

Defence

No. VID811 of 2010

Federal Court of Australia
District Registry: Victoria
Division: General

JOHN ANDREWS and others

Applicants

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED ACN 005 357 522

Respondent

To the Second Further Amended Statement of Claim filed ~~2228~~ March ~~2017~~2018, the Respondent (ANZ) says as follows:

A. NATURE OF THE DISPUTE

1. This dispute concerns the question whether the applicants and Group Members are entitled to a restitutionary remedy against ANZ in respect of fees charged by ANZ to accounts of the applicants and the Group Members in the circumstances described in the Second Further Amended Statement of Claim.

B. ISSUES LIKELY TO ARISE

2. The questions of fact that are raised by the Second Further Amended Statement of Claim concern:
 - a. whether ANZ was entitled to charge fees in respect of periodical payments that were not made, because of insufficient funds in the applicant's or Group Member's accounts, to an account that was not the account of another person or business;

Filed on behalf of (name & role of party)	Australia and New Zealand Banking Group Limited (respondent)		
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- b. whether any of the fees sought to be recovered by the applicants and Group Members were charged by ANZ in respect of payments that were to have been made to the account of another person or business; and
 - c. the quantum of any amount to be paid to the applicants and the Group Members if they are successful in respect of any of their claims.
3. The questions of law, or mixed fact and law, which are raised in the Second Further Amended Statement of Claim, are:
- a. whether any applicant or Group Member has a claim in restitution in respect of fees charged by ANZ in the circumstances described in the Second Further Amended Statement of Claim and if so whether the claim is properly characterised as one that is based on:
 - i. a failure of consideration; or
 - ii. an operative mistake made by the applicant or Group Member; or
 - iii. a breach of contract;
 - b. whether ANZ has been unjustly enriched by charging fees to the accounts of the applicants and Group Members in the circumstances described in the Second Further Amended Statement of Claim and receiving payment or satisfaction of those fees;
 - c. whether it would be inequitable or unjust in all the circumstances to require restitution to be made by ANZ to an applicant or Group Member in respect of any such fees;
 - d. whether the applicants' claims, and any claims made by Group Members concerning fees charged by ANZ prior to 19 December 2010, are statute barred; and
 - e. whether Group Members are entitled to any relief in respect of fees charged after 1 January 2008 but repaid by ANZ prior to 19 December 2016.

C. RESPONSE TO THE APPLICANTS' CONTENTIONS

C.1 Parties and Other Relevant Entities

- 4. ANZ admits the allegations in paragraph 8.
- 5. In respect of paragraph 10, ANZ:

- a. admits the allegations in sub-paragraphs (a), (c) and (d); and
- b. otherwise does not admit the allegations.

5A. In respect of paragraph 11, ANZ:

- a. admits the allegations in sub-paragraph (a);
- b. admits that since 17 June 2009, the Sample Group Member has been a customer of ANZ;
- c. admits that the Sample Group Member held and operated the following accounts with ANZ:
 - i. ANZ Progress Saver Account number 013 410 5098 26649 in the name of 'Luisa Cunti' from 17 June 2009 to 30 May 2012;
 - ii. ANZ Access Advantage Cheque Account number 013 410 5098 25646 in the name of 'Luisa Cunti' from 17 June 2009 to date;
 - iii. ANZ variable rate loan account number 013 410 3671 12586 in the name of 'Luisa Cunti' from 19 June 2009 to 28 March 2014; and
- d. otherwise does not admit the allegations.

6. ANZ admits the allegations in paragraph 12.

C.3 THE PPN FEES CHARGED

7. In respect of paragraph 41, ANZ:

- a. admits that between 21 August 2006 and 21 June 2007, ANZ charged eight fees to the account of “Matilda’s Books ABN 16 234 560 750” numbered 013 336 4966 98624 in respect of payments that were to have been made to the account of “John Andrews and Carol Ann Andrews t/as Matilda’s Books” numbered 013 414 3514 91526;
- b. admits that between ~~12 August 1999~~ 25 January 2006 and 13 June 2007, ANZ charged ~~eleven~~ six fees to the account of “Field Geoffrey Allan” numbered 013 623 5526 97854 in respect of payments that were to have been made from that account;
- c. says further that ~~eight~~ of the fees charged to the account of “Field Geoffrey Allan” numbered 013 623 5526 97854 ~~and referred to in lines 2, 3, 13, 17, 21, 24, 25 and 26 of Schedule 12~~ were charged by ANZ in respect of payments that were to have

been made to accounts of “Geoffrey Allan Field and Catherine Esther Williams” numbered 013 623 2745 28232 or 013 623 3582 79106; ~~and~~

- d. admits that on each of 19 April 2010 and 2 August 2010, ANZ charged a fee to the account of “Luisa Cunti” numbered 013 410 5098 26649 in respect of payments that were to have been made from that account;
 - e. says further that on or about 17 or 18 August 2016, ANZ refunded the fees referred to in subparagraph 7(d) and paid a Compensation Amount of \$1.61 to the account of “Luisa Cunti” numbered 013 410 5098 25646; and
 - f. otherwise does not admit the allegations.
8. ANZ denies all of the allegations in paragraph 62 and says further that:
- a. at the times when the fees referred to in subparagraph 7(a) above were charged by ANZ to the account of “Matilda’s Books ABN 16 234 560 750” numbered 013 336 4966 98624:
 - i. that account was governed by the applicable terms and conditions set out in lines 6 and 7 of Schedule 8 to the Second Further Amended Statement of Claim, a Partnership Account Authority signed by the first applicant dated 3 August 2005 and an ANZ Periodical Payment Form (**Authority Form**) signed by the first applicant dated 5 August 2005;
 - ii. the applicable “ANZ Business Transaction Accounts Fees and Charges” booklet relevantly provided that periodical payments included payments made to “connected accounts (related, in the same name) within the ANZ Group” and, under the heading “Periodical Payments (per payment)” provided that a Non-Payment Fee would be charged by ANZ to the account “if you have authorised a periodical payment that cannot be made because of insufficient funds”;
 - iii. the applicable “ANZ Business Transaction Accounts Fees and Charges” booklet relevantly provided that an “Outward Dishonour Fee” would be “Charged when a cheque written, direct debit, or periodic payment from your account is dishonoured due to the lack of cleared funds in your account”;
 - iv. the Authority Form signed by the first applicant:
 - A. directed ANZ to make the payments in respect of which the fees referred to in subparagraph 7(a) above were charged; and

- B. authorised ANZ to debit the account of “Matilda’s Books ABN 16 234 560 750” numbered 013 336 4966 98624 with a fee for non-payment in the event ANZ was unable to effect any such payments on the payment date because insufficient funds were held in the account on the payment date to meet such payments;
 - v. pursuant to the contractual terms and conditions governing the relationship between ANZ and the first applicant at the times when the fees referred to in subparagraph 7(a) above were charged, ANZ was entitled to charge a Non-Payment Fee in respect of a payment that was to have been made from the account of “Matilda’s Books ABN 16 234 560 750” to an account that was not the account of another person or business;
 - vi. alternatively to v., pursuant to the contractual terms and conditions governing the relationship between ANZ and the first applicant at the times when the fees referred to in subparagraph 7(a) above were charged, ANZ was entitled to charge an Outward Dishonour Fee in respect of a payment that was to have been made from the account of “Matilda’s Books ABN 16 234 560 750” to an account that was not the account of another person or business;
- ~~b. — at the times when the fees referred to in subparagraph 7(b) above were charged by ANZ to the account of “Field Geoffrey Allan” numbered 013 623 5526 97854:~~
- ~~i. — that account was governed by:~~
 - ~~A. — the applicable terms and conditions set out in lines 3 to 7 of Schedule 1 to the Amended Statement of Claim;~~
 - ~~B. — ANZ Personal Banking Convenient Everyday Banking Terms and Conditions dated January 1999;~~
 - ~~C. — ANZ Personal Financial Services Convenient Everyday Banking Terms and Conditions dated April 2000;~~
 - ~~D. — ANZ Convenient Everyday Banking Terms and Conditions dated October 2001;~~
 - ~~E. — ANZ Personal Banking Fees and Charges dated May 1998;~~
 - ~~F. — ANZ Personal Financial Services Fees and Charges dated April 2000;~~
 - ~~G. — ANZ Personal Financial Services Fees and Charges dated January 2001;~~

~~H. ANZ Personal Financial Services Fees and Charges dated April 2001;
and / or~~

~~I. ANZ Personal Financial Services Fees and Charges dated October
2001;~~

~~ii. the terms and conditions contained in the documents referred to in i.(B) to (D)
did not include any definition in respect of a “periodical payment”; and~~

~~iii. pursuant to the contractual terms and conditions governing the relationship
between ANZ and the third applicant at the times when the fees set out in
lines 1 to 5 of Schedule 12 to the Amended Statement of Claim were charged,
ANZ was entitled to charge a fee in respect of a payment that was to have
been made from the account of “Field Geoffrey Allan” to an account that was
not the account of another person or business;~~

- b. ~~further or alternatively,~~ the fees referred to in subparagraph 7(c) above were charged by ANZ to the account of “Field Geoffrey Allan” numbered 013 623 5526 97854 in respect of payments that were to have been made from that account to an account in the name of another person or business;
- c. at the times when the fees referred to in subparagraph 7(d) above were charged by ANZ to the account of “Luisa Cunti” numbered 013 410 5098 26649:
- i. that account was governed by the applicable terms and conditions set out in:
- A. the “ANZ Personal Banking Account Fees and Charges – March 2010” and “ANZ Saving & Transaction Products Terms and Conditions – April 2010” booklets, in respect of the fee charged on 19 April 2010;
- B. the “ANZ Personal Banking Account Fees and Charges – July 2010” and “ANZ Saving & Transaction Products Terms and Conditions – June 2010” booklets, in respect of the fee charged on 2 August 2010; and
- C. an Authority Form signed by the Sample Group Member;
- ii. the Authority Form signed by the Sample Group Member:
- A. directed ANZ to make the payments in respect of which the fees referred to in subparagraph 7(d) above were charged; and
- B. authorised ANZ to debit the account of the Sample Group Member with a fee for non-payment in the event ANZ was unable to effect any such

payments on the payment date because insufficient funds were held in the account on the payment date to meet such payments;

- iii. pursuant to the contractual terms and conditions governing the relationship between ANZ and the Sample Group Member at the times when the fees referred to in subparagraph 7(d) above were charged, ANZ was entitled to charge a non-payment fee in respect of a payment that was to have been made from the account of “Luisa Cunti” numbered 013 410 5098 26649 to an account that was not the account of another person or business;
 - d. further or alternatively, if either applicant has a claim in respect of fees charged by ANZ in the circumstances described in the Second Further Amended Statement of Claim (which is denied), the claim is properly characterised as a claim in restitution based on a failure of consideration and not based on an operative mistake by the applicant, or is a claim for breach of contract;
 - e. further or alternatively, if the Sample Group Member once had a cause of action in respect of fees charged by ANZ in the circumstances described in the Second Further Amended Statement of Claim (which is denied), by reason of the matters alleged in paragraph 7(e) above, the Sample Group Member does not now have, and, at the time at which any cause of action that might have resulted in a judgment was first brought in this proceeding, no longer had, such a cause of action.
9. ANZ denies all of the allegations in paragraph 63.
 10. ANZ denies all of the allegations in paragraph 65.
 11. ANZ denies all of the allegations in paragraph 66.
 12. ANZ does not admit the allegations in paragraph 67.
 13. ANZ denies all of the allegations in paragraph 68.
 14. In respect of paragraph 69, ANZ denies that any such debt is due.
 15. It admits paragraph 70 and that it is the fact that the Refund Amounts were refunded and that the Compensation Amounts were paid.
 16. In respect of paragraph 71, ANZ:
 - a. admits that the Compensation Amount was not calculated in accordance with paragraph 2.2 of the *Interest on Judgments Practice Note* (GPN-INT) or the rate specified in the *Penalty Interest Rates Act 1983* (Vic);

- b. admits that the Compensation Amount was calculated up to the end of the Refund Period being a date prior to the date of payment of the Refund Amount and the Compensation Amount;
 - c. admits that in respect of Group Members who received a Compensation Amount for more than one PPN Fee, the Compensation Amount was calculated by making the assumption alleged in subparagraph 71(c);
 - d. otherwise denies subparagraph 71; and
 - e. says further that:
 - i. s 51A of the *Federal Court of Australia Act 1976* does not permit an award of interest other than as an incident of a cause of action for the recovery of money that results in a judgment;
 - ii. the Group Members (including the Sample Group Member) who were paid Refund Amounts do not have any cause of action that may result in a judgment as an incident of which an award of interest might be made and had not, prior to the Refund Amounts being paid to their accounts, brought such a cause of action in this proceeding;
 - iii. in the premises, s 51A does not permit an award of the interest to be made to Group Members (including the Sample Group Members) who were paid Refund Amounts.
17. ANZ denies all of the allegations in paragraph 72 and refers to and repeats paragraph 16(e) above.

C.9 Relief Claimed

18. ANZ denies that the applicants, the Sample Group Member and the Group Members are entitled to the relief set out in the Further Amended Originating Application.
19. ANZ says further that:
- a. the applicants' claims and the Sample Group Member's claim are barred by section 5 of the *Limitation of Actions Act 1958* (Vic);
 - b. to the extent that any Group Member makes a claim in respect of fees or any part thereof or any interest thereon:

- i. that were paid by the Group Member prior to 19 December 2010, and the claim is one to which section 5 of the *Limitation of Actions Act 1958* (Vic) applies, the claim is barred by that section;
- ii. that were paid by the Group Member prior to 19 December 2010, and the claim is one to which sections 14 or 15 of the *Limitation Act 1969* (NSW) applies, the claim is barred by that section;
- iii. that were paid by the Group Member prior to 19 December 2010, and the claim is one to which sections 11 or 12 of the *Limitation Act 1985* (ACT) applies, the claim is barred by that section;
- iv. that were paid by the Group Member prior to 19 December 2010, and the claim is one to which section 10 of the *Limitation of Actions Act 1974* (Qld) applies, the claim is barred by that section;
- v. that were paid by the Group Member prior to 19 December 2010, and the claim is one to which sections 35 or 38 of the *Limitation of Actions Act 1936* (SA) applies, the claim is barred by that section;
- vi. that were paid by the Group Member prior to 19 December 2010, and the claim is one to which section 4 of the *Limitation Act 1974* (Tas) applies, the claim is barred by that section;
- vii. that were paid by the Group Member prior to:
 - A. 19 December 2014, and the claim is one to which section 38(1)(a) of the *Limitation Act 1935* (WA) applies, the claim is barred by that section;
 - B. 19 December 2010, and the claim is one to which section 38 (other than sub-section 38(1)(a)) of the *Limitation Act 1935* (WA) applies, the claim is barred by that section;
 - C. 19 December 2010, and the claim is one to which sections 13 or 26 of the *Limitation Act 2005* (WA) applies, the claim is barred by that section;
- viii. that were paid by the Group Member prior to 19 December 2013, and the claim is one to which sections 12 or 13 of the *Limitation Act 1981* (NT) applies, the claim is barred by that section;

- c. to the extent that any Group Member makes a claim in respect of fees that were charged by ANZ to the Group Member after 1 January 2008, and in respect of which ANZ has paid Refund Amounts and Compensation Amounts, that claim in respect of the fees and any claim for interest thereon is not maintainable because ANZ paid the amount of those fees (the Refund Amount) and further compensation in respect thereof (the Compensation Amount) to the Group Member prior to the commencement of the claim; and
- d. further or alternatively, it would be unjust to require ANZ to repay any or all of the fees or to pay any amount in connexion therewith.

Date: 20 April 20172018



Signed by Mark Bradley
Ashurst Australia
Lawyer for the Respondent

This pleading was prepared by C van Proctor and settled by A C Archibald QC.

Certificate of lawyer

I Mark Bradley of Ashurst Australia certify to the Court that, in relation to the defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 20 April 2017~~2018~~



Signed by Mark Bradley
Ashurst Australia
Lawyer for the Respondent