

Further Amended Originating application starting a representative proceeding under Part IVA of the Federal Court of Australia Act 1976

No. 1222 of 2014

Federal Court of Australia
District Registry: New South Wales
Division: General

Sydney Forex Pty Ltd (ACN 111 743 750)

Applicant

Westpac Banking Corporation (ACN 007 457 141)

Respondent

To the Respondent

The Applicant applies for the relief set out in this further amended application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place:

The Court ordered that the time for serving this application be abridged to

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party) Sydney Forex Pty Limited, Applicant
Prepared by (name of person/lawyer) Richard Louis Mitry
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Representative action

The Applicant brings this application as a representative party under Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**).

The group members to whom this proceeding relates (**Group Members**) are persons who:

- (a) operate a business providing remittance services, being services for the transfer of money between persons in Australia and persons in countries other than Australia (**Remittance Services**);
- (b) are registered on the Remittance Sector Register maintained by the Chief Executive Officer of the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) under s 75 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth); and
- (c) as at 21 November 2014 hold bank accounts (each an **Account**) with the Respondent (**Westpac**); and
- (d) have been notified by Westpac in writing that the Accounts will be closed by Westpac unless the Accounts are personally closed first (**Closure Notification**), and have not consented to such closure.

Details of claim

On the grounds stated in this Originating Application and in the accompanying Statement of Claim dated 27 November 2014 the Applicant claims on behalf of itself and Group Members:

1. a declaration that Westpac has engaged in unconscionable conduct in contravention of s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) by:
 - a. issuing the Closure Notification; and/or
 - b. failing to withdraw the Closure Notification,
 in circumstances where Westpac has breached cl 3.2 and 33.1(b) of the Revised Code of Banking Practice – 2013 (**Code**) and/or its contractual obligation to give reasonable notice of an intention to close the Accounts of the Applicant and Group Members;
- 1A. a declaration that Westpac has engaged in misleading or deceptive conduct in contravention of s 12DA of the ASIC Act by making the Consideration Representations;
2. an injunction pursuant to s 12GD of the ASIC Act restraining Westpac from:

- a. proceeding to close the Accounts of the Applicant and Group Members pursuant to the Closure Notification, or otherwise;
 - b. ceasing to make available the Foreign Exchange Portal (XYLO) (**FX Portal**, or **XYLO**) for use by the Applicant and Group Members in providing Remittance Services;
3. further, or alternatively, an order pursuant to s 12GM of the ASIC Act
- a. that Westpac, continue to make available (within the meaning of s 12GM(7)(f) of the ASIC Act), the Accounts and the FX Portal/XYLO to the Applicant and Group Members until:
 - i. a reasonable period of time has elapsed; and/or
 - ii. the Applicant and Group Members have obtained facilities from alternative financial service providers to enable them to conduct the business of operating Remittance Services;
 - b. that Westpac not be permitted to enforce any term of the contracts between the Applicant and Group Members entitling it to unilaterally close the Accounts and cease to provide the FX Portal/XYLO until:
 - i. a reasonable period of time has elapsed; and/or
 - ii. the Applicant and Group Members have obtained facilities from alternative financial service providers to enable them to conduct the business of operating Remittance Services;
- 3A. nominal damages for breach of contract;
4. costs; and
5. such further or other relief and orders as the Court considers appropriate.

Questions common to claims of group members

The questions of law or fact common to the claims of the Group Members are:

1. [deleted]
2. whether by issuing and/or failing to withdraw the Closure Notification Westpac breached the Code;
3. whether compliance with the Code by Westpac is an express, or alternatively, implied condition of the contracts between Westpac and the Applicant and Group Members;

4. whether by issuing and/or failing to withdraw the Closure Notification Westpac breached the terms of its contract with the Applicant and Group Members;
5. whether by issuing the Closure Notification and/or failing to withdraw the Closure Notification, Westpac engaged in unconscionable conduct in contravention of s 12BC the ASIC Act;
- 5A. whether the material facts and/or contentions of law pleaded in each of paragraphs 10, 11, 12, 16-30, 34, 35, 38, 40, 42, 44 , 46 and 48 of the Statement of Claim are correct;
6. whether if Westpac were to:
 - a. close the Accounts pursuant to the Closure Notification; and/or
 - b. ceasing to make available the FX Portal for use by the Applicant and Group Members in providing Remittance Services;

(to the extent the issue or non-withdrawal occurred in the circumstances pleaded in paragraphs 33 of the Statement of Claim) Westpac would be engaging in unconscionable conduct in contravention of s 12CB the ASIC Act.

Claim for interlocutory relief

The Applicant also claims interlocutory relief on behalf of itself and Group Members:

1. an interim injunction pursuant to s 12GD(3) of the ASIC Act and/or s 23 of the FCAA and s 33ZF of the FCAA and/or general law, pending determination of the claim of the Applicant and ~~Group Members~~ for relief, as specified in this Originating Application, restraining Westpac from:
 - a. proceeding to close the Accounts pursuant to the Closure Notification, or otherwise;
 - b. ceasing to make available the Foreign Exchange Portal (XYLO) for use by the Applicant and Group Members in providing Remittance Services;

Applicant's address

The Applicant's address for service is:

Place: C:/ Mitry Lawyers
 Liberty Place
 Level 1, 167 Castlereagh Street
 Sydney NSW 2000

Email: richard@mitry.com.au

The Applicant's address is Suite 1/147 Haldon Street, Lakemba NSW 2195, Australia

Service on the Respondent

It is intended to serve this application on all Respondents.

Date: ~~28~~ 27 November 2014



Signed by Richard Louis Mitry
Lawyer for the Applicant