

Garing

## REPLY

### 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

Plaintiff **Neil Younger**

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

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

### FILING DETAILS

Filed for **Neil Younger, plaintiff**

Legal representative David Thomas Newey, Gillis Delaney Lawyers  
Legal representative reference 141640  
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### PLEADINGS AND PARTICULARS

The Plaintiff joins issue with each allegation in the Defence (**Defence**) to the Further Amended Statement of Claim (**FASOC**) save for any admissions contained therein, other than as expressly pleaded hereunder in this Reply. Terms defined in the FASOC or Defence and used in this Reply have the meanings given to those terms in the FASOC or Defence.

## Introductory

1 In answer to paragraphs 40(c), 40AA, 40C(a), 40G(a) and 40K(a) of the Defence (**Deed Pleas**), the plaintiff admits that he executed the Younger Deed but denies that the Younger Deed:

- (a) effects a release of Westpac and Asgard from any liability for the Retention Incentive; and
- (b) may be pleaded by Westpac and Asgard in bar to the proceedings brought by the plaintiff,

and further makes the pleas set out in the balance of this Reply.

## Circumstances in which Execution of the Younger Deed occurred

2 The plaintiff signed the Younger Deed in circumstances where:

- (a) St George and/or Asgard had engaged in the following conduct:
  - (i) the board of St George:
    - (A) on or about 19 May 2008 resolved that for the purpose of the plaintiff and Group Members qualifying for payment of the Retention Incentive, the applicable target EPS for the 2008 financial year was 10.1% **{the Undisclosed EPS Target}** rather than the Revised 2008 EPS Target;
    - (B) on or about 29 October 2008 determined that it would refuse to pay the Retention Incentive to the plaintiff and Group Members if the Revised 2008 EPS Target was met but the Undisclosed EPS Target was not met (**Retention Incentive Payment Refusal Board Decision**).
  - (ii) on or about 31 October 2008, St George and/or Asgard sent or caused to be sent a letter to the plaintiff and Group Members (**October Remuneration Letter**), which represented that:
    - (A) St George had determined not to pay the Retention Incentive to because "our EPS outcome was below 90% of our target";
    - (B) St George's decision was consistent with its legal rights, including the Retention Incentive Term.

- (iii) St George did not at any material time after 19 May 2008 (including by the October Remuneration Letter) disclose to the plaintiff or Group Members the Undisclosed EPS Target and/or the Retention Incentive Payment Refusal Board Decision (***Misleading/Concealment Conduct***)
- (b) St George and/or Asgard were aware by no later than 17 November 2008 that the Undisclosed EPS Target and/or the Retention Incentive Payment Refusal Board Decision had not been communicated to the plaintiff and Group Members.

Particulars

*Email from Robert Marriott to Sarah Elliott 7 July 2008 at 12:35 p.m., subject "Fwd: One off incentive 2007/2008"*

*Email from Michael Pastega to Paul Fegan 10 November 2008 at 5:06 p.m., subject "Retention Payment –in good faith";*

*Meeting between Greg Bartlett and John Curtis (chairman of the Board of St George) on or about 11 November 2008;*

*Email from Paul Harvey to many 12 November 2008 at 8:53 a.m., subject "Determination of one off bonus";*

*Email from Jim Fingleton to Paul Harvey 12 November 2008 at 9:28 a.m., subject "Re: Determination of one off bonus";*

*Email from Jim Fingleton to Paul Harvey 13 November 2008 at 11:07 a.m., subject "FWD: Re: Determination of one off bonus";*

*Email from Sarah Elliott to John Curtis 17 November 2008 at 6:18 p.m., subject "Additional Incentive Letter and Script".*

- 3 Further, or alternatively, the plaintiff signed the Younger Deed in circumstances where:
- (a) the plaintiff was provided with the Younger Deed, by which provision Westpac and/or Asgard represented that:
    - (i) in order to receive the entitlements due to him pursuant to the Employment Contract, he was required to sign the Younger Deed; and/or

- (ii) if the plaintiff did not sign the Younger Deed, the plaintiff would not receive the entitlements due to him pursuant to the Employment Contract,

**(Entitlement Representations);**

Particulars

*The first Entitlement Representation was express and oral and made by an officer, servant or agent of Westpac and/or Asgard. The second Entitlement Representation was implied, and is to be implied from the terms of the first Entitlement Representation and the context in which it occurred.*

- (b) Westpac and/or Asgard was aware or ought reasonably to have been aware, and it was the case, that:
  - (i) St George (and Westpac) and/or Asgard was under a legal obligation to pay to the plaintiff his statutory entitlements, which obligation was not, and could not lawfully be, contingent upon the plaintiff executing the Younger Deed; and/or
  - (ii) the payment which St George (and Westpac) and/or Asgard covenanted to make to the plaintiff (as set out in the Younger Deed) was payment that St George and/or Asgard was legally required to make, irrespective of the execution by the plaintiff of the Younger Deed;
  - (iii) St George (and Westpac) and/or Asgard did not inform the plaintiff, prior to signing the Younger Deed, that he was not obliged to sign the Younger Deed in order to obtain the monies due to him upon termination of employment; and/or
  - (iv) the Entitlement Representations were incorrect and/or likely to be materially misleading to a person in the position of the plaintiff,

**(Entitlement Representation Context);**

- (c) by reason of the matters pleaded in sub-paragraphs (a) and/or (b), St George and/or Asgard (being in a position of dominance over the plaintiff) asserted pressure upon the plaintiff to cause him to execute the Younger Deed  
**(Pressure).**

4 By reason of:

- (a) the Misleading/Concealment Conduct, the plaintiff was unaware of and/or mistaken in relation to his legal rights to make the claims now pleaded in the FASOC (the ***Ignorance/Mistake***); and/or
- (b) the Entitlement Representations and/or the Pressure, the plaintiff was deprived of the opportunity to correct the Ignorance/Mistake prior to executing the Younger Deed.

#### **Proper construction of Younger Deed**

5 The plaintiff says that on its proper construction cl 2 of the Younger Deed does not release Asgard and Westpac from claims and liabilities arising out of or related in any way either directly or indirectly to circumstances which were not or could not reasonably have been known to the plaintiff as at the date of the Younger Deed.

6 The plaintiff says that the claims pleaded in the FASOC on his behalf are claims arising out of or relating directly or indirectly to circumstances which were not or could not reasonably have been known to the plaintiff as at the date of the Younger Deed in that:

- (a) the plaintiff did not become aware of the existence of the Undisclosed EPS Target and/or the Retention Incentive Payment Refusal Board Decision until a time subsequent to 20 June 2011; and/or
- (b) alternatively to subparagraph (a), by reason of the Misleading/Concealment Conduct, the plaintiff could not reasonably have become aware of the Undisclosed EPS Target and/or the Retention Incentive Payment Refusal Board Decision until a time subsequent to 20 June 2011;
- (c) by reason of the matters pleaded in subparagraphs (a) and/or (b), St George's failure and/or neglect and/or refusal to pay the Retention Incentive to the plaintiff and Group Members (as pleaded in paragraphs 36, 40D and 40H of the FASOC) arose out of or related directly or indirectly to circumstances which were not or could not reasonably have been known to the plaintiff as at the date of the Younger Deed.

#### **Impeachment of the Younger Deed**

7 The Plaintiff says that by reason of:

- (a) the Misleading/Concealment Conduct; and/or
- (b) the making of the Entitlement Representations and/or the Entitlement Representations Context; and/or
- (c) the Pressure,

the Younger Deed was procured by Westpac and/or Asgard by reason of unconscionable conduct and/or equitable fraud and/or in circumstances in which the plaintiff was labouring under the Ignorance/Mistake, and by reason thereof the Younger Deed is void and of no effect and/or alternatively Westpac and/or Asgard are estopped from relying on the Deed Pleas.

8 Alternatively, the plaintiff says that by reason of the making of the Entitlement Representations and/or the Entitlement Representations Context:

- (a) Westpac and/or Asgard has engaged (or would, if it were permitted to rely upon the Deed Pleas, engage) in:
  - (i) misleading or deceptive conduct in contravention of s 18 of the Australian Consumer Law (*ACL*);
  - (ii) unconscionable conduct in contravention of s 20 of the *ACL*; and/or
- (b) the Younger Deed was and is unjust in the circumstances relating to it at the time it was made, contrary to s 7 of the *Contracts Review Act 1980* (NSW) (***CRA***),

and the plaintiff says that, consistently with the principle referred to in *HP Mercantile Pty Ltd v Dierickx* [2012] NSWSC 1005 at [267] (following *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9), he is entitled by way of Reply to claim pursuant to s 237 of the *ACL* and/or s 7 of the *CRA* an order declaring the Younger Deed to be void and/or that Westpac and/or Asgard are not entitled to rely upon cl 2 and 3 of the Younger Deed and/or make the Deed Pleas.

**SIGNATURE OF LEGAL REPRESENTATIVE**

This reply does not require a certificate under section 347 of the Legal Profession Act 2004.

Signature

Capacity

Date of signature

Solicitor on record



3 July 2015

AFFIDAVIT VERIFYING

Name Neil Younger  
 Address ~~43 Yiramba Place, Forestville NSW 2087~~ 14 Headland Road  
 Occupation General Manager North Curl/Curl  
 Date 6 July 2015 2099.

I affirm:

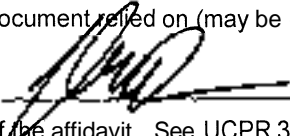
- 1 I am the plaintiff.
- 2 I believe that the allegations of fact contained in the reply are true.
- 3 I believe that the allegations of fact that are denied in the reply are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the reply are true.

AFFIRMED at Sydney  
 Signature of deponent   
 Name of witness Victoria-Jane Otavski   
 Address of witness Level 40, 161 Castlereagh Street, Sydney NSW 2000  
 Capacity of witness Solicitor

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 I saw the face of the deponent.
- 2 I have confirmed the deponent's identity using the following identification document:

NSW Drivers Licence  
 Identification document relied on (may be original or certified copy) †

Signature of witness 

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

[\* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]  
 [† "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]