Sean and Paula McArdle
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Parliamentary Joint Committee on Corporations and Financial Services 2009

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Introduction:

There is no reasonable doubt, after examining the conduct of the Commonwealth Bank and Storm Financial over the last decade, that they were partners. Partners in a deliberately orchestrated and jointly executed financial scheme developed to deliver maximum profits to both companies.

This in its self is not anything which in isolation warrants adverse comment. However the practices employed by both parties to maximise those profits for both companies, have demonstrated a negligently aggressive, flagrant and arrogant contempt for the regulations and laws of the sector and the retail clients targeted.

The actions taken to implement these practices are astounding departures from conventional Banking and Financial Planning practices. The results were extraordinary income generation with no risk to the Banks or Storm Financial. Unfortunately the same could not be said for the retail clients. Risk to these clients was not only that of the economic condition, but as history shows, more considerably the folly of the CBA Bank that financed the greater proportion of this scheme.

It is apparent that the amongst other critical components of this scheme not thought through or considered, was an exit strategy when one or the other of the partners lost their nerve. The CBA for reasons best know to themselves, and speculated by others, has stupidly and arrogantly taken the decision to exit this partnership without and pre consideration for its clients or its contractual arrangements.

The evidence of financial offers to catastrophically affected clients, in return for indemnity from further legal action strongly suggest the Bank has committed wrongful acts and knows it. Instead of honesty the Bank has orchestrated damage control procedures via influencing media and regulator actions. The banks executives have successfully utilised the enormous financial position to direct and focus attention on its smaller and less influential partner. It is a matter for the future examiners of this matter to determine if this is acceptable in lieu of genuine assessment and action to rectify the problem for which they are most certainly accountable and probably responsible for.

The matters subject of the following referenced action are different to that of the offences claimed by McArdles and other Storm Financial investors adversely effected by the Banks actions of October to December 2008. Many of the points noted by his

Honour in his summation bare direct correlation and hence relevance to the appropriateness of the actions taken by the Commonwealth Bank in the matter currently before the committee.

Federal court of Australia
Mention Hearing December 2008

I refer to comments of The Honourable Judge J Greenwood in his summation of the facts presented and his findings Re: Storm Financial Limited ABN 11 064 804 691 v Commonwealth Bank of Australia ABN 48123 123 124 FCA 1991, dated 24th of December 2008.

Page 3 Point 9 of the his honour's summary says :-

"Storm has been dealing with CGI for over 10years and in early 2007 Storm began discussions with the Bank to enter into an arrangement whereby the bank would offer margin loan facilities to Storm's clients of up to 80% of the value of selected funds to be acquired, that is, loans with an 80% LVR. Those discussions resulted in a letter dated 18th May 2007 by which the Bank and Storm agreed to the terms for such investments for clients of Storm".

Q1 Who from CBA approved this upward movement of the LVR and on what grounds?

Q2 What risk assessment was conducted on the product by the CBA before determining that it was appropriate for retail clients?

Q3 What benefit was there for the bank to offer Storm Financial this increase?

Q4 Did other Financial Planners receive the same increase?

Q5 Was the CBA positioned to benefit in any way from they anticipated investor support for such an initiative? Thought should be given to the lending parameters applied generally to Storm clients from both investment loans and margin loans. Further consideration re the proposed float of Storm Financial may also provide insight to the mindset of executives involved in this proposal.

Page 4 Point 10:- A paragraph from the letter dated 18 May 2007, from the Bank reads as follows:-

> "Despite our allocation of a global LVR of 80% to your clients on the basis of our expectations being met, as set out above, *nothing* in this letter modifies or varies the obligation of any client borrower under clause 3.2 of the margin loan to pay us the amount owing under the margin loan if that client borrower is either in default or <u>we send the client borrower a five day notice requiring payment of the amount owing</u>".

Section 3.2 of the Banks own document being the Terms and Conditions reads:-
"You must pay us the amount owing, on the date we specify, if:

(a) you are in default (see part V); or
(b) <u>we send you a notice requiring you to do so.</u> <u>We will always give you at least five (5) working days notice if we do this.</u>

To understand the above underlined parts of sections (3.2) and the Banks own letter it is helpful to apply the Banks own definition of the word “you” found in the Term and Conditions document (next page).
“**You** or **Borrower** means the person who borrows the money from us, whose details are set out in the application form. If there are more than one, you means each of them separately and every two or more of them jointly”.

- Comm Sec staff member, Angus Cameron informed the McArdles that CBA were not legally required to contact us re buffer or margin call notifications.
- Mr Brian Phelps, Executive Manager of Colonial Margin Lending (CML) further stated that they (CML) never contact Storm Clients and that this arrangement had worked fine for the last 10 years. He further stated that CML were *not allowed* to contact Storm clients. No disclosure of this, or the fact that this restriction would severely and negatively impact on the Banks ability to give the McArdles a buffer or margin call, was ever made by either Storm Financial or CBA to the McArdles.
- Mr John Clothier, Executive Manager of CML also stated in correspondence to the McArdles that the Bank had no responsibility to contact clients and that this was a matter for Storm.
- April 2009, Sean McArdle contacted CBA by phone re inquiries about taking out a margin loan with CML. Paul from Comm Sec gave a very full and detailed explanation of the margin loan product CML offered. He, like his colleagues had previously, stated that there was no obligation on the Bank to provide a margin call to the client and that it was just a courtesy if they did.

The written documents (previously referred to) and presented to the Court in December by the Bank are contradicted by Mr Cameron, Mr Phelps, Mr Clothier and Paul from Comm Sec.
No explanation for this contradiction has been provided to this date. However, the comments by the Banks executives and staff do fit with an ill-conceived attempt to mislead consumers re the Banks failure to abide by its own contractual agreement to provide clients with buffer and margin calls. Given the impact this scenario is likely to have on people effected, the behaviour of the Bank is a clear demonstration of unquenchable desire to protect profits at any cost.

However

If it is the Banks contention that its executives and staff have applied the correct interpretation of the terms and condition and application form, then the Bank would appear to have deliberately drafted and presented deceptive and misleading documents to the market..

On Page 4 point 10 of the Honourable Judges summary a third paragraph from the Banks letter is referred to and states:-

"In the unlikely event of a margin call, CGI and Storm Financial *will work in partnership* to clear the margin call. Note however that CGI *reserves* its rights under its *margin lending terms and conditions.*

[emphasis added]

- Interestingly the Bank uses the word Partnership. Yet since December 8th has done everything possible to distance itself from Storm Financial. It is confronting to understand the Banks commitment (demonstrated) to its business partners and clients is one accurately summarised by the term "fair weather friends".

Q6 Given the Banks written and verbal refusals to accept any responsibility for the monitoring of the margin loans their clients held, what was the commercial motivation for writing, "CGI and Storm Financial *will work in partnership* to clear the margin call".?

- A margin call is not *unlikely* as stated by the bank, if the loan is granted in a failing market to a client with a high LVR by a bank that refuses to accept any responsibility for notifying the client of their trigger points, (as per the McArdles position at the time CML took over the margin loan).

Q7 Will the inquiry endeavour to have a full disclosure made by the Bank pertaining to the assessment approval and implementation of this loan including key players and their involvement and the production of all correspondence including official and unofficial, electronic and hardcopy relating to this matter.

- At the time the McArdles were contacted by CML (for the first time) on the 8th of December 2009. No other attempts had been made by the Bank to contact them at all. McArdles phone records will confirm this.

Q8 Can the Bank explain why they made no attempt to contact the McArdles directly to see what if anything could be done to correct their LVR.

- Upon receiving this call the McArdles were told they were margined call over two weeks earlier and it was too late to correct their LVR despite having the security available to do so. It was clear that the nature of the call was to:-
  (a) accredit blame fully on Storm Financial for the Banks own contractual failing.
  (b) To advise the McArdles that a demand payment for the negative equity debt was imminent. The Bank allowed the McArdle's negative equity to reach 126.3% while it failed to react to the economic conditions of late 2008.

Q9 Can the Bank explain what action it took, proportionate and relevant to the potential devastation to its client, to prevent the above catastrophic margin call and there by fulfilled its obligation to, "CGI and Storm Financial *will work in partnership* to clear the margin call", as stated in the letter to Storm?

CGI uses a product called **"Empire"** as a management system for the whole margin loan product. I am aware that this system has a feature built into it that automatically produces a notification document when a client hits margin call trigger point.

Q10 Can the Bank advise if this feature responds to Buffer points in the same manner?

I have been advised that in order for this notification not to be acted upon a person operating the system would need to deliberately make the choice to ignore the information.

Q11 Who was the person responsible for the supervision of this system?
Q12 Was it an "in house" responsibility to send these notifications or was this function outsourced to a mailing house?

A number clients from Storm Financial have claimed not to have received any notification at Buffer or Margin call.
In response to this the staff and management of CBA/CML/CGI have repeatedly claimed that CML advised them and their advisor by updating the CGI website. This would appear to have been a deliberate strategy implemented by CML.

Q13 Why did CML choose to notify clients and advisors via an alternative method to the Empire system when a document had already been generated that only had to be sent?
Q14 Has the Empire system been the subject of complaints re inaccuracy and out of date information as has the CGI website?
Q15 Will the Bank produce both the backed up records of Empire system in an effort to demonstrate their transparent and dedicated pursuit of an honest resolution to Storm Financial and CML clients concerns?
Q16 What percentage of Storm Clients entering Margin call received an Empire generated notification of margin call, when margin call was reached during the months starting at the beginning September to end of November 2008?
Q17 How many non Storm clients (that is clients of other financial planners using CGI products) entering margin call during the same period received a notification as a result of the Empire System?
Q18 Was there a system failure with the Empire program during the period of Storm/CML client margin calls that has led to this current situation?
Q19 How many staff were assigned to the maintenance of Storm/CML client portfolios during the period of 2006, 2007, 2008 and 2009?
Q20 Was this staffing model revised and changed during the periods of September to end of November 2008?
Q21 Given the number of request that were generated was it physically possible for those/that staff member to keep up with the demands of those requests?

The Bank, despite having commercial obligations and commitments to its partner Storm Financial, and to its own clients the McArdles, have interpreted the act of incompetently maintaining a universally reputed and reportedly inaccurate web site

as the best way to advise clients of their buffer and margin trigger points been reached.
This is despite the Banks computer system, " Empire", which encompasses the automated notice generating system.
Despite the fact they had not supplied the McArdles with passwords and pin numbers to access this site.
Despite having up to date contact details for the McArdles.
Despite having up to date contact details for the McArdle's advisor Trevor Benson.
Despite a history of providing clients with written notification and advisors phone and or e-mail notification of the clients position.
Despite non Storm investors still being advised in line with the historical practice of the Bank above.

Q22 Why was Storm, and its clients treated differently?

Q23 What disclosures / advice were given to clients to advise them that they were not entitled to the protection that other financial planning clients were receiving as a standard operating practice?

Page 4 point 11 of the summary refers to the margin loan application form and particular attention is drawn to the statement:-

"Commonwealth Bank of Australia is authorised to take instruction(s) from the Client's Adviser on behalf of the Borrower(s). By completing this section, I acknowledge and confirm this:

I have been appointed by the borrower(s) as their Client Adviser; and

I have Identified the borrower(s)".

Brian Phelps Executive Manager, Investment Lending Stated in Correspondence to the McArdles dated 05/01/2009, "In signing the Margin Loan client agreement with us, you appointed Storm Financial as your advisor. You authorised Storm Financial to provide instructions to us on your behalf by Clause 3 of the Margin Loan Application".

This section of the *Banks* form has instructions printed and directly relating to the completion of the section.

Find attached on page 7 a copy of the McArdles form, it is indicative of the document presented to all Storm Clients.

In bold type and forming the title of this section are the words "**Advisor to Complete**"

There is no signature or initials on this page nor was it completed in the presence of, or before the clients sighted and completed their signatory requirements.

At the Banks direction the section is to be completed by the *advisor*.

As part of the application the term "You" can be taken to have the same definition as in the Terms and Conditions. This definition previously referred to in this document does not include the client's advisor.

For Mr Phelps to suggest the clients authorised anything by this section would appear to be another example of the concerted attempts by senior Bank employees to deceive and mislead clients rather then accepting responsibility for its failure.

Q24 Could Mr Phelps please explain his written interpretation to the inquiry?

3. Client Adviser Details – Adviser to Complete

Adviser's name: Trevor Benson
Client Adviser Number (CAN): 7/453
(if an existing adviser with Colonial Geared Investments)
Authorised representative of (Australian Financial Services Licensee): Storm Financial Ltd (14)
Postal address: Po Box 5066, Townsville State Qld Postcode 4810
Business phone: 0747725377 Facsimile: ( ) Mobile phone: E-mail address:

Commonwealth Bank of Australia is authorised to take instruction(s) from this client's adviser on behalf of the Borrower(s).
By completing this section, I acknowledge and confirm that:

- I have been appointed by the Borrower(s) as their Client Adviser; and
- I have identified the Borrower(s).

Adviser Date of Birth (If new Adviser) / /

4. Credit Limit

Credit limit applied for (Minimum of $20,000 applies) $3,000,000
Charge company registration fee to loan account?* ☐ Yes ☐ No – Please attach cheque
*If charges are capitalised to the loan account *you* must ensure the *credit limit* is sufficient and that the loan is not placed into a margin call by capitalising such charges. The company registration fee will not be charged if the facility is not approved. If you have provided a cheque for the company registration fee and the facility is not approved, the cheque will be returned to you.

Changing the subject temporarily:-
I would like to draw attention to the amount written into the "Credit Limit applied for" of **4.Credit Limit**:-
The first number of this amount has been obviously changed. There are no initials or dates indicating this was a legitimate error.

The McArdles did not apply for this amount. They were not contacted by Storm or the Bank re this alteration.

Q25 Can the Bank explain why a clearly altered document was allowed to be processed without question?

Page 5 Point 12 of the judges summary refers to section 9 of the Application. This section is a "Risk Disclosure Statement". At section 9 of Part 2, risks in relation to margin calls are described in these terms;

"**Margin calls**

If the margin loan equals or exceeds a certain percentage of the overall *security* value

You will receive a margin call. *You* cannot just "wait out" any down turns in the market. *You* will have limited time to deal with any margin call, by either repaying to us enough of *your* facility or giving us more securities on our list. If *you* fail to act within the time period specified in the terms and conditions, then some of *your* securities may be sold…………………………………*base* security value".

[the emphasis in this quote is the emphasis in the original document]
(underlining is not part of the original document)

Q26 Given the definition of the word "you" from the Banks terms and conditions document. Together with the comments by Clothier, Phelps, Cameron, and Paul from Comm Sec can the Bank explain what the above section means when it uses the word "You"?

Q27 Can the Bank explain where the McArdle's went wrong interpreting this section as applying to them as the borrowers in this matter.

Page 5-6 Point 13 of the Judges summary refers to the obligations imposed upon the borrower and states:

…then *you* [the borrower] must act within the time period specified in clause 4.2 to ensure that the current loan to security ratio does not exceed the base loan to security. *You* can do this by:

Giving us a *security interest* acceptable to *us* over additional securities acceptable to *us*, or
By repaying part of *your* loan, or
Selling some or all of the secured property and applying the sale proceeds to your loan".

Q28 Why were the McArdles and many Storm Clients not entitled to the opportunity to correct their LVR afforded by this section of the Banks own document?

Q29 If they were not entitled to this clause why did it form part of the terms and condition for the margin loan applied for by the McArdles?

Q30 If the application of the Terms and Conditions is not a unique situation but rather the normal and appropriate application of the banks rights. Can the Bank explain to the inquiry why every Bank client should not be sent information explaining their vulnerability given the Banks conduct in this matter?

Page 6 point 14 talks about clause 4 of the terms and conditions and states:-

"….By clause 4.3, the borrower agrees that the Bank may provide notice of margin call to the borrower or to the borrower's client adviser either in writing, orally or by updating the banks website."

Brian Phelps Executive Manager, Investment Lending Stated in Correspondence to the McArdles dated 05/01/2009 stated,

"You authorised us to provide certain notices to Storm Financial (rather than to you directly) by Clause 4.3(a)…."

The actual clause from the Terms and Conditions document relevant at the time the McArdles applied reads;

"Notice of *Margin Call*
4.3 (a) *You* ag*ree that we may* provide notice of *margin call* by any or all of the following ways to *you* or *your Client Adviser*:
• In writing (*including* by fax, email or other electronic means)
• Orally, *including* by telephone
• Updating the Colonial Geared Investments website".

The bracket phrase in Mr Phelps's interpretation, "(rather then to you directly) is not direct wording from the actual clause. This suggests that the Banks executives (Phelps included) feel they can attach any implied interpretation they feel suits their purposes. In this case it Mr Phelps has turned the clause to a statement of who can be contacted rather then how they can be contacted.

If the Bank is suggesting that it was it's intention to nominate that it only had to contact one or the other (client or clients advisor) It would have stated so clearly and concisely in the document leaving no ambiguity.

Q31 Can Mr Phelps explain where he obtained the words *"Rather then to you directly"*

Q32 Further will Mr Phelps nominate the legal precedent authorising him to modify the clear interpretation of a legally binding clause to suit the Banks particular requirements as determined by a particular circumstance?

Mr Phelps's interpretation is not the interpretation of a "reasonable person" applying for a loan with built in safety points and a contract repeatedly stating the word "You" when referring to the clients responsibilities, obligations and nominating who will wear the consequences for not meeting those obligations. Further the word "you" is repeatedly used through out the application and terms and conditions documents when the bank explains who will receive a margin call.

The word "or" in this reference is a conjunctive term including both client and client advisor in an agreement of *who maybe contacted* and the nature*/form that contact can take*.

The word "or" does not in any possible interpretation exclude the clients from notification of their own financial position.

The McArdles were advised by their financial advisor, that they would be contacted probably in writing and that he as their advisor would be phoned or e-mailed, probably both, if they were to get to margin call. This is consistent with versions provided by financial planners other then Storm employees, and was considered an industry standard. Therefore the interpretation based on this historic performance by the Bank was that there were a number of ways the Bank could contact clients or their advisers and that by 4.3 any of those methods would be acceptable to the client.

Significantly the clients were not informed that many Storm and Non Storm financial planners have stated the website referred to in 4.3 (a) was considered dysfunctional, inaccurate and not a suitable method of tracking LVR with the desired degree of accuracy required.

If we are to consider Phelps interpretation as correct it would appear to again provide a prima facie case that the Banks own documentation that is drafted and presented by the Bank with significant weight now on its importance, is in fact deceptive and misleading.

This deception is accentuated given the Banks historic conduct in relation to not only Storm clients but other financial planning clients with particular reference to the delivery methods employed re margin call notifications.

The below section is part of an written response to the McArdles from Mr Clothier of CML in which he explains the position of the Bank in relation to its contractual obligations to clients.

> The answers are that the Bank did contact customers by providing their financial adviser, Storm, with all the information needed to identify, avoid and manage margin calls. Our (3) contract expressly authorised CGI to notify Storm - as your representative – in this way.

This quote by Mr Clothier acknowledges that the Bank contacted Clients by "providing their financial advisor Storm, with all the information…"

Q33 Will Mr Clothier explain what sentence in 4.3(a) says the Bank can provide a margin call to the primary holder of the loan indirectly via a third party with no need to ensure that notification has been successful?

Q34 Can Mr Clothier provide the commercial legislation that defines that "communication" does not have to be received to be considered successful. That is that a recipient does not have to receive the content of the sender's message for it to be considered communication?

Mr Clothier in representing Australia's largest Bank, appears to believe that in relation to multi million dollar transactions, Chinese whispers are a perfectly prudent and acceptable method of communications.

Despite multi million dollar tax payer incentives provide to the Bank for its technology programs, no written correspondence from either party to acknowledge neither the receipt of the notification nor any confirmation of the desired action required or able to be taken by the client is required. Yet opening a child's savings account requires multiple signatures and forms.

Mr Clothier like his colleague, Mr Phelps has applied his own interpretation to the Banks documents, in this case the term *"expressly authorised"* is used. That term is not printed within the section and forms no part of any contract that I have with the Bank. By suggesting the clients expressly authorised anything, Mr Clothier suggests that I surrendered my right to margin call notification directly from the Bank to a third party, Storm.

No person of sound mind would confer such a significant risk management responsibility to a third party let alone a third party company. Further if the McArdles had surrendered this entitlement it would have required a written authorisation of the fact. The McArdles were happy to have their advisor, Trevor Benson contacted by any means listed in section 4.3 <u>*as well as themselves*</u>, definitely not instead of.

Page 6 point 14 of the Judges summary goes further to Clause 4.3(b) which states:-

"It is *your* obligation to keep your or *your adviser's* contact details up to date".

The McArdles were first contacted by Mr Angus Cameron of Comm Sec. When asked if he had had any trouble contacting the McArdles, he said "No".
The contacts for the McArdles advisor, Trevor Benson were available on the Banks records and in the public domain and from the clients themselves.

Mr Cameron also stated (in relation to the issue of contact) “at a stretch I’m sure we I mean imagine it’s (ringing clients) obviously available to us because we have your phone numbers and everything. But the way it um were. It’s just not how our business works”

Q35 Why did the bank choose to use the CGI website as their form of communication?

Q36 Who made this decision?

Q37 Was it applied equally across the spectrum of financial planners using the Banks product?

Q38 When did the bank notify the financial planners and their clients of the change in procedure?

Q39 If contacting the client is “not how the business works” why does the Application form and terms and conditions state in black and white that it does?

Q40 Can the bank explain its justification in watching hundreds of millions of dollars of margin calls occurring without making a single phone call to its clients to see why not one single one of them was making any attempt to prevent financial obliteration?

Would contacting the clients not be a prudent and fiscally responsible action, even if it was (and I am only playing the devils advocate by suggesting this) Storm Financials responsibility to pass on the Banks Margin Call notifications.

Page 6 point 15 of the Judges summary refers to the Terms and Conditions clause 4.4:-

“….the borrower is required to be in a position to receive any communications from the Bank and to act within the time limits specified in clause 4 and to ensure that a margin call does not occur”.

This statement again strongly infers the Bank will “deliver a communication”.

Mr McArdle was contactable via home phone, mobile, home email, work email, work phone work mobile, Australia post and private courier for most of, if not all of the period between September and November when the critical notifications were required.

No communication was delivered or even attempted to be delivered.

Q41 Can the Bank explain what else the McArdles could reasonably have done to be more contactable?

Q42 Can the Bank explain what attempts it made to contact the McArdles and provide independent corroboration of these attempts?

Page 6 point 15 of his Honours summary document refers to clause 4.5 and says:-

“if the borrower fails to meet a margin call, the Bank may but is not obliged to, sell any or all of the security supporting the borrower’s loan and reduce the amount owing”.

Q43 Why did they sell?

The actions by the Bank suggest that they believed the securities would not recover from the market fluctuation. Given the nature of these securities (shares in the top 300 companies in Australia) it is implausible to suggest with any validity that recovery was not going to happen.

Mr Tait executive with the Bank and directly involved in this debacle before retiring suddenly and with short notice, is recorded making comments to the effect of, the Bank did clients a favour selling them down when they did as they could have got into further negative equity if the Bank hadn’t taken the action it did. This again suggests a mentality of selling clients out

at the low point of the market as apposed to the statement authored by the Bank in its letter to Storm dated 18 May 2007 which states “CGI and Storm Financial *will work in partnership* to clear the margin call”

[emphasis added]

Page 6 point 17 of the Judge’s summary reads:-

“Storm contends that the completion of the application document subject to the terms ands conditions brought into existence and orthodox banker customer relationship which called upon the borrowers to discharge certain obligations and created rights and entitlements in the Bank to take a number of steps, and relevantly here, issue margin call notices under the terms and conditions and exercise any or all of the rights conferred by clause 4.

The McArdles contend that at the time of committing to this margin loan they were entering into a relationship between themselves and the Bank.

Page 7 Point 17 of the Judges summary continues:-

“…. There is nothing in the application document or the terms and conditions which recognise as between the banker and its customers, an obligation on the part of Storm to manage the margin loan on behalf of the Bank. Storm says that, objectively viewed, such an obligation if it was to subsist would be manifest and extant in the documents”

The McArdles were not advised of, nor did they observe any reference indicating Storm would be responsible for providing margin calls.

Page 7 Point 19 refers to paragraph 22 of the affidavit filed 19 December 2008 by Mr Cassimatis:-

“…there was no agreement between Storm and the Bank that Storm as a client advisor “would manage or monitor the performance of the units in the fund acquired with the proceeds of the margin loan for the purposes of monitoring whether a margin call was imminent or likely or indeed whether margin call situation had occurred – that is, that the value of the security had dropped so that the amount of the debt under the margin loan was equal or greater then 90%of the security”.

Q44 Can the Bank produce to the inquiry the document(s) where by the transfer of responsibility passed from the Bank to Storm in relation to margin call and the Banks client?

Q45 Can the Bank produce the section of this document(s) or other related document(s) that provides advice to clients of this arrangement and secures in writing their expressed consent for this to happen?

Page 7 Point 20 of the summary refers to Mr Cassimatis affidavit (para 26) saying:-

“…that the clients were responsible for identifying circumstances which would constitute a margin call. However if a margin call did arise, the Bank would give notice to the client borrower”.

Page 7 -8 Point 20 of his Honour’s summary refers to (para 27) of Mr Cassimatis’s affidavit:-

“The only role (para 27) which Storm had in the management and monitoring of margin loan facilities for customers of the Bank “was that CGI was entitled to give notice of margin call to the customer by giving such notice to Storm”.

This is not the McArdle understanding or belief and they reject this inference as unfounded and with out appropriate documented corroboration as to valididate its reference.

Q46 Can the document supporting this claim by Mr Cassimatis be produced and explained regarding the section that commercially obligated Storm to forward information of a margin call to the Banks client?

Q47 Can the client's written agreement, allowing a third party, Storm, to be positioned between themselves and direct receipt of a margin call from the Bank?

Q48 Can Mr Cassimatis explain the contradicting nature of his comments contained within paragraphs 26 and 27 of his affidavit relating to his understanding of how a margin call would be delivered by the Bank to the client?

Page 10 Point 29 of the Judges summary refers to a proposal put to the Bank by the Cassimatises and in particular a reference to a paragraph explaining the background to the unfortunate set of circumstances:-

"We are all in this situation, we clearly see it is both Storm's and the CBA responsibility and all parties may have done things differently in hindsight. However, no one wins from an attitude that is one sided. We ALL benefited from the client relationships, we ALL owe a duty of care to these clients, we ALL should participate in the recovery process and then we ALL will benefit again from those relationships when this crisis passes, as it inevitably will".

This paragraph outlines a partnership is in existence and to their mutual benefit.

Paqe 10 Point 30 refers to the Banks rejection of Storms proposal and includes this paragraph:-

"You will appreciate that, although they are Storms Customers – in that you are their financial adviser and planner, recommending their investment strategy including borrowings to invest in certain products – they are also Colonial Margin Lending customers, in that, while we have not provided them advice *we* have provided lending facilities to them".

Q49 The Bank acknowledges it lent money to the McArdles by the above statement. Where does the Bank obtain its substantive belief that it has no responsibility to those clients what so ever, particularly in relation to preventing negative equity and notifications of margin call?
Is it legislated, in the Terms and Conditions, a commercial agreement or perhaps a standard industry practice that affords the biggest bank in Australia a "*responsibility exemption*" in relation to its clients and products?

Q50 Can the Bank nominate the percentage of financial planners using CGI/CML products that are solely responsible for providing notifications of buffer and margin calls to the Banks client because the Bank has no intention of contacting them, as per Mr Phelps's comments to Mr McArdle?

The above reply from the Bank is (although not obvious) the first sign that the Bank is quitting its partnership with Storm Financial, without consideration of the consequences this action would expose the clients to. Significantly the Bank quit covertly and without any consultation with clients in relation to their current position.

Q51 Why did the Bank conduct a deliberate and orchestrated demolition of Storm Financial without consideration of a remedial plan for the retail investors inadvertently reduced to collateral damage?

Q52 Wouldn't it be a financially responsible move by the Bank to see what clients were able to correct their LVR and re assess the situation from there?

Q53 What acquisitions/positive impacts did the Bank achieve that benefited from the demolition of the loans associated with Storm Financial and its clients?

Page 10 Point 32 of the Judges Summary, refers to letters sent by the Bank to Storm Clients and in particular references the open sentence written by Mr Clothier and says:-

"I am writing to you regarding the margin loan facility that you have with Colonial Geared Investments, *which has been managed by the Storm Financial Group"*. [emphasis added]

This sentence provides significant insight to the margin loans and the retail clients that held them. The Bank via Clothier says "the margin loan facility that you have with Colonial Geared Investments" , NOT Storm Financial, CGI.

This is the McArdle's belief instilled via the Banks own terms and conditions and reinforced by the fact that the Bank is the company that financially destroyed them and many other Storm clients.

Q54 Is it really the Banks contention that it can deflect management of client's loans to a third party? and further that it can be done without the clients knowledge?

The next emphasis added statement, "*which has been managed by the Storm Financial Group"* is contentious as it is only the Bank that seems to believe this.

Q55 What historical instances are documented of a third party managing a margin loan for the Bank that have been validated by an independent regulatory body as appropriate despite any documentation of the arrangement?

The McArdles have made repeated requests for the documentation that exists of this commercial agreement. Neither Storm or the Bank have provided such documentation. Storm via Mr Cassimatis are emphatic that no such documentation exist. The Bank has repeatedly responded to requests for verification that these documents exist with resounding and deafening silence.

Q56 Can the inquiry confirm the existence any form of corroboration re the management arrangements of the margin loans?

Page 11 Point 34 of the Judges summary, refers again to the letter by the Bank to the clients and states:-

"Storm Financial is your financial adviser and has been the sole manager of *your investments and your margin loan throughout this period.* Colonial Geared Investments has been providing daily updates on your position to Storm Financial. Colonial Geared investments wants you to be aware of your position in regard to the deteriorated position of your investments, and we will endeavour to assist you in clearing the outstanding amounts. We have begun that process by calling you directly today."

[emphasis added]

No corroboration of the first claim (Storm Financial is your financial adviser and has been the sole manager of *your investments and your margin loan throughout this period)* in this document has been provided to the McArdles.

Q57 Would the inquiry please demand proof of this claim including documents informing the client of this arrangement?

"Colonial geared investments has been providing daily updates on your position to Storm Financial" is the second claim in this paragraph by the Bank which the McArdles have repeatedly sought corroboration. To this date the only response received is from Mr Robert

Ralston, Manager, Credit Management dated 30th of January 2009. No further correspondence on this matter has been replied to by the Bank.

Ralston states; "Electronic information is sent daily to Storm for all its clients that have margin loans with Colonial Geared Investments. These electronic updates are provided to Storm automatically. In addition to electronic information, CGI sends a daily e-mail to a Storm mail box of all clients with margin loans in margin call or in buffer (between 80% to 90% loan to valuation ratio).

Information pertaining to your margin loan is personal information and you are entitled to copies of that information. You are not entitled to see details of any other clients. This is why CGI is having difficulty providing the information sought by you.

CGI is looking at 'work outs' that separate/filter your information from all other clients and/or providing a printout where all other details are blacked out. An update on the progress of these work outs is to be provided early next week".

This would appear to demonstrate the biggest Bank in Australia is completely technically incompetent, which may explain the failure to communicate with its clients, or again via its employee Ralston it is engaging in deliberately deceptive and misleading conduct to avoid transparency in this matter.

Q58 Would the inquiry please investigate why such corroboration was not freely made available to clients of Storm Financial, and why the above pathetic excuse was given to clients?

The third comment in the subject paragraph is:
"Colonial Geared investments wants you to be aware of your position in regard to the deteriorated position of your investments".

Q59 Would the inquiry ask the bank to explain, why the Bank (by its actions) wanted investors to be aware of their position *only after* they had completed a margin call on the investments held by the investors, thereby aborting any ability for the client to correct their LVR and continue a long term investment strategy?

Page 11 Point 35 of the Judges summary refers to a letter written by Mr Clothier dated 9th of December 2008, the second paragraph of that letter states;

"In a meeting with the principals of Storm Financial on Thursday, 4th of December 2008 we received clear instructions that all margin loan accounts geared at greater then 90% should be redeemed to avoid the potential for negative equity on your account. Storm Financial are your financial adviser and they manage your margin loan according to the statement of advice they provide to you when you established your relationship with them."

The first claim in this paragraph has been proven to be an untruth. No such direction was given as claimed by Mr Clothier. This was apparent when a full transcript of the December 4 meeting was produced to the court. This transcript was available as a result of a recording made by Cassimatis. Mr Clothier was unaware of the recordings existence at the time he deliberately made the untrue claim to the Federal Court of Australia.

The second claim by Mr Clothier to the clients via the letter dated 9th December is that Storm manage the margin loan according to the Statements of Advice provided to the clients.

Page 66 of the Clients statement of advice reads as follows;
"**Margin Calls**

A ***margin call will be made if your equity –*** the value of the assets that you contribute to the investment – falls below the agreed lending ratio. If this happens, the lender will ask you to provide additional funds to restore at least the minimum equity position. To help protect against small market ...”

In underlining the above sentence I draw the inquiries attention to Mr Clothiers apparent second untruth in the afore mentioned paragraph.

Q60 Is Mr Clothier able to explain his unfortunate inaccuracies to the inquiry? And further why those inaccuracies would appear to be in the Banks interest?

Q61 Can Mr Clothier explain why a reasonable person taking consideration of all the facts of this matter should not consider the comments to be yet another deliberate attempt to deceive and mislead the investors who received these letters?

Page 11 Point 36 of the Judges summary refers to comments by Storm to the court and says;

“…Storm to its clients as part of its adviser client relationship does not contain an obligation upon Storm to manage margin loan accounts taken up by client borrowers with the Bank”.

The McArdle’s agree after failing to find any documentation to the contrary.

Page 12 Point 39 of the Judges summary, introduces information to the court from Mr Paul Johnston by affidavit sworn and filed 19th December 2008, and further from Mr David McCullough by affidavit sworn and filed 18th December 2008.

Mr Johnston says he established “Colonial Margin Lending”, a division of the Commonwealth Bank of Australia, in 1996.

Johnston further states, “If action was required on an account, for example, if a client wishes to redeem funds, Colonial did not accept instructions from Storm but upon written authorisation direction from a customer. He understood that Storm was not authorised to give instructions to the Bank on marginal lending facilities its clients held with the bank about written instructions. He says that this was general practice in the industry. He says that it was his experience that once Storm referred a client to the Colonial, Storm had little or nothing to do with the management or maintenance of the facility thereafter. In practice, the Bank regarded the facility as the customer’s facility the customer managed it”.

Q62 Is the Bank able to provide documentation to corroborate that Storm was in fact able to provide instructions to the Bank on its client’s facilities without the client’s written direction?

Q63 Can the Bank provide documented corroboration of when it no longer, “regarded the facility the customer’s facility the customer managed it”.

Q64 If it is the client’s facility, why does the Bank consider notifying Storm Financial a suitable method of delivering notifications, particularly of a most critical nature as these subject margin calls?

Mr Johnston goes on to say,” It was the Banks position to monitor the position of its margin loan customers and in the event that a margin call was looming, the Bank contacted either Storm or the clients direct”.

Q65 Can the Bank provide the inquiry with documented corroboration to both Storm and the investors that they would no longer contact either directly?

Q66 Will the Bank explain when and why it made this decision and what steps it took to ensure that all parties effected were aware of and accepted the change in procedures.

Mr Johnston then says; "…..Bank's practice was to act on instructions only from those clients and not instructions from Storm without confirming that an individual client with a margin loan facility had provided those instructions. He says that the Bank did not regard Storm as a manager of a margin loan".

Q67 Given the untruth that Mr Clothier was content to represent to the Federal court in sworn affidavit. Will the inquiry ask him when he believes the above "Bank's position" changed and further ask him to provide documented corroboration of that change?

Page 13 Point 40 of the Judges summary, introduces Mr McCullough as an employee of Storm for 10 years and a employee in senior positions of retail banking for 25 years before that. He says:

"…….That whenever a loan exceeded the "buffer" relating to a margin ratio for a margin loan, the bank would write to the client borrower and the Bank would require the client to do what was necessary to bring the loan back into the relevant ratio".

Q68 Can the inquiry discover when this changed and enter into evidence corroboration evidence to support the change and its acceptance by clients and advisors?

Q69 If the Bank contends that this is still the case can it produce the statistics of all notices to all clients, of all advisors, (not just Storm) relating to "buffer and margin calls during the months September to November 2008?

Q70 How many Storm Financial clients benefited from receiving these direct written notifications?

Q72 Would the Bank please explain any disparity in the figures relating to Storm Clients and other financial planners?

Mr McCullough Further states that at the meeting 4th of December 2008; " that one of the Bank representatives said it was not the Bank's responsibility to make margin calls".

Q73 Would the inquiry confirm if this was said, who said it and their authority within the Bank?

Q74 Can the inquiry again establish if it is this comment, or the terms and conditions document and application form that is being deliberately deceptive and misleading?

Page 14 Point 41 of the Judges summary refers to an Affidavit by Ms Teneale Henderson which attaches the transcript of the meeting 4th of December 2008. Objections were made to the transcript but the affidavit was admitted for interlocutory purpose. The transcript on p38 contains a statement by Mr Cassimatis in these term;

"You know, we should have sold people out earlier, yeah, the agreements were (*I suspect this is meant to read "agreements we have")* have say that you guys should have sold them out at 90%".

There are other statements in the transcript such as at p 20 where Mr Cassimatis says;

"None of these should be in negative equity, should have, could have, would have but didn't. For various reasons or for whatever reason they should have been sold at 90% or earlier".

The Bank through its executive and employees has via media representation, letters, e-mails and phone calls insisted in the strongest possible terms that it is in no way responsible for this matter and that it has done nothing wrong.

Q75 Can the bank explain why it objected to a transcript which could only provide a transparent indisputable corroboration of the conversations that took place at that meeting?

Q76 Can Mr Clothier explain why given his propensity to tell untruths, he doesn't record things to improve his accuracy in business dealings?

Q77 Given the unreliable nature of Mr Clothiers recollection would the inquiry please admit into evidence the transcript produced to the court December 2008 by Mr Cassimatis?

Page 14 Point 42 of the Judges summary outline:

"The Bank says that the references in the transcript; the references in the loan document by which the bank is authorised to take instructions from the client's advisor (Storm), the transmission of daily data sheets which contain schedules of all relevant information and proposal put by Storm in its letter of 4 December 2008, strongly suggest that the financial adviser had assumed the management role of the margin loan".

Q78 Can Mr Norris as the CEO of the biggest bank in Australia explain to the inquiry what statutory authority gives the Bank the option to assess actions, comments and correspondence, assign a value to those individual or combined things such as the term "*strongly suggest*", and then utilise that term to over ride commercially drafted, legally binding, and prudentially adopted contractual agreements?

Page 14 Point 43 the Honourable Judge Greenwood states in his summary to the court 24th of December 2008:

" For present purposes, I am satisfied by the weight of the weight of the applicant's material that had the financial adviser assumed a management responsibility for the margin loan transaction in each case and more particularly a "sole" responsibility for the management of the margin loan account through the period, the documents as between the Bank and Storm and in particular the letter of 18 May 2007 would have said so in clear and transparent terms.
Secondly, the documents as between the financial advisor and the client would have reflected that position.
Mr Cassimatis says it was not so as a matter of practice.
Mr Johnston says it was not so in his experience although his experience concluded 2003.
Mr McCullough also gives evidence consistent with Mr Cassimatis.
I am satisfied that solely for interlocutory purpose, Storm has demonstrated a sufficient likelihood of success in terms of *Australian Broadcasting Corporation v O'Neill* demonstrating that a statement as to the sole management of the margin loan accounts and instructions allegedly given in the meeting on 4th December 2008 are capable of being misleading or deceptive or likely to mislead or deceive".

Page 15 Point 44 of the summary, His Honour says:

"Storm also relies upon a further letter written by the Bank on 17th of December 2008 in which it says that Storm is "completely responsible for your financial position". In that letter, the Bank changed its position slightly from one of asserting *sole* management of the clients margin loan throughout the period to one where "Storm Financial is *primarily* responsible for your margin loan and we are disappointed they have not kept you informed of your account position or any instance of margin call"

Q79 Could the inquiry please request the information behind the reason the Bank changed its position in the letter above dated 17th of December 2008?

Page 16 Point 49 the Honourable Judge says;

"The Bank's position on the application for interlocutory relief is that this has nothing to do with the Bank. It is entirely a matter for Storm. That seems unlikely as the letter of 18th of May 2007 talked about the working partnership to clear margin calls and the Banks letter of 17th December 2008 seems to acknowledge that the position is that Storm had primary responsibility for the loan. It seems unlikely as a matter of prudential bank management that the Commonwealth Bank of Australia would have displaced all responsibility for its loan portfolio with these borrowers and investors entirely to a third party, Storm.

Page 18 Point 52 His Honour proposed to list the matter for directions on 9th of January 2009 for review.

On the 8th of January as a direct result of the action taken by the Commonwealth Bank of Australia, Storm was forced into voluntary liquidation and as a direct consequence forced to abort all present and future court matters. This essentially allowed the matters referenced in this document to left unaddressed by any form of independent, transparent and judicial inquiry to this date.

ASIC

Co Chairman of SICAG M Weir has written the following in a letter to former investors and it is now contained on the SICAG web site,

"…leading up to Xmas after out portfolios had been sold down. It was a time when most of all we needed answers and the support of our Advisers. There was much conjecture as to why this was not available- in the first instance it was thought that our advisers were deliberately avoiding all contact although there was also strong evidence (although unsubstantiated at the time) to suggest that Storm had been prohibited from engaging with their clients by ASIC. This confusion persisted until the occasion of the inaugural meeting of SICAG on 20 January. When, in attempting to substantiate if ASIC had in fact delivered this directive to Storm, it was denied by the ASIC representative at the Meeting.

Clearly this did nothing to dispel the matter or the emotion is was causing. It wasn't until early March that further enquiries led to an email being sent to a key person within ASIC, identified as being able to clarify the matter. Then on Wednesday 15 April I was contacted by that person who confirmed that ASIC had imposed a restriction on Storm prohibiting them from engaging with their clients. The reason for this prohibition was that ASIC had become aware that Storm were advising their clients *not* to pay their negative equity debt to Colonial and it was their considered opinion that this could be of further detriment to their circumstances through having interest accrue on the debt. I am compelled to say at this point that this reason is spurious if not outrageous. What of all the Storm clients who were with Macquarie and all others who were not sold down in negative equity or had other products under management by Storm. At a time when contact with their Advisers was of paramount importance, they were victimised by default. Furthermore I have not heard of anyone who was advised not to pay their debt. They might have been told to get a complete reconciliation before paying it and in any event, most clients could not have paid it even if they had wanted to- and still can't!

It was soon after this Xmas recess on 8 January that CBA foreclosed on Storm Financial causing them to go into voluntary administration. As a result, the administrators took control of Storm premises on 12 January and simultaneously the Financial Planning licenses of all Storm advisers were revoked by ASIC. This prevented them from engaging in any form of contact with clients, a breach of which would also have resulted in severe penalties.

A further key aspect of the above events was clarified on Monday 27 April. It was revealed, after some prevarication by ASIC, that they had reacted in 'gagging' Storm as a result of information brought to their attention by the CBA."

If the above is factual, and I have no reason to doubt its validity, especially knowing the integrity and outstanding personal qualities Mr Weir and indeed his colleagues in the SICAG committee.

It is with enormous trepidation about ASIC actions and, the regulators ability to be perceived as an independent, free of bias and preconceptions, that I refer to Judge Greenwoods comments (as follow). The comment is made after serious consideration of the facts referenced in the December court case and as a result of Storm seeking a restriction to prevent CBA continuing to make comments that essentially blamed Storm and allocated total responsibility to Storm for managing the margin loans.

His Honor said; "…an order *restraining* the Bank from making any representations in any relevant place or forum that the Bank acted with authority on 4 December 2008 (if that be necessary) would be likely to work injustice".

Yet the regulator, ASIC, funded from the public purse, feels it is entirely appropriate to *gag* Storm advisers totally on the advice/request of the Commonwealth Bank of Australia, a party to the dispute.

Q80 Can the inquiry ascertain the full details of the advice to ASIC that resulted in this Gagging of Storm. Who, when, how, why?

I fail to see how this lapse in judgment can be excused under any consideration of the facts currently before the inquiry.

The impotence displayed by ASIC in failing to recognise, address and prevent the insidious, abhorrent and unconscionable behavior of individuals within the Commonwealth Bank and other privileged institutions involved in this matter is more then disheartening, it is gutting.

Retail investors and customers who bank with the Commonwealth Bank should now be very concerned as to the level of trust they can ascribe to their dealings with this arrogant, deceitful institution. It has through this matter demonstrated a sociopathic ability to deal with any clients they no longer wish to indulge with honest transparent communication and ethics .

Sean McARDLE P J McARDLE

Justices Act 1886

I acknowledge by virtue of section 110A(5)(c)(ii) of the Justices Act 1886 that:

(1) This written statement by me dated 09/06/2009 and contained in the pages numbered 1 to 24 is true to the best of my knowledge and belief; and

(2) I make this statement knowing that, if it were admitted as evidence, I may be liable to prosecution for stating in it anything that I know is false.

S P J McARDLE
……………………………………………………………………………….Signature

Signed at Coolum.this.9th.day of June 2009.