applicants also rely upon the facts pleaded at paragraph 91 to support the inference that he was aware of the Storm Model and the matters pleaded at paragraphs 6-7; or
 - (b) in the circumstances pleaded at paragraphs 6-7 and 91, if Mr Deacon did not have actual knowledge, then:
 - (i) the matters pleaded at paragraph 45(1) above were there to be seen by Mr Deacon following him receiving information in the Standard Bank Presentation and Education Seminars, and he must have wilfully shut his eyes to those matters; or
 - (ii) in those circumstances Mr Deacon must have suspected the existence of the matters pleaded at paragraph 45(1) above, and Mr Deacon must have failed to make inquiries with the Storm representatives or Storm clients (such as some or all of the Group Members) as to the existence of the matters pleaded at paragraph 45(1) above to remove his suspicions, and that was a wilful and reckless failure given the position of Mr Deacon (being a banker working in Westpac's Private Banking division and with the experience and responsibilities pleaded at para-

graphs 46 and 91 (“**Mr Deacon’s Position**”), and an honest and reasonable person in Mr Deacon’s Position would have made such inquiries, and if Mr Deacon had made such inquiries the matters pleaded at paragraph 45(1) above would have been revealed to him; or

- (iii) in those circumstances, Mr Deacon had knowledge that would have indicated the matters pleaded at paragraph 45(1) above to an honest and reasonable person in Mr Deacon’s Position;
- (2) the matters pleaded at paragraphs 8 and 9, and that Storm clients, such as the Group Members, including some or all of the Group Members known to him at the time, and the Applicants, faced the Risks and the Applicants’ Risks, and:
- (a) Mr Deacon was told the matters in paragraph 8 in the Standard Bank Presentation and the Education Seminars, as pleaded at paragraph 91(4)(o). He was Storm’s Westpac Representative and the Applicants rely upon the facts pleaded at paragraph 91 to support the inference that he was aware of the Storm Model and the matters pleaded at paragraph 8. The Applicants repeat Mr Deacon’s knowledge of the matters pleaded in paragraph 8 above, along with knowledge that the Applicants (and other Storm clients) were relying upon returns from the Storm investments to service the loans (together with each of the matters set out in this sub-paragraph, the “**Deacon Matters**”), and the Applicants say that the Deacon Matters give rise to a natural inference that a banker in Mr Deacon’s Position would have actual knowledge that Storm clients and the Applicants faced the Risks and the Applicants’ Risks in that:
 - (i) he had previously received and read other financial profiles and loan applications from other Storm-referred clients which sought to rely upon investment returns for servicing the loans, as pleaded in paragraph 91;
 - (ii) he participated in negotiations with Storm about the extent to which returns from Storm investments would be taken into account for loan servicing purposes, as pleaded in paragraph 91;
 - (iii) it can be inferred from the above that Mr Deacon would have considered the reliability of such estimates of investment returns based on previous performance of the sharemarket and reasonable forecasts of the future performance of the sharemarket;
 - (iv) the Previous History of the sharemarket and financial market; and

- (v) such Previous History was well known at the time of the Applicants' Loan Applications and the loans of the Group Members as it was commonly reported in the press, in the media, and in the public domain generally, and it can be inferred such previous performance would be the subject of reporting to or consideration by a banker in the position of Mr Deacon, who was required to consider the reliability of investment returns for the servicing of bank loans; or
- (b) in the alternative to (a), in the circumstances of the Deacon Matters, if Mr Deacon did not have actual knowledge that Storm clients including the Applicants faced the Risks and the Applicants' Risks, then:
 - (i) the matters pleaded at paragraph 45(2) above were there to be seen by Mr Deacon following him receiving information in the Standard Bank Presentation and Education Seminars, receiving information that the Storm clients were relying upon the returns from the Storm investments to service the loans, receiving information in the circumstances pleaded at paragraph 91, and receiving information and reports about the Previous History, and he must have wilfully shut his eyes to those matters; or
 - (ii) in those circumstances Mr Deacon must have suspected the existence of the matters pleaded at paragraph 45(2) above, and Mr Deacon must have failed to make inquiries as to the existence of the matters pleaded at paragraph 45(2) above with Storm representatives or Storm clients (such as some or all of the Group Members) or by reading or listening to reports regarding the Previous History to remove his suspicions, and that was a wilful and reckless failure given Mr Deacon's Position, and an honest and reasonable person in Mr Deacon's Position would have made such inquiries, and if Mr Deacon had made such inquiries the matters pleaded at paragraph 45(2) above would have been revealed to him; or
 - (iii) in those circumstances, Mr Deacon had knowledge that would have indicated the matters pleaded at paragraph 45(2) above to an honest and reasonable person in Mr Deacon's Position; or
- (3) the matters pleaded at paragraphs 9 and 10 and that Storm's standard advice to its clients, such as to the Applicants and Group Members, likely, was not appropriate to their personal circumstances, and Storm's advice as to the risks involved was not correct, reasonable or appropriate, and that such advice would have a continuing effect on such persons after it was first made until at least the end of the Relevant Period, which was Mr MacDonald's belief, and:

- (a) knowledge of the underlying facts as to the Storm Model as pleaded above, including that Storm clients, such as the Applicants and the Group Members, likely did not want to risk the assets they owned and this was reported to Storm, combined with knowledge that the Risks applied to Storm clients' intended investments and loans, as pleaded in 45(2)(2) above, meant Mr Deacon had actual knowledge that Storm's advice as to the Risks was wrong; or
- (b) in circumstances where Mr Deacon had knowledge of the underlying facts as to the Storm Model as pleaded above, including that Storm clients, such as the Applicants and the Group Members, likely did not want to risk the assets they owned and this was reported to Storm, combined with knowledge that the Risks applied to Storm clients' intended investments and loans, as pleaded in 45(2) above, then if Mr Deacon did not have actual knowledge that Storm's advice as to the risks was wrong, then:
 - (i) the matters pleaded at paragraph 45(3) above were there to be seen by Mr Deacon following him receiving information about the Storm Model and receiving information that the Risks applied to the Storm clients' intended investments and loans, and he must have wilfully shut his eyes to those matters; or
 - (ii) in those circumstances Mr Deacon must have suspected the existence of the matters pleaded at paragraph 45(3) above, and Mr Deacon must have failed to make inquiries as to the existence of the matters pleaded at paragraph 45(3) above with the Storm representatives or Storm clients (such as some or all of the Group Members) or by reading or listening to reports regarding the Previous History to remove his suspicions, and that was a wilful and reckless failure given Mr Deacon's Position, and an honest and reasonable person in Mr Deacon's Position would have made such inquiries, and if Mr Deacon had made such inquiries the matters pleaded at 45(3) above would have been revealed to him; or
 - (iii) in those circumstances, Mr Deacon had knowledge that would have indicated the matters pleaded at paragraph 45(3) above to an honest and reasonable person in Mr Deacon's Position;
- (4) the likelihood that Storm, in its advice to its clients, such as the Applicants and the Group Members, was acting contrary to its legal obligations, and:
 - (a) the Applicants repeat the matters pleaded at paragraph 45(3) above regarding Mr Deacon's knowledge that the Storm advice to the Applicants and to other Storm clients, such as the Group

Members, was incorrect, unreasonable or inappropriate advice, and the Applicants say that it may be naturally inferred that a person in Mr Deacon's Position had actual knowledge that Storm was under a legal obligation not to provide advice to its clients, particularly as to the risks flowing from its recommended investments, that was incorrect, unreasonable or inappropriate; or

(b) if as a result of the matters pleaded at paragraph 45(3) above Mr Deacon did not have actual knowledge that Storm was under a legal obligation not to provide advice to its clients, particularly as to the risks flowing from its recommended investments, that was incorrect, unreasonable or inappropriate, then:

(i) the matters pleaded at paragraph 45(4) above were there to be seen by Mr Deacon following him receiving information about the Storm Model, and receiving information that the Risks and the Applicants' Risks applied to the Applicants' and Storm clients' intended investments and loans, and he must have wilfully shut his eyes to those matters; or

(ii) in those circumstances Mr Deacon must have suspected the existence of the matters pleaded at paragraph 45(4) above, and Mr Deacon must have failed to make inquiries as to the existence of the matters pleaded at paragraph 45(4) above with the Storm representatives or the Storm clients (such as some or all of the Group Members) or by reading or listening to reports regarding the Previous History to remove his suspicions, and that was a wilful and reckless failure given Mr Deacon's Position, and an honest and reasonable person in Mr Deacon's Position would have made such inquiries, and if Mr Deacon had made such inquiries the matters pleaded at paragraph 45(4) above would have been revealed to him; or

(iii) by reason of those matters, Mr Deacon had knowledge that would have indicated the matters pleaded at paragraph 45(4) above to an honest and reasonable person in Mr Deacon's Position; and

(5) Westpac had a policy of encouraging and facilitating the referral of Storm clients to Westpac for loans. Westpac lent money to Storm clients, such as the Applicants and Group Members, following referral from Storm and the providing of such loans assisted Storm in effecting its incorrect, unreasonable or inappropriate advice, as pleaded above, which may have meant that Westpac could have been acting contrary to law or could have suffered reputational damage, and:

(a) the relevant knowledge is actual knowledge and it is to be inferred from the matters pleaded at paragraph 91; or

- (b) in the circumstances pleaded at paragraph 91, if Mr Deacon did not have actual knowledge, then:
 - (i) the matters pleaded at paragraph 45(5) above were there to be seen by Mr Deacon in the circumstances pleaded at paragraph 91, and he must have wilfully shut his eyes to such matters; or
 - (ii) in those circumstances Mr Deacon must have suspected the existence of the matters pleaded at paragraph 45(5) above, and Mr Deacon must have failed to make inquiries with the Storm representatives or the Storm clients (such as some or all of the Group Members) as to the existence of the matters pleaded at paragraph 45(5) above to remove his suspicions, and that was a wilful and reckless failure given Mr Deacon's Position, and an honest and reasonable person in Mr Deacon's Position would have made such inquiries, and if Mr Deacon had made such inquiries the matters pleaded at paragraph 45(5) above would have been revealed to him; or
 - (iii) in those circumstances, Mr Deacon had knowledge that would have indicated the matters pleaded at paragraph 45(5) above to an honest and reasonable person in Mr Deacon's Position.
46. Mr Deacon's knowledge pleaded above is to be attributed to Westpac in respect of the Applicants' Westpac Loans and the Group Home Loans because he:
- (1) was Westpac's agent working in Westpac's Private Banking division;
 - (2) had the following functions, duties and responsibilities:
 - (a) he was Westpac's representative responsible for designated customers' accounts who, owing to their high net worth or importance to Westpac, were eligible to be customers of the Private Bank, which included:
 - (i) receiving and reading loan applications from such customers, declining such applications if contrary to bank policy, and advising the customers of the outcome of such applications;
 - (ii) advising such customers about the bank's products, policies and services;
 - (iii) being the point of contact between such customers and the bank in respect of all of the bank's available services;

- (iv) implementing the bank's policies, including by advising customers of such policies and the unavailability of loans if contrary to such policies; and
- (v) reporting and making recommendations to credit officers responsible for making decisions on such customers' loan applications;

Particulars

To be inferred from the matters pleaded at paragraph 91.

- (b) he was Westpac's representative responsible for Mr and Mrs Cassimatis' Westpac accounts as customers of the Private Bank, and acted as one of Storm's Westpac Representatives (as pleaded in paragraph 91), which responsibilities, duties and functions included:
 - (i) receiving, reading, and responding to Storm-referred loan quotations and loan applications where the customer was a customer of Westpac's Private Bank, and declining such quotations and applications if contrary to bank policy;
 - (ii) attending the Standard Bank Presentation and Education Seminars;
 - (iii) negotiating with Storm about the Concessions and Storm-referred loans and Westpac's policy concerning Storm-referred loans;
 - (iv) reporting and making recommendations to any Relevant Decision Maker about what Westpac's policy should be towards Storm-referred loans and the risks to Westpac involved in making such loans or granting the Concessions;

Particulars

The Applicants repeat the matters pleaded at paragraph 91.

- (3) acquired the knowledge pleaded above in the course of his duties, including for the Purpose as pleaded at paragraph 91; and
- (4) had an Implied Duty to make reasonable enquiries and report to any Relevant Decision Maker any knowledge or concerns he may have had about:
 - (a) the referral relationship between Storm and Westpac; the Storm Model; any credit risk arising from Storm-referred loans; Westpac acting contrary to law or suffering reputational damage arising out of the relationship between Storm and Westpac;

- (b) any credit risk arising out of granting any loan to a Storm client, such as to the Applicants and Group Members; Westpac acting contrary to law or suffering reputational damage arising out of granting such a loan; and
- (5) in the premises pleaded at paragraph 45, had an Implied Duty:
- (a) to cause Westpac not to lend to Storm-referred clients, such as some of the Group Members, who were borrowing for the purposes of investing pursuant to the Storm Model in respect of loans in north and far north Queensland, where such customers were members of the Private Bank for whom Mr Deacon had customer responsibility;
 - (b) to report and recommend to any Relevant Decision Maker that Westpac not lend to Storm-referred clients, such as the Applicants and Group Members, who were borrowing for the purposes of investing pursuant to the Storm Model;
 - (c) to report and recommend to any Relevant Decision Maker that Storm-referred clients, such as the Applicants and Group Members, be advised of the matters pleaded at paragraphs 35(1) and 52(1) (other than in respect of the Kelk Advice).
47. The knowledge of the Westpac Representatives pleaded at paragraphs 37 to 46, is to be aggregated with the knowledge of the officers who approved the Applicants' Westpac Loans and the Group Home Loans in that:
- (1) in the premises pleaded at paragraphs 37 to 38, Mr Kelk had a duty to report the knowledge and matters pleaded at paragraphs 37 to 38 to the officer who approved the Applicants' Westpac Loans;
 - (2) in the premises pleaded at paragraphs 39 to 42 and 45 to 46, Ms Barrie, Mr MacDonald and Mr Deacon, in respect of all loan applications received in respect of Group Home Loans had a duty to report the knowledge and matters pleaded at paragraphs 39 to 42 and 45 to 46 to the officers who approved the Group Home Loans;
 - (3) in the premises pleaded at paragraphs 37 to 46, all of the Westpac Representatives had a duty to report the knowledge and matters pleaded at paragraphs 37 to 46 to the officers responsible for formulating and implementing Westpac's credit policy with respect to Storm-referred loans or loans known by Westpac to be sought by customers following advice received from Storm and (in the case of Mr Kelk, Ms Barrie and Mr MacDonald) to officers responsible for supervising the officers likely to receive the Applicants' Loan Application, and such supervisory or credit policy officers in turn had a duty of enquiry, as pleaded at 35 and 52, and a duty to implement the credit assessment method pleaded at paragraphs 35 and 52 and ensure that the officers that approved the Applicants' Westpac Loans and the Group Home Loans were made aware of such policy and the reasons for it, which would cover the matters of knowledge pleaded at 37 to 46.

48. In the premises pleaded at paragraph 35, had Westpac acted in accordance with the Banking Code Term and the Implied Banking Code Term:
- (1) the Applicants would have been on notice of the matters pleaded at paragraph 35(1) in which case the Applicants would have sought alternative financial advice appropriate to their personal circumstances;
 - (2) further or alternatively, if the loans were declined, the Applicants would have sought to find out why the loans were declined and, upon being told about Westpac's concerns regarding the Storm advice, the Kelk Advice and the Applicants' inability to service the loans, the Applicants would have sought alternative financial advice appropriate to their personal circumstances; and
 - (3) by such alternative appropriate financial advice, the Applicants would have been advised:
 - (a) not to take out mortgages against their real property in order to invest in managed funds;
 - (b) to sell down their investments in the Special Funds and repay their margin loan; and
 - (c) to invest their cash in a balanced, diversified portfolio of investments and maintain their property investments without undertaking further borrowings,

and the Applicants would have acted on that advice.
49. In the premises, as a result of Westpac's breach of the Banking Code Term and the Implied Banking Code Term, the Applicants have suffered loss and damage.

Particulars

- (a) Owing to the fall in the market and the Applicants' liabilities under their margin loans, between October 2008 and March 2009, the Applicants were required to sell their units in the Special Funds and repay the Applicants' Margin Loan, which was then closed.
- (b) The Applicants were left with \$167,001.55 in their Dam Account, in circumstances where the Applicants had, during the period of the Applicants' Margin Loan, withdrawn only \$50,000 and otherwise their investments were lost.
- (c) The Applicants continue to owe Westpac the sum of \$1,210,000 pursuant to the Applicants' Westpac Loans.

- (d) The Applicants claim the difference between such financial position and that which the Applicants would have been in had they followed the alleged alternative appropriate financial advice.
- (e) Further and in the alternative, if the Court finds the Applicants would have in any event pursued a loan with other lenders for investment in accordance with the Storm Model, such other lenders also adopted the Banking Code and this should have led such lenders to decline the proposed loans on the ground of inability to service such loans, in which case the Applicants would not have been able to proceed with Storm and would have sought alternative financial advice appropriate to their personal circumstances or pursued a claim in damages against such lenders.
- (f) Further particulars will be provided on service of expert evidence.

C. Group Members' Contractual Claims Against Westpac

50. During the Relevant Period, the Group Members borrowed money from Westpac as loans secured against their real property (the "**Group Home Loans**") for the purposes of investing in accordance with the Storm Model and the advice provided by Storm.
51. The Group Home Loans contained conditions the same as or materially the same as the Home Loan General Conditions which in turn incorporated the Banking Code and thereby the Banking Code Term and the Implied Banking Code Term.
52. Westpac breached the Banking Code Term and the Implied Banking Code Term in that:
 - (1) it failed to exercise the care and skill of a diligent and prudent banker in the Position of Westpac, in that such a banker would have had in place and/or selected a credit assessment method which would have declined to offer loans to some or all of the Group Members for the purpose of investment pursuant to the Storm Model and such credit assessment method would have required a diligent and prudent banker in the Position of Westpac:
 - (a) to give the reasons for such refusal, including that Westpac had concerns about:
 - (i) the appropriateness of Storm's Advice and Storm's compliance with its lawful obligations to clients; and
 - (ii) the ability of the Group Members to service the Group Home Loans over the life of such loans;
 - (b) to advise Group Members that:
 - (i) it could provide no advice or recommendation on Storm's investments or the Storm Model; and
 - (ii) it recommended that Group Members seek financial advice independent of Storm before investing pursuant to the Storm Model;
 - (2) it failed to exercise the care and skill of a diligent and prudent banker in applying its credit assessment methods in that a diligent and prudent banker in the Position of Westpac applying its credit assessment methods would have declined to offer some or all of the Group Home Loans and taken the steps pleaded at paragraph 52(1); and
 - (3) it failed to exercise the care and skill of a diligent and prudent banker in forming its opinion about some or all of the Group Members' ability to repay in that a diligent and prudent banker in the Position of

Westpac would have formed the opinion that the Group Members did not have the ability to service the Westpac Loans and would have declined the loans.

Particulars

- (a) The Applicants repeat the matters pleaded at paragraphs 6-10.
- (b) Westpac's credit assessment methods (see pp. 28.30, 87-92 and 176 of the 2007 Annual Report and further particulars may be provided after discovery) required it to ascertain the risk of impairment of an individual loan through examining all relevant considerations that may have a bearing on expected future cash flows, including:
 - (i) the business prospects of the customer;
 - (ii) the realisable value of collateral; and
 - (iii) the reliability of information obtained by Westpac concerning the customer; and
 - (iv) make a reasonable and prudent decision based upon the resulting ascertainment of the risk of impairment.
- (c) Westpac's credit assessment method ought to have led to enquiries and a full understanding of the Group Members' existing and future possible indebtedness under any margin loans (if unknown).
- (d) The assessment of the risk of impairment ought to have included the extent to which Westpac was aware or ought to have been aware of Storm likely acting contrary to its legal obligations to the Group Members and the inappropriateness of Storm's advice to Group Members who were seeking Westpac loans under the Storm Model because of the potential for claims to be made by such persons against Westpac or for reputational damage being suffered by Westpac.
- (e) The assessment of the risk of impairment ought to have led to enquiries being made and a full understanding reached as to Storm likely acting contrary to its legal obligations to the Group Members and the inappropriateness of Storm's advice to clients and the Group Members under the Storm Model (if unknown) and of the matters pleaded at paragraphs 6-10 (if unknown).
- (f) The Group Home Loans exceeded Westpac's usual LVR limits (this is to be inferred by the fact that Mr Kelk advised at the Webb/Kelk meetings that the Applicants' Westpac Loans ex-

ceeded Westpac's usual LVR limits and the LVR sought for the Group Home Loans was the same as for the Applicants' Westpac Home Loans, and further particulars may be provided after discovery) and a prudent and diligent banker in the Position of Westpac ought not to have permitted those usual limits to be exceeded.

- (g) A prudent and diligent banker would not have assumed and allowed for any return from the Storm investments for the purposes of servicing the Westpac Loans, either at all or, alternatively, to the extent that Westpac did take such income into account for servicing purposes.

53. In the premises pleaded at paragraph 52, had Westpac acted in accordance with the Banking Code Term and the Implied Banking Code Terms:

- (1) Group Members would have been on notice of the matters pleaded at paragraph 52(1), in which case the Group Members would have sought alternative financial advice appropriate to their financial circumstances;
- (2) further, or alternatively, if the loans were declined, the Group Members would have sought to find out why and, upon being told the matters pleaded at paragraph 52(1), the Group Members would have sought alternative financial advice appropriate to their financial circumstances; and
- (3) by such alternative financial advice, Group Members would have been advised not to make investments in accordance with the Storm Model but to pursue alternative investment strategies appropriate to their personal circumstances, which would have involved no or less borrowings and investment in a diversified portfolio of investments appropriate to their personal circumstances, and the Group Members would have acted on that advice.

54. In the premises, as a result of Westpac's breach of the Banking Code Term and the Implied Banking Code Term, some or all the Group Members have suffered loss and damage.

Particulars

- (a) Owing to the fall in the market in 2008 and 2009, Group Members have lost, or substantially lost, their investments and still owe the Group Home Loans to Westpac.
- (b) The Group Members claim the difference between such financial position and that which the Group Members would have been in had they followed the alleged alternative financial advice.

- (c) Further and in the alternative, if the Court finds the Group Members would have in any event pursued a loan with other lenders for investment in accordance with the Storm Model, such other lenders also adopted the Banking Code and this should have led such lenders to decline the proposed loans on the ground of inability to service such loans, in which case the Group Members would not have been able to proceed with Storm and would have sought alternative financial advice appropriate to their personal circumstances or pursued a claim in damages against such lenders.
- (d) Further particulars will be provided on service of expert evidence.

D. Applicants' unconscionable conduct claim against Westpac

55. The Applicants refer to and repeat the matters pleaded in paragraphs 6-23, 25 32, 33, 34, 55, 71, 75, 79, 80, 84, 91, 96 and 102 and say that arising from such matters, at the time of the Applicants' Westpac Loans the Applicants were in a position of special disadvantage, including (without limiting the Applicants' reliance on all matters therein pleaded) because the Applicants were:
- (1) inexperienced in making such investments and taking out such loans which came with the Applicants' Risks;
 - (2) relying upon, and had reposed trust and confidence in, their financial adviser, Storm, who had misrepresented the Applicants' Risks to them and had provided inappropriate financial advice to them not suited to their personal circumstances;
 - (3) relying upon, and had reposed trust and confidence in, their banker, Mr Kelk of Westpac, who had also misrepresented the Applicants' Risks and had provided negligent advice to them.
56. The Applicants refer to and repeat the matters pleaded at paragraphs 36-47 as to Westpac's knowledge of the above matters and the Applicants' special disadvantage as pleaded above.
57. In the premises pleaded above and the matters pleaded at paragraphs 90 and 91 below, Westpac:
- (1) by, to its own benefit, making the Applicants' Westpac Loans and not declining such loans;
 - (2) by encouraging, to its own benefit, the making of referrals by Storm to Westpac of applications for loans by Storm clients, such as the Applicants;
 - (3) by not having in place a policy whereby it would have declined to offer loans to clients of Storm for the purpose of investment pursuant to the Storm Model or to the Applicants for the purposes set out in the Applicants' SOA;
 - (4) in not advising the Applicants that:
 - (a) Westpac had concerns about:
 - (i) the appropriateness of the Kelk Advice;
 - (ii) the appropriateness of Storm's advice and Storm's compliance with its lawful obligations to clients, including in the Applicants' SOA;

- (iii) the ability of the Applicants to service the Westpac Loans over the life of such loans;
 - (iv) Westpac could provide no advice or recommendation on the Applicants' SOA, Storm's investments or the Storm Model; and
 - (v) Westpac recommended that the Applicants seek financial advice independent of Storm before investing pursuant to the Storm Model or the SOA;
- (5) took unconscientious advantage of the Applicants' special disadvantage, and thereby engaged in conduct:
- (a) in trade or commerce, in connection with the supply of financial services to the Applicants which were services ordinarily acquired for personal, domestic or household use that was unconscionable within the meaning of section 12CB of the Australian Securities and Investments Commission Act 2001 (**ASIC Act**);
 - (b) which was unconscionable at general law;
 - (c) in relation to financial services which was unconscionable within the meaning of the unwritten law within the meaning of section 12CA of the ASIC Act; and/or
 - (d) in connection with the supply of financial services to the Applicants and, or alternatively, in connection with the acquisition by the Applicants of financial services, that was unconscionable in all the circumstances within the meaning of section 12CB and, or alternatively, section 12CC of the ASIC Act.

Particulars

The nature of the services provided by Westpac to the Applicants consisted of the provision of credit secured by mortgages, which services were at all material times of a kind commonly or ordinarily acquired for purposes including:

- (a) providing day to day income to be used for personal, domestic or household expenditure;
- (b) saving for living and other personal expenses including where the Applicants proposed to retire at a future point in time;
- (c) making a personal investment; and
- (d) acquiring goods and services relating to or for use about the home.

58. In the premises pleaded at paragraph 57, had Westpac not acted unconscionably:

- (1) the Applicants would have been on notice of the matters pleaded at paragraph 57(4), in which case the Applicants would have sought alternative financial advice appropriate to their personal circumstances;
- (2) further or alternatively, if the loans were declined, the Applicants would have sought to find out why they had been declined and, upon being told about the matters pleaded at paragraph 57(4), would have sought alternative financial advice appropriate to their personal circumstances; and
- (3) by such alternative financial advice, the Applicants would have been advised:
 - (a) not to take out mortgages against their real property in order to invest in managed funds;
 - (b) to sell down their investments in the Special Funds and repay their margin loan; and
 - (c) to invest their cash in a balanced diversified portfolio of investments and maintain their property investments without undertaking further borrowings;

and the Applicants would have acted on that advice.

59. In the premises, as a result of Westpac's unconscionable conduct the Applicants have suffered loss and damage.

Particulars

The Applicants repeat the matters pleaded at paragraph 49

E. Group Members' unconscionable conduct claim against Westpac

60. The Group Members refer to and repeat the matters pleaded in paragraphs 6-12 above and say that arising from such matters, at the time of the Group Home Loans, some or all of the Group Members were in a position of special disadvantage, including (without limiting the Group Members' reliance on all matters therein pleaded) because the Group Members were:
- (1) in many cases, inexperienced in making such investments and taking out such loans which came with the Risks;
 - (2) relying upon, and had reposed trust and confidence in, their financial adviser, Storm, who, in some or all cases, had misrepresented the Risks to them and had provided inappropriate financial advice to them not suited to their financial circumstances.
61. The Group Members refer to and repeat the matters pleaded at paragraphs 36-47 as to Westpac's knowledge of the above matters and the Group Members' special disadvantage as pleaded above.
62. In the premises pleaded above and the matters pleaded at paragraphs 90 and 91, Westpac:
- (1) by, to its own benefit, making the Group Home Loans and not declining such loans;
 - (2) by encouraging, to its own benefit, the making of referrals by Storm to Westpac of applications for loans by Storm clients, such as the Group Members;
 - (3) by not having in place a policy whereby it would have declined to offer loans to clients of Storm, including the Group Members, for the purpose of investment pursuant to the Storm Model;
 - (4) in not advising Group Members that:
 - (a) Westpac had concerns about:
 - (i) the appropriateness of Storm's advice and Storm's compliance with its lawful obligations to clients, including to the Group Members;
 - (ii) the ability of Group Members to service the Group Home Loans over the life of such loans;
 - (b) Westpac could provide no advice or recommendation on Storm's investments or the Storm Model; and

- (c) Westpac recommended that Group Members seek financial advice independent of Storm before investing pursuant to the Storm Model;
- (5) took unconscientious advantage of some or all of the Group Members' special disadvantage, and thereby engaged in conduct:
- (a) in trade or commerce, in connection with the supply of financial services to some or all of the Group Members which were services ordinarily acquired for personal, domestic or household use that was unconscionable within the meaning of section 12CB of the ASIC Act;
 - (b) which was unconscionable at general law;
 - (c) in relation to financial services which was unconscionable within the meaning of the unwritten law within the meaning of section 12CA of the ASIC Act; and, or
 - (d) in connection with the supply of financial services to the Applicants and, or alternatively, in connection with the acquisition by some or all of the Group Members of financial services, that was unconscionable in all the circumstances within the meaning of section 12CB and, or alternatively, section 12CC of the ASIC Act.

Particulars

The Group Members repeat the particulars pleaded at paragraph 57 as to the nature of the services provided to Group Members.

63. In the premises pleaded at paragraph 62, had Westpac not acted unconscionably:
- (1) some or all of the Group Members would have been on notice of the matters pleaded at paragraph 62(4), in which case some or all of the Group Members would have sought alternative financial advice appropriate to their circumstances;
 - (2) further or alternatively, if the loans were declined, the Group Members would have sought to find out why they had been declined and, upon being told about the matters pleaded at paragraph 62(4), some or all of the Group Members would have sought alternative financial advice appropriate to their personal circumstances; and
 - (3) by such alternative appropriate financial advice, the Group Members would have been advised not to invest under the Storm Model but to take out alternative investments appropriate to their circumstances with less or no additional borrowings, and some or all of the Group Members would have acted on that advice.
64. In the premises, as a result of Westpac's unconscionable conduct, some or all of the Group Members have suffered loss and damage.

Particulars

The Group Members repeat the matters pleaded at paragraph 54.

F. Applicants and Group Members' linked credit provider claims against Westpac

65. The Applicants and each of the Group Members entered into:
- (1) an initial agreement with Storm where Storm, for a fee, agreed to provide the Applicants and each of the Group Members with "financial services" within the meaning of section 12BAB of the ASIC Act, which included financial advice and financial planning services (the "**Storm Advice Retainer**"); and

Particulars

- (a) The terms of the Storm Advice Retainers were partly express and partly implied.
- (b) In so far as they were express:
- (i) for the Applicants, it was constituted by the Applicants' SOA; and
- (ii) for Group Members, they were constituted by an initial statement of advice in substantially similar terms (**Group Members' SOA**);
- (c) The implied terms of the Storm Advice Retainers are set out below at paragraphs 67, 68 and 70.
- (2) a subsequent agreement or agreements where, for a fee, Storm provided the Applicants and each Group Member with further financial advice and financial planning services (the "**Step Agreements**")

(both services pleaded in this paragraph are referred to collectively as the "**Services**").

Particulars

- (a) The terms of the Step Agreements were partly express and partly implied.
- (b) In so far as they were express:
- (i) the Step Agreement between Storm and the Applicants was constituted by the Applicants' SOAA, and the Applicants' SOA, which was incorporated into the Applicants' SOAA by express reference; and
- (ii) the Step Agreements between Storm and each Group Member were constituted by a document or documents

with the title “Your Next Step (Statement of Additional Advice)” and bearing the name of the relevant Group Member (the “**Group Members’ SOAA**”) and the Group Members’ SOA for each Group Member which was incorporated into each of the Group Members’ SOAAs by express reference.

- (c) The implied terms of the Step Agreements are set out below at paragraphs 67, 68 and 70.

66. The Services:

- (1) were of a kind ordinarily acquired for personal, domestic or household use or consumption in that the Services were at all material times of a kind commonly or ordinarily acquired for purposes including:
 - (a) providing day to day income to be used for personal, domestic or household expenditure;
 - (b) saving for living and other personal expenses including where the Applicants and Group Members proposed to retire at a future point in time;
 - (c) making a personal investment; and
 - (d) acquiring goods and services relating to or for use about the home.
- (2) included the provision of “personal advice” within the meaning of section 766B(3) of the Corporations Act 2001 (Cth) (**Corporations Act**); and
- (3) in the case of:
 - (a) some or all of the Storm Advice Retainers with each Group Member; and
 - (b) the Step Agreement with the Applicants and some or all of the Step Agreements with each Group Member,

were less than \$40,000; and
- (4) in the premises, Storm agreed to, and did, supply services to the Applicants and the Group Members as “consumers” within the meaning of section 12BC of the ASIC Act and section 4B of the TPA.

Particulars

The fee Storm charged the Applicants in relation to the Applicants’ SOAA was \$22,312.

67. By reason of the matters pleaded in paragraphs 65-66 above, a term was implied into each of the Storm Advice Retainers and Step Agreements that Storm would exercise due care and skill in providing the Services (the “**Storm Due Care and Skill Term**”):
- (1) under the general law; and
 - (2) by operation of section 12ED(1)(a) of the ASIC Act.
68. By reason of the matters pleaded in paragraphs 65-66 above, a term was included in each of the Storm Advice Retainers and Step Agreements that the Services would be reasonably fit for the purpose or purposes for which the Services were required by the Applicants and the Group Members in so far as such purposes were made known to Storm by each of the Applicants and the Group Members (the “**Storm Implied Warranty**”):
- (1) expressly (at page 2 and 21 of the Applicants’ SOA, see paragraph 14(a)(b) above) and, or alternatively;
 - (2) by implication pursuant to section 12ED(2) of the ASIC Act, as:
 - (a) the Applicants’ and the Group Members, as consumers, relied on the skill or judgment of Storm—the person providing the Services; and
 - (b) it was reasonable for the Applicants and each of the Group Members to rely on Storm’s skill and judgment in relation to the Services.
69. The Services provided by Storm pursuant to each of the Storm Advice Retainers and the Step Agreements were provided to the Applicants and to some or all of the Group Members as “Retail Clients” within the meaning of section 761A of the Corporations Act.
70. Each of the Storm Advice Retainers and the Step Agreements contained an implied term that Storm would determine and make reasonable enquiries in relation to the personal circumstances of the Applicants and Group Members and, having regard to such information obtained, would give such consideration to, and conduct such investigation of, the subject matter of the advice as was reasonable in all of the circumstances and that its advice was appropriate to the Applicants and to each Group Member having regard to that consideration and investigation (“**Storm 945A Term**”).

Particulars

- (a) The Storm 945A Term arises to give the contract business efficacy, by necessary implication from the express representations in the SOA (as pleaded at paragraphs 14(a), (b)), the fact that Storm held itself out as having special skill and competence to provide financial advice, and the implied terms pleaded at paragraphs 67-68.

- (b) The Storm 945A Term was implied by operation of section 945A of the Corporations Act.

71. Storm breached the Storm Due Care and Skill Term, the Storm Implied Warranty and the Storm 945A Term in each of the Applicants' Storm Advice Retainer and the Applicants' Step Agreement in that Storm:

- (1) did not explain the Risks to the Applicants;
- (2) failed to address adequately or at all the Applicants' goals, purposes and risk profile as set out in the Applicants' Prior Position, including their express desire to ensure that the risks associated with their investments were minimal or eliminated;
- (3) failed to adequately consider the Risks to the Applicants;
- (4) having regard to the information obtained from the Applicants, failed to give such consideration to, and conduct such investigation of, the subject matter of the advice as was reasonable in all of the circumstances in that it failed reasonably to consider and investigate an alternative investment strategy that did not involve the Risks that came with borrowing to invest in shares and which, instead, involved investing their existing cash and assets in a balanced, diversified portfolio of investments which would have been appropriate or more appropriate to the Applicants' personal circumstances including their age, assets, income, health, risk profile, individual financial objectives, retirement goals, living expenses, income sources and employability;
- (5) failed to give advice that was appropriate to the Applicants in that:
 - (a) the Storm Model was not appropriate for the Applicants who agreed with option 3 in the Confidential Financial Profile and had expressed a desire to ensure that the risks associated with their investments were minimal or eliminated;
 - (b) the Storm Model was not appropriate for the Applicant unless they were fully advised upon and were made to understand and appreciate the Risks – which had not occurred;
 - (c) the Storm Model was not appropriate for the Applicants given their age, that the Applicants had retired, that they had limited sources of income and needed to rely upon the investment's return to service the loans which came with the Applicants' Risks, and that there was a substantial risk the Applicants would default on the loans.

72. By reason of Storm's breaches of contract, the Applicants suffered loss and damage.

Particulars

The Applicants repeat the matters pleaded at paragraphs 36 and 49.

73. Storm breached the Storm Due Care and Skill Term, the Storm Implied Warranty, and the Storm 945A Term in each or some of the Group Members' Storm Advice Retainers and the Group Members' Step Agreements in that Storm:
- (1) did not explain the Risks to some or all of the Group Members;
 - (2) failed to address adequately or at all some or all of the Group Members' express desire to ensure that the risks associated with their investments were minimal or eliminated;
 - (3) failed adequately to consider the Risks in the case of some or all of the Group Members;
 - (4) having regard to the information obtained from the Group Members, failed to give such consideration to, and conduct such investigation of, the subject matter of the advice as was reasonable in all of the circumstances in that it failed reasonably to consider and investigate an alternative investment strategy that did not involve the Risks and gearing to invest in shares and which would have been appropriate or more appropriate to some or all of the Group Members' personal circumstances including their age, assets, income, health, risk profile, individual financial objectives, retirement goals, living expenses, income sources and employability;
 - (5) failed to give advice that was appropriate to some or all of the Group Members in that:
 - (a) the Storm Model was not appropriate for the Group Members who agreed with option 3 in the Confidential Financial Profile and had expressed a desire to ensure that the risks associated with their investments were minimal or eliminated;
 - (b) the Storm Model was not appropriate for the Group Members unless they were fully advised upon and were made to understand and appreciate the Risks, which did not occur for some or all of the Group Members;
 - (c) the Storm Model was not appropriate for some or all of the Group Members who needed to rely upon their Storm investment's return to service the loans, which came with the Risks and a substantial risk that some or all of the Group Members would default on the loans.
74. By reason of Storm's breaches of contract, the Group Members suffered loss and damage.

Particulars

The Applicants repeat the matters pleaded at paragraphs 52-54.

75. Storm represented to the Applicants that:

- (1) it would devise an investment strategy which involved no risk of the Applicants irrecoverably losing their Equity Contributions;

Particulars

The representation was made expressly by Stuart Drummond at a meeting attended by the Applicants on or about 14 June 2007 and, or alternatively, by Mr Drummond and, or alternatively, Mr Webb to the Applicants during a meeting or meetings which occurred on or about 30 April 2007, 21 May 2007, 28 June 2007, 18 July 2007, 25 July 2007, 17 August 2007, 29 August 2007, 10 September 2007, 22 January 2008 and/or 24 January 2008.

- (2) it would prepare an investment plan for the Applicants which, over the medium to long term, would involve manageable risks only and no risk of the Applicants irrecoverably losing any of their existing capital, their home or other assets;

Particulars

The representation was partly express and partly implied:

- (a) The representation was made expressly by Mr Drummond and, or alternatively, by Mr Webb to the Applicants during a meeting or meetings which occurred on or about 30 April 2007, 21 May 2007, 14 June 2007, 28 June 2007, 18 July 2007, 25 July 2007, 17 August 2007, 29 August 2007, 10 September 2007, 22 January 2008 and/or 24 January 2008;
- (b) It was implied by page 22 of the Confidential Financial Profile completed on about 28 June 2007, which provided that the Applicants were prepared to “accept volatility if in the medium to long term the investment growth is higher and the risks over that term are minimal or eliminated” and the fact that Terry Webb, as authorised representative of Storm, signed off on that Confidential Financial Profile.
- (3) there was no risk of capital loss or loss of equity associated with investing in accordance with Storm’s recommendations.

Particulars

The representation was made expressly by Mr Drummond at a meeting on 14 June 2007 and, or alternatively, by Mr Webb to the Applicants during a meeting or meetings which occurred on or about 30 April 2007, 21 May 2007, 28 June 2007, 18 July 2007, 25 July 2007, 17 August 2007, 29 August 2007, 10 September 2007, 22 January 2008 and/or 24 January 2008.

(The representations will be referred to collectively as the “**Applicants’ Risk Representations**”.)

76. On or about 17 August 2007, 29 August 2007 and, or alternatively, 10 September 2007, Storm made the following written representations to the Applicants as part of the Applicants' SOA and on or about 24 January 2008 as part of the Applicants' SOAA (the "**Applicants' SOA Representations**"):

- (1) Storm had made recommendations to address their needs and to achieve their goals;

Particulars

Page 2 of the Applicants' SOA.

- (2) Storm's recommendation of borrowing to invest, which was directly related to Storm's provision of information to the Applicants and the maintenance of the Dam Account, was safe;

Particulars

Pages, 10, 12, 23, 86 and 92 of the Applicants' SOA.

- (3) Storm's plan for the Applicants contained strategies to safeguard them from variability of investment returns and to allow them to profit from this volatility, provided they had the appropriate investment time frame;

Particulars

The representation was made in the Applicants' SOA on page 8 paragraph 3; page 10 last paragraph; page 23 paragraph 1; page 35 paragraph 2; page 37 last paragraph; page 38 paragraph 2; page 40 fifth to last paragraph; page 41 fifth to last paragraphs; page 43 paragraph 3; page 45 paragraph 3; page 47 last paragraph; page 48 paragraph 1; page 51 paragraphs 2-3; page 61 paragraphs 3-4; page 63 paragraph 2; page 80 paragraph 1; page 86 paragraph 1.

- (4) Storm would manage the volatility of the Applicants' investments by ensuring that they had adequate cash reserves to use for their plan when income and capital growth from shares was low;

Particulars

The representation was made in the Applicants' SOA on page 13 last paragraph; page 29 last paragraph; page 38 paragraphs 1 and 4; page 61 last paragraph to page 62 paragraph 2; page 87 last paragraph to page 88 paragraph 1; page 89 last paragraph.

- (5) Storm's recommendations to the Applicants were designed to maintain a level of cash reserves to keep them safe;

Particulars

The representation was made in the Applicants' SOA on page 14 paragraph 1; page 22 last paragraph, page 38 paragraph 4; page 41 paragraph

2; page 61 last paragraph to page 62 paragraph 1; page 86 paragraph 1; page 89 last paragraph.

- (6) Storm's recommendations to the Applicants were based on prudent debt to equity ratios which could withstand market volatility and protect the Applicants from losing part or all of their Equity Contribution; and

Particulars

The representation was made in the Applicants' SOA on page 23 paragraphs 4 and last; page 26 paragraph 2; page 29 last paragraph; page 42 paragraph 4; page 62 paragraphs 4 and last; page 89 paragraphs 1 to 3.

- (7) Storm had appropriate capacities to keep the Applicants in a safe position if they followed the Applicants' SOAA.

Particulars

Page 2 of the Applicants' SOAA.

77. In making the Applicants' Risk Representations and the Applicants' SOA Representations and in providing the Applicants' SOA and the Applicants' SOAA, Storm impliedly represented to the Applicants that such representations and financial plans were, and, to the extent that such representations and financial plans involved statements of opinion or representations as to future matters, such opinions and representations were:

- (1) based on reasonable grounds;
- (2) the product of the exercise of due care, skill and diligence; and
- (3) safe to be relied upon,

(the "**Applicants' Reasonable Grounds Representations**").

Particulars

- (a) At meetings on or about 30 April 2007, 21 May 2007, 14 June 2007 and, or alternatively, 28 June 2007, the Applicants provided Mr Webb with details of the Applicants' financial records and Mr Webb discussed those financial records together with the Applicants' expenses and assets in light of the Applicants' investment objectives.
- (b) The Applicants' Financial Profile was then completed by Mr Webb and he signed and accepted the Profile.
- (c) At all relevant times, Storm and Storm's representatives portrayed themselves, including by the terms of the Applicants' SOA (as pleaded at paragraphs 14(a), (b)) and the Applicants' SOAA, to the Applicants as experienced professional advisers who

would give financial advice, including investment representations, that was appropriate for the Applicants and based on the Applicants' needs.

- (d) As the Applicants' financial adviser, Storm had a duty to inform the Applicants if any of its advice to them was not based on reasonable grounds or the product of due care, skill and diligence or was not safe to be relied upon.
- (e) By not informing the Applicants at any time that any of its advice to them was not based on reasonable grounds or the product of due care, skill and diligence or was not safe to be relied upon, Storm either implied or represented to the Applicants that Storm's advice was so based on reasonable grounds and was the product of due care, skill and diligence and was safe to be relied upon.
- (f) On or about 17 August 2007, 29 August 2007 and, or alternatively, 10 September 2007, Storm provided the Applicants with the Applicants' SOA which purported to set out in detail Storm's recommended long-term investment strategy for the Applicants. On or about 22 January 2008 and, or alternatively, 24 January 2008, Storm provided the Applicants with the Applicants' SOAA which purported to set out Storm's further recommendations for the Applicants. In providing the Applicants' SOA, Storm used the information provided by the Applicants to evaluate the Applicants' existing financial profile and to prepare its recommendations in the Applicants' SOA, as well as the further recommendations contained in the Applicants' SOAA.
- (g) In the circumstances set out in particulars (a) to (f) above, the Applicants' Reasonable Grounds Representation was made impliedly or by silence in circumstances in which Storm provided the Applicants with the Applicants' SOA and the Applicants' SOAA and, in doing so, failed to disclose to the Applicants that the recommendations contained in those documents were not based on reasonable grounds or the exercise of due skill, care and diligence and were not safe to be relied upon, in circumstances in which the Applicants could reasonably have expected this was the case unless such matters were disclosed.

78. The Applicants' Risk Representations, the Applicants' Reasonable Grounds Representations and the Applicants' SOA Representations:

- (1) were representations made by Storm in trade or commerce within the meaning of section 12BA of the ASIC Act;

- (2) were or included representations as to future matters for the purposes of section 12BB(2) of the ASIC Act and section 769C of the Corporations Act;
 - (3) were made initially on the relevant dates set out above and were continuing throughout the period in which the Applicants entered into or acted upon the Applicants' Storm Advice Retainer and the Applicants' Step Agreement, and the Applicants invested in accordance with, and pursuant to, the advice and recommendations of Storm;
79. Each of the Applicants' Risk Representations, the Applicants' Reasonable Grounds Representations and the Applicants' SOA Representations:
- (1) in so far as they were or included representations as to a present matter or present matters, were untrue and, or in the alternative, misleading and deceptive or likely to mislead and deceive;
 - (2) in so far as they were or included statements of opinion, were made without a reasonable basis, without the exercise of due care, skill and diligence and were not safe to rely upon; and
 - (3) in so far as they were or included statements of opinion or representations as to future matters, were made without a reasonable basis, without the exercise of due care, skill and diligence, and were not safe to rely upon.

Particulars

The Applicants repeat the matters pleaded at paragraphs 8, 9, 34 and 71.

80. By reason of the matters pleaded in paragraph 79 above, by making each of the Applicants' Risk Representations, the Applicants' Reasonable Grounds Representations and the Applicants' SOA Representations, throughout the period pleaded at paragraph 78 above, in not correcting or qualifying such representations for the matters pleaded at paragraph 79 above for such period, Storm engaged in conduct:
- (1) in trade or commerce; and
 - (2) in relation to financial services (within the meaning of section 12DA(1) of the ASIC Act); or
 - (3) in relation to a financial product or financial service within the jurisdiction of the Corporations Act within the meaning of section 1041H of the Corporations Act; and
 - (4) in contravention of section 12DA of the ASIC Act and, or alternatively, section 1041H of the Corporations Act and which constituted misrepresentations within the meaning of section 73 of the TPA.

81. Each of the Applicants' Risk Representations, the Applicants' Reasonable Grounds Representations and the Applicants' SOA Representations:
- (1) were relied upon by the Applicants in deciding to accept the recommendations contained in the Applicants' SOA and the Applicants' SOAA and to enter into the Applicants' Storm Advice Retainer and the Applicants' Step Agreement; and
 - (2) materially contributed to the decisions of the Applicants:
 - (a) to accept the recommendations contained in the Applicants' SOA and the Applicants' SOAA and to pay Storm's fees; and
 - (b) not to seek alternative investment advice from a suitably qualified and licensed financial planner which was appropriate to the personal and financial circumstances of the Applicants.
82. By reason of the matters pleaded in paragraph 81 above, the Applicants have suffered loss and damage.

Particulars

The Applicants repeat the matters pleaded at paragraph 49.

83. Storm, during the Relevant Period, made representations to some or all of the Group Members to the same or materially the same effect as each of:
- (1) the Applicants' Risk Representations;
 - (2) the Storm No Risk Representation;
 - (3) the Applicants' Reasonable Grounds Representations; and
 - (4) the Applicants' SOA Representations,
- (collectively, the "**Group Member Representations**")

Particulars

The Group Members repeat the matters pleaded at paragraph 6.

84. The Group Member Representations:
- (1) were representations made by Storm in trade or commerce within the meaning of section 12BA of the ASIC Act;
 - (2) were or included representations as to future matters for the purposes of section 12BB(2) of the ASIC Act and section 769C of the Corporations Act; and
 - (3) were made initially on the relevant dates of the initial statements of advice from Storm for each relevant Group Member and were continuing throughout the period in which those Group Members invested

in accordance with, and pursuant to, the advice and recommendations of Storm.

85. The Group Member Representations:
- (1) in so far as they were or included representations as to a present matter or present matters, were untrue and, or in the alternative, misleading and deceptive or likely to mislead and deceive;
 - (2) in so far as they were or included statements of opinion, were made without a reasonable basis, without the exercise of due care, skill and diligence and were not safe to rely upon; and
 - (3) in so far as they were or included representations as to future matters, were made without a reasonable basis.

Particulars

The Group Members repeat the matters pleaded at paragraphs 6-10 and 73.

86. By reason of the matters pleaded in paragraphs 83-85 above, by making each of the Group Member Representations to some or all of the Group Members throughout the period pleaded at paragraph 84 above, in not correcting or qualifying such representations for the matters pleaded at paragraph 85 above for such period, Storm engaged in conduct:
- (1) in trade or commerce; and
 - (2) in relation to financial services (within the meaning of section 12DA(1) of the ASIC Act); or
 - (3) 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; and
 - (4) in contravention of section 12DA of the ASIC Act and in addition, or alternatively, section 1041H of the Corporations Act and which constituted misrepresentations within the meaning of s73 of the TPA.
87. Each of the Group Member Representations were:
- (1) relied upon by some or all of the Group Members in deciding to accept the recommendations contained in the Group Members' SOA and the Group Members' SOAA and to enter into the Group Members' Storm Advice Retainer and the Group Members' Step Agreements; and
 - (2) materially contributed to the decisions of the Group Members:
 - (a) to accept the recommendations contained in the Group Members' SOA and the Group Members' SOAA and to pay Storm's fees; and

- (b) not to seek alternative investment advice from a suitably qualified and licensed financial planner which was appropriate to the personal and financial circumstances of the Group Members.

88. By reason of the matters pleaded in paragraphs 86 to 87 above, some or all of the Group Members have suffered loss or damage.

Particulars

The Group Members repeat the matters pleaded at paragraph 54.

89. The credit provided by Westpac to the Applicants, being the Applicants' Westpac Loans, and to the Group Members, being the Group Home Loans, was provided to them, in the premises pleaded at paragraphs 57, 62, 65 and 66 above, as consumers:

- (1) pursuant to, and in accordance with, the Services supplied and the recommendations made therein, to the Applicants and the Group Members;
- (2) partly for the purpose of payment of Storm's fees for the Services provided, for the Applicants and for some or all of the Group Members; and

Particulars

- (a) The Applicants rely on the matters pleaded in paragraphs 7, 25 and 30 above.
- (b) Particulars of the Group Members' circumstances will be provided after the determination of the common issues in this proceeding.

- (3) at the time of providing such loans, Westpac was providing, or proposing to provide, in the course of a business carried on by Westpac, credit to consumers in relation to the acquisition of goods and services; and

Particulars

At all material times Westpac was a trading bank which made many loans to consumers, including for the acquisition of goods and services.

- (4) accordingly, such credit was provided "in respect of" or "in relation to" the supply and acquisition of the Services by Westpac as a credit provider within the meaning of section 73 of the TPA.

90. During the Relevant Period, Westpac and Storm had a contract, arrangement or understanding relating to the business carried on by Storm of supplying the Services known as Westpac's "**Financial Planning Industry Package**", being a finance and banking package designed for financial planners, offered by Westpac in conjunction with a company known as

Bstar Pty Ltd, the purpose of which was “To assist Financial Planners and Advisers [to] fund the acquisition of existing portfolios, succession in existing business, refurbishment or refit expenses together with a working capital (overdraft) facility” and to assist them in “preparing business plans and making investment decisions”.

Particulars

- (a) In or about early 2004, Mr Bowden of Westpac offered Storm the “Financial Planning Industry Package”. Westpac approved Storm’s application on about 1 April 2004 whereby Storm executed a Non-Disclosure Agreement with Westpac and a Tripartite Deed.
- (b) In about August 2005, Westpac, Storm, and, a wholly owned subsidiary of Storm Storm Financial (Seven) Pty Ltd (“**SF7**”) entered into a “Tripartite Deed” as required by Westpac and thereby granted Storm access to the Financial Planning Industry Package and Westpac approved a \$550,000 loan to SF7 in order to finance the purchase of a financial planning business.
- (c) Storm remained an Accredited Dealer Group with access to the Financial Planning Industry Package until placed into liquidation.

91. From at least 1999 and during the Relevant Period:

- (1) as pleaded at paragraph 6, Storm regularly referred clients to Westpac for property loans;
- (2) on the facts, matters and circumstances pleaded at (4) below, the Applicants and Group Members allege that Storm and Westpac held negotiations, at which:
 - (a) Storm sought from Westpac certain matters or concessions on Storm-referred loans, as pleaded below, in order to encourage or permit Storm to continue to regularly refer clients to Westpac for credit and to facilitate Storm’s business, as such concessions improved the Services and benefits Storm was able to provide to its clients, including:
 - (i) the appointment of a nominated Westpac officer to be a single point of contact at Westpac in order to liaise and negotiate with Storm in respect of Storm’s loan referrals, and to receive from Storm their clients’ loan quotations, financial profiles with forecast cash flow and income, and loan applications, and to respond thereto (Storm’s “**Westpac Representatives**”);
 - (ii) that Westpac make available to Storm their forms of application or offers for credit or loan contracts so that Storm could make such documents available to their cli-

ents and so that such documents may be signed by such clients at the premises of Storm;

- (iii) discounted interest rates;
- (iv) discounted fees;
- (v) a higher LVR (of 80%) than would ordinarily be offered to customers of Westpac;
- (vi) interest-only loans;
- (vii) that Westpac accept or adopt the cash flow and income projections in the financial profiles for servicing and credit assessment purposes, including for retirees

(the “**Concessions**”);

- (b) Westpac sought to be advised by Storm of the terms and Concessions sought by Storm in order to encourage or permit Storm to continue to regularly refer clients to Westpac for credit;
 - (c) Westpac advised Storm of the terms and Concessions Westpac would grant Storm in order to encourage or permit Storm to continue to regularly refer clients to Westpac for credit;
- (3) on the facts, matters and circumstances pleaded at paragraph (4) below, the Applicants and Group Members allege that arising from, and by reason of, such negotiations, and arising from, or by reason of, the conduct pleaded at paragraph 71(4), Westpac and Storm had an arrangement or understanding, in order to encourage or permit Storm to continue regularly to refer clients to Westpac for obtaining credit and to facilitate Storm’s business, to the following effect:
- (a) Westpac agreed to, and did, nominate one or more persons as Storm’s Westpac Representatives to receive from Storm, and/or be the officer to liaise and negotiate with Storm over, Storm referrals consisting of their clients’ loan quotations, financial profiles with forecast cash flow and income, and loan applications, and to respond thereto;
 - (b) Westpac agreed to, and did, make available to Storm its forms of application or offers for credit or loan contracts so that, and in the knowledge that, Storm could make such documents available to its clients and that such documents may be signed by such clients at the premises of Storm – which then took place;
 - (c) Westpac agreed to, and did, offer discounted interest rates on Storm-referred loans;
 - (d) Westpac agreed to, and did, offer discounted fees on Storm-referred loans;

- (e) Westpac agreed to, and did, permit a higher LVR on Storm-referred loans;
 - (f) Westpac agreed to, and did, permit interest-only loans on Storm-referred loans;
 - (g) Westpac agreed to, and did, permit projected income from Storm investments to be used for servicing and credit assessment purposes;
 - (h) Storm agreed to, and did, continue regularly to refer its clients to Westpac for the purpose of obtaining credit;
 - (i) Storm and Westpac agreed to continue to negotiate, and did negotiate, with a view to ensuring that Storm received the best possible service, terms and conditions from Westpac for Storm-referred loans and Storm continued regularly to refer its clients to Westpac for the purpose of obtaining credit.
- (4) The Applicants and the Group Members rely upon the following facts, matters and circumstances in respect of the alleged arrangement and understanding:
- (a) In or about 1999, Mr Bowden was an experienced officer at Westpac Private Bank responsible for the management of various high net worth and/or important customer accounts, including Mr and Mrs Cassimatis.
 - (b) In or about 1999 at a meeting or meetings between Mr and Mrs Cassimatis and Mr Bowden, Storm asked for the Concessions in order to facilitate and improve Storm's business and the Services it provided to clients and to encourage future referrals. Storm also complained about current Westpac credit policy which:
 - (i) did not provide 80% LVRs on interest-only loans;
 - (ii) did not always permit interest-only loans, or only permitted such loans for a duration of one year; and
 - (iii) did not accept or adopt the cash flow and income projections in the financial profiles provided by Storm for servicing and credit assessment purposes.
 - (c) In or about 1999, in order to understand the Storm Model, determine Storm's request for Concessions, and assess Westpac's relationship with Storm (the "**Purpose**"), Mr Cassimatis invited Mr Bowden to attend, and Mr Bowden did attend:
 - (i) Storm's Townsville offices to receive a presentation of the Storm Model, which lasted for approximately half a day, at which Mr Bowden was told each of the matters alleged in paragraphs 6-8 above, including, without lim-

iting the generality of the foregoing, examples of the advice given to clients, including the Storm No Risk Representation, examples of client's Confidential Financial Profiles, including that clients were encouraged to adopt, and nearly all clients adopted, the third option as to their risk profile, and examples of cash flow forecasts and income projections required to service the recommended loans (the "**Standard Bank Presentation**"); and

- (ii) Storm's education seminars, comprising of two sessions lasting about 6 hours in total, at which Mr Bowden was told each of the matters alleged in paragraphs 6-8 above (the "**Education Seminars**").
- (d) In or about 1999, Mr Muller, Westpac Area Manager responsible for Westpac's retail banking in the Central and North Queensland region, advised Storm that he was to be Storm's Westpac Representative who then was the Westpac officer who received from Storm, and was the Westpac officer to liaise and negotiate with Storm regarding, Storm referrals consisting of their clients' loan quotations, financial profiles with forecast cash flow and income, and loan applications, and was the Westpac officer to respond thereto.
- (e) Mr Bowden continued to negotiate and liaise with Storm about Storm-referred loans and to receive Storm referrals consisting of their clients' loan quotations, financial profiles with forecast cash flow and income, and loan applications, and to respond thereto, in cases where the Storm-referred client was a customer of Westpac's Private Bank division.
- (f) In or about 1999, at Mr Cassimatis' invitation and for the Purpose, Mr Muller attended Storm's Townsville offices and received the Standard Bank Presentation.
- (g) From about 1999 until October 2008, Westpac provided offers of credit to Storm in response to Storm's loan quotations so that, and in the knowledge that, Storm could and did make such documents available to their clients.

Particulars

Such knowledge is to be inferred from the fact that such offers of credit were provided only to Storm and not to the clients directly.

- (h) In or about 1999 through to about 2001, Mr Bowden and Mr Muller, in negotiations with Storm, agreed to apply, and Westpac then applied, discounted interest rates and fees for Storm-referred loans.
- (i) In or about 2001 and 2002, Mr Cassamatis and Mr Muller and/or Mr Bowden negotiated over the Concessions and Westpac

agreed to offer to Storm-referred clients discounted loan rates and fee waivers from time to time (email exchange dated 3 and 4 April 2001 between David McCullough of Storm and Paul van Rooyen of Westpac) and to permit an 80% LVR on Storm-referred loans, with an interest-only period extending up to three years which could be extended, which permitted greater borrowings from Westpac.

- (j) In or about 2002, Mr Muller was replaced by Mr MacDonald, Home Finance Manager, as Storm's Westpac Representative, who then was the Westpac officer who received from Storm, and was the Westpac officer to liaise and negotiate with Storm over, Storm referrals consisting of their clients' loan quotations, financial profiles with forecast cash flow and income, and loan applications, and was the Westpac officer to respond thereto.
- (k) In or about 2002, at Mr Cassimatis' invitation and for the Purpose, Mr MacDonald attended Storm's Townsville offices and received the Standard Bank Presentation and, further, at Mr Cassimatis' invitation and for the Purpose, attended the Education Seminars.
- (l) Thereafter, negotiations over the Concessions and the Storm/Westpac relationship continued between Mr Bowden and Mr MacDonald, as Storm's Westpac Representative, and representatives of Storm, and between 2002 to 2004, offers of discounted loan rates and fee waivers were advised by Westpac from time to time (as evidenced in an email dated 14 April 2003 from David McCullough of Storm to Jennifer Clarke of Westpac / BT Financial Group). There continued to be requests from Storm for extensions of interest-only periods for as long as possible and also the use of plan income or proposed returns on Storm investments for servicing or credit assessment purposes. Westpac's credit policy at the time generally did not permit this to occur, as was advised by Mr Bowden and Mr MacDonald.
- (m) In response to complaints by Storm made to Mr Bowden, Mr MacDonald, in about October 2004, was replaced by Ms Belinda Jude, Regional Manager, Home Finance, North and Far North Queensland, as Storm's Westpac Representative to liaise with Storm over Storm referrals generally (which role continued until at least October 2008) and Ms Alba Barrie, Home Finance Manager, as Storm's Westpac Representative to receive and respond to the individual loan referrals.
- (n) In about 2005, Mr Bernie Deacon at the Westpac Private Bank replaced Mr Bowden as Mr and Mrs Cassamatis' Private Bank relationship manager and one of Storm's Westpac Representatives and continued in that role until at least October 2008, including by continuing to negotiate with Storm representatives over Storm-referred loans and the Concessions, and to receive

documentation in respect of Storm-referred loans where the client was a customer of Westpac's Private Bank division.

- (o) In or about late 2004 or early 2005, at Mr Cassimatis' invitation and for the Purpose, Ms Jude, Ms Barrie and Mr Deacon attended Storm's Townsville offices and received the Standard Bank Presentation, and, further, at Mr Cassimatis' invitation and for the Purpose, Ms Barrie, Ms Jude and Mr Deacon attended, the Education Seminars.
- (p) From late 2004 to October 2008, negotiations over the Concessions and the Storm/Westpac relationship continued with Mr Bowden, followed by Mr Deacon, Ms Jude and Ms Barrie, and offers of discounted loan rates and fee waivers were advised from time to time (as evidenced in: email dated 17 June 2005 from Belinda Jude of Westpac to Claire Clive of Storm; email exchange of 4 July 2007 between Alba Barrie of Westpac and Angela Vinci of Storm; email exchange of 4 July 2007 between Alba Barrie of Westpac and Sharon Reed of Storm; email exchange of 5 September 2007 between Alba Barrie of Westpac and Pamela Crump of Storm).
- (q) On about 20 October 2005, Mr MacDonald emailed Claire Clive of Storm in order to advise that he was "now looking after Business Banking Customers throughout Queensland", and to offer his assistance in arranging finance for Storm clients who wished to apply for finance in a business name or to use a commercial or rural property as security for a loan and, thereafter, Mr MacDonald was Storm's Westpac Representative who, where a Storm-referred client applied for finance in a business name or used a commercial or rural property as security for a loan, received the client's loan quotations, financial profiles with forecast cash flow and income, and loan applications, and the Westpac officer who responded thereto.
- (r) In about mid-September 2006, Ms Jude called Ms Carolyn Blackburn of Storm and said that she wanted to increase the business that Storm referred to Westpac and that she was willing to discuss the rates which Westpac offered to Storm's clients (as evidenced in the email from Carolyn Blackburn to Anna Stathooules and Claire Clive of Storm dated 19 September 2006).
- (s) In or about 2005, at meetings or conversations between Mr and Mrs Cassamatis and Mr Deacon, Ms Jude, Mr MacDonald and/or Ms Barrie, Storm requested longer interest-only terms and that Westpac use projected plan or investment income for servicing or credit assessment purposes. Such Westpac officers said they would recommend a change in policy to their senior credit officers.

- (t) In or about 2005, Mr Deacon, Ms Jude, Mr MacDonald and/or Ms Barrie advised Storm that Westpac had agreed to changes that would apply to Storm-referred loans, whereby projected plan or investment income would be used for servicing or credit assessment purposes, and five-year interest-only loans could be renewed, with 80% LVRs available. Such concessions were in fact applied to Storm-referred loans, thereby enabling more and larger loans to be made available to Storm clients by Westpac.
- (u) In April 2005, Ms Barrie was replaced with Ms Sandra Kennedy as Storm's Westpac Representative.
- (v) Following Storm complaints to Ms Jude, Ms Kennedy was replaced with Ms Barrie, who resumed her role as one of Storm's Westpac Representatives in October 2005 until at least October 2008.
- (w) On about 16 March 2005, Ms Jude and Mr McCulloch met or had a conversation concerning the provision of mortgage-related documents by Westpac to Storm.
- (x) By way of email of that date, Ms Jude confirmed to Mr McCulloch, pursuant to their earlier conversation, that Westpac would disclose mortgage-related documents to Storm, subject to the provision to Westpac of a signed authority, a pro forma copy of which was enclosed with Ms Jude's email.
- (y) By email dated 23 August 2005, Ms Kennedy sent to Linda Buskell of Storm all of the documentation required by Westpac for a loan application, so that and in the knowledge that it would be made available by Storm to Storm's clients, which documentation included:
 - (i) a home loan application form
 - (ii) a guarantor application form;
 - (iii) a consent to provide information form; and
 - (iv) a checklist of acceptable documentation for income and other verification required in completing the application.
- (z) Thereafter, Storm made available such forms to its clients, including in the case of Lawrence as evidenced in emails dated August 2005, and many such clients, to the knowledge of Ms Jude, Ms Kennedy and later Ms Barrie, signed such forms at Storm's offices.

Particulars

Such knowledge is to be inferred from the fact that such forms were provided only to Storm and not to the clients directly and

Westpac had a practice of dealing only with Storm representatives rather than Storm's clients with respect to the approval and settlement of Storm-referred loans.

- (aa) In October 2005, Ms Barrie provided to Storm an updated loan application form for use by Storm, which thereafter was made available to clients by Storm, many of whom signed such applications at Storm's premises (as evidenced by email dated 10 October 2005 from Claire Clive of Storm to Carmela Richards, Carolyn Blackburn, Cherie Cooper, Emma Burgemeister, Erin Tompkins, Jennifer Jenyns, Linda Buskell, Nina Bhullar and Stephen Price, all of Storm).
- (bb) From about mid-2005, Westpac, following requests from Storm to Mr Deacon, Ms Jude, Mr MacDonald and/or Ms Barrie, sent by courier to Storm's offices, or made available at Westpac's offices for collection by Storm, Westpac's loan contracts. Storm then made those contracts available to its clients, many of whom, to the knowledge of Mr Deacon, Ms Jude, Mr MacDonald and/or Ms Barrie, signed such contracts at Storm's offices.

Particulars

Such knowledge is to be inferred from the fact that such loan contracts were provided only to Storm and not to the clients directly and Westpac had a practice of dealing only with Storm representatives rather than Storm's clients with respect to the approval and settlement of Storm-referred loans.

- (cc) In the Relevant Period, following requests from Storm to Mr Deacon, Ms Jude, Mr MacDonald and/or Ms Barrie, Westpac normally communicated through Storm, not the clients/customers, in respect of Storm-referred loans and the necessary loan documentation.
- (dd) From 1999 to October 2008, Storm regularly referred its clients to Westpac for obtaining credit by submitting to Mr Muller, Mr Deacon, Ms Barrie and Mr MacDonald during the periods they were Storm's Westpac Representative and/or Mr and Mrs Casimatis's Private Bank representative, clients' loan quotations, financial profiles with forecast cash flow and income, and loan applications, and they were read, responded to and dealt with by such persons, including to the point of settlement and loan dispersal;
- (ee) Such documentation passing between Storm and Westpac evidenced:
 - (i) the matters pleaded at paragraphs 6(1)(d) (as to Storm's cash flow forecasts), 7(1), 7(2), 7(4), 7(5), 8;

- (ii) that clients were seeking to borrow as much cash as possible against any assets they owned, including the family home and other real property;
- (iii) that such clients frequently had a large equity in the family home before coming to Storm, which was being geared for the Storm investments; and such officers responded to such applications and quotations;
- (iv) that such clients sought additional loans for investment with Storm whenever their properties increased in value;
- (v) that the loan proceeds were used to:
 - A. invest in the Special Funds;
 - B. make payments into a cash management account; and
 - C. make payments to Storm for their fees, usually at 7% of the total funds invested.

Further Particulars

- (a) Storm in most cases advised Storm's Westpac Representative (or, in some cases, another Westpac officer) by written instruction how to disperse the loan proceeds to the following effect:

Please disburse funds as follows:

<i>Special Fund(s)</i>	<i>[\$ amount]</i>
<i>Storm</i>	<i>[\$ amount]</i>
<i>Macquarie Investment Management Ltd – Macquarie CMT A/C</i>	<i>[\$ amount]</i>

- (b) Additional particulars of the matters in this paragraph may be provided after discovery.

92. In the premises pleaded at paragraphs 89-91 above, Westpac was a "linked credit provider" in relation to Storm, within the meaning of section 73(14) of the TPA, during the Relevant Period, in that:

- (1) Westpac and Storm, in the premises pleaded at paragraphs 90-91, had a contract, arrangement or understanding relating to:
 - (a) the business carried on by Storm of supplying the Services to its clients;
 - (b) the provision to Storm's clients of credit in respect of payment for the Services;

- (2) in the premises pleaded at paragraph 91, Westpac was a corporation to whom Storm, by arrangement with Westpac, regularly referred persons, being its clients, for the purpose of obtaining credit;
 - (3) in the premises pleaded at paragraph 91, Westpac was a corporation whose forms of contract or forms of application or offers for credit were, by arrangement with Westpac, made available to persons, being Storm's clients, by Storm;
 - (4) in the premises pleaded at paragraph 91, Westpac was a corporation with whom Storm had an understanding or arrangement under which contracts or loan application or offers for credit from Westpac may be signed by persons at premises of Storm.
93. 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 were tied loan contracts within the meaning of section 73 of the TPA in that:
- (1) this was recommended to the Applicants in the Applicants' SOA, a copy of which was provided to Alan Kelk as pleaded at paragraph 20 above;
 - (2) it was the standard procedure for Storm-referred loans, as disclosed to and known by Storm's Westpac Representatives and Mr Deacon, as particularised in paragraph 91 above, and Mr Kelk's knowledge of such procedure is to be inferred from his statements made as pleaded at paragraph 21;
 - (3) this was disclosed in writing by some or all Group Members in the loan dispersal instruction on settlement, and
- the Applicants repeat the matters pleaded at paragraphs 36-46 above as to Westpac's knowledge of Storm's standard procedures.
94. In the premises pleaded in paragraphs 65 to 93 above, pursuant to section 73(1)(b) of the TPA, 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 by Storm pleaded in paragraphs 71 and 72 above and, or alternatively, the misrepresentations by Storm pleaded in paragraphs 75-82 above.
95. In the premises pleaded in paragraphs 65 to 93 above, pursuant to section 73(1)(b) of the TPA, Westpac and Storm are jointly and severally liable to some or all of the Group Members for the amount of and loss or damage suffered by some or all of the Group Members as a result of the breaches of contract by Storm pleaded in paragraphs 73-74 above and, or alternatively, the misrepresentations by Storm pleaded in paragraphs 83-88 above.

G. NEGLIGENCE

96. At the time Westpac made the \$450,000 Loan and the \$760,000 Loan to the Applicants, the Applicants had been banking with Westpac for over ten years, had an established relationship with their bank manager Mr Kelk for at least 5 years, who acted as Westpac's representative in managing the Applicants' business, personal and loan accounts, and relied upon his advice, which included:

- (1) receiving loan applications from the Applicants and advising the Applicants of the outcome of such applications;
- (2) advising the Applicants about the bank's products, policies and services;
- (3) being the point of contact between the Applicants' and the bank in respect of all of the bank's available services, and

the Applicants had relied on such advice on such matters over the previous 5 years.

97. Before making the \$450,000 Loan and the \$760,000 Loan to the Applicants, Westpac provided the Applicants with the Kelk Advice.

Particulars

The Applicants repeat and rely upon paragraph 21.

98. The Applicants relied upon the Kelk Advice to Westpac's knowledge.

Particulars

Having given the Kelk advice, Mr Kelk was aware that the Applicants entered into the loan transactions with Westpac in order to invest in the Special Funds as pleaded in paragraph 25, and it is a natural inference that Mr Kelk would be aware that the Applicants would rely upon his advice, given the matters pleaded at paragraph 96 above.

99. At the time Westpac provided the Kelk Advice, Westpac knew, or ought to have known:

- (1) that the Applicants had no experience investing in shares;
- (2) of the information conveyed at the Webb/Kelk Meetings and contained in the Applicants' Financial Profile and Loan Application;
- (3) of the information contained in the Applicants' SOA;
- (4) of the information about the Applicants and their financial position held by Westpac as a result of the Applicants banking with Westpac over many years;

- (5) of the Storm Model and how it was operated by Storm.

Particulars

The Applicants repeat and rely upon paragraphs 36-46 above.

100. In the premises, it was reasonably foreseeable on the part of Westpac that:
- (1) a failure to exercise reasonable care and skill when giving advice about the Applicants' proposed investments with Storm would result in the Applicants suffering financial loss; and.
 - (2) there was a significant risk if the Applicants entered into the proposed investment with Storm, as set out in the Applicants' SOA, that they could lose their Equity Contributions, the Kedron Property, the Kelvin Grove Property and their investments in the Special Funds.

Particulars

The Applicants repeat and rely upon paragraphs 36-46 above.

101. In the premises, Westpac owed the Applicants a duty of care to exercise reasonable care and skill when giving advice about the Applicants' proposed investment in the Special Funds in accordance with the Storm Model, as set out in the Applicants' SOA.
102. Westpac negligently misstated the position in relation to the soundness of the Applicants' proposed investment in Storm and/or failed to communicate information to the Applicants about the risks of that investment.

Particulars

The Applicants repeat and rely upon paragraphs 9, 10, 34, 73 and 79 above.

103. In the premises, Westpac breached its duty of care to the Applicants.
104. If Westpac had not breached its duty of care to the Applicants, the Applicants would not have invested in accordance with Storm's advice and would have sought and received independent financial advice which was appropriate to their financial circumstances and needs, and followed that financial advice.
105. As a consequence of Westpac's breach of its duty of care, the Applicants suffered loss or damage.

Particulars

The Applicants repeat the matters particularised in paragraph 49 above.

Date: 30.8.16



Signed by Stewart Alan Levitt
Solicitor for the Applicants

Certificate of lawyer

I, Stewart Alan Levitt, certify to the Court that, in relation to the further amended statement of claim filed on behalf of the Applicants, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 30.8.16



Signed by Stewart Alan Levitt
Solicitor for the Applicants

The original pleading was prepared by Stewart Levitt of Levitt Robinson and Daniel Klineberg of Counsel and settled by Douglas Campbell of Queen's Counsel.

The first amended pleading was prepared by Daniel Klineberg of Counsel and settled by Stewart Levitt of Levitt Robinson.

The second amended statement of claim (unfiled) was prepared and settled by Douglas Campbell of Queen's Counsel and Dr Juliet Lucy of Counsel.

This further amended statement of claim was prepared by Daniel Meyerowitz-Katz of Levitt Robinson and settled by Robert Dubler of Senior Counsel and Timothy Kane of Counsel.

Schedule 1: Financial Profile

CONFIDENTIAL FINANCIAL PROFILE

Storm Financial Pty Ltd

Personal Details

Names:	John Charles Lee	Glenda Marian Lee
Dates of Birth:	30-Jul-52	19-Aug-54
Marital Status:	married	
Dependants	none	
Age of Dependants		
Occupation:	Bricklayer	Retired
Employer:	Lee Bricklaying	
Address of Employer		
Length of Service:	30 years	
Business Phone:	7 Mitchell Street, Kedron Qld 4031	
Home Phone:	(07) 33578004	
Home Address:	7 Mitchell Street, Kedron Qld 4031	
Date moved in:		

Glenda 2006 statements state \$170084 she sold the business but still owns the property

Yearly Income and Expenses

Income

Income	\$ 60,200.00
Income	\$ -
Investment Rent	\$ 75,000.00
Rent	\$ 20,000.00
Storm Income	\$ 200,000.00
Total Income	\$ 355,200.00

Assets and Liabilities

Assets

Home	\$ 800,000.00
Business Premises	\$ 900,000.00
Shares	\$ -
Cash at Bank	\$1,734,800.00
Superannuation	\$ 660,000.00
Contents	\$ 150,000.00
Motor Vehicles	\$ 90,000.00
Boat	\$ 20,000.00
Total Assets	\$4,354,800.00

Liabilities

Other Assets & Liabilities NOT PART OF PLAN

Investment property	\$ 250,000.00
Investment property	\$ 275,000.00
Westpac Loan	\$ (235,000.00)
Westpac Loan	\$ (132,000.00)

Commercial Property Loan	\$ 190,000.00
Mastercard \$11k limit	\$ -
2 x Mastercard \$50k limit	\$ -
AMEX Platinum	\$ -
3 x AMEX Credit Cards	
Altitude AMEX \$50K limit	
Visa \$15k limit	

Total Liabilities **\$ 190,000.00**

NOTE - Credit Cards Paid Monthly

Plan assumes sharemarket has returned growth and divs of 10%, however traditionally returns 13%.

Storm Investment \$3.6M

Schedule 2: Defined Terms

Term	Paragraph reference
<i>\$450,000 Loan</i>	24(1)
<i>\$760,000 Loan</i>	24(3)
<i>Additional Step Investment</i>	6(5)
<i>Applicants' Margin Loan</i>	17(1)
<i>Applicants' Reasonable Grounds Representations</i>	77(3)
<i>Applicants' Risk Representations</i>	75
<i>Applicants' Risks</i>	34(5)
<i>Applicants' SOA</i>	14
<i>Applicants' SOAA</i>	30
<i>Applicants' SOA Representations</i>	76
<i>Applicants' Westpac Loans</i>	24
<i>Applicants' Westpac Submission</i>	11
<i>ASIC Act</i>	57(5)(a)
<i>Banking Code</i>	26
<i>Banking Code Term</i>	28
<i>Barrie Matters</i>	39(4)
<i>Build Step</i>	6(5)(a)
<i>Caloundra Unit</i>	22(4)(c)
<i>Concessions</i>	91(2)(a)(vii)
<i>Confidential Financial Profile</i>	6(1)(c)
<i>Corporations Act</i>	66(2)
<i>Dam Account</i>	6(3)(b)
<i>Deacon Matters</i>	45(2)
<i>Education Seminars</i>	91(4)(c)(ii)

Term	Paragraph reference
<i>Equity Contribution</i>	6(2)
FCA	1
<i>Financial Planning Industry Package</i>	90
<i>Financial Profile</i>	12(3)
<i>Group Home Loans</i>	50
<i>Group Member Representations</i>	83(4)
<i>Group Members</i>	2
<i>Group Members' SOA</i>	65(1)
<i>Group Members' SOAA</i>	65(2)
<i>Home Loan General Conditions</i>	24(2)
<i>Implied Banking Code Term</i>	29
<i>Implied Duty</i>	36(2)
<i>Initial Investment</i>	6(3)
<i>Intensive Education Program</i>	6(1)
<i>Jude Matters</i>	43(2)
<i>Kedron Property</i>	22(4)(a)
<i>Kelk Advice</i>	21(5)
<i>Kelk Matters</i>	37(5)
<i>Kelvin Grove Property</i>	22(4)(d)
<i>Loan Application</i>	23
LVR	6(3)(b)(i)
<i>MacDonald Matters</i>	41(4)
<i>Mr Deacon's Position</i>	45(1)(b)(ii)
<i>Mr Kelk's Position</i>	37(1)(b)(ii)
<i>Mr MacDonald's Position</i>	41(1)(b)(ii)
<i>Ms Barrie's Position</i>	39(1)(b)(ii)

Term	Paragraph reference
<i>Ms Jude's Position</i>	43(1)(b)(ii)
<i>Position of Westpac</i>	35(1)
<i>Previous History</i>	37(5)(a)(iv)C
<i>Purpose</i>	91(4)(c)
<i>Recovery Step</i>	6(5)(b)
<i>Relevant Decision Maker</i>	38(4)
<i>Relevant Period</i>	2(1)
<i>Risks</i>	9(2)(e)
<i>Services</i>	65(2)
<i>Special Funds</i>	6(3)(d)
<i>Stafford Heights Property</i>	22(4)(b)
<i>Standard Bank Presentation</i>	91(4)(c)(i)
<i>Step Agreements</i>	65(2)
<i>Step Investment Strategy</i>	6(4)
<i>Storm</i>	2
<i>Storm 945A Term</i>	70
<i>Storm Advice Retainer</i>	65(1)
<i>Storm clients/Storm's clients</i>	2
<i>Storm Due Care and Skill Term</i>	67
<i>Storm Implied Warranty</i>	68
<i>Storm Model</i>	6
<i>Storm No Risk Representation</i>	6(1)(b)
<i>Storm's Westpac Representations</i>	91(2)(a)(i)
<i>TPA</i>	3
<i>Web/Kelk Meetings</i>	19
<i>Westpac</i>	2(1)

Term	Paragraph reference
<i>Westpac Representatives</i>	91(2)(a)(i)