

Next listing 12/2/16
File Location - Courtling J

Form 6A (version 1)
UCPR 6.9, 6.11

SECOND FURTHER AMENDED DEFENCE TO THE
SECOND FURTHER AMENDED STATEMENT OF CLAIM

(Pursuant to Orders dated ~~6 November~~ 17 December 2015)

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 **Westpac Banking Corporation, Asgard Wealth Solutions Limited, 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: 12/2/16

FILED

18 JAN 2016



PLEADING AND PARTICULARS

I INTRODUCTION

Plaintiff and Group Members

1. The First Defendant **{Westpac}** and Second Defendant **{Asgard}** do not plead to paragraph 1 of the Second Further Amended Statement of Claim as it contains no allegations against them.
2. Westpac and Asgard do not admit paragraph 2 of the Second Further Amended Statement of Claim.

St George

3. In answer to paragraph 3 of the Second Further Amended Statement of Claim, Westpac and Asgard:
 - (a) say that St George was a company incorporated under the *Corporations Act 2001 (Cth)* until 1 March 2010; and
 - (b) otherwise do not admit that paragraph.
4. Not used.
5. Not used.
6. In answer to paragraph 6 of the Second Further Amended Statement of Claim, Westpac and Asgard
 - (a) admit that Paul Fegan was employed as Managing Director and Chief Executive Officer of St George from November 2007 to December 2008 and;
 - (b) otherwise do not admit that paragraph.
- 6A. In answer to paragraph 6A of the Second Further Amended Statement of Claim, Westpac and Asgard refer to paragraph 6 above and otherwise do not admit the paragraph.
7. Westpac and Asgard admit paragraph 7 of the Second Further Amended Statement of Claim.
- 8A. Westpac and Asgard admit paragraph 8A of the Second Further Amended Statement of Claim.

8. In answer to paragraph 8 of the Second Further Amended Statement Claim, Westpac and Asgard:
- (a) say 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 do not admit that paragraph.

Asgard

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

Bank SA

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

Westpac

9. Westpac and Asgard admit paragraph 9 of the Second Further Amended Statement of Claim.
10. Westpac and Asgard admit paragraph 10 of the Second Further Amended Statement of Claim.

II ST GEORGE'S EPS TARGET

11. In answer to paragraph 11 of the Second Further Amended Statement Claim, Westpac and Asgard:
- (a) say 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 do not admit that paragraph.

12. In answer to paragraph 12 of the Second Further Amended Statement Claim, Westpac and Asgard:
- (a) admit 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 do not admit that paragraph.
13. Westpac and Asgard admit paragraph 13 of the Second Further Amended Statement of Claim.
14. Westpac and Asgard admit paragraph 14 of the Second Further Amended Statement of Claim.
15. Westpac and Asgard admit paragraph 15 of the Second Further Amended Statement of Claim.

III CONTRACTUAL TERMS

Employment Contract

- 15A. In answer to paragraph 15A of the Second 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 Second 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 Second 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

- 16. Westpac and Asgard do not admit paragraph 16 of the Second Further Amended Statement of Claim.

St George express terms

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

- (a) do not admit paragraph 17(a); and
- (b) otherwise deny that paragraph.

- 18. Westpac and Asgard deny paragraph 18 of the Second Further Amended Statement of Claim.

Asgard Employment Contract

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

Bank SA express terms

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

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

Implied Terms

18AG. Westpac and Asgard deny paragraph 18AG of the Second Further Amended Statement of Claim.

Collateral Contract

18A. In answer to paragraph 18A of the Second 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.

18B. Westpac and Asgard deny paragraph 18B of the Second Further Amended Statement of Claim.

Proper construction of contracts

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

- (a) say 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 deny that paragraph.

20. Westpac and Asgard do not admit paragraph 20 of the Second Further Amended Statement of Claim.

Employment Contract entitlement

20A. In answer to paragraph 20A of the Second 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

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

Asgard Employment Contract entitlement

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

Bank SA Employment Contract entitlement

21B. In answer to paragraph 21B of the Second 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 Second 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

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

- (a) admit 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 do not admit that paragraph.
23. Westpac and Asgard admit paragraph 23 of the Second Further Amended Statement of Claim.
24. In answer to paragraph 24 of the Second Further Amended Statement of Claim, Westpac and Asgard:
- (a) say 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 do not admit the paragraph.
25. Westpac and Asgard admit paragraph 25 of the Second Further Amended Statement of Claim.
26. Westpac and Asgard do not admit paragraph 26 of the Second Further Amended Statement of Claim.

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

27. In answer to paragraph 27 of the Second Further Amended Statement of Claim, Westpac and Asgard:
- (a) admit 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) admit 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) admit 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 do not admit that paragraph.

28. In answer to paragraph 28 of the Second Further Amended Statement of Claim, Westpac and Asgard:
- (a) deny that St George conducted its affairs with the Plaintiff 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 Plaintiff on 18 June 2008; and
 - (b) otherwise do not admit that paragraph.
29. In answer to paragraph 29 of the Second Further Amended Statement of Claim, Westpac and Asgard:
- (a) refer to paragraph 28 above; and
 - (b) otherwise do not admit that paragraph.
30. Westpac denies paragraph 30 of the Second Further Amended Statement of Claim.

Second Retention Incentive Condition satisfied

31. In answer to paragraph 31 of the Second Further Amended Statement of Claim, Westpac and Asgard:
- (a) admit that the Plaintiff remained employed by Asgard on 13 November 2008; and
 - (b) otherwise do not admit that paragraph.
32. In answer to paragraph 32 of the Second Further Amended Statement of Claim, Westpac and Asgard refer to paragraph 31 above.

Third Retention Incentive Condition satisfied

33. Westpac and Asgard do not admit paragraph 33 of the Second Further Amended Statement of Claim.
34. Westpac and Asgard do not admit paragraph 34 of the Second Further Amended Statement of Claim.

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

35. In answer to paragraph 35 of the Second Further Amended Statement of Claim, Westpac and Asgard:

- (a) admit that the Plaintiff and each Group Member was entitled to be paid the Retention Incentive on 13 November 2008;
- (b) say that the Plaintiff and each Group Member have released Westpac and Asgard from, *inter alia*, all liability in connection with their employment, including from any liability to pay the Retention Incentive to them; and
- (c) otherwise deny the paragraph.

Employment Contract and Collateral Contract

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

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

37. Westpac and Asgard deny paragraph 37 of the Second Further Amended Statement of Claim.

38. Westpac and Asgard deny paragraph 38 of the Second Further Amended Statement of Claim.

39. Westpac and Asgard deny paragraph 39 of the Second Further Amended Statement of Claim.

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

- (a) admit 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) say that the Retention Incentive Term was not a term of any employment contract between Asgard and the Plaintiff;
- (c) say that the Plaintiff has released Westpac and Asgard from, *inter alia*, any liability for the Retention Incentive;

Particulars

On or around 20 June 2011, the Plaintiff entered into a deed of release with Asgard under which the 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 Plaintiff's employment with Asgard.

Similar deeds of release have been entered into by each of the other Group Members.

(d) otherwise deny that paragraph.

40AA. In further answer to the whole of the Second Statement of Claim by the Plaintiff, Westpac and Asgard say that:

- (a) the Deed of Release between Asgard and the Plaintiff dated 20 June 2011 (the **Younger Deed**) is a bar to the proceedings brought by the Plaintiff; and
- (b) the payment made to the Plaintiff pursuant to the Younger Deed was in full satisfaction of any entitlements that the Plaintiff had, or would otherwise have had but for the Younger Deed, pursuant to, *inter alia*, his contract and any bonus and other incentive schemes.

Particulars

Clauses 2, 3 and 7 of the Younger Deed. Similar provisions are included in the deeds of release entered into by each of the other Group Members.

St George Employment Contract

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

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

40C. In answer to paragraph 40C of the Second 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 Second 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 Second Further Amended Statement of Claim.

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

40G. In answer to paragraph 40G of the Second 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 Second 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 Second Further Amended Statement of Claim.

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

40K. In answer to paragraph 40K of the Second 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

Misrepresentation as to entitlement

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

40M. In answer to paragraph 40M of the Second 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 Second 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 Second Further Amended Statement of Claim.

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

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

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

Concealment

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

(a) in respect of sub-paragraph (a):

(i) in respect of (i):

(A) admit that on 19 May 2008, the board of St George held a meeting to resolve (amongst other things) that the Retention Incentive would be payable subject to achievement of an EPS growth target of 10.1 per cent for that financial year;
and

(B) otherwise deny sub-paragraph(a)(i);

(ii) in respect of (ii):

(A) admit that on 27 October 2008, the board of St George held a meeting to resolve (amongst other things) that the Retention Incentive was not payable as the EPS growth target of 10.1 per cent had not been met; and

(B) otherwise deny sub-paragraph(a)(ii).

(b) in respect of sub-paragraph (b):

(i) say that a letter was sent by Asgard to the Plaintiff on or around 6 November 2008 regarding his remuneration, including the statement that "As our EPS outcome was below 90% of our target the Board has determined that no Additional Incentive would be payable to anyone": and

(iii) otherwise deny sub-paragraph (b).

(c) in respect of sub-paragraph (c):

(i) refer to the letter described in sub-paragraph (b)(i) above; and

(ii) otherwise do not admit sub-paragraph (c).

(d) deny sub-paragraph (d):

(e) deny sub-paragraph (e):

(f) in respect of sub-paragraph (f):

(i) refer to the deeds of release particularised in paragraph 40 above;

(ii) say that the deed of release between the Plaintiff and Asgard was made on 20 June 2011, being approximately nine months after the Plaintiff resigned from Asgard on 22 September 2010; and

(iii) otherwise deny that sub-paragraph.

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

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

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

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

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

VB FURTHER CONTRACTUAL BREACHES

41 A. Westpac and Asgard deny paragraph 41A of the Second Further Amended Statement of Claim.

41B. Westpac and Asgard deny paragraph 41B of the Second Further Amended Statement of Claim.

VI COMMON QUESTIONS OF LAW OR FACT

41. In answer to paragraph 41 of the Second Further Amended Statement of Claim, Westpac and Asgard say that:

(a) the questions of law and fact set out in sub-paragraphs (c1), (c2), (c3), (c4) and (c5) of the Second Further Amended Statement of Claim relate to circumstances that are specific to each of the Plaintiff and each Group Member, and are not questions common to all of them;

~~teXb)~~ on the basis of the pleading in paragraph 35 of this Second Further Amended Defence, the ~~common~~ questions of law and fact set out in the remaining sub-paragraphs of paragraph 41 of the Second Further Amended Statement of Claim no longer arise for determination in these proceedings; and

~~(b)(c)~~ there are no longer any questions of law or fact common to the claims of the Plaintiff 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

~~10 November 2015~~ 18 January 2016

FURTHER DETAILS ABOUT FILING PARTIES**Filing parties**

Name **Westpac Banking Corporation** (First Defendant)

Address 275 Kent Street
Sydney NSW 2000
Australia

Name **Asgard Wealth Solutions Limited** (Second Defendant)

Address 275 Kent Street
Sydney NSW 2000
Australia

Legal representative for filing parties

Name Peter John Elliot Arthur

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AFFIDAVIT VERIFYING

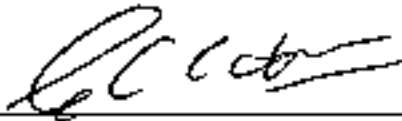
Name: Ganesh Chandrasekhar
 Address: Level 7, 275 Kent Street, Sydney NSW 2000
 Occupation: General Manager, Human Resources
 Date: ~~10 November 2015~~ 18 January 2016

I affirm:

1. I am an officer of Westpac Banking Corporation (**Westpac**). I am authorised to verify this defence on Westpac's behalf and on behalf of Asgard Wealth Solutions Limited, a wholly owned subsidiary of Westpac.
2. I believe that the allegations of fact contained in the defence are true.
3. I believe that the allegations of fact that are denied in the defence are untrue.
4. After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

AFFIRMED at
New South Wales

Signature of deponent



Signature of witness



Name of witness

PETER JOHN ELLIOTT ARTHUR

Address of witness

Level 5
 126 PHILLIP ST
 275 Kent Street, Sydney NSW 2000

Capacity of witness

Solicitor

CERTIFICATE UNDER SECTION 34(1)(C) OF OATHS ACT 1900

I, Peter John Elliott Arthur, a Solicitor, certify the following matters concerning the making of this affidavit by the person who made it:

1. I saw the face of the person.
2. I have known the person for at least 12 months.

Signature of authorised
witness



Date: ~~10 November 2015~~ 18 January 2016