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J-Ball



Filed: 28 April 2016 12:38 AM



Form 3A/B
Rule 6.2

AMENDED STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	Equity General
Registry	Supreme Court Sydney
Case number	2016/00086790

FILING DETAILS

Filed for	Plaintiff[s]
Legal representative	Trevor Hall
Legal representative reference	
Telephone	02 9233 3353

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Amended Statement of Claim (e-Services), along with any other documents listed below, were filed by the Court.

Amended Statement of Claim (AmendedStatementofClaim270416.pdf)

[attach.]

Form 3A (version 4)
UCPR 6.2

AMENDED STATEMENT OF CLAIM

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

COURT DETAILS

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

TITLE OF PROCEEDINGS

[First] plaintiff **Portland Property Holdings (NSW) Pty limited
ACN 108 610 359**

[Second] plaintiff **Peter Gower Walsh**

[Third] plaintiff **Australian Retirement Group Pty Limited,
ACN 097 623 704**

[First] defendant **The Directors and Past Directors of the
Commonwealth Bank of Australia Limited
ACN 123 123 124, [whose names appear on the
schedule marked "A"].**

Second defendant The Commonwealth Bank of Australia Limited

FILING DETAILS

Filed for **Portland Property Holdings (NSW) Pty limited
ACN 108 610 359
Peter Gower Walsh
Australian Retirement Group Pty Limited,
ACN 097 623 704**

Legal representative Trevor Hall, Hall Partners

#Legal representative
reference N/a

Contact name and telephone Trevor Hall (02) 9233 3353

Contact email trevor@hallpartners.com.au

TYPE OF CLAIM

Equity General List (other)

[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 ~~certain of 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. 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 alternatively to the~~

~~relief set forth as particulars at paragraph 120(ZG) to this statement of claim, that for the next 10 years from the date of the making of this order, 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 provide to the intending customer, security provider, or guarantor, a written document signed by the Chief Executive Officer of the Bank and required also to be signed by the customer, security provider or guarantor, on the Bank's letter head, and set out in a font of not less than 12 font, containing the words in the form accompanying this statement of claim, marked "B";~~

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 ~~and the significance of the matters set out in the annexure "B" statement accompanying this statement of claim;~~
- (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;
- (e). ~~that the customer, guarantor or security provider was advised by the solicitor that they should not assume that in all or in any of their dealings with the second defendant, the second defendant would approach those arrangements in good faith, would not behave in an unconscionable manner towards them, and would not seek to defraud them or deny them the benefits that they understood that they would receive from entry into~~

~~the contract or arrangement that they intended entering into with the Defendant;~~

~~(f) that the customer, guarantor or security provider had made a conscious decision that they intended to and wished, notwithstanding, to enter into the agreements;~~

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. An **Order** that the second defendant cause to be included in its lending manual a statement substantially in the terms of annexure "G" hereof.~~

14. Damages;

15. Exemplary damages;

16. Such other order or order(s) as the Court thinks fit;

17. Costs;

18. Interest.

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 FIRST SECOND AND THIRD-PLAINTIFFS

11. The ~~first~~ 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~~.

FACTS

15. ~~In May 2006~~ The second plaintiff entered into a guarantee agreement with Bankwest whereby it guaranteed a commercial debt of the third plaintiff to Bankwest ~~owing by the Brick and Block Company Pty Limited, (ACN 106 002 462), ("BBC")~~. 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, ~~including the BBC loan, and of which the first second plaintiff was guarantor,~~ had a Risk Grade of +4 or worse and Impairment Losses booked to the BankWest Income Statement totalled approximately \$361 million at this time., ~~but there was no provision made for impairment losses in respect of the BBC loan.~~

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 ~~and which~~ 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. ~~paragraph 59 of the Affidavit of Doriano Meta sworn 15 September 2015;~~

- 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 some manufactured 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. The first plaintiff's loan was identified as having an event of default that had as its start date, a date commencing prior to the Completion Date and on the basis of that default a provision and impairment was later raised concerning it;~~
 - 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 loaned, 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 first third plaintiff will provide further particulars in respect of this allegation ~~after discovery~~ 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, of Peter Ogilvy for the second defendant sworn 6 February 2013;~~
- ~~c. See the affidavit of Doriano Meta for the second defendant sworn 15 September 2015;~~
- 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 ~~first~~ 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 ~~first~~ third plaintiff's and the Group Members' facilities, that the ~~first~~ 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 BBC, (March 2011 November 2009), 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.

THE PLAINTIFF(S)

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 though 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 ration 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.

- ~~53. 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.~~
- ~~54. In January 2009 relying on the letter from Bankwest, BBC entered into agreements to buy Wesco and Kemp.~~
- ~~55. 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.~~
- ~~56. 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.~~
- ~~57. 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).~~
- ~~58. 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.~~
- ~~59. 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.~~
- ~~60. In June 2009, a 100% provision was raised in respect of the BBC facilities in its commercial loans.~~
- ~~61. 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.~~

62. ~~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.~~
63. ~~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.~~
64. ~~In accordance with Mr Notman's suggestion, BBC commenced preparing a restructure proposal.~~
65. ~~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 sell up the securities.~~
66. ~~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.~~
67. ~~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.~~
68. ~~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.~~
69. ~~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.~~

- ~~70. 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 FIRST SECOND AND THIRD PLAINTIFF(S)

71. The purpose of the review had been intended so as to secure the soonest possible termination of the ~~first plaintiff~~ second and third plaintiffs and of ~~and~~ the Group Members facilities and loans, and to take the soonest possible realisation path of the securities in relation to such facilities and loans.
72. 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

73. 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.

74. The ~~first plaintiff~~ 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

75. 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 ~~first~~ 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.

76. 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 ~~first~~ 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;

77. 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

78. The second defendant capriciously and wrongfully impaired the loans of the ~~first plaintiff~~ second and third plaintiff and of the Group Members knowing that such conduct would cause loss and damage to the ~~first~~ 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.
79. The actions of the second defendant in impairing the loans of the ~~first plaintiff~~ second and third plaintiff and of the Group Members was unconscionable in that the action was in contravention of the Code of ~~Banking Practice~~, 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;
 - a. other financial products and services;
 - b. privacy; and
 - c. 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 ~~first plaintiff~~ 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 ~~first~~ 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 ~~first plaintiff~~ 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 ~~first plaintiff~~ 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

~~80. 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").~~

~~81. It was an implied term and condition of the agreement that the second defendant would comply with the Banking Code of Conduct.~~

Particulars

a. ~~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 of Banking Practice, ("Code").

~~81. The terms and conditions of the Banking Code of Practice are of contractual effect and are binding on the Second Defendant in respect of the Commercial Facilities that it entered into with the Group Members.~~

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

Particulars

- a. The ~~first plaintiff~~ second and third plaintiffs rely on the particulars to paragraph 79 hereof.
83. By reason of the second defendant's breach of contract the ~~first~~ second and third plaintiffs have ~~has~~ suffered loss and damage.

DUTY OF GOOD FAITH

84. 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.
85. 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 ~~first plaintiff~~ second and third plaintiffs were as 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 ~~first plaintiff~~ 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 ~~first plaintiff~~ second and third plaintiffs and to the Group Members.

FRAUD & EQUITABLE FRAUD

- 86. The relationship between the ~~first plaintiff~~ 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.
- 87. 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.
- 88. 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.

89. 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.
90. 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.

91. There was an intentional failure on the part of the Second Defendant to inform the ~~first plaintiff~~ 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.
92. 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.
93. 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

94. 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,

95. 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 (gzf).

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

~~CONDUCT OF THE SECOND DEFENDANT IN RESPECT OF PREVIOUS FINANCIAL SCANDALS~~

~~97. At the second defendant's AGM, the second defendant through its chairman, stated that it intended to become an ethical bank and to become throughout Australia and the Australian business community as an ethical bank.~~

~~98. These matters are pleaded in so far as they are relevant to certain of the relief claimed in relation to claims for aggravated damages, together with certain of the orders that are referred to in the section of this pleading styled "Relief Claimed."~~

~~99. Over the period approximately 2012 through to 2015, the second defendant became embroiled in a number of financial scandals the full particulars of which are known to the second defendant but which are known in the financial market place and across Australian respectively as: –~~

~~(i). the Storm financial scandal,~~

- ~~(ii). the financial advice scandal;~~
- ~~(iii). the fraudulent mortgages scandal;~~
- ~~(iv). the Comminsure Scandal.~~

- ~~100. In the Storm Financial scandal, the Commonwealth Bank forced Storm into administration on 9 Jan 2009 when the bank called up its lending facilities to Storm citing a default on Storms own margin lending facility with the bank.~~
- ~~101. Whilst the date of the alleged default by Storm was 10 October 2008, the Commonwealth Bank records at the time showed Storm to NOT in default.~~
- ~~102. Notwithstanding the raising of an allegation by the second defendant that Storm was in default, the second defendant had approved a \$30m loan facility to Storm on 24 October 2008, had approved a funding facility of \$10m to Storm on 29 October 2008, and a new loan facility of \$4.725 m on 5 December 2008, for the purchase of a new building.~~
- ~~103. Data that the second defendant had provided to Storm and to Storm's clients was inaccurate and the second defendant knew of the inaccuracies. The data errors were integral and significant to the value of all financial losses that Storm suffered.~~

Particulars

- ~~(i). Concerning the inaccuracies in the data provided by the second defendant's, refer clause 24 of an evaluation conducted by the Honourable Roger Gyles AO QC on 18 November 2011 in relation to the Storm matter.~~
- ~~104. The Financial Planning Scandal concerned an issue that arose in respect of financial planning clients of the second defendant.~~
- ~~105. A compensation scheme was established to compensate the customers of the second defendant who had suffered hundreds of millions of dollars in financial losses and that included many elderly Australians by reason of the manner in which the second defendant carried on its financial planning business.~~
- ~~106. Complaints arose from persons in the employ of the Second Defendant that the compensation scheme as it was being implemented was a "joke," that it was substandard and that it was not adequately providing financial compensation to the second defendant's financial planning customers who had been effected by the scandal.~~
- ~~107. The second defendant placed those staff members on a "hit list" which had as its purpose driving these employees out of the employ of the second defendant and in order that the inadequacy of its compensation scheme could be withheld from public scrutiny and review, and that the second defendant could continue to ensure that adequate compensation was not paid to its customers.~~
- ~~108. The fraudulent mortgages scandal concerned a scandal concerning the second defendant that rose to public notice in about 2014, and in which the second defendant repeatedly ignored evidence of an alleged \$100 million fraud that implicated its own staff.~~

- ~~109. In the scandal, the second defendant seized the homes of persons where registered mortgages were recorded on the title of persons residing in the State of Victoria, in aid of securing an indebtedness amount back to the second defendant.~~
- ~~110. The second defendant in a bid to recover the monies paid out by it under the mortgages but which it knew were fraudulent, allowed the architects of the scam, (a Mr Bill Jordanou and a Mr Robert Zaia), to continue to broker tens of millions of dollars in loans on behalf of the second defendant notwithstanding the findings of an investigation by its own internal fraud division, that had taken place almost seven years prior.~~
- ~~111. In 2007, and in respect of one of the mortgages the second defendant foreclosed on a Mildura property concerning a \$1.5 million loan organised under this particular scheme and in which documents used to get the loan had been fabricated with the complicity of a senior loan manager, in the employ of the second defendant.~~
- ~~112. By reason of the second defendant's actions, its conduct and behaviour, and the steps taken by it in furtherance of the claims alleged under the mortgage, the Mildura property was sold in circumstances in which the second defendant treated the mortgage documents as if they were not forgeries, but was on notice that they were.~~
- ~~113. The second defendant allowed and permitted the company Zaia Arthur & Associates to broker at least a dozen other loans of more than \$40 million over a period of four years.~~
- ~~114. In this scandal, the second defendant claimed orders in the Supreme Court for at least four properties notwithstanding that the owners of the property had been identified as victims by the Victorian Police Service in criminal cases to be prosecuted in the Magistrates Court, later that same year.~~
- ~~115. During this scandal, the second defendant attempted to seek repossession of the home of a 91-year-old Victorian woman caught up in the scandal, but later abandoned those attempts after members of her family threatened to sue the second defendant for damages.~~
- ~~116. The CommInsure Scandal was a scandal in which the Commonwealth Bank denied insurance claims within its life insurance business based on what they knew contained out of date definitions concerning the definition of a heart attack its handling of the CommInsure customers and issued a public apology promising, (but only following adverse media comment), to review its conduct in respect of the claims and to compensate its aggrieved customers. and severe rheumatoid arthritis.~~
- ~~117. The second defendant refused the payment of claims of customers in distressed and near death circumstances holding policies of life and trauma, accident and illness insurance with CommInsure, a second defendant company.~~
- ~~118. The second defendant admitted publicly that it had acted wrongly in relation to~~

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) The malice with which the impairments and collective provisions were made against the plaintiff and the Group Members facilities, in that knowing that the loans were performing loans at the time, and that they continued to be performing loans, they were classified and treated as if they were not performing loans and were made subject of determination and foreclosure;~~
- ~~(i) The unprovoked nature of the Defendants' conduct;~~
- ~~(k) The gravity of the Defendants' conduct;~~
- ~~(l) The repeated manner in which the conduct occurred;~~
- ~~(m) The contemptuous manner in which the Plaintiffs rights were abused;~~
- ~~(n) The contemptuous manner in which the Plaintiffs property was taken from them and was destroyed;~~
- ~~(o) The pecksniffian, unctuous and self righteous manner in which the defendants conducted themselves in purported justification of their behaviour, in stating that the Group Member's facilities had been called in and determined based primarily on unrealistic security valuations, whereas the true reasons had never been disclosed;~~
- (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;
- ~~(s) The defendants' failure to have apologised for their conduct;~~
- ~~(t) The defendants' failure to make amends for their conduct;~~
- ~~(u) the fact that any apology if rendered now by the defendants would be facile, incredible, and rendered nugatory by reason of the lateness in time at which it would be forthcoming, and the systemic and intentional manner in which the plaintiff and the Group Members rights had been deliberately abused;~~

- ~~(v). the rewards that were bestowed upon the Group Head of Strategy of BankWest, Mr Ian Narev, who had managed the purchase and acquisition of BankWest by the second defendant's, and who by reason of the administration of his role in that portfolio and the great damage that it inflicted upon the Plaintiff and Group Members, was appointed as a director of the second defendant and promoted to the position as the second defendant's Chief Executive Officer, a position he presently continues to occupy;~~
- ~~(w). the record profits that the second defendant's recorded and publicly boasted that it had recorded, whilst at the same time it was taking all of the plaintiff's assets and those of the Group Members in circumstances in which it knew or ought to have known it had no legal claim over them and was not entitled to bring claims in respect of them;~~
- ~~(x). the hypocritical nature of the second defendant's conduct in that in the events following the GFC, it had extended out its hand and accepted the financial assistance of the Commonwealth of Australia in accepting a guarantee over its deposits, whilst at the same time the second defendant was intentionally wreaking havoc on the commercial affairs of the plaintiff and of the Group Members;~~
- ~~(y). The wilful and intentional way in which the second defendant went about destroying small Australian family companies and small businesses, thereby directly forcing members of the Australian community to live on the welfare system administered by the Commonwealth and the infliction of that expense upon the Commonwealth as a necessary incident of its actions and behaviour, whilst at the same time its own survival was on in no small way attributable to the generosity and largess of the Commonwealth who in a time of great need had agreed to provide a guarantee as to its customer deposits;~~
- ~~(z). The humiliation and sense of loss of self worth and degradation to which the plaintiff and the Group Members were subjected, in knowing that the circumstances concerning the review was a part of a pattern and a process of behaviour in which the second defendant did not deal with or treat its customers properly, and did not actively seek to properly compensate them and to apologise to them in an orderly and prompt way, and which included:—~~

- ~~(a). the customers of the second defendant whose facilities became embroiled in what is now publicly known as the "Storm Financial Scandal";-~~
- ~~(b). the customers of the second defendant whose insurance payments were not paid to them after they had suffered illnesses or injuries, and in some cases had succumb victim to life threatening circumstances and events, and for which the second defendant knew that it carried an obligation to make payment to the customer, but which it refused to do and made no payment, this scandal now known as the CommInsure scandal;-~~
- ~~(c). the customers of the second defendant whose savings and in certain cases their life savings were dwindled, depleted or lost completely by reason of the facts, circumstances and events that are now known as the "financial advice scandal";-~~
- ~~(d). the customers of the second defendant whose properties had been mortgaged by certain persons fraudulently and in which their homes were then subject of possession action and in other cases sale by the second defendant, in situations where the second defendant knew or had a basis to know that the said mortgages were fraudulent, and hence that the second defendant was not entitled to call them in and to proceed and take action in respect of them, referred to for the purposes of this statement of claim as the "fraudulent mortgage scandal."~~
- ~~(za). The humiliation and sense of loss of self worth and degradation to which the plaintiff and the Group Members were subjected in watching the development of each of the above scandals being played out before the Australian Public and in the Australian media, that in each of the respective scandals the second defendant would not come out and apologise publicly until well after great harm and damage had been done to its customers, and that it would only then apologise, whereupon in each case the second defendant would say that the scandals were the fault of a few rogue individuals within its organisation who had been weeded out of the organisation. However, in the case of the Plaintiff and the Group Members, the design and development of the strategy that~~

~~gave rise to the impairments and general provisions that were made and the manner in which the plaintiff and the Group Members facilities were subsequently determined, their loans called in and Receivers were appointed, went all the way to the role that was previously occupied by the current CEO of the second defendant, Mr Ian Narev, who is and was a Board member of the second defendant company and had previously been the individual within the second defendant responsible as Group Head of Strategy for the development of the Strategy of the second defendant concerning the acquisition of BankWest;~~

~~(zb). The further humiliation to which the first plaintiff and the Group Members were subjected when they observed that Mr Ian Narev in his capacity as CEO of the second defendant had caused to have removed from his curriculum vitae maintained on the second defendant's internet web site the fact that previously he had been employed as the Group Head of Strategy for the development of the Strategy of the second defendant concerning the acquisition of BankWest, and which made the plaintiff and the Group Members feel as if Mr Narev and the second defendant personally were seeking to forget the suffering inflicted upon the plaintiff and the Group Members, the loss of all of their assets and the loss of the assets of the Group Members, whilst the second defendant was content to continue on its course of defrauding its customers, breaching their contracts, engaging in unconscionable conduct, and causing them great financial injury and economic suffering as a normal and every day incident of the ordinary carrying on of its business;~~

~~(zc). The humiliation and degradation to which the plaintiff and the Group Members were subjected when they read on the curriculum vitae of Mr Ian Narev maintained on the internet web site of the second defendant both before and after the said amendments, that he lived in Sydney with his Wife and children, whereas for many of the Group Members, their marriages had broken down, their families were divided and fractured, they had lost all of their assets, they had been caused to suffer severe depression and mental breakdown, they no longer lived with their spouse or children, and in other cases certain of the Group Members had lost their homes and all of their assets and were forced into rental accommodation, hostels or homelessness, and had been forced to~~

become dependent upon social security benefits and payments. Certain of the Group Members had developed life-threatening illnesses, others had passed away, and others in the view and understanding of the Plaintiff and the Group Members, in terms of the illnesses that they had developed, had experienced a rapid progression in the stage, progression and level of severity of their life-threatening illnesses. Other family members and persons effected had experienced suicidal ideations, and in further cases that are anticipated will come to light throughout the course of these proceedings, others took their own lives and committed suicide, the hapless state of affairs of these persons being attributable to the defendants' conduct, to their actions and on account of their behaviour;

(zd). The humiliation to which the plaintiff and the Group Members were subjected to by reason of the second defendant's conduct and behaviour, wherein in 2015 and in response to adverse comment and reporting in the press and across the Australian media that was being aired in relation to the second defendant, the second defendant stated publicly that it was seeking to develop a reputation as being an ethical banker, when it was no such thing, and continued to suppress the truth as to its conduct, its actions and its behaviour, and that the defendants are now sued upon in these proceedings;

(ze). The additional humiliation, distress and disgust to which the plaintiff and the Group Members were put when in 2015 the second defendant embarked upon a public advertising program extolling the virtues of BankWest as a small business lending banker, and seeking to elicit clients' and new business in the small business lending sector, which line of commercial activity in respect of the plaintiff and the Group Members they had previously set out to deliberately and to intentionally destroy.

(zf). The humiliation, distress and disgust to which the plaintiff and the Group Members were put in knowing that the second defendant regarded its own conduct and behaviour as being extremely grave and conduct of the worst kind that could be engaged in by a corporation carrying on a business of banking in Australia, and yet having knowingly engaged in the said conduct, refused to admit or to acknowledge that it had done so;

~~(zg). The plaintiff and the Group Members disgust and ongoing concerns that unless restrained and compelled to warn its customers in the manner in which orders are claimed in this statement of claim, that the second defendant will continue to defraud its customers, to exploit them, to call in their securities, to breach their contracts, and to behave unconscionably towards them in the same fashion as was visited upon the plaintiff and upon the Group Members.~~

~~121. An award of Exemplary damages is required so as to send a clear message as to the Court's disapprobation and disgust in respect of the defendants' conduct, each and all of them, and so as to discourage any other persons from ever seeking to engage in any such conduct or behaviour again.~~

~~122. An award of Exemplary Damages is required so as to ensure that the Courts of this State send a clear message to individuals and corporations who commit frauds of the magnitude and nature of that which was committed by the Defendants in the manner that is set out in and that is the subject of these proceedings, that they will be dealt with very severely on account of their misconduct, their misbehaviour and their wrong doings.~~

~~123. An award of Exemplary Damages is required so as to ensure that persons contemplating participating in any and all such activities in the future will refrain from doing so on account of the clear message that was sent to the individuals that behaved in the conduct that is subject of these proceedings that the manner in which the Court dealt with their behaviour was sufficiently severe that no person would ever seek to engage or to think that they could profit from engaging in any such conduct again.~~

THE CODE OF CONDUCT, 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 PLAINTIFF

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. | Value of assets | \$12,000,000 |
| II. | Plus appreciation | \$ 3,000,000 |
| III. | Loss of rent. | \$10,000,000 |
| IV. | <u>Loss of the Proposed Development, \$80 million;</u> | |
| V. | <u>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;</u> | |
| VI. | <u>Loss of reputation</u> | <u>(To be assessed)</u> |

COMMON QUESTIONS

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

~~20 March~~ 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.
- 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 www.lawlink.nsw.gov.au/ucpr 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 ~~Iyad Rafidi~~ Peter Gower Walsh
 Address ~~4 Goulburn Peninsula, Sylvania Waters, NSW 2224~~
11 Lithgow Street, Abbotsford, Victoria, 3067

Occupation Director
 Date ~~20 March~~ 27 April 2016

I say on oath:

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

SWORN at Strathfield
 Signature of deponent ~~Iyad Rafidi~~ Peter Walsh
 Signature of witness Trevor Hall
 Name of witness Trevor Hall
 Address of witness Suite5, 2 Philip Street, Strathfield NSW 2135
 Capacity of witness [Solicitor]

[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]

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

[Third Plaintiff]

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

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	trevor@hallpartners.com.au		
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 Terrance 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