

**FURTHER AMENDED STATEMENT OF CLAIM**

**COURT DETAILS**

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

**TITLE OF PROCEEDINGS**

First Plaintiff **Julian-Fewtrell Neil Younger**

Number-of-Plaintiffs

First Defendant **Westpac Banking Corporation**  
**ACN 007 457 141**

Second Defendant **Asgard Wealth Solutions Limited**  
**ACN 009 143 597**

**FILING DETAILS**

Filed for **~~Julian Fewtrell, Neil Younger, Ed Box, Darren~~  
~~Whereat,~~ plaintiffs**

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**TYPE OF CLAIM**

Contract

~~These proceedings are listed for an initial case conference at 9.00 a.m. on the Wednesday after the expiration of 42 days following the filing of this Statement of Claim.~~

**RELIEF CLAIMED**

- 1 A Declaration that on its proper construction:
  - a. the expression "*Earnings Per Share for the 2007/08 financial year*" in the "First Retention Incentive Condition" referred to the 2008 "EPS Target", and in particular to the "Revised 2008 EPS Target" (each as defined in the Further Amended Statement of Claim); and
  - b. the First Retention Incentive Condition was satisfied by no later than 29 October 2008;
- 2 Judgment in the amount of the Retention Incentive;
- 3 Alternatively to 2, damages;
- 4 Interest pursuant to section 101(2) of the *Civil Procedure Act 2005* from 13 November 2008 on the amount of the Retention Incentive, to date and continuing;
- 5 Costs;
- 6 Interest on costs;
- 7 Such further or other orders as the Court thinks fit.

## PLEADINGS AND PARTICULARS

### I INTRODUCTION

#### ***Plaintiff and Group Members***

1. This proceeding is commenced in the Common Law Division of the Court as a representative proceeding pursuant to Part 10 of the *Civil Procedure Act 2005* (NSW) by the Plaintiffs Neil Younger (*Plaintiff*) on their his own behalf and on behalf of other persons (***Group Members***):
  - (a) who were employed:
    - (i) by St. George Bank Limited (***St George***) or a related body corporate (as defined in the *Corporations Act 2001* (Cth)). (***Related Body Corporate***) from on or before 18 June 2008 until at least 13 November 2008 (***St George Group Members***);
    - (ii) by the Second Defendant (*Asgard*) from on or before 18 June 2008 until at least 13 November 2008 (***Asgard Group Members***); or
    - (iii) by Advanced Leasing Limited ACN 063 369 488 t/a Bank of South Australia (*Bank SA*) from on or before 18 June 2008 until at least 13 November 2008 (***Bank SA Group Members***);
  - (b) who received a letter from the Managing Director of St George dated 18 June 2008 entitled "Additional One Off Incentive for 2007/2008 financial year" (***Fegan Letter***);
  - (c) who have not been paid the incentive referred to in the Fegan Letter;
  - (d) who did not at any time work in what was known as the Institutional & Business Banking Division, and prior to about 1999 the Treasury & Capital Markets Division, of St George (being those persons described in cl 1(c) of the Deed dated 11 May 2011 between *inter alia* Westpac and Gillis Delaney Lawyers (***Deed***)); and
  - (e) whose employment was not terminated by the Defendant (***Westpac***) (being those persons described in cl 1(d) of the Deed,); and

(fd) who have not, as at the date of commencement of these proceedings, commenced proceedings against St George, ~~or the First Defendant~~ **(Westpac)** or Asgard in respect of the non-payment of the incentive referred to in the Fegan Letter.

2. As at the date of the commencement of this proceeding, seven or more Group Members have claims against Westpac.

**St George**

3. St George or a Related-Body-Corporate was at all material times:

(a) a company duly incorporated pursuant to the *Corporations Act 2001* (Cth)

**(Corporations Act)**;

(b) the employer of the Plaintiffs;

(b) the employer of each of the Group Members.

6. At all material times Paul Fegan (**Fegan**) was the Managing Director and Chief Executive Officer of St George, and an authorised servant or agent of St George.

- 6A. At all material times Fegan was an authorised servant or agent of each Related-Body Corporate Asgard and Bank SA.

7. At all material times, the financial year for St George commenced on 1 October and ended on 30 September of the following year (**Financial Year**).

- 8A. At all material times, St George was the holding company (as defined in the *Corporations Act 2001* (Cth)) of:

(a) Asgard-Wealth-Solutions-Limited-ACN-009-143-597; and

(b) Bank SA ~~Advanced Leasing Limited-ACN-063-369-488~~.

8. At all material times prior to 17 November 2008, St George was:

(a) a corporation included in the official list of the financial market operated by Australian Securities Exchange (ASX) and whose securities are ED securities for the purposes of section 111AE of the Corporations Act;

(b) a listed disclosing entity within the meaning of section 111AL(1) of the Corporations Act;

- (c) subject to and bound by the Listing Rules of the ASX (***Listing Rules***); and
- (d) obliged by s 674(2) of the Corporations Act and the Listing Rules to ensure that any disclosure made by it to the ASX was truthful.

**Asgard**

9A. Asgard was, at the relevant times:

- (a) a company duly incorporated pursuant to the Corporations Act; and
- (b) able to sue and be sued in and by its corporate name and style.

**Bank SA**

9B. Bank SA was, at the relevant times, -a company duly incorporated pursuant to the Corporations Act.

9C. Bank SA was deregistered under section 601AA of the Corporations Act from 6 September 2010.

**Westpac**

9. Westpac is:

- (a) a company duly incorporated pursuant to the Corporations Act; and
- (b) able to sue and be sued in and by its corporate name and style.

10. On 1 March 2010, Westpac became the successor in law of St George in respect of all the assets and liabilities of St George:

- (a) pursuant to s 22 of the *Financial Sector (Business Transfer & Group Restructure) Act 1999* (Cth) and a Certificate of Transfer issued by the Australian Prudential Regulation Authority under section 18 of that Act; and
- (b) orders made by the Federal Court of Australia under s 413(1)(c) of the Corporations Act (*Westpac Banking Corporation (ACN 007 457 141), in the matter of St George Bank Limited (ACN 055 513 070) [2010] FCA 148*).

## II ST GEORGE'S EPS TARGET

11. By reason of the matters pleaded in paragraph 8, and Listing Rule 4.3A, St George was obliged to file with the ASX each year, not later than two months after the end of the Financial Year, a Preliminary Final Report (Appendix 4E) which disclosed, *inter alia*, St George's earnings per security (**EPS**) for the Financial Year.
12. At all material times in the 2008 Financial Year, by reason of the matters pleaded in paragraph 8 and Listing Rule 3.1, St George from time to time disclosed to the ASX and/or to the public an EPS growth target for the Financial Year (being expressed in percentage terms as a percentage increase of the EPS reported by St George for the previous Financial Year in accordance with paragraph 11) (**EPS Target**).

### Particulars

*News Release dated 31 October 2007, pages 3, 5.*

*News Release dated 31 March 2008, page 4.*

*2008 Interim Results presentation released to ASX on 6 May 2008, pages 4 (slide 7), 32 (slide 63).*

*News Release dated 12 August 2008.*

*2008 Final Results released to ASX on 29 October 2008, Slides 5, 13.*

13. In or about 31 October 2007, St George announced to the ASX and/or the public an EPS Target for the 2008 Financial Year of 10 per cent (**the Original 2008 EPS Target**).

### Particulars

*News Release dated 31 October 2007, pages 3, 5.*

14. On or about 6 May 2008, St George announced to the ASX and/or the public that it had revised its EPS Target for the 2008 Financial Year to a range of 8 to 10 per cent (**the Revised 2008 EPS Target**).

### Particulars

*Appendix 4D Profit Announcement released 6 May 2008.*

15. At no time following 6 May 2008 and up to 18 June 2008 did St George announce to the ASX and/or the public any variation to the Revised 2008 EPS Target.

### III CONTRACTUAL TERMS

#### ***Employment Contract***

15A. On a date before 18 June 2008, Plaintiff and each of the St George Group Members, Asgard Group Members and Bank SA Group Members entered into an agreement whereby each was employed by St George (***Employment Contract***).

#### Particulars

*In respect of each of the St George Group Members, Asgard Group Members and Bank SA Group Members, particulars of the date of the Employment Contract will be provided following discovery.*

*In respect of each of the Asgard Group Members and Bank SA Group Members, the Employment Contract was between themselves and St George on the basis that:*

- (a) Asgard and Bank SA were acting, respectively, as agents of St George with respect to the Employment Contract;*
- (b) each of the Asgard Group Members and Bank SA Group Members were under the effective management, supervision and control of St George; and/or*
- (c) St George represented to the Asgard Group Members and Bank SA Group Members that each were its employees.*

#### **Express terms**

15B. Insofar as the terms of the Employment Contract were express, they were partly in writing, such writing including:

- (a) a document entitled Service Agreement, or Letter of Offer, or Employment Agreement;
- (b) a Fegan Letter; and
- (c) correspondence between St George and each Group Member in or about November of each year of employment in relation to remuneration.

#### Particulars

*In respect of the each of the St George Group Members, Asgard Group Members and Bank SA Group Members, particulars of the documents will be provided following discovery.*

15C. By reason of the Fegan Letter, the Employment Contract contained an express term (***Retention Incentive Term***) to the effect that the employee thereunder would be paid on 13 November 2008 an additional cash incentive payment (***Retention Incentive***), provided that:

- (a) St George met its "Earnings per Share Target for the 2007/08 financial year" (First Retention Incentive Condition);
- (b) the St George Group Member, Asgard Group Member, or Bank SA Group Member remained in the employ of his or her respective employer as at 13 November 2008 (Second Retention Incentive Condition); and
- (c) his or her performance continued to be satisfactory (Third Retention Incentive Condition).

Particulars

The Retention Incentive Term is in writing and is set out in the Fegan Letter.

In respect of the Plaintiff, the amount of the Retention Incentive is \$69,000.00.

In respect of the Group Members, particulars of the Retention Incentive will be provided following the initial trial of the Plaintiffs claim.

**St George Employment Contract**

16. In the alternative to 15A, On a date before 18 June 2008, the Plaintiffs and each of the St George Group Members entered into an agreement whereby the Plaintiffs and each of the Group Members, respectively, was employed by St George or a Related Body Corporate (the St Geome Employment Contract).

Particulars

In respect of each of the St George Group Members, particulars of the date of the St George Employment Contract will be provided following discovery.

**St Geome Express-express terms**

17. Insofar as the terms of the St George Employment Contract were express, they were partly in writing, such writing including:
- (a) a document entitled Service Agreement, or Letter of Offer, or Employment Agreement;
- (b) a Fegan Letter; and
- (c) correspondence between their employer St George and the Plaintiffs and each St George Group Member in or about November of each year of employment in relation to remuneration.



Particulars

*In respect of the each of the St George Group Members, particulars of the documents will be provided following discovery.*

18. By reason of the Fegan Letter, the St George Employment Contract of the Plaintiffs (and each Group Member respectively) contained the Retention Incentive Term, an express term ~~(the Retention Incentive Term)~~ to the effect that the Plaintiffs (and each Group Member respectively) would be paid on 13 November 2008 an additional cash incentive payment ~~(the Retention Incentive)~~, provided that:
- (a) ~~St George met its "Earnings per Share Target for the 2007/08 financial year"~~  
**(First Retention Incentive Condition);**
- (b) ~~the Plaintiffs (or each Group Member respectively) remained in the employ of St George or a Related Body Corporate as at 13 November 2008~~ **(Second Retention Incentive Condition);** and
- (c) ~~the Plaintiffs performance (or each Group Member's performance respectively) continued to be satisfactory~~ **(Third Retention Incentive Condition);**

Particulars

~~The Retention Incentive Term is in writing and is set out in the Fegan Letter.~~

~~In respect of the First Plaintiff, the amount of the Retention Incentive is \$50,000.00.~~

~~In respect of the Second Plaintiff, the amount of the Retention Incentive is \$69,000.00.~~

~~In respect of the Third Plaintiff, the amount of the Retention Incentive is \$38,000.00.~~

~~In respect of the Fourth Plaintiff, the amount of the Retention Incentive is \$37,000.00.~~

~~In respect of the Group Members, particulars of the Retention Incentive will be provided following the initial trial of the Plaintiffs claim.~~

**Asgard Employment Contract**

18AA. In the alternative to 15A, on a date before 18 June 2008, the Plaintiff and each of the Asgard Group Members entered into an agreement whereby the Plaintiff and each of the Asgard Group Members, respectively, was employed by Asgard (Asgard Employment Contract).

**Asgard express terms**

18AB. Insofar as the terms of the Asgard Employment Contract were express, they were partly in writing, such writing including:

- (a) a document entitled Service Agreement, or Letter of Offer, or Employment Agreement;
- (b) a Fegan Letter; and
- (c) correspondence between Asgard and the Plaintiff and each Asgard Group Member in or about November of each year of employment in relation to remuneration.

Particulars

*In respect of the each of the Asgard Group Members, particulars of the documents will be provided following discovery.*

18AC. By reason of the Fegan Letter and the agency pleaded at paragraph 6A, the Asgard Employment Contract contained the Retention Incentive Term.

**Bank SA Employment Contract**

18AD. In the alternative to 15A, on a date before 18 June 2008, each of the Bank SA Group Members entered into an agreement whereby the Bank SA Group Members, respectively, was employed by Bank SA (***Bank SA Employment Contract***).

**Bank SA express terms**

18AE. Insofar as the terms of the Bank SA Employment Contract were express, they were partly in writing, such writing including:

- (a) a document entitled Service Agreement, or Letter of Offer, or Employment Agreement;
- (b) a Fegan Letter; and
- (c) correspondence between Bank SA and each Bank SA Group Member in or about November of each year of employment in relation to remuneration.

Particulars

*In respect of the each of the Bank SA Group Members, particulars of the documents will be provided following discovery.*

18AF. By reason of the Fegan Letter and the agency pleaded at paragraph 6A, the Bank SA Employment Contract contained the Retention Incentive Term.

**Collateral Contract**

18A. Further, and in the alternative to 18, 18AC and 18AF above, by reason of the Fegan Letter, there was brought into existence a contract collateral to the Employment Contract ~~between the any Plaintiff (and any Group Member) not employed by St George) and St George~~ St George Employment Contract, Asgard Employment Contract and Bank SA Employment Contract, between St George and the Plaintiffs and each of the Group Members containing an express term to the effect of the Retention Incentive Term **(Collateral Contract)**.

Particulars

The collateral ~~Collateral~~ contract-Contract was brought into existence by an offer (***the Offer***) by St George in the Fegan Letter to the effect that the Plaintiffs (and each Group Member respectively) would be paid on 13 November 2008 the Retention Incentive by St George provided that:

- (a) St George met its "*Earnings per Share Target for the 2007/08 financial year*";
- (b) the Plaintiffs (or each Group Member member—respectively) remained in the employ of ~~their~~ his or her employer (being a Related-Body-Corporate) ~~as at 43-13~~ November 2008; and
- (c) the Plaintiff's performance (or each Group Member's performance respectively) continued to be satisfactory.

The Offer was accepted by each ~~relevant~~ the plaintiff-Plaintiff (and each Group Member) by refraining from exercising his or her right to seek alternative employment and/or otherwise terminate the Employment Contract until at least 13 November 2008.

**Proper construction of contracts**

19. By reason of the matters pleaded in paragraphs 12 to 15, as at the date of the Fegan Letter, St George's EPS Target for the 2008 Financial Year was the Revised 2008 EPS Target.

20. On its proper construction, the expression "*Earnings per Share Target for the 2007/08 financial year*" in the First Retention Incentive Condition referred to the EPS Target, namely the Revised 2008 EPS Target.

**Employment Contract entitlement**

20A. By reason of the matters pleaded in paragraphs 15C, 15A, 19 and 20, the Plaintiff and each Group Member were entitled to be paid on 13 November 2008 a Retention Incentive, provided that:

- (a) St George met the Revised 2008 EPS Target in the 2008 Financial Year, so as to fulfil the First Retention Incentive Condition;
- (b) he or her remained in the employ of St George as at 13 November 2008, so as to satisfy the Second Retention Incentive Condition; and
- (c) his or her performance continued to be satisfactory, so as to satisfy the Third Retention Incentive Condition.

**St Geome Employment Contract entitlement**

21. In the alternative to paragraph 20A, By by reason of the matters pleaded in paragraphs 18, 19 and to =20above, the Plaintiff (and each St George Group Member) was entitled to be paid on 13 November 2008 a Retention Incentive, provided that:

- (a)(b) St George met the Revised 2008 EPS Target in the 2008 Financial Year, so as to fulfil the First Retention Incentive Condition;
- (b) the-Plaintiffs-(and-each-Group-Member)he or hershe remained in the employ of St George or a-Related-Body-Corporate-as at 13 November 2008, so as to satisfy the Second Retention Incentive Condition; and
- (c) the-Plaintiffs's- performance -(and-each-Group-Member'shis or her performance) continued to be satisfactory, so as to satisfy the Third Retention Incentive Condition.

**Asgard Employment Contract entitlement**

21A. In the alternative to paragraph 20A, by reason of the matters pleaded in paragraphs 18AC, 19 and 20 above, the Plaintiff (and each Asgard Group Member) was entitled

to be paid on 13 November 2008 a Retention Incentive, provided that:

- (a) St George met the Revised 2008 EPS Target in the 2008 Financial Year, so as to fulfil the First Retention Incentive Condition;
- (b) he or she remained in the employ of Asgard as at 13 November 2008, so as to satisfy the Second Retention Incentive Condition; and
- (c) his or her performance continued to be satisfactory, so as to satisfy the Third Retention Incentive Condition.

**Bank SA Employment Contract entitlement**

21B. In the alternative to paragraph 20A, by reason of the matters pleaded in paragraphs 18AF, 19 and 20 above, each Bank SA Group Member was entitled to be paid on 13 November 2008 a Retention Incentive, provided that:

- (a) St George met the Revised 2008 EPS Target in the 2008 Financial Year, so as to fulfil the First Retention Incentive Condition;
- (b) he or hershe remained in the employ of Bank SA as at 13 November 2008, so as to satisfy the Second Retention Incentive Condition; and
- (c) his or her performance continued to be satisfactory, so as to satisfy the Third Retention Incentive Condition.

**Collateral Contract entitlement**

21B. Further and in the alternative to paragraphs 21, 21A and 21B, by reason of the matters pleaded in paragraphs 18AF, 19 and 20 above, the Plaintiffs and each Group Member was entitled to be paid on 13 November 2008 a Retention Incentive, provided that:

- (a) St George met the Revised 2008 EPS Target in the 2008 Financial Year, so as to fulfil the First Retention Incentive Condition;
- (b) he or hershe remained in the employ of his or her employer as at 13 November 2008, so as to satisfy the Second Retention Incentive Condition; and
- (c) his or her performance continued to be satisfactory, so as to satisfy the Third Retention Incentive Condition.

#### IV ACCRUAL OF THE RETENTION INCENTIVE

##### ***First Retention Incentive Condition satisfied***

22. On 29 October 2008, in accordance with its obligation as pleaded in paragraph 11 above, St George disclosed to the ASX its EPS for the 2008 Financial Year, being 237c per share (***the Actual 2008 EPS***).

##### Particulars

*2008 Final Results presentation released to ASX on 29 October 2008, Slide 5.*

*Appendix 4E Profit Announcement released 29 October 2008 page 11.*

23. The Actual 2008 EPS was 8.3% higher than the EPS which St George had announced for the previous Financial Year.

##### Particulars

*2008 Final Results presentation released to ASX on 29 October 2008, Slide 5.*

*Appendix 4E Profit Announcement released 29 October 2008 page 12.*

24. The Actual 2008 EPS was within the range which comprised the Revised 2008 EPS Target.
25. Further, on 29 October 2008, St George announced to the ASX and to the public that St George had achieved the Revised 2008 EPS Target.

##### Particulars

*2008 Final Results presentation released to ASX on 29 October 2008, Slide 13.*

26. By reason of the matters pleaded in paragraphs 22 to 25, the First Retention Incentive Condition was satisfied on or about 29 October 2008.

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

27. Further, or alternatively, to paragraphs 22 to 26:

- (a) at no time after 18 June 2008 did St George announce to the ASX and/or the public and/or disclose to the Plaintiffs and Group Members any variation to the

Revised 2008 EPS Target;

- (b) on or about 12 August 2008, St George announced to the ASX and/or the public that it was "on track to meet its EPS growth target of 8-10% in 2008".

Particulars

*News Release dated 12 August 2008, Page 1.*

- (c) on or about 12 August 2008, Fegan sent an email to the Plaintiffs and each Group Member which stated that "We are on track to meet our Earnings Per Share (EPS) target of 8-10% in 2008, which is very positive."

Particulars

*Email from Fegan to the Plaintiff and each Group Member dated 12 August 2008.*

28. By reason of the matters pleaded in paragraph 27, at all times between 18 June 2008 and 13 November 2008 St George:

- (a) represented to the Plaintiffs and Group Members that the Revised 2008 EPS Target was the "Earnings per Share Target for the 2007/08 financial year" for the purposes of the First Retention Incentive Condition (**EPS Representation**) and/or
- (b) conducted its affairs with the Plaintiffs and Group Members on the basis that the Revised 2008 EPS Target was the "Earnings per Share Target for the 2007/08 financial year" for the purposes of the First Retention Incentive Condition (**EPS Conduct**).

Particulars

*The EPS Representation was partly express and partly implied. To the extent it was express, paragraph 27(b)-(c) are repeated. To the extent it was implied, paragraph 27(a) is repeated in combination with the absence of any correction or qualification to the express statements pleaded in paragraph 27(b)-(c), in circumstances where St George was subject to the obligations pleaded in paragraph 8(c)-(d).*

*The EPS Conduct comprised the matters pleaded in paragraph 27, together with the failure by St George to disclose to the Plaintiffs and Group Members in the course of their employment that the "Earnings per Share Target for the 2007/08 financial year" for the purposes of the First Retention Incentive Condition was anything other than the Revised 2008 EPS Target.*

29. The Plaintiffs and Group Members:

- (a) relied upon the EPS Representation; and/or
- (b) conducted their affairs with St George on the basis of the EPS Conduct;
- (c) conducted their affairs with Asgard on the basis of the EPS Conduct; and/or
- (d) conducted their affairs with Bank SA on the basis of the EPS Conduct.

Particulars

*The Plaintiffs remained in employment with St George or a-Related-Body Corporate Asgard until 13 November 2008 and did not inquire of St George or Asgard whether the "Earnings per Share Target for the 2007/08 financial year" was anything other than the Revised 2008 EPS Target.*

*Particulars of reliance by Group Members will be provided following the initial trial of the Plaintiffs' claims.*

30. By reason of the matters pleaded in paragraphs 27 to 29, the-Defendant Westpac is estopped from denying that the Revised 2008 EPS Target was the "Earnings per Share Target for the 2007/08 financial year" for the purposes of the First Retention Incentive Condition.

Particulars

*The estoppel is an estoppel by representation and/or by convention.*

**Second Retention Incentive Condition satisfied**

31. The:
- (a) Plaintiffs and Group Members remained in the employ of St George in accordance with the Employment Contract on 13 November 2008; or
  - (b) the:
    - (i) St George Group Members remained in the employ of St George in accordance the St George Employment Contract on 13 November 2008; and
    - (ii) the Plaintiff and Asgard Group Members remained in the employ of Asgard in accordance the Asgard Employment Contract on 13 November 2008; and
    - (iii) the Bank SA Group Members remained in the employ of Bank SA in



accordance the Bank SA Employment Contract on 13 November 2008.

~~Plaintiffs and each Group Member remained employed by St George or a Related Body Corporate on 13 November 2008,~~

32. By reason of the matters pleaded in paragraph 31, the Second Retention Incentive Condition was satisfied by the Plaintiffs and each Group Member.

***Third Retention Incentive Condition satisfied***

33. The Plaintiffs' and each Group Member's performance continued to be satisfactory between 18 June 2008 and 13 November 2008.

Particulars

*The Plaintiffs ~~rely~~ relies upon the absence of any statement by St George or a Related Body Corporate Asgard to ~~them~~ him to the effect that their his performance was not satisfactory.*

*In respect of the Group Members, particulars will be provided following the initial trial of the Plaintiffs<sup>1</sup> claims.*

34. By reason of the matters pleaded in paragraph 33, the Third Retention Incentive Condition was satisfied by the Plaintiffs and each Group Member.

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

35. By reason of the matters pleaded in:

- (a) paragraphs 26 and/or 30;
- (b) paragraph 32; and
- (c) paragraph 34,

the Plaintiffs and each Group Member was entitled to be paid the Retention Incentive on 13 November 2008 pursuant to the Retention Incentive Term and/or the Collateral Contract.

**Employment Contract and Collateral Contract**

36. St George has, at all times on and from 13 November 2008, failed and/or neglected and/or refused to pay the Retention Incentive to the Plaintiffs and Group Members.

37. By reason of the matters pleaded in paragraphs 35 to 36 above, on and from 13 November 2008 St George has breached the Retention Incentive Term and/or the Collateral Contract (**Retention Incentive Term Breach**).
38. As a result of the Retention Incentive Term Breach, the Plaintiffs and each Group Member has suffered loss and damage.

Particulars

~~The First Plaintiffs loss and damage is the amount of the Retention Incentive, together with interest, as follows:~~

<del>Retention Incentive</del>	<del>—————</del>	<del>\$50,000.00</del>
<del>Interest to date</del>	<del>—————</del>	<del>\$24,179.54</del>
<del>Total</del>	<del>—————</del>	<del>\$74,179.54</del>

~~The Second Plaintiffs loss and damage is the amount of the Retention Incentive, together with interest, as follows:~~

<del>Retention Incentive</del>	<del>—————</del>	<del>\$69,000.00</del>
<del>Interest to date</del>	<del>—————</del>	<del>\$33,367.77</del>
<del>Total</del>	<del>—————</del>	<del>\$102,367.77</del>

~~The Third Plaintiffs loss and damage is the amount of the Retention Incentive, together with interest, as follows:~~

<del>Retention Incentive</del>	<del>—————</del>	<del>\$38,000.00</del>
<del>Interest to date</del>	<del>—————</del>	<del>\$18,376.45</del>
<del>Total</del>	<del>—————</del>	<del>\$56,376.45</del>

~~The Fourth Plaintiffs loss and damage is the amount of the Retention Incentive, together with interest, as follows:~~

<del>Retention Incentive</del>	<del>—————</del>	<del>\$37,000.00</del>
<del>Interest to date</del>	<del>—————</del>	<del>\$17,892.86</del>
<del>Total</del>	<del>—————</del>	<del>\$54,892.86</del>

~~Full particulars of the loss and damage suffered by Group Members will be provided following the initial trial of the Plaintiffs' claims, but will be of the same character.~~

39. Further, and in the alternative, by virtue of the matters pleaded in paragraph 37 above, St George became indebted, on and from 13 November 2008, to the Plaintiffs and each Group Member in the amount of the Retention Incentive (**the Debt**).

Particulars

*The Debt in respect of each-of the Plaintiffs is the amount of the Retention Incentive, together with interest, as set out in the Particulars to paragraph 38.*

*Full particulars of the Debt owing to each Group Member will be provided following the initial trial of the Plaintiffs's claims, but will be of the same character.*

40. By reason of the matters pleaded in paragraphs 10 and 35 to 39, Westpac has, on and from 1 March 2010:
- (a) become liable to pay the Retention Incentive in accordance with the Retention Incentive Term;
  - (b) by reason of its non-payment of the Retention Incentive to the Plaintiffs and Group Members, been in breach of the Retention Incentive Term;
  - (c) become liable for the Retention Incentive Term Breach by St George; and/or
  - (fed) been liable for the Debt.

**St George Employment Contract**

40A. In the alternative to paragraph 38, as a result of the Retention Incentive Term Breach, each St George Group Member has suffered loss and damage.

Particulars

*Full particulars of the loss and damage suffered by St George Group Members will be provided following the initial trial of the Plaintiffs claims, but will be of the same character.*

40B. Further, and in the alternative, by virtue of the matters pleaded in paragraph 37 above, St George became indebted, on and from 13 November 2008, to each St George Group Member in the amount of the Retention Incentive (**St Geome Debt**).

Particulars

*The Debt in respect of the Plaintiff is the amount of the Retention Incentive, together with interest, as set out in the Particulars to paragraph 38.*

Full particulars of the Debt owing to each Group Member will be provided following the initial trial of the Plaintiffs claim, but will be of the same character.

40C. By reason of the matters pleaded in paragraphs 10, 35, 36, 40A and 40B, Westpac has, on and from 1 March 2010:

- (a) .. become liable to pay the Retention Incentive in accordance with the Retention Incentive Term:
- (b) by reason of its non-payment of the Retention Incentive to the Plaintiff and Group Members, been in breach of the Retention Incentive Term:
- (c) become liable for the Retention Incentive Term Breach by St George: and/or
- (d) been liable for the St George Debt.

**Asgard Employment Contract**

40D. In the alternative to paragraph 36, Asgard has, at all times on and from 13 November 2008, failed and/or neglected and/or refused to pay the Retention Incentive to the Plaintiff and Asgard Group Members.

40E. By reason of the matters pleaded in paragraphs 35 to 36 above, on and from 13 November 2008 Asgard has breached the Retention Incentive Term (**Asgard Retention Incentive Term Breach**).

40F. As a result of the Retention Incentive Term Breach, the Plaintiff and each Asgard Group Member has suffered loss and damage.

Particulars

The Plaintiff's loss and damage is the amount of the Retention Incentive, together with interest, as follows:

<u>Retention Incentive</u>	<u>\$69,000.00</u>
<u>Interest to date</u>	<u>\$33,367.77</u>
<u>Total</u>	<u>\$102,367.77</u>

Full particulars of the loss and damage suffered by Group Members will be provided following the initial trial of the Plaintiffs claims, but will be of the same character.

40G. Further, and in the alternative, by virtue of the matters pleaded in paragraph 40E above, Asgard became indebted, on and from 13 November 2008, to the Plaintiff and each Asgard Group Member in the amount of the Retention Incentive (**Asgard Debt**).

**Bank SA Employment Contract**

40H. In the alternative to paragraph 36, Bank SA, at all times on and from 13 November 2008, failed and/or neglected and/or refused to pay the Retention Incentive to the Plaintiff and Asgard Group Members.

40I. By reason of the matters pleaded in paragraphs 35 to 36 above, on and from 13 November 2008 Bank SA breached the Retention Incentive Term (**Bank SA Retention Incentive Term Breach**).

40J. As a result of the Retention Incentive Term Breach, the each Bank SA Group Member has suffered loss and damage.

Particulars

Full particulars of the loss and damage suffered by Bank SA Group Members will be provided following the initial trial of the Plaintiffs claims, but will be of the same character.

40K. Further, and in the alternative, by virtue of the matters pleaded in paragraph 40I above, Bank SA became indebted, on and from 13 November 2008, to the Bank SA Group Members in the amount of the Retention Incentive (**Bank SA Debt**).

**VA UNCONSCIONABLE AND MISLEADING CONDUCT**

40L. The claim in paragraphs 40M to 40R below is made on the basis that the Court finds:

(a) the Asgard Group Members and Bank SA Group Members were not employed by St George and/or were not party to the Collateral Contract or it did not exist; and

(b) on that basis, St George was not liable to pay the Retention Incentive to the Asgard Group Members or Bank SA Group Members notwithstanding the First, Second and Third Retention Incentive Conditions were met.

40M. The Board Representation contained a representation by St George that it would pay or cause to be paid the Retention Incentive to the recipient of each Fegan Letter if the

First, Second and Third Retention Incentive Conditions were met (**Board Representation**).

Particulars

The letter stated, inter alia, that "the Board, in good faith, has approved a one-off additional incentive if we deliver our 2007/2008 Group Financial performance target".

40N. By reason of the matters pleaded in:

- (a) paragraphs 26 and/or 30;
- (b) paragraph 32; and
- (c) paragraph 34.

the Asgard Group Members and Bank SA Group Members satisfied the First, Second and Third Retention Incentive Conditions.

40O. St George has, at all times on and from 13 November 2008, failed and/or neglected and/or refused to pay the Asgard Group Members and Bank SA Group Members.

40P. The Board Representation was made:

- (a) \_\_\_\_\_ in trade or commerce;

Particulars

In the premises of paragraph 40L, the Board Representation was made in trade or commerce because St George was not the employer of the Asgard Group Members and Bank SA Group Members.

- (b) \_\_\_\_\_ in connection with the supply of goods or services to a person; and/or
- (c) \_\_\_\_\_ in connection with the acquisition of services from a person.

40Q. By reason of the matters pleaded in paragraphs 29 and 40M to 40P, St George engaged in misleading and deceptive conduct in contravention of:

- (a) s 52 of the Trade Practices Act 1974 (Cth) (TPA); and/or
- (b) s 42 of the Fair Trading Act 1987 (NSW) (FTA).

40R. Further and in the alternative, by reason of the matters pleaded in paragraphs 29 and 40M to 40P, St George engaged and Westpac continues to engage in conduct that in all the circumstances was and is unconscionable in contravention of:

(a) ss 51 AA and/or 51AB and/or 51 AC of the TPA; and/or

(b) s 43 of the FTA.

## **VI COMMON QUESTIONS OF LAW OR FACT**

41. The questions of law or fact common to the claims of the Plaintiffs and the Group Members in this proceeding are:

(a) Did the:

(i) Employment Contract of the Plaintiffs and each Group Member;

(ii) St George Employment Contract;

(iii) Asgard Employment Contract; and/or

(iv) Bank SA Contract;

include the Retention Incentive Term?

(a1) Did the Collateral Contract include a term to the effect of the Retention Incentive Term?

(b) What is the proper construction of the words "*Earnings per Share Target for the 2007/08 financial year*" for the purposes of the First Retention Incentive Condition (in the Retention Incentive Term)?

(c) Did St George meet the Revised 2008 EPS Target in the 2008 Financial Year?

(d) Is Westpac liable to meet any established obligation(s) of St George or a Related Body Corporate Asgard or Bank SA to pay the Retention Incentive?

**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

Handwritten signature of Michael Gillis in black ink.

Capacity

Solicitor for the plaintiffs, by his partner M. J. Gillis

Date of signature

~~13-May-2015~~ 152 June 2015



## NOTICE TO DEFENDANT

You will be in default if you do not file a defence within 28 days of being served with this statement of claim. 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 plaintiffs 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 respond in one of the following ways:

1. **If you intend to dispute 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; or
  - 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; or
  - filing a defence in relation to the part that you do not believe is owed.

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

- the court registry for limited procedural information;
- a legal practitioner; or
- LawAccess NSW on 1300 888 529 or at .

Court forms are available on the UCPR website at [http://www.nswcourts.gov.au](#) or at any NSW court registry.

## REGISTRY ADDRESS

Street address	Supreme Court, Queens Square, Level 5, 184 Phillip Street, Sydney NSW 2000
Postal address	PO Box 3, Sydney NSW 2001
Telephone	02 9230 8111

**FURTHER DETAILS ABOUT PLAINTIFFS****First-Plaintiff**

Name	Julian-Fewtrell
Address	11 Pindari-Avenue St-Ives-NSW-2075

**Second-Plaintiff**

Name	Neil Younger
Address	13 Yiremba Place Forestville NSW 2087

**Third-Plaintiff**

Name	Ed-Box
Address	7-Creek-Street Forest-Lodge-NSW-2037

**Fourth-Plaintiff**

Name	Darren-Whereat
Address	31-Bilberry-Avenue Bilgola-Plateau-NSW-2107

**Legal representative for plaintiffs**

Name	David Thomas Newey
Practising certificate number	9399
Firm	Gillis Delaney Lawyers
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**DETAILS ABOUT DEFENDANT**

**First Defendant**

Name Westpac Banking Corporation

Address

275 Kent Street  
Sydney NSW 2000  
Australia

**Second Defendant**

Name

Asgard Wealth Solutions Limited

Address

275 Kent Street  
Sydney NSW 2000  
Australia