

VID 395 / 2008

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIAN DISTRICT REGISTRY**

No. VID 2008

BETWEEN

IMOBILARI PTY LIMITED
(ACN 091 464 729)

Applicant

AND

OPES PRIME STOCKBROKING LIMITED
(Receivers & Managers Appointed) (Administrators Appointed)
(ACN 086 294 028)

First Respondent

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

Second Respondent

ANZ NOMINEES LIMITED
(ACN 005 357 568)

Third Respondent

MERRILL LYNCH INTERNATIONAL (AUSTRALIA) LTD
(ACN 002 892 846)

Fourth Respondent

**APPLICATION UNDER PART IVA
OF THE FEDERAL COURT OF AUSTRALIA ACT 1976
(Order 73 rule 3)**

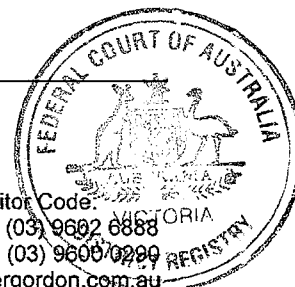
In this Application, the Applicant uses the terms defined in the Statement of Claim.

1. This Application is brought by the Applicant as a representative party.
2. This Application is brought by the Applicant on its own behalf and on behalf of those persons who:
 - (a) were a client of Opes Prime.
 - (b) entered into a Facility Agreement with Opes Prime.
 - (c) received the Representation at some time prior to entering into the Facility Agreement:

Filed on behalf of the Applicant

Filed by:
Slater & Gordon, Lawyers
The Dominion Building
533 Little Lonsdale Street
MELBOURNE VIC 3000
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Solicitor Code: VICTORIA
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Ref: KJF:SL:VM:TT:322524



- (i) directly from Opes Prime; and/or
 - (ii) indirectly from Opes Prime, through the group member's stockbroker.
- (d) relied upon the Representation in entering into the Facility Agreement.
- (e) deposited shares with Opes Prime under the Facility Agreement in exchange for cash advances or drawdown facilities.
- (f) since around 27 March 2008:
- (i) has had shares which it deposited sold by ANZ, or ANZ has authorised the sale of such shares, under the terms of an AMSLA between ANZ and Opes Prime; and/or
 - (ii) has had shares which it deposited sold by Merrill Lynch, or Merrill Lynch has authorised the sale of such shares, under the terms of a GMSLA or an IPBA between Merrill Lynch and Opes Prime.
- (g) has, as at the date of commencement of this proceeding entered into a funding agreement with Commonwealth Legal Funding LLC.

("Group Members")

3. The questions of law or fact common to the claims of the Group Members so far as those claims relate to Opes Prime are:
- (a) whether the Representation was made by Opes Prime;
 - (b) whether the Representation was made by Opes Prime with reckless indifference as to its truth;
 - (c) whether the Representation was intended to induce each of the Group Members to form the belief that they retained the beneficial ownership or equitable interest in the shares deposited with Opes Prime or ANZ Nominees contrary to the terms of the SLBA;
 - (d) whether prior to each of the Group Members entering into their respective Facility Agreement and at all times up to and including 27 March 2008, Opes Prime failed to inform, or fully inform, each Group Member that the true effect of the transaction was one in which Opes Prime or ANZ Nominees or Merrill Lynch obtained legal ownership of any shares deposited, and ANZ or Merrill Lynch would claim the

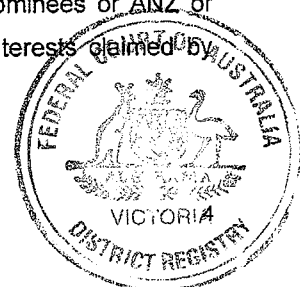


beneficial ownership of any shares deposited with the effect that each Group Member became unsecured creditors of Opes Prime.

- (e) whether Opes Prime in the circumstances of the case failed to inform, or fully inform, each of the Group Members that the true nature of the Facility Agreement was as set out in (d) above, and that Opes Prime had an interest in structuring the Facility Agreement so as to ensure that it could obtain clear title to the shares so as to enable Opes Prime to obtain financing for its own purposes from ANZ or Merrill Lynch and to enable it or ANZ or Merrill Lynch to transfer, or "lend" those shares to third parties for a fee for purposes including short selling those shares contrary to the interests of each of the Group Members.
- (f) whether Opes Prime in failing to inform, or fully inform, each of the Group Members of the matters referred to in (d) and (e) was recklessly indifferent to the truth of the Representation, or to the understanding of each of the Group Members of the Facility Agreement or the risks associated with it.
- (g) whether each of the Group Members entered into their respective Facility Agreement under a serious mistake about its contents in relation to fundamental terms, namely clauses 3.1 and 3.4 of the SLBA.
- (h) whether Opes Prime was aware that each of the Group Members was entering into their respective Facility Agreement under a serious mistake or misapprehension and Opes Prime deliberately set out to ensure that each of the Group Members did not become aware of the mistake before entering into their respective Facility Agreement and at all times up to and including 27 March 2008.
- (i) whether the making of the Representation or failure by Opes Prime to disclose sufficiently or at all the matters in (d) and (e) above:
 - (i) was conduct by Opes Prime, in relation to a financial service which was misleading or deceptive within the meaning of section 12DA of the *ASIC Act*;
 - (ii) further or alternatively, was conduct by Opes Prime, in relation to a financial product or financial service, which was misleading or deceptive within the meaning of section 1041H(1) of the *Corporations Act*;
 - (iii) further or alternatively, was conduct by Opes Prime, in trade or commerce, which was misleading and deceptive within the meaning of section 52 of the *Trade Practices Act 1974* (Cth) ("**Trade Practices Act**").
- (j) whether each of the Group Members relied on the Representation in entering into their respective Facility Agreement.



- (k) whether if Opes Prime had disclosed to each of the Group Members that the true nature of the relationship was a transaction in which Opes Prime or ANZ Nominees or Merrill Lynch obtained legal ownership of the shares and that ANZ or Merrill Lynch would claim the beneficial ownership of the shares with the effect that each of the Group Members became unsecured creditors of Opes Prime, each of the Group Members would not have entered into their respective Facility Agreement and would not have suffered loss or damage.
- (l) whether the nature of the relationship between each of the Group Members and Opes Prime was such that Opes Prime was proscribed from entering into the Facility Agreement with the Group Members unless Group Members were fully informed of the matters referred to in paragraphs (d) and (e) above.
- (m) whether in the circumstances of the case, equity would construe the Facility Agreement as a mortgage of the relevant securities consistently with the decision in *Kreglinger v New Patagonia Meat and Coal Storage Co Ltd* [1914] AC 25. and *Gurfinkel v Bentley Pty Ltd* (1966) 116 CLR 98.
- (n) whether by reason of the matters referred to at paragraph 3(a) to (m), each of the Group Members is entitled pursuant to, section 12GM(1) and 12GM(7) of the *ASIC Act*, section 1101B(1)(d) and 1041I of the *Corporations Act*, section 82 and 87 of the *Trade Practices Act* and at law to:
- (i) recover any loss or damage against Opes Prime;
 - (ii) an order rescinding their respective Facility Agreement and the SLBA or declaring their respective Facility Agreement and the SLBA void;
 - (iii) redeem at its election any of the shares still held by ANZ Nominees;
 - (iv) redeem at its election any of the shares still held by Merrill Lynch;
 - (v) equitable compensation.
4. The questions of law or fact common to the claims of the Group Members so far as those claims relate to ANZ, ANZ Nominees and Merrill Lynch are:
- (a) whether at the time that Opes Prime purported to transfer shares deposited by each of the Group Members to ANZ or Merrill Lynch, ANZ Nominees or ANZ or Merrill Lynch were on notice (actual or constructive) of the interests claimed by each of the Group Members in the shares.



- (b) whether from the date that each of the Group Members transferred their respective shares to ANZ Nominees or Opes Prime, ANZ Nominees or Merrill Lynch, as the case may be, held the shares as legal owner subject to the equitable interests which each of the Group Members held in the said shares.
- (c) whether ANZ and/or ANZ Nominees and/or Merrill Lynch have been involved in misleading and/or deceptive conduct of Opes Prime within the meaning of section 75B of the *Trade Practices Act* and section 79 of the *Corporations Act*.
- (d) whether from the date that each of the Group Members transferred the said shares, ANZ Nominees, or Merrill Lynch has been the recipient of trust property, namely the shares and the proceeds of the sale of the shares, within the first limb of *Barnes v Addy* (1874) LR 9 Ch App 244.
- (e) whether ANZ and/or Merrill Lynch wrongfully sold or authorised the sale of the shares, without the authority of each of the Group Members, and without taking into account the prior equitable interests of each of the Group Members in the said shares.
- (f) whether by reason of paragraph 4(a) to (e), on election by the Group Members and on repayment by the said Group Members of any monies owing to Opes Prime under the Facility Agreement or the SLBA, the Group Members are entitled to:
 - (i) the return by ANZ or ANZ Nominees or Merrill Lynch, as the case may be, of the shares or Equivalent Securities;
 - (ii) equitable compensation or damages from ANZ or ANZ Nominees or Merrill Lynch.

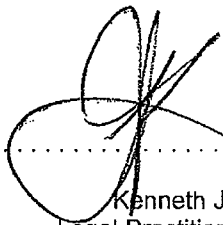
Relief claimed

5. The Applicant claims for itself and for each of the group members:
- (a) An order under section 440D of the *Corporations Act* 2001 (Cth) granting leave to the Applicant to proceed against Opes Prime.
 - (b) A declaration that the Facility Agreement (as defined) including the SLBA (as defined) entered into by each of the Group Members on the one part and Opes Prime on the other part is void and of no effect.
 - (c) An order rescinding or setting aside the Facility Agreement including the SLBA in respect of each of the Group Members.
 - (d) Equitable compensation and/or damages against Opes Prime.



- (e) An order to redeem any of the Shares deposited with ANZ Nominees (as defined) still held by ANZ Nominees.
- (f) An order to redeem any of the Shares deposited with Opes Prime (as defined) still held by Merrill Lynch.
- (g) A declaration that, on election by any of the Group Members, and on repayment by said Group Member to Opes Prime of any monies owed, the Group Member is entitled to:
 - (i) the return by ANZ or ANZ Nominees of the Shares deposited with ANZ Nominees (as defined) or the Equivalent Securities (as defined);
 - (ii) the return by Merrill Lynch of the Shares deposited with Opes Prime (as defined) or the Equivalent Securities (as defined); or
 - (iii) equitable compensation or damages from the ANZ Nominees or ANZ.
- (h) Interest.
- (i) Costs.
- (j) Such further or other orders as the Court thinks fit.

DATED: 30 May 2008


Kenneth John Fowle
Legal Practitioner Director
Slater & Gordon Lawyers
Solicitor for the Applicant



To the Respondents

First Respondent

OPES PRIME STOCKBROKING LIMITED
(Receivers & Managers Appointed)
(Administrators Appointed)
(ACN 086 294 028)
Level 17, 330 Collins Street
MELBOURNE VIC 3000

Second Respondent

**AUSTRALIA AND NEW ZEALAND
BANKING GROUP LIMITED**
(ACN 005 357 522)
Level 6, 100 Queen Street
MELBOURNE VIC 3000

Third Respondent

ANZ NOMINEES LIMITED
(ACN 005 357 568)
Level 2, 100 Queen Street
MELBOURNE VIC 3000

Fourth Respondent

**MERRILL LYNCH INTERNATIONAL
(AUSTRALIA) LTD**
(ACN 002 892 846)
Governor Phillip Tower
Level 38, 1 Farrer Place
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 no 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.

Date: 25th June 2008

Time: 11-00am

Place: Federal Court of Australia
305 William Street
MELBOURNE VIC 3000



FOR DISTRICT REGISTRAR

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30 MAY 2008

The Applicant's address for service is:

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MELBOURNE VIC 3000

The Applicant may be served at the following exchange box in the Melbourne Document Exchange:

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DX 229 MELBOURNE

The Applicant's address is:

C/- Imobilari Pty Limited
Unit 11, 22 Gadigal Avenue
ZETLAND NSW 2017

