

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 22/04/2022 5:17:36 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: Non-Prescribed Pleading
File Number: VID706/2021
File Title: DANIEL JEAN-MARIE TOUR v AUSTRALIA AND NEW ZEALAND
BANKING GROUP LTD
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 22/04/2022 5:25:42 PM AEST

A handwritten signature in blue ink that reads 'Sia Lagos'.

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

No. VID 706 of 2021

Federal Court of Australia
District Registry: Victoria
Division: General

Daniel Tour
Applicant

AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD (ACN 005 357 522)

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: [Registry will insert time and date]

Place: [address of Court]

The Court ordered that the time for serving this application be abridged to [Registry will insert date, if applicable]

Date: ~~29 November 2021~~ 22 April 2022

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

Filed on behalf of	Daniel Tour (Applicant)
Prepared by	Phi Finney McDonald and Peter Collinson QC and Eloise Dias of Counsel
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Details of claim

On the grounds stated in the accompanying Amended Statement of Claim, the Applicant claims on his own behalf and on behalf of Group Members:

1. A declaration pursuant to section 21, alternatively section 33ZF of the *Federal Court of Australia Act* (Cth) (**FCA Act**), alternatively section 12GND of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), that, by reason of the matters pleaded in the Statement of Claim, the Interest Term (as defined in the Amended Statement of Claim) in the Contracts is an unfair term and void *ab initio*.
2. An order pursuant to section 33Z(1)(g), alternatively section 33ZF, of the FCA Act that ANZ make restitution to the Applicant and Group Members of all or the aggregate of the amount of Retrospective Interest (as defined in the Amended Statement of Claim) paid by each of them to the Respondent.
3. Alternatively to paragraph 2, an order pursuant to section 12GM(1), alternatively 12GM(2), of the ASIC Act that the Respondent compensate the Applicant and Group Members for the loss or damage suffered by them as a result of the Respondent's contravention or contraventions of Division 2 of the ASIC Act.
- 1.4. Alternatively to paragraph 2, an order pursuant to section 12GM(1), alternatively 12GM(2), alternatively, section 12GM(7)(d), of the ASIC Act that the Respondent refund to the Applicant and Group Members the amount of Retrospective Interest (as defined in the Amended Statement of Claim) paid by each of them to the Respondent.
- 2.5. An order pursuant to section 12GF of the ASIC Act that the Respondent pay to the Applicant and Group Members damages for loss and damage suffered by the conduct of the Respondent in contravention or contraventions of section 12CB of the ASIC Act.
6. Alternatively to paragraph 3.5, an order pursuant to section 12GM of the ASIC Act that the Respondent compensate the Applicant and Group Members for the loss or damage suffered by them as a result of the Respondent's contravention or contraventions of section 12CB of the ASIC Act.
7. An order pursuant to s 33Z(1)(f) and/or s 33Z(1)(g) and/or s 33ZF of the FCA Act awarding damages in an aggregate amount in respect of the compensation claimed at paragraphs 3 and 5 above.
- 3.8. Interest.
- 4.9. Costs.

5-10. Such further or other relief as the Court may deem appropriate.

Questions common to claims of group members

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

1. Whether the Contract is a “consumer contract” within the meaning of section 12BF(3) of the ASIC Act.
2. Whether the Contract is a “standard form contract” within the meaning of sections 12BF(1)(b) and 12BK of the ASIC Act.
3. Whether the Contract is a “financial product” within the meaning of section 12BF(1)(c)(i) and section 12BAA of the ASIC Act.
4. Whether the Interest Term (as defined in the Amended Statement of Claim) is an unfair term pursuant to section 12BA to the extent that it purports to give ANZ a right to charge Retrospective Interest because it:
 - (a) would cause a significant imbalance in the parties’ rights and obligations arising under the Contract.
 - (b) is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, with the presumption being that this is so unless the Respondent proves otherwise pursuant to section 12BG(4); and
 - (c) would cause detriment (whether financial or otherwise) to a party (being the Applicant/Group Member) if it were to be applied or relied on by the Respondent.
5. Whether the Interest Term is transparent within the meaning of section 12BG(3) of the ASIC Act.
6. Whether in charging Retrospective Interest (as defined in the Amended Statement of Claim) to, and receiving Retrospective Interest from, the Applicant and Group Members, the Respondent relied or purported to rely on the Interest Term and thereby contravened Division 2 of the ASIC Act within the meaning of section 12GM(10) of the ASIC Act.
7. Whether the Applicant and Group Members have suffered loss or damage by reason of the Respondent’s contravening conduct and, if so, what relief should be granted in favour of the Applicant and the Group Members.
8. Whether the Respondent entered into and gave effect to the Contracts with the Applicant and Group Members, including the Interest Term, in trade or commerce and in connection with the supply or possible supply of a financial service.

9. Whether as a consequence of the matters pleaded at paragraphs 27 to 31 of the Amended Statement of Claim, the Respondent has engaged in unconscionable conduct in contravention of section 12CB of the ASIC Act.
10. Whether the Applicant and Group Members have suffered loss or damage by reason of the contravening conduct referred to in paragraph 9.
11. Whether the Respondent's contravention of section 12CB of the ASIC Act caused the Applicant or Group Member loss or damage and if so what relief should be granted in favour of the Applicant and the Group Members.
- 11.12. Whether the Applicant and Group Members paid the Retrospective Interest (as defined in the Amended Statement of Claim) to ANZ under a mistaken belief that they were under a legal obligation to pay such amounts to ANZ and that ANZ was legally entitled to such payment.

Representative action

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

1. The group members to whom this proceeding relates are persons who, between 1 July 2010 and 1 January 2019:
 - (a) were customers of the Respondent;
 - (b) were party to a contract with the Respondent for a consumer credit card facility to which an interest free period applied;
 - (c) failed to pay by the Due Date (as defined in the Amended Statement of Claim) the entire Closing Balance shown on a statement sent to them by the Respondent;
 - (d) by reason of the failure referred to in paragraph (c), were subsequently charged interest by the Respondent on purchases to which an interest free period had and would otherwise have applied, together with interest on such interest;
 - (e) paid to the Respondent the amounts referred to in paragraph (d);
 - (f) suffered loss or damage by reason of the conduct of the Respondent alleged in the Amended Statement of Claim, namely the amounts referred to in paragraph 1(e) above, together with the loss of use of such amounts;
 - (g) were not, and are not as at the date of the Amended Statement of Claim, any of the following:
 - i. a related party (as defined by s 228 of the Corporations Act) of the Respondent;

- ii. a related body corporate (as defined by s 50 of the Corporations Act) of the Respondent;
- iii. an associated entity (as defined by s 50AAA of the Corporations Act) of the Respondent;
- iv. directors or officers or a close associate (as defined by s 9 of the Corporations Act) of the Respondent; or
- v. a Justice, Registrar, District Registrar, or Deputy District Registrar of the High Court of Australia or the Federal Court of Australia.

(Group Members).

Applicant's address

The Applicant's address for service is:

Place: c/- Phi Finney McDonald, Level 3, 325 Flinders Lane, Melbourne VIC 3000.

Email: brett.spiegel@phifinneymcdonald.com

The Applicant's address is: 14A Yambla Street, Clifton Hill VIC 3068.

Service on the Respondent

It is intended to serve this application on the Respondent.

Date: ~~29 November 2021~~ 22 April 2022



Signed by Brett Spiegel
Lawyer for the Applicant