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Form 19
Rule 9.32

PROCESSED

VID 196/2013

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

(REDACTED VERSION)

No _____ of 2013

Federal Court of Australia
District Registry: Victoria
Division: General

LUCIO ROBERT PACIOCCO and another named in Schedule A
Applicants

**AUSTRALIA AND NEW ZEALAND BANKING
GROUP LIMITED (ACN 005 357 522)**
Respondent



To the Respondent

The Applicants apply 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: 9:30AM, 19 APRIL 2013

Place: Owen Dixon Commonwealth Law Courts Building, 305 William Street, Melbourne

Date: 14 March 2013



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

Filed on behalf of (name & role of party) Lucio Robert Paciocco & Anor – Applicants

Prepared by (name of person/lawyer) Paul Gillett

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DETAILS OF CLAIM

On the grounds stated in the accompanying Statement of Claim:

- (a) the First Applicant claims for himself and on behalf of Saving Group Members and Card Group Members (as those terms are defined in the accompanying Statement of Claim and as particularised in Parts 1 and 2 of Schedule 'B' respectively); and
- (b) the Second Applicant claims for itself and on behalf of Business Group Members (as that term is defined in the accompanying Statement of Claim and as particularised in Part 3 of Schedule 'B'):

Penalty

1. A declaration pursuant to section 21 of the *Federal Court of Australia Act 1976* (Cth) (**FC Act**) that:
 - (a) the Penalty Provisions (as defined in the accompanying Statement of Claim) (**Penalty Provisions**) and/or the Exception Fees (as defined in the accompanying Statement of Claim) (**Exception Fees**) being provisions contained in contracts between the applicants, Group Members and the respondent (**ANZ**) as particularised in the accompanying Statement of Claim, are wholly void, or in the alternative, unenforceable as a penalty; or
 - (b) *in the alternative to (a)*, the Penalty Provisions and/or the Exception Fees, being provisions contained in contracts between the applicants, Group Members and ANZ as particularised in the accompanying Statement of Claim, are void, or in the alternative, unenforceable as a penalty to the extent that the Exception Fees charged pursuant to them exceeded the damage suffered by ANZ as a result of the events giving rise to the charging of Exception Fees;
2. A declaration pursuant to section 21 of the FC Act that:
 - (a) the applicants and Group Members are entitled to be repaid the Exception Fees together with any interest charged to the applicants and Group Members on the Exception Fees; or
 - (b) *in the alternative to (a)*, the applicants and Group Members are entitled to be repaid the amount by which the Exception Fees exceeded ANZ's actual damage as a result of the events giving rise to the charging of Exception Fees, together with any interest charged to the applicants and Group Members on that part of



the Exception Fees that exceeded ANZ's actual damage as a result of the events giving rise to the charging of Exception Fees;

Unconscionable Conduct

3. *Further, or alternatively:*

- (a) a declaration pursuant to section 21 of the FC Act that ANZ, in entering into and giving effect to the provisions of the contracts as particularised in Parts C.2(I) and (II) of the accompanying Statement of Claim between the first applicant and Saving and Card Group Members and ANZ, namely the Penalty Provisions and/or the Exception Fees engaged in unconscionable conduct:
 - i. where such conduct occurred prior to 1 January 2011, in contravention of section 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);
 - ii. where such conduct occurred on or after 1 January 2011, in contravention of section 12CB of the ASIC Act and/or section 8 of the *Fair Trading Act 1999* (Vic) (**FTA**);
- (b) orders under section 12GM of the ASIC Act and/or section 158 of the FTA:
 - i. that the Penalty Provisions and/or the Exception Fees, being provisions contained in contracts between the first applicant and Saving and Card Group Members and ANZ as particularised in Parts C.2(I) and (II) of the accompanying Statement of Claim, be declared void;
 - ii. *in the alternative to i*, that the Penalty Provisions and/or the Exception Fees, being provisions contained in contracts between the first applicant and Saving and Card Group Members and ANZ as particularised in Parts C.2(I) and (II) of the accompanying Statement of Claim, be declared void to the extent that the Exception Fees charged pursuant to them exceeded the damage suffered by ANZ as a result of the events giving rise to the charging of Exception Fees;
 - iii. requiring ANZ to repay to the first applicant and Saving and Card Group Members:



- A. the Exception Fees charged to the first applicant and Saving Group Members together with any interest charged to the first applicant and Saving and Card Group Members on the Exception Fees; or
 - B. *in the alternative to A*, the amount by which the Exception Fees charged to the first applicant and Saving and Card Group Members exceeded ANZ's actual damage as a result of the events giving rise to the charging of Exception Fees, together with any interest charged to the first applicant and Saving and Card Group Members on that part of the Exception Fees that exceeded ANZ's actual damage as a result of the events giving rise to the charging of Exception Fees;
- (c) *further, or in the alternative to (b)iii*, an order that ANZ pay to the first applicant and Saving and Card Group Members statutory compensation pursuant to section 12GF of the ASIC Act and/or section 159 of the FTA;
- (d) a declaration pursuant to section 21 of the FC Act that ANZ, in entering into and giving effect to the provisions of the contracts as particularised in Part C.2(III) of the accompanying Statement of Claim between the second applicant and Business Group Members and ANZ, namely the Penalty Provisions and/or the Exception Fees engaged in unconscionable conduct:
- i. where such conduct occurred prior to 1 January 2011, in contravention of section 12CC of the ASIC Act and/or section 8A of the FTA;
 - ii. where such conduct occurred on or after 1 January 2011 and prior to 1 January 2012, in contravention of section 12CC of the ASIC Act;
 - iii. where such conduct occurred on or after 1 January 2012, in contravention of section 12CB of the ASIC Act;
- (e) orders under section 12GM of the ASIC Act and/or section 158 of the FTA:
- i. that the Penalty Provisions and/or the Exception Fees, being provisions contained in contracts between the second applicant and Business Group Members and ANZ as particularised in Part C.2(III) of the accompanying Statement of Claim, be declared void;
 - ii. *in the alternative to i*, that the Penalty Provisions and/or the Exception Fees being provisions contained in contracts between the second applicant and Business Group Members and ANZ as particularised in Part C.2(III) of the



accompanying Statement of Claim, be declared void to the extent that the Exception Fees charged pursuant to them exceeded the damage suffered by ANZ as a result of the events giving rise to the charging of Exception Fees;

- iii. requiring ANZ to repay to the second applicant and Business Group Members:
 - A. the Exception Fees charged to the second applicant and Business Group Members together with any interest charged to the second applicant and Business Group Members on the Exception Fees; or
 - B. *in the alternative to A*, the amount by which the Exception Fees charged to the second applicant and Business Group Members exceeded ANZ's actual damage as a result of the events giving rise to the charging of Exception Fees, together with any interest charged to the second applicant and Business Group Members on that part of the Exception Fees that exceeded ANZ's actual damage as a result of the events giving rise to the charging of Exception Fees;
- (f) *further, or in the alternative to (e)iii*, an order that ANZ pay to the applicants and Business Group Members statutory compensation pursuant to section 12GF of the ASIC Act and/or section 159 of the FTA;

Unjust transactions under the Code and New Code

4. *Further, or alternatively:*

- (a) a declaration pursuant to section 21 of the FC Act, that any Code Contracts (as defined in the accompanying Statement of Claim) between Card Group Members and ANZ, are unjust contracts;
- (b) an order pursuant to section 70(1) of the *Consumer Credit (Victoria) Code (Code)* reopening the transactions that gave rise to the Code Contracts between Card Group Members and ANZ, or to changes which incorporated the Penalty Provisions and/or Exception Fees into the Code Contracts;
- (c) an order pursuant to section 71(c) of the Code that the Penalty Provisions and/or the Exception Fees, being provisions contained in the Code Contracts between



Card Group Members and ANZ as particularised in Part C.2(II) of the accompanying Statement of Claim, be declared void; and

- (d) an order pursuant to section 71(g) of the Code requiring ANZ to repay to Card Group Members the Exception Fees charged pursuant to any Code Contracts together with any interest charged to Card Group Members on those Exception Fees; or
- (e) *in the alternative to (c) and (d)*:
 - i. an order pursuant to section 71(c) of the Code varying in whole or in part the Penalty Provisions and/or the Exception Fees contained in the Code Contracts so as to provide for the charging of Exception Fees that equate to the damage suffered by ANZ as a result of the events giving rise to the charging of Exception Fees; and
 - ii. an order pursuant to section 71(g) of the Code requiring ANZ to repay to Card Group Members the amount by which the Exception Fees charged pursuant to the Code Contracts exceeded ANZ's actual damage as a result of the events giving rise to the charging of those Exception Fees, together with any interest charged to Card Group Members on that part of those Exception Fees that exceeded ANZ's actual damage as a result of the events giving rise to the charging of those Exception Fees;
- (f) a declaration pursuant to section 21 of the FC Act, that the New Code Contracts between the first applicant and Card Group Members and ANZ, are unjust contracts;
- (g) an order pursuant to section 76 of the *National Credit Code* (**New Code**) reopening the transactions that gave rise to the New Code Contracts between the first applicant and Card Group Members and ANZ, or to changes which incorporated the Penalty Provisions and/or Exception Fees into the New Code Contracts;
- (h) an order pursuant to section 77(c) of the New Code that those Penalty Provisions and/or Exception Fees contained in the New Code Contracts between the first applicant and Card Group Members and ANZ as particularised in Part C.2(II) of the accompanying Statement of Claim, be declared void; and



- (i) an order pursuant to section 77(g) of the New Code requiring ANZ to repay to the first applicant and Card Group Members those Exception Fees charged pursuant to the New Code Contracts together with any interest charged to the first applicant and Card Group Members on those Exception Fees; or
- (j) in the alternative to (h) and (i):
 - i. an order pursuant to section 77(c) of the New Code varying in whole or in part those Penalty Provisions and/or Exception Fees contained in the New Code Contracts so as to provide for the charging of Exception Fees that equate to the damage suffered by ANZ as a result of the events giving rise to the charging of Exception Fees; and
 - ii. an order pursuant to section 77(g) of the New Code requiring ANZ to repay to the first applicant and Card Group Members the amount by which the Exception Fees charged pursuant to the New Code Contracts exceeded ANZ's actual damage as a result of the events giving rise to the charging of those Exception Fees, together with any interest charged to the first applicant and Card Group Members on that part of those Exception Fees that exceeded ANZ's actual damage as a result of the events giving rise to the charging of those Exception Fees;

Unfair Terms under the FTA and the ASIC Act

5. *Further, or alternatively:*

- (a) a declaration pursuant to section 21 of the FC Act, that the Penalty Provisions and/or the Exception Fees contained in the FTA Contracts (as defined in the accompanying Statement of Claim) between the first applicant, Saving Group Members and Card Group Members and ANZ, are void as unfair terms;
- (b) orders pursuant to section 23 of the FC Act requiring ANZ to repay to the first applicant, Saving Group Members and Card Group Members the Exception Fees charged to the first applicant, Saving Group Members and Card Group Members pursuant to the FTA Contracts, together with any interest charged on those Exception Fees; or



(c) *in the alternative to (b):*

- i. an order pursuant to section 23 of the FC Act varying in whole or in part the Penalty Provisions and/or the Exception Fees contained in the FTA Contracts so as to provide for the charging of Exception Fees that equate to the damage suffered by ANZ as a result of the events giving rise to the charging of Exception Fees; and
- ii. an order pursuant to section 23 of the FC Act requiring ANZ to repay to the first applicant, Saving Group Members and Card Group Members the amount by which the Exception Fees charged to the first applicant, Saving Group Members and Card Group Members pursuant to the FTA Contracts exceeded ANZ's actual damage as a result of the events giving rise to the charging of those Exception Fees, together with any interest charged to the first applicant, Saving Group Members and Card Group Members on that part of those Exception Fees that exceeded ANZ's actual damage as a result of the events giving rise to the charging of those Exception Fees;

(d) a declaration pursuant to section 12GND of the ASIC Act that the Penalty Provisions and/or the Exception Fees contained in the ASIC Act Contracts (as defined in the accompanying Statement of Claim) between the first applicant, Card Group Members and ANZ, are void as unfair terms;

(e) orders pursuant to section 12GM of the ASIC Act requiring ANZ to repay to the first applicant and Card Group Members the Exception Fees charged to the first applicant and Card Group Members pursuant to the ASIC Act Contracts, together with any interest charged on those Exception Fees; or

(f) *in the alternative to (e):*

- i. an order pursuant to section 12GM of the ASIC Act varying in whole or in part the Penalty Provisions and/or the Exception Fees contained in the ASIC Act Contracts so as to provide for the charging of Exception Fees that equate to the damage suffered by ANZ as a result of the events giving rise to the charging of Exception Fees; and
- ii. an order pursuant to section 12GM of the ASIC Act requiring ANZ to repay to the first applicant and Card Group Members the amount by which the Exception Fees charged to the first applicant and Card Group Members pursuant to the ASIC Act Contracts exceeded ANZ's actual damage as a



result of the events giving rise to the charging of those Exception Fees, together with any interest charged to the first applicant and Card Group Members on that part of those Exception Fees that exceeded ANZ's actual damage as a result of the events giving rise to the charging of those Exception Fees;

Other Orders

6. *In the alternative*, damages for breach of contract;
7. *Further*, orders pursuant to Rule 30.51 of the *Federal Court Rules 2011* that:
 - (a) an account be taken to determine the amount payable by ANZ to the applicants and Group Members as a consequence of the above declarations and orders; and
 - (b) any amount certified on taking the account to be due to the applicants and Group Members be paid by ANZ to the applicants and Group Members;
8. *Further*, interest (to be assessed), pursuant to section 51A of the FC Act;
9. *Further*, such order or further relief, including all necessary or appropriate accounts, inquiries, directions or referrals.

QUESTIONS COMMON TO CLAIMS OF GROUP MEMBERS

The questions of law or fact common between the claims of the applicants and the Group Members include but are not limited to the matters set out in paragraphs 2, 4 and 5 of the Statement of Claim.

CLAIM FOR INTERLOCUTORY RELIEF

The applicants also claim interlocutory relief as follows:

1. they have leave to file in this proceeding, in addition to this Application and the Statement of Claim filed by them on 14 March 2013 (together the Unredacted Documents), an Application (Redacted Version) and a Statement of Claim (Redacted Version).
2. until further order, the Unredacted Documents (including the various schedules to those documents) remain confidential for the purposes of Rule 2.32 inspection, and no



person (other than a party to the proceeding) may inspect or copy the Unredacted Documents without leave of the Court or a Judge; and

3. any applicant for leave to inspect the Unredacted Documents must provide the solicitors for the applicants written notice of the application for leave at least 48 hours prior to the hearing of the application for leave.

REPRESENTATIVE ACTION

The Applicant brings this application as a representative party under Part IVA of the FC Act.

The group members (**Group Members**) to whom this proceeding relates are those persons who:

- (a) at some time prior to date:
 - i. were customers of ANZ;
 - ii. held and operated banking facilities with ANZ;
 - iii. were charged by ANZ Exception Fees (as that term is defined in the accompanying Statement of Claim); and
- (b) are listed in a compact disc which comprises Schedule 'B' to this application.

APPLICANTS' ADDRESS

The Applicants' address for service is:

Place: Maurice Blackburn Pty Ltd, Level 10, 456 Lonsdale Street, Melbourne Vic 3000

The Applicants' address is as above.

SERVICE ON THE RESPONDENT

It is intended to serve this application on the Respondent.

Date: 14 March 2013



Signed by Paul Gillett
Lawyer for the Applicants



SCHEDULE A

No of 2013

Federal Court of Australia
District Registry: Victoria
Division: General

Applicants

Second Applicant: Speedy Development Group Pty Ltd (ACN 006 835 383)

Date: 14 March 2013



SCHEDULE B

Comprises the compact disc accompanying this application.

[CONTENTS OF DISC REDACTED]