

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 2/12/2021 7:11:00 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Concise Statement
File Number: NSD444/2021
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v DOD
BOOKKEEPING PTY LTD ACN 120 384 474 (IN LIQUIDATION)
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



Sia Lagos

Dated: 2/12/2021 7:11:06 PM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

Concise Statement

No.



Federal Court of Australia
 District Registry: New South Wales
 Division: General

IN THE MATTER OF DOD BOOKKEEPING PTY LTD (in liquidation)
 ACN 120 384 474

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

and

DOD BOOKKEEPING PTY LTD (ACN 120 384 474) (in liquidation)

Defendant

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. The Defendant (**Equiti FS**), previously known as Equiti Financial Services Pty Ltd, held an Australian Financial Services Licence No. 328681 and was authorised to provide “*financial product advice*” including “*personal advice*” within the meaning of s 766B(3) of the *Corporations Act 2001* (Cth) (**Act**) to retail clients for certain types of financial products including financial products comprising a “*superannuation interest*” within the meaning of s 10 of the *Superannuation Industry (Supervision) Act 1993* (Cth).
2. Equiti FS did so through financial advisers employed by it, namely, [REDACTED], [REDACTED] (each an **Adviser**), amongst other financial advisers.
3. Equiti FS was part of a group of companies (the **Equiti Group**) along with Equiti Property Pty Ltd (ACN 111 931 394) (**Equiti Property**) and Equiti Finance Pty Ltd (ACN 122 797 773) (**Equiti Finance**).
4. The Equiti Group operated as a “*one stop shop*”. Advisers employed by Equiti FS commonly provided recommendations to clients to establish a self-managed

Filed on behalf of (name & role of party)	<u>Australian Securities and Investments Commission, Plaintiff</u>
Prepared by (name of person/lawyer)	<u>Nicolette Bearup, Litigation Counsel</u>
Law firm (if applicable)	<u>N/A</u>
Tel	<u>02 9911 5745</u> Fax <u>(02) 9911 2279</u>
Email	<u>nicolette.bearup@asic.gov.au</u>
Address for service (include state and postcode)	<u>Level 5, 100 Market Street Sydney NSW 2000</u>

superannuation fund (**SMSF**) and to acquire property through that SMSF. Equiti FS also offered SMSF establishment and administration services; Equiti Property recommended properties to purchase; and Equiti Finance offered mortgage broking services.

5. On 9 October 2020, the members of Equiti FS resolved that it be wound up pursuant to a members' voluntary winding-up; and on the same date Steven Nicols was appointed as the liquidator of Equiti FS.

B. RELIEF SOUGHT FROM THE COURT

6. The Plaintiff seeks declarations, pecuniary penalty orders and ancillary orders as set out in the Originating Process.

C. PRIMARY GROUNDS FOR RELIEF SOUGHT

Provision of personal advice to retail clients

7. The clients of Equiti FS listed in *column A* of *Table 1* of **Confidential Schedule A** (either as a group of persons or as an individual) (each group or individual being referred to below as a **Client**) each:
 - (a) received a statement of advice (**SOA**) on or about the date set out in *column B* of *Table 1* of **Confidential Schedule A** from the Adviser described in *column C* of *Table 1* of **Confidential Schedule A**; and
 - (b) agreed to proceed with the implementation of the recommendations given by the Adviser on or shortly after the same day that the SOA was received by them.
8. Each SOA referred to in paragraph 7 above:
 - (a) contained what was in substance a "*recommendation*" (within the meaning of s 766B(1) of the Act) by the Adviser to the Client to implement the steps set out in the SOA;

- (b) specified at least the following steps for implementation:
 - (i) establishing an SMSF and, where applicable, roll over funds from their existing superannuation fund into the SMFS;
 - (ii) acquiring real property through the SMSF when the SMSF was established;
 - (iii) borrowing funds to acquire the property; and
- (c) was made in the absence of advice to the effect that the Client take time to consider carefully the recommendation, along with other possible alternatives, prior to implementing the recommendation,
(together, **Client Recommendation**).

Particulars

The recommendation given to each Client is summarised in **Schedule B** and the Adviser who gave the recommendation and the date on which it was given is set out in *Table 1* of **Confidential Schedule A**.

9. The Client Recommendation made in each SOA:
- (a) was provided to the Client as a “*retail client*” within the meaning of s 761G of the Act in that none of subsections (5), (6), (6A), (7) or s 761GA applied;
 - (b) was provided “*in relation to*” a “*financial product*” within the meaning of s 766B(1) and s 764A(1)(g) of the Act;
 - (c) constituted “*financial product advice*” within the meaning of s 766B(1)(b) of the Act in that each Client Recommendation could be regarded as being intended to influence the Client in making a decision in relation to a particular financial product or class of financial products or an interest in a particular financial product or class of financial products;
 - (d) constituted “*personal advice*” within the meaning of s 766B(3)(a) and/or (b) of the Act, in that each Adviser considered, in respect of each Client, one or more of that Client’s objectives, financial situation and needs and/or a reasonable

person might expect the Adviser to have considered one or more of those matters.

Legal relationship between Advisers and Equiti FS

10. Each Adviser was a “*representative*” of Equiti FS, which was the “*responsible licensee*” for each Adviser within the meaning of s 961P(a) of the Act.

Best interests obligations: contraventions of section 961K

11. For each SOA given to each Client, the relevant Adviser was obliged to:
- (a) act in the best interests of the Client in relation to that advice within the meaning of s 961B(1) of the Act (**s 961B Obligation**); and
 - (b) only provide advice to the Client if it would be reasonable to conclude that the advice was, within the meaning of s 961G of the Act, appropriate to the Client had the provider satisfied the duty under s 961B to act in the best interests of the client (**s 961G Obligation**).
12. In respect of each Client Recommendation, the Adviser contravened the s 961B Obligation, in the manner specified in the last column of *Table 2* and *Table 3* of **Confidential Schedule A**, in that, having regard to paragraphs 7 to 8 above, the Adviser did not, in giving the Client Recommendation, act in the best interests of the Client.
13. In respect of each Client Recommendation, the Adviser contravened the s 961G Obligation, in the manner specified in the last column of *Table 2* of **Confidential Schedule A**, in that, having regard to paragraphs 7 to 8 above, the Adviser did not, in giving the Client Recommendation, provide advice to the Client in respect of which it was reasonable to conclude that the advice was, within the meaning of s 961G of the Act, appropriate to the Client had the provider satisfied the duty under s 961B to act in the best interests of the client.

14. Equiti FS contravened s 961K(2) of the Act on each occasion on which each Adviser contravened either, or both, s 961B(1) or s 961G of the Act, as alleged in paragraphs 12 and 13 above.

Conflicted Remuneration: contraventions of section 963E(2) and section 963J

15. From time to time commencing in or about the periods described in subparagraphs (a) to (c) of paragraph 16 below, each Adviser made a recommendation (within the meaning of s 766B(1) of the Act) to each client (described in column B of **Confidential Schedule C** and column B of **Confidential Schedule D**) to acquire real property in the circumstances set out in paragraph 9(a) to (d) above (**Recommendation**).

16. In the year ended:

- (a) 30 June 2016, ██████ received from Equiti FS a monetary bonus payment (described as a “*bonus*” in the relevant salary payment advice issued by Equiti FS to ██████) on almost every occasion on which he made a Recommendation to a client in circumstances in which that recommendation was implemented by the client through the purchase of a property through Equiti Property, which bonus was paid to, and accepted by, ██████ after the property transaction settled;
- (b) 30 June 2016, ██████ received from Equiti FS a monetary bonus payment (described as a “*bonus*” in the relevant salary payment advice issued by Equiti FS to ██████) on almost every occasion on which he made a Recommendation to a client in circumstances in which that recommendation was implemented by the client through the purchase of a property through Equiti Property, which bonus was paid to, and accepted by, ██████ after the property transaction settled;
- (c) 30 June 2017, ██████ received from Equiti FS a monetary bonus payment (described as a “*bonus*” in the relevant salary payment advice

issued by Equiti FS to [REDACTED] on almost every occasion on which he made a Recommendation to a client in circumstances in which that recommendation was implemented by the client through the purchase of a property through Equiti Property, which bonus was paid to, and accepted by, [REDACTED] after the property transaction settled,

Those occasions on which a bonus payment was made are set out in **Confidential Schedule C (Schedule C Bonus Payments)**.

17. The employment contracts between Equiti FS and each of [REDACTED], [REDACTED] and [REDACTED] provided, in clause 5.2, that the salary of each would be paid at the intervals set out in Item 5 of the “*Financial Advisor Schedule*”, which stated that “*bonuses will be calculated and paid monthly*”.

Particulars

Employment contract between Equiti FS and [REDACTED] dated 25 January 2013.
Employment contract between Equiti FS and [REDACTED] dated 25 January 2013.
Employment contract between Equiti FS and [REDACTED] dated 17 March 2016.

18. The conduct on the part of Equiti FS referred to in paragraphs 16 to 17 above:
- (a) conveyed to each of the Advisers the representation that, if they were to make a Recommendation to a client and that recommendation was implemented by the client through the purchase of a property through Equiti Property, then, after settlement of the property transaction, a monetary bonus would or would be likely to be paid to them;
 - (b) objectively created on the part of each of the Advisers the expectation that, if they were to make a Recommendation to a client and that recommendation was implemented by the client through the purchase of a property through Equiti Property, then, after settlement of the property transaction, a monetary bonus would or would be likely to be paid to them.
19. Equiti FS made each of the bonus payments to each of [REDACTED] and [REDACTED] from 1 July 2016 and to [REDACTED] from 1 July 2017 referred to in

Confidential Schedule D (Schedule D Bonus Payments) and thereby reinforced the representation referred to in paragraph 18(a) and the objective expectation referred to in paragraph 18(b) above.

20. The nature of the Schedule C Bonus Payments and of each Schedule D Bonus Payment occurring prior to any Recommendation referred to in **Confidential Schedule D** was, and the circumstances (referred to in paragraphs 16 to 17 above) in which those bonus payments were made were, such that:

(a) at the time each Recommendation referred to in **Confidential Schedule D** was made, the conduct of Equiti FS as the licensee was such as to convey to the Adviser that, if he made a Property Recommendation and that recommendation was implemented through the purchase of a property through Equiti Property, then a bonus payment would or would be likely to be made to him after settlement;

(b) each of the Schedule D Bonus Payments could reasonably be expected to influence the choice of financial product recommended by, or the financial product advice given by, each of those Advisers to retail clients, in that they could reasonably be expected to influence each of those Advisers to make Recommendations to clients:

(i) in the case of [REDACTED] and [REDACTED] on and after 1 July 2016;

(ii) in the case of [REDACTED] on and after 1 July 2017.

21. In summary, the conduct of Equiti FS referred to in paragraphs 16 to 17 above was such as to give rise to a representation by it and objectively to an expectation on the part of the Advisers that, if they made a Recommendation to clients and that recommendation was implemented through the purchase of a property through Equiti Property, then they would or would be likely to receive a bonus payment shortly after settlement of the property the subject of the recommendation.

22. Accordingly, within the meaning of the definition of “*conflicted remuneration*” in s 963A of the Act, the “*benefit ... given to a ... representative of a financial services licensee, who provides financial product advice to persons as retail clients*”, which benefit “*could reasonably be expected to influence*” the choice of financial product recommended to, or the financial product advice given to, retail clients by the Advisers was:
- (a) all of the Schedule C Bonus Payments (as a whole) made to each Adviser;
and /or
 - (b) each Schedule D Bonus Payment made to each Adviser.
23. Each bonus payment referred to above, which was paid to [REDACTED] and [REDACTED] was accepted by [REDACTED] and [REDACTED] pursuant to an arrangement entered into before 1 July 2013 but related to a Property Recommendation given to clients after 1 July 2015.
24. Each bonus payment referred to above accepted by, or paid to, [REDACTED] was pursuant to an arrangement entered into on 17 March 2016.
25. Accordingly the grandfathering provision contained in s 1528 of the Act does not apply to any of the bonuses alleged in paragraph 22 above to constitute “*conflicted remuneration*”.
26. Equiti FS therefore contravened:
- (a) s 963J of the Act on each occasion on which it gave an Adviser a bonus payment referred to in paragraph 22(a) and/or (b) above, in that that payment was in each case paid for work carried out or to be carried out, namely, the giving of the Recommendation; and
 - (b) s 963E(2) of the Act on each occasion on which an Adviser accepted a bonus payment referred to in paragraph 22(a) and/or (b) above.

Certificate of Lawyer

I, Nicolette Bearup, certify to the Court that, in relation to the Concise Statement filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the Concise Statement.



.....
Signed by Nicolette Bearup

.....
Lawyer for the Plaintiff

.....
Date: 17 May 2021

This Concise Statement was prepared by the Plaintiff's counsel:
Alec Leopold SC and Talitha Fishburn

SCHEDULES

Confidential Schedule A

- Table 1* Client Groups, Adviser, date of SOA
Table 2 Contraventions of section 961B (best interests obligation) and section 961G (advice not appropriate)
Table 3 Additional contraventions of section 961B (best interests obligation) common to all Client Groups

Schedule B

- Table 1* Summary of Advice provided to all Client Groups

Confidential Schedule C

- Table 1* Bonus Payments to [REDACTED] (1.7.2015 to 30.6.2016), [REDACTED] (1.7.2015 to 30.6.2016), [REDACTED] (1.7.2016 to 30.6.2017)

Confidential Schedule D

- Table 1* Bonus Payments to [REDACTED] (from 1.7.2016), [REDACTED] (from 1.7.2016), [REDACTED] (from 1.7.2017)