FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd [2019] FCA 1932

File number:	VID 1141 of 2018
Judge:	**O'BRYAN J**
Date of judgment:	22 November 2019
Catchwords:	**CORPORATIONS** – false, misleading or deceptive conduct – contraventions of s 1041H of the *Corporations Act 2001* (Cth) (**Corporations Act**) and ss 12DA(1) and 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) – relevant principles – whether representations to a class of persons or separate representations to individuals – in the latter case, whether it is necessary to prove that individuals were misled – distinction between statements of fact and opinion – conduct found to be in contravention of s 1041H of the Corporations Act and ss 12DA(1) and 12DB(1)(i) of the ASIC Act
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12BAB(1)(a), 12BAB(5), 12DA(1), 12DB(1)(i), 12GBA(1)(e), 12GF *Corporations Act 2001* (Cth) Ch 7, Div 2, ss 761G, 761GA, Div 4, ss 766A, 766B(1), 766B(3), 766B(4), Pt 7.6, Divs 2, 3, 5, 6, ss 912A(1)(a), 917A, 917B, 917C(2), 917C(4), 917D, Pt 7.7, ss 947C(6), 951A, Pt 7.7A, ss 960A, 961B(1), 961G, 961H, 960J, 960K, 961L, Pt 7.10, ss 1041H(1), 1041I, 1101B(1)(a)
Cases cited:	*ACCC v Breast Check Pty Ltd* [2014] ATPR 42-479; FCA 190 *ACCC v Coles Supermarkets Australia Pty Ltd* (2014) 317 ALR 73 *ACCC v Dukemaster Pty Ltd* [2009] FCA 682 *ACCC v Hillside (Australia New Media) Pty Ltd trading as Bet365 (No 2)* [2016] FCA 698 *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640 *ASIC v GE Capital Finance Australia* [2014] FCA 701 *ASIC v Huntley Management Ltd* (2017) 122 ACSR 163; [2017] 35 ACLC 17-035; FCA 770 *ASIC v Westpac Securities Administration Limited* [2019]

	FCAFC 187
	Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592
	Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304
	Campomar Sociedad, Limitada v Nike International Ltd (2000) 202 CLR 45
	Comite Interprofessionnel du Vin de Champagne v Powell (2015) 330 ALR 67
	Cypjayne Pty Ltd v Babcock & Brown International Pty Ltd (2011) 282 ALR 152
	Domain Names Australia Pty Ltd v .au Domain Administration Ltd (2004) 139 FCR 215
	Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640
	Forrest v ASIC (2012) 247 CLR 486
	Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421
	Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd (1984) 2 FCR 82
	Google Inc v ACCC (2013) 249 CLR 435
	Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41
	Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd (1978) 140 CLR 216
	Noone (Director of Consumer Affairs Victoria) v Operation Smile (Australia) Inc (2012) 38 VR 569
	Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191
	Selig v Wealthsure Pty Ltd (2015) 255 CLR 661
	Singtel Optus Pty Ltd v ACCC (2012) 287 ALR 249
	Taco Co of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177
	Thompson v Riley McKay Pty Ltd (No 2) (1980) 29 ALR 267
	Tobacco Institute of Australia Limited v Australian Federation of Consumer Organisations Inc (1992) 38 FCR 1
	Yorke v Lucas (1985) 158 CLR 661
	.au Domain Administration Ltd v Domain Names Australia Pty Ltd (2004) 207 ALR 521
Date of hearing:	12, 13 June 2019
Registry:	Victoria
Division:	General Division

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Sub-area:	Regulator and Consumer Protection
Category:	Catchwords
Number of paragraphs:	130
Counsel for the Plaintiff:	Mr B F Quinn QC and Ms E Levine
Solicitor for the Plaintiff:	Australian Securities and Investments Commission
Counsel for the Defendants:	Mr J J Gleeson QC and Ms G Crafti
Solicitor for the Defendants:	Robert James Lawyers

ORDERS

VID 1141 of 2018

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**DOVER FINANCIAL ADVISERS PTY LTD** First Defendant
	TERRENCE PAUL MCMASTER Second Defendant
JUDGE:	**O'BRYAN J**
DATE OF ORDER:	**22 NOVEMBER 2019**

THE COURT ORDERS THAT:

1. The parties file, within 14 days, draft short minutes containing an agreed form of declarations reflecting the reasons for decision of the Court and orders proposed by the parties for timetabling a hearing as to pecuniary penalties or, in the absence of agreement, the plaintiff and defendants file competing draft short minutes containing the declarations and timetabling orders proposed by each party and accompanying submissions in support of no more than 4 pages in length.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

O'BRYAN J:

A. Introduction and overview

1 The Australian Securities and Investments Commission (**ASIC**) seeks declaratory relief and civil pecuniary penalties against Dover Financial Advisers Pty Ltd (**Dover**) in respect of alleged false, misleading or deceptive conduct relating to the content of a document entitled "Client Protection Policy" provided to clients by Dover's authorised representatives between around 25 September 2015 and around 30 March 2018 (which I will refer to as the **relevant period**). ASIC also seeks declaratory relief and civil pecuniary penalties against Mr Terrence McMaster on the basis that Mr McMaster was knowingly concerned in Dover's false, misleading or deceptive conduct. ASIC's application is made under ss 1041H and 1101B(1)(a) of the *Corporations Act 2001* (Cth) (**Corporations Act**) and under ss 12DA(1), 12DB(1)(i) and 12GBA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) (in force during the relevant period).

2 During the relevant period, Dover operated a financial services advice business and held an Australian financial services licence (**AFSL**) to conduct such a business. Mr McMaster was the sole director and shareholder of Dover and a responsible manager and key person on the AFSL. A substantial number of individuals and corporate entities operated as authorised representatives of Dover to provide financial services to clients. The number of authorised representatives increased over time from around 200 in September 2015, around 300 in 2016 and between around 350 to 400 in 2017. Dover's AFSL was cancelled by ASIC on 1 August 2018 on application by Mr McMaster pursuant to an undertaking given by him and Dover to ASIC under s 93AA of the ASIC Act.

3 Dover, acting through Mr McMaster, required its authorised representatives to incorporate into, or provide with, statements of advice provided to clients a document entitled "Client Protection Policy". For the reasons discussed below, the title of that document was highly misleading and an exercise in Orwellian doublespeak. The document did not protect clients. To the contrary, it purported to strip clients of rights and consumer protections they enjoyed under the law. Some 19,402 clients of Dover's authorised representatives were provided with the Client Protection Policy in conjunction with a statement of advice.

4 ASIC's case is focussed on the introductory clause to the Client Protection Policy which, as at 25 September 2015, stated:

> Dover's Client Protection Policy sets out a number of important consumer protections designed to ensure every Dover client gets the best possible advice and the maximum protection available under the law…;

5 From 3 May 2016, that introductory clause was revised such that the phrase "consumer protections" became "client protections". Dover and Mr McMaster did not suggest that the revision altered the meaning or effect of the introductory clause and I will therefore refer to both versions of the clause as the "Introductory Clause" without distinguishing between them.

6 ASIC alleges that the Introductory Clause was false, misleading or deceptive because the Client Protection Policy did not provide Dover's clients with the maximum protection available under the law. Rather, the Client Protection Policy sought to limit and exclude Dover's liability to clients. As discussed below, many clauses of the Client Protection Policy sought, perversely, to make the client responsible for failings and inadequacies in the advice provided to them.

7 By their response to ASIC's amended concise statement, the defendants admit the primary facts relied on by ASIC in the proceeding in relation to the content of the Client Protection Policy and its provision to clients of Dover's authorised representatives pursuant to the direction of Dover. The defendants also admit that the Introductory Clause was inaccurate because the Client Protection Policy did not set out the maximum protection under the law available to clients. The defendants further admit that Mr McMaster was responsible for determining or approving the content of the Client Protection Policy and requiring Dover's authorised representatives to provide the Client Protection Policy to clients during the relevant period. Before the hearing, in correspondence with ASIC, the solicitors for Mr McMaster conceded that, if ASIC succeeds in establishing the primary contraventions against Dover, it will also succeed in establishing that Mr McMaster was knowingly concerned in those contraventions.

8 Despite those admissions, the defendants deny that Dover engaged in false, misleading or deceptive conduct in contravention of the Corporations Act or the ASIC Act as alleged by ASIC. The basis for that denial, as stated in the defendants' response to ASIC's amended concise statement, was that ASIC had not pleaded or proved that any individual clients who had received a statement of advice with the Client Protection Policy were misled or deceived by the inaccuracy in the Introductory Clause or had suffered loss as a consequence. In the course of argument during the hearing, the defendants developed their defence into the following contentions:

(a) First, the defendants contend that the relevant conduct, providing the Client Protection Policy to clients in conjunction with a statement of advice, involved a separate and individual communication with each client. The defendants argue, and it may be accepted, that each statement of advice contained information and advice that was specific and personal to each client and was provided to each client at a time and in circumstances unique to that client.

(b) Second, the defendants contend that it follows that the communication of the Client Protection Policy to clients was not a communication to a "class of persons" and the method of analysis described in *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 (***Campomar***) at [101]-[105] is inapplicable to the present case. The defendants argue that the present case is analogous to *ACCC v Breast Check Pty Ltd* [2014] ATPR 42-479; FCA 190 (***Breast Check***), in which Barker J concluded (at [101]):

> …here there is no single piece of conduct or representation made to all members of the class contended for. Each customer received a separate communication, at a separate point in time, following the provision of the breast imaging service to that particular customer, that included a breast health report tailored to their particular circumstances.

(c) Third, the defendants contend that there is no evidence that any individual client was in fact misled by the Client Protection Policy. Indeed, the defendants contend that there is no evidence that the Client Protection Policy was read by any client. The defendants argue that, unlike in cases where representations are made to the public, which may "be approached at a level of abstraction", in cases involving an express untrue representation allegedly made only to identified individuals, the plaintiff bears the onus of proving that the individuals were misled or deceived (relying on *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 (***Campbell***) at [26]-[28] per French CJ).

(d) Fourth, the defendants contend that there is no evidence before the Court concerning the content of the statements of advice that were provided to clients together with the Client Protection Policy. In those circumstances, the defendants argue that the Court is unable to assess the Client Protection Policy in the context of the entire communication with the client, and cannot discount the possibility that the statements of advice qualified the Client Protection Policy in a manner that would overcome the misleading content.

(e) Fifth, to the extent that the present case should be analysed through the "class of persons" lens, the defendants contend that there is no evidence as to the characteristics of the clients who received the Client Protection Policy. The defendants argue that, in the absence of such evidence, the Court is unable to undertake the task required of it as described in *Campomar*.

9 In the course of argument during the hearing, the defendants also raised a new contention that had not been foreshadowed in their response to ASIC's amended concise statement: that the Introductory Clause in the Client Protection Policy was a statement of opinion, not a statement of fact. They argued that, to establish that the statement was false or misleading, it was necessary for ASIC to prove that the opinion was not honestly and reasonably held and that ASIC had failed to discharge that burden. In my view, the "opinion" contention should have been raised by the defendants in their response to the amended concise statement as a matter of procedural fairness. However, no objection of that kind was raised and ASIC elected to respond to the contention.

10 For the reasons explained below, I am satisfied that the provision to clients of the Client Protection Policy in conjunction with statements of advice was conduct of Dover that contravened s 1041H of the Corporations Act and ss 12DA(1) and 12DB(1)(i) of the ASIC Act as alleged by ASIC. I am also satisfied that Mr McMaster was knowingly concerned in those contraventions. By agreement of the parties, the hearing was confined to the issue of liability and declaratory relief. Given the findings of contravention, it will be necessary to schedule a further hearing on the issue of pecuniary penalties.

B. Evidence

11 The evidence adduced at the hearing was very confined on both sides. The defendants argued that ASIC's economical evidentiary approach resulted in a failure to prove its case. For the reasons discussed below, I disagree. The evidence adduced by ASIC was sufficient to prove its allegations and in that respect its economy was commendable. It was open to the defendants to adduce further evidence to contradict ASIC's allegations, but they did not do so.

12 Evidence on behalf of ASIC was given by Mr Tristan James Moseby by way of affidavits affirmed on 30 January 2019 and 15 February 2019. Mr Moseby is a solicitor and employee of ASIC. A number of documents were tendered through Mr Moseby's affidavits, and ASIC tendered a small number of additional documents. Objections were taken to parts of the

affidavits and certain documents and I ruled on those objections during the hearing. The substance of the evidence adduced by ASIC is described in section D below.

13 Mr Moseby was cross-examined in relation to his affidavit affirmed on 30 January 2019. That affidavit was originally read by ASIC on an interlocutory hearing in support of ASIC's opposition to a discovery application that had been made by the defendants. The defendants had sought discovery of, relevantly, documents relating to whether any person had been misled or deceived by the Client Protection Policy or had suffered loss as a result of being misled or deceived. Mr Moseby deposed that he and another lawyer employed by ASIC, Mr McAllister-Harris, had undertaken preliminary work to identify whether ASIC had any documents that may be responsive to that category of discovery. Mr Moseby deposed that he was informed by Mr McAllister-Harris that, based on enquiries made within ASIC, Mr McAllister-Harris was not aware of any documents in ASIC's possession, custody or control which tended to show that any person had been subjectively misled or deceived by the Client Protection Policy, or had suffered loss as a result of any reliance on the Client Protection Policy, during the relevant period the subject of the proceeding, and that it was very unlikely that ASIC had any such documents. In cross-examination, Mr Moseby explained that Mr McAllister-Harris had conducted a targeted review of ASIC's documents but not a full-scale review of all documents. Mr Moseby was unable to say whether ASIC contacted clients of Dover to ask whether they believed they had been misled or deceived by the Client Protection Policy.

14 Evidence on behalf of the defendants was confined to two short affidavits given by Mr McMaster and by Florence Tee, both of which were affirmed on 29 March 2019. Ms Tee was the Operations Manager of Dover from 2010 to 2018. The substantive parts of the affidavits are in identical terms as follows:

> I was a part of Dover's management committee and attended almost all of the monthly compliance meetings that dealt with complaints raised by clients. Where I was not in attendance at a compliance meeting I was informed as to what happened and what was discussed.
>
> While the "Client Protection Policy" **(CPP)** was in effect from 2015 to 2018, there were no complaints made in relation to the CPP at all. Further, there were no complaints made by a client after the CPP was withdrawn.

15 The cross-examination of Mr Moseby, and the evidence of Mr McMaster and Ms Tee, was directed to the defendants' defence that ASIC had not proved that any individual clients who received a statement of advice with the Client Protection Policy had been subjectively misled or deceived by the inaccuracy in the Introductory Clause or had suffered loss as a consequence.

In that respect, the defendants submitted that ASIC had not adduced any evidence of any complaints made by clients of Dover or its authorised representatives relating to the Client Protection Policy, nor any allegation by a client that he or she had been misled or deceived by the Client Protection Policy or had suffered loss as a consequence. The defendants argued that the absence of such evidence was significant in circumstances where:

(a) in mid-April 2018 and at the request of ASIC, Dover had sent corrective notices to current and former clients advising them that the Client Protection Policy was deceptive and recommending that, if the client considered that they had suffered loss, they ought to seek legal advice;

(b) prior to the proceeding, ASIC had sought from Dover the production of correspondence or other documents evidencing complaints or allegations from clients concerning the Client Protection Policy;

(c) Mr Moseby gave evidence that it was unlikely that ASIC had in its possession any documents indicating that any client had been subjectively misled or deceived by the Client Protection Policy; and

(d) Mr McMaster and Ms Tee gave evidence that no complaints had been made to Dover in relation to the Client Protection Policy.

16 The defendants argued that, on the basis of the foregoing, an inference can be drawn that no client had in fact been misled by the Client Protection Policy. For the reasons explained below, I regard the enquiry as to whether any individual client was subjectively misled by the Client Protection Policy as not determinative of the question whether Dover's conduct contravened the statutory prohibitions. The question whether conduct is misleading or deceptive or contains a false or misleading representation is an objective question to be determined by the Court by reference to the impugned conduct; the fact that a client may have been misled, and may have made a complaint about being misled, is admissible on the question but is neither necessary nor determinative. In any event, I am not willing to draw the inference and make the factual finding sought by the defendants. I do not consider that the absence of client complaints establishes that no clients were misled. It is plausible that a number of clients were misled by the Client Protection Policy but that they failed to receive or did not direct their attention to the corrective notice sent by Dover. In my view, the inference that the defendants ask me to draw requires speculation about a matter which is not essential to the causes of action advanced by ASIC.

C. Statutory context - consumer protections associated with the supply of financial advice

17 These proceedings concern the terms and conditions on which financial advice was given by Dover's authorised representatives to retail clients during the relevant period. It is necessary to describe briefly the protections afforded to recipients of financial advice at law and the regulatory framework governing the provision of statements of advice to retail clients.

18 A person who provides financial advice to a client incurs legal obligations under the general laws of contract and negligence, as well as specific statutory requirements in the Corporations Act. The legal obligations imposed under contract depend upon the terms of the contract agreed between the adviser and the client. In general terms, and subject to exclusions contained within a contract, the law of negligence imposes an obligation on a financial adviser to exercise reasonable care in the provision of advice. Of most relevance for present purposes, though, are the specific obligations imposed under the Corporations Act.

19 Chapter 7 of the Corporations Act regulates the provision of financial services which, relevantly, includes the provision of financial product advice (s 766A). Financial product advice means a recommendation or a statement of opinion that is intended to influence a person in making a decision in relation to a particular financial product or could reasonably be regarded as being intended to have such an influence (s 766B(1)). There are two types of financial product advice: personal advice (defined in s 766B(3)) and general advice (defined in s 766B(4)). In general terms, personal advice is financial product advice that is given or directed to a person in circumstances where the provider of the advice has considered one or more of the person's objectives, financial situation and needs or a reasonable person might expect the provider to have considered one or more of those matters. All other financial product advice is categorised as general advice.

20 Part 7.6 of the Corporations Act is titled "Licensing of Providers of Financial Services". Division 2 of that Part requires persons who carry on a financial services business to hold an Australian financial services licence covering the provision of the financial services. Division 3 imposes various obligations on financial services licensees. In particular, s 912A(1)(a) requires a financial services licensee to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly. Division 5 empowers a financial services licensee to give a person a written notice authorising the person to provide a specified financial service or services on behalf of the licensee. Such persons are

known as authorised representatives of the licensee. Division 6 sets out general rules governing the responsibility of financial services licensees for the conduct of their authorised representatives. The Division applies to any conduct of an authorised representative that relates to the provision of financial services on which a third person (the client) could reasonably be expected to rely and on which the client in fact relied in good faith. The general rules of responsibility are as follows:

(a) if the authorised representative is the representative of only one financial services licensee, the licensee is responsible for the conduct of the representative whether or not the representative's conduct is within authority (s 917B);

(b) if the authorised representative is the representative of more than one financial services licensee, but in respect of a particular class of financial service is the representative of only one licensee, then that licensee is responsible for the conduct of the representative that relates to that class of financial service whether or not the conduct is within authority (s 917C(2)); and

(c) otherwise if the authorised representative is the representative of more than one financial services licensee, all of the licensees are jointly and severally responsible for the conduct of the representative whether or not the conduct is within authority in relation to any of the licensees (s 917C(4)).

21 However, s 917D provides that a financial services licensee is not responsible under ss 917B or 917C for the conduct of an authorised representative if:

(a) the conduct is not within authority in relation to the licensee (that is, for a representative that is an employee, not within the scope of employment or, for a representative that is not an employee, not within the scope of the authority given by the licensee); and

(b) the representative disclosed that fact to the client before the client relied on the conduct; and

(c) the clarity and the prominence of the disclosure was such as a person would reasonably require for the purpose of deciding whether to acquire the relevant financial service.

22 Part 7.7 of the Corporations Act is titled "Financial services disclosure" and regulates disclosures that must be made by financial services licensees when providing a financial service (such as providing financial product advice). A provider of financial services cannot contract out of the obligations imposed by Part 7.7. Section 951A provides that a condition of a contract

for the provision of a financial service is void if it provides that a party to the contract is required or bound to waive compliance with any requirement of Part 7.7. There are two important disclosure obligations imposed under Part 7.7 which apply when personal advice is provided by a financial services licensee or an authorised representative to a retail client. The first disclosure obligation is to give the person a financial services guide in accordance with Division 2 of the Part and the second obligation is to give the client a statement of advice in accordance with Division 3 of the Part. The content of each form of disclosure is regulated by the Corporations Act. Relevantly, s 947C(6) of the Corporations Act requires authorised representatives to ensure that the statements and information included in a statement of advice are worded and presented in a clear, concise and effective manner.

23 Part 7.7A of the Corporations Act is titled "Best interests obligations and remuneration" and imposes further obligations in relation to the provision of financial product advice that is personal advice to a retail client. Again, a financial services licensee and its authorised representatives cannot contract out of those obligations. Section 960A provides that a condition of a contract or other arrangement is void if it provides that a party to the contract is required or bound to waive any right under Part 7.7A or waive the compliance with any requirement of Part 7.7A. Relevantly, Part 7.7A contains the following obligations:

(a) Section 961B(1) stipulates that the adviser must act in the best interests of the client in relation to the advice.

(b) Section 961G stipulates that the adviser must only provide the advice to the client if it would be reasonable to conclude that the advice is appropriate to the client, had the adviser satisfied the duty under s 961B to act in the best interests of the client.

(c) Section 961H stipulates that if it is reasonably apparent that information relating to the objectives, financial situation and needs of the client on which the advice is based is incomplete or inaccurate, the adviser must warn the client that the advice is, or may be, based on incomplete or inaccurate information and, because of that, the client should, before acting on the advice, consider the appropriateness of the advice having regard to the client's objectives, financial situation and needs.

(d) Section 960J addresses conflict between the client's interests and those of the adviser. It stipulates that if the adviser knows, or reasonably ought to know, that there is a conflict between the interests of the client and the interests of the adviser (or other related or associated entities including the financial services licensee of which the

adviser is a representative), the adviser must give priority to the client's interests when giving the advice.

(e) Section 960K stipulates that a financial services licensee contravenes the section if the licensee, or one of its authorised representatives, contravenes ss 961B, 961G, 961H or 961J.

(f) Section 961L stipulates that a financial services licensee must take reasonable steps to ensure that authorised representatives of the licensee comply with ss 961B, 961G, 961H and 961J.

24 Sections 761G and 761GA define who is a retail client for the purposes of Parts 7.7 and 7.7A of the Corporations Act. In general terms, a financial service is treated as having been provided to a retail client unless a provision states otherwise. Relevantly, and in general terms, a person will not be treated as a retail client, and will be classified as a sophisticated investor, if the licensee is satisfied on reasonable grounds that the person has previous experience in using financial services and investing in financial products and the client signs a written acknowledgment that the adviser has not given the person documents that would be required if the person was a retail client (s 761GA).

D. The Client Protection Policy

D.1 Implementation of the Client Protection Policy

25 On 25 September 2015, Mr McMaster sent an email to Dover's authorised representatives with the subject title "Friday Reflection: Three improvements to Dover's statement of advice process". Both the sender and addressee of the email was "Terry McMaster". The defendants agreed during the hearing that the addressee "Terry McMaster" on the email indicated that the email was sent to a group of addressees created by Mr McMaster and that the addressees included at least some authorised representatives. Given that admission, the content of the email and the absence of any direct evidence from Mr McMaster concerning the addressees within the group, I infer that the addressees of the email were Dover's then current authorised representatives. There is no reason to think that Mr McMaster would send the email to some of Dover's authorised representatives but not to others.

26 The email described three changes that Dover was introducing in relation to the process by which its authorised representatives provided statements of advice to clients. Two of the

changes related to the Client Protection Policy and its communication to clients by authorised representatives.

27 Mr McMaster informed authorised representatives that Dover had consolidated disclosures to be made to clients into a single document, being the Client Protection Policy. If an authorised representative communicated statements of advice to clients by email, Mr McMaster instructed them to delete various disclosure statements that had previously been included in statements of advice and replace them with a single paragraph (which I will refer to as the "Contract Conditions Clause") with a hypertext link in the following format:

> **Dover's Client Protection Policy**
>
> Dover's Consumer Protection Policy comprises additional conditions of our contract with you to give you the maximum protection possible under the Corporations Act and related law. You must read and understand **Dover's Client Protection Policy** before acting on the recommendations in this statement of advice. You can do this by clicking on this link: **Dover's Client Protection Policy**.

28 In the foregoing paragraph (and in what follows below), the bolding and underlining was in the original. Consistent with Mr McMaster's email and common electronic formatting, I infer that the underlined words also operated as a hyperlink to the document referred to.

29 If the authorised representative communicated statements of advice to clients in paper form, Mr McMaster instructed them to print a copy of the Client Protection Policy and staple it to the statement of advice.

30 Mr McMaster also provided authorised representatives with a form of acceptance clause (which I will refer to as the "Acceptance Clause") to be included in statements of advice in the following form:

> **The next step: please e-mail me to confirm your acceptance of my recommendations.**
>
> Please email me at [adviser's email address] with a copy to compliance@dover.com.au to record your acceptance of my recommendation and instruct me to implement my advice. Include your name(s), the date of this statement of advice and any additional concerns or instructions you may have.
>
> By accepting my recommendations you confirm you have:
>
> 1. understood this statement of advice, Dover's Client Protection Policy, the Financial Services Guide and the product disclosure statements provided to you in this statement of advice;
> 2. accepted the additional conditions of your contract in Dover's Client Protection Policy; and

> 3. received a clear and prominent disclosure of the limits of my authority from Dover as set out in Dover's Client Protection Policy.
>
> I will not implement the advice until you instruct me to do so. Please do not hesitate to contact me should any aspect of my advice not be clear or if you feel a further meeting is necessary to better understand my advice.

31 It can be seen that the Acceptance Clause contained an acknowledgment by the client that they had understood and accepted the Client Protection Policy.

32 A sample statement of advice, which included the Contract Conditions Clause and the Acceptance Clause, was attached to the email. On 29 September 2015, Mr McMaster sent a further email to the "Terry McMaster" group addressees (which in this email was identified as <terry@mcmasters.com.au>). Amongst other things, the email attached another sample statement of advice which was stated to be a real statement of advice in which the client's name had been changed (to the fictional Mary Widow). The sample statement also included the Contractual Conditions Clause and the Acceptance Clause in the form previously notified by Mr McMaster. There was nothing in either of the sample statements of advice that qualified or modified the provisions of the Client Protection Policy.

33 The Client Protection Policy as at 25 September 2015 was also provided to Dover's authorised representatives and, during the relevant period, was revised by Dover. The revisions primarily added clauses to the Client Protection Policy. It is convenient to describe in some detail the Client Protection Policy as at 25 September 2015, and then describe the additions that were made to the document during the relevant period.

34 ASIC also tendered an email dated 15 October 2015 from Yin Low, Dover's Compliance Manager to a self-titled email group "Yin Low". I infer from the contents of the email that the addressees in the email group were Dover's authorised representatives. The email referred to the recently introduced Client Protection Policy and informed the addressees that Dover had also updated its Financial Services Guide. The email stated:

> We have included Dover's Client Protection Policy ("CPP") in the FSG and your client is required to read the FSG in conjunction with the CPP. The FSG and the CPP now forms part of the contract between you and your client. You should stress the importance of these documents to your clients and request them to read them carefully.
>
> If you are providing a paper FSG, you should print the CPP and attach it to your FSG before sending it to your client.

35 Attached to the email was the updated version of Dover's Financial Services Guide. Under the heading "The purpose of this financial services guide ("FSG")", the document contained the following statements:

> This FSG is an important document that explains how we provide financial product services to you.
>
> This FSG is to be read in conjunction with Dover's Client Protection Policy ("CPP") which sets out a number of important client protections designed to ensure every Dover client gets the best possible advice and the maximum protection available under the law.
>
> A copy of Dover's CPP which forms part of the FSG can be accessed here: **Dover's Client Protection Policy**
>
> You should read this FSG and Dover's CPP carefully before using our services and these documents form part of our contract. It is intended to give you sufficient information to decide whether to obtain financial services from us.
>
> Most of the content of this FSG and Dover's CPP is dictated by the Corporations Act and is mandatory under that law…

36 Although the representations contained in the Financial Services Guide were to the same effect as the Introductory Clause in the Client Protection Policy, ASIC did not seek to rely on the Financial Services Guide as further acts of false, misleading or deceptive conduct by Dover. Nevertheless, it is significant to note that clients received each of the Financial Services Guide and the Client Protection Policy with statements of advice provided to them, with the Financial Services Guide reinforcing the importance of the Client Protection Policy.

D.2 Client Protection Policy as at 25 September 2015

Introductory Clause

37 As at 25 September 2015, the Client Protection Policy commenced with a section titled "Introduction" which included, as the first sentence, the Introductory Clause. The statements appearing under the heading "Introduction" were as follows:

> Dover's Client Protection Policy sets out a number of important consumer protections designed to ensure every Dover client get (sic) the best possible advice and the maximum protection available under the law. You should read each section of Dover's Client Protection Policy carefully and make sure you understand it and agree with it before you decide to accept our advice and instruct us to implement the advice.
>
> Dover's Client Protection Policy sets out my obligations to you as my client and your obligations to me, and includes a clear and prominent warning on the limit of my authority from Dover.
>
> These mutual obligations form part of our contract, and part of my duty of care to you as your adviser.

> Please refer any questions or concerns regarding Dover's Client Protection Policy to Dover's Responsible Manager, Terry McMaster, at terry@dover.com.au (mailto: terry@dover.com.au).

38 As noted earlier, ASIC's case is focussed on the Introductory Clause, and specifically the statement that Dover's Client Protection Policy sets out a number of important consumer protections and the maximum protection available under the law. ASIC alleges that that statement was false, misleading or deceptive because a number of the clauses in the policy purported to limit and exclude Dover's liability to clients in ways that were inconsistent with the requirements of the Corporations Act and which lessened clients' protections under the general law.

Authority Liability Exclusion

39 Section 1 of the document, which immediately followed the Introduction, was titled "Warning on the limits of your adviser's authority from Dover". The statements appearing under that heading were as follows:

> This is a clear and prominent warning from Dover on the limits of your adviser's authority.
>
> You should consider these limits before deciding to acquire financial services through your adviser and you should not acquire these services unless you understand and accept these limits. This warning is part of Dover's commitment to the highest possible compliance standards. These standards include making sure you know the limits of your adviser's authority before you decide to acquire a financial service.
>
> Under the Corporations Act Dover is not responsible for anything done by your adviser which is not within the authority provided by Dover in these circumstances.
>
> Your adviser is only authorised to provide advice that complies with the Corporations Act and the related regulations and regulatory guidelines. Your adviser cannot provide advice or do anything else which breaches a law or an ASIC regulation, is outside of Dover's AFSL or which is not in your best interests or appropriate to your circumstances.
>
> The limits on your adviser's authority include:
>
> - failing to disclose a commission or other amount payable by any person other than you;
> - failing to disclose a conflict of interest;
> - theft or any other fraudulent activity;
> - churning an insurance policy, i.e. an inappropriate recommendation for a new insurance policy for the purpose of generating a commission or a similar fee;
> - failing to adequately research a recommended financial product;
> - failing to consider your circumstances when recommending a financial or (sic) service;

- failing to provide personal advice in the form required under the Corporations Act;
- transferring money to or from an account without your written consent for that specific transfer;
- acquiring or disposing of a financial product without your specific written consent;
- recommending a financial service that a reasonable financial planner would not recommend;
- failing to advise you of a tax liability, stamp duty or similar cost of a recommended action;
- failing to advise you of a negative consequence of a recommended action; or
- any act that breaches a law of Australia or a State of Australia including the law of negligence, the criminal law and the corporations law or any ASIC regulation or regulatory guideline.

Your adviser must observe these limits on his or her authority as part of the contract with you.

40 ASIC referred to the foregoing statements as the "Authority Liability Exclusion". Those statements purported to exclude Dover's responsibility for the conduct of its authorised representatives by stipulating that:

(a) Dover is not responsible for anything done by an adviser which is not within the authority provided by Dover; and

(b) the adviser is not authorised to provide advice, or undertake other activities, that do not comply with the requirements of the Corporations Act or otherwise breach legal obligations owing to the client.

41 The purported effect of the Authority Liability Exclusion was to exclude Dover's liability for most foreseeable breaches of law by its authorised representatives. In that light, the statement included in section 1 that the "warning is part of Dover's commitment to the highest possible compliance standards" can only be regarded as cynical. Purporting to exclude all liability to clients from wrongful conduct by authorised representatives can hardly be regarded as exhibiting a commitment to the highest possible compliance standards. If the exclusions were legally effective, they would be more likely to reduce compliance standards (because legal liability for wrongful conduct would be excluded).

42 As noted in section C above, the Corporations Act generally makes licensees responsible for the conduct of their authorised representatives, whether or not the representative's conduct is within authority. However, s 917D permits a licensee to exclude responsibility for the conduct of its authorised representatives in circumstances where the conduct is not within the scope of

the representative's authority and the representative clearly and prominently disclosed that fact to the client before the client relied on the conduct. In my view, there is substantial doubt whether the Authority Liability Exclusion was legally effective under s 917D to exclude all of Dover's responsibility for the conduct of its authorised representatives that breached the law. The concept of acting within authority is defined in s 917A as contemplating conduct within the scope of employment or the scope of the authority given by the licensee to the representative. Ordinarily, that would embrace conduct that breaches the law by failing to discharge legally imposed standards of care or other regulatory obligations. However, it is not necessary to determine that issue. ASIC's case is based on a simpler proposition: by extracting the promises from clients in the form of the Authority Liability Exclusion, Dover purported to exclude its responsibility for the conduct of its authorised representatives and, as a consequence, lessened clients' protections under the Corporations Act and the general law. That proposition is not contested by the defendants and should be accepted.

Statement of Advice Liability Exclusion

43 Section 2 of the document was titled "The Financial Ombudsman and your understanding of your SOA". The statements appearing under that heading were as follows:

> The Corporations Act in effect says you must be able to understand the concepts, words, phrases and sentences used in your SOA. You should read and understand the attached materials from the Financial Ombudsman Service (FOS) concerning clients not understanding statements of advice: Financial Ombudsman Service's memorandum on clients understanding SOAs (http://www.fos.org.au/customs/files/docs/fos–approach-adequacy-of-statements-of-advice.pdf).
>
> If your SOA is not able to be understood you may be able to claim compensation through the FOS for any loss suffered as a consequence.
>
> You should not act on any aspect of this SOA unless you understand that:
>
> - every financial investment product has risk and can fall in value; and
> - every risk insurance product is complex and may not cover you against every risk.
>
> If you do not understand a concept, word, phrase or sentence used in this SOA you should ask me for a further explanation so that you do understand it. You should not act on any advice in this SOA unless you understand every word, phrase or sentence used in it, as well as its general intent and import.
>
> You agree that if you act on our advice you will not subsequently claim to have not understood the general intent of this SOA or any word, phrase or sentence used in it.

44 ASIC referred to the last three sentences of that section as the "Statement of Advice Liability Exclusion". The exclusion stipulated that:

(a) the client must not act on the advice if the client does not understand any concept, word, phrase or sentence in the advice; and

(b) if the client acts on the advice, the client agrees not to claim subsequently that the client did not understand any aspect of the advice.

45 That exclusion sought to prevent clients from making a claim against Dover or its authorised representatives on the basis that the advice was not clear and comprehensible or that the client did not understand the advice given.

46 The Statement of Advice Liability Exclusion is inconsistent with express requirements of the Corporations Act. Section 2 of the Client Protection Policy commenced with the correct statement that the Corporations Act requires, in effect, that a statement of advice must be able to be understood by the recipient. That statement reflects the requirement in s 947C(6) of the Corporations Act that the contents of a statement of advice must be worded and presented in a clear, concise and effective manner. Accordingly, and contrary to the purported effect of the Statement of Advice Liability Exclusion, the authorised representative was responsible for ensuring that the advice was clear and comprehensible. The Statement of Advice Liability Exclusion was a perverse distortion of that obligation, purporting to make the client responsible for understanding the advice given. By extracting the promises from clients in the form of the Statement of Advice Liability Exclusion, Dover purported to exclude its liability to clients in a way that was inconsistent with the requirements of the Corporations Act and which lessened clients' protections under the Corporations Act and the general law.

Insurance Liability Exclusion

47 Section 3 of the document was titled "Additional disclosures required by ASIC". That section included the following statements under the sub-heading "Risk insurance advice":

> ASIC has expressed concerns about churning risk insurance policies, i.e. the process of cancelling an existing policy and applying for a new policy without any real benefit to the client. Dover shares these concerns and does not allow churning. By accepting our risk insurance recommendations you acknowledge they do not comprise churning, are in your best interests, are appropriate to you and are not motivated by any other criteria.

48 ASIC referred to the third sentence as the "Insurance Liability Exclusion". That exclusion sought to prevent clients from bringing claims against Dover or its authorised representatives on the basis that risk insurance recommendations made by the adviser constituted "churning" or were otherwise not in the best interests of the client or were not appropriate to the client.

49 The Insurance Liability Exclusion is inconsistent with express requirements of the Corporations Act. Section 3 of the Client Protection Policy commenced with a statement that ASIC has expressed concerns about churning risk insurance policies. That concern is understandable as the practice of churning policies is inconsistent with many requirements of Chapter 7 of the Corporations Act, particularly:

(a) the obligation under s 961B for the provider of financial services advice that is personal advice to act in the best interests of the client in relation to the advice; and

(b) the obligation under s 961G for the provider to only provide advice to the client if it would be reasonable to conclude that the advice is appropriate to the client had the provider satisfied the duty under s 961B.

50 The Insurance Liability Exclusion was again a perverse distortion of those obligations, purporting to make the client responsible for assessing whether churning had occurred and whether the risk insurance recommendation was in the client's best interests. By extracting the acknowledgment from clients in the form of the Insurance Liability Exclusion, Dover purported to limit or exclude its liability to clients in a way that was inconsistent with the requirements of the Corporations Act and which lessened clients' protections under the Corporations Act and the general law.

Best Efforts Clause

51 Section 4 of the document was titled "Our obligations to each other as adviser and client". That section included the following promise on the part of the adviser:

> Our promises to you as your adviser
>
> We will use our best efforts to ensure our advice is in your best interests and appropriate to you.

52 ASIC referred to that statement as the "Best Efforts Clause". ASIC contended that the promise contained in the Best Efforts Clause was inferior to the protections afforded to consumers of financial services advice in ss 961B, 961G and 961L of the Corporations Act. As noted earlier, s 961L requires a financial services licensee to take reasonable steps to ensure that representatives of the licensee comply with (amongst other provisions) ss 961B and 961G. On that basis, ASIC alleged that the Introductory Clause was false, misleading or deceptive because the Best Efforts Clause, and thereby the Client Protection Policy, did not afford clients the maximum protections available under the law (being the protections afforded by ss 961B and 961G).

53 There are difficulties in comparing the Best Efforts Clause to the obligations imposed under ss 961B and 961G of the Corporations Act because each of those obligations differ in their primary focus and standard of obligation.

54 The Best Efforts Clause focusses upon the substance of the advice given and states that the adviser will use best efforts to ensure the advice is in the best interests of the client and is appropriate to the client. An obligation framed in terms of "best efforts" (or "best endeavours") is not absolute or unconditional: *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 (***Electricity Generation Corporation***) at [41]; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 (***Hospital Products***) at 144. The nature and extent of such an obligation is necessarily conditioned by what is reasonable in the circumstances, which can include circumstances that may affect the promisor's business: *Electricity Generation Corporation* at [41]; *Hospital Products* at 91-92 per Mason J. Hence the expressions "best endeavours" and "reasonable endeavours" have generally been recognised as imposing substantially similar obligations: *Electricity Generation Corporation* at [40]; *Cypjayne Pty Ltd v Babcock & Brown International Pty Ltd* (2011) 282 ALR 152 at [67].

55 In comparison, s 961B(1) requires a provider of advice to act in the best interests of the client. As recently observed by Allsop CJ in *ASIC v Westpac Securities Administration Limited* [2019] FCAFC 187 (***Westpac***), s 961B "contains a detailed attempt to define what is, in effect, an obligation of good faith and unqualified faithfulness to the interests of the client" (at [10]). The focus of the obligation is not the advice simpliciter but a broader conception of actions directed to the best interests of the client. As I observed in *Westpac* (at [405]):

> [405] In my view, textual and contextual considerations compel a conclusion that s 961B is not concerned with the question whether the substance of the advice is in the best interests of the client and, if it was necessary to refer to it, the relevant extrinsic materials confirm that conclusion. Rather, the section is concerned with the actions taken by the provider in the formulation of the advice and the objective purpose of the provider in taking those actions and giving the advice.
>
> [406] First, s 961B(1) states that the provider must act in the best interests of the client in relation to the advice; the section does not state that the advice must be in the best interests of the client. The section is directed to how the provider must "act" in relation to the advice and stipulates that the provider must act in the best interests of the client.
>
> [407] Second, s 961B(2) states the provider satisfies the duty in subsection (1) if the provider proves that he or she has done each of the following:
>
> (a) identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions;

(b) identified:

(i) the subject matter of the advice that has been sought by the client (whether explicitly or implicitly); and

(ii) the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the client's relevant circumstances),

(c) where it was reasonably apparent that information relating to the client's relevant circumstances was incomplete or inaccurate, made reasonable enquiries to obtain complete and accurate information;

(d) assessed whether the provider has the expertise required to provide the client advice on the subject matter sought and, if not, declined to provide the advice;

(e) if, in considering the subject matter of the advice sought, it would be reasonable to consider recommending a financial product:

(i) conducted a reasonable investigation into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered as relevant to advice on that subject matter; and

(ii) assessed the information gathered in the investigation;

(f) based all judgments in advising the client on the client's relevant circumstances; and

(g) taken any other step that, at the time the advice was provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances.

[408] Consistently with the use of the word "act" in subsection (1), subsection (2) focuses on what the provider has "done". It describes actions to be taken by the provider; it does not refer to the substance of the advice given. All of the actions are directed to the pursuit of the best interests of the client and describe diligent efforts directed to that pursuit through the identification of the client's objectives, financial situation and needs; by basing judgments on those matters; and by declining to advise if the provider does not have the requisite expertise to advise. Subsection (2) states that a provider satisfies the duty in subsection (1) if the provider does the things stipulated in subsection (2). It is implicit in that language that the legislature considered that the obligation imposed by subsection (1) requires the types of actions referred to in subsection (2).

56 There is a sense in which the obligations imposed by s 961B require diligent efforts to be made by the adviser directed to the object of providing advice that is in the best interests of the client. In that respect, the Best Efforts Clause might be regarded as a subset of the obligation imposed by s 961B.

57 Section 961G stipulates that the provider of the advice must only provide advice to the client if it would be reasonable to conclude that the advice is appropriate to the client had the provider satisfied the duty under s 961B to act in the best interests of the client. There is a degree of overlap between s 961G and the Best Efforts Clause. Like the Best Efforts Clause, s 961G

focusses upon the advice and the question whether it is appropriate to the client and the section imposes a test of reasonableness, based upon the provider having satisfied the duty in s 961B.

58 In my view, it is not necessary to explore further the extent of overlap and differences between the Best Efforts Clause and the obligations imposed by ss 961B, 961G and 961L of the Corporations Act. I do not consider that the Best Efforts Clause is inconsistent with the obligations imposed by ss 961B and 961G, or that it purported to operate in a manner that limited or excluded those obligations (unlike the other limitations and exclusions on which ASIC relies).

Continued Retainer Clause and Losses Liability Exclusion

59 Section 4 of the document also included the following promise on the part of the client:

> Your promises to us as our client
>
> …
>
> You must contact us every six months to request that we review our advice to you and update our advice for identified changes in your circumstances and the investment environment. You agree that six monthly reviews are an essential aspect of our relationship.
>
> …
>
> You agree that Dover is not responsible for any losses incurred by you:
>
> 1. for any reason after six months from the date of our most recent statement of advice;
> 2. for any reason connected to the misuse of your bank account and investment account details by any person and any failure by any person to keep your account, details, passwords, PINs and similar information confidential or any other cyber-security issues including the hacking of your computer records;
> 3. if you do not instruct us to implement our advice to you; and
> 4. if you cease to engage us as your adviser or if you engage another financial planner.

60 ASIC referred to the statement requiring the client to seek six monthly reviews as the "Continued Retainer Clause" and the statement concerning non-responsibility for losses as the "Losses Liability Exclusion".

61 In relation to the Continued Retainer Clause, ASIC contended that neither the Corporations Act nor the general law impose an obligation on a client to contact Dover every six months to request a review of Dover's advice. That contention may be accepted. However, it does not follow that the imposition of that obligation rendered the Introductory Clause false, misleading

or deceptive. The obligation imposed by the Continued Retainer Clause did not, of itself, reduce the protections given to clients under law. It merely purported to require clients to acquire further advisory services from the adviser every six months. For that reason, it is preferable to consider the Continued Retainer Clause in connection with the Losses Liability Exclusion. It is the latter clause that reduces the protections given to clients under law, and the former clause is related to it.

62 The Losses Liability Exclusion purported to exclude Dover's liability for losses incurred by the client in three particular circumstances: first, if the loss was incurred six months after the advice was given (and no further advice was given); second, if the client did not ask the adviser to implement the advice; and third, if the client ceased to engage the adviser or if the client engaged another adviser. No such exclusions apply to the obligations imposed on Dover pursuant to the Corporations Act or under the general law. Accordingly, by extracting those promises from clients, Dover purported to exclude its liability to clients in ways that lessened clients' protections under the Corporations Act and the general law.

Investments Minimum Holding Clause

63 Section 8 of the document was titled "Minimum holding period on investments". That section included the following statements:

> All investments recommended in your SOA [statement of advice] should be held for a minimum holding period of at least ten years. This is notwithstanding any statement made by the product issuer or any other person in a product disclosure statement or similar document or else where [sic] in this statement of advice.
>
> You agree that the performance of the investment will not be known and will not be able to be measured until the end of the minimum holding period and that no claim or complaint will be made regarding investment performance until the end of the minimum holding period.

64 ASIC referred to the foregoing statements as the "Investments Minimum Holding Clause". By that clause, Dover purported to exclude liability for claims in respect of investment advice until the expiry of ten years from the date of any investment. Again, no such exclusions apply to the obligations imposed on Dover pursuant to the Corporations Act or under the general law. By extracting those promises, Dover purported to exclude its liability to clients in a way that lessened clients' protections under the Corporations Act and the general law.

D.3 Client Protection Policy as at 28 September 2015

65 On 28 September 2015, Dover's Adviser Manager, Peter Thompson, circulated a further copy of Dover's Client Protection Policy to Dover's authorised representatives. This version of the

policy was relevantly in the same form as the version circulated by Mr McMaster on 25 September 2015.

D.4 Client Protection Policy as at 5 March 2016

66 ASIC adduced in evidence a version of Dover's Client Protection Policy bearing a date designated as "5/3/2016". In its amended concise statement and submissions, ASIC referred to that document as being dated 3 May 2016. In its response to ASIC's amended concise statement, Dover admitted that date. However, dates appearing on subsequent versions of Dover's Client Protection Policy strongly suggest that the date format used by Dover was day/month/year (for example, a subsequent version of the policy bore the date "16/01/2017"). Although nothing turns on the date, in my view the document bearing the date "5/3/2016" is likely to have been issued on 5 March 2016.

67 This version of the policy contained each of the clauses extracted above from the 25 September 2015 version save that, in the Introductory Clause, the phrase "consumer protections" was amended to "client protections". As noted above, nothing turns on that revision. This version also contained two additional clauses relied on by ASIC.

Ceased Engagement Exclusion

68 Section 3 of the document included a new sub-heading titled "Time limits and responsibility for implementing our advice" which included the following statement:

> We will not be responsible for any losses connected to our advice if it is not implemented by us, if you do not engage us as your adviser or if you cease to engage us as your adviser.

69 ASIC referred to that statement as the "Ceased Engagement Exclusion". The statement is to the same effect as the Losses Liability Exclusion in section 4 of the policy, discussed above. For the same reasons, by extracting those promises, Dover purported to exclude its liability to clients in ways that lessened clients' protections under the Corporations Act and the general law.

Underinsurance Exclusion

70 Section 5 of the Client Protection Policy was headed "Additional disclosure if we are recommending a risk insurance contract". The 25 September 2015 version of the policy had previously included a sub-heading titled "The under insurance problem" and the following statements:

> The recommended sums insured are less than the amounts that would be recommended by many other financial planners, and some would say you are under-insured. You are aware of this, and have compromised on the sums insured due to competing claims on your budget.
>
> The recommended sums insured are sensible compromises and, in summary, we believe they are appropriate to you having regard to your overall financial profile. Let me know if you are concerned with your under-insurance position and wish to increase the sums insured.

71 The 5 March 2016 version of the policy inserted the following additional statement:

> You agree to not complain or seek any form of compensation for any loss suffered as a result of being under-insured should an insured event occur.

72 ASIC referred to that statement as the "Underinsurance Exclusion". By that clause, Dover purported to exclude liability for recommendations made by advisers as to the level of insurance to be held by the client. Again, no such exclusion applied to the obligations imposed on Dover pursuant to the Corporations Act or under the general law. By extracting those promises, Dover purported to exclude its liability to clients in a way that lessened clients' protections under the Corporations Act and the general law.

D.5 Client Protection Policy as at 4 August 2016

73 ASIC adduced in evidence a version of Dover's Client Protection Policy dated 4 August 2016. This version of the policy contained the clauses extracted above from the earlier versions and a new clause in section 5 under a new sub-heading titled "Client must maintain all risk insurance policies for at least two years" as follows:

> You agree to maintain all risk insurance policies for at least two years and you agree to compensate the adviser for commissions or other income that have to be re-paid to an insurer or other person if you fail to do this.

74 ASIC referred to that clause as the "Insurance Minimum Holding Clause". By that clause, Dover imposed an obligation on clients to reimburse their adviser for commissions or other income that had to be repaid by the adviser to an insurer if the client cancelled a risk insurance policy within two years. No such obligation is imposed on consumers by the Corporations Act or under the general law. By extracting that promise, Dover imposed a liability on clients which exceeded the obligations that would otherwise be imposed under the Corporations Act or the general law.

D.6 Client Protection Policy as at 9 and 16 January 2017

75 ASIC adduced in evidence a version of Dover's Client Protection Policy as at 9 and 16 January 2017. Each version contained each of the clauses extracted above in respect of the preceding versions of the policy.

D.7 Client Protection Policy as at 23 November 2017

76 The final version of Dover's Client Protection Policy adduced in evidence by ASIC was dated 23 November 2017. It contained each of the clauses from the preceding versions extracted above. In addition, section 4 of the policy included the following additional statements under the sub-heading "Acting on advice and delays in implementing advice":

> You are responsible for ensuring our advice to you is implemented on a timely basis notwithstanding you may have engaged us to implement it for you. You indemnify and release us from any claim for costs or losses connected to any delays in implementing the advice no matter what caused the delay or who is responsible for the delay.

77 ASIC referred to the statements as the "Delayed Advice Indemnity". By those statements, Dover purported to exclude liability for claims arising from any delay in implementing advice regardless of whether the client was responsible for the delay or the adviser was responsible for the delay. Again, no such exclusion applies to the obligations imposed on Dover pursuant to the Corporations Act or under the general law. By extracting that promise, Dover purported to exclude its liability to clients in a way that lessened clients' protections under the Corporations Act and the general law.

D.8 Number of clients who received the Client Protection Policy

78 Dover and Mr McMaster have admitted that, during the relevant period, the number of clients of Dover's authorised representatives who were provided with statements of advice with an electronic link to the Client Protection Policy was 19,402.

79 Despite that admission, the defendants contend that there is no evidence that any individual client clicked on the link to the Client Protection Policy and there is no admission or evidence that any individual client was sent a paper version of the policy. Those contentions are correct, as far as they go. However, I consider it open to infer, and I do infer, that at least some clients clicked on the link and some were sent a paper copy of the Client Protection Policy and that, as a consequence, some clients read the Client Protection Policy. I draw those inferences from the primary facts that have been established and on the basis of common experience. The primary facts include that:

(a) the Client Protection Policy was sent in conjunction with statements of advice which, of their nature, would have received attention from the recipients;

(b) the statements of advice gave prominence to the Client Protection Policy through the Contract Conditions Clause and the Acceptance Clause, and the accompanying Financial Services Guide also gave emphasis to the Client Protection Policy;

(c) the Client Protection Policy was sent to a large number of people (some 19,402) which was likely to include persons who have a degree of attentiveness to the terms on which the financial advice was provided; and

(d) amongst such a large group of people, there were likely to be some who prefer communications in paper form rather than electronic form.

80 Furthermore, for the reasons discussed below, I consider that the electronic provision of the Client Protection Form to clients constituted misleading and deceptive conduct even if the document was not electronically accessed and read by a client at the time it was received. The conduct of electronically providing the document to clients in conjunction with statements of advice enabling the client to file the document electronically is equivalent to sending a paper copy by post, enabling the client to file the document in paper form. In both cases, the client may not read the document immediately, but may file the document for later use if it becomes necessary. In my view, if the contents of the document are likely to mislead or deceive when read, a person has engaged in misleading or deceptive conduct by successfully providing the document to the client.

D.9 ASIC's intervention

81 On 22 March 2018, ASIC wrote to Mr McMaster informing him that ASIC believed that various clauses of Dover's Client Protection Policy were misleading or deceptive within the meaning of s 1041H of the Corporations Act or s 12DA of the ASIC Act. ASIC sought an undertaking from Dover to withdraw the policy and not to rely on the policy in any dispute with a current or former client of its authorised representatives.

82 On 27 March 2018, Dover gave the undertaking sought by ASIC.

83 In the ensuing weeks, ASIC and Dover negotiated a form of corrective publication to be made by Dover. ASIC and Dover agreed that Dover would send a notice of correction by email or letter to all clients that had been provided with a statement of advice during the relevant period and would prominently display the notice of correction on the homepage of Dover's website

for 60 days. The agreed notice of correction sent to current and former clients in mid-April 2018 was in the following form:

> Dear Name
>
> I am writing to you regarding advice previously provided by Dover.
>
> This advice included materials incorporated into the advice by a hyper-text link known as the Dover Client Protection Policy (the "Protection Policy").
>
> The Protection Policy has been withdrawn and replaced by the Dover Client Information Policy, with retrospective effect.
>
> The Protection Policy was deceptive because it contained certain provisions the effect of which were to avoid liability to compensate clients for any loss resulting from the advice provided.
>
> Dover does not and will not rely on these clauses in any dispute because they are unlawful and are voided by the financial services law and the general law.
>
> If you consider the advice provided to you has resulted in a financial loss you should seek independent legal advice or lodge a complaint with the Credit Industry Ombudsman and you should disregard the Protection Policy.
>
> Please do not hesitate to contact me should you require further information about this matter.
>
> Terry McMaster
>
> Director

D.10 Cancellation of Dover's AFSL

84 On 6 July 2018, Mr McMaster wrote to ASIC requesting the immediate cancellation of Dover's AFSL.

85 On 1 August 2018, ASIC gave notice to Dover of the cancellation of its AFSL with effect on 1 August 2018.

E. Dover's conduct and the statutory prohibitions

E.1 Overview of the parties' contentions

86 ASIC alleges that, each time the Client Protection Policy was provided to a client together with a statement of advice, Dover engaged in conduct that was "misleading or deceptive" or "likely to mislead or deceive" within the meaning of s 1041H of the Corporations Act and s 12DA(1) of the ASIC Act and/or made a "false or misleading representation" within the meaning of s 12DB(1)(i) of the ASIC Act.

87 ASIC contends that the Introductory Clause was false, misleading or deceptive because the Client Protection Policy did not ensure that clients received the maximum protection available

under the law. Rather, the policy contained numerous exclusions, limitations, restrictions and/or dilutions of clients rights pursuant to one or more of the:

(a) Authority Liability Exclusion;

(b) Statement of Advice Liability Exclusion;

(c) Insurance Liability Exclusion;

(d) Best Efforts Clause;

(e) Losses Liability Exclusion;

(f) Continued Retainer Clause;

(g) Investments Minimum Holding Clause;

(h) Ceased Engagement Exclusion;

(i) Underinsurance Exclusion;

(j) Insurance Minimum Holding Clause; and/or

(k) Delayed Advice Indemnity,

(collectively, the **Limiting Clauses**). In effect, the Client Protection Policy represented that the Limiting Clauses constituted the maximum protections available to clients under the law.

88 The defendants admit that the Introductory Clause in the Client Protection Policy was inaccurate because the Client Protection Policy did not set out the maximum protection available to clients of Dover's authorised representatives under the law. That admission is rightly made for the reasons explained in section D above. The Limiting Clauses, other than the Best Efforts Clause and the Continued Retainer Clause, purported to remove mandatory consumer protections afforded to clients under the Corporations Act, often in a perverse manner, and did not otherwise afford clients the maximum protections available at law.

89 However, the defendants contend that ASIC has failed to prove that Dover's conduct contravened the statutory prohibitions. The defendants advance six arguments in support of that contention, which were set out in section A above. Stated shortly, those arguments are:

(a) The relevant conduct, providing the Client Protection Policy to clients in conjunction with a statement of advice, involved a separate and individual communication with each client.

(b) It follows that the communication of the Client Protection Policy to clients was not a communication to a "class of persons" and the method of analysis described in *Campomar* is inapplicable to the present case.

(c) In cases involving an express untrue representation allegedly made to identified individuals, the plaintiff bears the onus of proving that the individuals were misled or deceived and there is no evidence that any individual client read the Client Protection Policy or was misled by the Client Protection Policy.

(d) There is also no evidence concerning the contents of the statements of advice that were provided to individual clients together with the Client Protection Policy and therefore the Court is unable to assess the Client Protection Policy in the context of the entire communication with each client.

(e) To the extent that the present case should be analysed through the "class of persons" lens, there is no evidence as to the characteristics of the clients who received the Client Protection Policy and, in the absence of such evidence, the Court is unable to undertake the task required of it as described in *Campomar*.

(f) The Introductory Clause in the Client Protection Policy was a statement of opinion, not a statement of fact and ASIC has failed to prove that that opinion was not honestly and reasonably held by Dover.

90 A number of those arguments concern matters of legal principle relating to the statutory prohibitions, particularly the necessity to prove that one or more recipients of the Client Protection Policy were in fact misled or deceived. It is convenient to consider first the applicable legal principles and the defendants' contentions concerning those principles, before considering the remaining arguments advanced by the defendants.

E.2 Applicable principles

91 Sections 1041H(1) of the Corporations Act and 12DA(1) of the ASIC Act are framed in very similar terms. Section 1041H(1) of the Corporations Act provides:

> A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

and s 12DA(1) of the ASIC Act provides:

> A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

92 The two provisions are in analogous terms and the same principles are applicable to both provisions: *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 at [4].

93 Section 12DB(1)(i) of the ASIC Act is framed in different terms. It provides:

> A person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services:
>
> …
>
> (i) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including an implied warranty under section 12ED);

94 It can be seen that ss 1041H and 12DA(1) prohibit conduct that is misleading or deceptive or likely to mislead or deceive, whereas s 12DB(1)(i) prohibits the making of a false or misleading representation. Conduct that contravenes ss 1041H and 12DA may involve, but need not involve, the making of a false or misleading representation: *Campbell* at [102] per Gummow, Hayne, Heydon and Kiefel JJ, referring with approval to *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [103] per McHugh J. In the present case, though, the allegations do concern the making of an allegedly false, misleading or deceptive representation in the form of the Introductory Clause in the Client Protection Policy.

95 Although ss 1041H and 12DA(1) take a different form to 12DB(1)(i), the prohibitions are similar in nature. Whilst s 12DB(1)(i) uses the phrase "false or misleading" rather than "misleading or deceptive", it has been said that there is no material difference in the two expressions: see *ACCC v Dukemaster Pty Ltd* [2009] FCA 682 at [14] per Gordon J; *ACCC v Coles Supermarkets Australia Pty Ltd* (2014) 317 ALR 73 at [40] per Allsop CJ; *Comite Interprofessionnel du Vin de Champagne v Powell* (2015) 330 ALR 67 at [170] per Beach J.

96 There is no dispute between the parties that the foregoing statutory provisions are applicable to the conduct involving the provision of the Client Protection Policy to clients in conjunction with statements of advice. The provision of statements of advice by Dover or its authorised representatives constituted the supply of a financial service, being financial product advice, for the purposes of both the Corporations Act (see ss 766A(1)(a) and 766B) and the ASIC Act (see ss 12BAB(1)(a) and (5)).

97 There is also no dispute between the parties that the conduct involving the provision of the Client Protection Policy to clients in conjunction with statements of advice was conduct of Dover. As outlined in section D above, Dover created the Client Protection Policy and

instructed its authorised representatives to provide it to clients with each statement of advice. Its conduct therefore directly brought about the provision to clients of the Client Protection Policy which contained the Introductory Clause. Further, under the general law of agency and pursuant to ss 917B and 917C of the Corporations Act, Dover is responsible for the conduct of its authorised representatives in providing the Client Protection Policy to clients.

98 The applicable principles concerning the statutory prohibition of misleading or deceptive conduct (and closely related prohibitions) in the Australian Consumer Law, the Corporations Act and the ASIC Act are well known. The central question is whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error (that is, to form an erroneous assumption or conclusion about some fact or matter): *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 (***Puxu***) at 198 per Gibbs CJ; *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 (***Taco Bell***) at 200; *Campomar* at [98]; *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640 (***TPG Internet***) at [39] per French CJ, Crennan, Bell and Keane JJ; *Campbell* at [25] per French CJ. A number of subsidiary principles, directed to the central question, have been developed:

(a) First, conduct is likely to mislead or deceive if there is a real or not remote chance or possibility of it doing so: see *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 (***Global Sportsman***) at 87; *Noone (Director of Consumer Affairs Victoria) v Operation Smile (Australia) Inc* (2012) 38 VR 569 at [60] per Nettle JA (Warren CJ and Cavanough AJA agreeing at [33]).

(b) Second, it is not necessary to prove an intention to mislead or deceive: *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228 per Stephen J (with whom Barwick CJ and Jacobs J agreed) and at 234 per Murphy J; *Puxu* at 197 per Gibbs CJ.

(c) Third, it is unnecessary to prove that the conduct in question actually deceived or misled anyone: *Puxu* at 198 per Gibbs CJ. Evidence that a person has in fact formed an erroneous conclusion is admissible and may be persuasive but is not essential. Such evidence does not itself establish that conduct is misleading or deceptive within the meaning of the statute. The question whether conduct is misleading or deceptive is objective and the Court must determine the question for itself: see *Taco Bell* at 202 per Deane and Fitzgerald JJ.

(d) Fourth, it is not sufficient if the conduct merely causes confusion: *Puxu* at 198 per Gibbs CJ and 209-210 per Mason J; *Taco Bell* at 202 per Deane and Fitzgerald JJ; *Campomar* at [106].

99 In assessing whether conduct is likely to mislead or deceive, the courts have distinguished between two broad categories of conduct, being conduct that is directed to the public generally or a section of the public, and conduct that is directed to an identified individual. As explained by the High Court in *Campomar*, the question whether conduct in the former category is likely to mislead or deceive has to be approached at a level of abstraction, where the Court must consider the likely characteristics of the persons who comprise the relevant class of persons to whom the conduct is directed and consider the likely effect of the conduct on ordinary or reasonable members of the class, disregarding reactions that might be regarded as extreme or fanciful (at [101]-[105]). In *Google Inc v ACCC* (2013) 249 CLR 435, French CJ and Crennan and Kiefel JJ (as her Honour then was) confirmed that, in assessing the effect of conduct on a class of persons such as consumers who may range from the gullible to the astute, the Court must consider whether the "ordinary" or "reasonable" members of that class would be misled or deceived (at [7]). In the case of conduct directed to an identified individual, it is unnecessary to approach the question at an abstract level; the Court is able to assess whether the conduct is likely to mislead or deceive in light of the objective circumstances, including the known characteristics of the individual concerned. However, in both cases, the relevant question is objective: whether the conduct has a sufficient tendency to induce error. Even in the case of an express representation to an identified individual, it is not necessary (for the purposes of establishing liability) to show that the individual was in fact misled. As observed by French CJ in *Campbell* at [25]:

> Characterisation is a task that generally requires consideration of whether the impugned conduct viewed as a whole has a tendency to lead a person into error. It may be undertaken by reference to the public or a relevant section of the public. In cases of misleading or deceptive conduct analogous to passing off and involving reputational issues, the relevant section of the public may be defined, according to the nature of the conduct, by geographical distribution, age or some other common attribute or interest. On the other hand, characterisation may be undertaken in the context of commercial negotiations between individuals. In either case it involves consideration of a notional cause and effect relationship between the conduct and the state of mind of the relevant person or class of persons. The test is necessarily objective. (citations omitted)

100 The question whether conduct is misleading or deceptive, and thereby contravenes the statutory prohibition, is logically anterior to the question whether any person has suffered loss or damage

by reason of the conduct: *Campbell* at [24] per French CJ; *TPG Internet* at [49]. As observed by French CJ in *Campbell* (at [28]):

> Determination of the causation of loss or damage may require account to be taken of subjective factors relating to a particular person's reaction to conduct found to be misleading or deceptive or likely to mislead or deceive. A misstatement of fact may be misleading or deceptive in the sense that it would have a tendency to lead anyone into error. However, it may be disbelieved by its addressee. In that event the misstatement would not ordinarily be causative of any loss or damage flowing from the subsequent conduct of the addressee.

101 Similarly, where proceedings are brought by an enforcement agency, the Court has frequently imposed pecuniary penalties and other forms of relief for contraventions of the prohibition of misleading or deceptive conduct while expressly recognising that the conduct may not have caused loss: see for example *Singtel Optus Pty Ltd v ACCC* (2012) 287 ALR 249 at [57]; *ASIC v GE Capital Finance Australia* [2014] FCA 701 at [90]; *ASIC v Huntley Management Ltd* (2017) 122 ACSR 163; [2017] 35 ACLC 17-035; FCA 770 at [36]-[39].

E.3 Consideration of the defendants' arguments

102 The defendants' first argument, that the relevant conduct (providing the Client Protection Policy to clients in conjunction with a statement of advice) involved a separate and individual communication with each client, can be accepted as far as it goes. However, it does not follow that the communication of the Client Protection Policy was not to a "class of persons", nor that the method of analysis described in *Campomar* is inapplicable to the present case. Further, and in any event, the statutory prohibition of misleading or deceptive conduct does not draw any distinction between communications made to individuals and those made to groups such that, in the former case but not the latter, the plaintiff must show that the individuals were misled or deceived.

103 The defendants' second and third arguments about the purported difference in approach in cases involving communications to a group of persons and communications to individuals is based on a misunderstanding of what was decided in *Campomar* and related cases. Three points can be made. First, it can be observed that the statutory prohibitions against misleading or deceptive conduct are framed in simple terms and draw no distinction between communications to a group of persons and communications to individuals. The statutory provisions do not contemplate that a different legal test or standard should be applied depending on whether conduct involves a communication to a group of persons or to individuals, such that the latter case requires proof that the individual concerned was misled. Second, and as referred to above,

the central issue raised by the statutory prohibitions is whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error. Conduct is misleading or deceptive or likely to mislead or deceive if it has that *tendency*; it is not necessary to show that the conduct has had that effect (that is, that a person has in fact been misled). Third, *Campomar* explains that proof of that *tendency* will often differ depending on whether the conduct involves a communication to a group of persons or a communication to individuals. The High Court referred with approval (at [100]) to the observations of Deane and Fitzgerald JJ in *Taco Bell* (at 202) that, in cases involving express untrue representations made to identified individuals, the process of deciding whether the conduct was misleading or deceptive may be direct or uncomplicated. It was not suggested, however, that it was necessary to show that the individual concerned was actually misled. The High Court contrasted such cases with cases in which a representation is made to a wider group of persons, including the public or a section of it. The Court observed (at [101]) that in such cases, the sufficiency of the nexus between the conduct and the likelihood of misconception and error must be approached at a level of abstraction. The contrast drawn by the Court was not to the effect that, in the former case, it was necessary to prove that individuals were misled whereas, in the latter case, that was unnecessary. In both cases, it was only necessary to prove the sufficiency of the tendency of the conduct to lead people into error. However, proof of that tendency in the case of communications to a group is necessarily undertaken at a level of abstraction that is not present in the case of communications to an individual.

104 In support of their arguments, the defendants placed reliance on the statements of French CJ in *Campbell* at [26]-[28]. It is important to note that *Campbell* was an action for the recovery of loss and damage. Ultimately, the issues in dispute concerned causation of loss and damage and, in that case, whether the plaintiff was misled and suffered loss as a result. Understood in that context, nothing said by French CJ (at [26]-[28]) supports the defendants' arguments. At [26], his Honour discusses the practical distinction between the approach to characterising conduct as misleading or deceptive when the public is involved and where the conduct involves dealings between individuals. In the latter case, the state of knowledge of the individual may be relevant to the assessment of whether conduct is to be characterised as misleading or deceptive. That is because conduct may take on a different complexion depending on the course of dealings between individuals and mutual understanding about matters. His Honour does not suggest that a different legal test is applicable in the case of a communication to an individual such that, in order to prove that conduct is misleading or deceptive, it is necessary to prove that

the individual was misled. His Honour's discussion at [27] and [28] concerns the proof of loss and damage by reason of the misleading conduct, which will often involve proof that the individual concerned was misled and suffered loss by acting in reliance on the misleading conduct. Those paragraphs provide no assistance to the defendants in this case.

105 The defendants' argument that there is no evidence that any individual client clicked on the electronic link to the Client Protection Policy or read the policy should be rejected for two reasons. First, for the reasons explained at [79] above, I infer that it is likely that a number of clients downloaded an electronic copy of the Client Protection Policy or received a paper copy and read the document or at least the Introductory Clause which would have assured them that the terms gave them the maximum protection available at law. Second, and in any event, I do not consider that it is necessary for ASIC to prove that one or more of the individual recipients of the Client Protection Policy read the policy. The misleading or deceptive conduct was complete, and the false or misleading representation was made, when Dover, through its authorised representatives, communicated the Client Protection Policy to clients in a manner that would be expected to bring the document to their attention: cf *Thompson v Riley McKay Pty Ltd (No 2)* (1980) 29 ALR 267 at 273 per Franki J and 276 per Deane J. In that case, which concerned a criminal prosecution for a contravention of s 53(a) of the *Trade Practices Act 1974* (Cth) (the predecessor of s 29(1)(a) of the Australian Consumer Law and s 12DA(1) of the ASIC Act), Deane J observed (at 276):

> It is implicit in the ordinary use of the word "represent" that there be an intended representee, to whom the relevant representation is directed. That intended representee may be an identified person, as in the case of a representation made to a particular person in a letter, or unidentified, as is commonly the case with a representation made in an advertisement to be disseminated by the mass media. There is not, however, implicit in the word "represent" any requirement that the representation actually reach, or be understood by, the intended representee. The act of representing is complete once the subject matter is irrevocably set forth or disseminated upon the course which is intended to lead to the intended representee or representees.

106 The defendants' fourth argument is that there is no evidence concerning the contents of the statements of advice that were provided to individual clients together with the Client Protection Policy. Therefore, the Court is unable to assess the Client Protection Policy in the context of the entire communication with the client. The defendants argue that the present circumstances are analogous to those considered by Barker J in *Breast Check*. Specifically, the defendants rely on his Honour's finding (at [101]) that, where each customer of Breast Check received a separate communication, at a separate point in time, following the provision of a breast imaging service to that particular customer that included a breast health report tailored to their particular

circumstances, there was no single piece of conduct or representation made to all members of a class of persons.

107 In my view, the facts of this case are not analogous to those considered by Barker J in *Breast Check*. First, the relevant conduct in the present case involved the communication of a standard form document to a large number of people who were clients of Dover or its authorised representatives. Dover required its authorised representatives to send the Client Protection Policy to clients with each statement of advice. It can be accepted that each statement of advice was personal and individual to each client, but the applicable terms and conditions governing the contract between the adviser and the client were specified in the Client Protection Policy, which was in a standard form. Dover required its authorised representatives to include within each statement of advice a standardised provision (the Contract Conditions Clause) that had the effect of incorporating the Client Protection Policy as part of the contract between the adviser and the client. Dover instructed its authorised representatives to use a standardised Acceptance Clause when communicating a statement of advice to clients which required clients to confirm that they had accepted the additional conditions in Dover's Client Protection Policy. Second, and contrary to the defendants' argument, there is evidence before the Court concerning the format of the statements of advice that were provided to clients. Mr McMaster's emails of 25 and 29 September 2015 each attached a sample statement of advice, the latter being based on an actual statement of advice that had been given to a client but the personal details had been altered. There is nothing in those sample statements of advice that in any way qualifies or modifies the Client Protection Policy. Further, there is no reason to infer that a statement of advice would attempt to qualify or modify the Client Protection Policy or would be likely to do so. The evidence establishes that the Client Protection Policy was a standard form document required to be sent to clients together with each statement of advice. The Client Protection Policy served a different purpose and function to the statements of advice; it set out the terms and conditions of the contract between the adviser and the client. Having regard to the form and content of the Client Protection Policy, and the standard clauses by which it was required to be incorporated into the statement of advice, I do not accept the defendants' submission that the statement of advice may have qualified or overridden the Client Protection Policy. Given the evidence adduced by ASIC, the evidentiary onus shifted to the defendants to prove that, in individual circumstances, a statement of advice may have overridden or qualified the Client Protection Policy. No such evidence was adduced by the defendants.

108 The mode of analysis described by the High Court in *Campomar* is an appropriate method by which to assess whether Dover's conduct was misleading or deceptive. The relevant communication was in a standard form. The persons to whom the Client Protection Policy was sent were large in number. They share the common characteristic of being retail clients of Dover and its authorised representatives, although they are likely to vary in age, gender, wealth and education. It is both necessary and appropriate, in assessing Dover's conduct by reference to the statutory prohibitions, to consider the effect of the conduct on an ordinary or reasonable member of that class of persons. As observed by Finkelstein J in *.au Domain Administration Ltd v Domain Names Australia Pty Ltd* (2004) 207 ALR 521 (appeal dismissed in *Domain Names Australia Pty Ltd v .au Domain Administration Ltd* (2004) 139 FCR 215) at [18]:

> There can be no doubt that when the impeached conduct is directed towards an indeterminate group or to a group defined by general or collective criteria the case should be treated as one involving a representation to the public at large or to a section or class of consumer. It seems that the same approach should be followed when the case involves a representation to an identifiable group and the plaintiff is alleging not that he was misled but that members of the group (whether great or small in number) were misled by the conduct. In *Elders Trustee and Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193, 241 Gummow J indicated that he would treat this type of claim as a "representation to the public" case. This approach, which is the approach I propose to adopt, invites attention to the nature of the claim and not the identity of the person to whom the representation is directed.

109 The defendants' fifth argument that there was no evidence as to the characteristics of the clients who received the Client Protection Policy, and that as a consequence the Court is unable to undertake the task required of it as described in *Campomar*, should also be rejected. The evidence adduced by ASIC establishes the general context in which the policy was provided to clients. First, Dover held an Australian financial services licence that authorised it to provide financial product advice for a range of standard financial products described in the licence and to deal in a financial product on behalf of another person, again in respect of a range of standard financial products. Second, the defendants admitted that the Client Protection Policy was sent to some 19,402 clients together with a statement of advice in the relevant period. I infer from that fact that the clients of Dover and its authorised representatives were likely to be individuals rather than businesses. Third, the fact that the Client Protection Policy was sent with statements of advice indicates that the recipients were retail clients for the purposes of the Corporations Act. A person is not a retail client if the client is a sophisticated investor in the sense of having previous experience in using financial services and investing in financial products. Accordingly, I infer that the recipients of the Client Protection Policy were not sophisticated investors but ordinary members of the public who needed and sought financial advice. In my

view, the foregoing facts are sufficient to assess whether the provision of the Client Protection Policy involved misleading or deceptive conduct.

110 Finally, I reject the defendants' sixth argument that the Introductory Clause in the Client Protection Policy was a statement of opinion, not a statement of fact, and that ASIC had to show that that opinion was not honestly and reasonably held. In the context of the law prohibiting misleading and deceptive conduct, characterising a statement as one of fact or opinion is part of the task of determining whether the statement is likely to mislead or deceive. Whether a statement should be characterised as one of fact or opinion depends upon the words used and what is likely to be understood by the recipients of the communication: *Tobacco Institute of Australia Limited v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1 at 26-27 per Foster J and 46-47 per Hill J. In that case, Hill J observed:

> No case will forward a guide to any other case, since it must essentially be a question of fact whether a particular formulation of words expresses merely an opinion or a statement of fact. However, two observations may be made. First, the subjective purpose or motivation of the maker of the statement will not be of much significance. It is the reader's perception of the maker's intention which will ordinarily be the significant matter. The question will generally be resolved by looking to the persons to whom the statement was directed and asking whether any members of that class of persons would reasonably understand the statement to be one of fact or of opinion.
>
> Where, as here, the statement is directed to the public at large, it must be borne in mind that the class of persons will include the intelligent and the less intelligent, the informed and the less informed. The fact that some members of the class may perceive the statement as one of opinion will not avail a respondent if a not insignificant class of persons could reasonably be expected to perceive it as a statement of fact.
>
> Secondly, a statement will most usually be seen as a statement of fact if it is one which can be measured against an objective criterion. Thus, generally, where no objective criterion exists, so that of necessity what is said must depend upon judgment or opinion, the statement will be seen not as a statement of fact but as one of opinion.

111 The same approach was taken by the plurality in *Forrest v ASIC* (2012) 247 CLR 486 (at [31] and [33]):

> …it is ultimately unprofitable to attempt to classify the statement according to some taxonomy, no matter whether that taxonomy adopts as its relevant classes fact and opinion, fact and law, or some mixture of these classes. It is necessary instead to examine more closely and identify more precisely what it is that the impugned statements conveyed to their audience.

112 If a statement is likely to be understood by recipients as one of opinion, it follows that the recipients would understand that the statement only reflects the speaker's belief in the statement, not that the matter stated is necessarily true. In some circumstances, a statement of

opinion might also convey an implied representation that the speaker had reasonable grounds for making the statement, but that will not always be the case: *Global Sportsman* at 88.

113 In an abstract sense, a wide range of statements might be characterised as opinions, not facts. This includes statements about scientific matters, where a statement may reflect a widely accepted view about a matter but, strictly speaking, the statement is one of opinion. It is equally true that, at a certain level of abstraction, every statement about the law or legal rights can be characterised as an opinion. Ultimately, though, the relevant question for the purposes of the prohibition against misleading and deceptive conduct is: what would be understood by the recipient of the communication? In my view, clients receiving the Client Protection Policy would be likely to understand the Introductory Clause as a statement of fact for the following reasons:

(a) the statement is made in emphatic terms, and is not qualified by express words of opinion or belief;

(b) the statement is contained in a contractual or quasi-contractual document, not in an advisory document;

(c) the statement is made by a commercial supplier of financial services, not by a lawyer; and

(d) the statement is received by a retail client seeking financial advice.

114 In those circumstances, I consider that a reasonable recipient of the Client Protection Policy would understand the statement, that the policy sets out a number of important consumer protections designed to ensure every Dover client gets the maximum protection available under the law, to be a statement of fact and not merely a statement as to Dover's belief.

E.4 The Client Protection Policy was false or misleading

115 In my view, the Introductory Clause contained in the Client Protection Policy was "misleading or deceptive" or "likely to mislead or deceive" within the meaning of s 1041H of the Corporations Act and s 12DA(1) of the ASIC Act and a "false or misleading representation" within the meaning of s 12DB(1)(i) of the ASIC Act. For the reasons explained in section D above, the Introductory Clause was false, misleading or deceptive because the Client Protection Policy did not ensure that clients received the maximum protection available under the law. Rather, the Limiting Clauses in the policy (other than the Best Efforts Clause and the Continued Retainer Clause) purported to remove or dilute the protections that clients would otherwise

have under the law. In effect, the Introductory Clause represented that the Limiting Clauses constituted the maximum protections available to clients under the law when that was not the case.

116 As noted earlier, there is no dispute between the parties that the conduct involving the provision of the Client Protection Policy to clients in conjunction with statements of advice is conduct of Dover. It follows that Dover engaged in conduct that was "misleading or deceptive" or "likely to mislead or deceive" within the meaning of s 1041H of the Corporations Act and s 12DA(1) of the ASIC Act, and made a "false or misleading representation" within the meaning of s 12DB(1)(i) of the ASIC Act. I also accept ASIC's submission that, on each occasion a statement of advice was given to a client along with the Client Protection Policy, there was a separate contravention of the statutory prohibitions. That is because there was a separate communication to a client that was misleading: *ACCC v Hillside (Australia New Media) Pty Ltd trading as Bet365 (No 2)* [2016] FCA 698 at [12]-[20]. The evidence establishes that some 19,402 clients received the Client Protection Policy in conjunction with a statement of advice from Dover's authorised representatives during the relevant period.

F. Mr McMaster's liability for knowing involvement

117 As noted earlier, ASIC also seeks declaratory relief and civil pecuniary penalties against Mr McMaster on the basis that he was knowingly concerned in Dover's false, misleading or deceptive conduct. It is necessary to identify the statutory provisions (in force at the relevant time) in respect of which ASIC seeks the declaratory relief, and pursuant to which ASIC seeks pecuniary penalties, against Mr McMaster.

118 A contravention of s 1041H of the Corporations Act does not attract pecuniary penalties, but the contravening party, and a person involved in the contravention, may be liable for loss or damage caused by the conduct under s 1041I. The expression "a person involved in the contravention" is defined by s 79 of the Corporations Act to include a person who is knowingly concerned in the contravention. Accordingly, I understand ASIC to be seeking a declaration that Mr McMaster was knowingly concerned in Dover's contravention of s 1041H, within the meaning of s 79 of the Corporations Act (and is thereby a person involved in the contravention for the purposes of s 1041I of the Corporations Act).

119 Similarly, a contravention of s 12DA of the ASIC Act does not attract pecuniary penalties, but the contravening party, and a person involved in the contravention, may be liable for loss or damage caused by the conduct under s 12GF. The expression "a person involved in the

contravention" in s 12GF takes its meaning from s 79 of the Corporations Act (by reason of s 5(3) of the ASIC Act) and therefore includes a person who is knowingly concerned in the contravention. Accordingly, I understand ASIC to be seeking a declaration that Mr McMaster was knowingly concerned in Dover's contravention of s 12DA, within the meaning of s 79 of the Corporations Act (and is thereby a person involved in the contravention for the purposes of s 12GF of the ASIC Act).

120 A contravention of s 12DB(1)(i) of the ASIC Act attracts pecuniary penalties. Under s 12GBA, the Court may order the contravening party and (amongst others) a person knowingly concerned in the contravention to pay a pecuniary penalty. Accordingly, I understand ASIC to be seeking a declaration that Mr McMaster was knowingly concerned in Dover's contravention of s 12DB(1)(i) within the meaning of s 12GBA(1)(e) of the ASIC Act.

121 The phrase "knowingly concerned in" has the same meaning in each of the above statutory provisions. A person will be knowingly concerned in a contravention if that person was an intentional participant in the contravention, with knowledge of the essential elements constituting the contravention at the time of the contravention: *Yorke v Lucas* (1985) 158 CLR 661 at 670.

122 Mr McMaster has conceded that, if ASIC succeeds in establishing that Dover contravened s 1041H of the Corporations Act, s 12DA(1) of the ASIC Act and/or s 12DB(1)(i) of the ASIC Act, ASIC will also succeed in establishing that Mr McMaster was knowingly concerned in the contraventions. As a question of fact, the concession has been rightly made. During the relevant period, Mr McMaster was Dover's sole director and company secretary. By his response to ASIC's amended concise statement, Mr McMaster accepts that, during the relevant period, he was responsible for:

(a) determining the content of the Client Protection Policy;

(b) approving the content of the Client Protection Policy; and/or

(c) requiring Dover's authorised representatives to incorporate the Client Protection Policy into, or provide the Client Protection Policy with, the statements of advice provided to clients.

123 Accordingly, I also find, as a question of fact, that Mr McMaster was knowingly concerned in Dover's contraventions of:

(a) section 1041H of the Corporations Act, within the meaning of s 79 of the Corporations Act for the purposes of s 1041I of the Corporations Act;

(b) section 12DA(1) of the ASIC Act, within the meaning of s 79 of the Corporations Act for the purposes of s 12GF of the ASIC Act; and

(c) section 12DB(1)(i) of the ASIC Act, within the meaning of s 12GBA(1)(e) of the ASIC Act.

124 However, for the reasons explained in the following section, I am not satisfied that it is appropriate for the Court to make declarations in those terms.

G. Declarations and other orders

125 In the liability phase of the proceeding, ASIC seeks:

(a) pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**) or s 1101B(1)(a) of the Corporations Act, declarations that Dover has contravened s 1041H of the Corporations Act, s 12DA(1) of the ASIC Act and s 12DB(1)(i) of the ASIC Act; and

(b) pursuant to s 21 of the Federal Court Act, declarations that Mr McMaster was knowingly concerned in Dover's contraventions of s 1041H of the Corporations Act, s 12DA(1) of the ASIC Act and s 12DB(1)(i) of the ASIC Act.

126 On the assumption that ASIC was successful in establishing liability, the defendants did not oppose the making of declaratory orders at the conclusion of the liability hearing. However, the parties agreed that the determination of any pecuniary penalty would be the subject of a further hearing.

127 Before making a declaration, three requirements must be satisfied: the issue to be decided must not be hypothetical or theoretical; the applicant must have a real interest in raising it; and there must be a proper contradictor: *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437-8.

128 I am satisfied that these three requirements are met in relation to the declarations concerning Dover and that it would be appropriate for the Court to make the declarations sought. The contravening conduct was widespread and there is a public interest associated with the Court declaring the conduct to be unlawful.

129 For the same reasons, I am also satisfied that the three requirements are met in relation to the declaration that Mr McMaster was knowingly concerned in Dover's contravention of s 12DB(1)(i) of the ASIC Act, within the meaning of s 12GBA(1)(e) of the ASIC Act. There is utility in the Court making the declaration in circumstances where ASIC is seeking a pecuniary penalty against Mr McMaster under s 12GBA(1)(e). However, I am not presently satisfied that there is a proper basis for the Court to make declarations that Mr McMaster was knowingly concerned in Dover's contraventions of s 1041H or s 12DA in circumstances where ASIC is not seeking remedial relief under any statutory provision that requires such a finding.

130 In light of the foregoing observations, I will hear further from the parties as to the forms of declaration that can and should be made by the Court and as to orders timetabling a further hearing in respect of pecuniary penalties. I will make orders for the parties to file agreed orders reflecting these reasons or, if agreement cannot be reached, to file separate proposed orders accompanied by a short written submission.

I certify that the preceding one hundred and thirty (130) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O'Bryan.

Associate:

Dated: 22 November 2019