

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 19/06/2017 4:01:28 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: Defence - Form 33 - Rule 16.32
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



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 19/06/2017 4:01:32 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.



Form 33
Rule 16.32

Defence

No. NSD297 of 2017

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

KELVIN TURNER

Applicant

MYBUDGET PTY LTD ACN 093 118 597

Respondent

1. The Respondent admits paragraph 1 of the Amended Statement of Claim.
2. The Respondent admits paragraph 2 of the Amended Statement of Claim.
- 2A. As to paragraph 2A of the Amended Statement of Claim, the Respondent
 - 2A.1 does not plead to paragraph 2A to the extent that it describes the group members and does not make any allegation against the Respondent;
 - 2A.2 denies paragraph 2A to the extent that it alleges that the Respondent held interest earned on funds deposited by group members in trust.
3. In answer to paragraph 3 of the Amended Statement of Claim, the Respondent:
 - 3.1 does not know and cannot admit if the Applicant was in severe financial difficulty in 2013;
 - 3.2 admits that the Applicant said to the Respondent's consultant on around 23 July 2013 that he was struggling to pay some of his bills and that he needed advice on how to get out of debt;
 - 3.3 admits that the Respondent's consultant said amongst other things that the Respondent could help the Applicant get himself back on track financially and get his debts paid off and that the Respondent would prepare a budget plan in consultation with the Applicant;
 - 3.4 otherwise denies paragraph 3.
4. In answer to paragraph 4 of the Amended Statement of Claim, the Respondent:

Filed on behalf of (name & role of party) MyBudget Pty Ltd ACN 093 118 597, the Respondent
Prepared by (name of person/lawyer) Jacques Jacobs
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Address for service Level 18, Grosvenor Place, 225 George Street, Sydney, Australia
(include state and postcode)

- 4.1 admits that it entered into a Services Agreement with the Applicant;

Particulars

*The Services Agreement comprised the letter dated 23 July 2013 from the Respondent to the Applicant countersigned by the Applicant along with the document entitled Terms of Services Agreement (**Services Agreement**).*

- 4.2 admits that pursuant to the Services Agreement the Applicant agreed to pay an Establishment Fee of \$2,140 inclusive of GST;
- 4.3 admits that pursuant to the Services Agreement the Respondent agreed to provide the Applicant with services on the terms of the Services Agreement and in accordance with the Budget Plan;
- 4.4 otherwise denies paragraph 4.
5. In answer to paragraphs 5 of the Amended Statement of Claim, the Respondent:
- 5.1 admits that there was a term in the Services Agreement to the effect set out in paragraph 5 of the Amended Statement of Claim (the **Interest Provision**);
- 5.2 says further that under the Services Agreement the Respondent was obliged to pay or absorb all bank fees associated with the services provided under the Services Agreement.
6. The Respondent does not plead to paragraph 6 of the Amended Statement of Claim as no allegation is made against it.
7. In answer to paragraph 7 of the Amended Statement of Claim, the Respondent:
- 7.1 admits:
- 7.1.1 the first deposit of income by the Applicant was on 1 August 2013;
- 7.1.2 the amount deposited was \$2,125.21, being the Applicant's fortnightly pay received from his employer;
- 7.1.3 the second deposit of income by the Applicant was on 8 August 2013;
- 7.1.4 the amount deposited was \$55.68, being the Applicant's pension received from the Department of Veteran's Affairs.
- 7.2 admits that the account number used by the Applicant was BSB 035807 account number 612670117;
- 7.3 admits that the deposits were made for the purpose of the Respondent assisting the Applicant to pay his bills in accordance with the terms of the Services Agreement;
- 7.4 otherwise denies paragraph 7.
8. In answer to paragraph 8 of the Amended Statement of Claim, the Respondent:
- 8.1 admits:

- 8.1.1 the first deposit of income by the Applicant was on 1 August 2013;
 - 8.1.2 the last deposit of income by the Applicant was on 3 July 2014;
 - 8.1.3 the total amount of the deposits by the Applicant during the period was around \$60,887.33.
- 8.2 admits that the deposits were made for the purpose of the Respondent assisting the Applicant to pay his bills in accordance with the terms of the Services Agreement.
- 8.3 otherwise denies paragraph 8 of the Amended Statement of Claim.
9. As to paragraph 9 of the Amended Statement of Claim, the Respondent:
- 9.1 admits paragraph 9(a) to the extent it relates to Client Funds (as defined in the Amended Statement of Claim);
 - 9.2 denies paragraph 9(b) but says in the events that happened the Respondent did hold Client Funds in an interest bearing bank account;
 - 9.3 denies paragraph 9(c) and further says:
 - 9.3.1 the relationship between the Applicant and the Respondent was governed and regulated by the Services Agreement;
 - 9.3.2 it was an express term of the Services Agreement by the inclusion of the Interest Provision that the interest earned on Client Funds was not the subject of any trust; further or alternatively;
 - 9.3.3 the Interest Provision provided express authorisation to the Respondent to retain interest earned on Client Funds to the exclusion of the Applicant; further or alternatively;
 - 9.3.4 the Interest Provision expressly authorised the Respondent to apply interest earned on Client Funds against bank fees incurred; further or alternatively;
 - 9.3.5 pursuant to Section 35(2) of the *Trustee Act 1936* (SA), or in the alternative, Section 59(4) of the *Trustee Act 1925* (NSW), the Respondent was entitled to reimburse itself out of the trust fund all expenses incurred in or about the execution of the trust.
 - 9.4 denies paragraph 9(d).
10. The Respondent denies paragraph 10 of the Amended Statement of Claim and repeats paragraph 9 above.
11. As to paragraph 11 of the Amended Statement of Claim, the Respondent:
- 11.1 admits it owed a fiduciary duty to the Applicant not to obtain an unauthorised benefit in respect of the Client Funds;
 - 11.2 denies it owed any fiduciary duty in respect of interest earned on Client Funds and repeats and relies upon paragraph 9 above;

- 11.3 otherwise denies paragraph 11.
12. The Respondent denies paragraph 12 of the Amended Statement of Claim and repeats and relies upon paragraph 9 above.
13. As to paragraph 13 of the Amended Statement of Claim, the Respondent:
 - 13.1 admits it owed a duty to account to the Applicant in respect of the Client Funds;
 - 13.2 denies it owed any duty to account in respect of interest earned on Client Funds and repeats and relies upon paragraph 9 above;
 - 13.3 otherwise denies paragraph 13.
14. As to paragraph 14 of the Amended Statement of Claim, the Respondent:
 - 14.1 denies it breached the Duty to Account (as defined in paragraph 13 of the Amended Statement of Claim) and repeats and relies upon paragraph 9 above;
 - 14.2 says if, which is denied, by not providing the Applicant with any statement or calculation of interest the Respondent has breached an obligation to account, that breach should be excused pursuant to Section 56 of the *Trustee Act 1936* (SA) and/or Section 85 of the *Trustee Act 1925* (NSW) since:
 - 14.2.1 the Respondent has acted honestly and reasonably in not providing that statement or calculation;
 - 14.2.2 the amount of money involved is small;
 - 14.2.3 prior to the letter from the Applicant's solicitors dated 16 September 2016, the Applicant had not requested any calculation or statement of interest.
 - 14.3 otherwise denies paragraph 14.
15. The Respondent denies paragraph 15 of the Amended Statement of Claim and repeats and relies upon paragraphs 9, 13 and 14 above.
16. In answer to paragraph 16 of the Amended Statement of Claim, the Respondent:
 - 16.1 admits it was providing services pursuant to the terms of the Services Agreement but otherwise denies paragraph 16(a);
 - 16.2 denies paragraph 16(b);
 - 16.3 denies paragraph 16(c); and
 - 16.4 denies paragraph 16(d).
17. The Respondent denies paragraph 17 of the Amended Statement of Claim.
18. The Respondent denies paragraph 18 of the Amended Statement of Claim.
19. The Respondent denies paragraph 19 of the Amended Statement of Claim.

20. In answer to paragraph 20 of the Amended Statement of Claim, the Respondent:
 - 20.1 as to paragraph 20(a):
 - 20.1.1 admits that some group members may have been in severe financial difficulty;
 - 20.1.2 denies that all group members were in severe financial difficulty and says that some group members were in some but not severe financial difficulty and some group members were not in financial difficulty at all;
 - 20.1.3 admits that all group members sought advice and assistance from the Respondent on how to get out of debt and manage their money;
 - 20.1.4 admits that group members were provided services by the Respondent in accordance with each group members' respective services agreement.
 - 20.2 admits paragraph 20(b);
 - 20.3 as to paragraph 20(c):
 - 20.3.1 admits that some group members deposited funds pursuant to each group members' respective services agreement;
 - 20.3.2 says that some group members exercised their right to cool off within the two business day period permitted by the Services Agreement and never deposited funds with the Respondent;
 - 20.3.3 says that despite the expiry of the cooling off period permitted by the Services Agreement some group members never deposited funds with the Respondent.
 - 20.4 denies paragraph 20(d);
 - 20.5 as to paragraph 20(e), admits that some or all of the funds held on behalf of group members were deposited in an interest-bearing bank account;
 - 20.6 denies paragraph 20(f);
 - 20.7 denies paragraph 20(g);
 - 20.8 denies paragraph 20(h);
 - 20.9 denies paragraph 20(i).
21. The Respondent denies paragraph 21 of the Amended Statement of Claim and repeats and relies upon paragraph 9 above.
22. The Respondent denies paragraph 22 of the Amended Statement of Claim and repeats and relies upon paragraph 9 above.
23. The Respondent denies paragraph 23 of the Amended Statement of Claim and repeats and relies upon paragraph 9 above.

24. The Respondent denies paragraph 24 of the Amended Statement of Claim and repeats and relies upon paragraph 9 above.
25. The Respondent denies paragraph 25 of the Amended Statement of Claim and repeats and relies upon paragraph 9 above.
26. The Respondent denies paragraph 26 of the Amended Statement of Claim and repeats and relies upon paragraph 9 above.
27. The Respondent denies paragraph 27 of the Amended Statement of Claim and repeats and relies upon paragraph 9 above.
28. The Respondent denies paragraph 28 of the Amended Statement of Claim and repeats and relies upon paragraph 9 above.
29. The Respondent admits paragraph 29 of the Amended Statement of claim.
30. The Respondent denies paragraph 30 of the Amended Statement of Claim.
31. Further, and in answer to the whole of the Amended Statement of Claim, the Respondent relies on the "Limitation of Liability" clause in the Services Agreement and says that by reason of that clause:
 - 31.1 the Respondent is not liable for any liability (which is denied) to the Applicant or group members; further or alternatively
 - 31.2 any entitlement to damages (which is denied) is limited to the lesser of the actual amount of any loss or damage which is sustained or the fees received by the Respondent;
 - 31.3 to the extent that the Respondent is liable under the Trade Practices Act or the ASIC Act (which is denied), which liability may not be excluded, then that liability is limited solely to the resupply of the relevant services or the payment of the cost of having the service provided again (at the Respondent's option);
 - 31.4 in no event is the Respondent liable for any consequential damages (including, without limitation, loss of or damage to data, loss of profits, loss of savings and loss of revenue).

Date: 19 June 2017.



Signed by Jacques Jacobs
NORTON ROSE FULBRIGHT AUSTRALIA
Solicitors for the Respondent

This pleading was prepared by Jacques Jacobs, Solicitor and settled by Richard McHugh SC and David Sulan, Barristers.

Certificate of Lawyer

I, Jacques Jacobs, 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 each allegation in the pleading.

Date: 19 June 2017.