

Carling

Form 6A (version 1)
UCPR 6.9, 6.11

DEFENCE TO THE FURTHER AMENDED STATEMENT OF CLAIM

(Pursuant to Orders dated 19 June 2015)

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	General (Representative Proceedings)
Registry	Sydney
Case number	2014/335469

FILED

26 JUN 2015

NX



TITLE OF PROCEEDINGS

First-plaintiff/Plaintiff	<u>Julian-Fewtrell/Neil Younger</u>
Number-of-plaintiffs	4
First Defendant	<u>Westpac Banking Corporation</u> <u>(ACN 007 457 141)</u>
Second Defendant	<u>Asgard Wealth Solutions Limited</u> <u>(CAN 009 143 597)</u>

FILING DETAILS

Filed for	<u>Westpac Banking Corporation, Asgard Wealth Solutions Limited,</u> Defendants
Legal representative	Peter John Elliot Arthur Aliens, Solicitors
Legal representative reference	17450
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HEARING DETAILS

If the proceedings do not already have a listing date, they are to be listed at:

PLEADING AND PARTICULARS

I INTRODUCTION

Plaintiff and Group Members

1 The First Defendant (*Westpac*) and Second Defendant (*Asgard*) does not plead to paragraph 1 of the Further Amended Statement of Claim as it contains no allegations against ~~it~~them.

1.2 Westpac and Asgard does not admit paragraph 2 of the Further Amended Statement of Claim.

St George

2.3 In answer to paragraph 3 of the Further Amended Statement of Claim, Westpac and Asgard:

(a) says that St George was a company incorporated under the *Corporations Act 2001 (Cth)* until 1 March 2010; and

~~(b)~~—says that at all material times:

~~(i)~~—St George was the employer of the Third Plaintiff;

~~(ii)~~—Asgard Wealth Solutions Ltd (*Asgard*), a wholly-owned subsidiary of St George, was the employer of the First, Second and Fourth Plaintiffs; ~~and~~

~~(c)~~(b) otherwise does not admit that paragraph.

3.4 Not used.

4.5 Not used.

5.6 In answer to paragraph 6 of the Further Amended Statement of Claim, Westpac and Asgard:

(a) admits that Paul Fegan was employed as Managing Director and Chief Executive Officer of St George from November 2007 to December 2008 and;

(b) otherwise does not admit that paragraph.

6A In answer to paragraph 6A of the Further Amended Statement of Claim, Westpac and Asgard refer to paragraph 6 above and otherwise do not admit the paragraph.

6.7. Westpac and Asgard admits paragraph 7 of the Further Amended Statement of Claim.

8A. Westpac and Asgard admit paragraph 8A of the Further Amended Statement of Claim.

7.8. In answer to paragraph 8 of the Further Amended Statement Claim, Westpac and Asgard:

- (a) says that at all relevant times prior to 17 November 2008, St George was:
 - (i) a corporation included in the official list of ASX Limited;
 - (ii) a listed disclosing entity within the meaning of section 111AL(1) of the Corporations Act;
 - (iii) subject to and bound by the Listing Rules of the ASX; and
- (b) otherwise does not admit that paragraph.

Asgard

9A. Westpac and Asgard admit paragraph 9A of the Further Amended Statement of Claim.

Bank SA

9B. Westpac and Asgard admit paragraph 9B of the Further Amended Statement of Claim.

9C. Westpac and Asgard admit paragraph 9C of the Further Amended Statement of Claim.

Westpac

8.9. Westpac and Asgard admits paragraph 9 of the Further Amended Statement of Claim.

9.10. Westpac and Asgard admits paragraph 10 of the Further Amended Statement of Claim.

II ST GEORGE'S EPS TARGET

10.11. In answer to paragraph 11 of the Further Amended Statement Claim, Westpac and Asgard:

- (a) says that St George was obliged to file with the ASX each year, not later than two months after the end of St George's financial year, a Preliminary

Final Report (Appendix 4E) in compliance with Listing Rules 4.3A and 4.3B;
and

(b) otherwise does not admit that paragraph.

11.12. In answer to paragraph 12 of the Further Amended Statement Claim, Westpac and Asgard:

(a) admits that during the financial year that ended on 30 September 2008, St George from time to time announced to the ASX its EPS growth target for that financial year; and

(b) otherwise does not admit that paragraph.

12.13. Westpac and Asgard admits paragraph 13 of the Further Amended Statement of Claim.

13.14. Westpac and Asgard admits paragraph 14 of the Further Amended Statement of Claim.

14.15. Westpac and Asgard admits paragraph 15 of the Further Amended Statement of Claim.

III CONTRACTUAL TERMS

Employment Contract

15A. In answer to paragraph 15A of the Further Amended Statement of Claim, Westpac and Asgard:

(a) say that on a date before 18 June 2008, the Plaintiff entered into an agreement under which the Plaintiff was employed by Asgard;

(b) refer to the agreement described in sub-paragraph (a) for its full terms and effect in relation to the Plaintiff; and

(c) otherwise deny that paragraph.

Express Terms

15B. In answer to paragraph 15B of the Further Amended Statement of Claim, Westpac and Asgard:

(a) admit paragraph 15B(a) in relation to the Plaintiff; and

(b) otherwise deny that paragraph.

15C. In answer to paragraph 15C of the Further Amended Statement of Claim, Westpac and Asgard:

- (a) say that a letter was sent to the Plaintiff on 18 June 2008 regarding a one-off incentive scheme payment which contained a number of conditions;
- (b) refer to the letter described in sub-paragraph (a) for its full terms and effect;
and
- (c) otherwise deny that paragraph.

St George Employment Contract

~~15.16. Westpac and Asgard do not admit~~ In answer to paragraph 16 of the Further Amended Statement of Claim, Westpac:

- ~~(a) refers to paragraph 3(b) above;~~
- ~~(b) admits that on a date before 18 June 2008, the Third Plaintiff entered into an agreement under which the Third Plaintiff was employed by St George;~~
- ~~(c) denies that the First, Second and Fourth Plaintiffs were employed by St George "at the relevant time;" and~~
- ~~(d) otherwise does not admit that paragraph.~~

St George Express terms

~~16.17. In answer to paragraph 17 of the Further Amended Statement of Claim, Westpac and Asgard:~~

- ~~(a) refers to paragraph 3(b) and says that there was no employment contract between "St George" and "each of the "First," "Second" and "Fourth" Plaintiffs;~~
- ~~(a) do not~~ admits paragraph 17(a) in relation to the "Third" Plaintiff; and
- ~~(b) otherwise denies~~ deny that paragraph.

~~17.18. Westpac and Asgard deny~~ paragraph 18 of the Further Amended Statement of Claim. In answer to paragraph 18 of the Statement of Claim, Westpac:

- ~~(a) says a letter was sent to the Plaintiffs on 18 June 2008 regarding a one-off incentive scheme payment which contained a number of conditions;~~
- ~~(b) refers to the letter described in sub-paragraph (a) for its full terms and effect; and~~
- ~~(c) otherwise denies that paragraph.~~

Asgard Employment Contract

18AA. In answer to paragraph 18AA of the Further Amended Statement of Claim,

Westpac and Asgard:

- (a) admit that on a date before 18 June 2008, the Plaintiff entered into an agreement under which he was employed by Asgard; and
- (b) otherwise do not admit that paragraph.

Asgard express terms

18AB. In answer to paragraph 18AB of the Further Amended Statement of Claim,

Westpac and Asgard:

- (a) admit paragraph 18AB(a) in relation to the Plaintiff; and
- (b) otherwise deny that paragraph.

18AC. In answer to paragraph 18AC of the Further Amended Statement of Claim

Westpac and Asgard:

- (a) refer to paragraph 6A above; and
- (b) otherwise deny that paragraph.

Bank SA Employment Contract

18AD. Westpac and Asgard do not admit paragraph 18AD of the Further Amended Statement of Claim.

Bank SA express terms

18AE. In answer to paragraph 18AE of the Further Amended Statement of Claim,

Westpac and Asgard:

- (a) do not admit paragraph 18AE(a); and
- (b) otherwise deny that paragraph.

18AF. In answer to paragraph 18AF of the Further Amended Statement of Claim

Westpac and Asgard:

- (a) refer to paragraph 6A above; and
- (b) otherwise deny that paragraph.

Collateral Contract

18A. In answer to paragraph 18A of the Further Amended Statement of Claim, Westpac and Asgard:

- (a) refer to paragraph 15C above in relation to the Plaintiff; and
- (b) otherwise deny that paragraph.

Proper construction of contracts

18.19. In answer to paragraph 19 of the Further Amended Statement of Claim, Westpac and Asgard:

- (a) says that as at 18 June 2008, St George's EPS Target for the financial year ended 30 September 2008 as announced to the ASX was for a range of between 8 and 10 per cent;
- (b) otherwise denies-deny that paragraph.

19.20. Westpac and Asgard does not admit paragraph 20 of the Further Amended Statement of Claim.

Employment Contract entitlement

20A. In answer to paragraph 20A of the Further Amended Statement of Claim Westpac and Asgard:

- (a) refer to paragraphs 15A, 15C, 19 and 20 above; and
- (b) otherwise do not admit that paragraph.

St George Employment Contract entitlement

20.21. Westpac and Asgard dees-do not admit paragraph 21 of the Further Amended Statement of Claim.

Asgard Employment Contract entitlement

21 A. Westpac and Asgard do not admit paragraph 21A of the Further Amended Statement of Claim.

Bank SA Employment Contract entitlement

21B. In answer to paragraph 21B of the Further Amended Statement of Claim, Westpac and Asgard:

- (a) refer to paragraphs 18AF, 19 and 20 above; and

(b) otherwise do not admit that paragraph.

Collateral Contract entitlement

21C. In answer to the second paragraph 21B of the Further Amended Statement of Claim, Westpac and Asgard:

- (a) refer to paragraphs 18AF, 19 and 20 above; and
- (b) otherwise do not admit that paragraph.

IV ACCRUAL OF THE RETENTION INCENTIVE

First Retention Incentive Condition satisfied

21.22. In answer to paragraph 22 of the Further Amended Statement of Claim, Westpac and Asgard:

- (a) admits that on 29 October 2008, St George announced to the ASX its EPS for the financial year that ended on 30 September 2008, being 237 cents; and
- (b) otherwise ~~does~~do not admit that paragraph.

22.23. Westpac and Asgard admits paragraph 23 of the Further Amended Statement of Claim.

23.24. In answer to paragraph 24 of the Further Amended Statement of Claim, Westpac and Asgard:

- (a) says that St George's EPS for the 2008 Financial Year was within the range of 8 to 10 per cent announced to the ASX on or around 6 May 2008; and
- (b) otherwise ~~does~~do not admit the paragraph.

24.25. Westpac and Asgard admits paragraph 25 of the Further Amended Statement of Claim.

25.26. Westpac and Asgard does not admit paragraph 26 of the Further Amended Statement of Claim.

Alternatively, Defendant estopped from denying the Revised 2008 EPS Target satisfies the First Retention Incentive Condition

26.27. In answer to paragraph 27 of the Further Amended Statement of Claim, Westpac and Asgard:

- (a) admits that after 18 June 2008, St George did not announce to the ASX any variation to the EPS Target of a range of 8 to 10 per cent as announced to the ASX on or around 6 May 2008;
- (b) admits that on or around 12 August 2008, St George announced to the ASX that it was on track to meet its EPS Target of 8 to 10 per cent in the financial year ending 30 September 2008;
- (c) admits that on or around 12 August 2008, Mr Fegan sent an email to all St George staff which stated that St George was on track to meet its EPS Target of 8 to 10 percent in the financial year ending 30 September 2008; and
- (d) otherwise does not admit that paragraph.

27-28. In answer to paragraph 28 of the Further Amended Statement of Claim, Westpac and Asgard:

- (a) ~~denies~~-deny that St George ~~conducted~~ its affairs with the Plaintiffs on the basis that the EPS Target of 8 to 10 per cent as announced to the ASX on or around 6 May 2008 was the EPS Target for the purposes of the conditions contained in the letter sent to the Plaintiffs on 18 June 2008; and
- (b) otherwise does not admit that paragraph.

28-29. In answer to paragraph 29 of the Further Amended Statement of Claim, Westpac and Asgard:

- (a) refers to paragraph 28 above; and
- (b) otherwise does not admit that paragraph.

29-30. Westpac denies paragraph 30 of the Further Amended Statement of Claim.

Second Retention Incentive Condition satisfied

30-31. In answer to paragraph 31 of the Further Amended Statement of Claim, Westpac and Asgard:

- ~~(a) refers to paragraph 3(b) above; and~~
- ~~(a)~~ admits that the Third-Plaintiff remained employed by St-George-Asgard on 13 November 2008; and
- (b) otherwise do not admit that paragraph.

~~31.32.~~ In answer to paragraph 32 of the Further Amended Statement of Claim, Westpac and Asgard refers to paragraph 31 above.

Third Retention Incentive Condition satisfied

~~32.33.~~ Westpac and Asgard does not admit paragraph 33 of the Further Amended Statement of Claim.

~~33.34.~~ Westpac and Asgard does not admit paragraph 34 of the Further Amended Statement of Claim.

V ENTITLEMENT TO BE PAID AND NON-PAYMENT OF THE RETENTION INCENTIVE

~~34.35.~~ Westpac and Asgard does not admit deny paragraph 35 of the Further Amended Statement of Claim.

Employment Contract and Collateral Contract

~~35.36.~~ In answer to paragraph 36 of the Further Amended Statement of Claim, Westpac and Asgard:

- (a) admits that St George has not paid the Retention Incentive to the Plaintiffs; and
- (b) otherwise does not admit deny that paragraph.

~~36.37.~~ Westpac and Asgard does not admit deny paragraph 37 of the Further Amended Statement of Claim.

~~37.38.~~ Westpac and Asgard does not admit deny paragraph 38 of the Further Amended Statement of Claim.

~~38.39.~~ Westpac and Asgard does not admit deny paragraph 39 of the Further Amended Statement of Claim.

~~39.40.~~ In answer to paragraph 40 of the Further Amended Statement of Claim, Westpac and Asgard:

- (a) admits that on and from 1 March 2010 Westpac became the successor in law in respect of all the assets and liabilities of St George;
- (b) says that the Retention Incentive Term was not a term of any employment contract between St George Asgard and any of the Plaintiffs;
- (c) says that the Second-Plaintiff has released Westpac and Asgard from any liability for the Retention Incentive;

Particulars

On or around 20 June 2011, the Second-Plaintiff entered into a deed of release with Asgard under which the Second-Plaintiff agreed to release Westpac and Asgard from all claims and liabilities of any nature arising out of, or related in any way, directly or indirectly, to the Second-Plaintiff's employment with Asgard.

(d) otherwise does-not-admit-deny that paragraph.

40AA1.———In further answer to the whole of the Statement of Claim by the Second Plaintiff, Westpac and Asgard says that the Deed of Release between Asgard and the Second Plaintiff dated 20 June 2011 (the **Younger Deed**) is a bar to the proceedings by the Second Plaintiff.

Particulars

Clauses 2 and 3 of the Younger Deed.

St George Employment Contract

40A. Westpac and Asgard deny paragraph 40A of the Further Amended Statement of Claim.

40B. Westpac and Asgard deny paragraph 40B of the Further Amended Statement of Claim.

40C. In answer to paragraph 40C of the Further Amended Statement of Claim, Westpac and Asgard:

(a) refer to paragraphs 40 and 40AA above; and

(b) otherwise deny that paragraph.

Asgard Employment Contract

40D. In answer to paragraph 40D of the Further Amended Statement of Claim, Westpac and Asgard:

(a) admit that Asgard has not paid the Retention Incentive to the Plaintiff; and

(b) otherwise deny that paragraph.

40E. Westpac and Asgard deny paragraph 40E of the Further Amended Statement of Claim.

40F. Westpac and Asgard deny paragraph 40F of the Further Amended Statement of Claim.

40G. In answer to paragraph 40G of the Further Amended Statement of Claim, Westpac and Asgard:

(a) refer to paragraph 40 and 40AA above; and

(b) otherwise deny that paragraph.

Bank SA Employment Contract

40H. In answer to paragraph 40H of the Further Amended Statement of Claim, Westpac and Asgard:

(a) admit that Bank SA has not paid the Retention Incentive to the Plaintiff; and

(b) otherwise deny that paragraph.

40I. Westpac and Asgard deny paragraph 40I of the Further Amended Statement of Claim.

40J. Westpac and Asgard deny paragraph 40J of the Further Amended Statement of Claim.

40K. In answer to paragraph 40K of the Further Amended Statement of Claim, Westpac and Asgard:

(a) refer to paragraphs 40 and 40AA above; and

(b) otherwise deny that paragraph.

VA UNCONSCIONABLE AND MISLEADING CONDUCT

40L. Westpac and Asgard do not plead to paragraph 40L of the Further Amended Statement of Claim as it contains no allegations against them.

40M. In answer to paragraph 40M of the Further Amended Statement of Claim Westpac and Asgard:

(a) say that a letter was sent to the Plaintiff on 18 June 2008 regarding a one-off incentive scheme payment which contained a number of conditions;

(b) refer to the letter described in sub-paragraph (a) for its full terms and effect; and

(c) otherwise deny that paragraph.

40N. In answer to paragraph 40N of the Further Amended Statement of Claim, Westpac and Asgard:

- (a) refer to paragraphs 26 and 30 above in answer to paragraph 40N(a);
- (b) refer to paragraph 32 above in answer to paragraph 40N(b);
- (c) refer to paragraph 34 above in answer to paragraph 40N(c); and
- (d) otherwise deny that paragraph.

40O. Westpac and Asgard deny paragraph 40O of the Further Amended Statement of Claim.

40P. Westpac and Asgard deny paragraph 40P of the Further Amended Statement of Claim.

40Q. Westpac and Asgard deny paragraph 40Q of the Further Amended Statement of Claim.


40R. Westpac and Asgard deny paragraph 40R of the Further Amended Statement of Claim.

VI COMMON QUESTIONS OF LAW OR FACT

40.41. In answer to paragraph 41 of the Further Amended Statement of Claim, Westpac and Asgard Westpac-admits that the matters pleaded in that paragraph 41-of-the Statement-of-Claim-are questions of law or fact common to the claims of the Plaintiffs and the Group Members.

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 defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature	
Capacity	Solicitor for the Defendants
Date of signature	16 April 26 June 2015

FURTHER DETAILS ABOUT FILING PARTIES**Filing parties**

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