

NOTICE OF FILING

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. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)
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



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

Dated: 29/05/2017 3:35:05 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 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 Statement of Claim

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

1. The Applicant is a prison guard who was employed by the New South Wales Department of Corrective Services between 2002 and 2015.
 2. The Respondent is a corporation duly incorporated and liable to be sued in its corporate name and style and the holder of Credit Licence Number 391759 issued by the Australian Securities and Investments Commission under section 37 of the *National Consumer Credit Protection Act 2009* (Cth).
- 2A. The Applicant brings the proceedings on his own behalf and as representative party under IVA Federal Court of Australia Act 1976 on behalf of 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 them into accounts maintained, and held in trust by, the Respondent.

(Group Members)

Filed on behalf of (name & role of party) Kelvin Turner (Applicant)
Prepared by (name of person/lawyer) John Kelly SC and 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]

3. In 2013, the Applicant was in severe financial difficulty and sought and was given advice and assistance by the Respondent on how to get out of debt and manage his money.

Particulars

- i. The Applicant met with Ms Lesley Juchau of the Respondent at the Respondent's office on or about 23 July 2013.
 - ii. On that occasion, the Applicant informed the Respondent that he was struggling to pay his bills and living expenses, including rent; he was over-committed with credit; and he needed advice on how to get out of debt and manage his money.
 - iii. The Respondent, by Ms Lesley Juchau, orally advised the Applicant that the Respondent could help him get himself back on track financially and get his debts paid-off by preparing a budget plan for him (**Budget Plan**) and managing his money for him by collecting his wages, negotiating a moratorium with his creditors and selectively paying his debts for him, while giving him an allowance of \$150 per week for food, fuel and other living expenses.
4. On 23 July 2013 the Applicant entered into a Service Agreement with the Respondent whereunder, in consideration of the Applicant agreeing to pay the Respondent a number of fees, including an Establishment Fee of \$2,140.00, inclusive of GST, the Respondent agreed to administer the Applicant's financial affairs for him in accordance with the Budget Plan (**Agreement**).

Particulars

The Agreement was wholly in writing and contained in four documents dated 23 July 2013, namely:

- i. a letter of engagement dated 23 July 2013 signed by Ms Lesley Juchau on behalf of the Respondent, which included the Budget Plan (**Letter of Engagement**);
 - ii. a document entitled "Terms of Service Agreement" (**Terms of Service**);
 - iii. a document entitled "Important Practical Matters" (**Practical Matters Document**); and,
 - iv. a document entitled "Authority to Act" (**Power of Attorney**).
5. It was an express written term of the Agreement that "*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*" (**Interest Provision**).

Particulars

The Interest Provision is wholly in writing and contained in the Agreement on the third page of the Terms of Service.

6. The Applicant will refer to the whole of the terms and conditions of the Letter of Engagement, the Terms of Service, the Practical Matters Document and the Power of Attorney when the same are tendered in evidence in the present proceedings.
7. On about 24 July 2013, the Applicant caused his usual fortnightly pay of \$2,125.21 and his Department of Veteran's Affairs pension of \$55.68 to be paid into the Respondent's bank account (BSB 035807 account number 612670117) with Westpac for the purpose of being managed by the Respondent pursuant to the Agreement.
8. Between 24 July 2013 and July 2014, the Respondent received a total of \$59,834.58 in fortnightly pay and Department of Veteran's Affairs pension for and on behalf of the Applicant for the purpose of being managed by the Respondent pursuant to the Agreement (**Client Funds**).

Particulars

Full particulars are known to the Respondent and recorded by it in Account No. 20027718, which account was maintained by the Respondent for the purpose of recording all transactions on the Applicant's My Budget Account pursuant to the Agreement (**MyBudget Account**).

9. Upon the proper construction of the Agreement:
 - a. the Respondent received and held all Client Funds received by it under or for the purpose of the Service Agreement in trust for the Applicant;
 - b. the Respondent was obliged to and did in fact hold all Client Funds in an interest bearing bank account (**Bank Account**);
 - c. the Respondent holds all interest earned on Client Funds in the Bank Account (**Accrued Interest**) in trust for the Applicant; and
 - d. the Respondent had no lawful authority to expropriate the Accrued Interest or to use the Accrued Interest for its own purposes.
10. In breach of trust, between 24 July 2013 and a date which is best known to the Respondent, the Respondent expropriated the Accrued Interest and used that interest for its own purposes.

Particulars

- i. The Respondent took the Accrued Interest into its general revenue and treated the same as a profit to which it was entitled.
 - ii. Further particulars will be provided after disclosure by the Respondent.
 - iii. See also: Emails between Ms Alexandra Kelly (the lawyer for the Applicant) and Ms Sophie Neil and Ms Katherine Vaselli of the Respondent, dated 12, 16, 19, 23 and 25 November 2015.
11. Further and in the alternative, at all material times the Respondent owed the Applicant a fiduciary duty not to obtain an unauthorised benefit from its relationship with the Applicant (**Fiduciary Duty**).

Particulars

The Fiduciary Duty arises as a matter of law by reason of the relationship of advisor and client, trustee and beneficiary and donee and donor of the Power of Attorney, created on or about 23 July 2013, when the Agreement was made.

12. In breach of the Fiduciary Duty, between 23 July 2013 and a date which is best known to the Respondent, the Respondent obtained an unauthorised benefit from its relationship with the Applicant by expropriating the Accrued Interest and using the Accrued Interest for its own purposes.

Particulars

The Applicant repeats the particulars set out in [10] above.

13. Further and in the alternative, by reason of the relationship of trustee and beneficiary between the parties, the Respondent at all material times owed the Applicant a duty to account for the trust property made the subject of its trust including the Accrued Interest (**Duty to Account**).
14. In breach of the Duty to Account, the Respondent failed to Account to the Applicant for the Accrued Interest.
15. By reason of the breach of trust, breach of Fiduciary Duty and failure to account pleaded aforesaid, or on any of those grounds, the Respondent is liable to restore the Accrued

Interest to the Applicant or make good the Applicant's loss of the Accrued Interest by way of equitable compensation.

16. Further and in the alternative:

(a) At all material times, the Respondent carried-on business throughout Australia as a supplier of the service of advising persons who were in financial difficulty, creating budget plans for clients and managing client funds in the manner and upon the terms exemplified by the Agreement (**Business**).

Particulars

In carrying-on the Business, the Respondent has provided like services to more than 60,000 clients and managed client funds in trust to a value in excess of \$1,000,000,000.

(b) At the time of making the Agreement, holding the Client Funds in trust for the Applicant and expropriating the Accrued Interest, the Applicant was in a position of special disadvantage as against the Respondent.

Particulars

a. The Applicant:

- i. was overwhelmed by debt;
- ii. dependent upon the Respondent for advice and assistance in the management of his money; and,
- iii. vulnerable to any abuse of his trust by the Respondent by reason of the fact that the Respondent was receiving all of the Applicant's income, managing his debts, and paying him an allowance for living expenses.

b. The Respondent was in a vastly stronger financial position than the Applicant, and had complete control over the Applicant's financial affairs.

(c) The conduct of the Respondent in expropriating the Accrued Interest, using the Accrued Interest for its own purposes and failing to account to the Applicant for the Accrued Interest pleaded aforesaid was conduct on the part of the Respondent which exploited the position of special disadvantage in which the Applicant was placed by taking and using his property without his knowledge or consent and caused him loss and damage (**Contravening Conduct**).

Particulars of Loss and Damage

Loss of the Accrued Interest on the MyBudget Account.

(d) In the premises, the conduct of the Respondent in expropriating the Accrued Interest, using the Accrued Interest for its own purposes and failing to account to the Applicant for the Accrued Interest, was conduct in trade and commerce, by the Respondent, that was unconscionable within the meaning of the unwritten law in contravention of section 20 of the *Australian Consumer Law (ACL)*.

17. Further and in the alternative, the Applicant repeats the facts alleged in 16(a), (b) and (c) above and says that, by engaging in 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.
18. 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 (which is not admitted), the Interest Provision is an unfair term of a standard form consumer contract, and void by operation of section 23 of the ACL.

Particulars of Unfairness

The Interest Provision is unfair because it does not put the client on clear and certain notice that any interest earned on client funds would be appropriated by the Respondent and used for its own purposes.

Particulars of Standard Form

The number of Service Agreements entered into by the Respondent which contained the Interest Provision is best known to the Respondent and will be further particularised after disclosure by the Respondent.

19. In the alternative, the Applicant repeats the facts alleged in 16(a), (b) and (c) above, and says 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/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)*.
20. Upon various dates which are best known to the Respondent:
 - a. The Group Members are persons who were in severe financial difficulty and who sought and were given advice and assistance by the Respondent on how to get out of debt and manage their money;

- b. Each of the Group Members entered into a service agreement with the Respondent upon terms which contained the Interest Provision (**Standard Form Service Agreements**);
- c. the Respondent received client funds from each of the Group Members pursuant the Standard Form Service Agreement entered into with each of the Group Members (**Client Funds of Group Members**);
- d. the Respondent held the Client Funds of the Group Members in trust for the Group Member from whom it received those funds (**Group Member Trust Funds**);
- e. the Respondent held the Group Member Trust Funds in an interest-bearing bank account;
- f. interest accrued on the Client Funds of the Group Members while the Client Funds of Group Members were held in trust by the Respondent (**Group Member Interest**);
- g. Group Member Interest was held by the Respondent in trust for the Group Member from whom the Respondent received the Client Funds of Group Members;
- h. the Respondent expropriated Group Member Interest and used the same for its own purposes; and
- i. Group Members have suffered loss and damage by reason of the fact that the Respondent has expropriated Group Member Interest and used the same for its own purposes.

Particulars of Loss and Damage

Each Group Member has lost the interest earned by his or her individual client funds, calculated at the rates of interest earned by funds on deposit by the Respondent pursuant to the Interest Provision.

- 21. Upon the proper construction of the Standard Form Service Agreements the Respondent had no lawful authority to expropriate Group Member Interest and use the same for its own purposes.
- 22. Further and in the alternative, at all material times, the Respondent owed the Group Members a fiduciary duty not to obtain an unauthorised benefit from its relationship with the Group Members and a duty to account to Group Members for trust property.

23. In the premises, the conduct of the Respondent in expropriating Group Member Interest and using the same for its own purposes was a breach of trust by the Respondent, a breach of fiduciary duty and a failure to account, whereupon the Respondent is liable to restore the Group Member Interest by way of equitable compensation.
24. Further and in the alternative:
- a. At the time of making the Standard Form Service Agreements, the Group Members were each in a position of special disadvantage in relation to the Respondent in that they were each overwhelmed by debt, dependent upon the Respondent for advice and assistance in the management of their money and vulnerable to abuse of their trust by the Respondent by reason of the fact that the Respondent was receiving all of their income, managing their debts and paying them an allowance for living expenses whilst the Respondent was in a vastly superior financial position and had complete control over the Group members' financial affairs: and
 - b. the conduct of the Respondent in expropriating the Group Member Interest, using the same for its own purposes and failing to account was conduct in trade and commerce by the Respondent (**Contravening Conduct in relation to Group Members**) that was unconscionable within the meaning of the unwritten law in contravention of section 20 of the ACL.
25. Further and in the alternative, the Applicant repeats the facts alleged in paragraph 24(a) above and says the Contravening Conduct in relation to Group Members was conduct in trade or commerce in connection with the supply of services that was unconscionable in contravention of section 21 of the ACL.
26. In the alternative, the Applicant repeats the facts alleged in paragraph 24(a) above and says the Contravening Conduct in relation to Group Members was conduct in trade or commerce in connection with the supply of financial services to Group Members or from the Respondent that is in all the circumstances unconscionable in contravention of section 12CB of the ASIC Act.
27. The Group members have suffered loss and damage by reason of the aforesaid breaches of sections 20 and 21 of the ACL and section 12CB of the ASIC Act.

Particulars of Loss and Damage

The Applicant repeats the particulars set forth pursuant to paragraph 20(i).

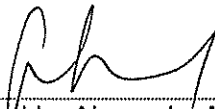
28. In the alternative, the Applicant says that, if upon the proper construction of the Standard Form Service Agreements, the Interest Provision permits the Respondent to expropriate the Group Member Interest and use the same for its own purposes (which is not admitted) the Interest Provision is an unfair term of a standard form consumer contract, and void by operation of section 23 of the ACL.

Particulars

The Applicant repeats the particulars in paragraph 18 above.

29. There are more than seven Group Members.
30. In the premises, the Applicant and the Group Members are entitled to relief pursuant to the Application.

Date: 29 May 2017



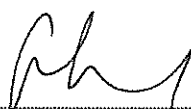
Signed by Alexandra M Kelly
Lawyer for the Applicant

This pleading was prepared by John C Kelly SC and Adrian E Maroya, Barristers.

Certificate of lawyer

I, Alexandra Marsden Kelly, certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 29 May 2017



Signed by Alexandra M Kelly
Lawyer for the Applicant