



Equity Division Supreme Court

Case Name: **Australian Securities and Investments
Commission v Park Trent Properties Group Pty
Ltd (No 3)**

Medium Neutral Citation: **[2015] NSWSC 782**

Hearing Date(s): 3-5, 9-12, 19, 22 June 2015

Date of Decision: 15 October 2015

Jurisdiction: Equity Division

Before: Sackville AJA

Decision:

1. If the plaintiff (**ASIC**) wishes to file written submissions as to the form of the orders proposed in this judgment (such submissions to be consistent with these reasons for judgment), or as to costs, it should do so within fourteen days.
2. If the defendant (**Park Trent**) wishes to file written submissions as to the form of the proposed orders (such submissions to be consistent with these reasons for judgment), or as to costs, or if it wishes to reply to ASIC's submissions, it should do so within a further fourteen days.

Catchwords:

CORPORATIONS LAW - whether defendant contravened s 911A(1) of the *Corporations Act 2001* (Cth) by carrying on a financial services business without a financial licence – defendant sold investment properties on commission – defendant's marketing strategy incorporated advice about establishing self managed superannuation funds (SMSFs) and using SMSFs to purchase investment properties – advice included projections as to the returns that could be achieved through SMSFs – whether the defendant made recommendations or stated opinions as to beneficial interests in SMSFs – whether recommendations and opinions were intended to influence decisions in relation to financial products

REMEDIES – whether declaratory and injunctive relief should be granted in respect of contravention of s 911A(1) of the *Corporations Act 2001* (Cth) – form of declaration and restraining order.

Legislation Cited:

Australian Securities and Investments Commission Act 2001 (Cth), s 33
Corporations Act 2001 (Cth), ss, 20, 761A, 761C, 764A, 765A, 766A, 766B, 911A, 911B, 1101B, 1311, 1312, 1324, 1332; Ch 7, Pt 7.6
Income Tax Assessment Act 1997 (Cth), s 995-1(1)
National Consumer Credit Protection Act 2009 (Cth), s 29
Superannuation Industry (Supervision) Act 1993 (Cth), ss 10, 17A, 19, 42A, 45, 67A
Superannuation Industry (Supervision) Amendment Act 2010 (Cth), sch 1 [8]
Trade Practices Act 1974 (Cth)

Corporations Regulations 2001 (Cth), reg 7.1.29

Civil Procedure Act 2005 (NSW), s 56(1), (2), (3)
Evidence Act 1995 (NSW), ss 97(1), 140
Property, Stock and Business Agents Act 2002 (NSW), s 8
Supreme Court Act 1970 (NSW), s 75

Estate Agents Act 1980 (Vic), s 12(2)

Cases Cited:

Andar Transport Pty Ltd v Brambles Ltd [2004] HCA 28; 217 CLR 424
Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq) [2015] FCA 342; 105 ACSR 116
Australian Securities and Investments Commission v Fuelbanc Australia Ltd [2007] FCA 960; 162 FCR 174
Australian Securities and Investments Commission v Monarch FX Group Pty Ltd [2014] FCA 1387; 103 ACSR 453
Australian Securities and Investments Commission v Narain [2008] FCAFC 120; 169 FCR 211
Australian Securities and Investments Commission v Oxford Investments (Tasmania) Pty Ltd [2008] FCA 980; 169 FCR 522
Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 1) [2015] NSWSC 752
Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 2) [2015] NSWSC 782
Australian Securities and Investments Commission v Stone Assets Management Pty Ltd [2012] FCA 630; 90 ACSR 523
Briginshaw v Briginshaw [1938] HCA 34; 60 CLR 336
Certain Lloyd's Underwriters v Cross [2012] HCA 56;

248 CLR 378
 Commodore Business Machines Pty Ltd v Trade
 Practices Commission (1990) 92 ALR 563
 Corporate Affairs Commission v Transphere Pty Ltd
 (1988) 15 NSWLR 596
 ICI Australia Operations Pty Ltd v Trade Practices
 Commission (1992) 38 FCR 248
 In the Matter of Idyllic Solutions Pty Ltd; Australian
 Securities Investments Commission v Hobbs [2013]
 NSWSC 106
 Jones v Dunkel [1959] HCA 8; 101 CLR 298
 Melway Publishing Pty Ltd v Robert Hicks Pty Ltd
 [2001] HCA 13; 205 CLR 1
 Mercedes Holdings Pty Ltd v Waters (No 2) [2010]
 FCA 472; 186 FCR 450
 Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd
 [1992] HCA 66; 110 ALR 449
 Project Blue Sky Inc v Australian Broadcasting
 Authority [1998] HCA 28; 194 CLR 355
 Re PFS Wholesale Mortgage Corporation Pty Ltd;
 Australian Securities and Investments Commission v
 PFS Business Development Group Pty Ltd [2006]
 VSC 192; 57 ACSR 553
 Rural Press Ltd v Australian Competition and
 Consumer Commission [2003] HCA 75; 216 CLR 53
 Sankey v Whitlam 1978 HCA 43; 142 CLR 1
 Walker v Wimborne [1976] HCA 7; 137 CLR 1

Category:	Principal judgment
Parties:	Australian Securities & Investments Commission (Plaintiff) Park Trent Properties Group Pty Limited (Defendant)
Representation:	Counsel: EA Cheeseman SC / TO Prince / KS Anderson (Plaintiff) J Hewitt (Defendant) Solicitors: Australian Securities & Investments Commission (Plaintiff) HWL Ebsworth Lawyers (Defendant)
File Number(s):	2014/331307

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
v PARK TRENT PROPERTIES GROUP PTY LTD (No 3)**

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JUDGMENT

- 1 **SACKVILLE AJA:** In these proceedings the plaintiff (**ASIC**) alleges that the defendant (**Park Trent**) has carried on “a financial services business” without an Australian financial services licence (**AFSL**) since January 2010, in contravention of s 911A of the *Corporations Act 2001* (Cth) (**Corporations Act**). ASIC seeks declaratory and injunctive relief.
- 2 There is no dispute that between January 2010 and the date of the trial (**the Relevant Period**) Park Trent did not hold an AFSL. The contest is whether Park Trent, throughout the Relevant Period, carried on a financial services business.
- 3 ASIC’s claim requires reference to a complex series of interlocking statutory provisions. In substance, however, its case is that Park Trent, throughout the Relevant Period, conducted the business of providing “financial product advice” to its clients in relation to their existing and future superannuation interests. In its opening written submissions, ASIC alleged, in summary, that Park Trent had:
 - “(a) promoted and recommended to members of the public the use of self-managed superannuation funds (**SMSFs**) as a means of investing in real property,
 - (b) advised that clients should purchase real property by establishing a SMSF, and
 - (c) advised that clients should transfer their existing superannuation account balances into a SMSF and
 - (d) facilitated that transfer.”

This conduct is said to have constituted carrying on a “financial services business” in contravention of s 911A(1) of the Corporations Act.

- 4 The proceedings were heard over nine hearing days. The documentary evidence, including statements tendered and affidavits read, comprises approximately 11,000 pages of material. The case is therefore substantial,

although not especially large by modern standards of hard-fought commercial litigation. What is surprising is that half way through the second decade of the twenty-first century, a national regulator conducts complex proceedings of this kind wholly in paper form. Even the contents of Park Trent's website was tendered in hard copy form. Indeed, the only material made available in digital form (and therefore searchable) was the transcript, which is not prepared by the parties.

- 5 The documentary evidence was presented in 25 folders, each of which was crammed to capacity and therefore prone to collapse. The organisation of the folders was not such as to engender confidence that a great deal of thought had been given to presenting the material in the most user-friendly manner. It was not uncommon, for example, for a single footnote to ASIC's submissions to require retrieval of and reference to five or more separate folders.
- 6 Perhaps there are advantages to the parties in litigation being conducted in this way. But an exclusive reliance on paper renders the preparation of a judgment an immeasurably more difficult process and inevitably leads to delays in finalising the case. The parties' written submissions were generally well organised and helpful. But sifting through the evidence referred to in those submissions and in oral argument proved to be an extremely time-consuming and often frustrating task.
- 7 I do not underestimate the difficulties confronting bodies such as ASIC in preparing and presenting complex cases for trial or, for that matter, the task facing defendants in defending proceedings. I think it important, however, that regulating agencies should present cases in a manner that assists the Court to fulfil the overriding purpose stated in the *Civil Procedure Act 2005* (NSW), namely to facilitate the just, cheap and quick resolution of the real issues in dispute.¹ In my opinion, that was not done as well as it could have been in the present case.

¹ *Civil Procedure Act 2005* (NSW), s 56(1), (2), (3).

ASIC's Pleaded Case

The Alleged Contravention

- 8 ASIC commenced proceedings in the Corporations List of the Equity Division on 10 November 2014. ASIC pleads its case in a Statement of Claim filed on 28 November 2014. Unusually, the Statement of Claim has not been amended although ASIC had modified the form of injunctive relief it seeks.
- 9 The Statement of Claim pleads that Park Trent, the only defendant, is the “head company” of a group of nine companies (including Park Trent itself):
- “which together operate as part of a single business trading under the name Park Trent Properties Group (... referred to collectively as the **Park Trent Group**).”
- 10 The eight companies other than Park Trent are identified as follows:
- Easy Plan Financial Services Pty Ltd (**EasyPlan**).
 - Cross Country Realty Pty Ltd (**CCR**).
 - Cross Country Realty Victoria Pty Ltd (**CCRVic**).
 - Parktrent Properties Group W.A. Pty Ltd (**Park Trent WA**).
 - Parktrent Properties Group S.A. Pty Ltd (**Park Trent SA**).
 - Parktrent Real Estate Pty Ltd (**Park Trent RE**).
 - Rhymney Pty Ltd (**Rhymney**).
 - Parallel Projects Pty Ltd (**Parallel**).
- 11 ASIC alleges that Park Trent has conducted and continues to conduct a property investment business involving the sale of real property on a commission basis and that Park Trent has engaged in a repeated pattern of

conduct throughout the Relevant Period. The conduct is said to include the following:

- Park Trent conducts telemarketing and advertising designed to promote its ability to provide information about SMSFs;
- Park Trent organises and presents seminars in which participants are urged by means of PowerPoint presentations to invest in real property through SMSFs and are told that Park Trent can provide expert advice in setting up SMSFs and in explaining how real property works within an SMSF;
- Park Trent arranges home visits during which a representative suggests to the potential investor the purchase of real property either in the name of the investor or by using an SMSF;
- Park Trent sets up office meetings at which a representative provides the potential investor with a projection of financial returns from real property on the basis of certain assumptions;
- where the potential investor has a superannuation account, Park Trent's representative typically advises the investor how a purchase of a particular property can be financed through the creation of an SMSF and the transfer of the balance in the existing superannuation account to the SMSF;
- if the investor decides to proceed with a purchase at the office meeting, Park Trent obtains a holding deposit of \$1,000 to enable the investor to secure the selected property;
- if the potential investor decides to purchase the property through a yet to be created SMSF, Park Trent charges a fee of \$5,000 to arrange for an SMSF to be set up and requires the investor to sign documentation authorising an accounting firm with which Park Trent has an existing

relationship to take the necessary steps; and

- Park Trent engages the accounting firm to establish the SMSF and liaising with the investor to transfer the balance in his or her existing superannuation balance to the SMSF.

12 Park Trent's conduct as a whole, or discrete parts of it, is alleged to contravene s 911A of the Corporations Act. Specifically, ASIC pleads that Park Trent, as part of its business, makes recommendations and states opinions which:

- "e) [are] intended to influence a person in making a decision in relation to a superannuation interest within the meaning of the [SIS Act], or an interest in such an interest;
- f) further or in the alternative to e), [are] intended to influence a person in making a decision to acquire, vary and/or dispose of a superannuation interest within the meaning of the [SIS Act], or an interest in such an interest."

Repeated acts of this kind by Park Trent are said to constitute the carrying of a financial services business in Australia, in contravention of s 911A of the Corporations Act.

Relief Sought

13 The declaratory relief sought by ASIC in the Originating Process is as follows:

"A declaration pursuant to s 1101B(1) of the *Corporations Act* that [Park Trent] persistently contravened during the period from January 2010 to date, and is continuing to contravene, s 911A(1) of the *Corporations Act* by:

- (a) Carrying on a business of providing financial services, namely financial product advice, by making recommendations or statements of opinion intended to influence persons (or which could reasonably be regarded as being intended to have such an influence) in making a decision to acquire, vary and/or dispose of a superannuation interest (or an interest in a superannuation interest) within the meaning of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**),
- (b) Without holding an [AFSL] covering the provision of the financial services."

14 Park Trent resists the grant of declaratory relief on the ground, among others,

that a court does not ordinarily make a declaration that a person has committed a criminal offence. Since a contravention of s 911A(1) of the Corporations Act is a criminal offence,² Park Trent submits that the Court should refuse to make a declaration in the terms sought by ASIC, even if the evidence establishes that Park Trent contravened s 911A(1) in the manner pleaded.

- 15 To counter this argument, ASIC has proffered the following undertaking to the Court:

“ASIC is prepared, as a condition of the grant of declaratory relief against [Park Trent] in this proceeding (**the Proceeding**), to give the following undertaking to the Court:

ASIC undertakes that it will:

- (a) not initiate or pursue any criminal investigation of [Park Trent] which investigation relates to or concerns the subject matter of the Proceeding; and
- (b) not refer any brief of evidence to the Commonwealth Director of Public Prosecutions which brief relates to possible criminal proceedings against [Park Trent] relating to or concerning the subject matter of the Proceeding.”

- 16 In its Originating Process, ASIC sought orders pursuant to ss 1101B(1) and 1324(1) of the Corporations Act restraining Park Trent, by itself, its officers, servants, employees, agents or otherwise from:

- “(a) Carrying on a business related to, concerning or directed to financial products or financial services within the meaning of section 761A of the *Corporations Act*;
- (b) Providing financial product advice within the meaning of section 761A of the *Corporations Act*;
- (c) In any way holding itself out as doing the things in (a) or (b) above.
- (d) Carrying on any business related to, concerning or directed to superannuation interests within the meaning of the *S/S Act 1993* (Cth)];

² Corporations Act s 1311(1)(a). The maximum penalty for a contravention by a body corporate is a pecuniary penalty of \$170,000: s 1312(1); sch 3, item 262C.

- (e) In any way holding itself out as doing the things in paragraph (d) above;
- (f) Being in any way; directly or indirectly, knowingly concerned in or a party to the conduct of another person or any business related to, concerning or directed to superannuation interests within the meaning of the *S/S Act*."

17 In the course of final submissions, ASIC modified the terms of the injunctive relief sought in the Originating Process. It now seeks orders pursuant to ss 1101B(1) and 1324 of the Corporations Act restraining Park Trent, by itself, its officers, servants, employees, agents or otherwise:

- "(a) from directly or indirectly
 - (i) making recommendations or statements of opinion to a person, whether orally or in writing, which recommendations or statements are made with an intention, or which could reasonably be regarded as being intended, to influence the person:
 - (A) to establish a self managed superannuation fund or to become a member of a self managed superannuation fund; or
 - (B) to dispose of, or reduce the person's interest in all or part of an existing superannuation fund; or
 - (C) to acquire an interest in a superannuation fund; or
 - (D) to modify an investment strategy or a contribution level in an existing superannuation fund; and
 - (ii) in any way advising, recommending, encouraging or suggesting that a person:
 - (A) establish a self managed superannuation fund or to become a member of a self managed superannuation fund; or
 - (B) dispose of, or reduce the person's interest in all or part of an existing superannuation fund; or
 - (C) acquire an interest in a superannuation fund; or
 - (D) modify an investment strategy or a contribution level in a superannuation fund; and
 - (iii) supplying, providing or arranging for the supply or provision of,

any form of Financial Investment Analysis to a person where the supply or provision is intended, or which could reasonably be regarded as being intended, to influence the person:

- (A) to establish a self managed superannuation fund or to become a member of a self managed superannuation fund; or
 - (B) to dispose of, or reduce the person's interest in all or part of an existing superannuation fund; or
 - (C) to acquire an interest in a superannuation fund; or
 - (D) to modify an investment strategy or a contribution level in an existing superannuation fund; and
- (b) from in any way holding itself out as doing or being able to do any of the things in (a) above; and
- (c) from being in any way, directly or indirectly, knowingly concerned in or a party to conduct by another person or the kind described in (a) or (b) above.

In this order:

superannuation fund and **self managed superannuation fund** have the same meaning as in the *Superannuation Industry (Supervision) Act 1993* (Cth); and

Financial Investment Analysis means any statement as to the projected future financial return, outcome or consequences of a particular investment or investment strategy."

Statutory Framework

Corporations Act

18 Section 911A of the Corporations Act is in Chapter 7, Part 7.6 of the Act. Section 760 states that the "main object" of Chapter 7 is to promote:

- "(a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and
- (b) fairness, honesty and professionalism by those who provide financial services; and
- (c) fair, orderly and transparent markets for financial products; and
- (d) the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities."

- 19 Part 7.6 of the Corporations Act is headed “Licensing of providers of financial services”. Section 911A(1) is as follows:

“Subject to this section, a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services.”

- 20 There are a number of exemptions from the prohibition in s 911A(1). Only one is of relevance – and then of only marginal relevance – to the present case. Section 911A(2)(j) exempts from the licence requirement a person who provides a financial service in the person’s capacity as the trustee of an SMSF.
- 21 Section 911B(1) of the Corporations Act provides that a person (the **provider**) must only provide a financial service on behalf of another person (the **principal**) who carries on a financial services business if, among other requirements, the principal holds an AFSL covering the provision of their service.
- 22 The expression “financial services business” is defined in s 761A of the Corporations Act (which is in Part 7.1) to mean “a business of providing financial services”.
- 23 Section 761C of the Corporations Act states that in working out whether someone carries on a financial services business, Part 1.2, Div 3, needs to be taken into account. Division 3 includes ss 19-21(1), which read as follows:

“19 A reference to a business of a particular kind includes a reference to a business of that kind that is part of, or is carried on in conjunction with, any other business.

20 A reference in this Act to a person carrying on a business, or a business of a particular kind, is a reference to the person carrying on a business, or a business of that kind, whether alone or together with any other person or persons.

21(1) A body corporate that has a place of business in Australia, or in a State or Territory, carries on business in Australia, or in that State or Territory, as the case may be.”

24 Subject to a presently irrelevant exception, s 766A(1)(a) of the Corporations Act states that a person “provides a financial service” for the purposes of Chapter 7 if, *inter alia*, that person provides “financial product advice”. The meaning of “financial product advice” is addressed in s 766B(1):

“(1) For the purposes of this Chapter, financial product advice means a recommendation or a statement of opinion, or a report of either of those things, that:

- (a) is intended to influence a person or persons 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; or
- (b) could reasonably be regarded as being intended to have such an influence.

(1A) However, ... the provision or giving of an exempt document or statement does not constitute the provision of financial product advice.”

25 Section 766B(2) states that there are two kinds of financial product advice: “personal advice” and “general advice”. “Personal advice” is financial product advice given or directed to a person in circumstances where the provider of the advice had considered one or more of the person’s objectives, financial situation and needs or a reasonable person might expect the provider to consider one or more of those matters.³ “General advice” is financial product advice that is not personal advice.⁴

26 Section 766B(5) stipulates that certain advice, such as advice given by a lawyer in his or her professional capacity about legal matters is not “financial product advice”. Section 766B(7) states that if in response to a request, a person gives the inquirer information about the cost of a financial product or the rate of return on a financial product, and the request could have been complied with by giving the inquirer equivalent information about one or more other financial products, the act of telling the inquirer the information does not of itself constitute the making of a recommendation in relation to the financial

³ Corporations Act, s 766B(3).

⁴ Corporations Act, s 766B(4).

product.

- 27 Section 764A of the Corporations Act identifies “[s]pecific things that are financial products”. Subject to subdivision D, which contains exclusions not presently relevant, the term “financial products” includes for the purposes of Chapter 7:

“(g) a superannuation interest within the meaning of the *Superannuation Industry (Supervision) Act 1993*”.

- 28 Section 1101B(1) of the Corporations Act provides as follows:

“The Court may make such order, or orders, as it thinks fit if:

- (a) on the application of ASIC, it appears to the Court that a person:
 - (i) has contravened ... any other law relating to ... providing financial services

...

However, the Court can only make such an order if the Court is satisfied that the order would not unfairly prejudice any person.”

- 29 Section 1101B(4) of the Corporations Act, without limiting s 1101B(1), gives examples of the orders that a court can make pursuant to s 1101B(1). The examples include an order restraining a person from carrying on a business or doing an act or classes of acts in relation to financial products, if the person has persistently contravened or is continuing to contravene a provision of Chapter 7.⁵

- 30 Section 1324(1) of the Corporations Act provides as follows:

“Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:

- (a) a contravention of this Act;

...

the Court may, on the application of ASIC ... grant an injunction, on such terms as the Court thinks appropriate, restraining the first-mentioned person

⁵ Corporations Act s 1101B(4)(a).

from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.”

Superannuation Industry (Supervision) Act 1993 (Cth)

- 31 To ascertain the meaning of superannuation interest, it is necessary to refer to the *Superannuation Industry (Supervision) Act 1993 (Cth)* (**SIS Act**). Section 10(1) of the SIS Act defines “superannuation interest” to mean “a beneficial interest in a superannuation entity” and a “superannuation entity” to include a “regulated superannuation fund”.
- 32 Section 19(1) of the SIS Act provides that a regulated superannuation fund is a superannuation fund in respect of which subsections (2) and (4) have been complied with. Those subsections are as follows:
- “(2) The superannuation fund must have a trustee.
 - (3) Either of the following must apply:
 - (a) ...
 - (b) the governing rules must provide that the sole or primary purpose of the fund is the provision of old-age pensions.
 - (4) The trustee or trustees must have given to APRA, or such other body or person as is specified in the regulations, a written notice that is:
 - (a) in the approved form; and
 - (b) signed by the trustee or each trustee;electing that this Act is to apply in relation to the fund.”
- 33 Section 17A(1) of the SIS Act provides that a superannuation fund, other than a fund with one member, is a “self managed superannuation fund” if it satisfies the following conditions:
- “(a) it has fewer than 5 members;
 - (b) if the trustees of the fund are individuals - each individual trustee of the fund is a member of the fund;

- (c) if the trustee of the fund is a body corporate - each director of the body corporate is a member of the fund;
- (d) each member of the fund:
 - (i) is a trustee of the fund; or
 - (ii) if the trustee of the fund is a body corporate--is a director of the body corporate ..."

Section 17A(2) specifies the requirements for an SMSF with only one member.

- 34 As Park Trent's submissions point out, real property as such is not within the definition of "financial products" in s 764A(1) of the Corporations Act. A "credit facility" within the meaning of the Corporations Regulations is also expressly excluded from the definition.⁶

Amendments to the SIS Act

- 35 There were a number of references in the evidence to the changes in the rules applicable to SMSFs that prompted Park Trent to provide information (to use a neutral expression) to clients about investing in property through an SMSF. Mr Hewitt's final written submissions helpfully explained the legislative amendments that apparently led Park Trent to adopt the business model described later in this judgment.
- 36 Section 67(1) of the SIS Act provides that, subject to certain exceptions, a trustee of a regulated superannuation fund, including an SMSF, must not borrow money or maintain an existing borrowing of money. Prior to the enactment of the *Superannuation Industry (Supervision) Amendment Act 2010* (Cth) (**SIS Amendment Act 2010**), s 67(4A) of the SIS Act exempted certain non-recourse borrowings from the prohibition in s 67(1).⁷ The SIS Amendment Act 2010, which came into force on 7 July 2010, repealed s

⁶ Corporations Act s 765A(1)(h)(i).

⁷ Section 67(4A) became law on 24 September 2007.

67(4A) and introduced s 67A into the SIS Act.⁸

- 37 The effect of s 67A, relevantly is that a trustee of an SMSF may borrow money to purchase a “single acquirable asset”.⁹ An “acquirable asset” is any asset that is not money, provided the trustee is not prohibited from acquiring the asset.¹⁰ Since an “asset” is defined as “any form of property”,¹¹ an acquirable asset includes real property.¹² The borrowing arrangement must, however, provide for the acquirable asset to be “held on trust so that the RSF [Regulated Superannuation Fund] trustee acquires a beneficial interest in the acquirable asset”.¹³ In addition, the RSF trustee must have the right to acquire legal ownership of the acquirable asset by making one or more payments after acquiring the beneficial interest and the lender’s rights on default must be limited to rights relating to the acquirable asset.¹⁴ The latter requirement limits the borrowing permitted to a trustee to a non-recourse loan.

Preliminary Matters

Interlocutory Judgments

- 38 I gave two interlocutory judgments during the hearing. In the first, I overruled an objection taken by Mr Hewitt on behalf of Park Trent to the tender or reading of statements and affidavits by investors or potential investors who had dealt with representatives of Park Trent.¹⁵ Mr Hewitt objected on the ground that the material constituted tendency evidence within s 97(1) of the *Evidence Act 1995* (NSW) and was inadmissible because it did not have significant probative value. I held that the evidence was relevant to the facts in issue, independently of its tendency to show that Park Trent had a propensity to act in a particular way. I also considered that, in any event, the

⁸ SIS Amendment Act 2010, sch 1 [8].

⁹ SIS Act, s 67A(1)(a).

¹⁰ SIS Act, s 67A(2).

¹¹ SIS Act, s 10(1).

¹² The *Explanatory Memorandum to the Superannuation Industry (Supervision) Amendment Bill 2010* (Cth) makes it clear that the purchase of real property constitutes a single acquirable asset: see at [1.14].

¹³ SIS Act, s 67A(1)(b).

¹⁴ SIS Act, s 67A(1), (c), (d).

¹⁵ *Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd* (No 1) [2015] NSWSC 752.

evidence had significant probative value.

- 39 In the second interlocutory judgment, I refused an application made by Park Trent on the sixth day of the trial to amend its defence.¹⁶ The proposed amendment sought to plead that by reason of reg 7.1.29 of the *Corporations Regulations 2001* (Cth), Park Trent's conduct was an "exempt service" within the meaning of reg 7.1.29(5) and thus it did not provide a "financial service" for the purposes of s 766A(1) of the Corporations Act. I ruled that the application raised fresh evidentiary issues and was made too late in the proceedings.

Standard of Proof

- 40 A contravention of s 911A(1) of the Corporations Act is a criminal offence and, where the contravention is by a body corporate, carries a maximum penalty of 1,000 penalty units (equivalent to \$170,000).¹⁷ In the present proceedings, ASIC does not seek to have criminal penalties imposed on Park Trent. It seeks only declaratory and injunctive relief in respect of the alleged contravention by Park Trent.
- 41 Section 1332 of the Corporations Act provides that where, in proceedings other than proceedings for an offence, it is necessary to establish that a person has contravened a provision of the Act, it is sufficient if the contravention is established on the balance of probabilities.
- 42 There is authority for the proposition that proceedings for declaratory and injunctive relief pursuant to ss 1101B and 1324 of the Corporations Act are not proceedings for the imposition of a penalty, even where the basis for the relief is an alleged contravention of a provision of the Corporations Act that can attract criminal sanctions.¹⁸ Nonetheless, ASIC accepts that the standard of proof that it must satisfy in the present proceedings is to be understood in

¹⁶ *Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 2)* [2015] NSWSC 782.

¹⁷ Corporations Act s 1311(1), 1311(1A), 1312(1), sch 3 item 262C.

¹⁸ *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* [2015] FCA 342; 105 ACSR 116 at [74]-[75] (White J).

the light of s 140(2) of the *Evidence Act 1995* (NSW) (**Evidence Act**).¹⁹ Section 140(2) provides that in determining whether, in a civil proceeding, the court is satisfied that the case has been proved on the balance of probabilities, it may take into account:

- “(a) the nature of the cause of action or defence;
- (b) the nature of the subject-matter of the proceedings; and
- (c) the gravity of the matter alleged.”

43 It follows that the principles stated in s 140(2) of the Evidence Act, which reflected those stated in *Briginshaw v Briginshaw*,²⁰ apply in the present case. The principles were restated by the plurality in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* as follows:²¹

“The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary “where so serious a matter as fraud is to be found”. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.” (Citations omitted.)

In making findings of fact, I have borne these principles in mind.

Park Trent’s Business Structure

44 ASIC contends that:

- Park Trent operates a single integrated business along with other companies in the Park Trent Group;

¹⁹ *ASIC v ActiveSuper* at [87].

²⁰ [1938] HCA 34; 60 CLR 336 at 361-362 (Dixon J).

²¹ [1992] HCA 66; 110 ALR 449 at 449-450 (Mason CJ, Brennan, Deane and Gaudron JJ).

- Park Trent is the core or head company of the Park Trent Group and controls the operation of the business; and
- Mr Ronald Cross (**Mr Cross**) is the ultimate controller of Park Trent and other companies within the Park Trent Group.

45 I shall address later whether the evidence supports ASIC's contentions. In order to do so, it is necessary to consider the business structure of Park Trent and the relationship between Park Trent and other members of the Park Trent Group. This includes an examination of Mr Cross' role as CEO of the Park Trent Group and as the moving force behind the Group's operations. One reason that Mr Cross's role is particularly important is that ASIC submits that his failure to give evidence justifies an inference that his evidence would not have assisted Park Trent on contested factual issues.²²

The Corporate Structure

46 The Statement of Claim alleges that Park Trent is the "head company" of the Park Trent Group. If what is meant by this allegation is that Park Trent is the holding company of other companies within the Group, the evidence does not support the claim. Park Trent, throughout the Relevant Period, has not held any shares in other companies within the Park Trent Group. However, there is no dispute that all companies within the Park Trent Group are related. The common element is that Mr Cross is a shareholder of each company within the Group.²³ In some cases, including Park Trent, Mr Cross holds 100 per cent of the shares. In all others, he and other members of his family hold 100 per cent of the issued capital between them.

47 Mr Cross or a member of his family is a director of each company within the Park Trent Group. Mr Cross himself is a director of all companies within the Group, except EasyPlan and CCR. Non-family members are also directors of some companies within the Group.

²² *Jones v Dunkel* [1959] HCA 8; 101 CLR 298.

²³ I use the present tense for convenience. Except in immaterial respects, the structure of the Park Trent Group was constant throughout the Relevant Period.

48 The structure of the Park Trent Group is set out in a chart prepared by ASIC, which is reproduced below. The chart differentiates between the so-called “Head Company” (Park Trent), the “Finance Company” (EasyPlan), the five “State Based Companies” and the two “Development Companies” (Parallel and Rhymney).

49 The members of Mr Cross’ family who are directors or shareholders of companies in Park Trent Group are:

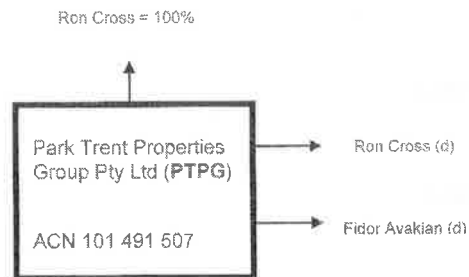
- Renee Cross (daughter)
- Kellie Cross (daughter)
- Jennifer Cross (sister)

(The reference to “Roni Cross” in the chart appears to be a mistaken reference to Renee Cross.) Renee Cross ceased her active involvement in the business of the Park Trent Group (other than as a director) some years ago. Kellie and Jennifer Cross continue to be actively involved, the former as the director of Park Trent’s Gold Coast office. Neither gave evidence.

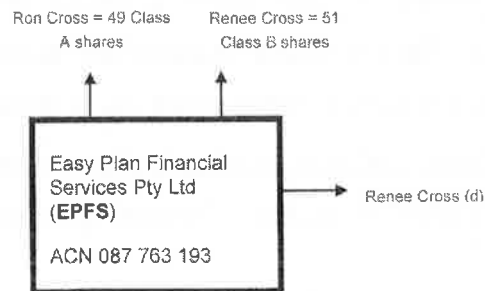
IN THE MATTER OF PARK TRENT PROPERTIES GROUP PTY LTD No. 2014/331307

COMPANY STRUCTURES

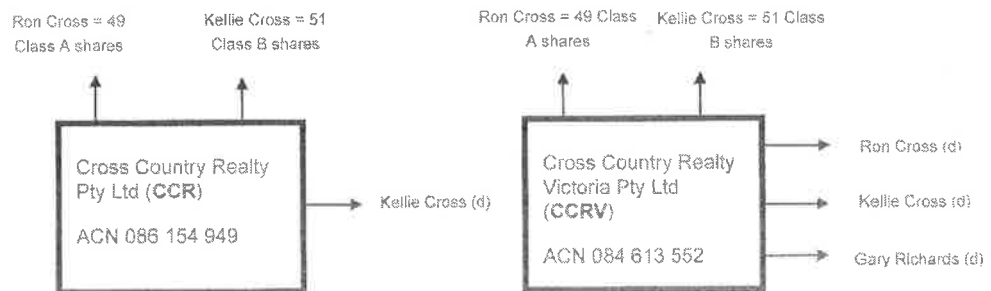
1. HEAD COMPANY

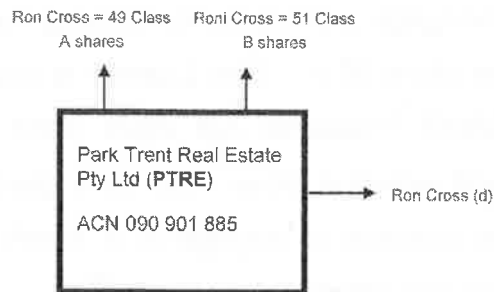
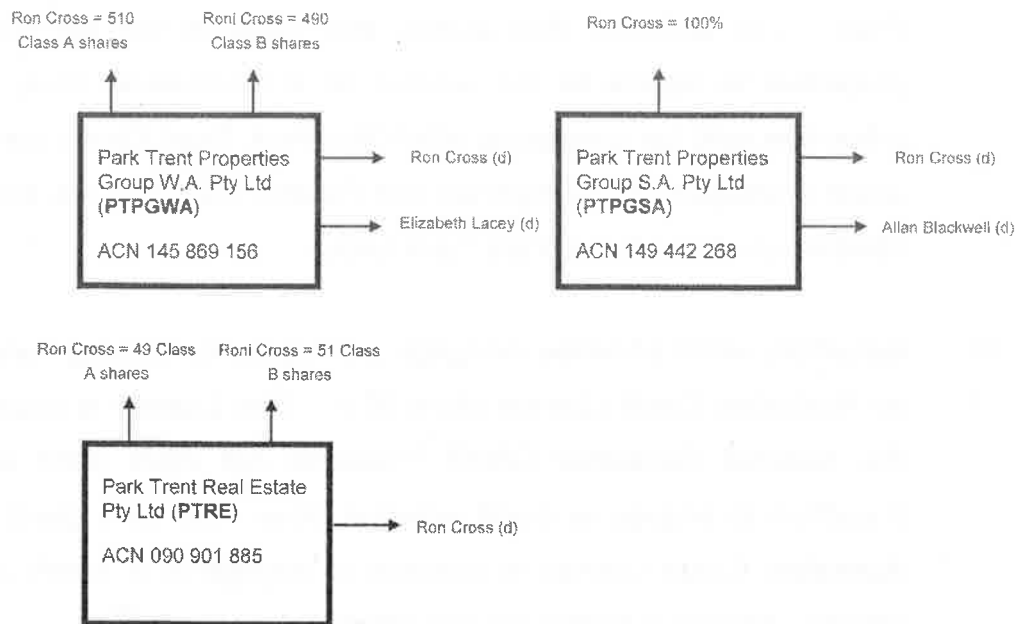


2. FINANCE COMPANY

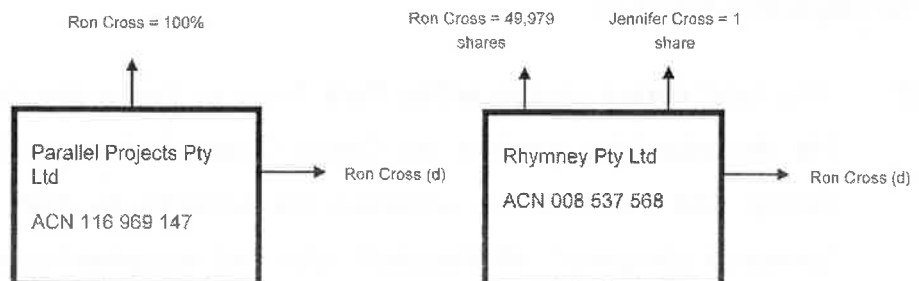


3. PARK TRENT STATE BASED COMPANIES





4. DEVELOPMENT COMPANIES



50 Park Trent admits in its Defence that each of six companies within the Park Trent Group (Park Trent, CCRVic, CCR, Park Trent WA, Park Trent SA and

Park Trent RE) operates a real estate business and has its own individual real estate licence. For example, Park Trent holds a licence issued pursuant to s 8 of the *Property, Stock and Business Agents Act 2002* (NSW), while CCRVic's licence is issued pursuant to s 12(2) of the *Estate Agents Act 1980* (Vic). The Defence also admits that each of the six companies sells properties as agents for the vendors on a commission basis. Some of the properties sold by companies within the Park Trent Group are developed or under development by Rhymney and Parallel, but most are sold on behalf of vendors unrelated to the Park Trent Group.

- 51 EasyPlan, which provides mortgage and insurance broking services, has held an Australian Credit Licence since 2011. This Licence is issued pursuant to the *National Consumer Credit Protection Act 2009* (Cth) and authorises EasyPlan to engage in credit activities other than as a credit provider. An Australian Credit Licence is required to engage in a "credit activity", which includes arranging finance for real estate transactions.²⁴

The Reporting Structure

- 52 The most senior person within Park Trent to give evidence was Mr Pavatich. He described his position as Group General Manager for the Park Trent Group and said that he provided his services to Park Trent through his "personal company". Mr Pavatich, who had occupied his position since 2007, said that his role covers the whole of Australia.
- 53 Mr Pavatich explained that as Group General Manager of Park Trent, he worked at Park Trent's Queensland and Western Australian offices, travelling to Western Australia about once a month. Until early 2015, he also had responsibility for the South Australian operations of the Park Trent Group. He identified his primary responsibilities as:
- overseeing home visits and office meetings conducted by Park Trent's sales consultants;

²⁴ *National Consumer Credit Protection Act 2009* (Cth), s 29.

- overseeing the performance of sales consultants;
- training sales consultants in Queensland, Western Australia and South Australia; and
- ensuring that sales consultants adhere to Park Trent's compliance procedures.

The representatives conducting home visits are known within the Park Trent Group as "homers". The office meetings are known as "run meeting" and the representatives who conduct them are known as "runners".

54 Mr Pavatich said that he reported directly to Mr Cross on the operations in Queensland, Western Australia and South Australia and took directions from Mr Cross. He also said that Mr Cross was the Chief Executive Officer (CEO) of Park Trent and ran the operations in New South Wales, Victoria and the Australian Capital Territory. Mr Petrov who has been contracted to Park Trent as a Senior Property Consultant for nine years and is based at Park Trent's Head Office in Wollongong, described Mr Cross as the CEO of the whole Park Trent Group.

55 Mr Pavatich and other witnesses gave additional details of the reporting structure within the Park Trent Group.

- Mr Eichmann, the most senior employee of Easy Plan, reported both to Mr Pavatich and to Mr Cross.
- The General Manager of CCRVic (first Ms Hogan and then Ms Parr) reported directly to Mr Cross.
- Mr Kutup, the Sales Manager employed by Park Trent, reported to Mr Cross. Mr Kutup was based in Park Trent's Head Office in Wollongong, New South Wales, but travelled regularly to Victoria and South Australia to attend sales meetings, and to conduct property

sales.

- Ms Johnston, who has been employed since 2004 by Park Trent as its Chief Operating Officer, reports to Mr Cross. Ms Johnston described her duties as including the preparation of slides for PowerPoint presentations at investment seminars and the co-ordination of marketing and of human resources. Ms Johnston said that she was responsible for preparing updating the slides on Mr Cross's instructions.

Mr Cross' Role

- 56 The evidence establishes that Mr Cross played a key role in the operations of Park Trent and of the Park Trent Group throughout the Relevant Period. As might be expected from Mr Cross's role as CEO of Park Trent and of the Park Trent Group, and from the reporting lines within the Group, he was actively involved in the day to day management of companies within the Group. Mr Petrov, among others, confirmed that this was the case.
- 57 Mr Cross determined on a weekly basis the payments that should be made to "homers" (those conducting the home visits) and to runners (those conducting office meeting with clients). Sales consultants were entitled to receive specified amounts as commissions on completed sales, while employees of Park Trent or other companies within the Group were entitled to be paid lesser amounts by way of commission. The payments Mr Cross authorised each week were made on account of commission, but were not necessarily tied to the precise contractual entitlement of each consultant or employee. The payments were made at Mr Cross' discretion, on the basis of his assessment of the relevant person's "productivity". They were regarded as in the nature of advances on commission, since a period of two or three years might elapse before a contract for the sale of a unit off the plan was completed. Mr Pavatich described the payments process as a "running productivity account".

- 58 As has been noted, Mr Cross gave directions to Ms Johnston as to the changes to be made to the PowerPoint presentations to be given at the seminars attended by potential clients. The changes made at Mr Cross' direction included details of new properties that were available for sale to clients. Mr Cross himself conducted Seminars, although he was not the only person within the Park Trent Group to do so. However, Mr Pavatich agreed that in his experience, the main presenter was Mr Cross himself.
- 59 During the Relevant Period initial training of the property consultants, wherever based, was invariably provided at Park Trent's Wollongong Head Office. The training program generally took place over four days and was conducted by Mr Cross. He received assistance from other employees or consultants including Mr Kutup, the State Manager for New South Wales; Mr Placek, a Contracts Co-ordinator employed by Park Trent; and Mr Gibson, an Assistant State Manager, who reported to Mr Kutup. About 15 to 20 trainees would usually participate in each four day program, although the numbers varied from time to time. As Mr Kutup explained in his evidence, training programs were required quite frequently because of the very high rate of turnover of property consultants contracted to members of the Park Trent Group.
- 60 When a consultant conducted a run meeting with a client in Wollongong, the usual practice was that the consultant asked Mr Cross to prepare the projections known as the Property Investment Analysis (**PIA**), on the basis of information provided by the client. Mr Cross himself also conducted run meetings both in Wollongong and in other State offices of the Park Trent Group.
- 61 The evidence establishes that Mr Cross, throughout the Relevant Period, was the key decision-maker on behalf of Park Trent and the Park Trent Group as a whole. In the absence of any contrary evidence from Mr Cross or any of the other directors of companies within the Park Trent Group, I am satisfied that he is the person who made (and continues to make) all important decisions concerning the strategy and business practices of Park Trent and of the other

companies within the Park Trent Group.

Park Trent's Interest in SMSFs

Formulation of the Strategy

62 The evidence indicates that Park Trent developed a strategy in 2010 to encourage clients to purchase property through SMSFs. The strategy more or less coincided with the enactment of the amendments to the SIS Act which made it easier for SMSFs to borrow by way of non-recourse loans to acquire real property.²⁵

63 It is convenient to record the evidence of Mr Moss, a principal of Munro Moss Hunt Pty Ltd (**MMH**), an accounting firm based in Sydney which provides superannuation services. Mr Moss was briefly cross-examined, but there was no challenge to the accuracy of his evidence. His evidence is helpful in establishing when and how Park Trent implemented its strategy and demonstrating that Park Trent received an early warning of the dangers posed by its business model.

64 Mr Moss was contacted on about 11 March 2010 by Ms George, then Park Trent's Chief Financial Officer. Mr Moss summarised what Ms George told him:

- “(a) Park Trent was a company in the property business and it was seeking to move into selling properties to SMSFs;
- (b) Park Trent did not have any expertise in setting up SMSFs and they were looking for someone to assist them in relation to the establishment of SMSFs, corporate trustees and SMSF borrowing arrangements; and
- (c) Separate to the set-up of SMSFs, some of Park Trent's clients would be obtaining finance for SMSF property purchases and lenders required certificates to be signed stating that the clients had received financial advice. Ms George asked me whether MMH could assist Park Trent by signing off on these types of certificates.”

65 Mr Moss met Ms George and Mr Cross on 12 March 2010 at Park Trent's

²⁵ See at [35]-[37] above.

offices in Wollongong. On 16 March 2010, Mr Moss sent a letter to Ms George outlining the services MMH could provide and the terms it was prepared to offer. The letter included the following:

“Thank you for offering us this opportunity to provide a proposal for our firm to assist Park Trent and its clients in setting up borrowing arrangements for Self Managed Superannuation Fund’s (SMSF’s).

Service Summary

Following our meeting last Friday 12 March, my understanding is that Park Trent would be seeking to engage Moss Munro Hunt to provide it with the following services:

- Setup of SMSF’s and corporate trustees for these entities
- Setup of SMSF borrowing trusts and corporate trustees for these entities.

My understanding is that the client or their SMSF would be seeking to independently engage Moss Munro Hunt to provide the following service:

- Review the affairs of the SMSF and provide it with a Limited Statement of Advice regarding the investment
- Sign off documentation provided by the lender, to confirm that the client has received financial advice regarding the investment
(The points are assuming Moss Munro Hunt agrees that the investment is appropriate for the particular client)

My understanding is that Park Trent would be providing the following services to the client:

- Asset selection for the client and SMSF
- Ongoing management of the asset for the client and SMSF
- Any other service that is sought by the client or SMSF, that is not listed above in the services to be provided by Moss Munro Hunt.

...
This pricing is based upon the expected circumstances your office advised me of, being entity setups and Advice being required for 4+ clients per week, with an estimate of 200-500 clients per year. Despite the discount to our standard pricing, given the volume expected the proposed fees will provide a comfortable profit margin for Moss Munro Hunt and I hope also a comfortable margin for Park Trent.”

- 66 MMH commenced to receive instructions to set up SMSFs for Park Trent clients shortly after 16 March 2010. The instructions were conveyed by means of a standard form prepared by MMH, entitled “Establishment of Self Managed Superannuation Fund (SMSF), SMSF Borrowing Trust and Corporate Trustees” (**SMSF Instructions**). The SMSF Instructions were

ordinarily completed by the Park Trent "runner" at the run meeting, on the basis of information provided by the client. The form was then signed by the client.

67 MMH provided services to Park Trent and its clients between March 2010 and September 2011. In doing so, Mr Moss dealt with Park Trent's National Superannuation Co-Ordinator, a position occupied by five different people during the eighteen months period. MMH established a total of 37 new SMSFs and prepared nine "limited SoAs [statements of advice]" for Park Trent clients during this period. The services included establishing corporate trustees and borrowing entities for clients who decided to invest in property using SMSFs. (Other accounting firms established SMSFs in conjunction with Park Trent after September 2011.)

68 MMH charged the following fees for services provided to Park Trent's clients:

- \$2,580, GST inclusive, for establishing an SMSF, corporate trustee and borrowing entity;
- \$1,980, GST inclusive, for the preparation of a limited SoA in relation to the purchase of a property by an SMSF using a limited recourse borrowing arrangement.

Invoices for the first category of services were usually issued to Park Trent, while invoices for the limited SoAs were issued directly to the client.

69 Mr Moss said he initially understood that the invoices for establishing SMSFs were on-forwarded by Park Trent to the clients. He believed that the client paid Park Trent and then remitted the payment to MMH. Later he was told by the Superannuation Co-Ordinator that Park Trent issued its own invoices to clients and that Park Trent added its own charges to the MMH's fees. This was in fact Park Trent's practice during the Relevant Period.

70 In February 2011, Mr Moss informed Mr Cross that he (Mr Moss) considered

that changes should be made to Park Trent's practices. Mr Moss set out his concerns in a letter to Mr Cross dated 14 February 2011. The letter included the following passages:

"... the Federal Government, Australian Taxation Office, Australian Securities & Investment Commission and Australian Prudential Regulation Authority all recently advised they will be further stepping up their surveillance and regulation of the superannuation and SMSF industry. There are some issues I very strongly recommend ParkTrent look to address ASAP. This can help prevent Park Trent from falling foul in the event of surveillance operations and potentially being viewed as a company that poses a risk to government policy.

...

- **Risks and responsibilities of having a SMSF.** Clients need to be made aware of the very serious risks and responsibilities of having a SMSF. ParkTrent should document that they have made an effort to ensure this occurred upfront, before a client enters into any transaction. The risk of not pursuing this issue is that at some point a client may make a claim that a ParkTrent representative recommended that they setup a SMSF. **This would be a very serious breach of corporations law for ParkTrent and their representative and could result in serious financial penalties, incarceration and injury to reputation.**

This could be addressed by ensuing [sic] that at the first stage of a ParkTrent representative meeting with the client (at Home Meeting) and the use of superannuation being discussed, Moss Munro Hunt factsheets are provided. The client would on the spot sign confirmation of receipt.

- **Costs of using a SMSF and borrowing arrangement.** Clients need to be made aware of the costs involved in running a SMSF and making use of a borrowing arrangement. ParkTrent should document that they have made an effort to ensure this occurred upfront, before a client enters into any transaction ...
- **SMSF not being able to rollover or obtain loan finance.** Before a client signs to purchase a property through a SMSF, their ability to finance the purchase should be tested first. ParkTrent should ensure this is done upfront and before a client signs up for a property purchase using superannuation. The risk of not doing this is that a portion of ParkTrent clients that initially commit to using superannuation to purchase property will be unable to pay the property deposit or obtain finance to settle in the future ...

- **Complying with SMSF borrowing legislation**

In order for a SMSF to be allowed to borrow and purchase property through the fund, it must satisfy certain conditions. In the last 4 months the Federal Government made some changes to these conditions. ParkTrent should follow a process to ensure their clients purchasing property through superannuation follow the required procedures. The risk of not ensuring this occurs is that the property purchases entered into by ParkTrent SMSF client may result in the

SMSF's being subject to audit by the Australian Taxation Office and potentially being subject to a 45% penalty tax. The other risk is that ParkTrent may be viewed as a "Promoter" by the regulators and subject to financial and other forms of penalties itself.

This issue can be addressed by ParkTrent not accepting a deposit on a superannuation property purchase until a SMSF has actually been setup and not accepting deposit payments from an individual personally or any other entity. ParkTrent should instead wait until the SMSF is setup and rollovers from their existing superannuation funds are received to fund the payment." (Emphasis added.)

Mr Moss accepted in his cross-examination that he was not intending to suggest in this letter that Park Trent had breached the Corporations Act.

- 71 Mr Moss was subsequently advised by the National Superannuation Co-Ordinator that Mr Cross had decided to continue with Park Trent's existing procedures and did not propose to implement Mr Moss' suggested changes. While Mr Moss may not have directly stated that Park Trent was acting in breach of the Corporations Act, his letter warned Park Trent that there was a risk that its business practices might constitute serious contraventions of the law.

The Practical Results

- 72 I shall describe in the next section Park Trent's marketing and sales process during the Relevant Period. Before doing so I summarise the evidence as to the practical significance of the strategy concerning SMSFs adopted by Park Trent in 2010.
- 73 Ms Ponton, a Financial Investigator with the Forensic Accounting Services team of ASIC, undertook an investigation of Park Trent's records. In particular she compiled information from Intuit Quickbooks produced by Park Trent in response to a notice served on Park Trent under s 33 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). Intuit Quickbooks is a computer software program used for bookkeeping and accounting purposes.

74 Ms Ponton's report addressed the following questions:

- the administration fees charged to clients of the Park Trent Group;
- the fees charged to clients relating to the establishment of SMSFs;
- payments made by the Park Trent Group to third party accountants in respect of SMSF set fees; and
- the net operating profit of each of the companies within the Park Trent Group for the 2012-2013 financial year and for the period from 1 July 2013 to 11 February 2014.

Ms Ponton was not required for cross-examination. Thus her evidence was not challenged.

75 Ms Ponton summarised the results of her investigation in a number of charts. I reproduce the charts recording the following information:

1. Client transactions by reference to the number of SMSF set up fees and administration fees.
2. The revenue generated by Park Trent (not any associated company) from SMSF set up fees and mark-ups on SMSF set up fees.
3. The net operating profit for each company within the Park Trent Group during the specified periods.

All amounts recorded in the charts are exclusive of GST.

Chart 1

Financial Year	Net number of Park Trent Group client transactions in relation to the Superannuation Set Up Fee	Net number of client transactions in relation to the Administration Fee	Percentage of Superannuation Set Up Fee transactions
2010/2011	32	727	4.40%
2011/2012	79	815	9.69%
2012/2013	217	804	26.99%
1 July 2013 to 14 February 2014	148	373	39.68%
TOTAL	476	2,719	

Chart 2

Financial Year	Amount generated by Superannuation Set Up Fee \$	Payments made for Third Party Superannuation Set Up fees \$	Mark-up on Superannuation Set Up Fees \$
2010/2011	70,613.64	55,297.63	15,316.01
2011/2012	249,436.62	224,399.91	25,036.71
2012/2013	768,076.80	506,017.22	262,059.58
1 July 2013 to 14 February 2014	469,090.45	206,477.28	262,613.17
TOTAL	1,557,217.51	992,192.04	565,025.47

Chart 3

Quickbooks data file	Net ordinary income	
	1 July 2012 to 30 June 2013	1 July 2013 to 11 February 2014
PTPG	-8,283,548.12	-5,063,526.65
CCRQ	1,425,910.64	442,401.04
CCRV	2,765,548.42	8,701,778.34
PTPGWA	254,069.20	292,107.66
PTPGSA	544,142.24	736,475.10
Rhymney	512,871.03	-618,517.28
Parallel	2,631,752.46	196,792.61
PTRE	-285,353.34	-535,550.63
EPFS	1,333,843.58	1,095,838.70
TOTAL NET ORDINARY INCOME FOR THE PARK TRENT GROUP	2,899,236.11	5,247,798.89

76 Unchallenged evidence was given by three third party accountants who dealt with the Park Trent Group during the Relevant Period, namely Mr Moss,²⁶ Mr Gorrie of Network Navigator Pty Ltd and Mr Zughbi of Kelly Partners Group. Their evidence establishes the following:

- Between March 2010 and September 2011, Moss Munro Hunt set up 37 new SMSFs for clients of Park Trent.
- Between March 2012 and March 2014, Network Navigator Pty Ltd set up 152 new SMSFs for clients referred by Easy Plan.
- Between mid-September 2013 and January 2014, Kelly Partners Group set up 15 new SMSFs for clients referred by Park Trent.

These were not the only third party accountants who dealt with the Park Trent Group during the Relevant Period. Consequently the figures are not complete.

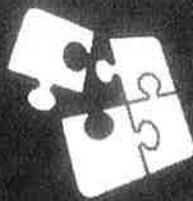
77 In addition to this material, the evidence suggests that as at March 2015 a total of 868 separate clients of Park Trent or the Park Trent Group had purchased or agreed to purchase an investment property using an SMSF. This figure, together with the other material to which I have referred, shows just how successful Park Trent was in encouraging clients to purchase investment properties through SMSFs and to set up SMSFs to enable the clients to purchase properties on offer.

The Marketing and Sales Process

The Eight Stage Approach

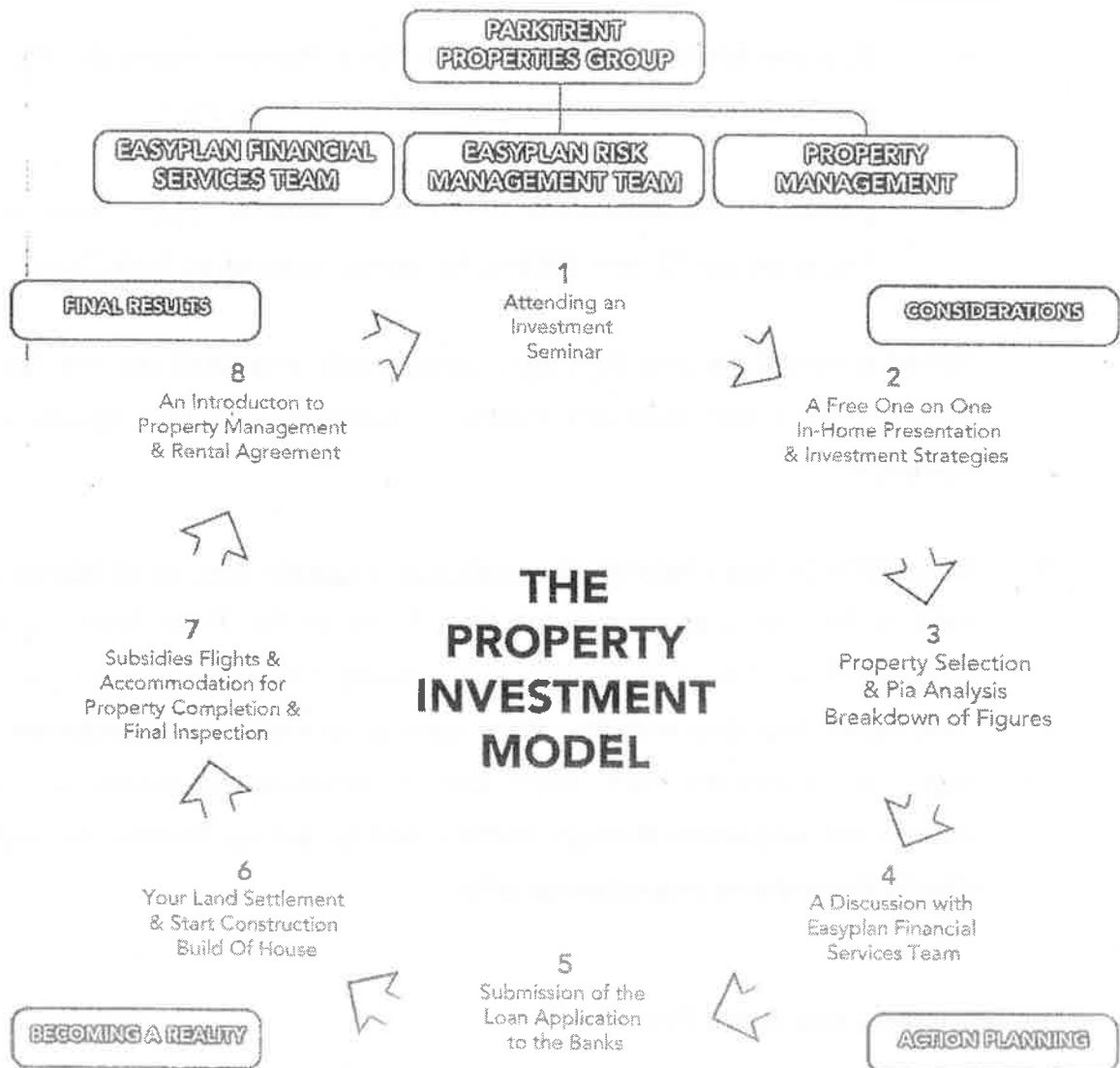
78 ASIC relied on an internal Park Trent document entitled "The 8 Stage Approach to Property Investment" (**8 Stage Document**) as demonstrating the approach Park Trent took to selling property throughout the Relevant Period. The document is as follows:

²⁶ Mr Moss' evidence has been referred to earlier: see at [64]-[71] above.



ParkTrent
Properties Group

The 8 Stage Approach to Property Investment



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ABN 89 101 491 507

WOLLONGONG SYDNEY CANBERRA MELBOURNE TUGGERAH PERTH ADELAIDE GOLDCOAST SUNSHINE COAST SHANGHAI

- 79 It will be seen that the 8 Stage Document bears the name “Park Trent Properties Group” and lists the Group’s office locations in Australian and Shanghai. Mr Pavatich said that the 8 Stage Document was made available to consultants and employees who undertook home visits or participated in run meetings. The general practice was to provide the 8 Stage Document to clients at the home meeting, although this was a matter for the “homer” conducting the meeting. The evidence establishes that, although there may have been earlier and somewhat different versions of the 8 Stage Document, it accurately reflects the practices followed by Park Trent throughout the Relevant Period. (Mr May, a representative contracted to Park Trent since 2010, had a recollection that an earlier version of the 8 Stage Document may have referred only to five stages, although he was not entirely sure.)
- 80 ASIC’s Statement of Claim concentrates on four stages of the marketing and sales process, namely the Seminars, the home visit, the run meeting and the discussion with Easyplan (should the potential client reach that stage of the process). The chart describes the run meeting as “Property Selection & PIA Analysis [Property Investment Analysis]”. As Mr Pavatich and others explained, the practice was for the discussion with the Easyplan mortgage broker to take place after the client had paid a holding deposit of \$1,000 to secure a property. The practice was also to have the client sign a contract of sale in respect of the property and other documentation prior to contact with Easy Plan.
- 81 Park Trent admitted in its Defence a number of the matters alleged in the Statement of Claim. The following account of the marketing and sales process is based on the matters admitted by Park Trent and uncontroversial (or largely uncontroversial) documentary evidence.

The Marketing of Seminars

- 82 Park Trent operated a call centre from its Head Office in Wollongong throughout the Relevant Period. Employees of Park Trent made telephone calls from the centre inviting members of the public to attend a Park Trent

Property Investment Seminar. Park Trent also promoted the Seminars through its website, the print media, commercial radio, social media and other means.

83 Park Trent provided its call centre employees with speaking notes to use when calling potential clients. The speaking notes (self-described as “Conference Spiel”) issued prior to 2012 suggested that the caller inform the potential client that it was possible to receive “\$100,000 tax free dollars” over ten years under the National Rental Affordability Scheme (**NRAS**). The caller was to advise the potential client that the “best way to take a positive step” was to attend a Seminar, for which a booking could be made. The pre-2012 call centre speaking notes apparently made no mention of superannuation.

84 Two versions of the speaking notes used in 2012 were in evidence. Both versions stated that at the Seminar:

“we will be discussing:

- What’s happening in the property market in 2012 ...
- How to utilise superannuation and property together in a DIY [Do it Yourself] super fund”.

85 Three versions of speaking notes prepared in 2013 included similar references to superannuation, although two of the versions omitted any specific reference to a “DIY super fund”. The 2014 version did not identify SMSFs as a specific topic for the Seminars.

86 Several sets of speaking notes provided a script for a call back to a potential client who expressed interest during the initial call, but did not attend the Seminar. Each of these scripts referred to SMSFs, while one referred to “New options for investors (Self managed – super funds, borrowing against your super)”. None of the call back speaking notes in evidence was dated.

Website

87 Throughout the Relevant Period, the Park Trent Group maintained a website

at URL address www.parktrent.com.au. This was the only website maintained by Park Trent and it provided material relevant to all activities of the Park Trent Group, subject to the qualification that Easy Plan introduced its own website in late 2014 or early 2015. However, after the Easy Plan website was set up the Park Trent website provided a link to the Easy Plan site.

88 A hard copy of the material available on the Park Trent website on 22 January 2014 was in evidence. The website advertised Seminars and provided a great deal of promotional material concerning the activities of the Park Trent Group. This included details of properties for sale throughout Australia.

89 A person accessing the website might be directed to invitations to attend Seminars, as well as material promoting the benefits of investing in property through SMSFs. The following are examples of material on the website:

By attending our 90 minute conference, you will learn the most up-to-date and innovative methods of:

- Ways to legally reduce your income tax
- How to borrow within your Self Managed Super Fund for property investment
- Exciting new options with mortgage elimination product
- Cash flow benefits created by investing in property

With a ParkTrent Property Investment Evaluation, we can provide information on how to best achieve your property investment goals - completely free of charge.

What we offer

The property investment evaluation will include the following;

- Effective tax minimisation strategies
- ParkTrent Property Investors Security Plan
- Self Managed Super Funds
- Detailed explanation of negative gearing
- Mortgage reduction
- Structure (line of credit)
- Determining what property will best suit you
- Personal investment strategy tailored to you

(Emphasis in original.)

90 It is convenient to record here other features of the website, although these

are perhaps less relevant to the sales and marketing process than to the relationship between Park Trent and other companies within the Park Trent Group. The significant features include the following:

- Each page on the website contains logos for “ParkTrent Properties Group”, “ParkTrent Investment”, “ParkTrent Real Estate”, “ParkTrent Property Management” and “EasyPlan Financial Services”.
- Each page on the website contains a statement: “Copyright 2009-2012 ParkTrent Properties Pty Ltd. All rights reserved.”
- A paged headed “About ParkTrent” identifies Mr Cross as the CEO and founder of “ParkTrent Properties Pty Ltd”, who “provides leadership and direction to Australia’s largest privately owned real estate group”.
- The same page contains the following statement:

As a comprehensive group of companies, ParkTrent offers the convenience of the full range of services required to buy and sell property. This comprehensive range of services offers clients the convenience of a “One-Stop-Shop” and makes us a leader in the field of property sales and property investment.

The page also stated that “our group of companies” includes “ParkTrent Property Investment”, “ParkTrent Real Estate”, “ParkTrent Property Management Services” and “EasyPlan Property Management”. The Group is said to have eleven offices nationwide and joint venture operations in other countries.

91 Extracts taken from the Park Trent Group’s website on 5 July 2013 and 8 September 2013 indicate that the features outlined above were also present on those dates. Some changes were made to the website later in 2014, to which I shall refer later.

92 Throughout the Relevant Period, Ms Johnson, an employee of Park Trent, was responsible for managing the website. Ms Johnson took directions from

Ms Johnston, the Chief Operations Officer of Park Trent, who reported to Mr Cross. It is clear that the website was established and maintained by Park Trent and contained material relevant to the operations of Park Trent as well as its associated companies.

- 93 There was no direct evidence as to the form of the website prior to January 2014. As will be seen, Ms Johnson removed some (but not all) references to SMSFs from the website between November 2013 and January 2014. I infer that the website prior to those references being removed contained more detailed material promoting investment in real property through SMSFs.

The Seminars

Conduct of the Seminars


- 94 Throughout the Relevant Period, Park Trent conducted Seminars in each Australian State. The presenter at a Seminar typically used a PowerPoint slideshow to convey information to attendees. The presenter typically addressed topics including the following:
- investment in real property;
 - the impact of trends such as population growth, housing availability and government subsidy schemes in driving capital growth and rental yields in Australian real property; and
 - the advantages of borrowing to invest in property and doing so as soon as possible.
- 95 Ms Johnston, who has been Park Trent's Chief Operations Officer since 2004, estimated that the Park Trent Group conducted, on average, about six Seminars per week, excluding the Christmas period, across the country. She said that attendances varied from as few as ten up to about 150, but that an average of about 30 to 40 people would attend each Seminar.
- 96 In the course of a Seminar, attendees were invited to provide Park Trent with

their names and contact details. This information was collected in order to facilitate home visits by Park Trent representatives (with the attendees' permission).

The PowerPoint Presentations


- 97 In response to a notice issued by ASIC pursuant to s 19 of the ASIC Act, Park Trent produced some 400 versions of the PowerPoint presentations prepared for the use of Park Trent's representatives at Seminars during the Relevant Period. The PowerPoint presentations were regularly updated to take account of changes in the properties being promoted for sale at the time the Seminars were conducted.
- 98 ASIC tendered what it said was a representative sample of PowerPoint presentations prepared during the Relevant Period. As might be expected, the PowerPoint presentations extolled the virtues of the Park Trent Group and of investing in real estate. Much of the material painted a glowing picture of the opportunities for substantial capital growth and high rental returns for investors. Some of the PowerPoint presentations encouraged potential investors by invoking "Ron's Story" – a "wonderful journey through life's Experiences and Challenges".
- 99 Perhaps of more relevance for present purposes, the presentations in evidence from 2010 to 2013 referred to SMSFs. A presentation dated 9 April 2010, for example, informed attendees that the "conference will be delivered in 5 parts" as follows:
- "1. ParkTrent Profile
 2. Successful investing in today's property market (National Rental Affordability Scheme)
 3. Structuring investment properties.
 4. **Utilising superannuation to purchase investment property.**
 5. Why we need to invest in property now". (Emphasis added.)

The section on superannuation in the presentation included the following slides:




We can provide expert advice to assist and provide relief for..

- Fixed interest rate loans
- Rapid repayment of current home loans
- Structuring and setting up self managed superannuation funds



Where Real Estate earns Real Returns www.parkrent.com.au



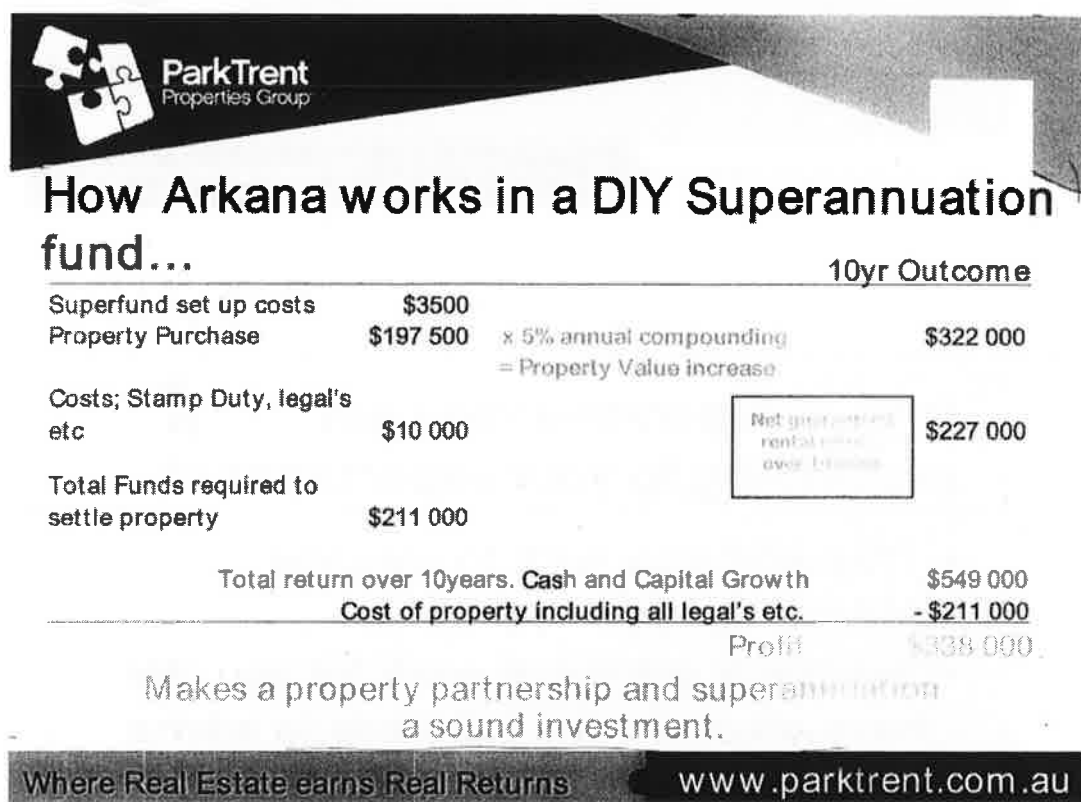
Is your superannuation not performing to your expectations?

- Then you may wish to consider obtaining a new approach.
- Superannuation can work for you. We have access to the expertise to advise you on how property works, by utilising property investment in a 'DIY Superannuation Fund'.

Where Real Estate earns Real Returns www.parkrent.com.au


between 2010 and 2013 included a slide informing attendees that the Park Trent Properties Group had available expert advice to assist in setting up SMSFs. All versions prepared during the same period also informed attendees that the Park Trent Group had access to expertise to advise how property investment worked in an SMSF.

- 101 Many of the PowerPoint Presentation used between 2010 and 2013 included projections as to the profitability of a purchase of a particular property through an SMSF. A presentation prepared on 17 March 2011, for example, contained the following slide concerning apartments in the "Arkana" development:



- 102 As can be seen, this projection assumed a constant five per cent per annum compounding growth in the capital value of the property over a period of ten years. The same "capital growth" would be derived from the purchase of any asset, if it is assumed that a uniform rate of five per cent per annum capital growth will be derived on the original price of \$197,500 and that the costs of the transaction would total \$13,500.

- 103 In 2012 and 2013, in addition to the standard advice concerning the purchase of property through an SMSF and commentary on what was said to be the poor performance of general superannuation funds, the presentations included slides explaining how the purchase of a property off the plan through an SMSF worked:



ParkTrent
Properties Group


Buying Off The Plan

How it works in a DIY Superannuation Fund

Off The Plan	
Property Purchase Price	\$350,000
Super Fund Set-up	\$4,000
Costs to Purchase	
• 10% of Purchase Price	\$35,000
• Legals & Stamp Duty	\$3,500
Total Set-up Cost	\$42,500

1. All available super funds transferred into the new DIY fund
2. Pay deposit
3. All surplus funds invested into term deposit during construction
4. All future contributions also deposited into the new DIY fund term deposit
5. On completion, DIY fund can borrow up to 80% of property value

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ParkTrent
Properties Group

How an off the plan property works in a DIY Superannuation Fund

- All available superannuation funds will be transferred into the new DIY fund
- All future employer contributions will be deposited into the new DIY fund
- All surplus funds, after the paying of deposit and legal's, including the additional employer contributions, will need to be invested into a term deposit during the construction of the investment property purchase
- On completion/settlement of the property, the DIY fund can borrow up to 80% of the value of the investment property

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Between 2010 and 2013, the presentations included slides characterising particular properties on offer as “a perfect property to place a DIY superannuation fund”.

- 104 The latest PowerPoint presentations in evidence were prepared on 17 and 20 February 2014. These differed from earlier versions in that they do not say that the issues to be addressed include utilising superannuation to purchase property. Nor do the presentations include any of the slides reproduced above. The possible use of SMSFs is addressed in two slides, one of which follows an Australian tradition of showing a fist full of dollars. The slides are as follows:

**WE CAN PUT YOU IN TOUCH
WITH EXPERT ADVISORS ON...**

- **Structuring and setting up self managed superannuation funds**
- **Rapid repayment of current home loans**
- **Fixed interest rate loans**

WHERE REAL ESTATE EARNS REAL RETURNS **WWW.PARKTRENT.COM.AU**



LOOKING FOR SUPERANNUATION OPTIONS...?

Then you may wish to consider
obtaining a new approach

- “DIY Superannuation Funds” can invest in property
- We can put you in touch with superannuation experts to give you the right DIY Superannuation advice



WHERE REAL ESTATE EARNS REAL RETURNS

WWW.PARKTRENT.COM.AU

Transcripts

- 105 ASIC tendered a number of transcripts of presentations at Seminars. The transcripts were produced from recordings made by ASIC investigators who attended the Seminars. When this material was tendered, Mr Hewitt requested that those instructing him be given the opportunity to check the accuracy of the transcripts. That opportunity was duly provided. No submission was made that the transcripts are inaccurate.
- 106 The earliest transcript is from a Seminar held in Melbourne on 28 August 2013. The presenter was a Mr Lanacella.²⁷ The transcript includes the following passages:

“We have available **excellent advice that can assist you when it comes to structuring self managed superannuation funds**, rapid repayment of your current home loans. ...

If you don't know specifically how your super is travelling, you really, really, really should find out. ...

²⁷ In another transcript his name is recorded as “Lamicella”.

Superannuation can definitely work for you, what we have is we have access at ParkTrent to expertise, **we have access to people who can advise you on how property can work by utilising property investment in a do it yourself superannuation fund.**

Who'd like to look have a look at how this can work? Let me go through and put some numbers around this and just show you specifically how this can work for virtually anyone in the room here. Okay. So what we're going to in this example is we're going to buy an apartment in the Melbourne CBD. ...

For us to establish a superannuation fund on your behalf, our fee is \$4000, we have to have the money up front, we have to find that. The property purchase price is 350, the cost to purchase would be \$18,000, the total amount of funds that you'll need will be \$372,000. You have your property in your own do it yourself fund. Now, here is the question: how will this perform in 10 years from now? **The good news is, I can tell you very accurately and very predictably, is exactly how you will finish.** So the future value of the property in 10 years is going to be \$570,000 based on what? Based on a 5 per cent annual growth rate per annum.

Am I being conservative? Yep, absolutely ...

It gets even more exciting. I'm not going to take questions, just in case you have some. We're getting to the real fun. Now, your superannuation will continue to come your way. **Imagine putting your super into this fund, and imagine on a weekly, monthly basis we take all of this cash flow and actually reinvest it short term** in fixed interest rates or long-term interest rates, and have that flow at the same time. ...

All the funds that you, your wife have will actually be combined into your new do-it-yourself fund if you pay the deposit, of course. All the surplus funds get invested in the term deposits during the construction of your property purchase, which is important. All the future contributions from your employer obviously will go into your new fund at the same time. On completion, the fund can borrow up to 30 per cent of the property purchase price in some examples up to 80 per cent. These are new rules." (Emphasis added.)

- 107 Not all transcripts tendered by ASIC incorporate similar advice about the virtues of investing in property through SMSFs or the ability of Park Trent to assist in the steps required to do so. Two presentations made on 13 February 2014 and 16 July 2014 in Melbourne and Sydney, respectively, make only cautious and qualified references to SMSFs. Both presentations, made by representatives of Park Trent other than Mr Cross, plainly fall short of recommendations to the attendees to invest in property through SMSFs.
- 108 The caution evident in these transcripts seems to be a consequence of Park Trent having engaged a firm of solicitors in September 2013 to provide advice on the requirements of Chapter 7 of the Corporations Act. The solicitors

prepared a Compliance Manual, the first version of which appears to have been created before February 2014. Among other advice, the Compliance Manual warned that Park Trent could not give financial products advice without a licence and that care had to be taken not to present factual information in a way that could be regarded as suggesting or implying a recommendation to acquire a financial product, including SMSFs

- 109 The warning in the Compliance Manual appears not to have been heeded by Mr Cross. The record of his presentation at a Seminar in Melbourne on 13 August 2014 suggests that he paid little attention to the Compliance Manual. His presentation included the following passages:

"Looking for superannuation options and you may wish to consider taking a new approach. Do-it-yourself superannuation funds can invest in property. We can now borrow money by utilising our superannuation. If superannuation is not performing well for you, ... [you] can now take it away from the fund managers that's looking after it. **You can set up your self-managed super fund, you can roll all the money and that super fund can now go and borrow money to buy an investment property. Who does that all for you? We do it all for you. We can set it up for you.**

So the super fund can borrow 80 per cent of the value of the property and when you look at superannuation and buying a property and it's all set up, you've got your rental going in there, you've got your employer contributions going in there and you can concessional contribute into that super fund as well. So you can actually negatively gear back into the super fund by claiming 50 per cent tax on the concessional that go in.

So you have the rent, you have employer contributions and you can concessional contribute into the super fund and when you do that and you own the property there and when you retire it's tax-free so if you sold it after you're 60 and you make half a million profit, it's tax-free. This is too good to pass up. This is a wonderful opportunity for you.

Yeah, it's amazing and to not do this it's crazy because the outlook – if you've got a super fund that's got \$200,000 in it **you can take the super fund and you can buy a \$500,000 property.** The 200,000 goes up by 7 per cent a year, that's 214,000. If property goes up at 7 per cent a year, that's 34,000 and you know time is the key factor. 35 after 10 years is 350. 14,000 over 10 years is 140 and that's how people wealthy. **We get older sure but you'll get wealthy by doing these things.** And let me tell you can concessional contribute up to \$35,000 into that super so if you're earning \$80,000 and you're putting in seven or eight thousand dollars you can put in another \$20,000-odd at 50 per cent tax back which can pay down the principal on the property.

It's the best thing. The government hates it. They're in too deep. They can't change it now. If they change it now they would be thrown out at the

next poll ... **We sold nearly 940** (indistinct) **in the super fund**. That's 900 properties that they're not going to get any capital gains tax on. It's amazing. It's a good story.

And we have the experts to look after you and make sure it's all done properly for you and correctly." (Emphasis added.)

- 110 At a Seminar held in Melbourne on 24 September 2014, Mr Cross essentially repeated the presentation he gave a month earlier:

"Looking for superannuation options, then you may wish to consider taking a new approach. Your superannuation now is with a managed fund and it's looking after your money. Do yourself a favour. Go back home, the next few days, over the weekend and calculate what you've contributed to your super fund in the years that you've been working since you've been putting money in the super fund. Find out how much you've contributed. Find out what your balance is and work out how much money that super fund has made for you on your behalf.

In most cases it's zero. In most cases the only money in that super fund is what you've put in. It's made nothing. Then do a calculation in your mind and think if you'd bought a property in that fund 10, 15, 12 years ago, whatever, how would that property have performed. It would have gone up considerably and the rent-cash component in that fund would have grown.

Super funds can now borrow money. They can borrow 80 per cent of the value. So you don't only have the rent going in, you have the rent going in, your employee contributions going in and you can concessional contribute into that up to \$35,000. So you can put your own money in off your salary at 15 per cent up to 35,000; your employee contribution and up to 35,000. **So you can actually negatively gear into a super fund. This is a fabulous opportunity and you should consider also the tax-free environment that it's in.**

If you sell that property and you're still working and you make \$100,000 the tax on that is \$10,000. If you sell that property after you retire and you make a \$100,000 profit, the tax on it is zero ... Go and do the numbers and **work out where your superannuation is** and then take the pathway that maybe you come into the ParkTrent operation **and we look at setting you up with a self-managed super fund and putting a wonderful property in there that will work for you and then just fast-forward 10 years and work out where you're going to be and where you will be if you don't do something like that. It's a wonderful opportunity for you ...**

This is an enormous opportunity for you. Take it, **set the structure up, we will do the structure, buy the beautiful property at the right price**, have enough money in there to pay 20 per cent deposit and watch your rental income go in, your employee contributions go in, then you can self-contribute in there as well and pay that down and imaging 10, 15 years into the future you own that property and your cash component is building up again just from the rental income alone. 21 billion in fees. Amazing." (Emphasis added.)

- 111 These representations by Mr Cross, made well after Park Trent had received legal advice that it could not recommend that clients invest through SMSFs, are important. They indicate that the CEO of Park Trent and the Park Trent Group was prepared to ignore the legal advice and continue on a path that he had marked out four years earlier.

Home Visits

- 112 The practice throughout the Relevant Period was that an attendee at the Seminar provided his or her name and contact details and the Wollongong office of Park Trent provided the details to the relevant State office. A home visit would then be arranged. Some clients (as I describe them) agreed to a home visit without attending a Seminar, for example after being contacted by someone from a Park Trent call centre. Mr Argawal in his evidence estimated that a home visit would last on average about 45 minutes.

Home Visits

- 113 There was a considerable volume of documentary and oral evidence as to the procedures followed by the homers during home visits. The evidence given by clients did not differ materially from the accounts given by Park Trent's witnesses, although there were some disputes as to precisely what was said concerning the virtues of investing in property through SMSFs. The principal task of the homers, apart from stimulating the client's interest in purchasing property on offer, was to collect standard information concerning the client's financial affairs, including details as to his or her superannuation balances. It was common ground that the homers recorded the information provided by clients on forms generated by Park Trent. The format of the documentation seems to have remained unchanged until early 2014, when a different form was used to record information concerning the client's current superannuation balance. However, the change did not affect the nature of the information collected and recorded by the homer.

- 114 The evidence of Mr Knight, a client who purchased a property by means of an

SMSF established for him by Park Trent, is typical of the experience of clients at the home meetings. Mr and Mrs Knight attended a Seminar at St Mary's, in Western Sydney, after they received a telephone call from a Park Trent call centre. At the Seminar, they indicated an interest in a home visit by a Park Trent representative. The visit took place on 12 September 2012.

- 115 The homer for this visit was Mr Gill, who did not give evidence. According to Mr Knight, whose evidence I accept, Mr Gill asked Mr and Mrs Knight questions about their income and assets and liabilities, including their superannuation balances. Mr Gill recorded personal and financial information on a printed document called a "Finance Information Form". Mr Gill recorded their superannuation balances on a separate printed form called a "Superannuation Information Form". I reproduce below the forms completed by Mr Gill at the home meeting. I have removed personal information in the boxes at the top of each of the forms, although Mr Gill recorded the relevant details.

☐ Refinancing

FINANCE INFORMATION FORM

NAME: _____
 ADDRESS: _____
 D.O.B.: _____
 PHONE - HOME: _____
 WORK: _____
 MOBILE: _____
 EMAIL: _____
 PERIOD OF RESIDENCE: _____
 OCCUPATION: _____
 EMPLOYER: _____
 GROSS INCOME PA: _____
 LENGTH OF EMPLOYMENT: _____
 ABN: _____
 COMPANY CAR: _____
 PA INCOME OTHER: (1,2,3,4) _____
 MARITAL STATUS: _____
 DEPENDENTS: (no) (Age/s) _____

NAME: _____
 ADDRESS: _____
 D.O.B.: _____
 PHONE - HOME: _____
 WORK: _____
 MOBILE: _____
 EMAIL: _____
 PERIOD OF RESIDENCE: _____
 OCCUPATION: _____
 EMPLOYER: _____
 GROSS INCOME PA: _____
 LENGTH OF EMPLOYMENT: _____
 ABN: _____
 COMPANY CAR: _____
 PA INCOME OTHER: (1,2,3,4) _____
 MARITAL STATUS: _____
 DEPENDENTS: (yes/no) (Age/s) _____

ASSETS	PUR. PRICE	PUR. YEAR	CUR. VALUE	RENT PAYMENT
HOME	\$ 395 K	2010	\$ 410 K	\$
(1) INV. PROP.	\$		\$	\$
(2) INV. PROP.	\$		\$	\$
(3) INV. PROP.	\$		\$	\$
FURNITURE	\$ 10,000		\$ 5,000	\$
CAR 1	\$ 27,000	2008	\$ 17,000	\$
CAR 2	\$ 16,000	2010	\$ 10,000	\$
(4) SHARES	\$		\$	\$
SAVINGS TERM INV.	\$		\$	\$
CASH AT BANK	\$ 1,000		\$ 1,000	\$
OTHER Super	\$ 40,000		\$	\$

LIABILITIES	FINANCIAL DETAILS	LOAN TYPE	LIMIT	BALANCE	INT. RATE	REPAYMENTS
HOME	Westpac	Fixed			7.03	2515.00
(1) INV. PROP.						
(2) INV. PROP.						
(3) INV. PROP.						
FURNITURE						
CAR 1						
CAR 2						
CREDIT CARD 1	Westpac		5K		13	100.00
CREDIT CARD 1						
STORE ACCOUNT						
PERSONAL LOAN						
OVERDRAFT						
OTHER						

I/we authorise release of the information contained herein by Parkrent Properties Group Pty Ltd to such parties as are necessary to provide information regarding property investments and/or other financing of our/our current finance position, provided that such information is treated as private and confidential.

Signature/s:  

Comfortable Weekly Repayments

\$ 50.00 \$

Date: 12.9.12

Consultant's Name:
Client Services
1800-652-224

THIS IS NOT AN APPLICATION FOR FINANCE



ParkTrent
Properties Group

SUBFRANNUATION INFORMATION FORM

NAME:	NAME:
ADDRESS:	ADDRESS:
D.O.B:	D.O.B:
HOME #:	HOME #:
WORK #:	WORK #:
MOBILE #:	MOBILE #:
EMAIL:	EMAIL:

FUND HOLDER	CURRENT APPROX VALUE
Colonial	\$ 45,000
First State	\$ 45,000
	\$
	\$
	\$
	\$
	\$
	\$

ADDITIONAL INFORMATION/COMMENTS

1st foreclosed in S.M.S.F.

I/We authorize release of the information contained herein by ParkTrent Properties Group Pty Ltd to such parties as are necessary to provide information regarding investments and/or other refinancing or my/our current financial position, provided that such information is treated as private and confidential.

Client's Name: _____ Client's Signature: _____

Consultant's Name: _____ Date: 12.9.12

H:\Consultant Files\Run - Contract document templates\SUBFRANNUATION INFORMATION FORM.doc

116 It will be seen that the Finance Information Form recorded the purchase price and current value of Mr and Mrs Knight's home. It also recorded the monthly

repayments of their mortgage loan, although not the current balance of the loan. Values were attributed to other assets, such as cars and furniture. The Superannuation Information Form recorded the current superannuation balance held by each of Mr and Mrs Knight. The Superannuation Information Form also recorded that they were “interested in SMSF”.

- 117 If the client decided at the home meeting to make an appointment for a run meeting, he or she was required to pay a booking fee of \$100 to the homer. The fee was refundable only if Park Trent (through Easy Plan) assessed the client’s borrowing capacity as insufficient to qualify them for a loan to finance the purchase of a property. In that case, the designation of “DNQ” [does not qualify] was placed on the “Borrowing Capacity” form prepared before the scheduled run meeting. However, the booking fee was not refunded if, for example, the client attended the run meeting but decided not to proceed with a purchase.

Action After the Home Visit

- 118 After the home visit, the homer usually completed a “Consultant In-Home Result Form” (**In-Home Result Form**) and a “Client Profile”. These were internal documents that were used for the run meeting, if the client agreed to such a meeting.
- 119 The In-Home Result Form provided for the homer to record a summary of the client’s financial position. A space for “Appointment Notes” allowed the homer to set out an assessment of the client’s particular aspirations or investment strategies. The notes often referred to the client’s willingness or desire to utilise his or her superannuation balance to purchase property. A space was also provided for “Client’s Hot Button”. The notations in this space also frequently referred to “super” or “SMSF”.
- 120 The Client Profile sometimes recorded much the same information as appeared on the In-Home Result Form. However, the Client Profile also allowed the homer to record impressions obtained that might assist the sales process. For example, the homer might express a view that it would be better

for a male or female consultant to conduct the run meeting and that a particular person in the household was likely to be the dominant decision-maker. The format of the In-Home Result Form and the Client Profile was amended at some stage, but the amendments were not major. In the later version, for example, the consultant's assessment of the client's "hot button" was recorded on the Client Profile, rather than on the In-Home Result Form.

Run Meeting

- 121 The next stage of the process was the run meeting, which was conducted at a Park Trent office, usually on a Saturday or Sunday. At the meeting, the runner met the client face to face, usually for an extended period. Mr May, for example, estimated that a typical run meeting would last for two or three hours. Ms Wilson, who had been employed by CCR in Queensland since February 2014, said that the objective of the run meeting was to have the client make a decision within a three hour period. For that reason, in her experience, appointments were usually made at 9 am and 1 pm. Clients were provided with lunch if they wished to eat after or before the scheduled meetings.
- 122 Run meetings were held at fortnightly intervals at Park Trent's Head Office in Wollongong. Mr Patavich said that on average run meetings were conducted in Queensland twice each month, while monthly run meetings were held in South Australia and Western Australia. Presumably run meetings in Melbourne were held about as often as those in Wollongong and in Queensland. The evidence established that run meetings were conducted in much the same way throughout Australia during the whole of the Relevant Period.

Borrowing Capacity Form

- 123 In preparation for the run meeting, someone within Easy Plan would complete a standard form document, entitled "Borrowing Capacity". This was based on information compiled by the homer during the home visit and was provided to the runner in advance of the run meeting. The principal purpose of the

Borrowing Capacity form was to enable the runner to present properties to the client within his or her assessed price range. Properties selected for presentation were not necessarily located in the client's home State. The consultant might choose or be directed to present properties located in another State, provided they were within the assessed price range.

- 124 By way of example, Mr May completed a Borrowing Capacity form for a married couple he saw in a home visit conduct in July 2014. The couple owned their own home subject to mortgage loans and had relatively modest superannuation balances totalling \$90,000. Mr May recorded in the "hot button" section of the Client Profile form the designation "S.M.S.F." meaning (as Mr May explained) that the clients had expressed an interest in purchasing a property through a yet to be established SMSF.
- 125 The Borrowing Capacity form completed by Mr May, with identifying features removed is as follows:

Borrowing Capacity					
Applicant 1 (name): Applicant 2 (name):		ONLY USE YELLOW FIELDS TO ENTER DATA			
MONTHLY INCOME:					
PAYG					
Gross P.A.		Tax	Medicare	NET MONTHLY	
\$ 53,000.00		\$ 8,712.00	\$ 770.00	\$ 3,518.00	
\$ 55,000.00		\$ 9,422.00	\$ 825.00	\$ 3,729.00	
PAYG with Negative Gearing Benefit (from NegGearingCalc)				\$ -	
PAYG with Negative Gearing Benefit (from NegGearingCalc)				\$ -	
SELF EMP.		Self Employed Income (from SE Worksheet)		\$ -	
OTHER		Self Employed Income (from SE Worksheet)		\$ -	
Social Security Income		(Enter 100% Value here ->)		\$ - Scaled @ 50%	
Overtime				\$ -	
Other - Please describe				\$ -	
RENTAL		Gross Mthly		Are ANY of the security properties located in a single industry town? <input type="radio"/> Yes <input checked="" type="radio"/> No	
Property 1	\$ 1,083.00			\$ 541.50 Scaled @ 50%	
Property 2 +				\$ -	
*If more than 2 properties enter total in Property 2					
TOTAL MONTHLY INCOME				\$ 8,215.23 NET MONTHLY	
MONTHLY OUTGO:					
	Unit	Details			
Credit Card	\$ 1,500.00	WBC		\$ 30.00	
Credit Card				\$ -	
Credit Card				\$ -	
Existing Loan 1		Home LOAN 300K		\$ 2,305.00	
Existing Loan 2		Home Loan 150k		\$ 593.00	
Existing Loan 3					
Rent - Ongoing					
Child Maintenance / Other					
Monthly Outgo Subtotal				\$ 2,928.00	
SURPLUS REQUIREMENTS					
	Marital Status	No Dependents	Postcode		
Applicant 1	Married to App 2	1	2170	Sydney	\$ 1,279.00
Applicant 2	Married to App 1	1	2170	Sydney	\$ 1,279.00
Buffer Calculation					
Is the new product a Single Fixed Rate Loan >= 3yrs OR a Fixed Rate Combo where all splits fixed at >= 3yrs? Note: If Yes, Buffer will calculate at 0.05%				No	
plus Other Westpac Loans				0.13 % Buffer: \$ 585.00	
plus Other Bank Loans				\$ 450,000.00 non-WBC Mortgages	
TOTAL MONTHLY OUTGO				\$ 6,071.00	
RAW INCOME SURPLUS				\$ 2,144.23	
<div style="font-size: 2em; transform: rotate(-15deg); display: inline-block;">072</div>				Interest Rate: 8.25	
				Term (Years): 30	
MAXIMUM BORROWING AMOUNT WITH P&I REPAYMENTS:				\$ 243,313	
** Please note this figure should only be used as a guide **					
E & K Rent pw added \$250. Superannuation 90%. LVR 55%					
Date: 17/07/2014 Name / Salary No.: Name & Salary #					

- 126 It will be seen that the Borrowing Capacity form records the net monthly income of the household, total outgoings and the "raw income surplus" presumably the amount potentially available to service a loan. In calculating the "net monthly income", Mr May seems to have included a notional rental derived from the investment property to be acquired by the clients. The reference in the Borrowing Capacity form to "LVR 55%" is the ratio of the outstanding mortgages on the couple's home (a total of \$450,000) and the

value attributed by the couple to their home (\$815,000, a figure that does not appear on the Borrowing Capacity form itself). Their maximum borrowing capacity is assessed at \$243,313. The form also records the couple's superannuation balances.

The Property Investment Analysis (PIA)

- 127 Park Trent admits in its Defence that its practice at run meeting was to show clients a PIA. Both Mr Pavatich and Mr Petrov (who was familiar with the practice followed in each State) agreed that run meetings followed the same format. Mr Pavatich confirmed in his oral evidence that the same practice was followed throughout the Relevant Period, including after February 2014 (that is, after Park Trent received the Compliance Manual from its solicitors). Mr Kutup, who worked in park Trent's head office and had participated in run meetings since 2010, gave evidence to the same effect.
- 128 These witnesses explained that a PIA would be prepared when the client expressed interest in purchasing a particular property. If the client was interested in purchasing the property through an SMSF (existing or to be established), the PIA would be prepared on the assumption that the client would use his or her existing superannuation balance, together with a limited recourse loan to the SMSF, to acquire the property.
- 129 Mr Kutup said that if Mr Cross was available he (Mr Kutup) would inform Mr Cross of the sale price of the property under consideration and the balance in the client's superannuation fund. Mr Cross would then prepare the PIA which Mr Kutup, as the runner, would present to the client at the run meeting. If Mr Cross was unavailable, Mr Kutup would prepare the PIA himself. Mr May said that Mr Cross was present on the majority of occasions when run meetings were held in Wollongong and thus was usually available to prepare the PIAs.
- 130 Mr Pavatich at first said that in the areas for which he was responsible (Queensland, Western Australia and South Australia) the runners mostly presented PIAs to clients. But he later said that he asked the runners to allow him to make the presentations because, as he explained, he knew how to

prepare and present a PIA to the client. Mr Pavatich acknowledged that some of the runners may not have “totally” understood the document they were to present to the client.

- 131 In an affidavit sworn during the hearing, Mr Pavatich said that the software program used to produce PIAs was developed by a company called Somersoft. The program, which could be purchased by anyone for a fee, was designed to analyse the capital growth, cash flows and rates of return on investment properties, taking tax implications into account.
- 132 The PIAs prepared by Park Trent reflected assumptions on such matters as capital growth, rates of inflation, rental values and taxation rates. The person preparing the PIA inserted figures relating to the proposed transaction, particularly the purchase price of the property and the amount of the mortgage loan required to finance it. The software program produced a chart based on those figures and the standard assumptions fed into the program.
- 133 I reproduce below the PIA prepared for a run meeting held on 23 June 2012 between the clients, Mr and Mrs Davis, and the runner, Mr May. I explain in detail later the sales process that led to the Davis’ deciding to purchase an apartment through a newly established SMSF. That account also explains why the word “KAPLAN” appears in handwriting on the PIA.

10%

KAPLAN

Parktrend - Fairy Meadow		PTP.0012 0001.0004
PROPERTY INVESTMENT ANALYSIS		
Prepared for:		23-Jun-2012
Consultant:		
Property:		
Description:		

SUMMARY

Assumptions		Projected results over 10 yrs	
Property value	\$435,000	Property value	\$779,019
Initial investment	\$43,500	Equity	\$368,524
Gross rental yield	3.78%	After-tax return /yr	21.07%
Net rental yield	2.48%	Net present value	\$222,446
Cap. growth rate	6.00%	IF SOLD	
Inflation rate	3.00%	Selling costs & CGT	\$16,816
Interest rate	6.10%	Equity	\$351,708
Taxable income	\$0	After-tax return /yr	20.49%

COMPUTER PROJECTIONS

Investment Analysis		Projections over 10 years					
End of year	2012	1yr	2yr	3yr	5yr	10yr	
Property value	\$435,000	461,100	488,766	518,092	582,128	779,019	
Purchase costs	\$14,700						
Investments	\$43,500						
Loan amount	\$410,495	410,495	410,495	410,495	410,495	410,495	
Equity	\$24,505	50,605	78,271	107,597	171,633	368,524	
Capital growth rate	6.00%	6.00%	6.00%	6.00%	6.00%	6.00%	
Inflation rate (CPI)	3.00%	3.00%	3.00%	3.00%	3.00%	3.00%	
Gross rent /week	\$323	16,435	16,928	17,435	18,497	21,443	
Cash deductions							
Interest (I/O)	6.10%	25,040	25,040	25,040	25,040	25,040	
Rental expenses	33.78%	5,666	5,836	6,011	6,377	7,393	
Pre-tax cash flow	\$-43,500	-14,271	-13,948	-13,616	-12,920	-10,989	
Non-cash deductions							
Deprec. of building	2.50%						
Deprec. of fittings	\$0	0	0	0	0	0	
Loan costs	\$4,295	859	859	859	859		
Total deductions		31,565	31,735	31,910	32,276	32,433	
Tax credit (single)	\$0	9,981	10,280	10,589	11,234	13,023	
After-tax cash flow	\$-43,500	-4,290	-3,668	-3,027	-1,686	2,034	
Rate of return (IRR)	21.07%						
Pre-tax equivalent	21.07%	83	71	58	32	(39)	

Disclaimer: Note that the computer projections listed above simply illustrate the outcome calculated from the input values and the assumptions contained in the model. Hence the figures can be varied as required and are in no way intended to be a guarantee of future performance. Although the information is provided in good faith, it is also given on the basis that no person using the information, in whole or in part, shall have any claim against Parktrend - Fairy Meadow, its servants, employees or consultants.

- 134 As can be seen, the PIA included a disclaimer, stating that the chart was prepared on the basis of assumptions. The PIA was accompanied by four pages of notes, providing further details on the following matters:

- property value (that is, the purchase price of the property);
- purchase costs (stamp duty and conveyancing costs);
- loan costs;
- total costs;
- loan details (including mostly repayments on an assumed loan of \$410,495);
- rental income from the apartment based on assumptions, including uniform annual rental increases;
- cash deductions available to the purchaser, including assumed rental expenses;
- a chart showing pre-tax cash flow, indicating that even in the tenth year there would be a negative cash flow of \$10,989;
- non-cash deductions available by means of depreciation allowances;
- total tax deductions on an annual basis;
- tax credits, including NRAS tax credits, suggesting that after ten years the negative cash flow would be reduced to \$39;
- “internal rates of return” over ten years;
- projections over 20 years based on a uniform increase in the capital value of six per cent per annum;
- equity projections over a twenty year period;
- tax benefits, on the assumption that the property is rented under the

NRAS;

- investment capacity, showing initial outlay required by the client.

135 The PIA prepared for the Davis' assumed that they would purchase the property through a yet to be established SMSF and that their existing balances would be transferred to the SMSF. The projections assumed that the value of the property would increase at a uniform rate of six per cent per annum over the ten year period. On that assumption, the PIA forecast that a sale of the property after ten years would produce an "equity" of \$351,708. This was said to constitute an after tax return to the purchaser of 20.49 per cent per annum, although neither the PIA nor the accompanying notes explained the basis of this calculation. The calculation of the "equity" allowed for selling costs and capital gains tax, with the latter apparently being calculated on the basis that an SMSF not in pension mode pays tax at the rate of 15 per cent of taxable income.

136 The PIA presented to the Davis' showed a large negative pre-tax cost flow for each of the ten years. However, when the benefit of the assumed tax deductions and NRAS tax credits were taken into account, a positive after-tax cash flow was projected in the tenth year. (The more detailed 20 year projection in the notes to the PIA suggested that a very small positive after-tax cash flow would be produced in the eighth year of the investment.)

The Purpose of the PIA

137 Mr Pavatich was asked about the practice of Park Trent providing PIAs to clients at the run meetings. In the following passage he accepted, unsurprisingly, that the intention in providing the financial projections was to adopt the strategy being proposed:

"Q. All those projections are being presented on the basis that they are based on reasonable assumptions that have been made, correct?

A. Correct.

Q. That they are something that the potential client can take into account in deciding whether to go ahead and establish a self managed

- superannuation fund, correct?
- A. Yes.
- Q. To decide whether to transfer their exiting superannuation into the new self managed super funds?
- A. Yes.
- Q. And whether to proceed to acquire the particular property that is being presented to them?
- A. That's correct.
- Q. That was the intention of the document. It was a selling point?
- A. It's an aid.
- Q. By aid you mean this was given to clients to influence them to agree to proceed with the strategy that was being promoted?
- A. It's part of the presentation.
- Q. The intention was for it to influence the individual in coming to a decision to adopt the strategy that's being put forward in the document?
- A. Yes."

Mr Pavatich also accepted that if the Superannuation Information Form showed that the client had a balance in a managed fund, the PIA was prepared on the basis that the client would transfer the balance to the yet to be created SMSF.

- 138 Ms Wilson gave similar evidence about the role played by PIAs in the marketing process in 2014:

- "Q. Your presentation of the property investment analysis to clients that had come in, that was an important selling tool during the time you were at Park Trent?
- A. Yes.
- Q. When you were presenting the PIA in the context of a client that was looking at whether or not to buy a property by establishing an SMSF, you intended in showing them the PIA to influence the person to set up an SMSF in the first instance?
- A. If their intention was to purchase through an SMSF it would stand to reason they would have to set up a SMSF first before they can purchase, but, yes, to answer your question.
- Q. The second necessary step was that they would have to transfer their existing superannuation balances into the newly created SMSF, is that correct?
- A. That is what they'd have to do, yes, but it's not something I went into detail with them with.

Q. Where you used a PIA and the client that you were presenting the property investment analysis to was a client that was looking at purchasing a property in an SMSF and transferring their existing superannuation into the newly created SMSF. Your intention in showing them the PIA was to influence them to make a decision to buy a property using that strategy, correct?

A. Yes.

Q. After showing a client the property investment analysis, for some clients, they agreed, in fact, to proceed and commit to purchasing a particular property using an SMSF as the purchasing vehicle, correct?

A. Yes."

139 Other witnesses called by Park Trent were less willing to make these concessions. For example, Ms Placek, Park Trent's Sales Director, was reluctant to accept that she presented PIAs to clients intending to influence them to adopt the strategy reflected in the projections. Ms Placek claimed that PIAs were merely designed to demonstrate how a purchase through an SMSF would work. She maintained that clients would make their own decisions and that she would tell them to take the PIAs to their own accountant.

140 I do not accept this evidence. Park Trent's system, which Ms Placek implemented, involved the referral of clients to accountants selected by Park Trent. The referral was made after the client had made a commitment to a purchase by paying the holding deposit and Park Trent's fees and by signing a contract of sale. The runners tried to secure this commitment from the client at the run meeting itself. It is true that, as the evidence from investor witnesses indicates, some clients subsequently sought their own advice. But most had virtually no contact with the accountants who set up the SMSFs, except to sign standard documentation.

Mr Pavatich's Analysis

141 Mr Pavatich swore a second affidavit during the hearing. This affidavit was apparently intended to demonstrate that, all other things being equal, a PIA prepared for a client proposing to acquire a property through an SMSF would always show a lower after-tax rate of return than one prepared for a client proposing to purchase a property in his or her name. It is difficult to see the

relevance of this material to any issues in the case.

- 142 Clients were not generally given PIAs which compared the (projected) benefits of purchasing a property through an SMSF with a purchase in their own names. Moreover, as Park Trent well appreciated, in many cases the only way the client could manage to pay the required deposit was to utilise existing superannuation balances and to acquire the property through an SMSF. Park Trent's practices were clearly designed to encourage clients whose only means of acquiring an investment property was through an SMSF to purchase the property through an SMSF. Where the client did not already have an SMSF, the PIA was one mechanism by which the client was encouraged to establish one.
- 143 In any event, there are difficulties with the analysis advanced by Mr Pavatich. He supported his claim that the return would always be lower for an SMSF investor than for a private investor by attaching PIAs to his affidavit. These were prepared respectively, for a hypothetical SMSF investor and a hypothetical private investor, and were based, so far as feasible, on the same assumptions. The PIAs showed that the projected after-tax returns over a ten year period were slightly higher for the private investor (who was assumed to have a taxable income of \$65,000) than for the SMSF investor. Mr Pavatich attributed the difference to the lower tax regime for SMSFs which reduced the benefits of the various tax advantages built into the model.
- 144 Mr Pavatich's affidavit did not attempt to analyse the impact on the comparative rates of return of changes in the various assumptions built into the model. He acknowledged in his cross-examination, for example, that the projections in the PIAs annexed to his affidavit did not take into account the favourable tax regime applicable to SMSFs in so-called pension mode. It was also apparent from the cross-examination that Mr Pavatich had only a limited understanding of some key components of the analysis reflected in the PIAs.
- 145 For these reasons, I have not found Mr Pavatich's second affidavit to be helpful on the issues requiring resolutions.

Park Trent's Record Keeping and Documentation

The Property Management System

- 146 The marketing and sales strategy adopted by the Park Trent Group required thorough record keeping and the preparation and use of many standardised forms. These aspects of the business shed light on the nature of Park Trent's business and its relationship with other companies within the Park Trent Group.
- 147 The documentary evidence adduced by ASIC included numerous extracts from the Park Trent Group's "Property Management System" (**PMS**). The PMS is a database used within the Park Trent Group to record interactions between representatives of the Park Trent Group and clients. It does so by allocating a distinctive "ID" number to each client and recording extensive information concerning the client and the client's progress within the marketing system.
- 148 The information recorded for each client is presented in a form similar to a running sheet presented (at least in hard copy) in reverse chronological order. The notations include references to communications with the client, whether in writing, at meeting or by telephone. In some cases, emails or other communications are set out at length. The PMS incorporates references to the standard documentation prepared by consultants during or after home visits and run meetings.
- 149 When the client has agreed to proceed with a purchase, the steps in the process are recorded. If the client proposes to establish an SMSF, or transfer funds to an SMSF, the PMS records the processing of the documentation required to complete the transaction. Not surprisingly, the PMS also records the payment by the client of the required fees, together with any other payments such as the holding deposit and the balance of the deposit.
- 150 The PMS covers clients in all States and Territories in which the Park Trent Group operated. It is not confined to clients who deal only with a

representative employed by or contracted to Park Trent. The database includes dealings with representatives who are employed by or contracted to other companies within the Park Trent Group. The information recorded in the PMS can be accessed by homers, runners or other representatives of Park Trent or the Park Trent Group.

Standardised Documentation

- 151 The forms used in the marketing and sales process were standardised across all States and Territories in which the Park Trent Group operated. No distinction was made according to the employment or contractor status of the representative dealing with clients or processing information. The same forms were used, regardless of whether the representative conducting a home visit or run meeting was employed by or contracted to Park Trent or to another company with the Group.
- 152 Most standardised forms contain references to Part Trent or the Park Trent Group. While receipts for holding deposits were ordinarily given in the name of the company which held the appropriate licence under State law, the documentation generally did not refer to any company within the Park Trent Group other than Park Trent itself.
- 153 It is not always easy to discern from copy documents in the Court Books whether a particular reference is to Park Trent or to the Park Trent Group. As Ms Cheeseman noted in her submissions, the words "Pty Ltd" often appear on documentation in microscopic typeface. However, ASIC provided a summary in a schedule to its written submissions of the relevant characteristics of the standard form used in the sales and marketing process. Mr Hewitt did not dispute the accuracy of the summary and I accept that it is accurate.
- 154 It is enough to refer to a few of the key documents:
- The Finance Information form and the Superannuation Investment Form completed at or after the home visit record the name "Park Trent Properties Group Pty Ltd" or simply "Park Trent Properties Group". In

each case, the clause authorising release of information is directed to "Park Trent Properties Group Pty Ltd".

- The earlier version of the "Client Details" form, which was completed during the home visit, was headed "Park Trent Properties Group Pty Ltd", while the later version used in 2014 was headed "Park Trent Properties Group". The form gave Park Trent's website address. It incorporated a table to record information relevant to "Property Management", "Property Listing", "Refinance" and "Self-Managed Super". The last section of the table allowed for space to record superannuation balances and asked whether the client "would like information regarding SMSF Property Purchases". The later version contained a footnote stating that "ParkTrent will refer you to a qualified financial adviser". The client signing the later version of the form authorised disclosure of information to "Park Trent Group of companies and third parties" for the purpose of providing information about purchasing and financing properties.
- The "Purchase Application" and "Purchase Application – SMSF" forms used when a client paid the holding deposit of \$1,000 were headed with either "Park Trent Properties Group Pty Ltd" or "Park Trent Properties Group". The heading included the internet address "parktrent.com.au". When the name "Park Trent Properties Group Pty Ltd" was used, the form stated that the company was a "MEMBER OF PARKTRENT GROUP OF COMPANIES". The form included Park Trent's Australian Business Number (**ABN**).
- The invoices to clients for administration fees and SMSF establishment fees were issued in the name of "Park Trent Properties Group Pty Ltd" and included its ABN in the header. The invoices required payment to be made to Park Trent.
- Park Trent was the Lender under the Deed of Loan Agreement, by which moneys were said to be advanced to clients in respect of SMSF

establishment fees and Statements of Advice (if required). The Deeds included Park Trent's ABN.

The Investor Witnesses

- 155 ASIC tendered statements from eleven so-called "investors" who participated in Park Trent's sales process. Of these, only three (Mr Davis, Mr Knight and Mr Sier) were cross-examined by Mr Hewitt on behalf of Park Trent.
- 156 Much of the evidence given by the investor witnesses was uncontroversial in that it accorded with the practices followed by Park Trent and the evidence given by the witnesses called on its behalf. However, the investor witnesses's accounts of what they were told by homers or runners during home visits or run meetings were often denied by the homers or runners concerned. Almost invariably, the denials were founded on what Park Trent's witnesses said was their practice in conducting visits and meetings, rather than on their recollection of the particular meetings or on contemporaneous documentation.
- 157 During the hearing I put squarely to Mr Hewitt that I thought it would be difficult to reject the evidence of investor witnesses who were not cross-examined. I indicated that could well be the case even if Ms Cheeseman did not cross-examine the witnesses called by Park Trent whose statements or affidavits disputed the claims of the investor witnesses. I gave this indication because the investors had recounted specific conversations, while Park Trent's witnesses relied on what they said was their general practice when conducting meetings. In the event, Ms Cheeseman cross-examined eleven witnesses called by Park Trent who dealt with clients (Mr Agarwal, Mr Kutup, Mr Lini, Mr May, Ms Parr, Mr Pavatich, Mr Perera, Mr Petrov, Ms Placek, Mr Silver and Ms Wilson).
- 158 I shall deal first with the evidence of the three investor witnesses who were cross-examined by Mr Hewitt. I shall then deal with the evidence of the eight investor witnesses who were not cross-examined.

Mr Davis (2012)

159 It is convenient to deal first in some detail with the experience of Mr Davis, one of the investor witnesses who was cross-examined. Mr Davis proceeded through the sales process to the point of establishing an SMSF, through which he and his wife contracted to purchase an apartment in a building to be constructed in Brisbane. The SMSF (through the corporate trustee) was unable to complete the purchase and thus forfeited the deposit of \$43,900. Mr Davis' experience provides a case study of the practices adopted by Park Trent and other companies within the Park Trent Group.

The Evidence

160 Mr Petrov conducted the home visit attended by Mr and Mrs Davis. There were no substantial differences between Mr Davis' account of the meeting and that of Mr Petrov.

161 Mr May conducted the run meetings with Mr and Mrs Davis. Mr May gave evidence and was cross-examined. Since Mr May's account conflicted with that of Mr Davis in certain respects, it is necessary to resolve the conflict. For the reasons that follow, I accept Mr Davis' account as broadly accurate. To the extent that Mr Davis' evidence differs from that of Mr May, I prefer Mr Davis' version unless it is inconsistent with contemporaneous documentation.

162 Mr Davis' account of what transpired at his run meetings seems to me consistent with the system that Park Trent put in place to facilitate (to use a neutral word) sales of property to investors who had or were prepared to establish an SMSF as the investment vehicle. I do not think that Mr May was attempting to mislead the Court, but his account in some respects is difficult to reconcile with the obvious purpose of collecting information about the client's superannuation balances and with the presentation of material plainly designed to demonstrate the benefits of investing in real property through an SMSF.

163 Mr May acknowledged that he had conducted hundreds of run meetings and

that he had no independent recollection of the meetings with Mr and Mrs Davis. He also lacked any contemporaneous notes (other than the standard forms he completed) and was reliant on what he said was his usual practice in dealing with clients. With one exception, Mr Davis also lacked contemporaneous notes of the conversations, but the meetings were unusual events for him and thus he had some reason to recall what had occurred. It was not suggested that Mr Davis was attempting to give a deliberately false account of the conversation.

164 Two matters in particular support Mr Davis' account. Mr Davis claimed that at the first run meeting Mr May said that he was a financial adviser. Mr May denied making any such statement. However, Mr Davis said that he remembered the statement because he had asked Mr May how to become a financial adviser and Mr May had given him the name "Kaplan", apparently an organisation which provides courses to gain the required accreditation. The word "Kaplan" is written on the PIA given by Mr May to Mr Davis and Mr May acknowledged that in 2012 he had been taking a course at Kaplan. While these circumstances do not make it certain that Mr Davis' recollection is correct, they make that conclusion more probable.

165 The second matter is that Mr Davis claimed that Mr May said at the run meeting:

"Based on your financial situation the only way you can afford to invest in a property is through an SMSF."

According to Mr Davis, Mr May also said that the best way to make money was not through his existing superannuation fund but by setting up an SMSF, which would also provide tax advantages. The SMSF would be set up by an independent accountant and managed by Park Trent.

166 Mr May accepted that he may have said that, given the Davis' borrowing capacity, an SMSF was the only option to purchase the property. But he denied referring to the tax advantages of an SMSF. He said that he would have followed his usual practice, which was to say:

“Look there is the option that you can set up an SMSF, and Park Trent has the ability to refer you to an independent accountant to set up an SMSF and they will determine that the property is suitable.”

- 167 Mr May’s version has an air of reconstruction about it, particularly as Mr Davis’ account is consistent with the messages conveyed by Park Trent’s representatives to clients attending Seminars. The lengths to which Park Trent went to present the purchase of property through an SMSF as an extremely attractive investment increases the likelihood that Mr May, like other Park Trent presenters, emphasised the virtues of SMSFs when they had a one to one meeting with the client. While there may perhaps have been some reason for Mr May to modify his approach after the Compliance Manual was prepared in 2014, Park Trent has not pointed to any earlier document or instruction that urged restraint on runners in promoting the virtues of acquiring property through an SMSF.

The Home Visits

- 168 Mr and Mrs Davis at the relevant times lived in rented accommodation in Cessnock, New South Wales, with two of their five children. They owned a house in Grafton, which they were trying to sell. For several years Mr Davis had been concerned that his superannuation had been “go[ing] backwards”. Mr Davis did not think at this stage that he could purchase property outside superannuation. He wanted to learn about SMSFs, but did not know whether an SMSF would be viable for him and his wife.
- 169 In May 2012, in response to an unsolicited call from Park Trent, Mr and Mrs Davis attended a Seminar in Maitland. They were shown slides about investing in property. Mr Davis told the presenter that he was interested in purchasing a property. A home visit was subsequently arranged.
- 170 As events transpired, the home visit had to be cancelled and Mr and Mrs Davis sat in on a home visit which had been arranged by their daughter. Mr Petrov conducted the home visit on 4 June 2012. Mr Petrov told Mr Davis that property could be bought within an SMSF and that Park Trent could put him in touch with people qualified to set up an SMSF. Mr Petrov also said

that he was not qualified to give advice on SMSFs.

- 171 Mr Petrov completed a Finance Information Form and a Superannuation Information Form on the basis of information supplied by Mr and Mrs Davis. The Superannuation Information Form recorded that their superannuation balances totalled \$90,000.
- 172 Mr Petrov recorded on the Superannuation Information Form (which he signed) that Mr and Mrs Davis were "interested in setting up SMSF". Mr Petrov subsequently completed an In-Home Result Form which stated "interested only in SMSF".
- 173 Mr Petrov told Mr and Mrs Davis that they could be given more information at a meeting in Newcastle, for which a booking fee of \$100 would be charged. Mr Davis paid the fee by credit card and was issued with a receipt from Park Trent.

The Run Meetings

- 174 Mr and Mrs Davis subsequently received a letter dated 15 June 2012 confirming a meeting in Newcastle on Saturday, 23 June 2012. They were advised to bring with them a variety of documents including payslips, a recent home loan statement and evidence of investment property income (if any).
- 175 Mr and Mrs Davis travelled to Newcastle expecting to attend a general presentation. Instead Mr Petrov introduced them to Mr May who conducted a one to one meeting, lasting two to three hours. At the outset, Mr May presented his business card, which described him as a "Senior Sales Consultant, Licensed Real Estate Agent".
- 176 At the meeting, Mr May made the observations about investing in property through an SMSF to which I have referred. Mr May showed Mr and Mrs Davis a brochure containing floor plans and other information about a development called "Brooklyn" to be constructed in Brisbane. Mr May drew their attention to a one bedroom apartment for sale at \$439,000.

- 177 Mr May briefly left the room and returned with the PIA reproduced above.²⁸ Mr May informed the Davis' that if they decided to buy the apartment they would need to pay a \$1,000 and an administrative fee of \$1,995. Mr Davis' evidence was that he was told that the fee covered the establishment of an SMSF, but I think he was mistaken about this. While I have no doubt that he believed the fee of \$1,995 covered the establishment of the SMSF, Park Trent's standard practice reflected in the documentation, was to charge separate fees for the SMSF.
- 178 The Davis' told Mr May they wanted to think about the proposal and Mr May said that a second meeting could be arranged for 12 July 2012. Mr Davis took a copy of the PIA with him.
- 179 Prior to the second meeting the Davis' saw an accountant in Cessnock. The accountant, whom they had not consulted previously, advised them that it could be viable to set up an SMSF, but only if they contributed more money to superannuation.
- 180 Mr Davis attended the second run meeting on 12 July 2012, without his wife. The meeting was very lengthy, but Mr Davis made no final decision about the proposed purchase.
- 181 The Davis' attended a third run meeting at Park Trent's office on 28 July 2012. At that meeting they decided to purchase the Brooklyn property and to set up an SMSF in order to do so. Mr May then handed the Davis' a large bundle of documents in a folder and introduced them to Mr Buttell. Mr Buttell's role was apparently to explain the documentation, although according to Mr Davis, Mr Buttell explained very little.

The Documentation

- 182 The Davis' signed an undated "Contract of Sale - Reference Schedule" for the purchase of the apartment. The buyer of the apartment was stated to be P & G Davis Borrowing Co Pty Ltd, a company which had not at that stage been

²⁸ See at [133] above.

incorporated. The "Contract of Sale – Reference Schedule" was subsequently dated 27 August 2012. I infer that the date was inserted by someone at Park Trent after it had been notified that the Davis' SMSF had been established.

- 183 In addition to the "Contract of Sale – Reference Schedule" Mr and Mrs Davis signed two documents that were apparently intended to form part of the contractual arrangements, although the likelihood is that the Davis' did not appreciate their significance. The first document was on Easy Plan letterhead. It did not expressly identify the purchaser of the Brooklyn apartment, but stated as follows:

"This contract is subject to the Purchaser obtaining a deposit bond or a cash deposit to the value of 10% of the purchase price, from a deposit bond provider/lending institution approved by the Vendor within 21 days from the date of sale. The purchaser covenants with the Vendor to make immediate application for the provision of the deposit/deposit bond ..."

The document was dated 28 July 2012.

- 184 The second document was headed "National Rental Affordability Scheme (NRAS)". It stated that if the property did not receive NRAS endorsement, "the Buyer has the opportunity ... to walk away from the contract". It, too, was dated 28 July 2012.
- 185 The other documents signed by the Davis' included a Deed of Loan Agreement between Park Trent as "Lender" and Mr and Mrs Davis as "Borrower". The "Principal Sum" advanced was the sum of \$5,000 required to establish the SMSF and a further \$2,200 if a Statement of Advice was required for a loan approval. As I have noted, Mr Davis did not appreciate at the time that he and his wife were committing themselves to pay \$5,000 for the establishment of the SMSF.
- 186 At the meeting, Mr Buttell gave the Davis' a document entitled "PURCHASE APPLICATION – SMSF". This document was stamped with the name of a firm of solicitors, selected by Park Trent, to act on behalf of the purchaser. It set out the Davis' full names and personal details and recorded that they had

paid a holding deposit or \$1,000. Next to the heading "Additional Contract Information" the following appeared:

"N.R.A.S.
SUPER COST TO BE PAID WITH FUNDS"

- 187 The Davis' signed a separate letter addressed to the firm of solicitors, instructing the firm to act on their behalf in connection with the purchase of the Brooklyn property. The letter stated that the firm was an independent legal practice which would derive no financial gain from the transaction other than its professional fees.
- 188 Mr and Mrs Davis also signed a printed document on the letterhead of a firm of accountants, Network Accounting entitled "Establishment of Self Managed Superannuation Fund (SMSF), SMSF Borrowing Trust and Corporate Trustees". The printed form left spaces to record information required to set up the SMSF. The information included the names of the corporate trustees for the proposed SMSF and for the Borrowing Trust and the details of the members of the SMSF. By signing the form, the Davis' authorised Network Accounting to set up the SMSF and related entities.
- 189 When the documentation was completed, Mr Davis paid the holding deposit of \$1,000 and the administration fee of \$1,995. Mr May gave Mr Davis a trust account receipt from Park Trent for these amounts. The receipt stated that the administration and processing fee was non-refundable. It also stated, rather curiously, that the purchaser had the right to "cool off by rescinding the contract" but in that case the purchaser would forfeit 0.25 per cent of the purchase price. Neither the evidence nor the submissions addressed how this statement was consistent with the fact that the purchaser had not yet been incorporated and that, in any event, the documentation signed by the Davis' seemed to make the purchase conditional on NRAS endorsement and the availability of finance for the deposit.

Transfer of Superannuation

- 190 Shortly after 13 August 2012, the Davis' received a detailed letter from

Networth Accounting. The letter advised that the SMSF had been established, and that the associated corporate entities had been incorporated. The letter requested the Davis' to sign and forward a number of documents and to take the necessary steps to ensure the SMSF could operate, such as opening a bank account in its name. The letter included the following advice:

- "5. **Should you wish** for your current superannuation savings in other superannuation funds to be entirely rolled over into your new SMSF, please contact the ParkTrent Superannuation Co-ordinator for assistance and return this folder to them.

...

7. **We strongly recommend you** contact Networth Accounting ... and request for an appointment to discuss your obligations for running a SMSF. As you are now directors of a SMSF trustee company you are required to have an adequate level of knowledge and understanding of superannuation law to maintain your SMSF and this training course will ensure you have this."

191 On 24 August 2012, Mr Davis received a telephone call from a representative of Park Trent who inquired whether the Davis' wished to transfer all their existing superannuation into the SMSF. Mr Davis agreed, but later changed his mind when he realised that he and his wife would lose their life insurance cover. He subsequently decided to close one superannuation account, but leave others on foot on the basis that settlement of the property purchase would not take place for some time.

192 On about 6 September 2012, the Davis' received a letter from the solicitors nominated by Park Trent, addressed to P & G Davis Borrowing Co Pty Ltd. The letter noted that the purchaser wished the solicitors to act on the enclosed transaction and enclosed, among other documents, the Contract of Sale - Reference Schedule (which had been signed on 27 August 2012) and a standard costs agreement. An enclosed summary of the Contract of Sale stated that as the Contract of Sale was dated 27 August 2012, the cooling off period had expired.

193 In late September 2012, Mr Davis transferred a total of \$50,781.33 from the Davis' superannuation accounts to the SMSF's bank account.

Forfeiture of the Deposit

- 194 On 19 October 2012, the Davis' received an email from Park Trent's National Superannuation Co-Ordinator requesting payment of the balance of the deposit under the Contract of Sale (being \$43,900 less \$1,000 already paid). The email also requested payment of \$5,000 being the "outstanding SMSF Establishment Fee (as per the attached signed Deed of Agreement)".
- 195 Mr Davis was upset about having to pay (as he saw it) an extra fee of \$5,000 to set up the SMSF. He became concerned about the feasibility of the purchase and consulted a solicitor to ascertain whether he had to proceed with the purchase. The solicitor advised that as the cooling off period had expired, the contract of sale could not be cancelled. The evidence does not address whether the solicitor was provided with all the documentation relating to the Contract of Sale of the Brooklyn apartment.
- 196 In view of the solicitor's advice, on 1 November 2012 Mr Davis caused P & G Davis SMSF Co Pty Ltd to pay the balance of the deposit and the \$5,000 SMSF fee. Park Trent issued a trust account receipt for each amount.
- 197 The Davis' heard nothing further about the purchase of the apartment for a considerable time. In late September 2014, at about the time the Davis' were informed that settlement of the sale was approaching, they met with Mr Cross at their home. The upshot of the meeting was that Mr Cross wrote a cheque for \$5,000 to compensate for the SMSF set up fee and undertook to speak to the vendor to see whether the deposit would be returned.
- 198 It appears that Mr Cross's representations were unsuccessful. On 21 November 2014, the vendor's solicitors informed the Davis' solicitors that the deposit paid by P & G Davis SMSF Co Pty Ltd in respect of the apartment had been forfeited.

Mr Sier (2011)

- 199 Mr Sier attended a Seminar at the Riverwood Legions Club in Sydney, in early 2011. Mr Sier had no previous experience in property investment.
- 200 The presenter at the Seminar told attendees that they could buy property "using the equity in your super". This was the first time Mr Sier had heard that it was possible to set up an SMSF in order to purchase an investment property. Mr Sier expressed interest in a home visit, which took place on 15 April 2011. Mr Sier arranged at the home meeting to attend a run meeting.
- 201 The run meeting took place at Park Trent's Wollongong office on 7 May 2011. Mr Sier told the representative, Mr Abnett, that he was interested in investing through an SMSF. The representative said that Park Trent could arrange everything, including setting up the SMSF.
- 202 Mr Sier was shown a brochure for a unit in Melbourne that could be bought off the plan for \$315,000. He was provided with a PIA prepared on the assumption that he would purchase the property through an SMSF and that his "initial investment" would be the balance of \$145,000 then held in his superannuation account. The projected after tax return over a ten year period was 8.47 per cent per annum. Mr Abnett told Mr Sier that he could expect a positive cash flow from the purchase after the first year. Mr Abnett also told Mr Sier that if he wanted to obtain independent advice, that was OK.
- 203 Nonetheless, Mr Sier decided at the run meeting to proceed with the purchase. He signed a large number of documents, including a contract of sale and a request to transfer the balance of his superannuation account to an SMSF. Mr Sier paid a total of \$6,495 by credit card on the day. He received a trust account receipt from Park Trent for three amounts: a part payment deposit of \$1,000, an administration and processing fee of \$1,995 and an SMSF set up fee of \$3,500.
- 204 Mr Sier saw his accountant in June 2011, but only for the purpose of preparing a document required by the Australian Taxation Office. Mr Sier did

not ask for any advice concerning the establishment of the SMSF. The establishment of the SMSF was handled by Moss Munro Hunt and Ms Billett of Park Trent arranged for the transfer of funds to the new SMSF.

- 205 On 5 August 2011, Mr Sier paid the balance of the deposit on the Melbourne property (\$30,500) out of the SMSF's account.
- 206 In January 2014, Ms Billett contacted Mr Sier and told him that the property was nearing completion. Shortly thereafter, Mr Sier was informed that the property was too small for a bank to lend money to the SMSF and that he would have to borrow using his home as security.
- 207 Mr Sier approached his accountant, who was also unable to arrange finance. The accountant advised him that it was not necessarily a good idea to have his superannuation tied up in a single property.
- 208 Mr Sier engaged a solicitor who negotiated with Mr Cross of Park Trent. Mr Sier subsequently received a refund of \$29,500 from Park Trent.
- 209 Mr Sier was cross-examined but his evidence was not challenged. I accept his account.

Mr Knight (2012)

- 210 Mr Knight made two statements and was cross-examined. The following account is based on his statement, but takes into consideration his oral evidence. There was no suggestion by Mr Hewitt that I should not accept Mr Knight as a truthful witness.
- 211 Mr Knight, prior to any contact with Park Trent, was aware from newspaper articles that an SMSF was a saving option. He also considered that the superannuation funds in which he and his wife had accounts were not doing well.

- 212 Mr Knight attended a Park Trent Seminar at St Mary's, near his home in Western Sydney, in August 2012. The presenter, whose name Mr Knight did not recall, said that property could be purchased through an SMSF and that money could be borrowed by the SMSF for this purpose. As a result of the Seminar, Mr Knight found the prospect of investing through an SMSF appealing.
- 213 A home visit took place on 12 September 2012. The homer, Mr Gill, explained that properties could be purchased through SMSFs. Mr Gill took details of the superannuation balances held by Mr Knight and his wife and said that any purchase through the SMSF would require borrowings. Mr Gill confirmed Mr Knight's opinion that he and his wife had insufficient equity in their home to purchase an investment property in their own names.
- 214 Mr Gill completed the Finance Information Form and Superannuation Information Form during the home visit. Mr Knight paid the \$100 fee to attend a run meeting.
- 215 The run meeting took place at Park Trent's Wollongong office on 20 October 2012 and lasted several hours. The meeting was conducted by Mr Petrov, who provided Mr and Mrs Knight with details of a property available in Birtinya, Queensland.
- 216 Mr Petrov took the Knights through a PIA which was prepared on the assumption that they would purchase the property through an SMSF. The PIA projected an after tax return of 13.7 per cent per annum over a ten year period. Mr Knight understood the PIA to suggest that "you couldn't really lose" although he did not really understand the assumptions built into the projections. Mr Petrov said that to purchase the property, the Knights would have to set up an SMSF and transfer their superannuation balances. Mr Petrov informed them that the SMSF could be set up by Networth Accounting, a firm qualified to do so, and that the fee would be \$5,000.

- 217 The Knights decided to purchase the Birtinya property. They were asked to sign many documents, including an authority to Network Accounting to establish the SMSF. At the request of Mr Nasir from Easy Plan, the Knights signed a document authorising Easy Plan to obtain information concerning their superannuation entitlements. Mr Knight paid the holding deposit of \$1,000 and obtained a receipt from Park Trent for that amount.
- 218 Mr and Mrs Knight signed a Deed of Loan Agreement covering the administration fee of \$1,995 and the SMSF establishment fee of \$5,000. The other party to the Deed of Loan Agreement was Park Trent. Mr Cross signed the Agreement on behalf of Park Trent.
- 219 Some time later, Mr Knight received an undated but signed copy of the contract of sale in respect of the Birtinya property. I infer that Mr and Mrs Knight signed the cover sheet at the run meeting.
- 220 On 26 October 2012, Mr Knight was contacted by Ms Ralevska, the Personal Assistant to Park Trent's Superannuation Co-ordinator, Ms Billett. Ms Ralevska asked for further information concerning the Knight's superannuation and said that she could assist with the rollover of funds. In due course, the Superannuation Co-ordinator arranged the rollover, which was completed on 13 December 2012.
- 221 In the meantime, Mr Knight had received documents from Network Accounting relating to the establishment of the SMSF. The standard letter said that if the Knights had any questions they should contact Network Accounting. However, the only contact between Network Accounting and the Knights was by means of written communications. Mr Knight neither requested nor received advice from Network Accounting about the financial wisdom of setting up an SMSF to purchase an investment property.
- 222 On 19 December 2012, Mr Knight paid the balance of the deposit on the Birtinya property and the fees payable under the Deed of Loan Agreement.

- 223 Mr Knight was contacted in mid-2013 by Mr Nasir to discuss financing of the purchase. Mr Knight ultimately decided to arrange his own finance through a bank. He did so because he was unhappy with Easy Plan and considered that Park Trent “always seemed to have a hidden fee attached to anything they did”.
- 224 On 19 June 2013, Networth Accounting sent an email asking for information so that they could prepare a Statement of Advice to provide to the lender. Networth Accounting provided the Statement of Advice on 17 July 2013. The Statement of Advice proved to be unnecessary for the purposes of arranging finance through the bank.
- 225 Mr Knight was “shocked” to receive a bill for \$2,200 for the Statement of Advice and refused to pay the fee. He ultimately agreed to pay \$990, a compromise apparently agreed to by Mr Cross on behalf of Park Trent.
- 226 The purchase of the Birtinya property was completed on 30 October 2013.
- 227 I should record that Mr Petrov gave evidence that differed in relatively minor aspects from that of Mr Knight. Mr Petrov acknowledged that he had no specific recollection of the meetings he had held with Mr Knight and other investors he had met. To the extent of any inconsistency, I prefer Mr Knight’s evidence.

Investor Witnesses Not Cross-Examined

Ms Ashwood (2012)

- 228 Ms Ashwood is a disability support worker. In 2012, she and her husband lived in Eagle Point, Victoria, and owned an investment property there. Neither Ms Ashwood nor her husband had previously seen a financial advisor.
- 229 As a result of a telephone call from Park Trent, Ms Ashwood agreed to a home visit. Mr Silver conducted the home visit on 21 August 2012. He explained how Ms Ashwood and her husband could use their superannuation to purchase a property through an SMSF. Ms Ashwood had not previously

realised that an investment property could be purchased through an SMSF. Mr Silver asked Ms Ashwood and her husband about their income and superannuation balances and arranged a run meeting. Ms Ashwood paid \$195 as the fee for the meeting and for accommodation in Melbourne.

- 230 The run meeting took place on 12 October 2012 at Park Trent's Prahran office. Ms Ashwood and her husband spoke with a number of representatives including Mr Silver and Mr Kurdi, whose card said that he was a Senior Sales Consultant with Park Trent.
- 231 Ms Ashwood told Mr Kurdi that she wished to retire by age 60 (she was 54 at the time). Mr Kurdi said that based on their financial circumstances the Ashwoods could afford to buy one investment property using their superannuation and one in their own names. Mr Kurdi said that by setting up their own SMSF they could control their own superannuation and benefit from property always going up in value. Based on what she was told, Ms Ashwood thought that setting up an SMSF was a great idea, especially as her family's superannuation was not doing well. Ms Ashwood did not refer in her statement to a PIA and no such document was included in the material annexed to her statement.
- 232 The Ashwoods were shown information about properties in Queensland and Victoria. Mr Kurdi suggested that they could buy a property in Sandringham, a suburb of Melbourne for \$365,000 through an SMSF and a property in Ipswich, Queensland, in their own names for \$402,872. Mr Ashwood and her husband decided to purchase both properties.
- 233 At the run meeting, the Ashwoods paid two holding deposits, each of \$1,000 and the administration fee of \$1,995. Mr Kurdi gave them a trust account receipt for those amounts in the name of CCRVic. The Ashwoods signed a contract of sale for each property and a number of other documents. These included incomplete forms authorising Easy Plan to obtain details of their superannuation balances and an incomplete document addressed to Networth Accounting requesting the establishment of an SMSF. The

Ashwoods also signed a Deed of Loan recording an advance by Park Trent of the \$5,000 SMSF establishment fee.

- 234 On 15 November 2012, the Ashwoods receive a telephone call from Ms Ralevska of Park Trent in which she advised that she had ascertained the balances in their superannuation accounts. Ms Ralevska asked Ms Ashwood whether she and her husband wishes to close the accounts and transfer the balances to the SMSF. Ms Ashwood confirmed that they did wish to transfer the funds.
- 235 Shortly thereafter Ms Ashwood received documents from Park Trent, Network Accounting and the Australian Taxation Office relating to the establishment of the SMSF and the transfer of the superannuation balances to the SMSF. The Ashwoods signed and returned the necessary documentation. They had no personal contact with anyone from Network Accounting.
- 236 Ms Ashwood was informed by Ms Billett of Easy Plan on 10 December 2012 that Mr Ashwood's superannuation balance of about \$126,000 had been transferred to the SMSF. Ms Billett asked if the 10 per cent deposit for the Sandringham property could be paid with these funds. Ms Ashwood sent a cheque from the SMSF for \$40,500, being the balance of the deposit and payment of the SMSF establishment fee.
- 237 The Ipswich purchase settled on 12 December 2012. At the date of Ms Ashwood's statement (25 September 2014), the purchase of the Sandringham property had not been completed. She did not know at that time how much the SMSF would have to borrow to complete the purchase.
- 238 Ms Ashwood stated that it was only after they had agreed to purchase the Sandringham property that she and Mr Ashwood realised that they would lose the insurance cover they had through their retail and industry superannuation accounts. They had to take out additional coverage to protect themselves.

239 Mr Kurdi did not give evidence. Mr Silver denied some of the statements attributed to him by Ms Ashwood during the home visit. He did not deny, however, that he discussed SMSFs during the home visit. In his cross-examination, he accepted that in 2012 his practice was to ask clients about their superannuation and that he would mention that SMSFs could be used to purchase the available properties. I accept Ms Ashwood's account of her dealings with Park Trent and its representatives.

Mr Gray (2012)

240 Mr Gray contacted Park Trent in August 2012 after receiving an email about a forthcoming Seminar in Brisbane. The email said that one of the topics to be discussed at the Seminar would be using an SMSF to invest in property. The possibility of investing through an SMSF interested Mr Gray because of his personal circumstances and because his superannuation fund was not doing well. Mr Pope, conducted a home visit at Mr Gray's home at Mt Gravatt on 10 September 2012. Mr Pope arranged for a run meeting at Park Trent's Gold Coast office.

241 The run meeting took place on 27 September 2012 and was conducted by Mr Lini. According to Mr Gray, Mr Lini said words to the following effect:

"The laws regarding superannuation have changed and you can now buy property using your superannuation. It's a good idea to have your super in something that you can have direct control over. It's a simple form of investing."

Mr Lini also said that in order to invest in property using superannuation, it was necessary to set up an SMSF, but Park Trent could organise for this to be done through a firm called Navigator Network. Mr Lini advised Mr Gray that the fee would be \$5,000 and when Mr Gray said he would have difficulty raising the money, Mr Lini said the fee could be paid by the SMSF.

242 Mr Lini told Mr Gray that he could afford to spend \$360,000 on a property using his superannuation and that "we get Navigator Network to do all the documents to create the super fund and enable it to borrow money". Mr Lini also said that Mr Gray could afford to purchase a property in his own name.

- 243 Mr Lini suggested that a property on the Sunshine Coast in Queensland would be suitable for purchase at a price of \$360,000 through an SMSF. Mr Gray decided to purchase the Sunshine Coast property. He also decided to purchase a property in Epping, Victoria in his own name for \$269,000. Mr Gray paid the holding deposit of \$1,000 for the Sunshine Coast property and the \$1,995 administration fee.
- 244 In due course Navigator Network established Mr Gray's SMSF. Mr Gray signed documentation engaging solicitors to act for him on the purchase of the two properties.
- 245 On about 14 December 2012, Mr Gray was asked to pay the balance of the deposit in the Sunshine Coast property. Mr Gray was unable to do so because of delays in rolling over his superannuation into the SMSF. He contacted Park Trent and had a meeting with Mr Cross, who said he would talk to the solicitors and work things out, if necessary by including the solicitor's fee in the finance.
- 246 Mr Gray's superannuation balance was ultimately transferred to the SMSF in mid April 2013 and the balance of the deposit on the Sunshine Coast property was paid in early May 2013.
- 247 On about 4 December 2013, Mr Gray received a letter in the mail from a "Finance Consultant" on Easy Plan letterhead advising that it was now time to arrange finance for the purchase of the Sunshine Coast property. Mr Gray was asked to complete the enclosed Finance Information Form and did so.
- 248 In January 2014, he was contacted by Mr Eichmann, the Finance Manager of Easy Plan. Mr Eichmann advised that the evaluation on the Sunshine Coast property was \$100,000 less than the price Mr Gray had agreed to pay. Mr Eichmann subsequently arranged for a fresh valuation and informed Mr Gray that another lender had agreed to finance the transaction.
- 249 Mr Gray was subsequently made redundant and decided that he had to

withdraw from the purchase of the Sunshine Coast property. He contacted Mr Pavatich at Park Trent who undertook to speak to the developers. Ultimately, the vendors offered to release Mr Gray's SMSF trustee from the contract of sale, provided Mr Gray (or the trustee) paid the vendor's legal fees and the agent's commission of \$11,880 (presumably paid to CCR). Mr Gray felt he had no choice but to accept the offer.

250 Mr Gray also sought to withdraw from the purchase of the property in his own name. The position concerning that property remained unclear at the time Mr Gray signed his second and final witness statement.

251 Mr Lini swore an affidavit stating that he had been contracted as a sales consultant to Park Trent for over four years. He set out what he said was his usual practice. This included telling clients that he was not qualified to talk about SMSFs and that the client would have to discuss that topic with an external planner. He also said that at the beginning of 2014 "senior managers in Park Trent such as Lou Pavatich and Martin Panic[k]ar" informed him that "we can't give any financial advice".

252 In a second affidavit sworn just before the trial commenced, Mr Lini said he had made a mistake in his first affidavit and that he was contracted not to Park Trent, but to CCR. He also said that when he referred to Park Trent in his first affidavit he meant CCR. This, however, could not literally be true since Mr Pavatich (to whom Mr Lini refers in his affidavit) in fact was contracted to Park Trent. Mr Lini's desire to correct his first affidavit is no doubt connected with a submission made by Mr Hewitt that Mr Gray dealt only with CCR and Easy Plan, and not Park Trent.

253 Mr Lini was cross-examined. He accepted that he had no independent recollection of the meeting with Mr Gray. Although he denied using some of the words attributed to him by Mr Gray, there was not a great deal of difference between their respective accounts. To the extent there is a difference I accept Mr Gray's version.

254 Apart from Mr Lini's apparent assumption until a late stage, that he was contracted to Park Trent, Mr Hewitt's submission that Mr Gray dealt only with CCR and Easy Plan overlooked a number of matters: Park Trent confirmed Mr Gray's home visit; Mr Gray's Finance Information Form and Superannuation Information Form were completed on Park Trent letterhead; Park Trent completed a travel requisition form (for Mr Gray's travel to view the properties); a "Purchase Application – SMSF" document was completed on Park Trent letterhead; a "ParkTrent Security Plan" was entered into between Park Trent and Mr Gray; Park Trent's National Projects Manager notified Mr Gray that the Sunshine Coast property was nearing completion; and Mr Gray had direct dealings with Mr Pavatich and Mr Cross of Park Trent.

Mr O'Driscoll (2012)

255 In 2012, Mr O'Driscoll was a high income earner with an investment property and a balance of \$289,000 in his superannuation account. He had been disappointed with his superannuation returns. In response to an invitation he received in the mail, Mr O'Driscoll attended a Seminar held at the Grand Hyatt Hotel in Melbourne on 5 July 2012. Mr Cross gave the presentation.

256 Mr O'Driscoll arranged for a home visit to take place on 12 July 2012. On that date, Mr Dhingra made the presentation to Mr O'Driscoll, his wife and daughter. Mr Dhingra obtained the usual financial details from Mr O'Driscoll, including details of his superannuation account. Mr Dhingra told Mr O'Driscoll that he had the option of using his superannuation to purchase an investment property.

257 Mr Dhingra duly arranged a run meeting, which took place at Park Trent's offices in Prahran on 21 July 2012. The meeting, which Mr O'Driscoll attended with his wife and daughter, lasted about four hours.

258 Mr O'Driscoll expressed interest in three properties, two in Melbourne and one at Point Cook. Mr Dhingra entered the details of the properties into a computer and produced three "financial analysis spreadsheets" which, I infer, were PIAs. During the discussion, Mr Cross met with Mr O'Driscoll and his

family. Mr Cross told them that "Park Trent is a one-stop investment shop".

- 259 Mr O'Driscoll decided to purchase all three properties. After communicating this decision he and his family were introduced to Mr Rodman, an Easy Plan representative. Mr and Mrs O'Driscoll then completed the usual forms. These included a "Purchase Application – SMSF" form in relation to a property at South Yarra, a request to transfer the balance of his superannuation account (with the details of the recipient fund left blank), an authority to Easy Plan to establish an SMSF on Mr O'Driscoll's behalf and a Deed of Loan in which Park Trent was the lender. Mr O'Driscoll paid a holding deposit in respect of each property and informed Mr Dhingra that the \$5,000 fee for establishing the SMSF would be paid after the SMSF was set up.
- 260 Mr O'Driscoll's SMSF was subsequently set up through Network Accounting. In September 2012 Mr O'Driscoll arranged for the transfer of sufficient funds from his superannuation account to pay the balance of the deposit on the South Yarra property. On 3 October 2012, Mr O'Driscoll arranged for the balance of the deposit and the fee for establishing the SMSF (a total of \$49,900) to be paid from the SMSF account to CCRVic.
- 261 Mr O'Driscoll was told in December 2012 by someone from Park Trent that the floor plan of the South Yarra apartment had been changed and that his SMSF had been allocated a slightly more expensive apartment. Ms Billett of Easy Plan provided Mr O'Driscoll with the documentation required to transfer additional funds into the SMSF account to "top up" the deposit. Ms Billett subsequently deposited funds from Mr Gray's superannuation account into the bank account of the newly established SMSF.
- 262 In November 2013, Ms Billett advised that she had received a cheque from Mr O'Driscoll's superannuation fund for the balance of his account. She forwarded the cheque to Mr O'Driscoll to be credited to the account of the SMSF.

- 263 The SMSF trustee duly completed the purchase of the South Yarra apartment. No finance was required.
- 264 In the meantime, Mr O'Driscoll completed the purchase of the other two properties. In each case, he had to find additional funds because the valuations on the properties were significantly lower than the purchase price and thus there was a shortfall in the finance available for the two purchases.
- 265 Shortly after completing the purchases of the three properties Mr O'Driscoll received an undated letter signed for Mr Cross as "Chief Executive Officer, ParkTrent Properties Group". The letter, which was on Park Trent letterhead, informed Mr and Mrs O'Driscoll that Mr Dhingra had left the organisation "for personal reasons".
- 266 Mr Dhingra did not give evidence. I accept Mr O'Driscoll's detailed account of his dealings with Park Trent and the Park Trent Group.
- 267 Mr Hewitt submitted that Mr O'Driscoll's dealings were with Mr Dhingra and Ms Rodman, who were engaged by CCRVic and Easy Plan, respectively. It is true that Mr O'Driscoll dealt with both representatives, but it is also true that he had direct dealings with Park Trent. Examples are the Purchase Application – SMSF form, the Deed of Loan and the communications with Mr Cross.

Mr Gillies (2013)

- 268 In 2013, Mr Gillies had never invested in property but was interested in doing so as a means of restoring his finances after a divorce. Mr Gillies was told by a relative that Park Trent did property investments through SMSFs and he wanted to understand how that worked.
- 269 Mr Gillies attended a Seminar at Ringwood in Melbourne on about 4 July 2013. The presenter compared the returns available from retail superannuation with the returns available by investing in property using an SMSF. The presenter also said that Park Trent was a "one stop shop" and

that investors would not need to worry about accountants, finance or lawyers.

- 270 A home visit was arranged and was conducted by Mr Alahakoon, whose card indicated that he was a sales consultant with Park Trent. Mr Gillies told Mr Alahakoon that on the basis of information provided at the Seminar, he was particularly interested in using his superannuation to invest in a property that qualified for the NRAS. Mr Alahakoon informed Mr Gilles that he had enough superannuation to purchase a property and that Park Trent would set up the SMSF for him. Mr Alahakoon suggested an apartment in a building being constructed in Footscray. Mr Alahakoon obtained the usual financial information from Mr Gillies and arranged a run meeting.
- 271 The run meeting was held at Park Trent's office in Prahran, on 28 July 2013. The meeting was conducted by Mr Petrov, who asked Mr Gillies questions about his financial circumstances. Mr Gillies did not have many questions about SMSFs because Mr Alahakoon had told him that Park Trent would take care of everything.
- 272 Mr Petrov introduced Mr Gillies to Mr Serdar, who was to handle the financial side of things. Mr Serdar's card indicated that he was a Finance Consultant with Easy Plan.
- 273 Mr Serdar showed Mr Gillies the PIA prepared in respect of the Footscray property. Mr Gillies was reassured because the analysis (as he understood it) showed that the SMSF would be making a profit within two years. Mr Serdar assured Mr Gillies that, if anything, the projections were conservative.
- 274 Mr Gillies decided to buy the Footscray apartment for \$465,000. He signed the documents presented to him and paid the SMSF set up fee of \$4,000, the holding deposit of \$1,000 and the administration fee of \$1,995 by credit card. (The card was declined but the payment was made later). Mr Serdar gave Mr Gillies a receipt in the name of CCRVic trading as Park Trent Properties Group.

275 On 31 July 2013, Mr Gillies received an email from Ms Billett. The email stated as follows:

"I am the National Superannuation Co-Ordinator for ParkTrent Properties Group Pty Ltd. It is my role to establish new Self Managed Superannuation Funds, Rollover your superannuation benefits, arrange deposits for settlement on SMSF purchased properties and if required organise SMSF borrowing to complete the property purchase."

276 On 12 August 2013, Mr Gillies was contacted by Network Accounting advising him that the SMSF and associated entities had been established. Shortly thereafter Mr Gillies signed the documentation required for the transfer of the balance of his superannuation account to the new SMSF. He subsequently arranged for the SMSF to pay the balance of the deposit.

277 In late September 2013, Mr Gillies received a letter from Ms Musso, a Sales Administrator with Park Trent, advising that exchanged contracts would be forwarded to Mr Gillies' solicitor. The letter enclosed a receipt from CCRVic.

278 In June 2014, Mr Gillies was contacted by a representative of Easy Plan and asked to provide documentation said to be required for finance approval. After providing the information, Mr Gillies was informed by Mr Mohan of Easy Plan that it had not been able to arrange finance for the purchase. Mr Mohan asked whether Mr Gillies could arrange alternative finance. Mr Gillies replied that he could not and asked why he had not previously been told that finance could be a problem. Mr Mohan said he did not know.

279 Mr Gillies sought the assistance of a firm of accountants to recover the deposit. The initial response from Park Trent was that this was a matter between the vendor and the purchaser. After further communications, Mr Gillies received a refund of \$45,465, apparently representing the deposit less a conveyancing fee of \$1,035.

Mr Anand (2014)

280 Mr Anand and his wife participated in a home meeting on 16 June 2014 conducted by Mr Agarwal, a consultant contracted to CCRVic. They also

participated in a run meeting on 27 July 2014 conducted by Mr Kutup, an employee of Park Trent, at Park Trent's Prahran office in Melbourne.

- 281 Mr Anand prepared two affidavits, both of which were admitted into evidence. The second statement, which was prepared shortly after Mr Kutup swore an affidavit, qualified Mr Anand's first statement in one respect. Mr Anand was not cross-examined.
- 282 Mr Argawal swore an affidavit and was cross-examined by Ms Cheeseman. He denied making certain statements attributed to him by Mr Anand. Since Mr Argawal had only a vague recollection of the home meeting, his denials were based on what he said was his usual practice.
- 283 Mr Argawal admitted that he took the initiative in asking clients at home meetings about superannuation. He also accepted that he may have said (as Mr Anand claimed) that investing in property through an SMSF was one option and that he told Mr Anand that SMSFs could purchase assets other than property. I did not find convincing Mr Argawal's insistence that his usual practice was to qualify any reference to SMSFs with a caveat that he was not a financial planner or accountant. He may have been conscious that his references to SMSFs should have been qualified in this way (the home visit with Mr Anand taking place after the Compliance Manual had been prepared), but I do not accept that he invariably did so. To the limited extent that Mr Anand's evidence and Mr Argawal's evidence is in conflict, I accept Mr Anand's account.
- 284 Mr Kutup swore two affidavits, the second of which denied words attributed to him by Mr Anand. Certain of Mr Kutup's claims were based on what he said was his usual practice at run meetings. Some of his evidence, for example that he did not limit the available options to purchasing property through an SMSF, is supported by the contemporaneous documentation. To the extent that Mr Kutup's evidence is supported by such documentation I accept it in preference to Mr Anand's account. Otherwise I accept Mr Anand's evidence. In particular, in the absence of any challenge to Mr Anand's evidence, I do not

accept that Mr Kutup expressly stated that he was not a financial adviser and that Easy Plan would refer Mr and Mrs Anand to a qualified adviser. I accept that Mr Kutup sometimes followed that practice at about this time, but not that he did so on this occasion.

285 At the home meeting, Mr Argawal told Mr and Mrs Anand that they could either purchase an investment property in their own names or through an SMSF. He said that in his experience an SMSF was the best way to go, but that he would refer Mr and Mrs Anand to people at Park Trent who were more qualified to discuss SMSFs in detail. Mr Argawal collected the usual information at this meeting and gave Mr Anand a Park Trent receipt for the \$100 run visit fee.

286 The run meeting with Mr Kutup lasted for about four hours. Mr Kutup showed Mr and Mrs Anand various brochures and promotional material. They were provided with two PIAs in respect of the same off-the-plan unit to be constructed in Eagleby, Queensland. One PIA was prepared on the basis that Mr and Mrs Anand would purchase in their own names. The other assumed that the purchase would be made through an SMSF. The latter projected that if the property was sold after ten years, the "equity" would be \$220,663, or a return of 11.04 per cent per annum. The former projected an "equity" of \$112,410 or a return of 50.59 per cent per annum. (The percentage return of over 50 per cent per annum was clearly erroneous). Mr Anand said in his affidavit that as he and Mrs Anand had insufficient assets outside superannuation to purchase the unit, the only feasible prospect was to purchase the unit through an SMSF.

287 I accept that Mr Kutup said words to the effect that if Mr and Mrs Anand purchased an investment property through an SMSF they could increase their superannuation through rental returns and that they would gain the benefit of increases in the capital value. This, after all, was the point of presenting PIAs to clients.

288 During the meeting Mr and Mrs Anand were introduced to Mr Cross. He said

that he would give them a discount on the cost of setting up an SMSF. Mr Anand thought that the discounted cost was \$3,500, but it appears that the discounted price was actually to be \$4,000.

- 289 Mr and Mrs Anand agreed at the run meeting to purchase the Queensland apartment and to do so through an SMSF. They paid part of the SMSF fee (\$540), the holding deposit of \$1,000 and the administration fee of \$1,995. They received a receipt from CCRVic trading as Park Trent Properties Group.
- 290 Ms Billett from Easy Plan contacted Mr Anand and advised that Easy Plan worked with Park Trent to set up SMSFs. Mr Anand decided, however, to use his own accountant who would charge less.
- 291 On 12 January 2015, Ms Billett informed Mr Anand that the sale of the Queensland property had been “cancelled”. Mr Anand had received no prior warning of any such cancellation. Ms Billett told him that the reason was that Mr Anand had insufficient funds in their superannuation.
- 292 Mr Anand subsequently sought a refund of all moneys paid to the Park Trent Property Group. At the date he signed his first affidavit (8 May 2015), the administration fee had not been refunded.
- 293 Mr Hewitt submitted that Mr Kutup was representing CCRVic when dealing with Mr Anand, notwithstanding that Mr Kutup is employed by Park Trent. This submission appears to be based on the fact that Mr Kutup holds a real estate licence under Victorian law. The submission fails to recognise that Mr Kutup’s activities were not confined to selling real property as agent for the vendor and in any event were clearly conducted on behalf of his employer.

Mr Helder (2014)

- 294 Mr Helder and his wife received a home visit at their residence in Officer, Victoria, on 14 July 2014. The home meeting was conducted by Mr Perera, who was employed by CCRVic. Mr Perera arranged a run meeting, which took place at Park Trent’s Prahran office on 26 July 2014. The runner was Ms

Placek, who had worked for about nine years as a Sales Director contracted to Park Trent. Mr Perera and Ms Placek made affidavits and were cross-examined.

- 295 Mr Helder recounted in his affidavit that Mr Perera, suggested that Mr and Mrs Helder could use the equity in their home to purchase a second property. Mr Helder explained that that was not an option. Mr Perera then ascertained that Mr Helder had about \$100,000 in superannuation and said:

“\$100,000 is more than enough to purchase property through a self-managed super fund. You could afford to buy a \$300,000 property. If you use your superannuation to pay for the deposit you will only have \$200,000 owing on the property.”

Mr Perera did not specifically deny saying words to this effect and I find that he did say them.

- 296 Mr Perera obtained the usual information and arranged the run meeting. Ms Placek denied making some comments attributed to her by Mr Helder, their accounts had a deal in common. To the extent that they differ, I accept Mr Helder’s account. Ms Placek was relying on her usual practice and had only a vague recollection of the meeting.

- 297 I find that Ms Placek said words to the following effect:

“You can afford to purchase a property through an SMSF. I think you could afford to borrow around \$240,000 and use your superannuation to buy a property worth \$340,000. You would have to transfer all of your super into the SMSF.”

There is no reason to think that Ms Placek did not provide Mr Helder with a PIA at the run meeting, but the PIA was not in evidence.

- 298 At that point Mr Helder had very little understanding of how SMSFs worked or what was required to set up an SMSF. Mr Held asked Ms Placek how much it would cost to set up an SMSF. She replied that it would cost between \$3,000 and \$5,000. Ms Placek said nothing about ongoing costs, once the SMSF was established. Ms Placek also said that she was in sales and could not give

financial advice, but there was someone next door who could answer questions and help set up an SMSF.

299 Ms Placek showed Mr and Mrs Helder brochures of property, including one at Roxburgh Park, Victoria. After discussing the available properties between themselves, Mr Helder informed Ms Placek that he and his wife would purchase the Roxburgh Park Property. Ms Placek said that this would require Mr and Mrs Helder to transfer all their superannuation to the SMSF, but someone would help them with that process.

300 Mr Helder paid the required holding deposit, administration fee and an SMSF fee of \$495. He received a receipt headed "Park Trent Properties Group", with the "Licensee" recorded at the bottom as CCRVic. Mr and Mrs Helder also signed other documents connected with the purchase, including a contract of sale.

301 After these documents were signed, Ms Placek took Mr and Mrs Helder to another room and introduced them to Mr Mohan, a Finance Consultant at Easy Plan, and Mr Tackaberry, the Business Development Manager of Saber Chartered Accountants. Mr Tackaberry did not ask whether Mr Helder needed advice about establishing an SMSF, but gave him a brochure that set out in point form some very basic information concerning SMSFs.

302 A conversation to the following effect then took place:

"[Mr Helder] Hayley and I have just bought a property, here is our receipt. We will be using an SMSF to make the purchase and I need some advice on setting up an SMSF and how to roll over our superannuation into it.

[Mr Tackaberry] For the moment you don't need to roll over all of your superannuation into the SMSF. You should leave some money in your current superannuation fund so that you are still making money on your super whilst the property gets built. You will need to set up a bank account in the name of your SMSF. When you rollover your super funds they will go into the SMSF bank account. I will be in touch via email about the other steps you will need to take."

Mr Tackaberry did not discuss with Mr Helder whether the property should be bought using an SMSF.

303 Mr and Mrs Helder authorised Networth Accounting to set up the SMSF and authorised the solicitors suggested by Ms Placek to act on their behalf on the purchase of the Roxburgh Park Property.

304 The documentation associated with the purchase by the Helders followed the usual pattern, including their execution of a Deed of Loan Agreement. The only unusual feature of their dealings with the Park Trent Group is that they claimed that Ms Placek had told them that the amounts paid at the run meeting would be refunded if they purchased the property using an SMSF. Ms Placek denied in her evidence that she said anything about a refund, but Park Trent, apparently after ASIC's intervention, refunded the holding deposit of \$1,000. Mr Helder apparently intends to proceed with the purchase of the Roxburgh Park property through his SMSF.

305 Two further points should be noted. First, Park Trent did not call Mr Tackaberry to give evidence and thus he did not contradict Mr Helder's account of their discussion. Secondly, Mr Hewitt submitted that Ms Placek should be regarded as acting exclusively on behalf of CCRVic in her dealings with Mr and Mrs Helder. For reasons that have already been given in relation to other investor witnesses, this submission cannot be accepted.

Ms Robinson (2014)

306 Ms Robinson attended a Seminar held at Pakenham in Victoria on 17 July 2014, after receiving a telephone call from someone from Park Trent. At the Seminar she saw a PowerPoint presentation during which the presenter said words to the following effect:

"You can use your superannuation to invest in property. It's a great way to do it. I can't go into it in detail tonight but if you want to learn more about it, make an appointment for someone from Park Trent to come to your home to discuss it with you."

307 Ms Robinson agreed to a home visit, which took place on 24 July 2014. The homer was Mr Silver, whose card said that he was a Senior Sales Consultant with Park Trent. Mr Silver was accompanied by a second person who said little at the run meeting.

308 Mr Silver asked Ms Robinson and her partner (Mr Bray) about their superannuation. In response to Ms Robinson's query as to whether she could use her superannuation to invest in property, Mr Silver replied to the following effect:

"You can use your super to buy a property by setting up a self-managed super fund. Once your self-managed super fund is set up, you are able to transfer your existing super into the fund and use your super to pay for the deposit on an investment property. Your super payments from your employer and rent payments from your investment property go into the self-managed super fund. That way you have a constant cash flow. I can't go into it too much this evening because we've only got an hour. If you come into Park Trent's office we can tell you more about investing in property using your super and whether you have enough super to buy a property. The meeting will cost you \$100 to attend."

As with Mr Helder, there is no reason to think that Mr Silver did not provide Ms Robinson with a PIA, but the PIA was not in evidence.

309 Ms Robinson paid the \$100 fee and received a receipt from "Park Trent Properties Group", with CCRVic's name at the bottom of the receipt.

310 Mr Silver completed documentation on the basis of information provided by Ms Robinson and Mr Bray. The documentation included a "Refinance Referral Form" which recorded the assets and liabilities of Ms Robinson and Mr Bray. This documentation authorised Park Trent to release the information to third parties if necessary to provide advice concerning property investment or refinancing.

311 At the conclusion of the meeting, Mr Silver gave Ms Robinson a brochure entitled "Where People and Property Come Together". This document bore the logo of "Park Trent Properties Group" and commenced with a "Message From the CEO [Mr Cross]". The document listed a number of companies

within the Park Trent Property Group. Under the heading "Finance & Risk Management", the following appeared:

"Self Manager Superannuation Funds

EasyPlan Financial Services provides uncomplicated easy to understand solutions.

Lending through a self managed superannuation fund, EasyPlan provides a proactive avenue to investment property that allows clients to invest in property now, while appealing to their individual plans for the future."

312 After the meeting, Ms Robinson and Mr Bray discussed purchasing a property through superannuation. Mr Bray said he would like to set up his own SMSF and suggested that if Ms Robinson did the same they could buy two properties.

313 At the run meeting held at Park Trent's Prahran office the next day, Ms Robinson and Mr Bray were introduced to Mr Koumourou as someone who could help them with information about investing in property "using your super". Mr Koumourou said this:

"Looking at your financial circumstances, you can both afford to purchase a property by setting up a self-managed superannuation fund and using your super to pay for the property. It might be a bit tight for Stephen but I think it will work. Here are some properties that I think you would be able to afford."

314 Mr Koumourou said that he would need to check with someone at Easy Plan. Mr Olson, a Finance Manager employed by Easy Plan, then joined the meeting. Mr Olson told Ms Robinson and Mr Bray that they could afford to buy a property using superannuation and that Easy Plan could arrange finance.

315 Ms Robinson and Mr Bray decided to purchase two units in a development at Roxburgh Park. At that stage Ms Robinson envisaged that one would be purchased through her own SMSF. Ms Robinson paid both holding deposits (a total of \$2,000) and the fee of \$1,995. She received a receipt from CCRVic trading as Park Trent Properties Group.

316 On 30 July 2014, Ms Billett sent an email to Ms Robinson in much the same form as the email sent to Mr Gillies. The email attached, among other documents, a copy of "Saber Accounting Financial Services Guide" and an "SMSF Establishment Form". Ms Robinson completed the form and returned it.

317 On 20 August 2014, Ms Robinson had a telephone conversation with Mr Thorne of Saber Accounting in which he said words to the following effect:

"[Mr Thorne] It might be worth you and Stephen setting up one self-managed superannuation fund rather than two. This means that you will only have to pay set up costs for one SMSF rather than two. You would both be members of the fund and you would be able to buy the two properties you purchased through the SMSF."

318 On the same day, Ms Robinson received an email from Mr Thorne as follows:

"As per our conversation, we will progress with the setup of one super fund that will have both Stephen and yourself as member. Subject to finance, you have the ability to purchase two properties in the fund under each members separate account. Your setup fees will be reduced as you only need to establish one SMSF."

319 Ms Robinson subsequently received invoices from Saber for establishing the SMSF and associated companies, updating the SMSF deed and preparing a Statement of Advice.

320 On 25 November 2014, Saber advised that funds had been received from Ms Robinson's superannuation accounts and would be deposited with the SMSF.

321 On 4 and 5 December 2014, Ms Robinson paid the balance of the deposit required for each of the units that had been purchased.

322 On 7 May 2015, Ms Robinson contacted Saber and advised the person she spoke to that she had received an invoice in 2014 for a Statement of Advice but did not remember ever receiving such a Statement. On the same day, she received copies of two documents. One was entitled "Advice to Trustees

– Trixie Super Fund” dated 27 October 2014. It included a section headed “Is a self managed super fund right for you?” which provided general information on SMSFs. The second document was entitled “Financial Plan” that incorporated recommendations that Ms Robinson and Mr Bray transfer their superannuation accounts to the SMSF.

- 323 In recounting Ms Robinson’s experience, I have accepted the substance of her evidence. Mr Hewitt read affidavits by Mr Silver and Mr Olson, but only Mr Silver was cross-examined. Neither had any clear recollection of the meetings with Ms Robinson and Mr Bray and relied on their usual practice. In the absence of any cross-examination of Ms Robinson, I prefer her account of what was actually said to the accounts based on usual practice, but not affirmatively supported by contemporaneous documentation.

Ms Zolin (2014)

- 324 Ms Zolin holds a senior academic position. She was contacted by someone from Park Trent in April 2014. At that time she lived in her own home in Brisbane and owned two investment properties in Queensland.
- 325 In 2012, Ms Zolin had seen a financial planner who advised setting up an SMSF to purchase shares, but at that time Ms Zolin was not interested in doing so. She was not told by the planner that she could purchase real property through an SMSF.
- 326 Ms Zolin was too busy to attend a Park Trent Seminar, but she agreed to a home visit. This took place on 30 April 2014 and was conducted by Ms Wilson, who was based in Brisbane. Ms Wilson introduced herself (as her card said) as a Senior Sales Consultant at Park Trent.
- 327 According to Ms Zolin, Ms Wilson asked questions about Ms Zolin’s financial circumstances and her financial objectives. Ms Wilson said that Ms Zolin could purchase real property through an SMSF and that she would be able to use the profits to build up her property portfolio.

- 328 In April 2014, Ms Zolin had about \$210,000 in superannuation with UniSuper, but most of this comprised a Defined Benefits Component. Ms Zolin did not fully appreciate the significance of this at the time, but she had previously been told that the Defined Benefits Component of her superannuation could not be used to purchase real estate. When Ms Zolin explained the difficulty, Ms Wilson said that Park Trent had the expertise to make Ms Zolin's superannuation work for her. Ms Wilson then drew a diagram explaining how an investment through an SMSF would work in Ms Zolin's circumstances. Ms Zolin retained the diagram, which was annexed to her statement.
- 329 Ms Wilson arranged for Ms Zolin to attend a run meeting on 3 May 2014. Before the meeting Ms Zolin felt confident, on the basis of what she had been told, that she could set up an SMSF and transfer the balance in her UniSuper account to the new SMSF.
- 330 Ms Wilson conducted the run meeting. She gave Ms Zolin a number of brochures and other promotional documents. These included the 8 Stage document reproduced above.²⁹ Ms Zolin's account does not refer to her receiving a PIA at the run meeting. Nonetheless, she decided to purchase a unit in Townsville (**Castle Point property**) for \$299,000. Ms Zolin signed the usual documents associated with a purchase of the property through an SMSF. She paid the holding deposit of \$1,000 and the fee of \$1,995.
- 331 Ms Wilson informed Ms Zolin that a company named Saber would set up her SMSF. After the meeting, Ms Zolin spoke to someone from Saber and learned that the fee for establishing the SMSF would be \$5,000. Ms Zolin then contacted her own accountant and was referred to an accounting firm that was prepared to set up an SMSF more cheaply.
- 332 During her meeting with the accounting firm to which she had been referred, Ms Zolin discovered that she could not transfer her superannuation balance into an SMSF. Ms Zolin informed Ms Wilson that in the light of this difficulty, she could not proceed with the purchase of the Castle Point property. Ms

²⁹ See at [78] above.

Wilson said that the deposit and administration fee would be returned. At the date Ms Zolin signed her statement, she had received a refund of the deposit, but not of the administration fee.

- 333 In preparing her first affidavit, Ms Wilson appears to have been suffering from the same misapprehension as Mr Lini. She stated that she had been employed by Park Trent since 15 February 2014. Like Mr Lini, Ms Wilson sought to correct her misapprehension in a second statement, in which she asked that the references to Park Trent in her first affidavit be treated as references to CCR.
- 334 In the first affidavit, Ms Wilson said that her practice was to advise clients that she was not qualified to give advice on SMSFs and that she told clients to seek advice from someone independent of Park Trent. She denied referring to SMSFs in the terms attributed to her by Ms Zolin.
- 335 Ms Wilson in her cross-examination accepted that if she discussed the possibility that the client would use his or her existing superannuation to invest in real estate, she would point out that it would be necessary to set up an SMSF. She said that she did her best to answer questions the client asked investing through SMSFs.
- 336 My impression was that Ms Wilson was attempting to give accurate evidence and was certainly not seeking to give misleading evidence. But I also formed the view that her account of taking care to disclaim expertise and to defer to specialists was influenced by her understanding of the practices that should have been followed, rather than a clear recollection of what she actually did.
- 337 As I have noted, Ms Zolin was not cross-examined. Her account has the ring of truth about it. I accept her evidence, including where it conflicts with that of Ms Wilson.
- 338 Mr Hewitt submitted that Ms Zolin should be regarded as having dealt only with CCR (through Ms Wilson) and Easy Plan (in discussions about finance).

This submission overlooks much of the documentary evidence. This evidence includes communications from Park Trent confirming appointments; brochures and promotional material from Park Trent given to Ms Zolin at the meetings, such as a Park Trent company profile featuring a message from Mr Cross as the CEO and the 8 Stage document bearing Park Trent's name; and a receipt by Park Trent for payment of the administration fee of \$1,995. Mr Hewitt's submission also overlooks that, although Ms Wilson (apparently to her surprise) was employed by CCR rather than Park Trent, she reported to Mr Pavatich who ran Park Trent's operations in Queensland.

Reasoning

The Issues

339 ASIC alleges that Park Trent, throughout the Relevant Period, has carried on a "financial services business" without an AFSL, in contravention of s 911A(1) of the Corporations Act. A "financial services business" is defined in s 761A of the Corporations Act to mean "a business of providing financial services". A person "provides a financial service" for the purposes of Chapter 7 of the Corporations Act if that person provides "financial product advice".

340 It is convenient to repeat the definition of financial product advice in s 766B(1) of the Corporations Act:

"(1) For the purposes of this Chapter, financial product advice means a recommendation or a statement of opinion, or a report of either of those things, that:

- (a) is intended to influence a person or persons 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; or
- (b) could reasonably be regarded as being intended to have such an influence."

341 Mr Hewitt contends that:

- (i) ASIC is not entitled to rely on the conduct of companies within the Park Trent Group other than Park Trent to establish that Park Trent has

contravened s 911A(1) of the Corporations Act;

- (ii) ASIC has failed to prove that Park Trent, as part of its business, made recommendations or stated opinions to clients, whether at Seminars, during home visits, in run meetings or otherwise;
- (iii) any recommendations or statements of opinion made by Park Trent as part of its business were not intended (and cannot be reasonably regarded as intended) to influence persons in making decisions in relation to superannuation interests; and
- (iv) in any event, throughout 2014 Park Trent instituted significant systemic changes to its business that effectively eliminated any pre-existing contraventions of s 911B(1) of the Corporations Act.

Findings as to Park Trent's Business

Some Background

342 As I have explained,³⁰ ASIC contends that:

- (i) Park Trent operates a single integrated business along with other companies in the Park Trent Group;
- (ii) Park Trent is the core or head company of the Park Trent Group and controls the operations of the business;
- (iii) Mr Cross is the ultimate controller of Park Trent and of other companies within the Park Trent Group.

In assessing the evidence, much of which has been summarised earlier in this judgment, several points should be borne in mind.

343 First, there is no dispute that Park Trent carried on a business throughout the Relevant Period. It admits as much in its Defence, but claims that it merely operated a "real estate business", involving the sale of real property mostly on a commission basis.

³⁰ See above at [44].

- 344 Secondly, the undoubted fact that Park Trent was carrying on a real estate business throughout the Relevant Period does not preclude a finding that it was also carrying on the business of providing financial services. Section 19 of the Corporations Act provides that a reference to a business of a particular kind (in this case the business of providing financial services) includes a reference to a business of a kind that is part of, or is carried on in conjunction with, any other business. Thus Park Trent can be found to have carried on the business of providing financial services if it did so as part of or in conjunction with the business of selling real estate (or for that matter any other business).
- 345 Thirdly, s 20 of the Corporations Act provides that a reference to a person carrying on business of a particular kind is a reference to a person carrying on business of that kind, whether alone or together with any other person. It follows from s 20 that Park Trent can be found to have been carrying on a financial services business if it carried on that business “together” with other persons. Those persons can include other companies within the Park Trent Group.
- 346 Mr Hewitt submitted that the activities of companies within the Park Trent Group, other than Park Trent, are simply irrelevant to the case pleaded. He contended, correctly, that the fact that a company is ultimately controlled by one person does not alter its status as a separate legal entity.³¹ Similarly, the fact that a group of companies is under common ownership or control does not affect the independent legal status of each company within the group.³²
- 347 Mr Hewitt relied on the fact that companies within the Park Trent Group held separate licences under State law to enable them to carry on business as real estate agents, while Easy Plan held an Australian Credit Licence.³³ He also pointed out that companies within the Park Trent Group employed their own staff and engaged consultants under contractual arrangements. All of this

³¹ *Andar Transport Pty Ltd v Brambles Ltd* [2004] HCA 28; 217 CLR 424 at [47] (McHugh, Gummow, Hayne and Heydon JJ).

³² *Walker v Wimborne* [1976] HCA 7; 137 CLR 1 at 6-7 (Mason J, Barwick CJ agreeing).

³³ See at [51] above.

may be accepted. But if Park Trent carried on a financial services business, it did not cease to do so because it carried on that business together with one or more of the other companies within the Park Trent Group.

Mr Cross' Position

- 348 It is convenient to start with Mr Cross' position. Mr Cross is (and has been) not merely a shareholder in all companies within the Park Trent Group and the sole shareholder of several companies, including Park Trent itself. He is the person who made all significant decisions within the Park Trent Group and who was the controlling mind of Park Trent. The reporting structure within the Park Trent Group makes it clear that Mr Cross, as the CEO, directed the activities of all companies within the Group.
- 349 The evidence also establishes that at all material times Mr Cross was closely involved in the day to day operations of the Part Trent Group. The 8 Stage document, which outlines the marketing strategy followed by Park Trent and companies within the Park Trent Group, embodied Mr Cross' ideas as to the strategies that should be employed to persuade clients to purchase properties. On the approach devised by Mr Cross, where a purchase of an investment property was feasible only through an SMSF, the client was advised as to the merits of setting up an SMSF to facilitate the purchase.
- 350 Mr Cross personally conducted many of the Seminars and was responsible for determining the content of the PowerPoint presentations made at Seminars. Mr Cross was responsible for incorporating the PIAs into the marketing strategy and in determining the manner in which they were completed and presented to clients at run meetings. He was also primarily responsible for training the consultants and representatives who were to conduct home visits and run meetings.
- 351 Mr Cross' role included training all new sales consultants, a process that took place at Park Trent's head office in Wollongong over a period of four days. He determined the amount of payments on account of commission to consultants regardless of whether they were employed by or contracted to

Park Trent or another company within the Park Trent Group. If any problems arose in arranging finance for a client who had agreed to purchase a property, they were immediately referred to Mr Cross (as the evidence of some of the investor witnesses confirmed).

- 352 I therefore find that at all relevant times Mr Cross was the ultimate controller of Park Trent and of the other companies within the Park Trent Group. Among other things, Mr Cross determined how far Park Trent used the personnel, resources and facilities of other companies within the Group to conduct its own business. He also determined the extent to which Park Trent's business was conducted in conjunction with the businesses of other companies within the Group.

The Position of Park Trent

- 353 The evidence establishes that the business or businesses conducted by companies within the Park Trent Group at all material times were controlled through Park Trent. The head office of Park Trent and of the Park Trent Group was in Wollongong. Mr Cross, as the CEO of both Park Trent and the Park Trent Group, conducted the operations of the Group in New South Wales, Victoria and the ACT. Mr Pavatich, Park Trent's Group General Manager, contracted to Park Trent, was responsible for the operations of the Park Trent Group in Queensland, Western Australia and South Australia. Mr Pavatich, who was the most senior person in the Park Trent Group in the property investment sales area other than Mr Cross, reported directly to Mr Cross. Mr Kutup, the New South Wales State Manager, and Ms Johnston, the Chief Operations Officer, were both employed by Park Trent and reported directly to Mr Cross. Senior personnel in other companies within the Park Trent Group reported either directly to Mr Cross or to Mr Pavatich. The personnel in this group included Mr Eichmann (the most senior person at Easy Plan), Ms Parr (CCRVic) and Ms Parr's successor, Ms Hogan.
- 354 Park Trent, under the direct control of Mr Cross, set up the sales and marketing process that incorporated the elements summarised in the 8 Stage

Document. Park Trent, through Mr Cross, devised the carefully constructed strategy of encouraging clients to invest in real property using SMSFs to enable them to do so. The strategy was largely implemented and directed by Park Trent. Moreover Park Trent derived substantial revenue from fees paid by clients, including fees for establishing SMSFs and administration fees which were intended, in part, to defray the costs of providing information and (in my view) advice to clients. Park Trent derived these fees from its business activities. Park Trent and its associated companies also derived income from other sources, notably commissions on sales. But this does not detract from the finding that it received income attributable to providing information and advice to clients about purchasing investment properties through SMSFs and establishing SMSFs to enable the purchaser to proceed.

355 The elements of the strategy that were devised and controlled by Park Trent included the following: the call centre based in Wollongong; the operation of the website for the Park Trent Group; the content of the Seminars (including the PowerPoint presentations); the form and content of home visits and run meetings; the compilation of promotional material provided to clients; the documentation used to record information from clients, including details of superannuation balances and willingness to set up SMSFs; the use of PIAs as a means of encouraging clients to purchase property by means of an SMSF; the establishment and maintenance of the PMS (integral to the Park Trent Group's operations); the arrangements for referring clients to third party service providers such as solicitors for conveyancing and accountants for the establishment of SMSFs; arranging the transfer of existing superannuation balances to newly created SMSFs; the system for referring clients to Easy Plan to obtain finance for the purchase and charging and collecting administration fees and fees for establishing SMSFs.

356 I find that Park Trent established and controlled the system for marketing and selling investment properties that was at the heart of its business. That system included as a key component encouraging clients to purchase investment properties through SMSFs and facilitating the creation and use of SMSFs for the purpose. Park Trent itself implemented the system through its

own employees and officers. It also utilised the services of other companies within the Park Trent Group to conduct some activities. Those services were provided within a detailed framework established and maintained by Park Trent and in accordance with practices and procedures directed by Park Trent.

An Integrated Business?

357 ASIC invited me to find that Park Trent operated a “single integrated business along with other companies in the Park Trent Group”. The evidence I have recounted and the findings I have made establish that Park Trent carried on the business of marketing and selling investments properties by encouraging clients to purchase properties through SMSFs. Specifically, it encouraged clients who otherwise could not afford to purchase investment properties in their own names (among others) to establish their own SMSFs and to transfer existing superannuation balances to the newly created SMSFs. Park Trent, as part of its business, facilitated the creation of SMSFs in a form that enabled the SMSFs to invest in real property. It did so by arranging the services of third party accountants on behalf of clients. Park Trent also assisted clients to transfer their superannuation balances to the SMSFs, thereby enabling the purchase of investment properties to proceed.

358 Park Trent derived revenues from the services it provided in relation to SMSFs. These included the fees charged for establishing the SMSFs and the administration fees charged to clients who purchased properties through SMSFs. Park Trent also derived commissions from the sales of investment properties through SMSFs, as did other companies within the Park Trent Group.

359 The evidence also establishes that:

- Park Trent conducted its business in close association with other companies with the Park Trent Group, using the services of these companies (in addition to Park Trent’s own personnel) to implement the sales and marketing strategy; and

- Park Trent controlled the operations of other companies within the Park Trent Group, insofar as they participated in the business I have identified.

360 These matters justify a finding in the terms sought by ASIC. However, the critical question is not so much whether Park Trent conducted an “integrated business” but whether it was conducting a business of providing “financial product advice” throughout the Relevant Period. I now turn to that question.

Financial Product Advice

The Construction of s 766B of the Corporations Act

361 The definition of “financial product advice” in s 766B(1) of the Corporations Act requires a “recommendation or statement of opinion or a report of either of those things”. The recommendation, statement of opinion or report is within the definition if:

- it was the subjective intention of the maker to influence a person or persons in making a decision in relation to a particular financial product or class of financial products or an interest in such a product or class of products; or
- objectively the recommendation, statement of opinion or report could reasonably be regarded as being intended to have such an influence.³⁴

As has been seen, ASIC’s case is that Park Trent carried on the business of providing recommendations or statements of opinion which were intended to influence clients or could reasonably be regarded as intended to influence clients to make a decision in relation to financial products, being beneficial interests in SMSFs.

362 The task of construing s 766B(1) of the Corporations Act must begin with the text of the provision. However, the construction of s 766B(1) may require

³⁴ *Australian Securities and Investments Commission v ActiveSuper Pty Ltd* (in liq) [2015] FCA 342; 105 ACSR 116 at [296] (White J).

consideration of its context, including the general purpose and policy of the provision and the mischief it is seeking to remedy. As French CJ and Hayne J observed in *Certain Lloyd's Underwriters v Cross*.³⁵

"The context and purpose of a provision are important to its proper construction because, as the plurality said in *Project Blue Sky Inc v Australian Broadcasting Authority*,³⁶ "[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute" (emphasis added). That is, statutory construction requires deciding what is the legal meaning of the relevant provision "by reference to the language of the instrument viewed as a whole", and "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". (Some citations omitted.)

- 363 Dictionary definitions do not control the construction of a statutory provision. They may indicate, however, that the language used by Parliament is capable of a broad meaning and operation. Section 766B(1) uses the expressions "recommendation" and "statement of opinion". The dictionary definitions of "recommendation" and "opinion" suggest that each term can readily be accorded a broad meaning.
- 364 The dictionary definition of "recommendation" includes "anything that serves to recommend a person or thing or induce acceptance or favour".³⁷ The definitions of "recommend" include:

- "1. to commend by favourable representations; present as worthy of confidence, acceptance, use etc.
2. to represent or urge as advisable or expedient."

The dictionary definition of "opinion" includes:

- "1. judgment or belief resting on grounds insufficient to produce certainty.
- ...
3. the expression of a personal view, estimation or judgment."

- 365 The construction of s 766B(1) must take into account that the language

³⁵ [2012] HCA 56; 248 CLR 378 at [24].

³⁶ [1998] HCA 28; 194 CLR 355 at [69].

³⁷ *The Macquarie Dictionary*.

encompasses a recommendation or statement of opinion that is intended to influence a person in making a decision relating to a financial product or could reasonably be regarded as having such an influence. A person wishing to influence another person (the client) to make a decision relating to a financial product (in ASIC's case, a decision to establish an SMSF to facilitate the purchase of property) may do so in ways other than by express recommendations or explicit statements of opinion. Information or other material may be presented to the client in a form implying that the presenter favours or commends a particular course of action without saying so explicitly. Similarly information or other material may be presented in a form that implies that the presenter's view is that the contemplated course of action is likely to be beneficial to the client.

- 366 The authorities have accepted that the statutory language should be given a broad interpretation. Specifically, they support the proposition that a person may provide information or present material in a way that implicitly makes a recommendation or states an opinion in relation to a financial product.
- 367 In *Australian Securities and Investments Commission v Oxford Investments (Tasmania) Pty Ltd*,³⁸ the defendants carried on a business of training customers in the use of a system of trading futures contracts known as the "Methodology". As part of their business they provided customers with historical data relating to a share price index and a licence to use computer software to interpret the data. The defendants also provided material containing principles to be applied in successful trading of share price index futures.
- 368 Heerey J held that the business involved a recommendation or statement of opinion.³⁹

"The statements they made necessarily implied that [the defendants] held the opinion that application of the Methodology would enable the user to trade profitably. It is not to the point that the defendants did not advise the client as to particular transactions, as for example whether to

³⁸ [2008] FCA 980; 169 FCR 522.

³⁹ *ASIC v Oxford Investments* at [17], [22].

buy, sell or hold a particular security. It is sufficient that their system would 'influence' such a decision, in the sense of making available information, and a system of analysing that information, which would be seen by a recipient as relevant to the making of a decision.

...
In the present case there has been, first, an expression of opinion that, in specified circumstances arising from a particular kind of market analysis, trading in a particular way is likely to be profitable. Secondly, there is the provision of technical aids that assist in identifying those circumstances from day to day. The combined effect is the provision of financial product advice within the meaning of the statute." (Emphasis added.)

369 The observations of Heerey J were quoted with approval by Besanko J in *Australian Securities and Investments Commission v Stone Assets Management Pty Ltd*.⁴⁰ In that case a company conducted a business which facilitated online access to the trading of certain foreign exchange contracts via an online trading platform known as MetaTrader 4. The company's website contained a direct link to MetaTrader 4, which had the ability to automate trades or general trading signals. Besanko J found that by providing trading analysis information, MetaTrader 4 could be construed as expressing an opinion that trading in a certain way, namely by using the trading indicators made accessible by the platform, was likely to be profitable.⁴¹ The platform could reasonably be regarded as intended to influence the trading decisions of clients and thus the business included the provision of financial product advice.

Did the Park Trent Group Make Recommendations or State Opinions?

370 In the present case, Park Trent established and carried on throughout the Relevant Period an extremely well-organised national operation designed, among other objectives, to maximise sales of real property on a commission basis. As the evidence of Mr Moss demonstrated, the sales and marketing operation devised by Park Trent in early 2010 was put in place in order to promote to clients the advantages of purchasing property through SMSFs. The process was structured so as to provide clients without an SMSF with the

⁴⁰ [2012] FCA 630; 90 ACSR 523 (**ASIC v Stone Assets**).

⁴¹ *ASIC v Stone Assets* at [27].

services required to establish SMSFs and to transfer their existing superannuation balances to the SMSF to enable the purchase of the selected investment property to proceed through the SMSF. The services extended to facilitating the borrowing of moneys by the SMSF (through the appropriate entity), to enable the SMSF to purchase the investment property.

- 371 For present purposes, the key elements in the sales and marketing process were the Seminars, the home visits, the run meetings and completion of the purchase (including, if necessary, establishing an SMSF and arranging finance). At each stage prior to completion of the transaction, Park Trent provided information and marketing material that was designed to encourage clients to consider favourably purchasing property using their superannuation balances and, if necessary, to establish SMSFs to allow the purchase to proceed. The process was not aimed exclusively at clients who might wish to use an SMSF to purchase property, or who might be persuaded to establish an SMSF to do so. But clients within these categories formed an important part of the Park Trent's strategy for generating sales and revenue.
- 372 The issues addressed at the Seminars included the advantages of utilising SMSFs to purchase investment properties and the virtues of borrowing in order to acquire properties. The PowerPoint presentations show clearly that attendees at Seminars were told that superannuation could work for them. They were also told that they could be provided with the expertise required to invest in property through SMSFs. Illustrations were provided during the Seminars of how a purchase of property through an SMSF (described as a "DIY Superannuation fund") could generate substantial profits and high returns over a ten year period. The illustrations provided to attendees demonstrated how the purchase of a unit "off the plan" would work through an SMSF, using borrowed funds of up to 80 per cent of the property's value.
- 373 The transcripts of Seminar presentations obtained by ASIC strongly suggest that presenters were by no means subtle in urging attendees to establish or use existing SMSFs to invest in property and make large tax free gains. The most telling transcripts are those recording Mr Cross's enthusiastic

presentations in August and September 2014. Even after Park Trent had received the Compliance Manual and was supposedly paying close attention to it, the CEO of Park Trent was telling attendees at Seminars that they could set up an SMSF, roll over their existing balance into the SMSF and borrow funds through the SMSF to purchase an investment property. Mr Cross assured the attendees that Park Trent had the experts to look after the necessary procedures and thus allow them to take advantage of a “wonderful opportunity”.

374 I infer from the transcripts of Mr Cross’s presentations that if he was prepared to make these statements after having received the Compliance Manual, he similar if not more ringing endorsements of the virtues of investing in property through SMSFs and in establishing SMSFs for this purpose in his presentations between 2010 and 2014. As I have noted,⁴² Mr Hewitt submitted that there was no occasion to draw any *Jones v Dunkel* inference from Park Trent’s failure to call Mr Cross, on the ground there was nothing in the evidence for Mr Cross to contradict. This is a clear case in which I can more comfortably draw an inference from Mr Cross’s absence from the witness box. The slides used at presentations suggest that Mr Cross, who was the main presenter at Seminars throughout the relevant period, invariably exhorted attendees to invest in property through SMSFs. Since Mr Cross elected not to give evidence to the contrary, I am satisfied that he did precisely that.

375 I deal later with the extent to which the practices of Park Trent changed after the Compliance Manual was prepared. Subject to that issue, I find that presenters at the Seminars throughout the Relevant Period almost always made statements recommending, both expressly and implicitly, that attendees should give favourable consideration to purchasing investment properties through an SMSF and that, if they did not already have an SMSF, they should favourably consider establishing one for the purpose. I further find that presenters made statements that expressly and implicitly constituted statements of opinion that investing in properties through an SMSF was a

⁴² See at [45] above.

sound investment strategy likely to produce strong returns in the medium to long term and that attendees who did not already have an SMSF should favourably consider establishing one. The presenters who implicitly and expressly recommended the use of Park Trent's services to establish the required SMSF and to arrange the purchase through the SMSF.

- 376 The practice during home visits was to collect information on the superannuation balances of clients who were assessed to be possible candidates for the purchase of properties through an SMSF, whether existing or to be created. The tasks performed by the homers included assessing the client's aspirations and investment properties and recording the homer's impressions of these matters. The principal objective of the home visit was to encourage the client to attend a run meeting and to pay the required fee of \$100.
- 377 The format of the home visit meetings did not necessarily involve the homer making recommendations or stating opinions as to the desirability of investing in property through an SMSF. I accept that the practices of homers varied from time to time and from State to State. However, the evidence of the investors, recounted in detail elsewhere, shows that some clients were given information in a form that constituted a recommendation or statement of opinion that they should consider favourably investing in real property through an SMSF and that they should favourably consider establishing an SMSF if they did not already have one. The evidence of Mr Gray (2012), Mr O'Driscoll (2012), Ms Zolin (2014), Mr Anand (2014), Mr Helder (2014) and Ms Robinson (2014) provides examples.
- 378 Mr Hewitt correctly pointed out that ASIC called evidence from only a relatively small number of investors whose home visits occurred only between 2012 and 2014. Mr Hewitt also pointed out that Park Trent's witnesses gave evidence that their practice was not to make recommendations about SMSFs or that they would tell clients that they would be put in touch with a qualified person if they wanted more information. This evidence was given in relation to both home visits and run meetings.

- 379 The evidence from the investor witnesses that I have accepted demonstrates that the claimed practices were not universally adhered to and that there were occasions on which recommendations were made and opinions stated at home visits as to the merits of investing in property through an SMSF. In my view, the strong probability is that such recommendations were made and opinions were expressed frequently by homers throughout the Relevant Period, but particularly prior to 2014.
- 380 Park Trent's carefully worked out strategy was to encourage clients to invest in property through SMSFs. The CEO, who was primarily responsible for conducting Seminars, expressly and vigorously, if not flamboyantly, promoted the advantages of investing in this way. There is no evidence of any written instructions to consultants or employees conducting home visits prior to 2014 to refrain at home meeting from encouraging clients to consider SMSFs as an investment vehicle. The remuneration of homers depended in part on persuading clients not merely to participate in run meetings but to purchase property. I think it is fanciful to suggest, as some of the witnesses did, that it was only when clients took the initiative in raising SMSFs as investment vehicles that any discussion of the subject took place.
- 381 I find that subject to considering the effect of the Compliance Manual, throughout the Relevant Period homers regularly made statements to clients explicitly or implicitly encouraging them to invest in real property using an SMSF and suggesting that it was desirable to establish an SMSF for this purpose. The statements included encouragement to transfer existing superannuation balances to the SMSF, since this was the only way the SMSF could purchase the property. The statements were frequently made to clients by representatives employed by or contracted to Park Trent itself. They were also made by representatives of the Park Trent Group who were employed by or contracted to other companies within the Group (although the employees or contractors were sometimes unclear about the entity which had engaged them). But the activities of representatives employed or contracted to companies other than Park Trent operated within a structure set up by Park Trent and in accordance with objectives determined by Park Trent.

382 The evidence of the Park Trent witnesses made it clear that the principal objective of a run meeting was to secure the written agreement of the client to purchase a property and to obtain the holding deposit and administration fee. The key element in the sales strategy at the run meeting was to present the client with a PIA. I have described in detail the form and content of the PIA.⁴³

383 As I have noted, Mr Pavatich and Mr Kutup said that a PIA would be prepared on the assumption that the client would purchase a property through an SMSF if the client expressed an interest in taking this course. It is no doubt true that by the time some clients attended the run meeting, they had made a reasonably firm decision that if they purchased a property they would do so through their own SMSF. However a significant proportion of this group would have made that decision on the basis of what they had been told earlier in the marketing process. Ms Zolin, for example, felt confident before the run meeting that she could set up an SMSF, but she formed that view on the basis of what she had previously been told at the home visit by Ms Wilson. Some clients participating in a run meeting would have realised before the meeting that they could afford to purchase a property only if they transferred their existing superannuation balances to a newly established SMSF. While some people in this category may have more or less decided before the run meeting to set up an SMSF, that decision was very likely to have been influenced by the presentation at a Seminar or by the information given to them during a home visit.

384 Given that the objective of the run meeting was to persuade the client to purchase a property and that the typical meeting lasted several hours, it would be very surprising indeed if many runners did not explicitly encourage the client to proceed with a purchase of property through an SMSF, especially if that was the only option available to the client. As I have observed, Park Trent adduced no evidence to show that it had systematically attempted to ensure that all consultants were aware, at least before 2014, that runners should not say or present anything that could constitute a recommendation or statement of opinion as to the desirability of investing in property through

⁴³ See at [127]-[136] above.

SMSFs. On the contrary, if a PIA was prepared on the assumption that the client would establish an SMSF to purchase property, the presentation of the figures to the client provided an obvious opportunity and incentive for the runner to emphasise the benefits of doing precisely what the PIA suggested. The evidence of the investors shows that this is in fact what occurred both before and after Park Trent had received the Compliance Manual.

- 385 The marketing approach of the Park Trent Group relied heavily on the PIAs presented to clients at the run meetings. If a client could afford to purchase an investment property only by establishing an SMSF and transferring the balance of his or her superannuation account to the SMSF, the PIA was prepared on the basis that the client would set up an SMSF to purchase the property and funds would be transferred to it. If there were other reasons to think that the client would be more likely to purchase by using an existing SMSF or by establishing a new SMSF, the PIA was also prepared on the assumption that the property would be purchased through the existing or newly created SMSF.
- 386 The assumptions built in to the model underlying the PIAs were plainly designed to demonstrate that the purchase of a property through an SMSF was not only feasible but a highly desirable investment strategy for the client, who of course would be a member of the SMSF. Whether or not the projections were based on reasonable assumptions, the projections uniformly purported to show that a client who set up an SMSF to purchase an investment property would experience substantial positive returns over a ten year period, typically amounting to a pre-tax equivalent of more than 20 per cent per annum.
- 387 A PIA presented to a client who was able to purchase an investment property only by using his or her existing superannuation balance incorporated a number of implicit recommendations. These included recommendations that:
- the client should set up an SMSF in order to purchase the investment property, as this would enable the client (as a member of the SMSF) to

obtain very substantial returns from the investment;

- the client should transfer the whole or part of his or her existing superannuation balance to the SMSF, once established, to enable the purchase to proceed;
- the property selected by the client should be purchased through the SMSF, once established; and
- the establishment of the SMSF, including the entities required to purchase the property and obtain finance, should be arranged using services provided by Park Trent Group.

388 Where the client could afford to purchase a property in his or her own name, the preparation and presentation of a PIA on the basis of a purchase through an SMSF implicitly incorporated recommendations that:

- it was desirable to set up an SMSF in order to purchase the property selected by the client;
- a purchase of an investment property through an SMSF would enable the client (as a member of the SMSF) to obtain very substantial returns on the investment;
- the client should transfer the whole or part of his or her existing superannuation balance to the SMSF, or otherwise channel funds into the SMSF, to enable the purchase to proceed;
- the property selected by the client should be purchased through the SMSF (to be created); and
- if an SMSF was to be established, this should be arranged using the services provided by the Part Trent Group.

389 It is true that the material accompanying the PIAs, if read carefully, showed

that the projections were based on assumptions as to rental returns, rates of capital growth, future rates of inflation, benefits available under government programs and other variables. The evidence suggests that few clients read the material carefully and even fewer fully understood the import of the qualifications to the projections. In any event, the material accompanying the PIAs does not detract from their force as a marketing tool incorporating recommendations and statements of opinion as to the desirability of setting up or using an SMSF in order to invest in property.

Intention to Influence a Decision

- 390 In order to obtain a finding that Park Trent conducted a business of providing financial services, ASIC must show that the recommendation or statements or opinion made in the course of Park Trent's business were either intended to influence a person to make a decision in relation to a financial product or could reasonably be regarded as being intended to have such an influence.⁴⁴ As has been seen, recommendations and statements of opinion as to the desirability of purchasing investment properties through an SMSF were made at all stages of the marketing process up to the client's decision to commit to a purchase of a property through an SMSF.
- 391 Section 766B(1) of the Corporations Act does not specify who must intend to influence a person to make a relevant decision if the terms of the provision are to be satisfied. ASIC accepts that it has to show that Park Trent intended to make recommendations and state opinions in order to influence clients to decide to establish SMSFs and to decide to use the newly created SMSFs to purchase properties through the Park Trent Group. ASIC submits that the evidence establishes that this was in fact Park Trent's intention.
- 392 Park Trent's business included organising and conducting the marketing process, even though some marketing activities were conducted by representatives contracted to or employed by other companies within the Park Trent Group. I have found that the marketing process involved

⁴⁴ Corporations Act, s 766B(1).

recommendations being made and statements of opinions being expressed to clients about the merits of establishing any using SMSFs to purchase investment properties.

393 In my view, it is quite clear that Mr Cross, as the controlling mind of Park Trent, intended that the recommendations made and opinions expressed in the course of the marketing process should influence clients to make decisions in relation to the use and creation of SMSFs to purchase properties. In particular, Mr Cross was fully aware of the content of Seminars and intended the presentations to influence attendees in making decisions on the matters I have identified. Similarly, Mr Cross was fully aware of the content of PIAs and intended that they should be presented to clients in order to influence them to purchase property through SMSFs. I infer that Mr Cross was well aware that as part of the marketing process he devised and refined, homers and runners would make statements in order to encourage clients to purchase property through SMSFs and that he intended that this should occur. That, after all, was the fundamental purpose of the PIAs.

394 I therefore find that Park Trent, through Mr Cross, intended that the recommendations made and opinions expressed to clients in the course of Park Trent's business would influence clients to make decisions in relation to the purchase of properties through SMSFs. This included the recommendations and statements of opinion that I have identified. I make this finding without relying on the inferences that may be available from Mr Cross' failure to give evidence. Nevertheless, Mr Cross' absence from the witness box enables me to draw inferences as to his intentions with greater confidence.

395 In order to establish the subjective intention contemplated by s 766B(1)(a) of the Corporations Act, I do not think it is necessary to find that individual presenters at run meetings intended that the PIAs should influence clients to make decisions in relation to the establishment and use of SMSFs. However, the evidence of Mr Pavatich and Ms Wilson demonstrates that presenters at run meetings understood and intended that PIAs prepared on the assumption

that the clients would use SMSFs to purchase properties would influence the clients to adopt that course. If necessary, I would find that the runners responsible for conducting run meetings intended that the recommendations and statements of opinion in PIAs prepared on that assumption should influence clients to make decisions in relation to the use and creation of SMSFs for the purchase of investment properties.

396 In view of the finding that Park Trent made or provided recommendations or statements of opinion intended to influence clients to make decisions in relation to a particular financial product or class of financial products, it is not necessary to decide whether the recommendations or statements of opinion could reasonably be regarded as intended to have such an influence. However, if an objective test is applied in the manner that s 766(1)(b) of the Corporations Act requires, in my opinion the test is satisfied.

397 An objective observer would regard the recommendations made and statements of opinion expressed to attendees at Seminars and clients at home visits and run meetings as intended to influence them to purchase properties through SMSFs and to set up SMSFs for the purpose. The system devised and put in place by Park Trent was self-evidently designed to promote a particular message to a class of potential investors who might be able to utilise SMSFs to purchase property. One part of the message was that clients could use their existing superannuation balances to purchase property if they set up SMSFs and transferred the balances to the newly created SMSFs. Another element of the message was that this was a sound financial strategy that the clients would be well-advised to follow since they would be members of the SMSFs. In this context, the recommendation and statements of opinion could reasonably be regarded as being intended to influence decisions in relation to financial products.

398 Mr Hewitt resisted these findings essentially on the ground that the evidence of the investor witnesses did not establish that the PIAs or any other conduct of Park Trent influenced any decision they made concerning SMSFs. Mr Hewitt supported this submission by pointing out that some of the witnesses

acknowledged that they knew that they could control the nominated accountants to seek advice or information about SMSFs, had they wished to do so.

399 There are two principal reasons why Mr Hewitt's submission must be rejected. First, the question posed by the relevant provisions of the Corporations Act, in particular s 766B(1), is whether the business conducted by Park Trent included making recommendations or stating opinions that were intended to influence decisions in relation to financial products or could reasonably be regarded as so intended. The question is not whether the clients were actually influenced to make particular decisions. Even if there was no evidence that the presentations at Seminars or at run meetings actually influenced clients to set up SMSFs in order to purchase investment properties, the evidence nonetheless establishes that Park Trent's business throughout the Relevant Period incorporated as an essential component making recommendations or stating opinions in relation to financial products.

400 In any event, the evidence of the investor witnesses shows that some were influenced by the presentations at Seminars or run meetings, particularly the PIAs, to pay the holding deposit and to give instructions to establish an SMSF. Moreover, the fact that some clients knew that they could seek advice or information from the nominated accountants, is not inconsistent with their decisions being influenced by the recommendations made during the marketing process. Very few clients took up the opportunity to obtain advice from the nominated accountants notwithstanding that the clients frequently had little understanding of what was involved in setting up and operating an SMSF in accordance with the governing legislation.

The Recommendations and Opinions were in Relation to Financial Products

401 I have found that Park Trent carried on the business of making recommendations and stating opinions that were intended to influence clients to purchase investment properties through SMSFs. As part of the business, Park Trent recommended or expressed opinions to clients that they should set

up their own SMSFs in order to enable them to purchase properties and, to that end, should transfer their existing superannuation balances to the newly created SMSFs. Park Trent's business included facilitating the creation of SMSFs and charging fees for the services it provided. Park Trent also derived commissions from the sale of properties arranged through SMSFs created in this way, as did other companies within the Park Trent Group.

402 In order for ASIC to make out its case for relief, it must establish that the recommendations made and opinions stated as part of its business were made

“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”.⁴⁵

403 ASIC submitted that the evidence satisfies this requirement. Its submission proceeds by the following steps:

- The definition of “financial products” for the purposes of Chapter 7 of the Corporations Act includes “a superannuation interest within the meaning of the SIS Act”: Corporations Act s 764A(1)(g). Such an interest is called a “superannuation product”: s 761A.
- The SIS Act defines “superannuation interest” to mean “a beneficial interest in a superannuation entity”: s 10(1).
- The definition of “superannuation entity” includes a “regulated superannuation fund”: SIS Act s 10(1).
- A regulated superannuation fund is a superannuation fund which complies with the requirements stated in s 19 of the SIS Act.⁴⁶
- An SMSF is one that satisfies the conditions specified in s 17A(1) or (2) of the SIS Act.⁴⁷

⁴⁵ Corporations Act, s 766B(1).

⁴⁶ See at [32] above.

- In practice SMSFs must be regulated superannuation funds⁴⁸ since in order for a superannuation fund to be entitled to taxation concessions under the *Income Tax Assessment Act 1997* (Cth), it must be a “complying superannuation fund” within the meaning of s 45 of the SIS Act.
- The effect of s 42A of the SIS Act is that an SMSF, in order to be a complying superannuation fund, must be a regulated superannuation fund.
- The SIS Act defines beneficiary in relation to a fund as a person, whether described as a member or otherwise, who has a beneficial interest in the fund and includes, in relation to a superannuation fund, a member of the fund: s 10(1).
- It follows that a beneficial interest in an SMSF, for example as a member, is a “financial product” for the purposes of s 766B(1)(a) of the Corporations Act.

404 The result is that a recommendation or statement of opinion which is intended to influence a person to establish an SMSF, transfer funds into the SMSF and become a member of the SMSF is a recommendation or statement of opinion in relation to a beneficial interest in an SMSF. Since a beneficial interest in an SMSF is a financial product, the recommendation or statement of opinion is intended to influence a person in relation to a particular financial product (the proposed SMSF of which the person establishing the SMSF is to be a member) or a class of financial products (SMSFs of which persons establishing the SMSFs are to be members).

405 ASIC’s submission is consistent with the approach taken by Gordon J in *Australian Securities and Investments Commission v Monarch FX Group Pty*

⁴⁷ See at [33] above.

⁴⁸ *Income Tax Assessment Act 1997* (Cth), s 995-1(1).

*Ltd.*⁴⁹ In that case a company (Monarch FX) which promoted foreign exchange dealings followed a practice, where a prospective client had insufficient funds to invest, of recommending that the client set up an SMSF and roll over funds into the SMSF. The recommendation was made to allow the client to gain access to funds in order to establish trading accounts for foreign exchange contracts.⁵⁰

406 Gordon J held that by its marketing communications.⁵¹

“Monarch FX provided advice in relation to establishing a SMSF and rolling in funds held elsewhere. The clients’ superannuation interests were financial products within the operation of s 764A(1)(g) of the Corporations Act: see [13] above. Monarch FX therefore provided financial product advice for the purpose of s 766B of the Corporations Act, as it made recommendations that could reasonably be regarded as being intended to influence clients making a decision about their superannuation interest.”

In [13] of her Honour’s judgment, referred to in the above extract, Gordon J recorded that the definition of “financial product” includes a “superannuation interest”, being a beneficial interest in a “superannuation entity” as defined in the SIS Act.⁵²

407 The reasoning of Gordon J is consistent with the approach taken by Hargrave J in *Re PFS Wholesale Mortgage Corporation Pty Ltd; Australian Securities and Investments Commission v PFS Business Development Group Pty Ltd*.⁵³ In that case a company conducted an unlicensed business by recommending to potential clients that they vary existing superannuation arrangements and establish SMSFs. Hargrave J held that the company was carrying on a financial services business.⁵⁴

408 *Re PFS* was followed by White J in *Australian Securities and Investments Commission v Active Super Pty Ltd (in liq)*.⁵⁵ White J described conduct in

⁴⁹ [2014] FCA 1387; 103 ACSR 453 (**ASIC v Monarch**).

⁵⁰ *ASIC v Monarch* at [59]-[60].

⁵¹ *ASIC v Monarch* at [83].

⁵² SIS Act, s 10(1); Corporations Act, s 764A(1)(g).

⁵³ [2006] VSC 192; 57 ACSR 553 (**Re PFS**).

⁵⁴ *Re PFS* at [355], [357], [360].

⁵⁵ [2015] FCA 342; 105 ACSR 116.

that case that constituted a contravention of s 911A(1) of the Corporations Act in terms that could be applied to the present case:

“Royale by its telemarketers and Mr Gibson himself made recommendations or statements of opinions intended to influence persons to establish their own SMSF. In his conversations with those persons who expressed interest, Mr Gibson made arrangements for them to acquire a superannuation interest and later facilitated that acquisition. He also arranged for those persons who agreed to establish an SMSF to establish a Macquarie Account. The very business of Royale involved the marketing and establishment of SMSFs and the making of investments by SMSF investors”.

409 I therefore find that, subject to the arguments I am about to consider, Park Trent carried on business by making recommendations or stating opinions intended to influence clients to make decisions in relation to a particular financial product or class of financial products, or in relation to an interest in such product or products.

Park Trent’s Submissions on Financial Products

410 Mr Hewitt advanced several arguments based on the construction of Chapter 7 of the Corporations Act in opposition to ASIC’s submission that Park Trent conducted a business of making recommendations (and stating opinions) intended to influence decisions in relation to beneficial interests in SMSFs.

411 First, Mr Hewitt contended that Park Trent could not have made recommendations “in relation to” beneficial interests in SMSFs, since the SMSFs were not in existence at the time any recommendations were made or opinions stated. Mr Hewitt contended that unless an SMSF had actually been created and members of the SMSF identified, Park Trent could not make a recommendation in relation to members of the SMSF. It followed, so he said, that unless and until all requirements stated in s 19 of the SIS Act had been complied with, such as the appointment of a trustee to the SMSF and the giving of notices to the regulator, there was no beneficial interest in the SMSF that could be the subject of a recommendation or opinion.

412 This contention cannot be accepted. Section 766B(1) of the Corporations Act is directed to conduct intended to influence a person to make decisions on the

future. As ASIC pointed out, it would make little sense to confine s 766B(1) to a financial product which the relevant person had acquired **before** receiving a recommendation to acquire the product. This conclusion is reinforced by the definition of “financial product” in s 764A(1), which includes products such as contracts of insurance which could not be in existence at the time recommendations are made to take out insurance coverage. The submission is also contrary to the authorities to which I have referred. Each would have been decided differently if the submission is correct.

413 In support of this and related arguments Mr Hewitt referred to *Australian Securities and Investments Commission v Narain*,⁵⁶ where Jacobson and Gordon JJ accepted a submission that the words “in relation” in s 1041H of the Corporations Act were an adjectival phrase that qualifies the breadth of the proscribed conduct.⁵⁷ However, their Honours went on to say that there is a wealth of authority for the proposition that “in relation to” is extremely wide and that its meaning will be determined by the context.⁵⁸ Their Honours also said that the context will determine whether the relationship must be direct or substantial or whether an indirect or less than substantial relationship will suffice.⁵⁹

414 Furthermore, as Ms Cheeseman pointed out, s 766B(1) of the Corporations Act is directed to recommendations or opinions intended to influence **future** decision-making. It is difficult to see the point of legislation drafted by reference to actions intended to influence a person in making certain kinds of decisions if the legislation is limited to actions relating to decisions that have already been made.

415 As Ms Cheeseman also pointed out, Park Trent’s submission is difficult to reconcile with the statutory language. Section 766B(1) applies, *inter alia*, to a recommendation intended to influence a person in making a decision in relation to a class of financial products. Those words contemplate advice

⁵⁶ [2008] FCAFC 120; 169 FCR 211 (**ASIC v Narain**).

⁵⁷ *ASIC v Narain* at [66].

⁵⁸ *ASIC v Narain* at [68].

⁵⁹ *ASIC v Narain* at [71].

being given in relation to a class of products even though no particular product is in existence at the time the recommendation is made.

416 Furthermore Park Trent's submission is inconsistent with *ASIC v Monarch* and other authorities to which I have referred. If the submission is correct, those cases would have been decided differently.

417 Secondly, Mr Hewitt submitted that any recommendations made to clients by or on behalf of Park Trent had nothing to do with a beneficial interest in the SMSF. Mr Hewitt relied on the fact that there are different decisions to be made in relation to an SMSF. For example, a person has to decide to set up an SMSF, to appoint a trustee, to become a member and to determine what investments the SMSF should make. As I understand the argument, Mr Hewitt contended that any recommendation made or opinion stated by Park Trent related only to the establishment of the SMSF and (possibly) the appointment of a corporate trustee, but not to the client's membership of the SMSF.

418 As ASIC's submissions pointed out, the distinction Mr Hewitt attempted to draw is illusory in the present context. Under the SIS Act, an SMSF must have fewer than five members.⁶⁰ Except for an SMSF having only one member, every trustee of an SMSF or every director of a corporate trustee must be a member of the SMSF.⁶¹ Further, each member of the SMSF must be a trustee of the SMSF or a director of the corporate trustee.⁶² Where the SMSF has only one member, that member must be the trustee or a director of the corporate trustee, although there may be another trustee or director of the corporate trustee.⁶³

419 A recommendation that a person set up an SMSF to advance that person's investment objectives necessarily involves a recommendation that the person should become a member of the SMSF. Mr Hewitt did not dispute that a

⁶⁰ SIS Act, s 17A(1)(a).

⁶¹ SIS Act, s 17A(1)(a), (b).

⁶² SIS Act, s 17A(1)(d).

⁶³ SIS Act, s 17A(2).

recommendation to this effect would be a recommendation in relation to a beneficial interest in a superannuation and thus in relation to a financial product or class of financial products.

- 420 In any event, the evidence clearly establishes that the recommendations made or opinions stated to clients of Park Trent were intended to influence them to set up SMSFs **of which they would be members**. The whole point of a recommendation to set up an SMSF was to persuade the client that his or her investment objectives, including securing a more comfortable retirement, would be achieved more readily by purchasing an investment property through the SMSF. The objectives could be achieved consistently with the recommendation only if the client became a member of the SMSF so that he or she could benefit from the projected returns.
- 421 Not surprisingly, in practice all SMSFs established for Park Trent's clients resulted in the clients becoming members of the SMSFs. Park Trent intended to influence clients not merely to set up SMSFs as entities, but to do so in order to purchase investment properties in the manner most financially favourable to them. That required the clients to become members of the SMSFs. As Park Trent (through Mr Cross and Mr Pavatich) knew, the clients' membership in the SMSF was an essential step in the proposed investment strategy.
- 422 Thirdly, Mr Hewitt submitted that in order for a recommendation or opinion to be intended to influence a decision in relation to a beneficial interest in an SMSF, there must be a causal relationship between the recommendation and opinion and the client's decision. If, therefore, the client was referred to an advisor before he or she finally decided to establish an SMSF, any recommendation or opinion could not have any effect. The advisor would presumably be responsible for the ultimate decision and the advice received by the client would negate or supersede any recommendation made or opinion stated by Park Trent.

- 423 This argument fails at two levels. As I have pointed out, s 766B(1) defines “financial produce advice” to include a recommendation or statement of opinion **intended to influence** a person in making a decision in relation to a financial product. A recommendation made or opinion stated with that intention is within the definition regardless of whether another person subsequently plays a role in the decision-making process.
- 424 Furthermore, while clients may have been able to contact a third party accountant selected by Park Trent and seek advice from that source, the evidence strongly suggests that very few of them did so before committing themselves to establishing an SMSF. Moreover, Park Trent’s business model required clients to pay or undertake to pay the SMSF establishment fee and the holding deposit in respect of the property to be purchased before the accountant was given instructions. There was no evidence that any accountant gave advice that could have had the effect of depriving the material provided to clients, whether in writing or otherwise, of the character of recommendations or opinions intended to influence the clients to make decisions in relation to a financial product.
- 425 There is evidence, to which I refer later, that in November 2014 Park Trent provided a printed notice to some clients informing them that they should obtain advice before making a decision.⁶⁴ As I shall explain, the evidence does not demonstrate that the notice was brought to the attention of all clients. In any event, the notice was not in a form that could deprive material and advice presented by Park Trent to clients of its character as recommendations or opinions intended to influence decisions in relation to financial products.

Park Trent Conducted a Financial Services Business

- 426 ASIC framed its argument in terms of Park Trent conducting an “integrated business”. The critical point, however, is that Park Tent conducted its own financial services business. Some of its activities were conducted in

⁶⁴ See at [446] below.

conjunction with the businesses conducted by its associated companies, notably the sale of properties on a commission basis. But as I have explained, this is no barrier to a finding that Park Trent carried on a financial services business.

427 I find that, subject to the effect of any change of practice by Park Trent in 2014, it carried on a financial services business throughout the Relevant Period. It did so by conducting a business which involved making recommendations or stating opinions intended to influence clients to establish SMSFs, transfer funds from their existing superannuation accounts to the newly established SMSFs, purchase investment properties through the SMSFs and become members of the SMSFs. Park Trent assisted clients to establish SMSFs of which they became members and to complete the purchase of investment properties through the SMSFs. Park Trent derived revenue from this aspect of its business, both in the form of commissions on sales of investment properties and fees. The fee income included administration fees and charges for establishing the SMSFs.

428 It was integral to Park Trent's business that it should make recommendations and state opinions intended to influence clients to establish SMSFs and purchase investment properties through the SMSFs. The recommendations were made and opinions were stated in material devised and compiled by Park Trent and presented to clients in accordance with strategies and procedures formulated and overseen by Park Trent. To the extent that the recommendations were made and opinions stated by representatives, often those representatives were employed by or contracted to Park Trent itself. If, the representatives were employed by or contracted to other companies within the Park Trent Group, they acted in accordance with procedures and practices determined and supervised by Park Trent.

Did Park Trent Change its Business in 2014?

429 Park Trent adduced evidence intended to show that the companies within the Park Trent Group changed their business practices from about the beginning

of 2014. Mr Hewitt submitted that the effect of the changes was that even if Park Trent conducted a business in contravention of s 911A(1) of the Corporations Act before 2014, it ceased to do so during 2014. Thus at the date of the hearing Park Trent was conducting its business in a lawful manner and had done so some time prior to ASIC instituting the proceedings in November 2014. It followed, so Mr Hewitt contended that the Court should decline to grant ASIC either declaratory or injunctive relief.

The Compliance Manual

430 The evidence establishes that on 24 September 2013, Park Trent sought advice from HWL Ebsworth Lawyers as to the requirements of Chapter 7 of the Corporations Act insofar “as they relate to the business activities of Park Trent, including the activities of Park Trent’s representatives in their interactions with clients”. The letter of instructions stated that the advice was to extend to:

- “(a) reviewing the company’s training materials, policies and procedures, and company records, and
- (b) identifying any areas of potential compliance risk, and working with Park Trent to develop and implement appropriate strategies for managing those risks.”

431 Mr Walton of HWL Ebsworth forwarded the first draft of a Compliance Manual to Ms Mangan, Park Trent’s Company Administrator, on 13 November 2013. Mr Walton described the document in his covering email as drafted at a “reasonably high level” but noted that it “covers a very wide range of laws”. The draft underwent modification after discussions with Park Trent representatives. The final version of the Compliance Manual is dated 11 March 2014.

432 In the course of preparing the Compliance Manual, Mr Walton was provided with some of the advertising material used by Park Trent. It does not appear, however, that he was provided with the scripts used at Seminars, although he was given the then current version of the PowerPoint presentation. Most importantly, I was not taken to any material suggesting that Mr Walton’s

attention was directed to the PIAs or to the use made of them at run meetings. Nor does it appear that his attention was directed, prior to the completion of the Compliance Manual, to Park Trent's practice of charging administration fees and fees for the establishment of SMSFs. Mr Hewitt did not submit that I should find that Mr Walton's attention was directed to these matters.

- 433 The final version of the Compliance Manual is indeed presented at a high level of generality. The text comprises 19 double spaced pages and covers 15 separate topics, only one of which deals with "Financial product advice". That section, in its entirety, is reproduced below:

"Financial product advice

You must not provide financial product advice unless you are authorised to do so. This includes in advertising materials, presentations, or discussion with clients.

General

Financial products are financial investment, risk and non-cash payment facilities, such as:

- superannuation, including self-managed super funds (**SMSFs**),
- shares, and managed investment schemes such as property trust,
- insurance products, and
- bank accounts, including term deposits.

Giving advice about financial products is not permitted without an appropriate licence from ASIC, or an authorisation from a licence holder.

Financial product advice is a recommendation or opinion that is intended to influence a person in making a decision about a financial product, or could reasonably be regarded as being intended to have an influence.

Financial product advice is not limited to comprehensive financial advice, such as financial planning services. Financial product advice can be given in a wide range of circumstances, such as in pre-prepared marketing materials, media advertisements and large client seminars.

As a general rule, purely factual information will not be considered to be financial product advice, as it will generally not involve any expression of opinion, or recommendation. However, there are also some circumstances in which factual information may be considered financial product advice. This is likely to occur where factual information is presented in a way where it could be regarded as suggesting or implying a recommendation to acquire a financial product.

In order to determine whether factual information you are providing could be considered financial product advice, you need to look at the overall impression being given in the circumstances.

From time to time, you may need to give information to clients about financial products, such as where a client asks a question about purchasing property through an SMSF. You must make sure you only give factual information in these circumstances, and not give any information (including factual information) in a way that may, in the circumstances, reasonably be regarded as being financial product advice.

Purchasing property is a significant financial decision. You should make sure that you recommend clients obtain their own independent professional financial advice - including where the clients asks for information relating to financial products.

Avoiding giving financial product advice

Generally, provided that you clarify at the outset that you are only providing factual information, and that the information is not intended to imply any recommendation or opinion about a financial product, you will not be considered to be providing financial product advice. Making this clear to the client upfront will avoid confusion and help the client to understand what service they are getting.

The following are some practical examples of the distinction between factual information and financial product advice:

- (a) **SMSF:** If a client asks about funding a property through their SMSF, merely informing the client that SMSFs can be used to purchase real property is likely to be factual information. However, informing the client that using an SMSF can be a tax effective way to purchase property is likely to be financial product advice.
- (b) **Handing out documents prepared by other organisations, or promoting other organisations' services** - merely handing out information brochures about other organisations' financial products, without endorsing (explicitly or implicitly) that information, is unlikely to amount to financial product advice.

Similarly, recommending the services of another organisation who can give financial product advice is also unlikely to be viewed as amounting to financial product advice (eg. "If you'd like to [sic] more about investing in property through an SMSF, we recommend you talk to ABC Co. - they'll be able to give you the advice that's right for you").

- (c) **Insurance:** If a client contacts a call centre asking about insurance, explaining the difference between landlord insurance and building insurance is likely to be factual information. However, if the operator suggests that landlord insurance can be a good way of managing financial risks associated with renting properties, then this is likely to amount to financial product advice. It is likely that this sort of statement would reasonably be viewed as being a recommendation about the insurance.

- (d) **Seminars:** If a person speaking at a seminar claims that during periods of stock market volatility real property is a more desirable investment than shares because it involves less risk, this is likely to constitute financial product advice. The desirability of a financial product is a matter of opinion and such statements could be regarded as intended to influence seminar attendees to make an investment decision [sic] invest in certain products.

Compliance tips

- *Only provide factual information about financial products, and make sure that this information is provided in circumstances where it is understood to not to be any recommendation or statement of opinion about the financial product.*
- *Do not make any explicit or implicit recommendation about any financial product.*
- *Do not express an opinion on the suitability of a financial product.*
- *Do not use emotive language when discussing a financial product.*
- *Make sure that you recommend that clients obtain their own independent professional financial advice.*
- *Ensure that all marketing and advertising materials are approved by Park Trent.” (Emphasis in original.)*

Implementation of the Compliance Manual

- 434 Park Trent adduced evidence intended to show that it has made thorough efforts to ensure adherence to the Compliance Manual. The evidence identified by Mr Hewitt can be summarised as follows.
- 435 According to Ms Johnson, Park Trent's Chief Operations Officer, Mr Cross gave a direction in November 2013 to remove from Park Trent's website references to investing in property via SMSFs. Ms Johnston said in her affidavit that following this instruction “certain material” regarding superannuation was removed from the website.
- 436 I have reproduced earlier in the judgment⁶⁵ extracts from the website as it was on 22 January 2014. This demonstrates that considerable material relating to SMSFs remained on the website notwithstanding the instruction Mr Cross was

⁶⁵ See at [89] above.

said to have given in November 2013. Ms Johnson, who was responsible for maintaining the website subject to supervision by Ms Johnston, attributed the failure to remove the material to an oversight. She said that she went through the website “manually” but that she must have missed some of the references to SMSFs. In fact overlooked references to SMSFs remained on the website until at least October 2014. Ms Johnson accepted that no-one at Park Trent checked her work or determined for themselves whether Mr Cross’ instructions had been fully implemented. This does not suggest an assiduous determination on the part of Park Trent to implement the Compliance Manual or to desist from referring to the virtues of investing in property through SMSFS.

- 437 On 10 October 2013, not long after Mr Walton received instructions, he suggested in an email that changes should be made to Park Trent’s PowerPoint presentations at Seminars in order to remove or substantially modify the references to SMSFs. Ms Johnston stated in her affidavit that in November 2013 she was directed by Mr Cross to remove “various references to superannuation and SMSFs from the Seminar PowerPoints”. Ms Johnston did not say that, disregarding the oversights, the intention was to make all the changes necessary to give effect to Mr Walton’s advice.
- 438 On 21 January 2014, Mr Walton attended a meeting of Park Trent’s senior management to discuss Park Trent’s compliance obligations. Mr Walton prepared slides for the meeting, but they were very brief and added little if anything to the draft Compliance Manual.
- 439 Mr Johnston prepared minutes of the meeting. They record that, in addition to Mr Walton, fourteen senior management attended the meeting including Mr Cross, Renee Cross, Kellie Cross and Jennifer Cross. The minutes record that Mr Walton advised that while objectively ascertainable information does not constitute a recommendation, “projections [are] not factual information”. Mr Walton also pointed out that “ASIC does not like using past information to suggest future results”.

440 The Minutes record the following:

- “● ASIC’s major focus is on SMSF only. ASIC considers there is a couple of concerns. 1. Running a SMSF is hard and people aren’t experienced to do this. 2. ASIC likes to see a spread of risk. They don’t like people having an unbalanced portfolio. 3. Borrowing increases risk. There is no compensation scheme for people who lose money in SMSF.

- Consequences: Penalties associated which are substantial. For the people involved and the organization. ASIC takes action and does a press release, they may also try to ban them. Which ultimately shuts down businesses.
- You may also not deemed proper and fit to get a licence. ASIC’s discretion to do so.
- Should we become licenced? With the compliance and consequences – Stuart would say no. In ASIC’s view, they don’t want people advising people to recommend SMSF in property only. You need to talk about all options and whether it’s viable. Our job is to sell real estate. This is not our business model. It won’t support our business model as we would need to recommend other products such as super.
- If you do get a licence. You need to be authorised to give advice of a specific kind. Giving advice to mums and dad’s requires specific training. RG146. Involved and costs a lot of money and involvement. You then have disclosure obligations, including statement of advice, these are expensive to prepare. These are involved, and you have to give these documents.
- Restrictions on commission flows, rebates etc.” (Emphasis in original.)

441 In February 2014, Ms Johnson co-ordinated a “compliance meeting” held at a hotel near Wollongong. The meeting was attended by Park Trent’s senior managers, finance managers and sales managers from all States. Copies of the draft Compliance Manual were handed out. Mr Walton explained its contents to the attendees. According to Mr Johnston, Mr Cross attended the meeting and asked attendees to take copies of the Compliance Manual to their delegates. He reminded attendees that Park Trent could get into trouble if they mentioned SMSFs.

442 From 17 April 2014, Park Trent's call centre staff began to use a document entitled "2014 Conference Spiel". This document, according to Ms Johnston, omitted "various references to superannuation", but her evidence did not make clear precisely what was omitted.

443 Ms Johnston, the Park Trent employee responsible for managing the content of the Park Trent website, gave evidence that due to another "administrative oversight" some material that had in fact been removed from the website in November 2013 was reintroduced on 1 October 2014 when a new website was launched. Most of the mistakenly reintroduced material was removed in mid-November 2014. However, further oversights resulted in some of the reintroduced material not being removed until late January 2015. Ms Johnson said that a review of the website before she swore her affidavit on 17 April 2015 made her "confident" that the changes made in November 2014 had been carried out. Why she was confident in view of past mishaps was not explained.

444 On 19 November 2014, Ms Johnston sent an email to "All Users" as follows:

"I refer to the training sessions that you have had this year and the compliance manual that has been provided to you previously.

During the training session you were asked to read the manual carefully and to contact management if you had any questions or concerns regarding the manual or compliance generally.

The compliance manual is an important document and it is critical that you read the whole manual carefully, understand it and act in accordance with the policies, procedures and guidelines contained within it. The whole manual is important, however, I would like you to read with extra care sections 2.1 and 2.2.

Please contact myself if you have any questions or concerns regarding the manual or compliance generally and I can consult our compliance experts for a response for you. I have also taken the liberty of supplying an additional copy for you."

445 Mr Walton conducted a further compliance meeting on 11 December 2014. The meeting was attended by New South Wales staff. Some managers and sales staff in other States participated via telephone link. The slides for this presentation suggest that Mr Walton covered what representatives could and

could not say about SMSFs. The slides record that attendees were told, for example, to provide only factual information and to do so only in circumstances where it is understood not to be a recommendation or statement of opinion about the financial product.

- 446 According to Ms Johnston, from about late November 2014, Park Trent instituted a practice of providing clients at home visits and run meeting with a notice in the form set out below:

SELF MANAGED SUPERANNUATION

Make sure you get the advice that's right for you

Deciding what to do with your superannuation, including by establishing a self managed superannuation fund, is one of the most important financial decisions you will make.

While ParkTrent can provide you with information about purchasing property, no member of the ParkTrent group is licensed or authorised to:

- provide advice relating the establishment of a self managed superannuation fund,
- provide advice about using a self managed superannuation fund to purchase property, or
- establish a self managed superannuation fund for you.

You should obtain your own financial, taxation and legal advice before making any decisions about your superannuation.

ParkTrent can refer you to licensed superannuation specialists who can help you make the decision that's right for you, taking into account your objectives, financial situation and needs. They can also work with you to establish your self managed superannuation fund, if that's what you decide to do.

Read ASIC's guide *Financial advice and you* available from the MoneySmart website www.moneysmart.gov.au for a guide to:

- what the kind of financial advice may be useful to you,
- the best place to get financial advice, and
- how to get the most from your conversations with your financial adviser.

The MoneySmart website also contains useful information on investing in property via an SMSF, and on superannuation more generally.

- 447 Ms Johnston did not explain what, if any, systems had been introduced to ensure that representatives adhered to the practice or specifically drew the attention of clients to the document. The evidence does not justify a finding

that the document has in fact been brought specifically to the attention of clients. Even if it had been, it could not negate recommendations made or opinions stated by Park Trent or its representatives relating to the desirability of establishing SMSFS and purchasing property through the SMSFs.

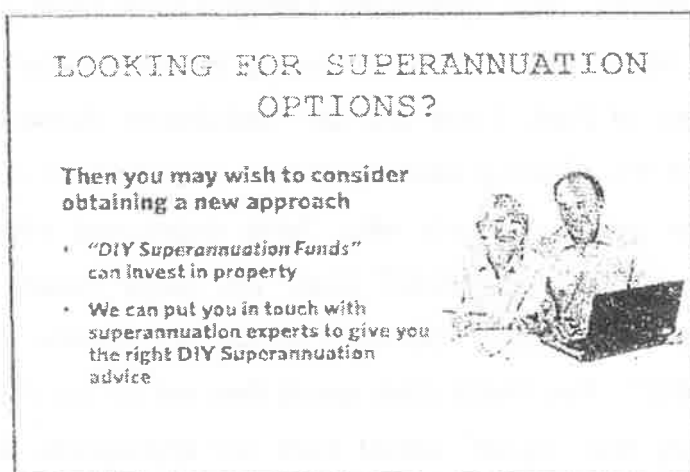
- 448 Ms Johnston also said that as from 27 November 2014, Park Trent ceased entering into an agreement with any person to charge that person a fee or mark up any fee charged by a third party in relation to the establishment of an SMSF. Precisely what this statement meant was not explored in the evidence. In particular, the evidence did not address the arrangements made and practices adopted by Park Trent after 27 November 2014 to ensure that clients paid the costs of establishing SMSFs.
- 449 In January 2014, the "2014 Conference Spiel" was further revised to remove all references to superannuation.
- 450 Mr Kent and Mr Street, who had been presenting for Park Trent for 20 years and three and a half years respectively, gave uncontradicted evidence that they attended a meeting at the Wollongong office of Park Trent on 23 February 2015. At that meeting, attended by four other Park Trent presenters, there was a discussion about the PowerPoint presentation to be used at Seminars. Mr Cross stated to those present that the number of slides relating to superannuation had been reduced and that they should limit themselves to the words on the slides.
- 451 Both Mr Kent and Mr Street annexed transcripts of Seminar presentations they made after this meeting. In each case, the presentation made only brief references to SMSFs. In his presentation of 24 February 2014 at Bankstown, Mr Kent referred to SMSFs as follows:

"And of course there are other areas that we could talk about - self managed super funds - but that needs other advice down the track. These things can be utilised for those benefits alright so there's things we need to look at.

But it is important. If you do want to get into the self managed super fund area. I've got a self managed super fund. **I must admit I'm a fan of self managed super funds** - but you do need to seek expert advice.

It is an area that does need the right people to speak to - ParkTrent are very fortunate in being able to put you in the right direction - they can put you in touch with the experts that can absolutely give you the right DIY superannuation advice. And I do say, and I'm sure the young accountant will agree with me, this is an area you do need to seek expert advice. It's not something you just rush out, make a decision - you need to sit down with the right people and make informed decisions - **because it is a tremendous area that can be utilised.**" (Emphasis added.)

- 452 Ms Johnston, in an affidavit sworn on 25 March 2015, annexed the "Current Seminar PowerPoints used by Park Trent". Only one slide referred to SMSFs, as follows:



Third Party Accountants

- 453 Mr Hewitt placed reliance on the role performed by Saber Chartered Accountants (**Saber**) in 2014 and the SMSF Club in 2015. Both were said to be licensed under the Corporations Act and to have provided clients with appropriate advice concerning SMSFs.
- 454 Park Trent severed its relationship with Saber well before the hearing. In any event, the role played by Saber during the period it was associated with Park Trent does not advance the latter's case. The evidence of Mr Helder and Ms Robinson, both of whom had dealings with Saber, shows that they had effectively decided to set up SMSFs before they came in conduct with Mr Tackaberry or any other representative of Saber.

455 Moreover, Saber did not provide advice tailored to the clients' individual circumstances. It did not address, for example, whether it was wise for Mr Helder and Ms Robinson to set up SMSFs and invest the bulk if not all of their superannuation savings into the purchase of a single investment property. Nothing done by Saber affected the fact that Park Trent made recommendations and expressed opinions intended to influence Mr Helder and Ms Robinson to establish SMSFs and purchase investment properties through the SMSFs.

456 Mr Hewitt submitted that the SMSF Club replaced Saber in 2015 as a source of advice for potential clients. The relationship between Park Trent and the SMSF Club seems to have originated in a meeting on 24 February 2015 between representatives of Park Trent and Mr Tackaberry, formerly with Saber. The minutes of the meeting contemplate an arrangement whereby Park Trent would refer potential clients who "have expressed interest in learning more about an SMSF" to the SMSF Club. An "SMSF coach" would then contact the client and give "general advice in relation to the establishment of an SMSF". The SMSF Club would then set up the SMSF for the client. Presumably the "coach" would hold an appropriate licence, although the minutes make no reference to that aspect of the arrangement.

457 Mr Pavatich gave evidence that Park Trent's relationship with the SMSF Club commenced in March 2015. He said that his practice after this time was to give potential clients who expressed interest in an SMSF a copy of the "SMSF Club Pamphlet". This consisted of a welcome letter, a brochure outlining the SMSF club's services, a book entitled "Making Super Easy" and an appointment booking form. Mr Pavatich said that Easy Plan broker would take a completed form to arrange a meeting with the SMSF Club.

458 Mr Pavatich said that on at least three occasions prior to him swearing his affidavit of 16 April 2015 advisers from the SMSF Club had attended Park Trent's Queensland office to provide advice to clients interested in purchasing property. Mr Pavatich did not say how these clients had come to be

interested in purchasing property nor was advice they received from the SMSF Club.

- 459 The files of several clients who were apparently referred to the SMSF Club during the period between March and April 2015 were in evidence. None of these clients gave evidence and the files do not make it clear what information or advice the clients received from Park Trent's representatives **before** being referred to the SMSF Club. The files indicate that before any referral, the representatives completed Finance Information Forms and recorded the clients' superannuation details. There was therefore ample opportunity for representatives to continue their practice of encouraging clients to establish SMSFs, particularly as Park Trent has never abandoned its use of PIAs as a marketing tool.
- 460 Mr Hewitt's written submissions selected the case of Mr and Mrs Sivcevic to exemplify the role played by the SMSF Club. The file for these clients suggests that they were seen by a Park Trent representative on about 16 March 2015, when information was obtained about their superannuation balances. They signed a request on 31 March 2015 for a one on one appointment with an "SMSF Head Coach". This request apparently led to Mr Tackaberry contacting Mr and Mrs Sivcevic by email on 10 April 2105 with a view to holding a teleconference the following week. The email attached a number of documents providing general information about SMSFs, including the Australian Taxation Office's Guide to setting up an SMSF. What transpired at the teleconference is unclear, but on 21 April 2015, Mr and Mrs Sivcevic completed a form indicating that they intended to proceed with establishing an SMSF.
- 461 The difficulty with Mr Hewitt's reliance on advice given by the SMSF Club to Mr and Mrs Sivcevic is that they signed a contract of sale on 2 April 2015 and paid the holding deposit and other fees on that date. Their first contact with Mr Tackaberry was not until 10 April 2015, **after** they had effectively committed themselves to a purchase through the yet to be created SMSF. It is therefore hard to see how any advice given by Mr Tackaberry or the SMSF

Club could have assisted Mr and Mrs Sivcevic to decide to purchase an investment property through an SMSF. In addition, the evidence is consistent with the Park Trent representatives making recommendations or expressing opinions to Mr and Mrs Sivcevic before they met Mr Tackaberry that they should establish an SMSF to enable them to purchase an investment property.

- 462 In any event, Mr Hewitt's reliance on the SMSF Club faces the further difficulty that the relationship between Park Trent and the SMSF Club was "put on hold" on 12 May 2015. Mr Beeton, the Managing Director of the SMSF Club, wrote to Jennifer Cross of Park Trent and Ms Billett of Easy Plan in the following terms:

"As initially outlined to you both, I'd like to provide extensive compliance training to all Park Trent sales staff **to ensure they understand what can and can't be said relating to a SMSF**. This will include reviewing the sales process for SMSF investors and providing a compliant solution.

Until this training is complete, unfortunately we will need to put a hold on providing any SMSF services to Park Trent clients as the compliance risk is too high for both entities. This will be effective immediately.

We will continue to service the clients that have been referred to us to date and will work closely with Kim to ensure no clients are affected by this decision that are in the pipeline." (Emphasis added.)

The contents of this letter do not inspire confidence that the Park Trent representatives dealing with the SMSF Club appreciated and adhered to the requirements of the Corporations Act.

- 463 Mr Hewitt, perhaps understandably, was vague in his final submissions as to what arrangements, if any, were in place at the date of the hearing to provide Park Trent clients with advice concerning the establishment of SMSFs.

Did the Changes Terminate Park Trent's Contraventions?

- 464 Mr Hewitt submitted that the changes affected by Park Trent in its business operations from early 2014 onwards have a twofold significance. The changes show that if Park Trent did contravene s 911A(1) of the Corporations Act prior

to 2014, its contraventions ceased during 2014. The changes also demonstrate that the Court, in the exercise of its discretion, should decline to grant any relief since Park Trent is no longer at risk of engaging in contravening conduct. I reject both submissions for four reasons.

465 The first is that the Compliance Manual is a document presented at a high level of generality and is not based on a full and accurate assessment of Park Trent's actual business practices. There is no evidence, for example, that Mr Walton was told about the crucial role played by PIAs in Part Trent's marketing and sales strategy. Not surprisingly, the Compliance Manual does not consider how representatives of Park Trent or the Park Trent Group could meticulously avoid making recommendations or expressing opinions about SMSFs, yet at the same time present projections to clients implying that they should set up SMSFs in order to purchase investment properties.

466 These observations are not intended as criticism of Mr Walton. Although the original letter of instructions is in evidence, I do not necessarily have all the communications that passed between Park Trent and Mr Walton's firm. I am also conscious that Mr Walton gave advice from time to time, some of which seems to have been ignored. For example, at the meeting of 21 January 2014, Mr Walton made it clear (as the minutes indicate) that financial projections cannot be regarded simply as neutral information, but may well be interpreted as a recommendation or statement of opinion that the client take a particular course. Despite this advice and the distribution of the Compliance Manual, Park Trent adhered to its sales strategy of presenting to clients PIAs prepared on the assumption that they would set up their own SMSFs to invest in property. The very point of the PIAs is to convince clients that investment in property through an SMSF is a sound strategy and is very likely to produce high returns over the medium term.

467 Since the Compliance Manual contains only general advice, it is not a self-executing document. Even if Park Trent's representatives read the document reasonably carefully, they would still have to exercise a judgment as to how far they should go in referring to SMSFs in making their presentations to

clients. Mr Kent, despite having been warned the previous day to limit himself to the content of the newly edited slides, could not resist suggesting at his Seminar that SMSFs were "a tremendous area that can be utilised". Park Trent did not adduce evidence demonstrating that it had formulated a revised marketing strategy that eliminated all references to SMSFs. Nor did it adduce evidence showing that it gave detailed and precise written instructions to consultants and other representatives as to what they could and could not say to clients. In the absence of evidence that these steps were taken and were coupled with close supervision of the activities of representatives, it could hardly have been expected that Park Trent's well established practices would undergo a radical transformation.

468 Secondly, the evidence of Mr Cross' presentations at Seminars in August and September 2014 is a major obstacle standing in the path of Mr Hewitt's submissions. As I have found, Mr Cross simply ignored the Compliance Manual and other warnings by Mr Walton of the need to avoid making recommendations or stating opinions as to the desirability of establishing SMSFs to invest in real property. Mr Cross was and is the controlling mind of Park Trent. Yet after receiving the warnings, Mr Cross continued to make presentations at Seminars that were clearly intended to persuade attendees that should favourably consider setting up their own SMSFs to purchase investment properties and should do so with the assistance of Park Trent.

469 In the absence of evidence from Mr Cross, I infer that these were not the only two occasions in and after 2014 that Mr Cross exhorted attendees at Seminars to set up SMSFs. There is no particular reason to think that it was only on the two occasions ASIC happened to tape Mr Cross' presentations in 2014 that he should have strayed so egregiously from the advice he had received and supposedly implemented.

470 In this respect I have not overlooked that Park Trent tendered the transcripts of a number of presentations at Seminars conducted in 2014 and 2015. These transcripts carefully avoid references to SMSFs of a kind that could be construed as recommendations or statements of opinion. The sample of

transcripts was self-selected and I infer that they were prepared for use in the pending litigation. The conduct of Mr Cross is much more cogent evidence of both his mindset and his willingness to ignore legal advice as to the nature of Park Trent's statutory obligations.

471 A third reason for rejecting Mr Hewitt's submission is the evidence of the investor witnesses. That evidence shows that during 2014 some representatives of Park Trent or the Park Trent Group continued during home visits and run meetings to encourage clients to purchase investment properties through SMSFs. Whether they did so because of an excess of zeal or because of Park Trent's failure to implement appropriate strategies to ensure compliance with the Corporations Act, some representatives continued to make recommendations and state opinions in relation to the establishment of SMSFs.

472 The culture of an organisation is often determined by the attitudes and practices of the leader, in this case Mr Cross. If he was prepared to conduct Seminars in the manner he did, it is hardly surprising that some representatives were prepared to follow. Moreover, as I have pointed out, the continued use of the PIAs, coupled with the imperatives of Park Trent's remuneration arrangements, made it very difficult, if not impossible for representatives to avoid crossing the boundary between providing information and persuading.

473 I accept that some representatives of Park Trent modified their practices from about early 2014. But the practice after that time varied depending on the representative. Moreover, some of those who modified their practices did not invariably do so. Throughout 2014 and until the date of the trial some representatives of Park Trent not only presented the PIAs, but used language designed to encourage clients to purchase investment properties through SMSFs.

474 The fourth reason is that Park Trent has continued to use PIAs at the run meetings. Mr Anand, who attended a run meeting in July 2014, produced the

PIAs that had been presented to him at the meeting, including one prepared on the assumption that he would purchase an investment property through an SMSF. In Mr Hewitt's concluding oral submissions, he conceded that there is no dispute that Park Trent has continued to use PIAs, presumably up to the hearing.

475 As I have found, the very point of a PIA prepared on the assumption that the investment property would be purchased through an SMSF was and is to persuade the client of the merits of establishing an SMSF (with the client as a member) in order to purchase the property. A PIA prepared on that assumption is intended to influence the client to decide to set up the SMSF, transfer his or her existing superannuation account (or part of it) to the new SMSF and complete the purchase of the investment property through the SMSF. The preparation and presentation of PIAs to clients have formed an integral element in Park Trent's marketing and sales strategy since early 2010. Park Trent has persisted in using projections in the PIAs as a potent marketing tool, notwithstanding legal advice that this strategy was likely to fall foul of the Corporations Act.

476 Park Trent has persisted in using PIAs as a marketing tool and has adhered to its business model despite having been told of ASIC's concerns about people being encouraged to invest inappropriately in SMSFs. Mr Cross and other senior management attended the meeting of 21 January 2014 where Mr Walton identified ASIC's concerns.⁶⁶ Not all of Park Trent's clients were naïve or inexperienced investors, but many were. For those investors, setting up an SMSF and using borrowed funds to purchase an investment property and using virtually the whole of the investor's superannuation balance to do so exposed them to precisely the concerns that ASIC had identified.

477 The fact that Park Trent has belatedly instituted a practice of providing clients with a printed form⁶⁷ does not detract from the significance of its practice of using optimistic projections in PIAs as a marketing tool. There is nothing to

⁶⁶ See at [438]-[440] above.

⁶⁷ See above at [446].

indicate that anything short of the intervention of the Court will cause Park Trent to cease and desist from the use of PIAs as a means of encouraging clients to set up SMSFs and purchase investment properties through the SMSFs.

Relief

A Declaration

- 478 The Court has power to grant a declaration that Park Trent has contravened s 911A(1) of the Corporations Act. It has that power by virtue of s 1101B(1) of the Corporations Act and s 75 of the *Supreme Court Act 1970* (NSW).
- 479 The principles governing the grant of declaratory relief were summarised by Gordon J in *ASIC v Monarch*⁶⁸ as follows:

"[62] The Court has a wide discretionary power, pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth), to grant declarations that particular persons have engaged in conduct that contravenes the Corporations Act: *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (No 2) (1993) 41 FCR 89 at 97-98; *Australian Securities and Investments Commission v Axis International Management Pty Ltd* (2009) 178 FCR 485 at [9]-[12]; and *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378 at [8]-[9].

[63] Considerations relevant to the exercise of the discretion to make declarations in the present case include whether the declaration will have any utility, whether the proceeding involves a matter of public interest and whether the circumstances call for the marking of the Court's disapproval of the contravening conduct: *Australian Competition & Consumer Commission v Renegade Gas Pty Ltd* (trading as Supagas NSW) [2014] FCA 1135 at [65], citing *Tobacco Institute* at 99-100; *Australian Competition and Consumer Commission v Powerballwin.com.au Pty Ltd* [2010] FCA 378 at [41] and *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437-8.

[64] Declarations are not made as a matter of course. The Court will not make declarations of contravention unless it is satisfied that there is sufficient evidence to support those declarations, to the standard set out in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-2; *Re Scott* at [17]; *Australian Securities and Investments Commission v Lindberg* [2012] VSC 332 at [6]. Where it is appropriate for a declaration to be made, attention must be given to the form of the declaration, so that it is at least informative as to the basis on which the Court declares that

⁶⁸ [2014] FCA 1387; 103 ACSR 453.

a contravention has occurred. The declarations should contain appropriate and adequate particulars of how and why the impugned conduct is a contravention of the Act: *Renegade Gas* at [66] and the cases cited.”

480 In that case, her Honour made a declaration because

“they will define the contravening aspects of the relevant conduct and also enable others in the foreign exchange industry to recognise the unlawfulness of the conduct, and serve as a warning. In addition, the declaration will mark the Court’s disapproval of the contravening conduct, and may inform affected persons that the conduct occurred and was unlawful”⁶⁹

481 Subject to the form of the declaration, in my view this is a clear case for the grant of declaratory relief. The evidence demonstrates to the requisite standard of proof that Park Trent has conducted a business in contravention of 911A(1) of the Corporations Act. It has done so systematically over a long period.

482 Park Trent was warned by Mr Moss as early as February 2011 that its business operations needed to be carefully scrutinised to ensure that they did not fall foul “in the event of surveillance operations” by regulators. While Mr Moss did not specifically draw Mr Cross’ attention to s 911A of the Corporations Act, he warned that if a Park Trent representative recommended to a client that he or she set up an SMSF this:

“would be a very serious breach of [C]orporations [L]aw for ParkTrent and their representatives and could result in serious financial penalties [or] incarceration ...”⁷⁰

Mr Cross chose to ignore the warning.

483 There is a clear public interest in the Court expressing its disapproval of Park Trent’s behaviour. To use the language of Besanko J in *ASIC v Stone Assets*,⁷¹ Park Trent has shown “open disregard for the requirements of the Act”. As his Honour observed, a contravention of s 911A of the Corporations

⁶⁹ See also *In the Matter of Idyllic Solutions Pty Ltd* [2013] NSWSC 106 (**Re Idyllic Solutions**) at [35]-[36] (Ward JA).

⁷⁰ See at [70] above.

⁷¹ *ASIC v Stone Assets* at [42].

Act is a very serious matter because the licensing of providers of financial services is a key element in the regime established by Chapter 7 of the Corporations Act.

- 484 Park Trent conducted its business by utilising sophisticated techniques to induce investors to invest all or at least much of their superannuation balances in a single asset which it was in Park Trent's interests to sell to them (and for which Park Trent charged fees). Not all investors were financially naïve, but many were. They were influenced to make important decisions concerning their superannuation strategy with little or no genuine consideration of whether the decisions took proper account of their individual financial circumstances. Some suffered financial loss as a consequence.
- 485 A declaration also serves as a warning to others who conduct or propose to conduct businesses which seek to influence clients to establish SMSFs for investment purposes, without having the necessary licence to do so. It is troubling that Park Trent could have conducted its business in this way for so long without being required to desist or to change its practices. If there are others in a similar position, a declaration may bring home to them the importance of ceasing their unlawful conduct and of ensuring that they are appropriately licensed.
- 486 Mr Hewitt submitted that even if I found that Park Trent had contravened s 911A(1) of the Corporations Act, I should decline to make a declaration to that effect. He pointed out that a contravention of s 911A(1) is capable of constituting a criminal offence. He contended that courts generally ... decline to declare that a person has committed a criminal offence and that practice should be followed in the present case. In his written submissions, Mr Hewitt said that the usual practice should be adhered to because the possibility of a criminal prosecution of Park Trent remained open.
- 487 The authority relied on by Mr Hewitt recognises that a court undoubtedly has jurisdiction in an appropriate case to make a declaration that a person has

engaged in criminal conduct.⁷² There is ample authority to support the view that the traditional reluctance of courts to make a declaration that a person has engaged in criminal conduct is of little weight where a statutory authority seeks a declaration that conduct has contravened regulatory legislation designed to protect the public.⁷³ In any event, the undertaking given by ASIC⁷⁴ makes the prospect of any criminal prosecution arising out of Park Trent's conduct remote if not impossible. I therefore reject Mr Hewitt's submission.

488 I have set out the form of declaration proposed by ASIC.⁷⁵ ASIC describes the proposed declaration as a "wordier version" of the declaration made by Gordon J in *ASIC v Monarch*. The proposed declaration follows closely the language of s 911A(1) of the Corporations Act, although it identifies the subject of the recommendation or statement of opinion as a decision as "to acquire, vary and/or dispose of a superannuation interest within the meaning of the [SIS Act]".

489 In *Rural Press Ltd v Australian Competition and Consumer Commission*,⁷⁶ the High Court criticised the form of a declaration which stated that companies had contravened sections of the *Trade Practices Act 1974* (Cth) by entering into an arrangement without specifying the nature of the arrangement or indicating the gist of the findings made in that case by the trial Judge. Consistently with that approach, the declaration in the present case should incorporate the gist of the findings I have made as to the conduct of Park Trent that constituted making recommendations or stating opinions intended or that can reasonably be regarded as intended to influence persons in making decisions in relation to financial products, being superannuation interests within the meaning of the SIS Act.

⁷² *Corporate Affairs Commission v Transphere Pty Ltd* (1988) 15 NSWLR 596 at 603 (Young J), referring to *Sankey v Whitlam* 1978 HCA 43; 142 CLR 1 at 20-21 (Gibbs ACJ).

⁷³ See especially *Australian Securities and Investments Commission v Fuelbanc Australia Ltd* [2007] FCA 960; 162 FCR 174 at [51]-[61] (Heerey J) and authorities cited there.

⁷⁴ See at [15] above.

⁷⁵ See at [13] above.

⁷⁶ [2003] HCA 75; 216 CLR 53 (**Rural Press v ACCC**) at [89]-[90] (Gummow, Hayne and Heydon JJ, Gleeson CJ and Callinan J agreeing).

490 The declarations should therefore refer specifically to Park Trent's contravening conduct. ASIC in its written submissions accepts that there might be "scope for some improvement in expression". That improvement might be achieved by a declaration in the following form:

A declaration pursuant to s 1101B(1) of the *Corporations Act* that the defendant (**Park Trent**), throughout the period from March 2010 until the date of the trial, contravened s 911A(1) of the *Corporations Act 2001* (Cth) in that it carried on the business of providing financial services, namely financial product advice, by making recommendations or statements of opinion intended to influence persons (or which could reasonably be regarded as intended to have such an influence) in making a decision to acquire, vary or dispose of a superannuation interest within the meaning of the *Superannuation Investment (Supervision) Act 1993* (Cth) (**SIS Act**), without holding an Australian Financial Services Licence (**ASFL**) covering the provision of the financial services, and did so by:

- (a) making recommendations and stating opinions to persons attending Seminars conducted or arranged by Park Trent that they should establish their own Self Managed Superannuation Fund (**SMSF**) (of which they would be members) in order to invest in real property, transfer the whole or part of their current superannuation balances to the newly established SMSF and invest in real property through their own SMSF;
- (b) making recommendations and stating opinions of the kind referred to in (a) to persons (**clients**) who attended home visits or run meetings conducted or arranged by Park Trent, such recommendations and statements of opinion being made by employees or persons contracted to Park Trent or employees or persons contracted to other companies within the Park Trent Group;
- (c) making recommendations and stating opinions referred to in (a) by presenting clients who attended run meetings conducted or arranged by Park Trent with Property Investment Analyses (**PIAs**) incorporating projections as to financial returns, prepared on the basis that the clients would establish or use SMSFs to invest in real property; and

- (d) facilitating the establishment of SMSFs by clients, the transfer of clients' superannuation accounts or balances to the newly established SMSFs and the completion of the purchase of investment properties through the SMSFs.

491 It will be seen that this declaration relates to the period from March 2010, rather than January 2010, as proposed by ASIC. The evidence suggests that Park Trent commenced the financial services business in about March 2010, when Mr Moss was contacted by Mr Cross.

Injunctive Relief

492 Section 1324(1) of the Corporations Act provides that where a person has engaged in or is proposing to engage in conduct that constituted, constitutes or would constitute a contravention of the Act:

“the Court may ... grant an injunction, on such terms as the Court thinks appropriate, restraining the first-mentioned from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing”.

493 Section 1101B(1) of the Corporations Act empowers the Court to make such orders as it thinks fit on the application of ASIC, if it appears to the Court that a person has contravened a provision of Chapter 7, including s 911A(1). The power is subject to the proviso that the Court may only make such an order if it is satisfied that the order will not unfairly prejudice any person.

494 Section 1011B(4) provides that the orders that may be made under s 1101B(1) include:

- “(a) an order restraining a person from carrying on a business, or doing an act or classes of acts, in relation to financial products or services, if the person has persistently contravened or is continuing to contravene [a provision of Chapter 7].”

The Court therefore has power to grant permanent injunctions under s 1101B(1) restraining a person from doing an act or a class of acts in relation to financial products.⁷⁷

495 The findings I have made establish that the Court's powers under ss 1101B(1) and 1324 of the Corporations Act have been enlivened. In particular, I have found that:

- Park Trent contravened a provision of Chapter 7, namely s 911A(1), thus enlivening the power in s 1101B(1);
- Park Trent has persistently contravened and is continuing to contravene a provision of Chapter 7, namely s 911A(1), thus enlivening the specific power referred to in s 1101B(4)(a); and
- Park Trent has engaged and is proposing to engage in conduct that constituted and would constitute a contravention of the Corporations Act, namely s 911A(1) thus enlivening the power in s 1324(1).

496 Issues can arise as to the relationship between ss 1101B and 1324 of the Corporations Act. For example in *Re Idyllic Solutions*, a question arose as to whether s 1101B operated as a code, so as to preclude ASIC obtaining relief under s 1324 by way of an injunction having the effect of a financial services disqualification order without a contravention of the kind that enlivens the power in s 1324.⁷⁸ Mr Hewitt did not suggest that any such question arises in the present case. Nor did he submit that different principles governed the exercise of the discretionary power conferred on the Court by each provision. Indeed there was not real dispute as to the principles governing the exercise of the powers conferred by ss 1101B(1) and 1324(1) of the Corporations Act.

⁷⁷ *Re PFS* at [399].

⁷⁸ *Re Idyllic Solutions* at [82]. Ward JA held that s 1101B is not a code in the sense suggested in that case: see at [90].

497 In *Re Idyllic Solutions*, Ward JA stated the general principles governing the exercise of the discretionary jurisdiction conferred by s 1324(1) of the Corporation Act, as follows:⁷⁹

- [65] In *Triton Underwriting Insurance Agency* (2003) 48 ACSR 249; [2003] NSWSC 1145 at [22] (*Triton*), the court noted that the discretionary jurisdiction conferred by s 1324(1), to make orders where in the opinion of the court it is desirable to do so, turns upon an assessment by the court of a broad concept of what is 'desirable'.
- [66] The jurisdiction which the court exercises under s 1324 is a statutory jurisdiction, (*Australian Securities and Investments Commission v Mauer-Suisse Securities Ltd* (2002) 42 ACSR 605; [2002] NSWSC 741 (*Mauer-Suisse*)) and hence the court is not confined by the considerations which would be applicable if it were exercising the traditional equity jurisdiction ... s 1324 was drafted with the intent that a court should grant an injunction in circumstances where a court of equity would ordinarily have refused to grant such an injunction; the operative principle underlying s 1324 being for the remedies available to the court to be used in such a way that would serve some utility or purpose within the contemplation of the Corporations Act (such as protecting the community from a real risk of wrongdoing where a person has a propensity to contravene the Act or to mark the disapproval of the court and community with the actions of the defendant).
- [67] That said, s 1324 does not displace the court's equitable jurisdiction (*Mauer-Suisse* ...) and it has been said that equitable principles represent a sound basis for undertaking a preliminary assessment which should then be reviewed against the statutory role ASIC plays and the wider question of what is 'desirable' in the statutory context (*Triton* at [25] ...)
- [68] As to the general principles application where injunctive relief is sought under s 1324, Palmer J, in *Mauer-Suisse*, said (at [36]) in the context of an application for injunctive relief:
- amongst the considerations which the court must take into account in an application for an injunction under s 1324 ... are the wider issues [that] may be gathered under the broad question *whether the injunction would have some utility or would serve some purpose within the contemplation of the Corporations Act*; (emphasis added)
 - where there is an appreciable – that is, not fanciful – risk of particular future contraventions of the Corporations Act by a defendant, it would serve a purpose within the contemplation of the Corporations Act that the court grant not only a permanent injunction but, in an appropriate case, an interim injunction

⁷⁹ *Re Idyllic Solutions* at [65]-[69].

restraining such conduct. *Section 1324 evinces an intention that the possibly severe consequences and the relative promptness of proceedings for contempt of court be added to criminal prosecutions as a deterrent to contraventions of the Corporations Act.* [Emphasis added.]

[69] ASIC submits, and I accept, that the Corporations Act is concerned primarily with the protection of the public interest in the prevention of particular conduct ... and that (as was recognised to be the position in relation to the former Trade Practices Act) the statutory jurisdiction to grant an injunction is essentially a public interest provision. Hence, considerations of public policy are relevant in the exercise of the discretion whether to grant such relief.” (Some citations omitted.)

498 Other propositions relevant to the present case include the following:

- Injunctions should be based on the case proved against the defendant and should indicate the conduct which is enjoined so that the defendant knows what is expected in order to conform with the orders.⁸⁰
- Injunctions should not be worded so as simply to reproduce the language of the statutory provision that the defendant has contravened.⁸¹
- It is not “appropriate” for a court to restrain conduct if, on its face, it operates on conduct that does not have the required relationship with the contraventions that enliven the power to grant the injunction.⁸²

499 For the reasons I have given in relation to declaratory relief, I think that, subject to arguments advanced by Mr Hewitt to which I refer below, this is an appropriate case for the grant of injunctive relief. I consider that unless such relief is granted, it is likely that Park Trent will continue to conduct its business in a manner that contravenes s 911A(1) of the Corporations Act, although perhaps not as flagrantly as in the past. In particular, it is likely that Park

⁸⁰ *Commodore Business Machines Pty Ltd v Trade Practices Commission (Commodore v TPC)* (1990) 92 ALR 563 at 575 (Full Federal Court) *per curiam*; *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13; 205 CLR 1 at [60] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

⁸¹ *Commodore v TPC* at 574-575.

⁸² *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 267 (Gummow J); *Rural Press v ACCC* at [91] (Gummow, Hayne and Heydon JJ).

Trent will use PIAs in order to influence clients to establish SMSFs and purchase investment properties through the SMSFs. There is certainly a significant chance that it will continue its business model which, to a considerable extent, depends on persuading relatively unsophisticated investors of the virtues of using their superannuation accounts to purchase investment properties and to establish SMSFs (at considerable expense) to enable the purchase to proceed.

- 500 Park Trent's contraventions of s 911A(1) of the Corporations Act have influenced investors to purchase investment properties through SMSFs without receiving appropriate financial advice. Investors have therefore been influenced to make decisions that, as Mr Walton clearly pointed out to Park Trent's senior management in January 2014, expose the investors and their superannuation accounts to significant risks of financial loss (notwithstanding the optimistic projections presented to them).
- 501 In my view, it is clearly in the public interest that Park Trent be restrained from continuing to engage in conduct that contravenes s 911A(1) of the Corporations Act.
- 502 Mr Hewitt advanced many arguments against the ground of injunctive relief. As in my opinion, they lack substance, I propose to deal with them briefly.
- 503 Mr Hewitt submitted that Park Trent's contraventions were insufficiently serious to warrant injunctive relief. I have explained why I consider the contraventions, which took place over a period in excess of five years, to be serious. Moreover, the contraventions were continuing at the date of the trial.
- 504 Mr Hewitt next submitted that Park Trent had shown that it was willing to act within the parameters of the law. It had done this by revising its business practices in 2014 so that by the trial it was complying "completely or almost completely" with its obligations under the Corporations Act. I have explained why I reject this submission.

- 505 I have also given reasons for rejecting the contention that there is no reason to think that in the future Park Trent will disregard its statutory obligations. In my view, it is likely to do so if not restrained. It has failed to comply with its own compliance regime which, in any event, was inadequate to prevent it contravening s 911A(1) of the Corporations Act.
- 506 It is true, as Mr Hewitt pointed out, that ASIC has not alleged that Park Trent acted fraudulently or dishonestly. But the absence of egregious misconduct of this kind does not exempt Park Trent from injunctive relief if such relief is otherwise appropriate.
- 507 Contrary to Mr Hewitt's submission, there is no evidence that Park Trent co-operated with ASIC's investigation in such a way as to render an injunction unnecessary or inappropriate. There is nothing to suggest that Park Trent did anything more than comply with its statutory obligations to provide documentation and other information to ASIC.
- 508 Mr Hewitt asserted that an injunction should not be granted against Park Trent because it would have an adverse effect on third parties. The only third parties he identified were other companies within the Park Trent Group, but he did not refer to any evidence that they would be prejudiced in the conduct of their respective businesses.
- 509 I have found that the making of recommendations and stating opinions as to the desirability of purchasing investment properties was integral to Park Trent's business. But that finding does not mean that an injunction would prevent other companies within Park Trent Group continuing to conduct the business of selling investment properties to clients on a commission basis. That is precisely what Park Trent's submissions contend that the other companies (except Easy Plan) have been doing throughout the Relevant Period. In any event, if any companies within the Park Trent Group suffer any prejudice, it is not "unfair prejudice" within the meaning of s 1101B(1) of the Corporations Act. If they do sustain any prejudice, it will be because Park

Trent's business in which they have participated and from which they may have derived some benefit, can no longer be conducted unlawfully.

510 Park Trent adduced no evidence that if an injunction in the terms sought by ASIC was granted, its consultants and employees would suffer unfair prejudice. Park Trent has consistently maintained that even if it contravened the Corporations Act prior to 2014, it has conducted its business since 2014 in compliance with the legislation. Its position throughout has been that it can conduct its nationwide business of selling investment properties on a commission basis and providing ancillary services (such as managing the properties and organising finance) without contravening the Corporations Act. The granting of injunctive relief will not inhibit Park Trent from pursuing that course. I am satisfied that the grant of injunctive relief will not cause unfair prejudice to employees of or consultants to Park Trent.

511 It is appropriate that the Court make a restraining order against Park Trent pursuant to s 1101B(1) of the Corporations Act, the terms of which are closely tied to the findings of contravention I have made. I therefore propose an order that broadly follows the form of the declaration referred to earlier:⁸³

Pursuant to s 1101B(1) of the *Corporations Act 2001* (Cth), the defendant (**Park Trent**) be permanently restrained, by itself, its servants or agents or otherwise, from the following conduct:

- (a) making recommendations or stating opinions to persons attending Seminars or other meetings or presentations conducted or arranged by Park Trent that they should establish their own Self Managed Superannuation Fund (**SMSF**) in order to invest in real property, transfer the whole or part of their current superannuation accounts or balances to the newly established SMSF or invest in real property through their own SMSF;

⁸³ See at [400] above.

- (b) making recommendations or stating opinions as to the matters referred to in (a) to persons (**clients**) who attend or participate in home visits, run meetings or on other meetings conducted or arranged by Park Trent, whether such recommendations are made or opinions are stated by employees or person contracted to Park Trent or employees or persons contracted to other companies within the Park Trent Group;
- (c) making recommendations or stating opinions as to the matters referred to in (a) by presenting or making available to clients, whether at meetings or otherwise, Property Investment Analyses (**PIAs**) or other similar documents incorporating projections as to financial returns achievable by investing in real property, when the projections are prepared on the basis that the clients will establish or use an SMSF to invest in real property; or
- (d) facilitating or otherwise assisting in the establishment of an SMSF by clients or the transfer of clients' superannuation accounts or balances to an SMSF.

512 It should be noted that the proposed order does not restrain Park Trent from facilitating the purchase of investment properties by means of an SMSF. The reason for this exclusion is that such an order might prohibit activities customarily performed by real estate agents (although Park Trent's past conduct in facilitating purchases through SMSFs has gone considerably further).

513 For the reasons I have given, I consider that s 1101B(1) of the Corporations Act empowers the Court to make a restraining order against Park Trent in the terms I have proposed. I therefore do not think it necessary to consider whether the specific power granted by s 1101B(1), in the circumstances of the present case, precludes reliance on the general power conferred by s 1324(1) of the Corporations Act to grant an injunction against a person who has engaged in conduct constituting a contravention of the Corporations Act

against Park Trent by reason of its contraventions of s 911A(1) of the Corporations Act.

514 Since neither party addressed this question,⁸⁴ I do not propose to do so.

515 I note, however, that the common assumption of the parties appeared to be that s 1324(1) is an available source of power for an injunction to be granted against Park Trent. If the assumption is correct, s 1324(1) also authorises the restraining order that I propose and I would invoke that provision as a source of power to make the order.

Conclusion

516 I have found that Park Trent has persistently contravened s 911A(1) of the Corporations Act throughout the period from March 2010 until the date of the trial. My present view is that I should make a declaration and grant an injunction in the terms set out above.⁸⁵

517 I propose, however, to give the parties a further opportunity to comment on the form of the proposed declaration and injunction, provided the comments are consistent with my reasons. It is not an opportunity to re-argue matters dealt with in the judgment.

518 Subject to any submissions by the parties on costs, my present view is that Park Trent should pay ASIC's costs of the proceedings.

519 The orders I propose to make are as follows:

1. If the plaintiff (**ASIC**) wishes to file written submissions as to the form of the orders proposed in this judgment (such submissions to be consistent with these reasons for judgment), or as to costs, it should do so within fourteen days.

⁸⁴ See *Re Idyllic Solutions* at [72]-[90]; *Mercedes Holdings Pty Ltd v Waters (No 2)* [2010] FCA 472; 186 FCR 450 at [30]-[31] (Perram J).

⁸⁵ See at [491], [511]] above.

2. If the defendant (**Park Trent**) wishes to file written submissions as to the form of the proposed orders (such submissions to be consistent with these reasons for judgment), or as to costs, or if it wishes to reply to ASIC's submissions, it should do so within a further fourteen days.

I certify that the preceding 519 paragraphs are a true copy of the reasons for judgment herein of the Honourable Acting Justice Sackville.

Date: 15 October 2015
Associate: [Signature]

