



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: S69/2020
File Title: Westpac Securities Administration Ltd & Anor v. Australian S
Registry: Sydney
Document filed: Form 27E - Reply
Filing party: Appellants
Date filed: 31 Jul 2020

Important Information

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Part I: Internet publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Reply

2. Misleading conduct complaint irrelevant: The only issue arising on this appeal is whether Westpac provided personal rather than general advice to the 14 customers during the calls, which turns on the proper interpretation of s 766B(3) of the *Corporations Act 2001* (Cth). Much of the RS agitates a complaint that Westpac’s sales campaign misled the customers by creating the impression that a decision to roll over superannuation was a “*straightforward and obvious decision*” when it may not have been in the customers’ interests: RS [10], [19], [40], [55]-[56]. That complaint, independent of any finding that the advice was personal, was held by the Full Court to be outside the pleaded case in relation to s 912A(1)(a), against which finding no cross-appeal is brought: RS [19]. Criticisms of Westpac’s conduct as misleading or “sharp” are irrelevant to, and distract from, the task of statutory interpretation before the Court.
3. Misstatement of the content of the calls and the advice provided: The RS misstate the content of the calls and the financial product advice found to have been provided:
 - (a) Westpac did not ask the customers to identify their “objectives” in the sense that term is used in s 766B(3): cf RS [2(b)], [13(c)], [17(c)], [60]. The customers, having requested that Westpac search for their other accounts, were asked variants of the questions: “*What was the main reason that prompted you to ask us to look for your supers?*”, “*What was the reason you wanted to put all your super together?*” or “*What do you see as the benefit of combining your super?*”;¹
 - (b) There was no finding that Westpac provided financial product advice by making recommendations the rollovers would “meet” the customers’ stated “objectives” (cf RS [2(c)], [40], [42]) or that the customer should roll over because that was “an obvious and uncontroversial course of action for that particular customer” (cf RS [13(d)], [15], [17(c)], [33], [40], [60]). The only alleged recommendation found to have been made was an implied recommendation that the customer should roll over their external account into their BT account (PJ [246], [260] (CAB 88, 92));²

¹ AFM 18.30; 28.30; 51.20; 58.00; 74.20; 90.30; 99.20; 119.10; 145.10; 154.00; 159.20; 173.10; 187.10-.25; 198.50

² Only 2 recommendations were alleged and are set out at PJ [246]-[263] (CAB 88.40-93.30). Certain statements of opinion – principally that the customer could potentially save on fees and combining superannuation accounts made sense from a management point of view - were also alleged and found (see AS [9]), but as Allsop CJ correctly observed at FC [76] (CAB 201-202) such statements could not be seen as personal to the particular customer. The “implied opinion” conceived of by Allsop CJ at FC [5], [67], [77] (CAB 174.10, 196.40, 202.20), that acceptance of the rollover service would “meet or fulfil” the customer’s stated concerns or objectives, was not part of the pleaded case and at most is a technique used by his Honour

- (c) Nor was there any finding that the implied recommendation temporally followed the customer indicating what he or she saw as the benefits of consolidation (*cf* RS [13(d)], [17(c)]). A recommendation implied from the whole of the conversation³ cannot be pinpointed as having been made at a particular point in the conversation;
- (d) Contrary to the suggestion in RS [12], a warning that the rollover may impact any insurance on the accounts being rolled-over was given on every call.

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4. QM Framework: ASIC's reliance on the "QM Framework" document⁴ as a substitute for analysis of the actual content of the calls is misplaced (RS [3], [10]). It was a training document used to monitor the quality of calls from a marketing and compliance perspective. When it speaks of the customer's "motivations", "needs" and "wants" it is not using those terms as proxies for the statutory concepts in s 766B(3); it is referring, in the language of marketing, to what the customer wants to achieve on the call (*i.e.*, to roll-over) and their reasons for doing so: PJ [50]-[63] (CAB 29.20-33.20).

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5. Ground 1: ASIC concedes that the objective limb in s766B(3)(b) does *not* contain a normative element (RS [5(a)]) and assumes the burden of showing that the Full Court did not introduce one: RS [31]*ff*. It seeks to do so not through close analysis of the Full Court's reasoning on the critical question, but by contending that a *factually correct* matter going to the circumstances in which the advice is provided is not *legally irrelevant* to s 766B(3)(b): RS [35]. This misses Westpac's complaint, which is that the Full Court reasoned from a normative expectation not found in the Act (that the advice provider should act in the best interests of the recipient) to a factual conclusion (about what a reasonable person might expect Westpac had in fact considered) which was at odds with the full facts known to the customer. That normative expectation is no less normative because the Court selectively referred to one fact (the recipient is an existing customer of the advice provider) as engaging the normative expectation. The matters in RS [34], [35] cannot support the Full Court's conclusion unless the statutory enquiry is directed to a reasonable person's normative expectation, which ASIC concedes it is not.

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6. ASIC's continuing reliance on the normative element is reflected in the repeated incantation that the calls were framed as courtesy calls to "help" the customer with their superannuation: RS [13(a)], [17(b)], [18], [33], [59], [61]. The helpfulness of the calls is irrelevant to the question posed by s 766B(3), unless premised on an assumption that a

to arrive at the normative conclusion at FC [150] (CAB 213-214) that a bank should not recommend consolidation of superannuation through general advice.

³ FC [77] (CAB 202.25)

⁴ Appellants' Supplementary Book of Further Materials at 5.

superannuation provider offering to help its existing customers should be acting exclusively in the customers' interests and not its own. Self-evidently, a financial services provider can offer to assist its customers by providing general advice, or indeed by selling them a product or service without providing any advice. Assistance, helpfulness and politeness are not exclusive markers of personal advice.

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7. As to RS [32], Allsop CJ was not referring at FC [30] (CAB 183 – 184) to the issue of construction raised by Ground 1, much less rejecting the normative approach clearly taken by Jagot and O'Bryan JJ. His Honour was simply explaining that s 766B(3)(b) does not posit a negligence standard as to what a reasonable or responsible adviser would have done and, for that reason, the reasonable person's expectation could not be informed by matters not known to the customer.
8. The only point at which the RS engage with Westpac's contention that a reasonable person would know that Westpac was incapable of giving consideration to the stated objective of saving on fees is at RS [61], which speculates (for the first time) that a reasonable customer might expect Westpac to have engaged in a detailed comparison of fee levels, rates of return *etc* across all of the customer's other accounts shown up in the customer's search results. Why a customer might expect Westpac to have undertaken that large exercise without any mention of it to the customer is not explained; it could only be sourced in a normative assumption that a superannuation provider should undertake that exercise before making any recommendation to its existing customers. Moreover, at times the Westpac caller made it clear that he or she had no knowledge of the details of the customer's other accounts identified in the search results.⁵
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9. Ground 2: ASIC's answer to Ground 2 is that the term "considered" has an "ordinary" meaning, sourced from a dictionary, of great generality ("*to pay regard to*", "*to view attentively*") and any suggestion the term has a more focused meaning in s 766B(3) is an impermissible gloss: RS [38], [39]. The legal meaning of a statutory term is rarely assisted by resort to a dictionary definition;⁶ a dictionary will give a range of meanings of a word; the task of a court is to identify, from text, context and purpose, the particular meaning that a statutory provision bears.⁷ The content Westpac seeks to give the term within s 766B(3) is not one from "another universe" of administrative law: *cf* RS [37], [39(d)]. It is a content sourced from statutory context and purpose.
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⁵ AFM 77.50-78.20; 81.60-82.30; 103.20-.30; 112.40-113.50; 177.10-.50; 205.10-.50

⁶ *Thiess v Collector of Customs* (2014) 250 CLR 664 at [23]

⁷ *Coverdale v West Coast Council* (2016) 259 CLR 164 at [18]; *South Western Sydney Local Health District v Gould* (2018) 97 NSWLR 513 at [78]-[81]

10. Westpac agrees the meaning of “considered” in s 766B(3) is one which a reasonable person would readily comprehend: *cf* RS [38]. The meaning given by the primary judge⁸ meets that criterion. With respect to Allsop CJ, the concept that an advice provider had “considered” a customer’s objectives by “fulfilling them”⁹ is one which would be elusive to most retail clients.
11. *Ground 3*: ASIC’s position, exposed in RS [51], is that consideration of “*an aspect*” of a customer’s objectives, financial situation or needs is sufficient to cause the advice to be personal. ASIC has embraced the view of Jagot J that consideration of an isolated aspect of the customer’s financial situation (*e.g.* having more than one super account) is enough to impose on the provider the heavy burden of the personal advice obligations.¹⁰
12. The unworkability of the provision on that interpretation is readily apparent. Is a stockbroker prevented from providing general advice to a client who has said they have \$100,000 to invest? Is a superannuation provider prevented from suggesting, by way of general advice, a defensive fund to a customer who has said she wants to change to a more conservative investment profile? Knowledge by the provider of “an aspect” of the recipient’s objectives, financial situation or needs and consideration of that aspect (by “paying regard” to it) for the purposes of providing directed general advice cannot have been intended as the trigger for the personal advice regime.
13. There is no confusion in Westpac’s position: *cf* RS [48]. Each of a person’s “objectives”, “financial situation” and “needs” is a category. The personal advice obligations will be engaged where the adviser considers (or a reasonable person would expect that the adviser had considered) at least one of those categories in giving the advice. That requires consideration of so much of the category as is relevant to the advice in question. A person’s “objectives” is used in s 766B(3) as a collective or compendious expression. An adviser will be giving personal advice if it has considered (or a reasonable person might expect it has considered) the recipient’s collective objectives that are relevant to the subject matter of the advice, but not if it has considered only a single objective (*e.g.* better “manageability”) which would not provide a reasonable basis to conclude, if given as personal advice, that the advice would be appropriate for the client.¹¹

⁸ “*an active process of evaluating or reflecting upon the subject matter of the consideration, appropriate to the provision of financial product advice*”: PJ [127] (CAB 49)

⁹ See AS [48]

¹⁰ See AS [58], fn 61

¹¹ To adopt the language of s 961G of the Act.

14. Such an interpretation does not permit advisers to avoid the personal advice provisions by permitting them to stop short of considering one or more of the categories to the extent relevant to the advice: RS [53]. The objective limb in s 766B(3)(b) performs that protective function: see AS [45].
15. Nor does s 961B(2)(c) tell against Westpac’s construction: *cf* RS [58]. That subsection presumes the adviser’s client has sought advice and disclosed their objectives, financial situation and needs through instructions (s 961B(2)(a), (b)(i)).¹² An expectation that an adviser in those circumstances would clarify incomplete or inaccurate instructions (s 961B(2)(c)) provides no support for a view that the statute presumes consideration of an isolated aspect of a person’s personal circumstances is sufficient to engage the best interests obligations in Pt 7.7A Div 2.
16. *General advice warning*: RS [13(b)], [41] make the criticism that the general advice warning given on the calls was “formulaic”. Formula is the essence of a prescribed form of warning. RS [13(b)], [41] also contend for the first time that the warning provided on the calls was not strictly compliant with the Class Order relief for oral warnings. It is not apparent where the criticism goes: no contravention of s 949A was alleged and ASIC’s own guidance accepts that adherence to the exact wording of the prescribed warning is not required.¹³ The important point is the warning itself.
17. *Prior correspondence*: Westpac has always maintained that the calls should be construed in the context of the earlier correspondence received by each customer: *cf* RS [11]. The primary judge’s view to the contrary was not a finding of fact or law requiring challenge by a separate ground of appeal. It was plain to the recipients of that correspondence that Westpac was encouraging them to roll over their external accounts into their BT account.¹⁴ None of them could reasonably have thought, if they took up Westpac’s search offer, that Westpac was offering to assist them in rolling over their BT account to a competitor’s fund: *cf* RS [12].

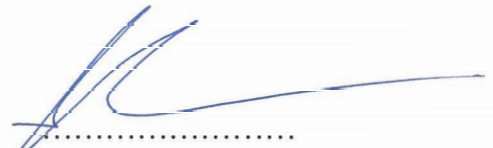
Dated: 31 July 2020



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¹² Noting that none of Westpac’s customers sought any advice: PJ [374(1)] (CAB 113)

¹³ ASIC Regulatory Guide RG244.39 (AFM 215)

¹⁴ AFM 8.30, 10.31, 32.31, 46.14, 67.34. See also acknowledgement at PJ [153] (CAB 54.40)