

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S69 of 2020

BETWEEN:

WESTPAC SECURITIES ADMINISTRATION LTD ACN 000 049 772
First Appellant

BT FUNDS MANAGEMENT LTD ACN 002 916 458
Second Appellant

10

and

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

1. **Publication:** This Outline may be published on the internet.
2. **Relevant factual context:** In each of the 15 calls, Westpac gave financial product advice to a person (the customer) within the meaning of s 766B(1) insofar as it made a recommendation (implicitly) that was intended to influence the person in making a decision in relation to a financial product, namely Westpac's superannuation product.
3. During the course of each call, the person informed the caller of the person's objectives in response to questions designed to elicit that information.
 - 10 - RS [2(b)], [13(c)], [14], [51], [54] (contra ASR [3(a)].
 - PJ [54], [56], [65(4)], [247], [252(2)], [254], [380], [382]
 - Allsop CJ: FFC [5], [77]
 - Jagot J: FFC [266], [272], [273], [275], [277(2),(6)]
 - O'Bryan J: FFC [381], [382], [391]
4. A reasonable person in the position of the customer might expect that the caller was interested in the person's objective so elicited and that the caller listened to the person's objective so elicited.
 - 20 - RS [4], [42].
 - PJ [65(5)]
 - Jagot J: FFC [277(3), (5)]
 - O'Bryan J: FFC [391]
5. The recommendation in each call was made, at least partly, after the person informed the caller of the person's objectives and by conveying to the person that the person's objectives would be served by the Westpac product.
 - 30 - RS [2(c)], [3], [13(d)], [17(c)-(d)], [42], [60] (contra ASR [3(b), (c)])
 - PJ [45]-[47], [54], [56], [57], [65(4)], [247], [252(4),(5)], [254]-[260], [387], [395(4)], [404], [445]-[448]
 - Allsop CJ: FFC [5], [37], [39], [58], [64]-[67], [77], [81], [84], [85], [88], [89], [94], [95], [98], [99], [103], [104], [108], [109], [112], [113], [116], [117], [122], [123], [126], [127], [131], [132], [136], [137], [141], [142], [146], [149], [150]
 - Jagot J: FFC [218], [219]-[235], [274], [275], [277(6), (7)], [278], [281], [284]
 - O'Bryan J: FFC [344] -[348], [384], [391], [397], [398], [415(c)], [427]

6. Westpac’s argument is that the Full Court of the Federal Court erred in concluding that Westpac gave that advice *in circumstances where a reasonable person might expect Westpac to have considered* that person’s objectives which it deliberately elicited for the very purpose of making a recommendation the effect of which was that it was an obvious and uncontroversial decision which could be made there and then. Westpac resists the outcome by shifting the burden of acting reasonably on the customer who it says, in effect, should have known better.
7. **Ground 1: Did the Full Court introduce a “normative” element into s 766B(3):** ASIC agrees that “should have considered” is not the correct test (RS [5(c)]). If the
10 Full Court applied the correct statutory test, Westpac does not invite this Court simply to reconsider the facts applying the same test as the Full Court.
8. Each member of the Full Court applied the correct statutory test without any so called “normative” element:
 - RS [17]-[18], [31]-[32], [35].
 - Allsop CJ: FFC [30], [75]-[78], [80];
 - Jagot J: FFC [241], [258]-[260], [266], [274], [277(3), (5)];
 - O’Bryan J: FFC [323], [386]-[392], [396].
9. There was no imposition of “default quasi-fiduciary duties” on Westpac (RS [33]-
20 [34]). Each Judge on appeal examined the reasonable expectation of a customer in each of the calls, including:
 - a. the pre-existing customer relationship and the importance of superannuation: RS [17(a)];
 - b. the Westpac caller’s repeated emphasis on helping the customer, implying Westpac was acting in the customer’s interest: RS [17(b)];
 - c. the eliciting and use of the customer’s objectives to influence the decision to convey a message that the product met those objectives: RS [17(c)]; and
 - d. the implicit recommendation to act to acquire the product after being told of the customer’s personal circumstances: RS [17(d)].
10. The Full Court’s findings do not dictate that any offer of assistance, or raising of a
30 customer’s personal circumstances, will result in personal advice (RS [26]):
 - a. as Westpac’s own training guidelines practically demonstrated: FFC [33]-[34]; FFC [145]; RS [27]; and because

b. CA s 961B(2)(b)(ii) provides for the safe harbour of limited or scaled advice on a particular topic: FFC [257]; RS [28(b)], [29].

11. **Ground 2: the word “considered”:** The Full Court correctly gave the word “considered” in s 766B(3)(b) its ordinary meaning, to “pay attention or regard to”, “take into account” or “view attentively: RS [38]-[39(a), (b)]; FFC [24]-[26]; [241], [245]-[248]; [373]-[375].

12. A gloss requiring “an active process of evaluation or reflecting upon” and an “intellectual engagement with” the specified matters is neither warranted nor conducive to clarity or consumer protection.

10 13. Imported notions from public law are unwarranted: RS [39(d)].

14. There is no inconsistency in approach between ss 766B(3)(a) and (b). The callers had not “considered” the customer’s objectives within s 766B(3)(a) because they were recommending the product irrespective of what the customer said: FFC [75], [265], [384]; RS [45].

15. **Ground 3: The interpretation of “one or more of the person’s objectives, financial situation or needs”**

16. The Primary Judge and Full Court correctly found that what is required is consideration of at least an aspect of a person’s objectives, financial situation or needs: FFC [27]-[29], [249]-[257], [365]-[372], PJ [111]-[119]: RS [51].

20 17. That follows inexorably from the statutory changes to s 766B(3) made by the *Financial Services Reform Bill 2001* (Cth), see the *Supplementary Explanatory Memorandum* to that bill [3.20]-[3.23] (Authorities Vol 5 p1082); RS [52].

18. Westpac’s construction:

a. gives s 961B(2)(c) no work to do: FFC [251], [370]; RS [58];

b. leaves uncertain what will engage the personal advice protections FFC [255]; RS [50], [53];

c. permits an adviser to avoid the personal advice protections by deliberately stopping short of considering all of a customer’s relevant objectives, financial situation, or needs: FFC [251]-[252], [256], [370]; RS [53].

30 Dated: 7 October 2020

Tony Bannon SC

James Renwick SC

Timothy Kane

Matthew Kalyk