

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 29/05/2017 2:15:04 PM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Originating Application Starting a Representative Proceeding under Part IVA Federal Court of Australia Act 1976 - Form 19 - Rule 9.32
File Number:	NSD297/2017
File Title:	KELVIN TURNER v MYBUDGET PTY LTD ACN 82 093 118 597
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	Case Management Hearing
Time and date for hearing:	16/06/2017, 9:30 AM
Place:	Court Room Not Assigned, Level 17 Law Courts Building Queen's Square, Sydney



A handwritten signature in blue ink, reading 'Warwick Soden'.

Dated: 29/05/2017 3:34:41 PM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



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

No. NSD 297 of 2017

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

KELVIN TURNER

Applicant

MYBUDGET PTY LIMITED ACN 82 093 118 597

Respondent

To the Respondent:

The Applicant applies for the relief set out in this 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:

Date:

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

Filed on behalf of (name & role of party) Kelvin Turner (Applicant)
Prepared by (name of person/lawyer) John Kelly SC & Adrian Maroya
Law firm (if applicable) Financial Rights Legal Centre
Tel (02) 9212 4216 Fax (02) 92124711
Email info@financialrights.org.au
Address for service Level 1 80 Cooper Street Surry Hills NSW 2010
(include state and postcode)

[Form approved 01/08/2011]



Details of claim

On the grounds stated in the accompanying statement of claim or other document prescribed by the rules, the Applicant claims:

1. A declaration that upon the proper construction of the Service Agreement made between the Applicant and the Respondent dated 23 July 2013 (Agreement) and the Standard Form Service Agreements (as defined in the Amended Statement of Claim), the Respondent holds all funds received by it under or for the purpose of the Agreement (Client Funds) and the Standard Form Service Agreements in trust for the Applicant and Group Members, respectively.
2. A declaration that upon the proper construction of the Agreement and the Standard Form Service Agreements, the Respondent is obliged to hold all Client Funds in an interest-bearing bank account (**Bank Account**).
3. A declaration that upon the proper construction of the Agreement and the Standard Form Service Agreements, the Respondent holds all interest earned on Client Funds in the Bank Account (**Accrued Interest**) in trust for the Applicant and Group Members in individual shares proportionate to the Client Funds of the Applicant and Group Members.
4. A declaration that upon the proper construction of the Agreement and the Standard Form Service Agreements, with particular regard to the provision of the Agreement and the Standard Form Service Agreements which reads as follows (**Interest Provision**), namely

Client funds are held in an interest bearing account arranged by MyBudget. Interest is not payable to clients on funds held in your MyBudget Bank Account. Credit interest on client funds will be applied by MyBudget in its discretion to pay bank fees on the account,

the Respondent has no lawful authority to expropriate the Accrued Interest, or to use the Accrued Interest for its own purposes.

5. A declaration that the Respondent has at all material times owed the Applicant and Group Members a fiduciary duty not to obtain an unauthorised benefit from its relationship with the Applicant and the Group Members (**Fiduciary Duty**).
6. A declaration that the Respondent has a duty to account to the Applicant and Group Members for the Accrued Interest (**Duty to Account**).
7. A declaration that in breach of trust, breach of Fiduciary Duty and breach of the Duty to Account, the Respondent has obtained an unauthorised benefit from its relationship with the Applicant and Group Members by expropriating the Accrued Interest, using the



Accrued Interest for its own purposes and failing to account to the Applicant and the Group Members for the Accrued Interest (**Contravening Conduct**).

8. A declaration that, by the Contravening Conduct, the Respondent has engaged in conduct in trade or commerce that is unconscionable within the meaning of the unwritten law in contravention of section 20 of the *Australian Consumer Law (ACL)*.
9. Further and in the alternative, a declaration that, by the Contravening Conduct, the Respondent has engaged in conduct in trade or commerce in connection with the supply of services that is unconscionable in contravention of section 21 of the ACL.
10. In the alternative, if, upon the proper construction of the Agreement, the Interest Provision permits the Respondent to expropriate the Accrued Interest and use the same for its own purposes, a declaration that the Interest Provision is an unfair term of a standard form consumer contract and void by operation of section 23 of the ACL.
11. In the alternative, a declaration that, by engaging in the Contravening Conduct the Respondent has engaged in conduct in trade or commerce in connection with the supply of financial services to the Applicant and Group Members or from the Respondent that is in all the circumstances unconscionable in contravention of section 12CB of the *Australian Securities and Investments Commission Act 2001 (ASIC Act)*.
12. An order that the Respondent account to the Applicant and Group Members for the Accrued Interest.
13. In the alternative, an order that the Respondent and Group Members pay equitable compensation to the Applicant for breach of trust and breach of fiduciary duty.
14. In the alternative, damages under section 236 of the ACL for contravention of sections 20 and 21 of the ACL.
15. In the alternative, damages under section 12GF of the ASIC Act for contravention of section 12CB of that Act.
16. Such further or other declaration or order as the Court thinks fit.
17. Interest.
18. Costs on an indemnity or ordinary basis.

Questions standard to claims of group members

The questions of law or fact common to the claims of the group members are:

1. Does the Respondent hold Client Funds received by it under or for the purpose of Service Agreements made by it with other persons (**Clients**) containing an interest



provision in the same terms as the Interest Provision (**Standard Form Service Agreements**) in trust for the Clients?

2. Is the Respondent obliged to hold Client Funds under the Standard Form Service Agreements in an interest-bearing bank account?
3. Does the Respondent hold the interest earned on Client Funds under the Standard Form Service Agreements in trust for the Clients?
4. Upon the proper construction of the Interest Provision in the Standard Form Service Agreements, is the Respondent entitled to expropriate interest earned on Client Funds under the Standard Form Service Agreements and use that interest for its own purposes?
5. Does the Respondent have a fiduciary duty not to obtain an unauthorised benefit by reason of its relationship with Clients?
6. Does the Respondent have a duty to account to Clients for interest earned on Client Funds under the Standard Form Service Agreements?
7. Has the Respondent expropriated interest earned on Client Funds under the Standard Form Service Agreements, obtained an unauthorised benefit by so doing and failed to account to the Client for that interest in breach of trust, breach of fiduciary duty and/or breach of the Duty to Account?
8. Has the Respondent engaged in conduct in trade or commerce that is unconscionable within the meaning of the unwritten law in contravention of section 20 of the ACL by expropriating interest earned on Client Funds under the Standard Form Service Agreements, using that interest for its own purposes and failing to account?
9. Has the Respondent engaged in conduct in trade or commerce in connection with the supply of services to the Clients that is unconscionable in contravention of section 21 of the ACL, by expropriating interest earned on Client Funds under the Standard Form Service Agreements, using that interest for its own purposes and failing to account?
10. In the alternative, is the Interest Provision an unfair term of a standard form consumer contract and void by operation of section 23 of the ACL?
11. In the further alternative, has the Respondent engaged in conduct in trade or commerce in connection with the supply of financial services under the Standard Form Service Agreements that is in all the circumstances unconscionable in contravention of section 12CB of the ASIC Act?
12. What is the quantum of interest earned on Client Funds under the Standard Form Service Agreements?



13. What is the measure of equitable compensation to which the Clients are entitled for breach of trust and breach of fiduciary duty?
14. What is the measure of damages to which the Clients are entitled for contravention of sections 20 and/or 21 of the ACL or section 12 CB of the ASIC Act?
15. The terms of any relief, including the terms on which the Respondent should be ordered to account to or compensate group members for their loss.

Representative action

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

The group members to whom this proceeding relates are all of the ~~clients of the Respondent~~ natural persons who:

- i. entered into Standard Form Service Agreements with the Respondent upon terms which included the Interest Provision; and
- ii. have not received the interest earned on funds deposited by the group members into accounts maintained, and held in trust by, the Respondent.

Applicant's address

The Applicant's address for service is:

Place: Financial Rights Legal Centre
80 Cooper Street
SURRY HILLS NSW 2010

Email: info@financialrights.org.au

The Applicant's address is

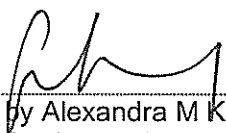
38 Bottlebrush Drive
Cranebrook NSW 2749



Service on the Respondent

It is intended to serve this application on all Respondents.

Date 29 May 2017



Signed by Alexandra M Kelly,
Lawyer for the Applicant