

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 18/12/2020 10:23:30 AM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Concise Statement
File Number: VID806/2020
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v LA
TROBE FINANCIAL ASSET MANAGEMENT LTD
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 18/12/2020 10:37:20 AM AEDT

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

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Concise statement

No. VID of 2020

Federal Court of Australia
District Registry: Victoria
Division: General

IN THE MATTER OF LA TROBE FINANCIAL ASSET MANAGEMENT LTD
ACN 007 332 363

Australian Securities and Investments Commission
Plaintiff

and

La Trobe Financial Asset Management Ltd (ACN 007 332 363)
Defendant

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. The defendant, La Trobe Financial Asset Management Ltd (ACN 007 332 363) (**La Trobe**), is the responsible entity of a registered managed investment scheme called the La Trobe Australian Credit Fund (ASRN 088 178 321) (**Fund**).
2. La Trobe holds an Australian Financial Services Licence (AFSL 222213), under which it is authorised, among other things, to operate registered managed investment schemes that hold deposits and mortgages for retail and wholesale clients.

Investment options and withdrawal rights

3. The Fund invests in loans secured by first mortgages, as well as cash and deposits.
4. A person may acquire an interest in the Fund (and thus become a member of the Fund) by making an investment in the Fund. The minimum investment is currently \$10.
5. La Trobe offers several different investment options to members of the Fund, including an investment option known as the “48 hour Account”, “Classic 48 hour Account” or “Classic Notice Account” (**48 Hour Account**), and an investment option known as the “90 Day Notice Account” (**90 Day Account**).
6. The asset allocation for each investment option is different. For example, on 29 February 2020:

| | | |
|--|---|-------------------------|
| Filed on behalf of (name & role of party) | <u>The Plaintiff</u> | |
| Prepared by (name of person/lawyer) | <u>Nick Kelton</u> | |
| Law firm (if applicable) | <u>Australian Securities and Investments Commission</u> | |
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- (a) 26.5% of funds in the 48 Hour Account were invested in cash and deposits and 73.5% of funds in that investment option were invested in first mortgages; and
 - (b) 16.2% of funds in the 90 Day Account were invested in cash and deposits and 83.8% of funds in that investment option were invested in first mortgages.
7. The constitution of the Fund (**Constitution**) sets out the rights of members to withdraw from the Fund. Before 21 August 2020, members of the Fund had the following rights to withdraw from the 48 Hour Account and the 90 Day Account:
- (a) when the Fund was liquid, members had a right to withdraw by giving a withdrawal notice to La Trobe, which La Trobe was required to satisfy within 12 months after receiving the notice; and
 - (b) when the Fund was not liquid, as long as La Trobe made a current withdrawal offer (which it was not obliged to make), members had a right to withdraw in accordance with the terms of the withdrawal offer.
8. Further, whether the Fund was liquid or not, in certain circumstances, La Trobe was entitled to withhold or suspend any right of members to withdraw, or to satisfy withdrawal notices only proportionally.

Marketing of the Fund

9. In the period from at least 1 April 2017 to the present, La Trobe has marketed the Fund in a variety of ways throughout Australia, including in newspapers and magazines, on television and radio, and on its website (www.latrobefinancial.com.au).
- 48 Hour Representations*
10. In the period from at least 1 April 2017 to 14 August 2020, on its website, La Trobe described the 48 Hour Account using the phrases “48 hour”, “48 hour Account” or “Classic 48 hour Account”, and, until 19 May 2020, described that investment option as providing “Easy access to cash” or “Easy access to your cash”.
11. Further, in the period from 1 April 2017 to 25 January 2020, La Trobe ran newspaper advertisements for the Fund which described the 48 Hour Account using the phrase “48 hour” or “48 hour Account”.
12. By engaging in the conduct in paragraphs 10 and 11 above, La Trobe, in the course of trade or commerce, represented to consumers that persons who invested funds in the 48 Hour Account would be entitled to withdraw those funds within 48 hours of giving a withdrawal notice to La Trobe (**48 Hour Representations**).

13. The 48 Hour Representations were misleading or deceptive, or likely to mislead or deceive, because, in the period from 1 April 2017 to the present:
- (a) when the Fund was liquid, La Trobe had up to 12 months to satisfy a withdrawal notice in relation to funds invested in the 48 Hour Account; and
 - (b) when the Fund was not liquid, a member of the Fund may have had no right to withdraw funds invested in the 48 Hour Account, or may only have been entitled to withdraw a proportion of the amount specified in the withdrawal notice.

90 Day Representations

14. In the period from 24 June 2019 to the present, on its website, La Trobe described the 90 Day Account as the “90 Day Notice Account”, and, until 19 May 2020, described that investment option as providing “Easy access to your cash”.
15. Further, in the period from 12 July 2019 to 25 January 2020, La Trobe ran newspaper advertisements for the Fund which described the 90 Day Account using the phrase “90 Day Notice” or “90 Day Notice Account”.
16. By engaging in the conduct in paragraphs 14 and 15 above, La Trobe, in the course of trade or commerce, represented to consumers that persons who invested funds in the 90 Day Account would be entitled to withdraw those funds within 90 days of giving a withdrawal notice to La Trobe (**90 Day Representations**).
17. The 90 Day Representations were misleading or deceptive, or likely to mislead or deceive, because, in the period from 24 June 2019 to 21 August 2020:
- (a) when the Fund was liquid, La Trobe had up to 12 months to satisfy a withdrawal notice in relation to funds invested in the 90 Day Account; and
 - (b) when the Fund was not liquid, a member of the Fund may have had no right to withdraw funds invested in the 90 Day Account, or may only have been entitled to withdraw a proportion of the amount specified in the withdrawal notice.

Capital Stable Representations

18. In the period from 16 May 2019 to 19 May 2020, on its website, La Trobe described an investment in the Fund as being a “Capital stable investment in every economic cycle”, and stated that “We offer an investment product range that delivers simplicity, performance and capital-stable monthly income”.

19. Further, on 1 December 2019, La Trobe ran advertisements in Money Magazine which invited consumers: “To invest with the Best and enjoy capital stable returns with La Trobe Financial”.
20. By engaging in the conduct in paragraphs 18 and 19 above, La Trobe, in the course of trade or commerce, represented to consumers that any capital invested in the Fund would be “stable”, in the sense of there being no risk of substantial loss of that capital (**Capital Stable Representations**).
21. The Capital Stable Representations were misleading or deceptive, or likely to mislead or deceive, because a person who invested in the Fund could substantially lose the capital invested.

Performance Representations

22. In the period from at least 1 April 2017 to 14 August 2020, on its website, La Trobe displayed a particular rate of return in relation to each of the investment options in the Fund.
23. Further, in the period from 1 April 2017 to 25 January 2020, La Trobe ran newspaper advertisements in which it also displayed a particular rate of return in relation to each of the investment options in the Fund.
24. By engaging in the conduct in paragraphs 22 and 23 above, La Trobe, in the course of trade or commerce, represented to consumers that an investment in the Fund would provide the particular rate of return that was displayed in relation to the relevant investment option (**Performance Representations**).
25. The Performance Representations were misleading or deceptive, or likely to mislead or deceive, because none of the investment options in the Fund were guaranteed to provide any particular rate of return. Instead, the rate of return depended on the performance of the Fund’s investments.

B. RELIEF SOUGHT FROM THE COURT

26. The plaintiff seeks the relief set out in the accompanying originating process.

C. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

27. An interest in the Fund is a financial product within the meaning of s 12BAA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and s 764A of the *Corporations Act 2001* (Cth) (**Corporations Act**), and a financial service within the meaning of a 12BAB of the ASIC Act. Further, in operating the Fund, La Trobe provides a financial service within the meaning of s 12BAB of the ASIC Act and s 766A of the Corporations Act.

28. The 48 Hour Representations, the 90 Day Representations, the Capital Stable Representations and the Performance Representations were made in trade or commerce, and were made in relation to financial services within the meaning of s 12DA(1) of the ASIC Act, in connection with the supply or possible supply of financial services within the meaning of s 12DB(1) of the ASIC Act, and in relation to a financial product or financial service within the meaning of s 1041H(1) of the Corporations Act.
29. The 48 Hour Representations and the 90 Day Representations were representations about the existence or effect of a right within the meaning of s 12DB(1)(i) of the ASIC Act. By making those representations, La Trobe:
- (a) made false or misleading representations in contravention of s 12DB(1)(i) of the ASIC Act; and
 - (b) engaged in misleading or deceptive conduct or conduct that was likely to mislead or deceive, in contravention of s 12DA(1) of the ASIC Act and s 1041H(1) of the Corporations Act.
30. The Capital Stable Representations and the Performance Representations were representations about the performance characteristics or benefits of an investment in the Fund within the meaning of s 12DB(1)(e) of the ASIC Act. By making those representations, La Trobe:
- (a) made false or misleading representations in contravention of s 12DB(1)(e) of the ASIC Act; and
 - (b) engaged in misleading or deceptive conduct or conduct that was likely to mislead or deceive, in contravention of s 12DA(1) of the ASIC Act and s 1041H(1) of the Corporations Act.
31. Further, the Capital Stable Representations and the Performance Representations were representations with respect to future matters, and La Trobe did not have reasonable grounds for making them. In this respect, ASIC relies on s 12BB of the ASIC Act and s 769C of the Corporations Act.

D. ALLEGED HARM

32. In the period from 1 January 2017 to 30 August 2020, 21,313 persons invested in the Fund. The total amount of new investments by those persons was approximately \$6,931,699,451. In particular:
- (a) in the period from 1 January 2017 to 30 August 2020, approximately 8,331 persons invested funds in the 48 Hour Account, and the total amount of new investments by those persons was approximately \$2,978,145,392; and

- (b) in the period from 24 June 2019 to 30 August 2020, approximately 1,517 persons invested funds in the 90 Day Account, and the total amount of new investments by those persons was approximately \$321,727,521.

Date: 18 December 2020

This concise statement was prepared by Philip Solomon QC and Mark Hosking of Counsel.

Nick Kelton

Signed by Nick Kelton

Solicitor for the Australian Securities & Investments Commission

Certificate of lawyer

I Nick Kelton certify to the Court that, in relation to the concise statement filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the concise statement.

Date: 18 December 2020



Signed by Nick Kelton

Lawyer for the Plaintiff