

## **FURTHER AMENDED STATEMENT OF CLAIM**

(Filed pursuant to orders of Justice Ball made on ~~7 April~~ 12 July 2016)

### **COURT DETAILS**

Court	Supreme Court of New South Wales
Division	Equity
List	Representative Proceedings
Registry	Sydney
Case number	<u>2016 / 00086790</u>

### **TITLE OF PROCEEDINGS**

First plaintiff	<b><del>Portland Property Holdings (NSW) Pty limited</del> <del>ACN 108 610 359</del> Australian Retirement Group Pty Limited, ACN 097 623 704</b>
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Second plaintiff	<b>Peter Gower Walsh</b>
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<del>{First} defendant</del>	<b><del>The Directors and Past Directors of the Commonwealth Bank of Australia Limited ACN 123 123 124, [whose names appear on the schedule marked "A"].</del></b>
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Defendant	The Commonwealth Bank of Australia Limited
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### **FILING DETAILS**

Filed for	<b><del>Portland Property Holdings (NSW) Pty limited</del> <del>ACN 108 610 359</del> Peter Gower Walsh AND Australian Retirement Group Pty Limited, ACN 097 623 704</b>
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Legal representative	Trevor Hall, Hall Partners
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### **TYPE OF CLAIM**

Equity General List (other)

[on separate page]

## RELIEF CLAIMED

1. A **Declaration** that BankWest designed and implemented a system by which the Group Members' banking facilities were transferred to CAM, notwithstanding that the businesses of the Group Members were Performing Loans at the time, and there had been no breaches of the terms of the Facility Agreements by Group Members;
2. A **Declaration** that, as part of that system, BankWest hindered or prevented Group Members from performing obligations under the respective Facility Agreement to which they were parties, thereby leading BankWest to write off the loans;
3. A **Declaration** that the Facility Agreements executed by the first plaintiff and the Group Members and either expressly or by implication, incorporated the terms of the Code of Banking Practice as terms of the Facility Agreements;
4. A **Declaration** that the system, conduct, or pattern of conduct constituted a breach of the terms of the Code of Banking Practice, and thus the terms of the Facility Agreement executed between the Group Members and BankWest;
5. A **Declaration** that the conduct, or pattern of conduct that was implemented constituted unconscionable conduct on the part of BankWest in its dealings with the plaintiffs and the Group Members, in contravention of s 12CB of the ASIC Act 2001, and/or the general law;
6. Damages;
7. An **Order** for the purposes of Section 12GD of the ASIC Act 2001 (Cth) and / or Section 66 of the Supreme Court Act restraining the Defendant from taking any step for the purposes of enforcing or seeking to rely upon a contract of guarantee conferred upon the Defendant with respect to any Facility Agreement of a Group Member;
8. Such other relief or order(s) as in the opinion of the Court is justified;

9. Costs;

10. Interest.

## PLEADINGS AND PARTICULARS

### A. The Group Members

1. The plaintiffs bring this proceeding on their own behalf and on behalf of represented persons (Group Members) pursuant to Part 10 of the Civil Procedure Act 1995 (NSW).
2. Group Members are:
  - i. The borrowers, who fall within the definition of “small business” customers contained in the Banking Code of Conduct, and who entered into facility agreements with BankWest prior to 19 December 2008, and whose loan facilities were the subject of a review by BankWest after 19 December 2008, and that were subsequently placed into the Credit Asset Management (CAM) division of BankWest; or
  - ii. guarantors under the said facility agreements where entered into with BankWest prior to 19 December 2008.
3. As at the date of the commencement of this proceeding, seven or more persons have claims against the defendant.

### B. The Common Questions

4. The following common questions of fact or law arise in the proceedings:
  - i. whether the Group Members entered into Facility Agreements with BankWest;
  - ii. whether BankWest designed and implemented a system by which BankWest hindered or prevented Group Member from performing their obligations under the respective Facility Agreement, and transferred the Group Members’

banking relationship to CAM, notwithstanding that the loans of the Group Members were Performing Loans at the time, and there had been no breaches of the terms of the Facility Agreements by Group Members;

- iii. whether as part of that system, BankWest materially altered its credit policy, under which it operated at the time it executed the facility agreement with Group Members, so that Group Members who had a Total Aggregate Exposure (TAE) to BankWest of greater than \$10,000,000.00, but whose loans were Performing Loans, had their credit risk downgraded from that previously determined by BankWest, leading BankWest to re-classify the Group Members' loans as non-Performing Loans, and transfer the banking relationship to CAM;
- iv. whether, as part of that system and once in CAM, BankWest hindered or prevented a Group Member from performing its obligations under the respective Facility Agreement, thereby causing events of default of the Facility Agreement, and leading BankWest to write off the loans;
- v. whether, as part of that system, BankWest maintained that Group Members were in breach of their LVR covenants, having revalued the respective Secured Property using erroneous or unreasonable assumptions as to land value;
- vi. whether the Facility Agreements executed by the first plaintiff and the Group Members either expressly or by implication, incorporated the terms of the Code of Banking Practice as terms of the Facility Agreements;
- vii. if so, whether that system, conduct, or pattern of conduct constituted a breach of the terms of the Code of Banking Practice, and thus the terms of the Facility Agreement executed between the Group Members and BankWest;
- viii. alternatively, whether that conduct, or pattern of conduct constituted unconscionable conduct on the part of BankWest in its dealings with the plaintiffs and Group Members;

ix. If so, whether the Group Members are entitled to the relief that they claim?

### **C. The Plaintiffs and the Defendant**

5. The first plaintiff (**ARG**) is a corporation able to sue in its corporate name and style.
6. At all material times the second plaintiff was a director of ARG and was a guarantor of Facility Agreements entered into between ARG and BankWest. He is a Group Member for the purposes of paragraph 2(ii). above.
7. The defendant is liable to be sued in its corporate name and style. It is an authorised deposit-taking institution (ADI), and is subject to regulation by the Australian Prudential Regulation Authority (APRA) under the authority of the Banking Act 1959.
8. With effect from 19 December 2008, the defendant acquired BankWest from the Halifax Bank of Scotland.
9. BankWest's business, and all its rights and obligations, were transferred to the defendant on 1 October 2012 under a certificate of transfer issued pursuant to the [Financial Sector \(Business Transfer and Group Restructure\) Act 1999](#) (Cth).
10. In this statement of claim, unless it is necessary to distinguish between BankWest and the CBA, references to BankWest include references to the defendant.
11. Claims raised against BankWest in this statement of claim are brought against the defendant, it being responsible and answerable for all such claims, responsibilities and obligations of BankWest by reason of the Financial Sector Transfer Act that is pleaded above.

## **FACTS**

### **D. The review of the Group Members' banking facilities**

12. Group Members, including ARG and the second plaintiff, were borrowers or guarantors under facility agreements entered into with BankWest prior to 19 December 2008.
13. Following the acquisition of BankWest by the defendant, and between 19 December 2008 and 1 October 2012, BankWest undertook a review of approximately 1,958 files relating to, inter alia, commercial facilities previously provided by BankWest, including the files of the Group Members and ARG.
14. The review was part of a system designed by BankWest that was known as the “Credit Risk Transformation Program”, so as to enable it to identify and remove and write off from its books the Group Members’ commercial loans.
15. Pursuant to the system pleaded above, BankWest’s original credit policy, under which it operated at the time it executed the facility agreement with Group Members, including ARG, was materially altered, such that 1,958 loans that were:
  - (a) Performing Loans (defined in this pleading as a loan that is neither past due nor impaired), and which had a risk rating in the original BankWest credit policy of between 1 and 7 (1 being “Excellent” and 7 being “Weak: pass with caution”), and which therefore met BankWest’s lending criteria;
  - and
  - (b) had a Total Aggregate Exposure (TAE) to BankWest of greater than \$10,000,000.00;
  - had their credit risk downgraded from that previously determined by BankWest to a risk rating of between 8 (meaning that the loan was “Substandard”) to 10 (meaning the loan was classified as being “Loss – actual”); and
  - (c) were then classified as non-Performing Loans.

16. Following their classification as non-Performing Loans, BankWest:

- (i) hindered or prevented a Group Member from performing its obligations under the respective Facility Agreement,
- (ii) placed the Group Members' loans and banking relationship into the Credit Asset Management department of BankWest, (CAM); and
- (iii) wrote off the loans.

#### **Particulars**

- i. CBA's internal calculations sheets concerning 1,958 customer cases of Group Members loans which were loans which existed as at the acquisition date of 19 December 2008;
  - ii. CBA August 2010 Results Presentation;
  - iii. On 15 August 2010, Mr Ralph Norris, CEO of the defendant, acknowledged that 10% of the BankWest loan book had disappeared as part of the review
  - iv. CBA Debt Investor Update dated September 2010;
  - v. CBA Results Presentation for full year ended 30 June 2012.
17. The purpose and function of transferring the Group Members' loans to CAM was to remove them from the BankWest loan book, and to bring to an end the banking customer relationship between BankWest and the Group Members.
18. At the time that a Group Member's banking relationship and Facility Agreement was placed into CAM:
- i. The Group Member's loan, including ARG, was a Performing Loan; and
  - ii. The Group Member, including ARG, had not committed any act of default pursuant to the terms of the Facility Agreement, or any material

- act of default that could properly be viewed as justifying the transfer to CAM that was relevantly made; and
- iii. The Group Member, including ARG, was otherwise meeting its obligations and was within terms of the respective Facility Agreement(s).

### **Particulars**

- i. On 15 August 2010, Mr Ralph Norris and who was at that time the CEO of the defendant stated that the reviewed loans had been Performing Loans at the time they were reviewed and placed into CAM;
19. Once a Group Member's loan had been placed into CAM, BankWest:
- i. ceased, or delayed, the making of payments so that Group Members were unable to complete projects within the terms and upon the completion dates as were referred to within a Group Member's facility agreement; and/or
- ii. to achieve the purpose identified in paragraph 17 above, caused the Secured Property of a Group Member to be revalued using erroneous or unreasonable assumptions as to land values, thereby causing the Group Members' facilities to breach their loan to value ratio covenants; and/or
- iii. otherwise hindered or prevented a Group Member from performing its obligations under the respective facility agreement.
20. Further, once a Group Member's loan had been placed into CAM, BankWest:
- i. engaged in unfair practices including charging higher default rates of interest, imposing fees and charges on the loans and issuing unreasonable payment demands;
- ii. issued notices of default to Group Members requiring repayment of the loans in full within short periods of time;
- iii. terminated the facility agreement between the Group Member and BankWest.



21. BankWest then appointed receivers over the assets of Group Members and proceeded to sell the Secured Properties.
22. BankWest through the receivers then sold the assets of the Group Members and thereby caused the Group Members to suffer loss and damage.
23. BankWest then made a demand against those Group Members who were guarantors as security for the loans in respect of any shortfall.

#### **E. The Facility Agreements and the Banking Code of Practice**

24. The facility agreements entered into between BankWest and the Group Members were similar and consisted of the following:
  - i. an Offer Letter from BankWest; and
  - ii. Facility Terms; and
  - iii. BankWest's General Terms for Business Lending dated December 2007;
  - iv. the provisions and clauses contained within the Banking Code of Practice as it then existed.

**(together, "the Facility Agreement")**

#### **Particulars**

- i. An example of the terms and conditions is contained in the Offer Letter and Facility Terms executed by ARG on or about 18 September 2009.
25. Each of the Facility Terms contained a number of common terms and characteristics, including a clause which reads as follows:
  - i. *"By accepting this Offer Letter you acknowledge and agree that a legally binding contract between us and you is created on the terms set out in this Offer Letter, the Facility Terms and the General Terms."*
26. Clause 20 of the General Terms is headed "CODE OF BANKING PRACTICE" and states as follows:

### 20.1 Application

We have adopted the Code of Banking Practice and relevant provisions of the Code apply to this Agreement if:

you are an individual or small business customer (as defined by the Code); or the Guarantor is an individual and you are an individual or a small business customer (as defined by the Code).

27. Pursuant to the Code of Banking Practice, Group Members fall within the definition of “small business customer” as it is defined.

28. Relevant terms of the Code of Banking Practice state as follows:

This Code is a voluntary code of conduct which sets standards of good banking practice for us to follow when dealing with persons who are, or who may become, our individual and small business customers and their guarantors.

### PART B: OUR KEY COMMITMENTS AND GENERAL OBLIGATIONS

Our key commitments to you

#### 2.1 We will:

continuously work towards improving the standards of practice and service in the banking industry;

promote better informed decisions about our banking services:

by providing effective disclosure of information;

2.2 We will act fairly and reasonably towards you in a consistent and ethical manner. In doing so we will consider your conduct, our conduct and the contract between us.

3.2 If this Code imposes an obligation on us, in addition to obligations applying under a relevant law, we will also comply with this Code except where doing so would lead to a breach of a law (for example a privacy law).

25.1 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. By reason of clause 20 of the General Terms of the Facility Agreement(s) executed by the Group Member(s), the relevant terms of the Code of Banking Practice particularised in the paragraph above were incorporated into each Facility Agreement.
30. Each Facility Agreement was required to be supported by a guarantee.
31. Further, each Facility Agreement contained other common terms or characteristics, including:
- i. A requirement on the part of the Group Member to achieve and to maintain a particular loan to value ratio; and,
  - ii. Where the loan was for the purpose of permitting building works to be undertaken:
    - (a). payment of a progress claim would only be made by the defendant when all conditions precedent had been satisfied; and
    - (b). the conditions precedent included a condition requiring the building works to be completed by a date specified in the Facility Agreement.

#### **F. The Guarantee**

32. Each of the guarantees provided by Group Members, including the second plaintiff, contained materially the same terms, including the following term:
- “23.2 The relevant provisions of the [Code of Banking Practice] apply to this guarantee and indemnity.”*
33. By reason of the facts pleaded above, the relevant paragraphs of the Banking Code form part of the contractual terms of the guarantee executed by Group Members who were guarantors.

### **THE PLAINTIFF(S) CLAIMS**

#### **G. Claims by ARG**

34. Between approximately 2001 to 2003, ARG acquired and became the registered proprietor of land known as Lots 49, 51, 101, 105 and 106 McGilvray Road, Bonny Hills, NSW.
35. ARG had a Development Approval to construct 102 independent living units for persons aged 55 and over, 1,000 sq m of commercial retail floorspace, and 1,000 sq m of community facilities (the Carnegie Cove development).
36. On or about 5 October 2006, ARG and Bank of Western Australia Ltd (BankWest) entered into a facility agreement by which BankWest agreed to loan ARG the sum of \$9,000,000 in order to fund early development costs relating to the Carnegie Cove development.
37. From time to time after October 2006, and as the Carnegie Cove development progressed, new facility agreements were agreed between ARG and BankWest to fund further costs of the development.
38. Each facility agreement replaced the prior agreement as to all of its terms and became the facility agreement governing the relationship between BankWest as banker and the Group Member as a customer, guarantor or borrower from the inception date of the first facility agreement.

#### **H. ARG's Facility Agreements**

39. In 2009 BankWest agreed to lend ARG additional funds to fund stage 1A of the Carnegie Cove development, which works consisted of the construction of 9 independent living units, infrastructure works, the construction of McGilvray Road, and a temporary community facility.
40. On 30 March 2009, Mr Baptist, an employee of BankWest, wrote to ARG offering to vary the existing limit of the Facilities so as to increase the Facility Limit of the existing facilities by \$8,152,000 to the sum of \$23,135,000. The letter stated that it enclosed new Facility Terms which, once ARG had accepted them, would replace the existing facility agreement.

41. Under the terms of this proposed facility agreement, ARG was to ensure that the Building Works were commenced by 30 April 2009 and practically completed, to the satisfaction of BankWest's appointed quantity surveyor, by the 30 April 2010.
42. The March 2009 Facility Agreement was executed by the directors of ARG on or about 17 April 2009.
43. By June 2009 ARG had completed pre-sales for all but two of the proposed residential units within stage 1A of the development.
44. Construction works for Stage 1A commenced on or about June 2009.
45. The construction company appointed by ARG to carry out the construction works pursuant to a building contract was Bendix Pty Ltd (Bendix).
46. BankWest appointed Rider Levitt Bucknall (RLB) as its approved quantity surveyor in order to assess each progress claim submitted by Bendix, and to submit a monthly report to BankWest confirming that all conditions precedent to payment of the progress claim had been satisfied and that the amount of the progress claim was due and payable.
47. Bendix, ARG and BankWest entered into a tripartite agreement by which BankWest made payments to Bendix upon submission of the monthly progress claims.
48. Between July 2009 and January 2010, Bendix made 7 monthly progress claims.
49. Notwithstanding that building works had not commenced by 30 April 2009, and that one of the conditions precedent had not been met, RLB recommended, and BankWest agreed to pay the 7 progress claims.
50. Each of the progress claims were then paid and the requirement that works commence by the 30 April 2009 was thereby waived by BankWest.

51. On or about 4 September 2009, the terms of the facility agreement were again varied by agreement between BankWest and ARG.

### **Particulars**

- (i). Under the terms of the 4 September 2009 Facility Agreement, ARG was required, in addition to certain other terms, to provide a security deposit in the sum of \$450,000 in favour of the Port Macquarie Hastings Council concerning the construction of McGilvray Road.

#### **I. The 18 September 2009 Facility Agreement**

52. On or about 18 September 2009, Ms Tina Polly, an employee of BankWest wrote to ARG agreeing to vary the existing Facilities and to grant additional facilities to ARG. The letter enclosed new Facility Terms which, once ARG had accepted them, were intended to replace the terms of the existing facility agreement.
53. ARG executed the September 2009 Facility Agreement (Facility Agreement) on or about 25 September 2009.
54. The directors of ARG, including the second plaintiff, were guarantors of the Facility Agreement.
55. On or about 21 October 2009, BankWest varied the terms of the Facility Agreement, with the consent of ARG, which had the following effect on the parties' rights and obligations:
- i. the Building Works were to have a commencement date of July 2009;  
and
  - ii. the construction period was to remain 12 months; and
  - iii. ARG was required to ensure that practical completion of the Building Works to stage 1A occurred by 30 June 2010.

## **J. Breach of Facility Agreement – Claims by ARG**

56. On or about January 2010, BankWest transferred responsibility for ARG's banking relationship and Facility Agreement to CAM.

57. At the time that ARG's banking relationship and Facility Agreement was placed into CAM:

- i. ARG had not committed any act of default pursuant to the Facility Agreement; and
- ii. ARG was meeting its obligations and was conducting itself within arrangements and within the terms of its Facility Agreement.

## **K. Events following transfer into CAM**

58. On or about 29 January 2010, progress claim no. 8 was submitted for payment to the second defendant, pending review and approval for payment by RLB.

59. The RLB Progress Drawdown Report Number 8 was submitted by RLB on or about 26 February 2010.

60. By letter dated 17 March 2010, BankWest, through its solicitors, refused to make the progress payment number 8 which had been due for payment on or about 26 February 2010.

61. On or about 22 March 2010, progress claim 9 was submitted for payment to the defendant, pending review and approval for payment by RLB.

62. RLB approved payment claim number 9 for payment.

63. BankWest did not make progress payment number 8 on time or for its full amount and did not make progress payment number 9 by its due date, or at all.

64. The effect of BankWest refusing to make progress payment number 8 on time and/or progress payment number 9 at all, and within the terms of the Facility Agreement, was as follows:

- i. Bendix were unpaid and work ceased on the development after April 2010; and
- ii. The completion of works by the required date of practical completion was thereby prevented; and
- iii. ARG was unable to complete the construction of McGillvray Road to the satisfaction of the Port Macquarie Hastings Council.

65. In or about March 2010, an officer from BankWest contacted Patricia Forbes of Landmark White, who had undertaken the previous valuations of the Secured Property.

66. BankWest instructed Ms Forbes to prepare a further valuation of the Secured Property, wherein the value of the ARG Security Property reflected an overall valuation based on the comprised lands being worth a sum of \$5,000 per hectare.

67. Ms Forbes refused those instructions and advised the BankWest officer that such a valuation was outside the permissible range of valuation having regard to the existence of relevant comparable sales of land.

68. BankWest proceeded to revalue the lands at a value which was significantly less than the value of the land.

69. On 29 April 2009, at a meeting between Mr Lincoln Daley of Bendix, and officers of BankWest, BankWest represented as follows:

- a. BankWest would pay Progress Payment Number 8, in the sum of \$128,334.25, on or before 30 April 2010; and
- b. BankWest would pay Progress Payment Number 9, in the sum of \$92,093.76, on or before 30 April 2010

70. On 29 April 2010, BankWest made a payment of \$128,334.25 for Progress Payment Number 8, but failed to make Progress Payment Number 9 on that date, or at all.

71. On 10 May 2010, Lincoln Daley wrote to Lucy Hadfield at BankWest seeking confirmation as to whether payment for Claim #9 would be made on that day.



72. On the same day Lucy Hadfield replied to the effect that she had received authority to pay progress payment number 9 and that the claim would be processed that day, and paid, either that day or the next day.
73. Moreover and in any event there was no basis upon which, or no proper basis upon which, Progress payment numbered 8 was not paid on time, or as to why Progress payment number 9 was not paid.
74. In May 2010, Port Macquarie Hastings Council made claim upon BankWest concerning the security bond that ARG had provided to Council as a condition of obtaining the development consent, the said bond having been provided by Bank West as a part of the Facility Agreement and in the event that ARG did not complete the construction of McGilvray Road.
75. Following the demand, BankWest paid Council the full balance of the monies referred to as being the total sums available under the security bond in the sum of \$300,000, notwithstanding that:
- i. at the date of drawing on the Bond, ARG could not have completed the construction of McGilvray Road because BankWest had not made progress payments on time; and,
  - ii. the cost of the remaining works to construct McGilvray Road amounted to no more than \$160,000 pursuant to the terms of a fixed price contract.
76. On or about 10 June 2010, BankWest's solicitors issued a Letter of Demand to ARG requiring it to pay to BankWest by no later than 11 June 2010 the sum of \$300,000, being the sum paid by BankWest to Council for the bond
77. On or about 17 September 2010, BankWest issued a further notice of demand to ARG asserting that ARG was in default of the following 3 terms of its Facility Agreement:
- i. its Loan to value ratio covenants;
  - ii. the Guarantee Facility concerning the security bond; and
  - iii. the failure to complete the building works by the Practical Completion Date.

78. Under the heading “Loan to value ratio” (LVR), the letter stated that the Facility Limit is \$23,785,000; that BankWest had determined that the Security Value was \$4,059,645; and that the LVR is and remains at a level exceeding 75%, namely that it was sitting at 586%.
79. Under the heading “Guarantee Facility”, it was asserted that ARG had failed to pay the sum of \$300,000, which obligation arose as a result of BankWest’s payment to Council in respect of the bank guarantee issued by the BankWest to Council pursuant to the Bank Guarantee Contingent Instrument Facility.
80. Under the heading “Practical completion date” BankWest asserted that ARG was in default because it had not completed the Building Works by 30 April 2010.
81. The letter stated that the sum of \$20,453,211.36 was due and payable by 4pm on 22 September 2010, and that ARG was required to pay interest on the total sum at the BankWest Overdue Rate.
82. By reason of the facts pleaded above, these events of alleged default were either (a) not events of default at all, (as set out in (i) to (iv) below) or, (b) alternatively were events of default that had arisen because BankWest had hindered or prevented ARG from completing the terms of the Facility Agreement (as set out in (v) to (vii)) as follows:
- i. the valuation that was arrived at was less than 1/3<sup>rd</sup> of the amount that the defendant’s registered and qualified valuer had determined to be the appropriate amount of valuation in September 2009 and March 2010;
  - ii. BankWest knew that the valuation was erroneous based on the BankWest officer’s conversation with Patricia Forbes in or about March 2010 and in which she had refused to accept instructions to value the security property on the basis that the land parcel could be determined by attributing a value to the lands of \$5,000 per hectare;

- iii. a valuation of \$5,000 per hectare was referenced by the sale of Crown land to ARG of a discrete residual parcel of land within the Property but that carried no resemblance to the market value of the development land contained within the property where assessed across the whole of the land parcel;
- iv. the failure of ARG to complete the construction of McGilvray Road was not caused by any omission or failure of ARG, but was entirely due to BankWest's failures to pay the progress payments 8 and 9 within time, or, in the case of payment number 9, at all;
- v. the sum of money required to complete the construction of McGilvray Road was, pursuant to the terms of a fixed price contract, considerably less than the \$300,000 amount demanded by BankWest from ARG;
- vi. the failure of ARG to complete the Building Works by the Completion Date of 30 April 2010, or at all, was not caused by any omission or failure of ARG, but was entirely due to BankWest's failures to pay the progress payments 8 and 9 within time, or, in the case of payment number 9, at all; and
- vii. in any event, there was no requirement to complete the Building Works by 30 April 2010, on the basis that any such requirement had been varied by agreement between ARG and BankWest as pleaded above.

83. On 28 March 2011, Mr Philip Wilson and Mr Keiran Hutchinson of Ernst & Young were appointed by the defendant as receivers to ARG.

84. In the circumstances, BankWest breached the terms of the Facility Agreement, in particular paragraph 2.2 of the Banking Code, in that it did not act fairly and reasonably towards ARG and nor did it act in a consistent and ethical manner concerning the ARG facility, the particulars of which are set out as follows:

- i. it transferred responsibility for ARG's banking relationship and Facility Agreement to CAM as part of a system by which it placed 1,958 Group

- Member loans into CAM, in the knowledge that the loans were neither past due nor impaired;
- ii. it transferred responsibility for ARG's banking relationship and Facility Agreement(s) to CAM at a time when ARG had not committed any event of default pursuant to the terms of the Facility Agreement;
  - iii. it materially altered its credit policy, under which it operated at the time it executed the facility agreement with ARG, so that ARG, which had a Total Aggregate Exposure (TAE) to BankWest of greater than \$10,000,000.00, had its credit risk downgraded from that previously determined by BankWest, leading BankWest to re-classify the ARG loan as a non-Performing Loan, and transferred the banking relationship to CAM;
  - iv. it transferred, and retained, ARG in CAM for the purpose of making ARG's business and commercial dealings as difficult as possible and with a view to removing ARG from its loan book;
  - v. it failed to make payments for progress claims within the terms of the Facility Agreement within time or within any extended times to which it had then stated that they would be made;
  - vi. it failed to make progress payments within time, or at all, which had the effect that ARG was unable to fund construction works, leading to the cessation of those works, and essential terms of the Facility Terms could not then be met by ARG;
  - vii. it relied upon a valuation of the Secured Property which BankWest knew was based on an erroneous assumption of the value of the overall parcel and the whole of the Security Property, and which was an unreasonable valuation having regard to the previous valuation carried out in August 2009 by Patricia Forbes, and which BankWest knew was the true market value of the property;
  - viii. it relied upon alleged events of default of the Facility Agreement which were caused by the actions of BankWest;
  - ix. it wrongly maintained that ARG's LVR was greater than 75%, and was as high as 588%, when in fact ARG's LVR was substantially lower than this amount;
  - x. it incorrectly contended by letter dated 17 September 2010 that ARG was in default of the Facility Agreement;
  - xi. it failed to work with ARG to ensure that it could complete the development and comply with the Facility Agreement

- xii. it unfairly raised interest rates to a level where ARG was unable to service the interest or repay the debt;
- xiii. it determined the facility agreements where by its letter dated Friday 17 September 2010 made formal demand on ARG that it make repayment in respect of them on or before Wednesday 22 September 2010; and,
- xiv. on 28 March 2011, it appointed Mr Philip Wilson and Mr Keiran Hutchinson of Ernst & Young as receivers to ARG.

85. Further, BankWest acted in breach of the Facility Agreement, in particular clause 25.1 of the Banking Code, in that it failed to exercise the care and skill of a diligent and prudent banker may have been expected to exercise in having agreed to the terms of the Facility Agreement, including the advance of a loan of approximately \$23,000,000 in September 2009, and in circumstances where only a few months later, BankWest placed ARG into CAM and erroneously and falsely determined that the value of the Security Property was the sum of only \$4,050,000.

86. As a result of the breaches of the terms of the Banking Code and the ARG Facility Agreement pleaded in the preceding paragraphs, ARG:

- i. was placed into receivership;
- ii. became the subject of a claim by BankWest that there was a shortfall on the sums payable to BankWest under the facilities;
- iii. was denied, and lost the opportunity to complete the development project;
- iv. was denied, and lost the opportunity to make a profit from the development;  
and
- v. suffered loss and damage;
- vi. and the second plaintiff had a demand pressed against him by the defendant in respect of his guarantee.

#### **L. Group Members – Breaches of Contract by BankWest**

87. Paragraphs 12 to 33 are repeated.

88. BankWest breached the terms of Group Members' Facility Agreement, in particular paragraph 2.2 of the Banking Code, in that it did not act fairly and reasonably towards a Group Member in a consistent and ethical manner as follows:

- i. it transferred responsibility for a Group Member's banking relationship and Facility Agreement to CAM as part of a system by which it placed 1,958 Group Member loans into CAM, in the knowledge that the loans were neither past due nor impaired;
- ii. it transferred responsibility for a Group Member's banking relationship and Facility Agreement(s) to CAM at a time when the Group Member had not committed any event of default pursuant to the terms of the Facility Agreement;
- iii. it materially altered its credit policy, under which it operated at the time it executed the facility agreement with Group Members, so that Group Members who had a Total Aggregate Exposure (TAE) to BankWest of greater than \$10,000,000.00 had their credit risk downgraded from that previously determined by BankWest, leading BankWest to re-classify the Group Members' loans as non-Performing Loans, and transferred the banking relationship to CAM;
- iv. it transferred, and retained, the Group Member in CAM for the purpose of making ARG's business and commercial dealings as difficult as possible and with a view to removing ARG from its loan book;
- v. it failed to make payments for progress claims within the terms of the Facility Agreement;
- vi. through its actions in which the system and the review was implemented, it caused events of default to emerge in respect of the Facility Agreements to which the Group Member were party and upon which it then relied so as to call in, to determined and to bring to an end the Group Members facilities;
- vii. it wrongly maintained that Group Members were in breach of their LVR covenants;
- viii. it incorrectly contended that the Group Members were in default of the terms of their Facility Agreement(s) whereas in point of fact the only relevant defaults if arising were ones that through its conduct had arisen and that BankWest had then identified;

- ix. it failed to work with a Group Member or with the Group Members so as to ensure that it could complete the development and comply with the terms of the Facility Agreement;
- x. it unfairly raised interest rates to a level where a Group Member was unable to service the interest or repay the debts concerning it; and
- xi. it ultimately appointed receivers to the Group Members, and took proceedings against the Group Members who were guarantors.

89. If, following a determination of the common issues, it is necessary to determine the individual claims of Group Members:

- a. the plaintiffs anticipate that claims of the nature pleaded will be brought by the individual Group Members; and
- b. further detailed particulars of those claims will be provided.

90. As a result of the breaches pleaded in paragraph 87-89 above, some or all of the Group Members:

- i. were placed into receivership; and
- ii. were denied, and lost the opportunity to complete the development project;
- iii. were denied, and lost the opportunity to make a profit from the development;
- iv. had their assets seized and their estate sequestrated;
- v. were placed into personal bankruptcy;
- vi. suffered loss and damage;
- vii. became the subject of demands pressed against them by the defendant concerning their contracts of guarantee.

#### **M. Breaches of Implied terms and Duty to act reasonably by BankWest**

91. In the event that the relevant paragraphs of the Code of Banking Practice do not form an express part of the Facility Agreement executed by Group Members, the Facility Agreements executed by Group Members, including ARG, contained the following implied terms and duties on the part of BankWest:

- i. the relevant terms and duties contained in the paragraphs of the Code of Banking Practice particularised above; and
- ii. a duty to act in good faith, and consistently with fair dealing, towards ARG and/or not to act in bad faith; and
- iii. a duty to co-operate with ARG and not to prevent performance by ARG; and
- iv. a duty to act rationally;
- v. a duty to act reasonably;
- vi. a duty to act for a proper purpose.

#### **N. ARG – Breaches of implied terms and Duty to act reasonably**

92. By reason of the facts and matters pleaded at paragraph 84 to 86 above, BankWest failed:

- i. to act reasonably; and/or,
- ii. breached the implied terms of the Facility Agreement with ARG, in particular its duty to act in good faith and/or not act in bad faith and its duty contained in paragraph 2.2 of the Banking Code,

in that it did not act fairly and reasonably towards ARG in a consistent and ethical manner.

93. As a result of the breaches pleaded in the preceding paragraph, ARG:

- i. was placed into receivership; and
- ii. was denied, and lost, the opportunity to complete the development project;
- iii. was denied, and lost, the opportunity to make a profit from the development; and
- iv. suffered loss and damage;
- v. and the second plaintiff became the subject of a demand pressed against him concerning his guarantee.

#### **O. Group Members – Breaches of Implied terms and duty to act reasonably by BankWest**

94. [This paragraph is blank].



95. Paragraph 91 above is repeated.

96. By reason of the facts and matters pleaded above at paragraphs 88 and 91 above, BankWest failed to act reasonably and/or breached the terms of Group Members' Facility Agreement, in particular paragraph 2.2 of the Banking Code, in that it did not act fairly and reasonably towards a Group Member and in a consistent and ethical manner.

97. If, following a determination of the common issues, it is necessary to determine the individual claims of Group Members:

- a. the plaintiffs anticipate that claims of the nature pleaded will be brought by the Group Members; and
- b. further detailed particulars of each of those claims will be provided.

98. As a result of the breaches pleaded in paragraph 96 above, some or all of the Group Members:

- i. were placed into receivership; and
- ii. were denied, and lost the opportunity to complete their projects;
- iii. were denied, and lost the opportunity to make a profit from their commercial activities including those activities that were the subject of their facilities; and
- iv. suffered loss and damage;
- v. had demands made and pressed against them concerning their contracts of guarantee.

**P. Unconscionable conduct by BankWest**

99. By reason of the matters pleaded, BankWest engaged in conduct in trade or commerce in connection with the supply of financial services to Group Members, including ARG, that was, in all the circumstances, unconscionable, contrary to the general law, or in contravention of s 12CB of the ASIC Act 2001 (Cth).

**Particulars of Unconscionable Conduct**

- i. The Group Members' loans were transferred to CAM at a time when they had been Performing Loans;
- ii. Group Members were not consulted prior to their facilities being transferred to CAM;
- iii. The intended purpose in transferring the loans to CAM was to remove them from the Bankwest commercial loan book of Bankwest and to cause them to be written off;
- iv. The undisclosed nature of the intended purpose in transferring the loans to CAM;
- v. The reliance upon acts of default in the manner in which the loans were transferred to CAM that which, but for the Credit Risk Transformation Program, would not have justified their transfer to CAM;
- vi. The unfair practices that Bankwest engaged in and that are referred to in Paragraph 20 of this Statement of Claim;
- vii. The non-compliance with the provisions of the Code of Banking Practice that the Credit Risk Transformation Program involved and to which the Group Members Facilities were subjected;
- viii. In the case of a Group Member who was a guarantor, the way in which claims under their contracts of guarantee were pressed upon them notwithstanding that the loans that they guaranteed had been performing loans;
- ix. the individual Group Members were not asked and were not permitted to negotiate the terms upon which their facilities were placed into CAM nor as to the events that followed concerning them, and the purpose of them being transferred to CAM was not made known to them;
- x. It was not reasonably necessary to protect the legitimate interests of BankWest that the facilities of the Group Members where they were Performing Loan Customers, were transferred into CAM together with the intention that this entailed;
- xi. BankWest's treatment of the Group Members loans was not motivated or informed by the observance of the Banking Code or its duty to otherwise

act rationally and reasonably, but rather was directed towards writing off the loan and removing it from the Commercial Loan Book.

100. Further, as a result of being placed in CAM, Group Members, including ARG, were in a position of special disadvantage in their dealings with BankWest.

**Particulars of Special Disadvantage**

- i. The Group Members, where their facilities were in CAM, had no realistic chance or opportunity to secure alternate arrangements with another financier;
  - ii. The transfer of the Group Members' loans to CAM and the way in which their facilities were dealt with was being determined by reference to the 'Credit Risk Transformation Program', being a Program over which the Group Members had no control because the program existed outside the contractual arrangements between Bankwest and the Group Members;
  - iii. The Group Members were not told at the time of the basis and the manner in which, following 19 December 2008, their facilities were being dealt with, and they were never told of the existence of the Credit Risk Transformation Program which was the primary determinative factor as to how their loans were being treated.
101. Further, BankWest, in trade or commerce, acted unconscionably in its dealings with ARG and Group Members, in contravention of s 12CB(4) of the ASIC Act, in devising and implementing a system of conduct as pleaded at paragraphs 25 to 29 above, and in appointing receivers to the assets of Group Members, and/or commencing proceedings against a Group Member who is a guarantor of a commercial loan, pursuant to that system of conduct.
102. By reason of the unconscionable conduct pleaded above, Group Members, including ARG:
- i. were placed into receivership; and
  - ii. were denied, and lost the opportunity to complete the development project;
  - iii. were denied, and lost the opportunity to make a profit from the development; and
  - iv. suffered loss and damage;

- v. had demands pressed against them by the defendant concerning their contracts of guarantee.

103. The Plaintiffs have suffered damage including the following damage:

- i. loss of the Proposed Development, \$80 million;
- ii. loss of the opportunity to have further developed the Property including as to the construction of a golf course, construction of a Hotel, further amenities and commercial activities, together with further potential subdivision, an additional \$70 million;
- iii. loss of reputation, (to be assessed);

- iv. The pressing of a demand against the Second Plaintiff under the contract of guarantee.

#### **COMMON QUESTIONS**

104. These are now contained at paragraph 4 of this statement of claim, (The Common Questions).

[on separate page]

## RELIEF CLAIMED

1. ~~A **Declaration** that the conduct of the second defendant in respect of the impairment, provisioning, appointment of Receiver Managers and writing off of loans carried out across the Corporate Loan Book of BankWest against the plaintiffs and the Group Members in the events following the Completion Date was unconscionable conduct for the purposes of Section 12CA and 12CB of the ASIC Act 2001 Cth, and / or for the purposes of Part 2.2, Section 20 of Schedule 1 to the Australian Competition and Consumer Act, and the general law;~~
2. ~~A **Declaration** that the conduct of the second defendant in respect of the impairment, provisioning, appointment of external administrators and writing off of loans that was carried out across the Corporate Loan Book of Bankwest against the plaintiffs and the Group Members in the events following the Completion Date, was fraudulent;~~
3. ~~An **Order** for the purposes of Section 12GD(1) and 12GG(6) of the ASIC Act 2001 Cth, and / or Section 232, Schedule 2, of the Australian Consumer Law, and / or Section 66(4) of the Supreme Court Act 1970 NSW, and / or pursuant to the general law, that the Court appoint an independent suitably qualified and experienced "expert" accountant, (at the Defendant's expense), to review the books and records of the second defendant for the purposes of establishing the significant costs savings achieved by the second defendant, and the profits made by the second defendant, in terms of:—~~
  - ~~(i). the financial advantages obtained from the enhancement of the return on equity calculations concerning BankWest going forward from the Completion Date and concerning the value of its Risk Weighted Assets, with respect to the removal of Standard & Poors (S&P) BB or worse rated commercial loans, sitting on the Corporate Loan Book of BankWest, being Risk Weighted Assets of BankWest;~~
  - ~~(ii). the replacement of the BankWest wholesale funding arrangements into loans from which the CBA could extract greater benefits rather than as was required for the loans referred to in (i) above;~~

~~(iii). the value of any and all deductions achieved by the second defendant and by way of set off to the Excess Amount or otherwise, referred to in the Share Sale Deed;-~~

~~(iv). the dollar value of any incremental adjustments achieved with respect to any movement in the second defendant's favour or in which it achieved a financial advantage by reason of the inclusion of any loans existing upon the Corporate Loan Book of BankWest being placed on or referred to on the Dispute Notice, and that was issued for the purposes of the Share Sale Deed, and with the intention of obtaining an adjustment in the second defendant's favour in respect of the Adjusted Purchase Price.-~~

~~(v). any and all amounts received by reason of any increase in interest rate(s), charges, fees, expenses levied or penalties charged by the second defendant to the plaintiff, and / or to a Group Member's facility from the Completion Date, until such time as that facility was determined by the second defendant, placed under external administration, or Receivers were appointed by the second defendant in respect of it;~~

~~(vi). the value of all profits achieved by the second defendant by reason of the change in composition of the Loan Book of BankWest and the scaling down in size of the Corporate Loan Book of BankWest, where then referable to the growth in size and dollar value of the residential book, which Bankwest grew substantially in the events following the Completion Date;-~~

~~(vii). the "Aggregate Amount" being the total of the amounts referred to at (i). to (vi). above.-~~

~~4. An **Order** that the second defendant produce and provide the expert with access to all of its records and all of its documents, at the second defendant's expense, that are requested by the expert for the purposes of carrying out the duties conferred upon the expert in accordance with the preceding order;-~~

~~5. An **Order** that the expert may employ such persons and incur such costs and expenses for the purposes of carrying out his function as the expert determines are in the reasonable opinion of the expert, appropriate, and that the second defendant pay any and all such costs and expenses as are so incurred by that expert;-~~

6. An **Order** that the expert prepare a report and report back to Court as to the dollar value of the Aggregate Amount;
7. An **Order** that the second defendant disgorge and pay the Aggregate Amount into a fund to be administered by Michael Gregory Jones and Bruce Gleeson, Official Liquidator(s), the balance of that fund to then be distributed rateably amongst the plaintiffs and the Group members;
8. An **Order** for the purposes of Section 12GF of the ASIC Act 2001 Cth and / or Section 236 and 237 of Schedule 2 of the Australian Consumer Law, that the defendant pay damages and / or compensatory damages such as the Court may so order to the plaintiffs and to the Group members;
9. An **Order** for the purposes of Section 12GD(1) and 12GG(6) of the ASIC Act 2001 Cth, and / or Section 232, Schedule 2, of the Australian Consumer Law, and / or Section 66(4) of the Supreme Court Act 1970 NSW, and / or pursuant to the general law, and / or alternatively to the relief set forth as particulars at paragraph 120(ZG) to this statement of claim, that the second defendant, by itself, its servants or agents, or in any other way at all, is restrained for a period of two (2) years, commencing from the date of this order, from:—
- (a). writing within the Commonwealth of Australia any contract of credit over which it seeks to take security or a guarantee from any natural person or corporation, (otherwise than in the case of a public company), in respect of lending to a customer or to a proposed customer of the second defendant, that is either wholly or predominantly for personal, domestic, household or commercial lending;
- (b). enforcing or purporting to rely on or enforce across Australia, without first obtaining leave of the Court, a credit contract or a contract of guarantee entered into by it and in which it seeks to exercise powers with respect to any security or a guarantee from any natural person or corporation, (otherwise than in the case of a public company), where seeking to recover monies purportedly owing to it in respect of lending to a customer or to a proposed customer of the second defendant that is either wholly or predominantly for personal, domestic, household or commercial lending.
10. [This paragraph has been deleted from a prior pleading].

11. An **Order** that, for the next 10 years, from the date of the making of this order, that the second defendant, prior to entering into any contract of credit, or seeking to take security in respect of any such contract of credit, or obtaining a guarantee with respect to any such contract, that it cause and require the customer to obtain and to provide to it a certificate from an independent Legal Practitioner, at the Second Defendant's costs, with a practising certificate in force in the relevant State or Territory of Australia in which it is proposed that the said agreement(s) are to be written, setting out:—

- (a). the name and contact particulars of the Legal Practitioner;
- (b). that the Legal Practitioner met with the proposed customer, security provider and / or guarantor, and explained the effect of the agreement(s) that are proposed to be entered into;
- (c). that in the view of the solicitor providing and signing the certificate, the person(s) appeared to understand that effect of the documents explained;
- (d). that the solicitor explained the benefits and advantages as well as the potential liabilities and disadvantages in entering into the agreement(s) that were proposed to be entered into;

12. An **Order** that the customer, security provider or guarantor's costs which are required to be reimbursed by the defendant to the customer, security provider or guarantor, and that they are required to pay for the purposes of the preceding order, be capped at \$1,000 plus GST, (indexed to the CPI), in respect of each agreement upon which advice is given and as to the costs of each person for whom a certificate is issued, the said amount to be paid by the second defendant regardless of whether or not the agreements or arrangements are ever entered into.

13. [This paragraph has been deleted from a prior pleading].

15. Exemplary damages;—

## **PLEADINGS AND PARTICULARS**

1. — This proceeding is commenced as a representative proceeding pursuant to sections 157 and 158 of the *Civil Procedure Act, 2005 (NSW)*.

## **GROUP MEMBERS**



- ~~2. The “Group Members” were previously customers of BankWest, either as primary borrowers, guarantors or security providers in respect of commercial facilities that were sitting on the Corporate Loan Book of Bankwest prior to 19 December 2008, (“the Completion Date”).~~
- ~~3. The Group Members were pre-acquisition Corporate Loan customers whose facilities were reviewed by Bankwest on or after the Completion Date, for the purposes of ascertaining whether, and if so in what way, impairment provisions could be raised in relation to them and in order that those loans could be removed from the BankWest balance sheet for the second defendant’s extraneous purposes and then written off, (“the review”).~~
- ~~4. As a result of the review, the Group Members lost control of their commercial facilities. The day to day responsibility concerning the plaintiffs and the Group Members facilities was taken away from the individual Bankwest Business Banking Manager(s) who had previously held responsibility concerning them.~~
- ~~5. Following the review the facilities of the Group Members were placed into the Credit Asset Management (CAM) division of Bankwest and their facilities were determined.~~
- ~~6. The Group Members’ facilities had been Standard and Poors rated BB- or lower rated loans.~~
- ~~7. The Group Members’ facilities had been performing loans.~~
- ~~8. The second defendant, through its control of Bankwest, caused BankWest to wrongfully terminate the plaintiff and the Group Member’s facilities, appointed Receivers to administer them and to call in all assets pledged as securities in respect of them, and caused great damage to all of the Group Members.~~
- ~~9. On 1 October 2012, all of Bankwest’s business, as well as any duties, obligations, immunities, rights and privileges that applied to Bankwest were transferred to the second defendant under the *Financial Sector (Business Transfer and Group Restructure) Act 1999 (Cth)*, (the Transfer Act).~~
- ~~10. The effect of the transfer is that second defendant is, for all purposes, the successor to and a continuation of the same legal entity as Bankwest. References in this statement of claim together with all obligations thereto concerning BankWest are equally obligations of the second defendant.~~

## **THE SECOND AND THIRD PLAINTIFFS**

~~11. The third plaintiff is a corporation able to sue and to be sued in its corporate name and style.~~

## **THE DEFENDANTS**

~~12. The first defendants are the directors of the second defendant during the relevant period and sat as directors of the second defendant for some or the whole of the period 1 July 2008 to 31 December 2012.~~

~~13. The second defendant is a corporation liable to be sued in its corporate name and style.~~

~~14. The second defendant is Australia's largest banking and financial institution and is subject to regulations controlling banking throughout the Commonwealth of Australia, including:—~~

~~14.1 prudential standards required by the Australian Government and administered by the Australian Prudential Regulation Authority, (APRA); and,~~

~~14.2 The "Code" of Banking Code of Practice.~~

~~15. The second plaintiff entered into a guarantee agreement with Bankwest whereby it guaranteed a commercial debt of the third plaintiff to Bankwest. The third plaintiff is a corporation and was a customer of BankWest having capacity to sue in its corporate name and style, it having held a commercial facility with BankWest the particulars of which were recorded on the Corporate Loan Book of BankWest prior to the Completion Date~~

~~16. On 1 January 2008, APRA changed the basis upon which banks may engage in commercial lending in such a manner that heavily favoured residential lending over commercial lending in Australia.~~

~~17. Bankwest was however exempted from these changes for 12 months, and was further exempted from conforming to the requirements of APS 120, (the relevant prudential standard dealing with Securitisation), until June 2010. At this time, BankWest had held approximately \$5.2 billion in Securitised loans.~~

### **Particulars**

~~(a) See prudential standard APS120, and APS 112, issued January 2008;~~

~~(b) See APRA Response to Submissions dated 11 July 2007 page 11 (Transition Arrangements APRA's Prudential Approach);~~

- (c) — See APRA letter dated 8 April 2009 under the heading Transitional Relief;
- (d) — See page 42 of the Full Year Profit Announcement for the second defendant 30 June 2009.
- (e) — The BankWest 2008, 2009 and 2010 financial statements.
18. — ~~By a Share Sale Deed made on 8 October 2008 and amended on 19 December 2008 (“the Share Sale Deed”), the second defendant agreed to purchase from HBOS Australia Pty Ltd (HBOS Australia) inter alia all the ordinary shares held by HBOS Australia in BankWest for an initial purchase price (“IPP”) of \$2.1 billion, (including shares in St Andrews, an associated entity of Bankwest), with a mechanism for adjustment under clause 10 of the said Deed which provided a method of calculation concerning the Adjusted [or final] Purchase Price, (“APP”). The APP was disclosed to the public at the time as being approximately \$2.4 billion and 80% of the 2007 book value;~~
19. — ~~There were terms of the Share Sale Deed that specified or included:~~
- ~~(i) the date for completion of the Second Defendant’s purchase would be 19 December 2008, the Completion Date;~~
  - ~~(ii) HBOS Australia's parent company, HBOS Plc warranted to the second defendant the accuracy of BankWest's accounts, including its balance sheets, as at the Completion Date and the second defendant was, relevantly, entitled to make a warranty claim in respect of any alleged inaccuracy in the amount of provisions for impaired loans by no later than one year after Completion: clauses 15.1, 15.3, 16.1, 16.2, schedule 6 cl 5.1 of the Share Sale Deed.~~
  - ~~(iii) At settlement, the Second Defendant had to pay to HBOS, [HBOS Treasury Arm, being a company known as BOSTA], the loan monies supplied to BankWest, but capped at \$14.5 billion with the balance to be a loan from HBOS Treasury to the second defendant but which loan had to be repaid in six months, being 19 June 2009, (the Excess Amount): see cl 12 of the Share Sale Deed ;~~
20. — ~~The Share Sale Deed was completed on the Completion Date and the second defendant thereafter controlled BankWest;~~
21. — ~~The Australian Competition and Consumer Commission (“ACC”) required that BankWest’s business was not to be subsumed by or within the second~~

~~defendant's business, but had to operate as an independent Authorised Deposit Taking Institution for a nominated period of time;~~

~~22. At the time of acquisition, the BankWest loan book was comprised of \$57.4 billion as follows:~~

~~(i). 44% Investment Grade loans being \$25.2 billion of BB+ Standard and Poors' rated or better loans of which \$5.2 billion was already borrowed against in the form of securitised loans;~~

~~(ii). 56% Non-Investment Grade loans being Standard and Poors' rated worse than BB+, totalling at least \$32.1 billion.~~

~~23. The commercial loans of BankWest as at 19 December 2008 had an approximate value \$23.08 billion. Many of these loans, had a Risk Grade of +4 or worse and Impairment Losses booked to the BankWest Income Statement totalled approximately \$361 million at this time.~~

#### **Particulars**

~~a. See the BankWest 31 December 2008 Financial Statements;~~

~~b. The second defendant's 30 June 2009 Results Presentation;~~

~~c. The BankWest Credit Policy;~~

~~d. The second defendant's 20 April 2009 Dispute Notice.~~

~~24. As at 1 January 2008 banks generally were required to meet the Australian Prudential Regulation Authority (APRA) Basel II requirements, with the exception of BankWest which operated under the Basel I requirements until 31 December 2008, and was required to meet (APRA) Basel II Standardised Accreditation requirements as at 1 January 2009, which meant:~~

~~(i) an increase in the Tier 1 Capital holding requirements for loans having a Standard & Poors' Rating of BB+ or worse, (being a BankWest Risk Grade of 4+):~~

~~(ii) all the \$29.2 billion BankWest loans having a Standard and Poors' Rating of worse than BB+ could not be borrowed against without significantly increasing BankWest's capital holding requirements and which would have had the effect of reducing BankWest's return on equity and profitability.~~

#### **Particulars**

~~a. BankWest 31 December 2008 financial statements;~~

~~b. the second defendant's 30 June 2009 Profit Announcement;~~

- ~~c. slide 49 of the the second defendant's 30 June 2009 Results Presentation;~~
  - ~~d. BankWest Credit Policy;~~
  - ~~e. Australian Prudential Regulatory Authority (APRA) Standards: APS 120 APG 112.~~
- ~~(iii) From 1 January 2009, BankWest was required to hold approximately 428% more Tier 1 capital for commercial loans having BB rating or worse than it did for residential loans. This meant that BankWest for the same capital outlay or expense could lend 4.28 times the number or value of residential loans, compared with such commercial loans where charging the same interest rate margin. Accordingly, BankWest could earn 4.28 times the interest income from the same Tier 1 capital if it replaced commercial loans having BB rating or worse with residential loans.~~

### **PARTICULARS**

- ~~a. APS 112, a statement concerning capital adequacy;~~
  - ~~b. APG 112, a practice guide concerning capital adequacy.~~
- ~~(iv) BankWest had to increase significantly its Tier 1 Capital holding unless it altered the credit profile of its risk weighted assets;~~
- ~~(v) BankWest could not increase its lending unless it increased its Tier 1 capital or altered the credit profile of its risk weighted assets on its balance sheet.~~

### **Particulars**

- ~~a. Australian Prudential Regulatory Authority (APRA) Standards APS 112,120 and 220, AGN 220.1, AGN 220.2, AGN 220;~~
- ~~b. Freehills letter to HBOS plc dated 21 January 2008,~~
- ~~c. 20 April 2009 Dispute Notice;~~
- ~~d. This sub paragraph has no content and was deleted from a prior pleadings;~~
- ~~e. Slide 14 of the second defendant's Investor Presentation Risk Management Credit Risk 16 and 17 November 2010;~~
- ~~f. BankWest Credit Policy;~~

- ~~g. The second defendant's 2010, 2011 and 2012 Results Presentations;~~
- ~~h. BankWest 31 December 2008-2012 Financial Statements;~~
- ~~i. The second defendant's 31 December 2008 Half Year Profit Announcement;~~
- ~~j. Taylor Woodings (insolvency practitioners) internal email dated July 2010;~~
- ~~k. LinkedIn profiles of Bernie Armistead and Matt Robinson;~~

~~25. BankWest was provided with a further extension to 30 June 2010 to meet the relevant Basel requirements, after which it had to make a significant increase to its capital holding requirements by reason of its \$5.2 billion of securitised loans unless it altered the credit profile of its risk weighted assets.~~

**Particulars**

- ~~a. BankWest 2008, 2009 and 2010 financial statements (Debt Securities on Issue); APRA 11 July 2007 Response to Submissions, page 11 Transition Arrangements;~~
- ~~b. APRA 8 April 2009 letter To All Authorised Deposit Taking Institutions page 2 Transitional Relief.~~

~~26. After the Completion Date the second defendant required BankWest to achieve the APRA Standard of Advanced Basel II accreditation, and an Extension of the second defendant's Basel II Advanced Accreditation for BankWest within three years to have a lower Tier 1 capital holding requirement, but which required an improvement in the Risk Grade of BankWest's risk-weighted assets.~~

**PARTICULARS**

- ~~a. Regulation Impact: Adoption of the Basel II Capital Framework In Australia;~~
- ~~b. Prudential Standard APS 112 & 113 Standardised Approach;~~
- ~~c. Prudential Standard APS 115 & 117 Advance Approach, APS 111;~~
- ~~d. BankWest Credit Policy;~~
- ~~e. Westpac Bank Slide Presentation "Impact of Basel II on Australian Banking" delivered by Phillip Chronican, (Chief Financial Officer);~~
- ~~f. The second defendant's 2009 Profit Announcement;~~
- ~~g. The second defendant's Half Year Ended 2012 Results Presentation, the second defendant's 2013 Half Year Profit Announcement;~~

- ~~27. The second defendant's wholesale funding requirements arising from the purchase of BankWest, excluding the approximate \$2 billion capital raised to fund the equity payment, consisted of approximately \$8.5 billion in short term funding which was funded in part from Negotiable Certificates of Deposit and Unsecured Commercial Paper and the balance from surplus liquid assets, \$6 billion in long term funding and approximately \$4 billion, as estimated on 13 November 2008, to be paid in 6 months, being the Excess Amount;~~
- ~~28. Of the \$14.5 billion paid by the second defendant, \$12.9 billion was in replacement of BankWest's former parent company's wholesale funds of \$17 billion.~~

#### **Particulars**

- ~~a. Share Sale Deed;~~
- ~~b. CBA 11 February 2009 Investor Presentation;~~
- ~~c. CBA 13 November 2008 Investor Pack;~~
- ~~29. BankWest did not increase its Tier 1 capital on 1 January 2009 which would have been required had the APRA Basel II Standardised Accreditation requirements been applicable and enforced and the risk weighted assets of BankWest as revealed in BankWest's completion accounts as at 19 December 2008 remained on the balance sheet.~~

#### **HOW THE LOANS WERE IMPAIRED**

- ~~30. From the Completion Date, the second defendant commenced reviewing the BankWest \$23 billion Corporate Loan Book in order to identify a basis upon which, according to the second defendant, they could raise impairments and collective provisions against the customers' facilities that sat on the Commercial Loan Book of BankWest.~~

#### **Particulars**

- ~~a. See BankWest 31 December 2008 financial statements;~~
- ~~b. See BankWest emails authorised by the person Alan Pavisich and exchanged with him concerning the review of the BankWest Corporate Loan Book;~~
- ~~c. This sub paragraph is blank and has been deleted from a prior pleading;~~

- d. ~~The credit policy operative at that time within BankWest required that the level of provision that BankWest raised in respect of a facility had to be reflective of anticipated loss (actual) upon termination of the facilities and realisation of securities;~~
- e. ~~In the case of BBC no such proper provisioning was not made and in certain cases amongst the Group Members loans, the provision that was raised was 100% of the face value of credit extended against the facility at the date that the impairment was raised;~~
- f. ~~The third plaintiff will provide further particulars in respect of this allegation in the course of these proceedings;~~

31. ~~The Credit Policy under which BankWest operated was changed at the direction of the second defendant following the Completion Date, and from a risk rating perspective, such that loans that were:~~
- (i). ~~previously considered “average” and “adequate” under the policy that existed prior to completion;~~
  - (ii). ~~were considered as loans of “substandard” and that were placed onto “watch list.”~~

#### **Particulars**

- a. ~~See the BankWest Credit Policy;~~
  - b. ~~See the affidavits of Banking Officers filed in other proceedings concerning the BankWest Commercial Loan Book and to which, (to the extent necessary), the plaintiffs will later seek leave to refer;~~
  - c. ~~This subparagraph has been deleted from a prior version of the pleading;~~
  - d. ~~See slide 14 of the second defendant’s November 2010 Investor Presentation given by Mr. Alden Toevs and by Mr. Ross Griffiths.~~
32. ~~This change in credit policy enabled BankWest to provision these loans and move them under the supervision of BankWest’s Credit Asset Management Department, (“CAM”).~~
33. ~~By impairing and provisioning these loans the second defendant was no longer required to hold the amount of requisite capital against those loans, and/or could deduct their full value from the capital holding amounts that were otherwise required.~~

#### **Particulars**



- a. ~~See Australian Prudential Standards and Guidance Notes dated January 2008, APS 220 and AGN 220.1, AGN 220.2 and AGN 220.3.~~

34. ~~Once the loan was impaired and provisioned for loss, it was removed from BankWest's performing balance sheet, and it was classified as non-performing.~~
35. ~~A non-performing loan is a loan that is considered to be no longer performing and that is no longer considered as being within terms and within its arrangements. It is a loan against which, in the normal course of banking, No provision is required to be taken up and NO impairment is required to be raised.~~
36. ~~A loan not performing within arrangements with its present financier will not, in the ordinary course, qualify for finance with other major financiers.~~
37. ~~Accordingly, the effect of the loan being classified as if it is non-performing means that all such customers, as included the third plaintiff and the Group Members, held no realistic opportunity of achieving refinance, and thereby afforded BankWest the opportunity to exercise its exit enforcement rights in determining the specific customer's facilities, and in this case the first third plaintiff's commercial loan facilities.~~
38. ~~BankWest well knew that through the process in which the impairments and collective provisions were raised against the third plaintiff's and the Group Members' facilities, that the second and third plaintiffs and the Group Members' loans were performing loans, and that they had remained performing loans throughout the period of the review but in which, nevertheless:~~
- a. ~~they were impaired,~~
  - b. ~~individual and collective provisions were raised in respect of them; and,~~
  - c. ~~the Group Members, including the plaintiff's facilities, were determined.~~

#### **Particulars**

- a. ~~Refer statement made by Ralph Norris former CEO of the second defendant on 15 August 2010 to the ABC Inside Business Program hosted by Mr Alan Kohler.~~

#### **EXTENT OF VALUE OF LOANS IMPAIRED**

39. ~~By letter dated 21 January 2009 from Freehills, the second defendant made a warranty claim (**the Warranty Claim**) under clause 15.1 of the Share Sale Deed on account of the allegation by it concerning inadequate, collective and specific provisions in the BankWest accounts in relation to impaired assets.~~
40. ~~The BankWest Basel II APRA Disclosures for the period ending 31 March 2009 reported the BankWest Performing Commercial Loan Book as \$12,431 million,~~

a \$10.4 billion reduction in the value of the 19 December 2008 Commercial Loan Book with \$753 million reported as representing impaired loans. The value for impaired loans was reported to APRA as at 31 December 2009 as \$1,632 million.

**Particulars**

a. ~~BankWest Basel II APRA Disclosures, in the BankWest Financial Statements in the year ended 31 December 2009.~~

41. ~~Between March 2009 and April 2009, the second defendant reviewed many loans to determine whether such loans would be provisioned and made the subject of a claim for a reduction in the IPP of \$622m under clause 10 of the Share Sale Deed.~~

**Particulars**

a. ~~emails of Mr Dean 18 March 2009, Mr Pavisich 19 March 2009, 20 March 2009, Mr Hayes 27 March 2009, 9 April 2009;~~

b. ~~the second defendant's Half Year Profit Announcement 31 December 2008;~~

c. ~~the second defendant's 20 April 2009 Dispute Notice.~~

42. ~~The purpose of the review was to reduce the IPP from \$2.1 billion to \$1.806 billion, under the respective provisions of the Share Sale Deed concerning the Dispute Notice and that was issued by the second defendant and served on the Vendor, HBOS on about 20 April 2009.~~

43. ~~The attempted price reduction in respect of claims for inadequate impairment and provisioning of BankWest loans raised by the Dispute Notice was for approximately \$464 million.~~

44. ~~The result of second defendant's claim under clause 10 of the Share Sale Deed was that \$2.126 billion became the final purchase price which was disclosed to the public as being approximately 70% of the book value of the loans.~~

**Particulars**

a. ~~The second defendants' 2009 Profit Announcement;~~

45. ~~In the period after the acquisition of BankWest and throughout the 2010 calendar year:~~

(i). ~~wholesale funds for banks were almost impossible to obtain;~~

(ii). ~~the second defendant's board had auditors at every meeting to ensure the second defendant came through the financial crisis and because the executives of the second defendant were deeply concerned to ensure that the bank continued to exist;~~

~~(iii). the second defendant over this period obtained a guarantee from the Commonwealth concerning its deposits.~~

~~46. On 19 June 2009, approximately between \$3 billion and \$4 billion by way of the Excess Amount became owing under cl 12 of the Share Sale Deed, but the second defendant only paid \$679,743,962.98 due to adjustments, including \$64,474,042 as a receivable from HBOS. All claims, including the Warranty Claim under clauses 15.1, 15.3, 16.1, 16.2, schedule 6 cl 5.1 of the Share Sale Deed were settled by way of an agreement dated 11 December 2009 which resulted in the release of all outstanding liabilities of the second defendant under the Share Sale Deed, including the obligation to pay the balance of the Excess Amount.~~

#### **Particulars**

- ~~a. Statements made by or on behalf of the second defendant at the 11 November 2009 AGM by the Chairman;~~
  - ~~b. The second defendant's document entitled HBOSA Settlement 19 June 2009;~~
  - ~~c. Schedule 8 of the Share Sale Deed;~~
  - ~~d. The second defendant's 11 February 2009 Investor Presentation;~~
  - ~~e. the BankWest 30 December 2008 financial statements.~~
- ~~47. By the year end 30 June 2009 accounts, BankWest had raised additional Impairment Losses Booked to the BankWest Income Statement for impaired loans of approximately \$1.285 billion.~~

#### **Particulars**

- ~~a. the second defendant's 2009 Profit Announcement;~~
  - ~~b. the second defendant's 30 June 2009 Results Presentation;~~
  - ~~c. Extract of Share Holder Questions Answered at the the second defendant's 2009 AGM;~~
  - ~~d. the BankWest Financial Statements for the year ended 31 December 2008 and 30 June 2009.~~
- ~~48. Such additional Impairment Losses did not affect the profitability of the second defendant at the consolidated level because the final purchase price paid for BankWest meant that the second defendant had secured a net gain on acquisition of approximately \$983 million, with the result that it could write off and / or provision approximately \$1,878 billion in impaired loans without any negative impact on its future profitability at the consolidated level.~~

~~49. In the period after the acquisition of BankWest and up to the time of the appointment of Receivers to the third plaintiff, (March 2011), BankWest raised events of default, appointed receivers, charged default or penalty interest rates, realised its securities, and terminated a large number of commercial loans with a risk grade of 5 or worse; and which conduct remained ongoing, such that by 30 June 2012 approximately 1,900 of the existing commercial loans existing on the Corporate Loan Book of Bankwest as at the Completion date had been terminated. At the same time, BankWest's residential lending portfolio was increased, the extension of the second defendant's Basel II Advanced Accreditation for BankWest being thus achieved by the altering of the risk profile of BankWest's risk weighted assets, and the removal of such commercial loans from the balance sheet.~~

~~50. BankWest continued after 30 June 2009 to terminate BankWest commercial loans and by:~~

- ~~(i) 30 June 2010, had reviewed a further 1,100 performing loans and engaged insolvency practitioners from its panel list to assist with such review;~~
- ~~(ii) 30 June 2010, BankWest's securitised borrowings increased from \$5.2 billion as at 31 December 2008 to \$10.4 billion as at 30 June 2010: See BankWest 2008, 2009 and 2010 financial statements and the second defendant's 2009 and 2010 Results Presentations;~~
- ~~(iii) 30 June 2011, BankWest had terminated a further 21.8% of the original or legacy \$23 billion commercial loan book; and~~
- ~~(iv) 30 June 2012, BankWest had removed a further 9.5% of the BankWest original or legacy commercial lending book;~~

#### **Particulars**

- ~~a. Slide 44 & 99 of the second defendant's 30 June 2010 full year Results Presentation;~~
- ~~b. slide 8 & 50 of the second defendant's 30 June 2011 full year Results Presentation;~~
- ~~c. Taylor Woodings (insolvency practitioners) internal email dated July 2010;~~
- ~~d. slides 33 & 37 of the second defendant's June 2012 full year~~

~~Results Presentation.~~

51. ~~The commercial loans that were impaired and against which individual and collective provisions had been raised had been performing loans according to the BankWest credit policy as it had existed at the Completion Date, and were loans against which, but for the extraneous and improper purpose as is set out following in this statement of claim, no such impairment of provision would have been raised and the facilities would have continued to have been carried on as if in the normal course of banking.~~
52. ~~The arrangements under which the impairments and collective provisions had been raised on the customers holding facilities on the Corporate Loan Book of BankWest had arisen as a result of conduct on the part of the second defendant in which the second defendant had tortiously and deliberately interfered with the contractual arrangements between the first second and third plaintiff and the Group Members on the one hand, and BankWest on the other, and that arose as a contractual agreement with BankWest by reason of the facility agreements that were otherwise in operation between the Group Members and BankWest, causing BankWest to break the terms of those facility agreement(s) in the manner herein pleaded.~~
53. ~~Over the period approximately 2001 to 2003, the third plaintiff acquired by contract and became the registered proprietor of lands known as Lot 49, 51, 101, 105 and 106 McGilvray Road, Bonny Hills, in the State of New South Wales, which lands are known as the Carnegie Cove development, (“the Property”).~~

**Particulars**

- (a). ~~The lands are described and recorded in the records maintained by the New South Wales Department of Lands and are recovered in certificates of title numbered 49/754444, (lot 49), 51/754444, (lot 51), 101/857791, (lot 101), 105/754444, (lot 105) and 106/754444, (lot 106);~~
- (b). ~~Bonny Hills is located in the Hastings Shire, via Port Macquarie, and is approximately 375 kilometres North of Sydney.~~
54. ~~On about 5 October 2006, the third plaintiff entered into an agreement with The second defendant concerning a facility for the purposes of the proposed development of the Property, and for the purposes of developing it into a~~

retirement village with 102 dwellings, together with a championship golf course and country club, (“the Proposed Development”).

#### **Particulars**

- ~~(a). The facility offered by the second defendant to the third plaintiff was referred to in a letter of offer issued by the second defendant and dated 5 October 2006;~~
- ~~(b). The purpose of the facility was to effect a refinancing of the Property and in order that the second defendant would fund the carrying out of the Proposed Development;~~
- ~~(c). On 23 October 2006, the third plaintiff conferred a fixed and floating charge in favour of the second defendant and which was registered with the ASIC concerning all monies owing under the facility;~~
- ~~(d). The facility was supported by a Real Property Act mortgage registered with the New South Wales Department of Lands over the whole of the Property;~~
- ~~(e). The facility was supported by personal guarantees conferred in favour of the second defendant by its then directors, Mr Peter Walsh, (being the third plaintiff), Mr David Stuckey and Mr Trevor Mason.~~

55. ~~The Proposed Development was the subject of a development consent issued by the Hastings Shire Council, being the Local Government Authority for the locality of Bonny Hills in the State of New South Wales.~~

56. ~~A valuation obtained by the second defendant and that supported the decision to extend the Commercial Facilities to the third plaintiff was dated 29 August 2006 and estimated the valuation concerning the Proposed Development in the amount of \$37,930,000.~~

#### **Particulars**

- ~~(a). The valuation was prepared by the then certified practising valuer, Patricia Forbes, from the Firm of valuer’s known as Landmark White.~~

57. ~~The facility limit when first issued by the second defendant to the third plaintiff, (in October 2006), was for \$9,000,000, this amount being progressively increased to the sum of \$23,785,000 in order to fund the construction and development works intended to be carried out for the purposes of the Proposed Development.~~

58. — ~~The relationship managers having day to day responsibilities for the third plaintiff's facilities with the second defendant were Mr Nick Carter, a National Director of The second defendant, and a Mr Rod Baptist, Mr Baptist being employed in the position of director of the second defendant in relation to the second defendant's activities of commercial banking on the East Coast of Australia at that time.~~
59. — ~~The third plaintiff's solicitor was Mr Guy Vinden of the firm of solicitors known as Atkinson Vinden.~~
60. — ~~As part of the Proposed Development, power, water, sewerage and other "upgrade works" were required to be carried out to the Hasting Shire infrastructure and were also required to be undertaken in order that the Hastings Shire Council would issue a construction certificate authorising the commencement and carrying on of the construction works in relation to the Proposed Development, ("the civil works").~~
61. — ~~In about August 2008, it became known to the third plaintiff that HBOS was in financial difficulty and that it was the parent company of the second defendant, in Australia.~~
62. — ~~At this time, the second plaintiff, at that time a director of the third plaintiff together with Mr Vinden and Mr Stuckey, (Stuckey being a director of the third plaintiff), entered into discussions with Mr Carter and with Mr Baptist concerning the financial viability of the second defendant and its then capacity to continue on as the third plaintiff's banker going forward, and to fund the construction works concerning the Proposed Development.~~
63. — ~~In the discussions, the second plaintiff and Mr Stuckey in their capacity as officers of the third plaintiff told each of Carter and Baptist in their capacity as officers of the second defendant, that the third plaintiff did not wish to proceed~~

~~with the increase in the facility limits, and that it did not wish to exercise the draw-down of funds under the facilities that it held with the second defendant for the purposes of the Proposed Development.~~

- ~~64. Each of Carter and Baptist told the plaintiff that the second defendant remained a committed lender to the third plaintiff and that the second defendant intended to remain actively committed to carrying on business as the third plaintiff's lender, up to and including the conclusion of the Proposed Development, ("the second defendant's representations").~~
- ~~65. In June 2009, the third plaintiff's Proposed Development had pre-sales concerning all but 2 of the proposed residential units within stage 1A of the Proposed Development. Deposits taken on the presales were held in the trust account of Atkinson Vinden.~~
- ~~66. In reliance upon the second defendant's representations, the third plaintiff appointed Bendix Constructions as its builder for the purposes of carrying out and carrying on the Proposed Development, and Bendix began carrying on and carrying out the construction works.~~
- ~~67. Construction works concerning the Proposed Development commenced in about June 2009.~~
- ~~68. For the purposes of having Bendix carry out and carry on the construction works, and in about June 2009, Bendix, the third plaintiff, and the second defendant entered into a tri-partite deed. Pursuant to the deed and the commercial arrangements in place between Bendix, the second defendant and the third plaintiff, the second defendant made payments to Bendix and could direct the completion of works should it have chosen to do so where and if for any reason the third plaintiff was not in a position to continue carrying on with the Proposed Development.~~



~~69. At the direction of the CBA, Rider Levett Bucknall, (“the quantity surveyor”); were appointed as quantity surveyor and were responsible for the assessment of any and all progress claims concerning the works carried on by Bendix, and to make recommendations to the second defendant as to the amount for which each of the progress claims should be properly paid.~~

~~69A. On and from June 2009, Bendix made 7 progress payment claims, each of which were assessed by the quantity surveyor, and all of which were recommended to be paid. In accordance with the recommendation of the quantity surveyor, each of the payments were made in full by the second defendant to Bendix and without incident, delay or difficulty.~~

~~69B. Notwithstanding the second defendant’s representations, On 1 December 2009 The second defendant wrote to third plaintiff stating to the effect that the second defendant’s credit panel no longer wished that the second defendant remain as the third plaintiff’s banker concerning the Proposed Development, and that the second defendant did not wish to and did not intend to see the third plaintiff’s Proposed Development proceed through to completion, with the second defendant remaining as its banker.~~

~~69C. In the period shortly following 1 December 2009, (the precise date being a date that is known to the defendants), responsibility for the third plaintiff’s facilities was passed to the Credit Asset Management (CAM) department of the second defendant, and Mr Carter and Mr Baptist were relieved of ongoing operational control and management concerning the third plaintiff’s facilities.~~

~~69D. As at the Date that the third plaintiff’s facilities were placed into CAM, the third plaintiff had been a Performing Loan Customer of the second defendant. The third plaintiff’s facilities were not in monetary default, and nor were they occasioned by any relevant default, (save those for which and for the reasons that are pleaded following, the second defendant was entirely responsible).~~

~~69E. Following the passing of the third plaintiff's facilities into CAM, the second defendant appointed Blake Dawson Waldron as its solicitors to act for it and to advise it concerning the ongoing management of the third plaintiff's account and the third plaintiff's facilities.~~

~~69F. From the circumstances referred to at paragraphs 69H to 69L, (following), the third plaintiff's facilities were placed into commercial distress and thereafter became the subject of the appointment of receivers by the second defendant in the manner set out following. The facilities were ultimately called in and were determined.~~

~~69G. Thereby, the value of the equity within the third plaintiff company, together with the value of all of its assets, was destroyed by the second defendant.~~

~~69H. On 29 January 2010, progress claim number 8 was submitted for payment to the second defendant, pending review and approval for payment by the quantity surveyors. Claim number 8 was approved for payment by the quantity surveyors for payment on 21 April 2010, after revisions had been requested by the second defendant.~~

~~69.I. By letter dated 17 March 2010, The second defendant through its solicitors Blake Dawson refused payment of progress payment number 8. It had been a payment claim in the amount of \$128,334.24. It had been due for payment on 26 February 2010. Claim 8 was finally paid on 29 April 2010.~~

~~69J. On 22 March 2010, progress claim number 9 was submitted for payment to the second defendant, pending review and approval for payment by the quantity surveyors.~~

~~69K. The second defendant did not make and refused to make progress payment number 9 by its due date, or at all. It had been a payment claim in the amount of \$92,093.76 and was due for payment on 25 April 2010.~~

~~69L. On 29 April 2009 and at a meeting between Mr Lincoln Daley of Bendix, and The second defendant, an agreement was reached as to the dates upon which The second defendant intended to make progress payments numbered 8 and 9, and the amounts for which those payments would be made.~~

#### **Particulars**

- ~~(i). At the meeting, the second defendant agreed to pay the sum of \$128,334.25 concerning Progress Payment claim no. 8, on or before 30 April 2010;~~
- ~~(ii). At the meeting, the second defendant agreed to pay the sum of \$92,093.76 concerning Progress Payment claim no. 9, on or before 30 April 2010.~~

~~69M. On 29 April 2010, the second defendant made a payment concerning progress claim number 8 in the amount of \$128,334.25, but the agreed payment as to progress payment no. 9 was never made at all.~~

~~69N. The failure on the part of the second defendant to have made the progress payment no. 8 within terms and within arrangements, and the failure on the part of the second defendant to have made progress payment claim no. 9 at all, had the effect of:~~

- ~~(i). severely weakening the third plaintiff's cash flow, thereby giving rise to the circumstances that are set out at paragraph 69F, preceding;~~
- ~~(ii). preventing the completion of works by the required date of practical completion;~~
- ~~(iii). placing the third plaintiff in the position where it was unable to complete the "civil works".~~

#### **Particulars**

~~Concerning (ii) above:~~

- ~~(a). Refer emails exchanged between the second defendant and John Cameron, a consultant to the third plaintiff and dated 21 April 2010;~~

- ~~(b). Refer emails exchanged between the second defendant and John Cameron, dated 23 April 2010;~~
- ~~(c). Refer emails exchanged between the second defendant and Mr Lincoln Day of Bendix dated 5 May 2010, stating that practical completion could no longer be achieved or occur prior to November 2010;~~
- ~~(d). Refer emails exchanged between the second defendant and Mr Lincoln Day of Bendix dated 6 May 2010, seeking release of progress payment funds in order to proceed to practical completion;~~
- ~~(e). Refer emails exchanged between the second defendant and John Cameron, and dated 13 May 2010;~~
- ~~(f). Refer emails exchanged between the second defendant and John Cameron, and dated 17 May 2010;~~
- ~~(g). Refer letter sent by Blake Dawson as solicitors for the second defendant enclosing a draft deed signed on behalf of the second defendant, indicating the second defendant's consent to an extension in the practical completion date to 17 November 2010, but which required the inclusion of other unwarranted terms;~~
- ~~(h). Refer letter sent by Atkinson Vinden Lawyers for the third plaintiff to Blake Dawson concerning practical completion.~~

~~69.O. In May 2010, Hastings Shire Council made demand upon the second defendant concerning a security bond that the third plaintiff had provided to Council as a condition of the obtaining of development consent concerning the Proposed Development, the said bond having been provided by the second defendant as a part of the third plaintiff's Commercial Facilities and in the event that the third plaintiff did not complete the civil works.~~

~~69P. On 17 December 2010, The second defendant called in the third plaintiff's facilities and in doing so purported to rely on 3 events of defaults.~~

### **Particulars**

- ~~(i). there had been a drop in the security value of the Property and the Proposed Development and that had triggered a default in the loan to equity value of the third plaintiff's facilities, and which was otherwise required to have been maintained at 75%;~~

~~(ii). the Hastings Shire Council had called on the bond and a sum of \$300,000 had been paid out to it by the second defendant;~~

~~(iii). the constructions works of the Proposed Development had not been completed by the (original) date of practical completion.~~

~~69Q. Concerning each of the events of alleged default:~~

~~(i). the drop in the loan to value ratio was not an event of default;~~

#### **Particulars**

~~(a). The valuation report obtained by the second defendant and that grounded the drop in the loan to value ratio purported to value the whole of the Property at \$4,059,646.~~

~~(b). The valuation was based on an erroneous, (but commercially convenient assumption to the second defendant), that the valuation of the Property could be appropriately arrived at by extrapolating a value of \$5,000 per hectare across the whole of the 450 hectare land parcel;~~

~~(c). The valuation of \$5,000 per hectare reflected the sale by the Crown to the third plaintiff of a discrete residual and unwanted parcel of lands within the Property and that carried no resemblance to the value of the whole of the Property and the complete parcel;~~

~~(d). The valuation for \$4,059,646 for the whole of the Property constituted an overall drop in valuation concerning the Property of 89.3% from the previous Landmark White valuation, [1 – (\$4,059,646 / \$37,930,000) = 89.3%];~~

~~(e). The second defendant concealed the valuation from the third plaintiff and refused to provide it a copy, notwithstanding that the third plaintiff had paid for it.~~

~~(ii). the second defendant had permitted the Hastings Shire Council to draw on the security bond, notwithstanding that the third plaintiff was not at the time of drawing required to have completed the civil works.~~

~~(iii). the works had not been carried out within the date of Practical Completion because, and as was entirely the fault of the second defendant, the progress payments no. 8 or no. 9 were not made by the second defendant within terms or within arrangements, and in the case of progress payment no. 9, at all.~~

~~69R. On 28 March 2011, Mr Philip Campbell Wilson and Mr Keiran William Hutchinson of Ernst & Young were appointed as receivers to the third plaintiff who, in the events following their appointment as receivers, called in and sold up all of the assets of the third plaintiff, thereby destroying all of its commercial value. The receivers then retired their appointments on 23 September 2013.~~

~~70. The steps taken by the second defendant in having transferred the third plaintiff's facility into CAM occurred at a time when the third plaintiff's facility was and had been a Performing Loan, but at which they had been a risk weighted asset of the second defendant appearing on the Corporate Loan Book of the second defendant as a pre Completion Date facility, and thereby the second and third plaintiffs were Group Members.~~

~~71. In January 2009 Bankwest issued a "short form approval letter" indicating an intention to provide monies to BBC to permit it to acquire certain businesses known as Wesco and Kemp for \$5 million.~~

~~72. In January 2009 relying on the letter from Bankwest, BBC entered into agreements to buy Wesco and Kemp.~~

~~73. In January 2009 Freehills, solicitors for the second defendant, issued a letter on behalf of the second defendant to HBOS as vendor for the purposes of the Deed of Sale styled "Sale Deed Warranty Claim Notice" and in which they indicated an intention to identify and to quantify further claims by way of warranty claims arising out of clause 15 of the Share Sale Deed, and because, (or so the letter / the Claims Notice says), the balance of financial statement items had been misstated or were materially incorrect in respect of the valuation amounts recorded in the completion balance sheets.~~

~~74. In February 2009, Bankwest advised BBC that it was withdrawing its offer to contribute monies and that it was not prepared to provide anything to assist BBC in the acquisition of the Wesco and of the Kemp businesses.~~

- ~~75. In June 2009, the BBC facilities were passed to the CAM department of Bankwest and on account of a pre-Completion Date provisioning and impairment event of default that BankWest claimed that it had indentified, (at the request of the Second Defendant).~~
- ~~76. The provisioning and impairment event concerned an alleged failure on the part of BBC to have directed the BBC debtor receipts to be paid to the BankWest "blocked" bank account, for the purposes of BBC's invoice discounting facility, as it was then in place.~~
- ~~77. The impairment event was an event for which BankWest had been entirely responsible in that it was on account of a failure on the part of BankWest to have followed instructions that the payment of monies had not been directed to the BBC debtor proceeds account.~~
- ~~78. In June 2009, a 100% provision was raised in respect of the BBC facilities in its commercial loans.~~
- ~~79. In August 2009, a Mr Notman representing Bankwest advised Mr Rafidi representing BBC that he should appoint administrators to deal with a funding crisis within BBC.~~
- ~~80. Mr Notman in a BankWest strategy paper dated 25 August 2009 estimated the second defendant's potential loss in a Receiver sale situation at \$1.4 million on an approximate 11% provision for BBC loan facilities.~~
- ~~81. The funding crises within BBC had arisen and has as its root cause the fact that BBC had not received the Wesco and Kemp funding that was the subject of the short term approval and that BankWest had promised to BBC.~~
- ~~82. In accordance with Mr Notman's suggestion, BBC commenced preparing a restructure proposal.~~
- ~~83. In October 2009, Mr Hageali representing BankWest and on instructions from Mr Notman met with Mr Rafidi representing BBC, and advised him that BBC could proceed to appoint an administrator, and that BankWest would not seek to rely on that appointment to call up and call in the securities pledged in relation to BBC's commercial facilities, and that it would not and did not intend to appoint receivers in respect of the facilities or to call in the facilities and sll up the securities.~~
- ~~84. In November 2009 and immediately following the appointment of administrators to BBC, Bankwest then appointed receivers over all of the assets and all of the undertakings of BBC and its related company Portland, (the first plaintiff as guarantor), and sold both BBC's assets and the first plaintiff's assets in~~

~~reduction of all monies claimed by BankWest, against BBC and against the securities. Those securities included the real property of the plaintiff.~~

~~85. On 11 February 2010, the real property owned by the first plaintiff was sold for \$9,000,000 dollars notwithstanding a valuation obtained on 18 November 2008 for mortgage security purposes. The valuation amount specified in that valuation was for an amount of \$12,000,000.~~

~~86. In 2011, Bankwest and in further exercise of its entitlements to seek recovery of amounts said to be due and owing to it under the BBC commercial facilities, commenced proceedings against Mr Rafidi seeking to recover what BankWest claimed was a \$5,400,000 shortfall upon the sale of BBC and the first plaintiff's assets under the instruments of charge and flowing on from the appointment of receivers to BBC.~~

~~87. In 2013 the receivers of the first plaintiff, having sold all of the assets and undertakings of the first plaintiff and having destroyed all of its value, and in payment of all amounts putatively owing to the second defendant for the purposes of BBC's commercial facilities, retired and returned control of the first plaintiff company to its directors, it by this stage being a hollow shell and delivering up the company to its shareholders.~~

~~88. The first plaintiff company was reduced to zero in terms of its value and now holds no assets, in circumstances in which all of its assets were sold at undervalue to satisfy the calling in of BBC's putative debts and obligations, but which were brought forward and called up by reason of the impairments and the collective provisions that were raised against the corporate loan book of BankWest, and to which the first plaintiff's (concerning BBC's commercial facility) was a party, and more generally the Group Members across the whole of the Corporate Loan Book of Bankwest.~~

### ~~THE EXTRANEOUS AND IMPROPER PURPOSE OF THE IMPAIRMENTS GENERALLY CONCERNING THE GROUP MEMBERS AND CONCERNING ALSO THE SECOND AND THIRD PLAINTIFF(S)~~

~~89. The purpose of the review had been intended so as to secure the soonest possible termination of the second and third plaintiffs and of the Group Members facilities and loans, and to take the soonest possible realisation path of the securities in relation to such facilities and loans.~~

~~90. The second defendant caused the soonest possible repayment and removal from BankWest's balance sheet of loans as part of the wider purpose being~~



~~pursued at the time in that it was seeking to remove from BankWest's balance sheet any and all commercial loans with a Standard & Poor's credit rating of BB- or worse, to thereby achieve the following commercial benefits:~~

- ~~(i). avoidance of the higher capital holding requirement that such loans attracted under the applicable Australian Prudential Regulation Authority (APRA) Basel II requirements;~~
- ~~(ii). freeing up of capital and cash to allow more loans to be made which came with lower capital holding requirements;~~
- ~~(iii). freeing up of cash which in turn would reduce BankWest or the second defendant's need for short term wholesale funding;~~
- ~~(iv). avoidance of BankWest having to increase its Tier 1 capital holding(s);~~
- ~~(v). improving BankWest's ability to raise wholesale funds on the security of its risk weighted assets;~~
- ~~(vi). aligning the risk grading of BankWest's risk weighted assets with that of the second defendant and thereby made it easier for BankWest to achieve Basel II Advanced Accreditation which was applicable to the second defendant; and~~
- ~~(viii). allowing BankWest to achieve a higher rate of return on its capital; and~~
- ~~(ix). in part to enable the second defendant, in respect of the BBC loans, to make a warranty claim, or to evidence and support the existing warranty claim made on 21 January 2009, under the Share Sale Deed between the second defendant, HBOS Australia Pty Ltd and HBOS plc dated 8 October 2008.~~

#### **Particulars**

- ~~a. The allegations at paragraphs 15-71 above are repeated.~~

#### **KNOWLEDGE OF PLAINTIFF AND GROUP MEMBERS**

~~91. The actions of BankWest concerning the review and the manner in which the Corporate Loan Book's customers' facilities had been reviewed was intentionally concealed by BankWest and by the second defendant.~~

#### **Particulars**

- ~~a. The second defendant's answers to questions on notice to the Parliamentary Joint Committee between August and December 2015,~~
- ~~b. Parliamentary and Joint Committee Hansard dated 2 December 2015;~~

- c. ~~Statement by the second defendant's CEO Ian Narev at the the second defendant's AGM in 2013 wherein he stated that *"the line that we have somehow put people in hardship in order to have a gain for the Commonwealth Bank is categorically wrong;"*~~
- d. ~~The provisions of the Share Sale Deed that conferred a financial advantage upon the second defendant to raise impairment and collective provisions were embedded within the terms of the Share Sale Deed;~~
- e. ~~The Share Sale Deed was not a public document;~~
- f. ~~From 2009 to 2016, including in affidavits sworn by solicitors instructed by the Bank and to which, to the extent necessary, the plaintiffs will seek a grant of leave to refer, the second defendant has consistently denied allegations that it stood to gain any financial advantage from the impairment and collective provisioning of commercial loans sitting on the Corporate Loan Book of BankWest;~~
- g. ~~Each of the said denials were made for the purposes of concealing the real purpose of the review and the impairments and collective provisions that had been raised.~~

92. ~~The second and the third plaintiffs and the Group Members did not know and could not have known of the conduct of BankWest or of the second defendant, that they had set out acting together and as part of the manner in which the first defendants had intended that the second defendant would achieve the purchase of BankWest as cheaply and as cost effectively as possible, by wrongfully impairing and collectively provisioning the performing commercial loans on the BankWest Corporate Loan Book, following Completion. The date upon which the said behaviour came to an end is a date known to the defendants, but that was prior to December 2015.~~

## ~~CONSPIRACY OF DIRECTORS~~

93. ~~In the premises and as to all of matters pleaded, the first defendants agreed together and in concert, knowingly and intentionally, that through the steps taken in the review and in which the loans of the second and third plaintiff and the Group Members were impaired and became the subject of collective~~

~~provisions, caused damage to the second and third plaintiff and to the Group Members.~~

~~94. The steps authorised by the first defendants and carried on by BankWest under the direction of the second defendant had been taken by them:~~

- ~~a. to enable the second defendant to comply with APS 112 and APS 120;~~
- ~~b. as part of a process in which the first defendants agreed to wrongfully request and to require the second defendant, and to have the second defendant require BankWest as it then was, to carry out impairments and collective provisioning of the loans of the second and third plaintiff and of the Group Members whose facilities sat upon the Corporate Loan Book of BankWest;~~
- ~~c. as a conspiracy between them in which they met and participated as Board members in the management of the second defendant to invoke the impairments and general provisioning across the Corporate Loan Book of BankWest that took place, and so as to injure the Plaintiffs in the manner set forth in this statement of claim;~~

~~95. Further and alternatively, the first defendants agreed together and in concert to carry out a lawful act but by an unlawful means, to knowingly and to intentionally cause damage to the First Plaintiff second and third plaintiff and to the Group Members in the manner set forth following:~~

- ~~a. To enable the second defendant to comply with APS 112 and APS 120, the first defendants agreed to wrongfully impair the loans of the Plaintiff and of the Group Members;~~
- ~~b. The actions of the first defendants was contrary to the Code of Banking Practice;~~
- ~~c. The Facts and particulars alleged in paragraph 75 and 76 above, are repeated.~~

#### ~~UNCONSCIONABLE CONDUCT OF THE SECOND DEFENDANT~~

~~96. The second defendant capriciously and wrongfully impaired the loans of the second and third plaintiff and of the Group Members knowing that such conduct~~

would cause loss and damage to the second and third plaintiff, and to the Group Members.

### Particulars

~~(a). The conduct alleged in paragraphs 53 to 70 above was unconscionable and was in breach of sections 12CA and 12 CB of the *Australian Securities and Investments Commission ("ASIC") Act 2001 Cth*, or alternatively was unconscionable for the purposes of Section 19 of the *Competition and Consumer Act 2010 (Cth)* and the general law.~~

~~97. The actions of the second defendant in impairing the loans of the second and third plaintiff and of the Group Members was unconscionable in that the action was in contravention of the Code, and in particular;~~

- ~~i. Clause 2.1(b)(i) of the Code, which provided for the effective disclosure of information by subscriber Bank's to their customers;~~
- ~~ii. 2.1(c) of the Code, and that imposes an obligation upon a subscriber Bank to impart general information about the rights and obligations that arise out of the banker and customer relationship, in relation to banking services;~~
- ~~iii. 2.1(e) of the Code and that requires a subscriber Bank to monitor external developments relating to banking codes of practice, legislative changes and related issues and to comply with them;~~
- ~~iv. Clause 2.2 of the Code provides that "We", a subscriber bank, of which the second defendant was one, are to act fairly and reasonably towards "you", the customer, in a consistent and ethical manner;~~
- ~~v. In doing so a subscriber Bank is required to consider its own conduct and the contract with the customer in its approach to the Banking / customer relationship;~~
- ~~vi. Clause 3.1 of the Code provides that We will comply with all relevant laws relating to banking services, including those concerning consumer credit products;~~
  - ~~b. other financial products and services;~~
  - ~~c. privacy; and~~
  - ~~d. discrimination.~~
- ~~vi. Where the Code imposes an obligation on a subscriber Bank, then in addition to obligations applying under a relevant law, the~~

~~Bank is also required to comply with the Code, except where doing so would lead to a breach of a law (for example, a privacy law).~~

~~vii. Clause 5.1 of the Code provides that We will:~~

- ~~a. continuously work towards improving the standards of practice and service in the banking industry, and;~~
- ~~b. promote better informed decisions about our banking services:~~

~~by providing effective disclosure of information; and by explaining to you, when asked, the contents of brochures and other written information about banking services;~~

~~ix. Clause 5.1(c) of the code requires a subscriber Bank to provide general information about the rights and obligations that arise out of the banker and customer relationship in relation to banking services;~~

~~x. Clause 5.2 of the Code requires that we will act fairly and reasonably towards you in a consistent and ethical manner. In doing so, we will consider your conduct, our conduct and the contract between us.~~

~~(a) The second and third plaintiff and the Group Members were under a special disadvantage in their dealings with the second defendant in that the defendants did not inform the second and third plaintiffs and the Group Members of the real purpose for the raising of impairments and the collective provisioning of their facilities and of their loans was occurring, being to gain a commercial advantage to the second defendant and to exploit the second and third plaintiffs and the Group Members as if dealing with each of them on an individual basis separate to the Group Members, and in so doing in a manner that was unconscionable.~~

~~(b) The manner in which the second defendant impaired the loans of the second and third plaintiffs and of the Group Members was:-~~

- ~~(i). fraudulent,~~
- ~~(ii). visited by serious misconduct;~~
- ~~(iii). clearly unfair;~~

~~—and was therefore unreasonable and was thereby unconscionable.~~

## **BREACH OF CONTRACT**

~~98. In May 2006 the first plaintiff entered into a guarantee agreement with Bankwest whereby it guaranteed a commercial debt to Bankwest owing by the Brick and Block Company, (BBC) (“the agreement”).~~

~~99. It was an implied term and condition of the agreement that the second defendant would comply with the Banking Code of Conduct.~~

### **Particulars**

~~80. The second defendant is Australia’s largest banking and financial institution and is subject to regulations controlling banking throughout the Commonwealth of Australia, including:–~~

~~14.2.1 prudential standards required by the Australian Government and administered by the Australian Prudential Regulation Authority, (APRA); and,~~

~~14.2.2 the Code.~~

~~81. In the facts and circumstances alleged in paragraphs 78 and 79, the Second Defendant breached the provisions of the Code and by reason thereof, the terms of the contract.~~

### **Particulars**

~~a. The second and third plaintiffs rely on the particulars to paragraph 79 hereof.~~

~~100. By reason of the second defendant’s breach of contract the second and third plaintiffs have suffered loss and damage.~~

## **DUTY OF GOOD FAITH**

~~101. At all material times the contracts of loan between the second defendant and the plaintiff and the Group Members contained an implied term that the second defendant would act in good faith, or alternatively that it would not conduct the banking customer relationship that arose pursuant to the terms of the facility agreements in bad faith.~~

~~102. In breach of the implied term, the second defendant failed to so act in the manner in which it impaired and collectively provisioned the plaintiff’s and the Group Members loans and facilities that had been recorded on the Corporate Loan Book of BankWest, and which included the facilities to which the second and third plaintiffs were a party and the facilities of the Group Members.~~

### **Particulars**

- ~~a) The first plaintiff second and third plaintiffs rely on the particulars provided in paragraph 72 and 75 to 79 hereof;~~
- ~~b) In the circumstances of the arrangements and agreements between the plaintiffs and the Group Members, and the second defendant, there was an implied duty to co-operate on the part of the second defendant and to act co-operatively with the plaintiffs and with the Group Members in relation to the exercise of rights and obligations under the customer facility agreements, but which the second defendant failed to do or to observe;~~
- ~~c) In the circumstances, there was an implied duty for the second defendant to act honestly, which it failed to do;~~
- ~~d) The second defendant had a duty to recognise and to have regard to the legitimate commercial interests of the second and third plaintiffs and the Group Members in respect of the approach to which it reviewed their facilities, but which it failed to do;~~
- ~~e) The second defendant had an obligation not to act in bad faith;~~
- ~~f) In the circumstances the second defendant failed to honour the obligations that it owed to the second and third plaintiffs and to the Group Members.~~

### **~~FRAUD & EQUITABLE FRAUD~~**

~~103. The relationship between the second and third plaintiffs and the Group Members with the Second Defendant was a special relationship of customer and banker and which, in the circumstances and manner pleaded the actions of the defendants in impairing the loans of the plaintiff and of Group Members was fraudulent conduct and in this respect, the matters set forth at paragraphs 72 and 75 to 79 hereof are repeated.~~

~~104. The conduct was fraudulent because the commercial loans on the Corporate Loan Book of BankWest had been impaired and collective provisions had been raised against them for an extraneous and improper purpose, as is set forth in this statement of claim.~~

~~105. A conscious decision was taken by the defendants and for the purposes of the review, and concerning the impairments and collective provisions that were~~

~~raised, to cause loans to be treated as if they were outside their terms and outside arrangements, and as if they were non performing loans, when in fact they had been and remained as performing loans throughout the course of the review. Notwithstanding, the plaintiffs' and the Group Members' facilities were called up, their facilities were determined, their loans and advances were called in and the assets that secured their putative obligations back to the second defendant were then sold by Receivers appointed by the Bank, as if the underlying loans and commercial facilities had been materially in default, when they were not.~~

~~106. There had been a deliberate intention to look for and to search out pre Completion Date events of default, but which had no impact in fact on what was intended to have been the management of the customer relationship going forward, in justification of the impairments and collective provisions that were then raised, and so as to bring forward a Warranty Claim for the purposes of attracting commercial Benefits under the Share Sale Deed. Thereby, the amount that was otherwise properly payable to HBOS Plc and to its related entity BOSTA, and known as the Excess Amount, was not repaid.~~

~~107. There had been an intentional concealment of the manner in which the loans on the Commercial Loan Book of BankWest had been impaired and the collective provisions that had been raised.~~

### **Particulars**

~~(a). The particulars to paragraph 73 above are repeated.~~

~~108. There was an intentional failure on the part of the Second Defendant to inform the first and second plaintiffs and the Group Members of information which would make them aware of their causes of action against BankWest, and of the real but concealed reasons as to why their facilities had been impaired and why they had become a part of the collective provisions booked to the Corporate Loan Book of BankWest, post the Completion Date.~~

~~109. The net result of the impairments and collective provisioning that had resulted across the whole of the Corporate Loan Book of BankWest was to provide the second defendant a mechanism to reduce the Excess Loan Amount in circumstances where a commercial benefit accrued to the second defendant through the provisioning and impairment of performing customer loans, where carried on by BankWest, by deception.~~



~~110. And for the preceding reasons, the conduct of BankWest together with the second defendant in respect of the steps as have been pleaded and that were taken by way of increasing the impairments and collective provisions that were made in respect of the Plaintiff and Group Member's loans on the Corporate Loan Book of BankWest constituted a fraud and an equitable fraud upon the plaintiff, together with the Group Members.~~

~~**DEFENDANTS CONDUCT DELIBERATELY AND UNLAWFULLY CAUSATIVE OF LOSS**~~

~~111. The relationship between the plaintiffs and the Group Members and the defendants was that of banker and customer and which imposed on the defendants an obligation to not deliberately cause harm or loss to the plaintiff and group members.~~

~~**PARTICULARS**~~

~~a. Paragraphs 2 and 3 hereof,~~

~~112. The course of conduct in which the defendants engaged in was calculated and had the intention to cause harm and loss to the plaintiff and to the Group Members.~~

~~**PARTICULARS**~~

~~a. Facts alleged in paragraphs 72, 75 to 79, 81(a), 85(a) to (f), 88 and 89 to 93, 120(a) to (qzf).~~

~~113. As a result of the conduct the plaintiff and the Group Members suffered harm and loss.~~

~~114. Paragraphs 96 through to 118 are blank as they have been removed from an earlier pleadings.~~

~~118. Refer above, 96.~~

~~**CLAIMS FOR AGGRAVATED AND EXEMPLARY DAMAGES**~~

~~119. The Plaintiff brings claim for aggravated and exemplary damages.~~

~~120. And the Plaintiffs rely on the following particulars as justifying an order or an award of aggravated damages:~~

- ~~(a) the systematic, intended and calculated way in which the plaintiffs rights were deliberately and intentionally abused by the conduct of the second defendant;~~
- ~~(b) the deliberate acts of concealment engaged in by the second defendant as to the true purposes of the impairment and collective provisions that had been raised in relation to the plaintiffs' and the Group Members facilities;~~
- ~~(c) the level of suffering and damages to which all of the defendants knew, (they all being educated and sophisticated bankers), that the plaintiffs would suffer, and the full extent of their financial and other injuries that would be incurred;~~
- ~~(d) the way and manner in which the defendants went about deliberately and intentionally misleading the public as to the true nature of their conduct and behaviour;~~
- ~~(e) the unlawful demands that were made by the second defendant, and with the consent, acquiescence and approval of the first defendants, and under threat of exaction through court process that each of the plaintiffs and all of the Group Members were to have all of their assets taken from them for an illegal and impermissible purpose, in the manner that has been pleaded;~~
- ~~(f) the deliberate insult and humiliation to which the plaintiffs were subjected;~~
- ~~(g) the manner in which the plaintiffs and the Group Members were made to feel that what had occurred to them was as a consequence of their own actions and their own fault, whereas what had occurred had occurred by reason of the defendants' calculating wrongful conduct and behaviour;~~
- ~~(f) The financial gain sought by the defendants at the expense of the plaintiff and of the Group Members;~~
- ~~(g) The falsity of the allegations made against the plaintiffs and the Group Members by the second defendant, that their facilities and the facilities to which they were associated were in default and had to be foreclosed and determined, whereas they did not have to be and the defendants well knew that there was no proper basis for doing so;~~

~~(h) sub paragraphs (h) to (p). have been deleted from a prior pleading and hence they are blank;~~

~~(q). The repeated manner in which the plaintiffs' and the Group Members property was deliberately withheld by the defendants and sold up by the second defendant, to repay debts and obligations that were not due and payable;~~

~~(p) The deliberate and calculated conduct of the defendants conduct;~~

~~(q) The self interest exhibited and the motivation of the defendants conduct with knowledge that it would severely injure the plaintiff and the Group Members;~~

~~(r) The defendants' failure to accept responsibility for their conduct;~~

~~121. Paragraphs 121 to 123 are blank as they have been deleted from a prior pleading.~~

~~122. Paragraphs 121 to 123 are blank as they have been deleted from a prior pleading.~~

~~123. Paragraphs 121 to 123 are blank as they have been deleted from a prior pleading.~~

### **THE CODE, LOSS & DAMAGE OF GROUP MEMBERS**

~~124. The second defendant impaired 1,958 loans with a total value of about \$20 Billion.~~

~~125. In addition to direct losses the Group Members suffered individual and separate claims for loss of reputation, profits, interest and other consequential and flow on losses.~~

~~126. The Total valuation of individual losses will be ascertainable for the purposes of these proceedings only at the point at which the class is closed and the claims of all Group Members are capable of being determined.~~

### **PARTICULARS OF LOSS AND DAMAGE OF THE PLAINTIFF(S)**

~~127. 127.1 The second plaintiff has suffered loss and damage including loss to his commercial standing and reputation, and such other losses that the second plaintiff will particularise in the course of these proceedings.~~

~~127.2 The third plaintiff has suffered the following loss to date and continuing.~~

~~I. (i). to (iii) are blank and were removed from a prior pleadings;~~

- ~~128. Did the first defendants' actions cause loss and damage to the Plaintiff and to the Group Members?~~
- ~~129. Did the first defendants know that their actions would cause loss and damage to the Plaintiff and to the Group Members?~~
- ~~130. Did the first and second defendants breach the Banking Code of Practice?~~
- ~~131. Was there an agreement between the first defendants to cause BankWest and the Second Defendant to impair the loans on the Corporate Loan Book of BankWest?~~
- ~~132. If there was an agreement between the first defendants, did they know the impairment of the loans would cause loss and damage to the Plaintiff and to the Group Members?~~
- ~~133. Was the agreement of the first defendants a conspiracy?~~
- ~~134. Are the first defendants liable to the Plaintiff and to the Group Members in damages for conspiracy?~~
- ~~135. Is the second defendant liable to the Plaintiff and to the Group Members for:~~
- ~~i. breach of contract in respect of the manner in which the review was carried on by BankWest;~~
  - ~~ii. unconscionable conduct;~~
  - ~~iii. the actions of BankWest in respect of breach of the contractual duty of good faith; and / or~~
  - ~~iv. the actions of BankWest in having approached its contractual duties in bad faith;~~
  - ~~v. Fraud and / or Equitable Fraud~~
  - ~~vi. Intentional infliction of harm?~~
- ~~136. Did the Plaintiff and the Group Members suffer loss and damage caused by the actions of the defendants?~~
- ~~137. Did the second defendant conceal its actions from the Plaintiff and from the Group Members?~~
- ~~138. Did the second defendant fail to provide information to the Plaintiff and to the Group Members that would have made them aware of their causes of action against the second defendant?~~
- ~~139. Did the second defendant actively impair and to collectively provision the Corporate Loan Book of BankWest to its commercial advantage with the~~

~~knowledge and intention to exploit the position of the Plaintiff and the Group Members, to their detriment?~~

### **SIGNATURE OF LEGAL REPRESENTATIVE**

I certify under section 347 of the Legal Profession Act 2004 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiff[s] that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature

*Trevor Hall*

Capacity

[eg solicitor on record, contact solicitor]

Date of signature

12 July ~~27 April~~ 2016

## NOTICE TO DEFENDANT

**If you do not file a defence within 28 days of being served with this statement of claim:**

- **You will be in default in these proceedings.**
- **The court may enter judgment against you without any further notice to you.**

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

## HOW TO RESPOND

**Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.**

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at [www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au).
- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 If you intend to dispute the claim or part of the claim,** by filing a defence and/or making a cross-claim.
- 2 If money is claimed, and you believe you owe the money claimed,** by:
  - Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
  - Filing an acknowledgement of the claim.
  - Applying to the court for further time to pay the claim.
- 3 If money is claimed, and you believe you owe part of the money claimed,** by:
  - Paying the plaintiff that part of the money that is claimed.
  - Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at or at any NSW court registry.

**REGISTRY ADDRESS**

Street address	Lvl 5, Law Courts Building, Cnr King and Philip Street, Queens Square, Sydney NSW 2000
Postal address	GPO Box 3, Sydney NSW 2001
Telephone	1300 679 272

[on separate page]

[Do not include the affidavit verifying in Local Court proceedings. See Guide to preparing documents for other circumstances where affidavit not required.]

## #AFFIDAVIT VERIFYING

Name Peter Gower Walsh  
 Address 11 Lithgow Street, Abbotsford, Victoria, 3067  
 Occupation Director  
 Date 12 July ~~27 April~~ 2016

I say on oath:

1. I am a director of the third plaintiff company and I am the second plaintiff.
2. I believe that the allegations of fact in the statement of claim are true.

SWORN at

Signature of deponent

Signature of witness

Name of witness

Address of witness

Capacity of witness

HERBERT



[Solicitor]

**MICHAEL FRANCIS SKERRETT**  
 of 221 Queen St  
 Melbourne VIC 3000  
 An Australian Legal Practitioner  
 within the meaning of the  
 Legal Profession Uniform Law (Victoria)



[on separate page]

**PARTY DETAILS****PARTIES TO THE PROCEEDINGS****First Plaintiff**

Portland Property Holdings (NSW) Pty  
Limited, ACN 108 610 359

**First Defendant**

~~The directors of the Second Defendant  
and whose particulars are referred to in  
the schedule marked "A"~~

**Second Plaintiff**

Peter Gower Walsh

**Second Defendant**

Commonwealth Bank of Australia ABN  
48 123 123 124

**Third Plaintiff**

Australian Retirement Group Pty  
Limited, ACN 097 623 704

**FURTHER DETAILS ABOUT PLAINTIFF[S]****[First] plaintiff**

Name	Portland Property Holdings (NSW) Pty Limited ACN 108 610 359		
Address [The filing party must give the party's address.]	4 Goulburn Peninsula Sylvania Waters	NSW	2224

**[Second Plaintiff]**

Name	Peter Gower Walsh		
Address [The filing party must give the party's address.]	11 Lithgow Street Abbotsford VIC		3067

**[Third Plaintiff]**

Name	Australian Retirement Group Pty Limited, ACN 097 623 704		
Address [The filing party must give the party's address.]	11 Lithgow Street Abbotsford	VIC	3067

**Legal representative for plaintiff[s]**

Name	Trevor Hall		
Practising certificate number	22757		
Firm	Hall Partners		
#Contact solicitor	[include name of contact solicitor if different to solicitor on record]		
Address	Suite 5		
	2	Philip Street	
	Strathfield	NSW	2135
DX address	N/a		
Telephone	9233 3353		
Fax	9233 4901		
Email	<a href="mailto:trevor@hallpartners.com.au">trevor@hallpartners.com.au</a>		
Electronic service address	As above.		

**DETAILS ABOUT DEFENDANT[S]****First defendant**

~~Jane Sharman Hemstritch,  
John Anthony Anderson,  
Andrew Max Mohl, Brian  
James Long, Lorna Karen  
Inman, David John Turner,  
Ian Mark Narev, Harrison  
Hurst Young, Sarah Carolyn  
Hailes Kay, Fergus Denis  
Ryan, Colin Robert Galbraith,  
Ralph James Norris, Reginald  
John Clairs, John Michael  
Schubert,~~

~~{being the named directors of  
the Second Defendant whose  
particulars appear on the  
schedule marked as "A", and  
of}:-~~

~~'Gnd Floor, Tower 1' 201  
Sussex Street  
Sydney NSW 2000~~

**Second Defendant**

**Commonwealth Bank of Australia ABN 48 123 123 124**  
AFSL and Australian Credit Licence 234945  
'Ground Floor, Tower 1, 201 Sussex Street  
Sydney NSW 2000

**Schedule A**

Name	Date of Appointment	Date of resignation	Current director?	Listed contact address
Jane Sharman Hemstritch	09/10/2006	Current	Y	'G Tower 1' 201 Sussex Street, Sydney, NSW
John Anthony Anderson	12/03/2007	Current	Y	3 Bayview Terrace Oriental Bay, Wellington, New Zealand
Andrew Max Mohl	01/07/2008	Current	Y	5 Burroway Street, Neutral Bay, NSW
Brian James Long	01/09/2010	Current	Y	1 Dangar Street, Lindfield, NSW
Lorna Karen Inman	16/03/2011	Current	Y	21 Mount Ida Avenue, Hawthorn East, VIC
David John Turner	01/08/2006	Current	Y	'G Tower 1' 201 Sussex Street, Sydney, NSW
Ian Mark Narev	01/12/2011	Current	Y	'G Tower 1' 201 Sussex Street, Sydney, NSW
Harrison Hurst Young	13/02/2007	Current	Y	22 Royal Crescent, Armadale, VIC
Sarah Carolyn Hailes Kay	05/03/2003	31/03/2015	N	16 Fairfax Road, Bellevue Hill, NSW
Fergus Denis Ryan	31/03/2000	30/10/2012	N	6 Caprice Court, Templestowe, VIC
Colin Robert Galbraith	13/06/2000	30/10/2012	N	70 Harold Street, Middle Park, VIC
Ralph James Norris	22/09/2005	30/11/2011	N	'G Tower 1' 201 Sussex Street, Sydney, NSW
Reginald John Clairs	01/03/1999	13/04/2010	N	40 Ritchie Road, Pallara QLD
John Michael Schubert	08/10/1991	10/20/2010	N	Level 16, 171 Collins Street, Melbourne, VIC