

WESTPAC SECURITIES ADMINISTRATION LTD & ANOR v AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (S69/2020)

Court appealed from: Full Court of the Federal Court of Australia
[2019] FCAFC 187

Date of judgment: 28 October 2019

Special leave granted: 24 April 2020

The Appellants (“Westpac”) offered superannuation products under the “BT” brand. During 2014 it invited existing BT customers to consolidate their external superannuation accounts into their BT accounts. Each of the 15 customers who form the subject of the Australian Securities and Investments Commission’s (“ASIC”) claim received communications from Westpac highlighting the potential benefits of rolling over their superannuation accounts. These included:

- a) the potential to save fees; and
- b) the convenience of having all of one’s superannuation in one place.

Westpac also offered to conduct a search for other superannuation accounts that the customers may have held elsewhere. These benefits were basically the same general benefits as identified by ASIC in its “Moneysmart” website.

Westpac then called each of the 15 customers in question. Both the primary judge and the Full Court held that Westpac, in its calls to a customer known as “Customer 1”, had impliedly recommended that that customer roll over her external accounts into her BT account. In doing so Westpac had travelled beyond the giving of general advice and had assumed the more onerous obligations imposed by s 766B(3)(b) of the *Corporations Act 2001* (Cth) (“the Corporations Act”) for providers of personal advice.

All three members of the Full Court (Allsop CJ, Jagot & O’Byrne JJ) found that a reasonable person standing in Customer 1’s shoes (and with that customer’s knowledge) might have expected that Westpac had considered that customer’s subjective circumstances in making the implied recommendation that she roll-over her superannuation accounts. In doing so, the Full Court overturned the primary judge’s finding that distinguished between what a reasonable person might expect Westpac to have *actually* considered, compared to what it *should* have considered.

Having found that Westpac had given personal advice, the Full Court held, inter alia, that Westpac had contravened s 961B of the Corporations Act (and therefore s 961K, the civil penalty provision) by failing to act in the customers’ best interests. Westpac had also contravened s 946A of the Corporations Act by failing to give each customer a written statement of advice.

The grounds of appeal include:

- The Full Court erred in its construction of the reasonable person test in s 766B(3)(b) of the Corporations Act, by asking whether a reasonable person might expect that the advice provider *should have* considered one or more of the recipient's objectives, financial situation and needs, rather than asking whether a reasonable person might expect that the advice provider *had in fact* considered such matters.