FEDERAL COURT OF AUSTRALIA

Turner v MyBudget Pty Limited [2018] FCA 1407

File number:	NSD 297 of 2017
Judge:	**LEE J**
Date of judgment:	18 September 2018
Catchwords:	**CONTRACT** – proper construction of interest provision in consumer contract – whether it authorises respondent to take and use interest earned on client funds for its own purposes – whether breach of trust or breach of fiduciary duty – held contract authorises respondent's actions and no breach **CONSUMER LAW** – *Australian Consumer Law* s 24(1) – meaning of an unfair term – relevant considerations – whether a term is unfair if it authorised respondent to take and use interest earned on client funds for its own purposes – discussion of matters relevant to establish an unfair term including meaning of a "significant imbalance in the parties' rights and obligations arising under the contract" – held no unfair term **REPRESENTATIVE PROCEEDING** – orders made under s 33ZB of *Federal Court of Australia Act 1976* (Cth) binding group members who have not opted out
Legislation:	*Australian Consumer Law* ss 21, 23 *Federal Court of Australia Act 1976* (Cth) Pt IVA, ss 33ZB, 43(1A)
Cases cited:	*Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited* [2015] FCA 1204; (2015) 239 FCR 33 *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 377; (2016) ATPR 42-517 *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1998] UKHL 19; [1999] 1 AC 266 *Cherry v Steele-Park* [2017] NSWCA 295; (2017) 351 ALR 521 *Cook v Addison* (1869) LR 7 Eq 466 *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52; [2002] 1 AC 481 *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty*

	Ltd [2017] HCA 12; (2017) 91 ALJR 486 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7 *Foskett v McKeown* [2001] 1 AC 102 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 *Jetstar Airways Pty Ltd v Free* [2008] VSC 539; (2008) 30 VAR 295 *Southern Cross Commodities Pty Ltd (In Liq) v Ewing* (1987) 11 ACLR 818; 5 ACLC 1, *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; [2015] HCA 37 *O'Sullivan v Management Agency and Music Ltd* [1985] *Wilkie v Gordian Runoff Ltd* [2005] HCA 17; (2005) 221 CLR 522
Date of hearing:	1, 3 May 2018
Registry:	New South Wales
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Category:	Catchwords
Number of paragraphs:	82
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ORDERS

NSD 297 of 2017

BETWEEN:	**KELVIN TURNER** Applicant
AND:	**MYBUDGET PTY LIMITED ACN 82 093 118 597** Respondent
JUDGE:	**LEE J**
DATE OF ORDER:	**18 SEPTEMBER 2018**

THE COURT ORDERS THAT:

1. The originating application be dismissed.

2. Pursuant to s 33ZB of the *Federal Court of Australia Act 1976* (Cth) an order be made binding all group members who have not opted out of the proceeding, that the answers to the following two common questions:

   (a) Does MyBudget hold any interest accrued or earned on the funds received by it or for the purpose of the service agreement made with group members in trust for the group members?

   (b) Is the Interest Provision an unfair term for the purposes of s 23 of the ACL?

   both be answered "No".

3. By 4pm on 25 September 2018, the parties provide to the Associate to Justice Lee a minute of an order identifying the order they seek as to the costs together with any submissions upon which they rely.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

LEE J:

A INTRODUCTION AND RELEVANT ISSUES

1 This is a Part IVA representative proceeding commenced by the applicant, Mr Turner, against the respondent (**MyBudget**). Mr Turner represents group members who: (a) entered into standard form service agreements with MyBudget upon terms which included a term relating to interest as set out at [6] below (**Interest Provision**); and (b) have not received the interest earned on funds deposited by them into accounts maintained by MyBudget.

2 MyBudget is a provider of what it describes as "budget management services". Its services are directed to persons experiencing difficulty in managing their financial affairs. It necessarily follows that its services are marketed to persons who have significant financial problems and, as a consequence, will often be vulnerable. MyBudget services include, among other things:

(a) creating, in consultation with a prospective client, a budget and long-term financial plan, which is supposed to be specific and tailored to each client; and

(b) holding funds on behalf of a client in a bank account into which the client's income is deposited and from which the client and the client's creditors are paid in accordance with the agreed budget plan.

3 On or about 23 July 2013, Mr Turner entered into an agreement with MyBudget. He had first become aware of MyBudget through a television advertisement. He arranged a consultation and went to see a representative of MyBudget at its offices in Church Street, Parramatta in New South Wales. The consultation lasted for approximately two hours and was directed to discussion as to why Mr Turner had become beset with financial difficulties and as to the identity and quantum of his debts. A representative from MyBudget took the material that Mr Turner had brought to the meeting (such as paper bills) and, after discussions with another MyBudget employee, then prepared a budget and repayment plan in consultation with Mr Turner. Immediately prior to the entry into the agreement with MyBudget, the evidence discloses that Mr Turner had the following:

(a) a line of credit with an entity called Police Bank Limited (which was referred to by Mr Turner as the "Police Credit Union account");

(b) a line of credit with the Commonwealth Bank (named a "Complete Access account");

(c) a Commonwealth Bank MasterCard account;

(d) two secured car loans; and

(e) a line of credit with the Australian Public Service Benevolent Society.

4 Mr Turner's salary was paid into the Police Credit Union account and a small pension he received from the Department of Veterans' Affairs was deposited into the Complete Access account. Mr Turner was earning virtually no interest across the accounts he held but he was incurring a miscellany of bank fees including overdrawn account fees on the Police Credit Union account and the Complete Access account.

5 At the conclusion of the initial consultation, Mr Turner was provided with (and then signed) a letter of engagement dated 23 July 2013, which included the Budget Plan (**Letter of Engagement**) and which, among other things, stated as follows:

> Dear Kelvin
>
> It was great to meet with you. We have carefully assessed your income, expenses and financial goals and we are pleased to provide you with a clear and workable budget plan which will assist you to achieve your financial objectives.
>
> **Your stated objective(s):**
>
> "I want to get myself back on track financially and get my debts paid off"
>
> **Solution:**
>
> Establish a MyBudget account and use MyBudget's services to help you prioritise and manage your payments, and stick to a personalised, workable budget.
>
> After analysing your current financial position, we have calculated that after taking your basic living and required expenses from your income, at this time you have nothing left over to pay your debts.
>
> Therefore, we propose to negotiate with your creditors for you to cease making payments to your creditors for a maximum period of 3 months. After this period, should your situation improve, we will reanalyse your position to work out how much (if anything) you can afford to pay to your creditors, and potentially negotiate new payment amounts and terms with them.
>
> Please note that based on the details provided by you today, your income would need to increase (or expenses decrease) by an annual amount of more than -$5,655.89.
>
> If your financial situation remains unchanged during the next three months, we will assist you to consider your other options. The most likely option for you to consider at this time will be bankruptcy. By entering into bankruptcy you will save thousands in payments and interest to your creditors.
>
> If you feel that your financial position is not likely to change in the near future you do of course have the option of entering into bankruptcy, which MyBudget will arrange for you on your behalf in the first few months of your budget starting. Further

> information about bankruptcy is enclosed.
>
> **How does MyBudget work?**
>
> Instead of your employer(s) paying your income to you, your income will be paid directly to your MyBudget account.
>
> MyBudget will then transfer to you, your weekly living expenses of $150.00 in to your nominated personal bank account. The transfer will be made on the same day and at the same time each week so that you always know exactly when to expect the funds. Your living expenses are given the highest priority in your budget.
>
> MyBudget processes three payment runs every business day. The first run occurs in the morning before business commences (and this is when your living expenses will be transferred); the second run is between 11:00AM and midday (CST), and; the final run is between 3:30PM and 4:00PM.
>
> If your personal bank account is with Westpac, funds will appear in your account within two hours of the transfer. If your account is with a different institution, please allow overnight processing by your bank.

6 Together with the other 24,222 clients of MyBudget, he also signed a document entitled "Terms of Service Agreement" (**Service Agreement**). It was this document that contained the Interest Provision which was expressed in the following terms:

> Client funds are held in an interest bearing account arranged by MyBudget. Interest is not payable to clients on funds held in your MyBudget Account. Credit interest on client funds will be applied by MyBudget in its discretion to pay bank fees on the account.

7 In broad terms, the case of Mr Turner is that:

(a) MyBudget acted in breach of trust and in breach of its fiduciary duty not to obtain an unauthorised profit because MyBudget has taken and used interest earned on his funds for its own purposes; and

(b) MyBudget has engaged in unconscionable conduct, or alternatively, the Interest Provision is void as an unfair term.

8 More specifically, Mr Turner's case, as refined at hearing, is that MyBudget has obtained an unauthorised benefit from its relationship with Mr Turner and the group members by expropriating interest, using accrued interest for its own purposes and failing to account to Mr Turner and the group members for the interest. Separately from calling in aid equitable remedies, it is submitted that this conduct is contrary to the statutory norm prohibiting unconscionable conduct under s 21 of the *Australian Consumer Law* (**ACL**). In the alternative, it is contended that if on a proper construction of the contractual documentation, the Interest Provision permits MyBudget to take the interest and use it for its own purposes, the Interest

Provision is an unfair term of a standard form consumer contract and is void by operation of s 23 of the ACL.

9 The primary response of MyBudget is that, properly construed, the Interest Provision authorises MyBudget to take and use interest earned on client funds for its own purposes, and hence there has been no breach of trust or breach of fiduciary duty in MyBudget acting in accordance with its contractual entitlements. The further points are made that if MyBudget is correct on a proper construction of the Interest Provision, MyBudget's use of the interest for its own purposes is not contravening conduct, and that the Interest Provision, providing for such an eventuality, is not an unfair term.

10 As can be seen, consideration of all of the claims must logically begin with identifying the proper construction of the Interest Provision. The case for breach of trust and fiduciary duty must accommodate itself to the terms of the contract. The case for statutory unconscionable conduct relies solely on the conduct of taking and using trust property and its premise is that there has been a contractually unauthorised expropriation of accrued interest (see the amended statement of claim (**ASOC**) [16], [17]). By way of contrast, the point of departure for the unfair term case as developed in the submissions is that the Interest Provision allows, as MyBudget contends, a taking of interest earned on client funds for its own purposes.

11 For reasons I will explain, the construction advanced by MyBudget is correct. Adopting that construction, I do not consider that the Interest Provision is an unfair term as pleaded. It follows that Mr Turner is not entitled to any of the relief he seeks and his individual claim should be dismissed. Consistent with standard procedure in Part IVA proceedings, the parties agree that my resolution of the common issues that arise on Mr Turner's claim should be reflected in orders pursuant to s 33ZB of the *Federal Court of Australia Act 1976* (Cth). This order, framed in the nature of answers to two questions reflecting the common issues, will create a statutory estoppel as to these issues, binding group members who have not opted out of the proceeding. Those questions are as follows:

(a) Does MyBudget hold any interest accrued or earned on the funds received by it or for the purpose of the service agreement made with group members in trust for the group members?

(b) Is the Interest Provision an unfair term for the purposes of s 23 of the ACL?

12 For the reasons that follow, the answer to each of these questions is 'no'.

13 I propose to organise the balance of these reasons under the following headings:

- B Evidentiary Issues & Interest Calculation
- C The Proper Construction of the Interest Provision
  - C.1 The Applicable Principles
  - C.2 The Submissions of the Parties
  - C.3 Conclusion as to Proper Construction
- D The Breach of Trust and Fiduciary Case
- E The Statutory Unconscionability Case
- F The Unfair Term Case
  - F.1 Would the Interest Provision cause a significant imbalance in the parties' rights and obligations arising under the contract?
  - F.2 Was the Interest Provision not reasonably necessary in order to protect the legitimate interests of MyBudget as a party advantaged by it?
  - F.3 Would the Interest Provision cause detriment to a party if it were to be applied or relied on?
- G The Limitation of Liability Defence
- H Conclusion

B EVIDENTIARY ISSUES & INTEREST CALCULATION

14 Before coming to the proper construction of the Interest Provision, it is necessary to make some further findings in addition to the matters noted in the Introduction at [2]-[6] above, as to how the service provided by MyBudget to Mr Turner operated in practice and the relationship between the parties. It is also necessary to touch upon some legal and evidentiary issues relating to accounting for interest which, as I will explain, are unnecessary to resolve.

15 Mr Turner remained a client of MyBudget until July 2014. During the period in which Mr Turner was a client from July 2013 to July 2014 (**Relevant Period**), Mr Turner received an Account Statement which recorded his debit and credit transactions including the charges which MyBudget levied. It did not, however, record costs incurred by MyBudget which are not chargeable by MyBudget (such as bank fees); nor did it record any interest earned on Mr Turner's funds.

16 Deposits from clients such as Mr Turner (including salary payments) were received into a bank account held by MyBudget being the Westpac Banking Corporation Integrated Banking Service Account, (**WIBS Account**). The WIBS Account included a number of sub-accounts for each MyBudget client and each client, such as Mr Turner, had a separate sub-account with its own BSB and Account number. It was into these personal 'sub-accounts' that clients, or their employers, were to transfer their monies. These were referred to by MyBudget as "virtual accounts" and were used by MyBudget to identify each client's deposits. The accounts were "virtual" because they were not actual separate bank accounts (and hence no individualised bank statements exist). The virtual accounts are the product of a service offered by Westpac Bank through which MyBudget can use "off system BSBs" to receive all deposits in just one nominated account, but also receive reports which reconcile the amounts received with MyBudget's internal debtors. In this way, it is possible for MyBudget to keep track of the "balance" of each client's account.

17 The funds deposited by clients were "swept" around six times a day into the WIBS Account and then were cleared into another bank account held by MyBudget at Westpac known as the "Westpac Trust Account". It was from this account that: (a) the third party payments were made on behalf of individual clients; (b) payments were made to clients for their living expenses; and (c) payments were made to MyBudget for its fees. Additionally, surplus funds were transferred to term deposits or other high interest accounts (**Surplus Fund Accounts**) and interest earned on the Westpac Trust Account was also transferred out. All the surplus funds transferred into the Surplus Fund Accounts were client funds.

18 Two transaction accounts were used by MyBudget in the Relevant Period in addition to the Westpac Trust Account, being a Commonwealth Bank account used to process "Bpay" payments and a National Australia Bank account used to process cheques.

19 As to the Surplus Fund Accounts in the Relevant Period, there were nine such accounts held with various trading banks. The interest earned on Surplus Fund Accounts and the other client accounts was regularly transferred into one of MyBudget's corporate bank accounts (i.e. entirely separate accounts which did not hold client funds). There is no dispute that, in this way, interest was earned by MyBudget on client interest held in these separate corporate accounts.

20 Opinion evidence was adduced by MyBudget from Mr Wynand Mullins, a partner of Ferrier Hodgson and a specialist in forensic accounting. Mr Mullins' evidence was said by MyBudget

to establish two matters, the accuracy of which is not material to the determination of the dispute. It is nevertheless useful, however, in that it provides at least some indication as to the quantum of the amount of interest in dispute, at least during the Relevant Period. *First*, according to Mr Mullins, the total amount of interest earned from all accounts held by MyBudget during the Relevant Period was $622,734 (this was calculated by considering the audited financial statements, bank statements and the general ledger for MyBudget). *Secondly*, according to Mr Mullins, the total amount of interest which was earned on client funds (leaving aside interest earned on that interest as explained above), was $588,361 (this was calculated by reference to bank statements and the general ledger for MyBudget).

21 As would by now already be obvious, as a result of the pooling of client funds, it is not possible to identify with any precision the proportion of client interest that has been contributed by specific client's funds. Having said that, to give an estimation of Mr Turner's allocation, or share, of total interest in the Relevant Period, Mr Mullins considered the average end of day balances of all clients in the Relevant Period. He estimated the amount attributable to Mr Turner was $10.11. Similarly, although Mr Mullins accepted that it was not possible to calculate the precise interest earned by MyBudget on an individual client's interest, Mr Mullins estimated that the total amount of interest on client interest during the Relevant Period was $5261 and that using average end of day balances, Mr Turner's contribution to that interest was $0.07.

22 Turning to the bank fees, in respect of the transactions carried out on behalf of Mr Turner during the Relevant Period, Mr Mullins calculated that the bank fees incurred by MyBudget were $15.35.

23 Although, as I will explain, it is necessary to approach precise figures with caution, it follows that in comparing both fees and interest, according to Mr Mullins, the "rough" net position in respect of Mr Turner during the Relevant Period is -$5.17 which is made up of: (a) Mr Turner's allocation of client interest ($10.11); and (b) Mr Turner's allocation of interest on client interest ($0.07); less (c) Mr Turner's bank fees of $15.35.

24 It should already be clear, but it is worth reiterating, that this calculation is premised on what Mr Mullins accepted was merely an estimate given the pooling of client funds. More significantly, it is also based on the disputed assumption that if the interest *was* held on trust, then Mr Turner's proportion of the interest earned by MyBudget should be calculated rateably according to the amounts of Mr Turner's money that MyBudget held at relevant points in time, and the amounts of money that MyBudget held for other persons, including itself, on which

interest was earned: see *Foskett v McKeown* [2001] 1 AC 102 at 110 per Lord Browne-Wilkinson, at 131-132 per Lord Millett.

25 MyBudget submits that given it held Mr Turner's funds in an account together with all other group members' funds, it follows that all group members must be treated equally. MyBudget further submits that it must not have an overall liability greater than the interest actually earned on group member funds (together with statutory interest) and, if Mr Turner succeeded on his primary argument, it would be necessary to ascertain Mr Turner's share of interest without calculating it at a rate that would be at the expense of other group members.

26 In making reference to the calculations of Mr Mullins made on this basis, I am aware that Mr Turner has submitted that the interest on his funds should be calculated by reference to the highest yield achieved by MyBudget on mixed client funds. Mr Turner makes the point that MyBudget is the accounting party and, as such, it is duty bound to account accurately: *Cook v Addison* (1869) LR 7 Eq 466 at 470. It is contended that if Mr Turner is correct on his primary contention that MyBudget has not done so, the correct calculation of interest earned on Mr Turner's funds would be carried out by reference to the highest yield achieved by MyBudget on mixed client funds, in its various interest bearing deposits, once that yield has been disclosed by MyBudget. It is further said that correct accounting will allow no reduction on account of bank transaction fees and include compound interest, at court rates, from the date of termination of the contract in June 2014 to the date of judgment, conformably with the principles discussed and applied in *Southern Cross Commodities Pty Ltd (In liq) v Ewing* (1988) 91 FLR 271 and *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428.

27 In reply, MyBudget submitted that even if Mr Turner was correct, this is not a case of trust money mixed with personal money. Such a characterisation might be true in relation to interest earned on funds in the nine Surplus Fund Accounts but may not be true in relation to the interest earned on Surplus Fund Accounts and the other client accounts that was regularly transferred into one of MyBudget corporate bank accounts. In any event, given that no obligation to account exists, it is unnecessary to resolve this issue. It suffices to note that either way, if interest was to be calculated by reference to the applicants or individual group members, it is unlikely substantial sums would be payable to group members. Needless to say, if bank fees attributed to the applicants or individual group members were taken into account, the amounts would be even less.

28 It is also unnecessary to resolve the related factual question as to whether there is evidence to find, as Mr Turner submits, that the effective interest earned on client interest was at the rate of 3.66% per annum (which was recorded in the MyBudget financial accounts as the "effective interest rate on short term deposits": see Exhibit A, p 206). MyBudget submits that although it is not in dispute that client interest was regularly transferred to corporate bank accounts, there is no secure evidentiary foundation for finding that such corporate accounts would be earning interest in 2014 at a rate anywhere near a higher term deposit rate of 3.66% per annum.

C THE PROPER CONSTRUCTION OF THE INTEREST PROVISION

C.1 The Applicable Principles

29 Unsurprisingly there was no dispute between Mr Turner and MyBudget as to the applicable principles. They do not require extensive repetition here. It is clear that the rights and liabilities of parties under a contractual provision are to be determined objectively, by reference to its text, context and purpose: *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; (2015) 256 CLR 104 at 116 [46]; *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640 at 656-657 [35].

30 Further in *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12; (2017) 343 ALR 58 at 63 [16], the High Court (Kiefel, Bell and Gordon JJ) summarised the principled approach to construction of contracts as follows:

> It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract. In a practical sense, this requires that the reasonable businessperson be placed in the position of the parties. It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it.
>
> Citations omitted.

31 The start and end point of the construction exercise is the language chosen by the parties to record their bargain when considered in the light of legitimate relevant surrounding circumstances: *Cherry v Steele-Park* [2017] NSWCA 295; (2017) 351 ALR 521 per Leeming JA at 537 [72] (with whom Gleeson JA and White JA agreed). Finally, for present purposes, it is also worth remarking that preference will be given to a construction supplying a congruent operation to various components of the whole: *Wilkie v Gordian Runoff Ltd* [2005] HCA 17; (2005) 221 CLR 522 at 529 [16].

32 With these principles in mind I come to the text of the relevant provisions (viewed in the context of the contract as a whole) and also the submissions of the parties regarding the constructional choices for which they advocate.

C.2 The Relevant Provisions and the Submissions of the Parties

33 The starting point is to identify the whole of the agreement between the parties. Mr Turner contended that the pleaded agreement comprised four documents dated 23 July 2013 being: (a) the Letter of Engagement; (b) the Service Agreement; (c) a document entitled "Important Practical Matters" (**Practical Matters Document**); and (d) a document entitled "Authority to Act" (**Power of Attorney**). MyBudget admits that it entered into an agreement with Mr Turner which comprised the Services Agreement and the Letter of Engagement. The better view is that the Services Agreement and the Letter of Engagement set out the express terms of the relevant agreement (**Contract**). The Practical Matters Document was just that: a document explaining practical matters; and the Power of Attorney was a separate instrument giving effect to an authority provided for by the Contract. Having said this, it was common ground that the issues that fall for determination as to construction are not affected by whether the Practical Matters Document and the Power of Attorney (together with the Letter of Engagement and the Service Agreement) formed part of the one agreement reached on 23 July 2013.

C.2.1 Mr Turner's Primary Submission as to Construction

34 Three provisions of the Service Agreement are worth noting:

(a) Under the heading "**Managing your budget plan**", on the first page, the "Services" to be provided are defined in the following way:

> By entering into this Terms of Service Agreement ('*this Agreement*') you authorise MyBudget to administer your financial affairs in accordance with your budget plan and the terms and conditions set out in this document ('the Services'). (**Services Clause**)

(b) Under the heading "**Fees**" on that same page, the client agrees to pay an "Establishment Fee" (of $2,140.00) and an "Account Administration Fee" (of $34.50 per week). The Account Administration Fee is expressed to be:

> intended to compensate MyBudget for the costs associated with the ongoing management of your financial affairs, namely the ongoing payment of your bills, receiving your salary and for future consultations and will normally be given priority over payments other than your weekly living expenses. (**Administration Fee Clause**)

(c) Under the same heading, on page three, it is provided that:

> MyBudget will absorb all bank fees associated with the Services. We also pay for cheque writing fees and postage for any cheques that we mail on your behalf. (**Absorption Clause**)

35 It is in the context of these and the other provisions of the Contract that the Interest Provision falls to be construed. For convenience, it is worth setting out the Interest Provision again:

> Client funds are held in an interest bearing account arranged by MyBudget. Interest is not payable to clients on funds held in your MyBudget Account. Credit interest on client funds will be applied by MyBudget in its discretion to pay bank fees on the account.

36 Mr Turner contends that there are no words in the first or second sentences of the Interest Provision which reveal an intention, or have the legal effect, that interest earned on client funds will become the property of MyBudget. This construction is said to be given further force when one considers the surplusage of the third sentence if the alternate construction is adopted. It is submitted that if MyBudget was the beneficial owner of the interest on client funds, then the "discretion" to pay bank fees on the account would be unnecessary and that the sentence is left with no work to do.

37 For no reason other than as an illustration of a provision which would operate in the way that MyBudget contends, Mr Turner points to the words used by MyBudget in a 2009 version of the same document, in which the equivalent clause to the Interest Provision was expressed in the following terms:

> All client funds are held in a bank account which is interest bearing, any interest earned will be paid to MyBudget and is appropriated by MyBudget to meet costs and expenses of providing our service, this interest retention is in addition to the weekly fee.

38 Mr Turner points out that there are no words equivalent to "any interest will be paid to MyBudget", or "is appropriated by MyBudget to meet costs and expenses of providing our service", or "this interest is in addition to the weekly fee", in the Interest Provision in Mr Turner's Agreement; nor does the third sentence of the predecessor leave any room to infer an intention to that effect.

39 Adopting Mr Turner's construction of the first and second sentence of the Interest Provision, it is contended that the third sentence would then have the purpose and effect of authorising MyBudget to apply clients' accrued interest, at its discretion, to pay certain types of unusual or "extraordinary" bank fees such as a dishonour fee or a quick clearance fee. This would not include fees covered by the payment of the account administration fee.

C.2.2 MyBudget's Primary Submission as to Construction

40 MyBudget starts with the proposition that the Contract, as noted above, consists of both the Services Agreement and the Letter of Engagement. In summary, it is submitted that the Contract is straightforward. It provides that the client is required to pay an upfront fee, a monthly Account Administration Fee, and some specific fees for certain services (such as $22 to process an immediate transaction, or $20 to modify a settled budget plan). It provides (by the Absorption Clause) that MyBudget is to absorb all bank fees incurred in providing the services and that no interest is payable to the client.

41 When one has regard to the nature of the relationship regulated by the Contract and, in particular, has regard to the low interest rates and modest level of bank fees that MyBudget has negotiated with its banks, the point is made that neither interest nor bank fees are likely to be appreciable. It is said to be obvious that the trouble and expense of separately calculating accounting for interest and bank fees is likely to swamp the amounts involved.

42 The Letter of Engagement describes the "MyBudget account" as an account that can be opened and into which income can be paid, and from which payments can be made. It provides, in the third last paragraph, that "MyBudget will absorb all bank and government fees associated with your MyBudget account".

43 The Services Clause provides that Mr Turner's financial affairs in accordance with his budget plan and the terms and conditions set out in the balance of the document. The fourth paragraph defines the MyBudget Account as "the account managed by MyBudget on your behalf". Under the heading "Fees" in the Administration Fee Clause, there are terms relating to the Establishment Fee and the Account Administration Fee and, midway down the same page, there is the Absorption Clause that provides that "MyBudget will absorb all bank fees associated with the Services. We also pay for cheque writing fees and postage for any cheques that we mail on your behalf".

44 As with Mr Turner, MyBudget accepts, that it is in this context of these interrelated provisions that the Interest Provision falls to be considered. It is asserted that the first two sentences are relatively straightforward: they provide that client funds are held in an interest bearing account arranged by MyBudget, and that interest is not payable to clients on funds held in the client's MyBudget Account. The ordinary meaning of "interest is not payable" is said to mean that the client will not receive interest (at all). It does not mean, as Mr Turner asserts, that "interest is not payable immediately" or "interest is not payable until you close your account with us".

45 MyBudget submits that if a business was to enter into a contract that said that "fees are not payable for service X", then this does not mean that fees can be accrued but not charged until the customer closes their account, whereupon they can be billed with a large account for unpaid fees. An ordinary person would understand the first two sentences to mean that the money would be put into an interest bearing account, but interest would not be paid over to the client at any stage, and MyBudget would therefore retain the interest.

46 Consistently with this proposition, MyBudget contends that Mr Turner advances an unrealistic construction of the third sentence of the Interest Provision. On Mr Turner's construction the discretion to use the interest earned would not be able to be exercised with respect to fees already covered by the payment of the account administration fee. Given that Mr Turner otherwise says that MyBudget has agreed to absorb "all bank fees", this construction must involve reading the words "all bank fees" in the Absorption Clause as "all bank fees other than certain unspecified fees which we haven't told you about". This is said to be an artificial and uncommercial construction.

47 Rather, it is submitted, the proper construction is that no bank fees at all are chargeable to the client and no interest is payable to the client (as the Contract provides in terms). Under this construction, MyBudget obtains and pays the credits and debits of actually holding the bank accounts necessary to carry out the services (that is, the fees, taxes, government charges, and interest), and accounts to the client only for the monies deposited and the payments made out of the accounts, together with the fees the client expressly agrees to pay, being the upfront fee, the Account Administration Fee, and the additional fees detailed and quantified in the Contract (which are fees for additional services provided by MyBudget at a cost to MyBudget).

48 In relation to the third sentence, the construction of that sentence occurs in a context where MyBudget's bank accounts accrue bank fees for carrying out transactions on behalf of clients, as well as being used to earn interest on client funds. The third sentence, it is submitted, merely confirms that MyBudget, which has discretion in relation to interest in light of the second sentence, may utilise that discretion to pay bank fees on the account. It does not mean that bank fees otherwise payable by Mr Turner may be paid by MyBudget applying interest that is otherwise payable to Mr Turner. That would be inconsistent with the other provisions about bank fees, which provide that MyBudget will absorb all bank fees.

49 On that approach, MyBudget accepts the third sentence is unnecessary (in the sense that the contract would operate in the same way without it). The contention that it is surplusage is

rejected in that, in a consumer contract context, it is sensible to make clear that, as a practical matter, one way in which the "no interest, no bank fees" arrangement otherwise specified by the Contract will be carried out is to net bank fees off against interest.

C.2.3 Mr Turner's Submission in Reply as to Construction

50 Mr Turner places central emphasis on the fact that the current version of the Interest Provision does not contain any language which has the effect of disclosing an intention of entitling a trustee to take part of the trust property as an additional, fully disclosed, fee. It does not follow from the fact that interest is to accrue on client funds held in trust and that it is not "payable to clients" that a trustee in the position of MyBudget is at liberty to keep the interest, still less that it may be appropriated by MyBudget in return for MyBudget "not charging bank fees".

51 This construction, it is contended, is supported by the fact that MyBudget did not charge the customer for bank fees. The Absorption Clause, which relevantly provides that "MyBudget will absorb all bank fees associated with the Services" is, like other provisions, to be read contextually, including by reference to the Administration Fee Clause. It is said that read in this way the Contract makes it clear that the weekly administration fee is "intended to compensate MyBudget for the costs associated with on-going management of "the client's financial affairs", including "on-going payment of your bills" and "receiving your salary". The "transaction fees" for payment of client bills and receipt of the client's salary are the relevant bank fees. They are "absorbed" by MyBudget only in the sense that they are not billed separately and this is because they have already been separately paid by way of the weekly fee.

52 No implied term is pleaded and in the absence of express words to the effect that the interest earned on the client funds is to be appropriated by MyBudget the appropriate constructional choice is clear.

C.3 Conclusion as to Proper Construction

53 Read as a whole, the arrangement constituted by the Contract seems to me to be relatively straightforward. The submissions of MyBudget summarised above ought generally to be accepted. The client, who seeks assistance of MyBudget to manage their financial affairs in accordance with an agreed budget, provides the requisite authority to MyBudget to allow it to do so (see the Services Clause). In exchange for this service, the client agrees to pay an upfront and substantial Establishment Fee and an ongoing weekly Account Administration Fee. The former fee is to compensate MyBudget for making the initial arrangements, and the latter fee

is to compensate MyBudget for ongoing management services (see the Administration Fee Clause). Apart from this large initial fee and the regular weekly fees, from time to time, other fees might be incurred in relation to additional services. These additional, non-standard services (additional withdrawals, withdrawing funds committed for future expenses, a transaction that requires immediate processing or if "fresh arrangements" need to be made) carry specified additional charges.

54 It is against this background, of specific identified fees (either one off or regular) and the services provided by MyBudget that those fees are said to compensate, that one comes to the Absorption Clause. The absorption is for all bank fees and also cheque writing fees and postage for any cheques mailed.

55 It seems to me that although the contractual intention may have been able to have been expressed in a more pellucid manner, it remains tolerably plain: no bank fees at all are to be chargeable to the client and also no interest is payable to the client. MyBudget obtains and suffers the pluses and minuses of the bank accounts necessary to discharge its obligations to provide the services. When read as a whole, a reasonable person in the position of Mr Turner would not conclude that the client is entitled to interest because, as the provision expressly states: "[i]nterest is not payable to clients".

56 The surplusage of the "discretion" in the third sentence may be accepted, but this is not a consideration so significant as to undermine the construction I have just identified. If a detailed analysis of a written contract leads to a conclusion that flouts business commonsense, the contract must be made to yield to business commonsense (albeit as an objectively ascertained matter); however, the primary task of contractual construction is the ascertainment of meaning of the words used. As Lord Hoffman noted in *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266 at 273, the argument of redundancy is seldom an entirely secure one. In the context of a series of otherwise straightforward provisions, it does not logically follow that a reasonable person's interpretation of the third sentence would be that interest is reserved for the payment *only* of unforeseen extraordinary unspecified fees, which as MyBudget submits, would most likely be a rare occurrence, given the way in which clients' fees are pooled and managed. The fact remains that here the parties agreed on a workable arrangement which netted off interest and bank fees. This result makes sense, by reference to the text, context and purpose of the Contract as a whole.

D THE BREACH OF TRUST AND FIDUCIARY DUTY CASE

57 It was common ground that the question of whether interest earned on Mr Turner's money is the subject of a trust turns on the proper construction of the Interest Provision. The proper construction of the terms of the Contract is foundational to considering the claim for breach of fiduciary duty. As Mason J explained in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 97:

> …it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

58 In the light of the conclusion that the Interest Provision ought to be construed as expressly permitting MyBudget to keep any interest it earns on the money it holds from time to time on behalf of Mr Turner, the consequence is that such interest cannot be held on trust for Mr Turner. The breach of fiduciary duty case was similarly premised on the notion that MyBudget breached its fiduciary obligation to Mr Turner by failing to account for the interest. For reasons I have already explained, this case must fail.

E THE STATUTORY UNCONSCIONABILITY CASE

59 The statutory unconscionability case can be dealt with shortly. Unsurprisingly, given the broad scope of s 21 of the ACL, Mr Turner did not press his claim that the Court consider whether MyBudget engaged in unconscionable conduct within the meaning of the unwritten law under s 20 of the ACL. As to the s 21 claim, Mr Turner's assertion that MyBudget engaged in unconscionable conduct in all the circumstances, was again premised on MyBudget having taken Mr Turner's interest without his consent (see ASOC, [16(c)] and [17]). Having determined MyBudget's construction of the Interest Provision to be correct, it follows that there was no relevant taking of interest without consent, because MyBudget was permitted to do so by the Interest Provision. This case must fail.

F THE UNFAIR TERM CASE

60 Unlike the statutory unconscionability case, at least as it was run at the hearing, the unfair term case has commences with the notion that the Contract does provide for the appropriation of interest by MyBudget. Hence this argument is advanced by Mr Turner in the alternative in the event that MyBudget's construction of the Contract is, as I have found, preferred.

61 Section 23 of the ACL provides that a term of consumer contract is void if the term is "unfair" and it is a "standard form contract". A term of a standard form consumer contract is "unfair" if it satisfies all of the criteria in s 24(1), which requires that:

> (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
>
> (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
>
> (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

62 There was no dispute between the parties as to the appropriate principles. In *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 377; (2016) ATPR 42-517 at [54], Gilmour J summarised them as follows:

> (a) The underlying policy of unfair contract terms legislation respects true freedom of contract and seeks to prevent the abuse of standard form consumer contracts which, by definition, will not have been individually negotiated: *Jetstar Airways Pty Ltd v Free* (2008) 30 VAR 295; [2008] VSC 539 at [112].
>
> (b) The requirement of a "significant imbalance" directs attention to the substantive unfairness of the contract: *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 481; [2001] UKHL 52 at [37].
>
> (c) It is useful to assess the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it: *Director General of Fair Trading v First National Bank plc* at [54].
>
> (d) The "significant imbalance" requirement is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in its favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty: *Director General of Fair Trading v First National Bank plc* at [17] per Lord Bingham, applied in *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Limited (in liq) (formerly Advanced Medical Institute Pty Limited)* [2015] FCA 368 at [950].
>
> (e) Significant in this context means "significant in magnitude", or "sufficiently large to be important", "being a meaning not too distant from 'substantial'": *Jetstar Airways Pty Ltd v Free* at [104]-[105] per Cavanough J; cf *Director of Consumer Affairs Victoria v AAPT Limited* [2006] VCAT 1493 at [32]-[33].
>
> (f) The legislation proceeds on the assumption that some terms in consumer contracts, especially in standard form consumer contracts, may be inherently unfair, regardless of how comprehensively they might be drawn to the consumer's attention: *Jetstar Airways Pty Ltd v Free* at [115].
>
> (g) In considering "the contract as a whole", not each and every term of the contract is equally relevant, or necessarily relevant at all. The main requirement is to consider terms that might reasonably be seen as tending to counterbalance the term in question: *Jetstar Airways Pty Ltd v Free* at [128].

63 In *Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited* [2015] FCA 1204; (2015) 239 FCR 33, Edelman J at 40-41 [39] noted that s 24 is an example of a legislative technique which creates broad evaluative criteria to be developed incrementally and that it is not possible to state a precise or universal test for its application. At 41-42 [43], his Honour approved the following approach concerning the construction of s 24:

1. for a term to be unfair it must satisfy the requirements of all of s 24(1)(a) to (c);
2. the onus is upon the applicant to prove the matters in ss 24(1)(a) and 24(1)(c) but it is upon the respondent in relation to s 24(1)(b);
3. s 24(2)(a) only requires the Court to consider transparency in relation to the particular term that is said to be unfair and only in relation to the matters concerning that term in s 24(1)(a) to (c);
4. similarly, the assessment of the contract as a whole in s 24(1)(c) only requires the Court to consider the contract as a whole in relation to the particular term that is said to be unfair and only in relation to the matters concerning that term in s 24(1)(a) to (c);
5. as the Explanatory Memorandum to the *Trade Practices Amendment (Australian Consumer Law) Bill (No 2)* provided at [5.39], "if a term is not transparent it does not mean that it is unfair and if a term is transparent it does not mean that it is not unfair"; and
6. guidance can be had to s 25 which provides examples of unfair terms.

64 Mr Turner's pleading asserts that the Interest Provision meets the statutory characterisation of being unfair because it "does not put the client on clear and certain notice that any interest earned on client funds would be appropriated by the Respondent and used for its own purposes": see ASOC [18]. Although in some respects they overlap, it is convenient to assess the submissions of Mr Turner by reference to the requirements of each of subsections 24(1)(a) to (c).

F.1 Would the Interest Provision cause a significant imbalance in the parties' rights and obligations arising under the contract?

65 Mr Turner submitted that the form of the Interest Provision caused a significant imbalance in the parties' rights and obligations by reason of the fact that "it empowers a trustee to take and use trust property for its own purposes and impose a hidden fee". I will assume in favour of Mr Turner that although framed in terms of taking "trust" property, I take the complaint to be that the real vice in the Interest Provision was a lack of transparency in making it plain to group members that any interest earned on funds would be to the benefit of MyBudget.

66 In order to assess properly whether the Interest Provision causes a significant imbalance in the rights and obligations arising under the Contract, consideration must be given to the Interest Provision in the context of the parties' other rights and obligations.

67 In considering whether the Interest Provision, to adapt the words of Lord Bingham, tilts the agreement significantly in MyBudget's favour, it is important to note that although the Interest Provision conferred on MyBudget the benefit of retaining any interest earned on group member funds, the correlative (or at least related) obligation was for MyBudget to absorb the bank fees incurred in connexion with the provision of its services. Given the nature of services and the fact that they were provided to persons who had experienced financial difficulty, it is reasonable to think that any interest obtained on group member funds would not, in most cases, be large and it would also be reasonable to assume that it may be less than the bank fees charged. It is worth recalling that those using the services provided for by the Contract are persons who were unlikely to enjoy a significant interest return on any of their surplus funds. Hence it was likely that both sides of the notional ledger would, at least in many cases, be roughly netted off.

68 In noting this, I am not ignoring that pursuant to the Contract, in exchange for MyBudget supplying its services, group members had to pay a not inconsiderable Establishment Fee (in the case of Mr Turner being $2,140) and a significant Account Administration Fee (in the case of Mr Turner being $38.64 per week). MyBudget was fully, some might say handsomely, remunerated, but any interest that was received was relatively small in the scheme of things (in the case of Mr Turner $0.19 - $0.26 on a weekly basis by way of illustration). Although minds may differ as to whether the overall cost of the services was reasonable, this is not a matter I am called upon to determine. It seems somewhat a stretch, however, to suggest that the Interest Provision itself causes a *significant* imbalance in the rights and obligations arising under the Contract.

69 Separately from this, the Interest Provision cannot be assessed in a vacuum which ignores the practical considerations which attach to the carrying out of contractual obligations. The Interest Provision reflected a pragmatic solution to a practical issue. The practical issue being how one was to account for interest and bank fees earned and charged on separate amounts of money that had since been pooled. If one was to adjust the Contract by omitting one part of the netting off (and requiring individualised accounting) then no doubt MyBudget would say that the

commercial response would be to either increase the fees charged or to introduce individualised apportionment of bank fees.

70 The practical effect of the Interest Provision is that it removes the necessity to keep separate bank accounts or to perform some complicated and costly accounting process to ascertain the amounts payable by way of interest on an individual basis. There is something to be said for the submission made by MyBudget that irrespective of what one might think of charging very significant amounts to financially challenged persons to manage their affairs, in the context of such an arrangement, there was no imbalance between the parties caused by the Interest Provision itself. Moreover, if one is to assess the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it (see *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52; [2002] 1 AC 481 at 505 [54]), the practical effect would not be significant as the costs of accounting for interest payable to individual group members would likely be disproportionate to any benefit that would be received (leaving aside whether the costly accounting process would have been factored into increased fees or by also passing on a proportion of bank charges).

71 As noted above, the evaluative exercise requires that the Court take into account the extent to which the term is "transparent" and have regard to the contract "as a whole": s 24(2) ACL. Under s 24(3), a term is "transparent" if it is:

> (a) expressed in reasonably plain language; and
>
> (b) legible; and
>
> (c) presented clearly.

Mr Turner submits that when the considerations in sub-sections 24(2) and (3) of the ACL are applied to the Interest Provision, the conclusion to be drawn is that the provision is not transparent, nor does recourse to the Contract as a whole ameliorate the inherent unfairness of the Interest Provision. Put more broadly, it is said that even if the Interest Provision could be said to be plainly and clearly expressed, this is not capable of neutralising "the assumption that some terms in consumer contracts, especially in standard form consumer contracts, may be inherently unfair … regardless of how comprehensively they might be drawn to the consumer's attention": *Jetstar Airways Pty Ltd v Free* [2008] VSC 539; (2008) 30 VAR 295 at 337 [115].

72 On one level it can be accepted, as MyBudget contends, that the Interest Provision was expressed in plain language, not in legalese and that it was written in legible font, and clearly

presented under a separate bold heading "Interest". This does not, however, deal with the entirety of the argument as to a want of transparency by Mr Turner. It is said the term imposed "a hidden fee", which is the antithesis of transparency. In this regard, the different form of the interest provision in the 2009 version of the standard form consumer contract, evinces this lack of transparency (see [37] above).

73 It is not correct to characterise the Interest Provision as a "hidden fee". Although as I noted in relation to the construction argument, the Interest Provision could have been expressed more clearly, when it is read in the context of the Contract as a whole, it is sufficiently clear. The Letter of Engagement explains the "MyBudget account" and notes, in the third last paragraph, that "MyBudget will absorb all bank and government fees associated with your MyBudget account". In the Service Agreement, the Fees are set out and the Absorption Clause appears. The first two sentences of the Interest Provision provide, in a straightforward manner, that client funds are held in an interest bearing account arranged by MyBudget, and that interest is not payable to clients on those funds held. As noted above, the ordinary meaning of "interest is not payable" is that the client will not receive any interest at all. The written terms of the Service Agreement was provided to Mr Turner, and indeed, was signed by Mr Turner. That document was legible, presented clearly and was readily available to him.

74 Overall, for the reasons I have expressed, and as an evaluative assessment of all the circumstances relevant to the Interest Provision including its transparency and the Contract as a whole, the Interest Provision did not cause a significant imbalance in the parties' rights and obligations arising under the Contract. This is determinative of the application for relief, but I will go on to briefly consider the other aspects of the argument.

F.2 Was the Interest Provision not reasonably necessary in order to protect the legitimate interests of MyBudget as a party advantaged by it?

75 It is submitted that the Interest Provision cannot be reasonably necessary to protect MyBudget's legitimate interests, including its interest in defraying the cost to it of bank fees incurred on transactions. This is because a "hidden fee" could never be said to be reasonable, still less when MyBudget has already been compensated for the expense it uses to justify the hidden fee by way of the weekly Account Administration fee. Additionally, there is a rebuttable presumption in s 24(4) that a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term. Mr

Turner submitted that MyBudget identified no ground that establishes the reasonable necessity of the hidden fee and for the protection of its interests in circumstances where it bears the onus.

76 I have already explained why I consider the premise of a "hidden fee" is mistaken. Having said this, leaving aside the reasonableness of consideration generally, contrary to Mr Turner's submission, I am satisfied that MyBudget established that it was reasonably necessary in order to protect the legitimate interests of MyBudget for the pragmatic arrangement (to net off bank fees and interest) to be put in place by the Interest Provision. This is in circumstances where group member funds had been pooled into one account, bank charges were payable on that pooled account and any amounts payable for interest to group members were likely to be very modest and, in any event, the cost of accounting for such modest sums would likely have significantly reduced or even eliminated any such sum.

F.3 Would the Interest Provision cause detriment to a party if it were to be applied or relied on?

77 As would no doubt be the case in many cases, here, considerations of detriment were also an important part of the consideration of whether the Interest caused a significant imbalance in the parties' rights and obligations arising under the contract.

78 Mr Turner submitted that the Interest Provision causes financial detriment to Mr Turner by the appropriation of "trust" property by his trustee for no consideration, because the adventitious "set-off" propounded by MyBudget, namely, "no charges for bank fees but no interest", is illusory. I have already explained why there is no appropriation of trust property and the "set-off" is neither adventitious nor illusory but is rather a practical solution to dealing with the charging of bank fees on a pooled account on the one hand and interest accruing on pooled funds on the other.

F.4 Conclusion

79 For reasons I have explained, the Interest Provision does not cause a significant imbalance in the parties' rights and obligations arising under the Contract. Without reaching any conclusion as to the overall subjective "fairness" of the bargain between a corporation charging substantial fees to persons vexed by financial difficulty for the types of services it provided, MyBudget established, in the context of the Contract entered into, that the Interest Provision was reasonably necessary in order to protect its legitimate interests. Additionally, when seen in the context of the bargain represented by the Contract as a whole (including the "netting off" of

bank fees and interest for group members), I am not satisfied that the term itself causes an overall detriment (whether financial or otherwise).

G THE LIMITATION OF LIABILITY DEFENCE

80 Lastly, in the event that I found Mr Turner's construction of the Interest Provision to be correct, MyBudget submitted that it would be able to rely on a limitation of liability clause contained in the Contract. The clause purported to exclude or reduce liability for equitable compensation or an account in the case of a breach of fiduciary duty or statutory compensation. Given my conclusions as to the construction of the Contract, it is unnecessary to consider this defence.

H CONCLUSION

81 It follows from the above that the individual claim of Mr Turner must be dismissed. It will also be necessary for me to make orders under s 33ZB of the FCAA which will operate so as to bind group members who have not opted out of the determination of the common issues that I have resolved in the context of determining Mr Turner's claim.

82 This leaves the question of costs. MyBudget did foreshadow that it would seek costs in the event that the application was dismissed. Given the nature of this case and, more generally, that representative proceedings have a public dimension which transcends ordinary *inter partes* litigation and the rights of the parties *inter se*, it is not the case that costs should somehow automatically follow the event. I will give the parties seven days to provide details of any order they seek as to costs and to provide any submissions. Subject to hearing from the parties, I would then propose to deal with costs on the papers.

I certify that the preceding eighty-two (82) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lee.

Associate:

Dated: 18 September 2018