

**IN THE FEDERAL COURT OF AUSTRALIA (FCA)  
NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA  
GENERAL DIVISION** **No: NSD2492/2007**

**NOTICE OF FILING**

This document was filed electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 11/08/2010.

**DETAILS OF FILING**

**Document Lodged:** Amended Application/Appeal  
**File Number:** NSD2492/2007  
**File Title:** Wingecarribee Shire Council v Lehman Brothers Australia Limited  
**District Registry:** NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



★ **Date:** 11/08/2010

**Registrar**

*Warwick Soden*

**Note**

This Notice forms part of the document and contains information that might otherwise appear elsewhere in the document. The Notice must be included in the document served on each party to the proceeding.



**Form 129**  
(Order 73, rule 3)

**IN THE FEDERAL COURT OF AUSTRALIA**  
**NEW SOUTH WALES DISTRICT REGISTRY**

No. NSD 2492 of 2007

BETWEEN

**WINGECARRIBEE SHIRE COUNCIL**

First Applicant

**CITY OF SWAN**

Second Applicant

**PARKES SHIRE COUNCIL**

Third Applicant

- and -

**LEHMAN BROTHERS AUSTRALIA LIMITED**

**(IN LIQUIDATION) (ACN 066 797 760)**

Respondent

**SECOND FURTHER AMENDED APPLICATION UNDER PART IVA OF THE FEDERAL  
COURT OF AUSTRALIA ACT 1976**

*Amended Pursuant To Leave Granted By Rares J on 9 July 2010*

1. This application is brought by each Applicant as a representative party.
2. The group members to whom this proceeding relates are those persons who:
  - (a) during the period between March 2003 and May 2008 (the '**Claim Period**')  
acquired interests in one or more of the synthetic collateralised debt

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Filed on behalf of: Plaintiff  
Prepared by: Piper Alderman  
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Attention: Amanda Kim Banton

obligations ('**Claim SCDOs**') identified in Schedule 1 to the Second Further Amended Statement of Claim (**2FASOC**);

- (b) acquired the interests referred to in paragraph (a) above from, or in reliance upon representations from, the Respondent ('**Lehman**');
- (c) by reason of the matters referred to in paragraphs (a) and (b) above, suffered loss and/or damage; and
- (d) have, prior to the commencement of these proceedings, entered into a litigation funding agreement with IMF (Australia) Limited in respect of their purchase of SCDOs in the circumstances pleaded in (b) above;

**("Group Members")**.

3. On the grounds outlined in the 2FASOC the Applicants claim for themselves and the Group Members (together and severally "**Claimants**"):
  - (a) Declarations that Lehman engaged in conduct in contravention of:
    - (i) s 12DA of the Australian Securities & Investments Commission Act (**ASIC Act**) and/or
    - (ii) ss 1041E and 1041H of the Corporations Act (**CA**) and/or
    - (iii) s 42 of the Fair Trading Act (NSW) (**FTA NSW**) and s 10 of the Fair Trading Act (WA) (**FTA WA**).
  - (b) Further or in the alternative, declarations pursuant to s 21 of the Federal Court of Australia Act (**FCA**) that Lehman, by the conduct alleged in the 2FASOC :
    - (i) breached duties of care it owed to the Claimants; and
    - (ii) breached terms of the IMP it entered with each of the IMP Claimants; and
    - (iii) breached fiduciary duties which it owed to the Claimants.
  - (c) Damages pursuant to:

- (i) s 12GF of the ASIC Act in respect of Lehman's contravention of s 12DA of the ASIC Act; and/or
  - (ii) s 1041I of the CA in respect of Lehman's contravention of ss 1041E and 1041H of the CA; and/or
  - (iii) s 68 of the FTA NSW and s 79 of the FTA WA in respect of Lehman's contraventions of s 42 of the FTA NSW and s 10 of the FTA WA respectively.
- (d) Damages at common law, further or alternatively equitable compensation, for Lehman's breaches of duty of care and/or breaches of the IMPs and/or its breaches of its fiduciary obligations.
- (e) Further or alternatively, orders:
- (i) pursuant to s 12GM(7)(d) of the ASIC Act and/or s 1325(5)(d) of the CA, directing Lehman to refund to each Claimant the acquisition cost of the Claim SCDOs on terms that the Claimants transfer to Lehman the said SCDOs;
  - (ii) further or alternatively, pursuant to s12GM(7)(b) of the ASIC Act and/or s 1325(5)(b) of the CA varying each IMP applying to each IMP Claimant by:
    - (1) in relation to NSW IMP Claimants by deleting the words "*Collateralised Debt Obligations*" from the list of "*Approved Instruments*";
    - (2) in relation to NSW IMP Claimants and WA IMP Claimants, by adding an additional clause 2.3(ca) to each IMP Agreement in the following terms:
 

*"(ca) The Client may request that any Portfolio asset not in accordance with the Guidelines be removed from the Portfolio by Grange at the acquisition cost. This request must be in writing and, upon receipt of such a request, Grange must remove the relevant assets from the Portfolio (at the acquisition cost) within*

*30 days notwithstanding termination of this agreement pursuant to clause 7.”*

- (3) in relation to NSW IMP Claimants and WA IMP Claimants, by adding an additional clause 8A to each IMP Agreement in the following terms:

*“Grange must indemnify, and keep indemnified, the Council against any losses (including any capital losses and loss of investment income) suffered by the Council by reason of the acquisition of investments not in accordance with the Guidelines (as may be varied pursuant to clause 2.3(b)).”*

- (iii) further or alternatively, a declaration pursuant to s12GM(7)(b) of the ASIC Act and/or s 1325(5)(b) of the CA that each IMP Agreement had effect as varied by the order in paragraph (e) above from the date of the execution of each IMP Agreement;
- (f) Further, or alternatively an order pursuant to s12GM(7)(f) of the ASIC Act and/or s 1325(5)(f) of the CA that Lehman comply with any request made by a Claimant to remove any assets from the Claimant's portfolio specified by the Claimant in its request, at the acquisition cost of the relevant assets.
- (g) Further or alternatively, orders pursuant to s 12GM(7)(e) of the ASIC Act and/or s 1325(5)(e) of the CA directing Lehman to pay to each Claimant the amount of loss and damage suffered by each Claimant by reason of Lehman having caused the Claimant to have invested in Claim SCDOs.
- (h) Further or alternatively a declaration that each of the transactions by which Lehman acquired, on behalf of a Claimant, any Claim SCDOs, has been validly rescinded *ab initio* by each Claimant.
- (i) Further or alternatively, an order for restitution to each Claimant of any monies paid to Lehman in respect of the Claim SCDOs.
- (j) Further or alternatively, equitable compensation in respect of the respondent's breach of fiduciary duty.
- (k) Such other or further orders as the Court thinks fit.

(l) Costs.

4. The questions of law or fact common to the claims of the Applicant and the Group Members are (using terms as defined in the 2FASOC filed herein):

**(as to SCDOs)**

- (a) whether the Claim SCDOs had the features alleged in paragraph 14 of the 2FASOC;
- (b) whether the Claim SCDOs, having the features alleged in paragraph 14 of the 2FASOC, were or are consistent with:
- (i) Conservatives Strategies;
- (ii) the investment requirements of:
- (1) the LGA NSW and the *Trustee Act NSW*;
- (2) LGA WA and the *Trustees Act WA*;

**(as to claims in negligence)**

- (c) whether Lehman owed the Adviser Duties to a class of persons including the Claimants;
- (d) if Lehman owed the Adviser Duties to the Claimants, whether Lehman by engaging in conduct alleged in paragraph 22 of the 2FASOC, breached the duties;

**(as to claims of misleading and deceptive conduct)**

- (e) whether Lehman, by conduct as alleged in paragraph 28 of the 2FASOC, made the Assurances;
- (f) whether the Assurances, if made:
- (i) were conduct in trade or commerce or in relation to a financial product or a financial service within the meaning of the *CA*, the *ASIC Act*, the *FTA NSW* or the *FTA WA* as the case may be ('**the Statutes**');)

- (ii) were misleading or deceptive or likely to mislead or deceive for the purposes of the Statutes, and if so in what respects;

***(as to the Wingecarribee subgroup)***

- (g) in respect of the subgroup's claims in contract:
  - (i) whether the Claim SCDOs were:
    - (1) derivative contracts; or
    - (2) Collateralised Debt Obligations;

within the meaning of the Guidelines;
  - (ii) whether investments in Claim SCDOs were:
    - (1) consistent with the Guidelines;
    - (2) consistent with the *LGA NSW*;
  - (iii) what investigations, analysis and advice were required to discharge Lehman's obligations under the NSW IMPs referred to in paragraph 36.9 of the 2FASOC above;
  - (iv) what notification of conflicts of interest was required to discharge Lehman's obligations under the NSW IMPs;
- (h) in respect of the subgroup's claims in respect of fiduciary obligations – whether in circumstances alleged in paragraph 48 of the 2FASOC, Lehman owed the fiduciary obligations alleged;

***(as to the WA IMP subgroup)***

- (i) in respect of the subgroup's claims in contract:
  - (i) whether investments in Claim SCDOs were:
    - (1) consistent with the WA Guidelines;
    - (2) consistent with the LGA WA;
  - (ii) what investigations, analysis and advice were required to discharge

- Lehman's obligations under the WA IMPs;
- (iii) what notification of conflicts of interest was required to discharge  
Lehman's obligations under the WA IMPs;
- (j) in respect of the subgroup's claims in respect of fiduciary obligations –  
whether, in circumstances alleged in paragraph 48 of the 2FASOC Lehman  
owed the fiduciary obligations alleged;

***(as to the Parkes subgroup)***

- (k) as to the subgroup's claims in contract – if the implied terms alleged are to  
be implied in the Sale Contracts:
  - (i) whether by selling Claim SCDOs to the subgroup claimants Lehman  
breached the implied terms;
  - (ii) what reports and advice from Lehman were required to perform the  
implied terms of the SCDO Sale Contracts requiring it to monitor and  
advise the claimants;
- (l) as to the subgroup's claims in respect of fiduciary obligations – whether, in  
circumstances alleged in paragraph 58 of the 2FASOC, Lehman owed the  
fiduciary obligations alleged;

***(as to claims of breach of fiduciary obligations)***

- (m) whether Lehman had the Conflicted Role (as defined in paragraph 13 of the  
2FASOC) in respect of any, and if so which, Claim SCDOs;
- (n) if Lehman owed fiduciary obligations to any Claimant as alleged:
  - (i) whether causing Claimants to invest in Claim SCDOs in respect of  
which Lehman did hold the Conflicted Role:

- (1) involved a conflict of interest for the purposes of the equitable rule that a fiduciary ought not act in a position of conflict between its interests or duties and the interests of the beneficiary;
  - (2) involved profit for the purposes of the equitable rule that a fiduciary may not profit from its fiduciary position;
- (ii) what notice was required in order to obtain a Claimant's informed consent to Lehman:
- (1) acting in a position of conflict of interest; further or alternatively
  - (2) profiting from its fiduciary position;

***(as to the form of relief)***

- (o) the correct principles for measuring compensable loss and damage for losses suffered as alleged herein;
- (p) what relief other than monetary relief is available to the Claimants.

Date: 11 August 2010



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Piper Alderman  
Solicitors for the Applicants  
Signed by Amanda Kim Banton, Partner

To: The respondent, Lehman Brothers Australia Limited (In Liquidation)  
  
c/- Blake Dawson  
225 George Street  
Sydney NSW 2000

A directions hearing in this application will be heard by the Court at the time and place specified below.

If there is not attendance before the Court by you or a legal practitioner representing you, the application may be dealt with and judgment may be given or an order made in your absence. Before any attendance at that time, you must file an appearance in the Registry.

Time: 9:30 am on 20 August 2010

Place: Court Room 14A, Level 14,80 William Street, Sydney NSW 2000

Date: 11 August 2010

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An officer acting with the authority of the  
DISTRICT REGISTRAR

The applicant's addresses for service are:

Wingecarribee Shire Council, City of Swan and Parkes Shire Council  
c/- Piper Alderman Lawyers,  
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