

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 7/06/2019 11:59:56 AM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Concise Statement
File Number: NSD906/2019
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v R M CAPITAL PTY LTD ACN 065 412 820 & ANOR
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading 'Warwick Soden'.

Dated: 7/06/2019 3:04:46 PM AEST

Registrar

Important Information

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

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

CONCISE STATEMENT

No.

of 2019



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

IN THE MATTER OF R M CAPITAL PTY LTD (ACN 065 412 820)

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Plaintiff

R M CAPITAL PTY LTD (ACN 065 412 820) AND ANOTHER
Defendants

A. Nature of proceeding

1. The first defendant, R M Capital Pty Ltd (**RM Capital**), at all material times held an Australian Financial Services Licence (AFSL) No 221938 under which it was authorised to provide “financial product advice” within the meaning of s766B of the *Corporations Act 2001* (Cth) (**Act**) (**Financial Product Advice**) for various classes of financial products, including superannuation.
2. The second defendant, The SMSF Club Pty Ltd (**SMSF Club**), at all material times carried on a business of providing Financial Product Advice, and accounting and administration services for self-managed superannuation funds (**SMSFs**). Since 7 August 2013, SMSF Club has been an “authorised representative” (within the meaning of s761A of the Act) of RM Capital under RM Capital’s AFSL and, therefore, a “representative” of RM Capital within the meaning of s910A of the Act. In particular, SMSF Club was at all material times authorised under RM Capital’s AFSL to provide Financial Product Advice, deal in financial products, issue or vary financial products and apply for, acquire, vary or dispose of financial products on behalf of RM Capital. At all material times, when SMSF Club undertook these activities, it did so through advisers employed by SMSF Club and Justin Beeton, at all material times a director of SMSF Club (together, **SMSF Club Advisers**).
3. Positive RealEstate Pty Ltd (**PRE**) at all material times carried on a business of providing property investment services, including property education, property mentoring and property advice.
4. ASIC contends that, during the period 19 December 2013 to 29 July 2016, SMSF Club contravened the prohibition in s963G(1) of the Act by accepting conflicted remuneration within the meaning of s963A of the Act (**Conflicted Remuneration**) paid pursuant to a Referral Agreement (defined at paragraph 7 below) between PRE and SMSF Club. ASIC contends that SMSF Club contravened this prohibition by accepting payments under the Referral Agreement, as described in section D.1 below.

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5. In addition, ASIC contends that RM Capital, in contravention of s963F of the Act, failed to take reasonable steps to ensure that its representative, SMSF Club, did not accept Conflicted Remuneration, as described in section D.2 below.

B. Relief sought from the Court

6. ASIC seeks declarations, pecuniary penalties, compliance orders and ancillary orders as set out in the Originating Application.

C. Important facts giving rise to the claim

C.1 Referral Agreement

7. During the period August 2013 to August 2016 (**Referral Agreement Period**), a “referral agreement” was in place between PRE and SMSF Club (**Referral Agreement**). From August 2013 until around 7 September 2015, the Referral Agreement was an oral agreement. From around 7 September 2015 onwards, the Referral Agreement was a written agreement in terms materially the same as the oral agreement.
8. Pursuant to the Referral Agreement, SMSF Club and PRE agreed that, from time to time, PRE may refer clients to SMSF Club and that there would be a referral fee payable by PRE to SMSF Club, which was to be “*calculated as a \$5,000 AUD fee to be negotiated between the parties when clients of [PRE] use the services of [SMSF Club] and associated entities for the establishment of a Bare Trust within an SMSF and purchase property through [PRE]*” (**Referral Fee**).

C.2 Conduct of SMSF Club during the Referral Agreement Period

9. Throughout the Referral Agreement Period, SMSF Club conducted a program known as “the SMSF Club” (**SMSF Club Program**), which SMSF Club clients could join. SMSF Club services to clients who joined the SMSF Club Program included establishing an SMSF for the client or, if the client already had an SMSF, organising the transfer of the accounting and administration of the SMSF to SMSF Club, and then administering the person’s new or existing SMSF.
10. Throughout the Referral Agreement Period, SMSF Club Advisers provided Financial Product Advice consisting of recommendations or statements of opinion that were, or could reasonably be regarded as, intended to influence a person in making a decision in relation to a financial product, namely a beneficial interest in an SMSF, or a class of financial products, namely beneficial interests in SMSFs, being a decision:
 - (a) whether or not to establish an SMSF in which the client would have a beneficial interest; or
 - (b) whether or not to acquire specific real property, or real property generally, through an SMSF in which the client had or would have a beneficial interest.
11. The Financial Product Advice provided by SMSF Club referred to in the preceding paragraph, and the occasions on which it was provided, included the following:
 - (a) SMSF Club Advisers presented at 15 or more property seminars known as “property information nights” (PINs) held by PRE and, in doing so, provided to attendees, and displayed to them slides that contained, Financial Product Advice;
 - (b) SMSF Club Advisers presented at 43 or more “mentoring program” workshops held by PRE, and, in doing so, provided to attendees, and displayed to them, slides that contained Financial Product Advice;

- (c) SMSF Club Advisers attended initial meetings with persons referred to SMSF Club by PRE. At those meetings:
 - (i) if the person did not have an SMSF and was considering buying property through an SMSF, the SMSF Club Adviser provided Financial Product Advice; and
 - (ii) if the person already had an SMSF, the SMSF Club Adviser reviewed the person's SMSF investment strategy and provided Financial Product Advice;
 - (d) if, either at or following the initial meeting, the person decided to join the SMSF Club Program, SMSF Club required the person to complete an application form, which included Financial Product Advice;
 - (e) SMSF Club Advisers presented at 30 or more "mentoring events" held by SMSF Club and, in doing so, provided to attendees, and displayed to them, slides that contained Financial Product Advice;
 - (f) SMSF Club provided to some SMSF Club Program members Home Study DVDs that contained Financial Product Advice;
 - (g) SMSF Club distributed by email to SMSF Club Program members newsletters containing Financial Product Advice; and
 - (h) SMSF Club Advisers provided Financial Product Advice to persons whose SMSFs it was administering. If such a person decided to invest SMSF funds in property, an SMSF Club Adviser generally notified that person's PRE "mentoring coach" about this decision.
12. In the alternative, SMSF Club provided the Financial Product Advice referred to in paragraph 10 above to the clients named in Column 1 of Schedule 1 (**Selected Clients**) as described in Column 2 of Schedule 1.
13. If a person decided to purchase a property being offered for sale by PRE through an SMSF within the SMSF Club Program, the person was required to submit a written expression of interest in the property to PRE and pay PRE a holding deposit. SMSF Club's practice was then to provide the contact details of the person to lawyers, who prepared the contract for the purchase of the property and, if necessary, established a corporate trustee of the SMSF and a bare trust structure for the SMSF through which the property was to be purchased.

C.3 Referral Payments made pursuant to the Referral Agreement

14. During the Referral Agreement Period, PRE paid Referral Fees (**Referral Payments**), in some instances directly to SMSF Club (**Direct Referral Payments**) and, in other instances, to RM Capital's commission account (**Indirect Referral Payments**), after which RM Capital on-paid all or a portion of the Indirect Referral Payment to SMSF Club (**Referral On-Payments**). Referral Payments and Referral On-Payments were sometimes made in batches (**Batch Payments**), which sometimes included other payments that were not in respect of Referral Fees. The payments described in this paragraph are more particularly described in Schedule 2.
15. The Referral Payments and Referral On-Payments included those that were wholly or partly in respect of the Selected Clients as set out in the rows of Schedule 2 appearing in bold typeface.

C.4 Conduct of RM Capital

16. During the Referral Agreement Period, RM Capital:

- (a) knew that SMSF Club was providing Financial Product Advice, at least in the form of general advice;
- (b) knew of the Referral Fees referred to at paragraph 8 above and approved and endorsed the acceptance by SMSF Club of the Referral Fees by:
 - (i) from 18 July 2014, asking for and facilitating SMSF Club to document the Referral Agreement;
 - (ii) from 12 March 2014 to 17 August 2015, facilitating the payment of Referral Payments to SMSF Club as referred to at paragraphs 8 and 14 above; and
 - (iii) from 25 May 2015 onwards, informing SMSF Club about how to disclose the Referral Fees to clients;
- (c) had in place a “Managing Conflicts of Interest Policy” that acknowledged that commission-related remuneration presented a conflict of interest and required such remuneration to be disclosed to clients and required representatives involved in providing financial services to clients to maintain a “soft dollar register” to record “soft dollar benefits” of more than \$300 in value received throughout the year. The Policy did not suggest that accepting commissions or soft dollar benefits could amount to accepting prohibited Conflicted Remuneration and did not specifically address Conflicted Remuneration or specify that accepting Conflicted Remuneration was prohibited;
- (d) had no policy or procedures in place relating to preventing the acceptance of Conflicted Remuneration;
- (e) instead, had a draft policy relating to Conflicted Remuneration, which was not implemented or given to SMSF Club or its representatives, and which erroneously stated that the ban on Conflicted Remuneration applied only in relation to the provision of personal advice to retail clients;
- (f) received advice in an email dated 4 January 2014, from Stephen Luu of Saxo Capital Markets (Australia) Pty Ltd, as to ways in which the draft Conflicted Remuneration policy was erroneous and inadequate, but failed to rectify those errors and inadequacies in the draft policy or implement a policy with those matters rectified;
- (g) had in place a Compliance Programme dated 28 May 2012, which: (i) was not updated after Division 4 of Part 7.7A of the Act came into effect on 1 July 2013; (ii) did not mention, or specify any requirements, responsibilities, actions to be taken or training program with respect to complying with the requirements of that Division, and (iii) countenanced conduct that could constitute accepting Conflicted Remuneration, such as accepting soft dollar benefits;
- (h) did not train or educate its representatives, including SMSF Club, or their representatives, adequately or at all on the prohibition under the Act of accepting Conflicted Remuneration;
- (i) did not monitor, adequately or at all, SMSF Club’s compliance with s963G(1) of the Act, including by failing to audit SMSF Club’s advice files on a regular basis to enable it to

ascertain the kinds of advice that SMSF Club representatives were providing and whether it was or might be affected by remuneration it accepted under the Referral Agreement;

- (j) did not take any, or adequate, steps to consider whether the Referral Payments accepted by SMSF Club were Conflicted Remuneration;
- (k) identified the Referral Fee as a conflict of interest that needed to be disclosed to clients, but failed to identify it as prohibited Conflicted Remuneration; and
- (l) did not take any, or adequate, steps to remove (or request SMSF Club to remove) the incentive created in the Referral Agreement for SMSF Club to accept Conflicted Remuneration.

D. Primary legal grounds for the relief sought

D.1 Contravention of s963G(1) by SMSF Club

17. Throughout the Referral Agreement Period, SMSF Club was an authorised representative of RM Capital that provided Financial Product Advice, as set out in paragraphs 10 to 11, alternatively 12, above, to persons as “retail clients” within the meaning of s761G of the Act save where (as provided in s761G(6)(b) and (c) of the Act) the advice was given to the trustee of a superannuation fund that had net assets of at least \$10 million or the person was a RSA provider within the meaning of the Restirement Savings Accounts Act 1997. Specifically, ASIC relies upon the following:

- (a) a beneficial interest in an SMSF constitutes a “financial product” within the meaning of s764A(1)(g) and a superannuation product within s761A of the Act;
- (b) through the conduct of SMSF Advisers described above, SMSF Club gave Financial Product Advice to persons as retail clients, alternatively to the Selected Clients as retail clients;
- (c) the advice related to a superannuation product within s761G(6)(b) of the Act.

18. On each occasion that SMSF Club received:

- (a) a Column G Amount, alternatively a Column F Amount, alternatively a Column E Amount as respectively defined in Schedule 2;
- (b) alternatively, an amount referred to in Column 3 of Schedule 1 in respect of a Selected Client (each a **Selected Client Amount**),

it accepted a monetary benefit, being a benefit that, because of its nature or the circumstances in which it was given, could reasonably be expected to influence the choice of financial product recommended or the Financial Product Advice provided by SMSF Club.

19. A Referral Fee was paid only if a person used SMSF Club’s services to purchase a property through PRE or, alternatively, to purchase a property through PRE and establish a bare trust within an SMSF. Further, the receipt by SMSF Club of each Column G Amount, Column F Amount, Column E Amount or Selected Client Amount was an acceptance of such a Referral Fee or a fraction or multiple thereof. Accordingly, the nature of each such benefit, or the circumstances in which it was given, could reasonably be expected to influence SMSF Club in favour of:

- (a) recommending that a person establish an SMSF; and/or

- (b) making recommendations in favour of investing in real property through a SMSF; and/or
- (c) giving advice or providing opinions to a person emphasising the benefits or de-emphasising the risks of doing either or both of those things.

20. By reason of the matters set out above, SMSF Club contravened s963G(1) of the Act in respect of its receipt and acceptance of each Column G Amount, Column F Amount, Column E Amount or Selected Client Amount.

D.2 Contravention of s963F by RM Capital

21. By reason of the matters set out in paragraph 16 above, throughout the Referral Agreement Period, in contravention of s963F of the Act, RM Capital failed to take reasonable steps to ensure that its representative SMSF Club complied with s963G(1) of the Act, and thereby contravened s936F of the Act. RM Capital contravened s963F of the Act on each occasion that SMSF Club contravened s963G(1). Alternatively, RM Capital committed a single contravention of s963F throughout the Relevant Agreement Period.

Date: 7 June 2019



Signed by Susan Donnelly
Solicitor for the Australian Securities and Investments Commission