

ASIC Act precludes admission of statements made in s 19 examinations in criminal or civil penalty proceedings if the privilege against self-incrimination or self-exposure to a penalty were claimed, White J held that these proceedings were not civil penalty proceedings. In these proceedings, ASIC sought declarations as to contravention and injunctions under s 1101B(1) and s 1324(1) CA restraining each defendant from carrying on a financial product or financial services business, providing financial product advice, dealing in financial products or carrying on any business related to superannuation interests. White J considered that the lack of reference to the above provisions in s 1349(4) CA, which sets out examples of proceedings "for the imposition of a penalty" to which s 68(3)(b) of the ASIC Act does not apply, indicated a legislative intention that proceedings in which orders and injunctions under s 1101B(1) and s 1324(1) are sought are not penalty proceedings. Further, s 1101B(1) and s 1324(1) were largely remedial in character. It should be noted, however, that Gordon J, in a decision handed down after the hearing in this matter, took the opposite view that s 68(3) did preclude the admission into evidence of a s 19 transcript in similar circumstances in *Australian Securities and Investments Commission (ASIC) v Monarch FX Group Pty Ltd* [2014] FCA 1387; BC201410801. White J decided not to re-open the hearing, however, as in the end he relied very little on the s 19 transcripts.

In *CIC Australia Ltd (No 2), Re* [2015] NSWSC 1314; BC201508697, Brereton J approved a scheme of arrangement. Almost all the scheme shareholders by value, and almost all the general shareholders, approved the scheme. While an expert took the view that the scheme was "not fair but reasonable", Brereton J doubted some aspects of the valuation that might have caused the expert to find the scheme was not fair and was "not in the least concerned" that the minority shareholders had been treated unfairly. Brereton J noted that the fact that the scheme involved a selective off-market buy-back did not itself require court approval, but that compliance with Pt 2J.1, Div 2 was relevant to the court's exercise of its discretion to approve. Here, the scheme and the buy-back did not materially prejudice the company's ability to pay its creditors.

In *Adhesive Pro Pty Ltd v Blackrock Supplies Pty Ltd* [2015] ACTSC 288; BC201509136, the plaintiff's application to set aside a statutory demand under s 459G CA was dismissed. The plaintiff served a copy of the application on the defendant within the 21-day period, but not in a manner sufficient to satisfy s 459G(3) because the version served did not indicate it had been accepted by the court. Due to the Court Registry not sealing and stamping the application on the day it was filed, the served copy of the application lacked a court seal, court stamp, proceeding number or registrar's signature. It contained a return date inserted by the plaintiff's solicitor, not by the court, although that happened to be the return date the Registry later fixed. Mossop AsJ held the service ineffective to comply with s 459G(3) as "in order to be a copy of the application the document must also bear some evidence it has been accepted by the court" (at [45]), though Mossop AsJ did not say that all of the above indicia were necessarily required. The plaintiff's subsequent serving of the sealed and stamped copy of the application was invalid as outside the 21-day period.

In *Templeton v Australian Securities and Investments Commission* [2015] FCAFC 137; BC201510286, the Full Court of the Federal Court allowed an appeal from the primary judge's decision dismissing an application for review of a Registrar's reduction by percentage of receivers' fixed remuneration, costs and expenses. The application for review before the primary judge was by way of a rehearing de novo and was an evaluative exercise of the fixing of reasonable remuneration according to the orders appointing the receivers, rather than the exercise of a discretion in the *House v The King* sense. The Full Court accepted that proportionality was relevant to the reasonableness of remuneration. However, while the evaluative judgment involved was one on which reasonable minds might differ, the court held the primary judge erred in applying the proportionality principle in failing to compare like with like: that is, comparing the specific amounts of remuneration claimed in relation to specific categories of work as against the worth of that work. Further, the Full Court did not consider that sufficient consideration was given to the fact that the receivers' work was a function of the matter's complexity and the court's orders.

Article

[575] Federal Court declares multiple contraventions of fundraising and

financial services laws in scheme targeting SMSF investors: ASIC v ActiveSuper Pty Ltd (in liq) [2015] FCA 342

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In the decision of *Australian Securities and Investments Commission (ASIC) v ActiveSuper Pty Ltd (in liq)* [2015] FCA 342; BC201502609 handed down earlier this year, White J of the Federal Court of Australia made declarations of contraventions of fundraising and financial services laws by several individuals and entities who had promoted an investment scheme which targeted Australian self-managed superannuation fund investors. Around 187 investors had invested in this scheme, which ultimately resulted in losses over \$4 million. As well as demonstrating ASIC's resolve to act against such activities, the decision provides some useful guidance on establishing accessorial involvement in contraventions of ss 727, 911A and 1041H of the Corporations Act 2001 (CA), and the admissibility of transcripts of examinations conducted under s 19 of the Australian Securities and Investments Commission Act 2001 (ASIC Act).

[1] Factual background

Between May 2010 and March 2012, Gold Coast-based ActiveSuper Pty Ltd and its associated business Royale Capital Pty Ltd induced or assisted a number of persons to establish self-managed superannuation funds (SMSFs). Mr Justin Burrows controlled ActiveSuper, and also exercised considerable control over Royale, a marketing business for ActiveSuper whose day-to-day activities were supervised by Mr Justin Gibson.¹ Mr Gibson managed a team of up to six telemarketers who promoted the establishment of SMSFs and investment opportunities through "cold-calling" prospective investors. From late 2010, Royale promoted an "investment opportunity" to the SMSFs to acquire shares in a yet-to-be-formed American company which would purchase "distressed" real estate in the United States, with a view to generating profits at the end of a five-year period. This investment opportunity was set out in a document entitled "US Deals Invest Now", which was described in the Federal Court proceedings as the "US Realty Memorandum".² During the "cold calls" to promote these investments, Royale's telemarketers read from scripts which stated (inter alia):

"... our current members are achieving FANTASTIC returns in the last financial year. I am sure that a FANTASTIC return would be GREAT to see for a change? ... Are you aware that the number 1 industry super fund has only returned 2.9% over the last 3 years? If we could show you a SIMPLE way to get your super into your own name and own bank account that you control would that be of interest to you?"³

Around 187 SMSF investors acted on this offer, paying in aggregate around \$3.1 million to ActiveSuper. ActiveSuper then transferred approximately \$1.4 million of this sum to the bank accounts of US companies of which it was the shareholder. Of that sum, only \$455,000 was applied to the purchase of 14 properties in Arizona. The purchasers of these properties were US limited liability companies (LLCs) controlled by Mr Burrows. None of the SMSF investors received shares in these LLCs, or in any other company acquiring "distressed" real estate in the United States.⁴ In November 2012, the 14 properties in Arizona were sold, however there was no accounting for the proceeds of these sales to ActiveSuper nor the Australian investors, with all amounts invested in these properties being wholly lost.⁵

In October 2011, the LLCs entered into a loan agreement with MOGS Pty Ltd, a Gold Coast-based property developer,⁶ for \$1 million (later increased to \$1.47 million). Ultimately around \$2.15 million of the \$3.1 million invested by the SMSFs pursuant to the US Realty Memorandum was paid to MOGS, the main controller of MOGS Mr Craig Gore⁷ and associated persons, despite MOGS having had no involvement in acquiring "distressed" real estate in the United States.⁸ Following this agreement, Mr Gore arranged for two companies, Syndicated Property Group Ltd (SPG) and Worldwide Property Opportunities Ltd (WPO), to be incorporated in the British Virgin Islands, and for Cayco Management Ltd to be incorporated in the Cayman Islands.⁹ SPG and WPO were promoted as real estate investment funds to ActiveSuper's SMSF clients, and each issued a "Private Placement Memorandum" (PPM) which was in the

nature of a prospectus for the issue of shares. Cayco acted as an investment manager of the funds raised pursuant to the PPMs.¹⁰

In early 2012, investment in SPG and WPO was promoted to the Australian public and in particular to ActiveSuper's SMSF clients. ActiveSuper and/or Royale received around \$2.4 million from 122 subscriptions pursuant to these PPMs, with these monies being paid to SPG and/or WPO.¹¹ However, none of these monies were invested in real estate, rather they were advanced to Cayco, MOGS and associated persons.¹² The Federal Court made orders for the appointment of provisional liquidators to SPG, WPO and Cayco on 14 November 2012,¹³ and to MOGS on 19 March 2013.¹⁴

[2] 2015 FCA proceedings

Following a formal investigation, ASIC alleged several contraventions of the Corporations Act and of the ASIC Act in the Federal Court of Australia, seeking declaratory and injunctive relief, and orders for the winding up of the LLCs, MOGS, SPG, WPO and Cayco.¹⁵

[2.1] Admissibility of transcripts of examinations under s 19 of the ASIC Act 2001

Two of the directors of MOGS sought to oppose the tender to the court of the transcripts of their examinations which had been conducted under s 19 of the ASIC Act.¹⁶ In allowing the tender of the transcripts, White J dismissed an argument (which was later withdrawn) that because the directors had not signed the transcripts in accordance with s 76(3) of the ASIC Act, the transcripts were inadmissible against the directors. His Honour reasoned that:

"s 76(3) [of the ASIC Act 2001] provides one means by which evidence of statements made by a person at a s 19 examination may be adduced before a court, but it is not the only means. Sections 76-79 inclusive do not constitute an exhaustive code relating to the admission into evidence of statements made in s 19 examinations: *Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 2)* [2009] FCA 424; (2009) 176 FCR 529 at [11]."¹⁷

Secondly, after reasoning that the omission of inclusion in s 1349(4) CA of orders and injunctions pursuant to s 1101B(1) and s 1324 respectively (which were sought by ASIC) indicated that proceedings in which those orders are sought should not to be regarded as proceedings for the imposition of a penalty, his Honour held that s 68(3) of the ASIC Act did not preclude ASIC from relying on the evidence given by the two directors at their respective examinations under s 19 of the ASIC Act.¹⁸

[2.2] Contraventions of the Chapter 6D fundraising requirements

ASIC first alleged that through offering shares in the yet to be formed US LLCs, the ActiveSuper defendants had contravened s 726 CA through offering securities in a non-existent company. The court agreed, declaring that ActiveSuper and Mr Burrows had contravened s 726 after finding that the US Realty Memorandum contained the "usual indicia of an offer of securities", the offer was targeted to Australian investors, the US LLCs did not exist at the time the offer was made, that ActiveSuper and Mr Burrows made the offers, and that none of the s 708 exceptions to disclosure applied.¹⁹

ASIC's second allegation was that the ActiveSuper defendants, SPG, WPO and Cayco, had contravened s 727(1) and (2) CA through offering securities without a disclosure document.²⁰ In declaring these provisions had been breached, White J determined that despite their cautionary statements and disclaimers about investment risks, the PPMs of SPG and WPO were offers of securities with application forms of the kind contemplated by s 727,²¹ in relation to which the defendants had made offers and/or distributed application forms.²² His Honour also found that none of the s 708 exceptions to disclosure applied, noting in particular the SMSF investors were not "sophisticated investors" as contemplated by s 708(8),²³ and that neither the SPG or WPO PPMs had been lodged with ASIC.²⁴

[2.3] Contraventions of financial services licensing requirements under s 911A

ASIC's third allegation was that the ActiveSuper defendants, SPG, WPO and Cayco contravened s 911A through providing financial services without holding an appropriate Australian Financial Services Licence (AFSL).²⁵ Whilst Royale had been an authorised representative of two successive AFSLs between April 2011 and June 2012, Royale's authorisations did not authorise the provision of personal financial product advice.²⁶ White J held that through the conduct of Mr Gibson and its team of telemarketers, Royale's "cold-calling" amounted to recommendations to influence recipients of these calls in relation to the acquisition of an SMSF.²⁷

The court also found that through their offers of securities pursuant to the PPMs, SPG, WPO and Cayco were providing financial services by inducing Australian investors to subscribe for an issue of shares. The indicia of targeting Australian investors in the PPMs included the use of the Australian dollar as the currency for the offer and the statements that the PPMs had "identified a unique opportunity for Australian [SMSFs] to access residential and commercial property developments not normally available to SMSFs".²⁸ Cayco's counsel submitted that the publication of the PPMs on Cayco's website was "too passive a role to constitute carrying on a financial services business" and that the court should draw a distinction between the role of an author on the one hand, and the role of a publisher on the other, citing *Google Inc v Australian Competition and Consumer Commission (ACCC)* [2013] HCA 1; (2013) 249 CLR 435; BC201300295 on this point.²⁹ In dismissing this argument, his Honour declared that:

"In my opinion, this submission overlooks the effect of s 911D(1). ASIC is not required to show that the publication of the PPMs on the Cayco website constituted by itself the carrying on of a financial service business. It is instead sufficient if, in the course of the business carried on by Cayco, it engaged in conduct of the requisite kind."³⁰

His Honour also dismissed a submission on behalf of Cayco that *Australian Securities and Investments Commission (ASIC) v Stone Assets Management Pty Ltd* [2012] FCA 630; (2012) 205 FCR 120; BC201204403 (in which Besanko J at [22] held that the facilitation of online access for the purpose of acquiring financial products constituted the provision of financial services pursuant to s 766A(1) CA) ought to be distinguished because in that case, the whole business of Stone Assets Management had been conducted through its website platform. White J stated that:

"In my view, that is an insufficient basis for distinction. It is plain that the Cayco website was intended to be, and was, a significant means by which Cayco sought to attract investments in SPG and WPO."³¹

[2.4] Misleading or deceptive conduct

ASIC also advanced claims of misleading or deceptive conduct in contravention of s 1041H CA, and s 12DA of the ASIC Act. In the case of the US Realty Memorandum, the court found the representations of the ActiveSuper defendants and the four US LLCs in relation to the manner in which the funds would be invested and the expected returns were misleading and deceptive.³² In the case of the PPMs of SPG and WPO, the court held the ActiveSuper defendants, SPG, WPO and Cayco made misleading and deceptive statements about the investment objectives and strategies of these funds.³³ His Honour found there were no reasonable grounds for the representations in the PPMs that the funds invested by the SMSF clients would be invested in real estate, noting that no steps were taken by or on behalf of SPG and WPO to purchase real estate (such as appointing agents or putting in place systems for the appraisal of possible acquisitions) and that instead the whole purpose of the investment scheme was for SPG and WPO to be a source of funds for MOGS.³⁴

The court dismissed arguments that the misleading effect of the statements in the PPMs was mitigated by statements to the effect that the PPMs were targeted at experienced investors, that the proposed investments were speculative and entailed substantial risk, that there could be no assurance that the funds would achieve their investment objectives, and that only those investors who were able to bear the risk of loss should make investments. His Honour declared that:

"... I do not accept that these statements operated as some kind of balm salving the misleading effect of the PPMs. On the contrary, the circumstance that investment in SPG and WPO was speculative and involved substantial risk made it even more important that prospective investors be informed accurately and completely of all matters bearing upon the nature and extent of the risks about which they were being warned and of the use to which it was intended investment monies would be put. It is plain that they were not."³⁵

ASIC's claims of misleading or deceptive conduct by omission by the ActiveSuper defendants, SPG, WPO and Cayco, through their failure to inform investors as to the past use of invested funds, did not succeed, as White J held that at the time when the respective PPMs of SPG and WPO were published, neither SPG or WPO had any history of use of funds about which investors could be informed.³⁶

[2.5] ASIC's accessory claims against those knowingly concerned in the above contraventions

ASIC contended that each of the MOGS defendants³⁷ had been knowingly concerned in the contraventions by the primary defendants of ss 727(1) and (2), 911A and 1041H CA and of s 12DA of the ASIC Act.³⁸ ASIC sought injunctions against the MOGS defendants under s 1324, a provision which White J reasoned should not be read narrowly as applying only to accessories who had themselves contravened the provisions as argued by ASIC.³⁹ His Honour reviewed the authorities on accessorial liability, which indicated that both intention and knowledge were the essential elements,⁴⁰ For accessorial involvement in the contraventions of s 727(1), ASIC needed to establish that the offers of shares in SPG and WPO were being made, or that application forms for the issue of shares were being distributed, and that no disclosure document had been lodged with ASIC. ASIC was not required to prove that in addition the defendants knew the offer required disclosure to investors under Part 6D.2 CA.⁴¹ To establish accessorial involvement in the contraventions of s 911A, ASIC needed to prove the MOGS defendants knew that the ActiveSuper defendants were carrying on financial services businesses in Australia, and that they did not hold an AFSL covering the provision of the financial services.⁴² To prove that the defendants were knowingly concerned in the contraventions of s 1041H and s 12DA, ASIC needed to establish that the defendants knew that the representations as alleged were made, and that there were no reasonable grounds for the representations.⁴³

After considering the involvement of the respective persons and entities in the contraventions according to the above criteria, his Honour determined ASIC had established knowing involvement in the contraventions by all the directors of MOGS, except for Mr Graeme Stonehouse, whose involvement in the schemes had not been as extensive as the other directors.⁴⁴

[2.6] Remedies:

White J made orders for the winding up of the LLCs, SPG, WPO and Cayco under s 583 CA as sought by ASIC.⁴⁵ In a second hearing, his Honour issued a total of 18 declarations of contraventions against the individuals and entities involved in the fundraising schemes, as well as granting injunctions restraining the defendants from carrying on or being involved in financial services and fundraising business activities. Six of the individuals were also disqualified from providing financial services, and two were disqualified from managing companies, for periods ranging from 7.5 years to permanent disqualification.⁴⁶ In welcoming the Federal Court's decision, ASIC Commissioner Greg Tanzer said:

"Today's outcome shows the courts, ASIC and the community will not tolerate behaviour that seeks to destroy people's lives. With more than 539,000 SMSFs, over a million members, and assets totaling more than \$550 billion, ASIC has ramped up its attention on a sector which is of growing importance to more Australian investors."⁴⁷

¹ For the sake of convenience, his Honour referred to ActiveSuper, Royale, Mr Burrows and Mr Gibson as "the ActiveSuper defendants":

ASIC v ActiveSuper Pty Ltd (in liq) (2015) 105 ACSR 116; [2015] FCA 342; BC201502609 at [3].

2 *ASIC v ActiveSuper Pty Ltd (in liq)* (2015) 105 ACSR 116; [2015] FCA 342; BC201502609 at [3]-[4]; [100]-[105]; [106]-[121].

3 Above, n 2, at [319] (Emphasis in original).

4 Above, n 2, at [5]-[6].

5 Above, n 2, at [8].

6 Above, n 2, at [122]-[130].

7 Above, n 2, at [131]-[136]; [555]-[567].

8 Above, n 2, at [7].

9 Above, n 2, at [9].

10 Above, n 2, at [10].

11 Above, n 2, at [11]-[12].

12 Above, n 2, at [13].

13 *ASIC v ActiveSuper Pty Ltd (No 1)* (2012) 92 ACSR 614; [2012] FCA 1519; BC201210850.

14 *ASIC v ActiveSuper Pty Ltd (No 2)* (2013) 93 ACSR 189; [2013] FCA 234; BC201301412. See also ASIC Media Release 13-054MR "Provisional liquidators appointed in SMSF investigation" 19 March 2013. For commentary on these decisions, see Ben Langford "Orders sought to appoint provisional liquidators to a foreign company" BCLB No 4, March 2013 at [133]; and Ben Langford "ASIC applies to have a provisional liquidator appointed until just and equitable winding up application determined" BCLB No 7, April 2013 at [254].

15 Above, n 2, at [17]-[31].

16 Above, n 2, at [58].

17 Above, n 2, at [62].

18 Above, n 2, at [79].

19 Above, n 2, at [206]-[247].

20 Above, n 2, at [248]-[256].

21 Above, n 2, at [257]-[261].

22 Above, n 2, at [263]-[284].

23 Above, n 2, at [287].

24 Above, n 2, at [289].

25 Above, n 2, at [293]-[308].

26 Above, n 2, at [303]-[306].

27 Above, n 2, at [310]-[324].

28 Above, n 2, at [336].

29 Above, n 2, at [337]. In *Google Inc v ACCC* (2013) 249 CLR 435; 294 ALR 404; [2013] HCA 1; BC201300295 at [3], the High Court overturned the findings of the Full Court of the Federal Court that Google had engaged in misleading and deceptive conduct by publishing and displaying sponsored links as part of their search results in response to a user's search request. The court unanimously held that Google

was not the author of the sponsored links. The court also found that ordinary and reasonable users of the search engine would have understood that the sponsored links were created by advertisers and that any misrepresentations made by the sponsored links were those of the advertisers and had not been adopted or endorsed by Google.

30 Above, n 2, at [338].

31 Above, n 2, at [339].

32 Above, n 2, at [345]-[358].

33 Above, n 2, at [359]-[386].

34 Above, n 2, at [382].

35 Above, n 2, at [384]-[385].

36 Above, n 2, at [387]-[394].

37 For a list of the MOGS defendants, see above, n 2, at [13].

38 Above, n 2, at [395].

39 Above, n 2, at [423].

40 Above, n 2, at [433].

41 Above, n 2, at [451].

42 Above, n 2, at [452]-[453].

43 Above, n 2, at [456]-[457].

44 Above, n 2, at [532]-[614]; [620]-[629].

45 Above, n 2, at [630]-[638].

46 *ASIC v ActiveSuper Pty Ltd (in liq) (No 2)* (2015) 106 ACSR 302; [2015] FCA 527; BC201504480.

47 ASIC Media Release 15-134MR "Decision in ActiveSuper civil proceedings", 29 May 2015.

Recent Cases

[576] Approval of scheme of arrangement where expert determines it is not fair but reasonable

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CIC Australia Ltd (No 2), Re [2015] NSWSC 1314; BC201508697 (15 May 2015, Brereton J)

[CA s 411]