FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Westpac Banking Corporation [2019] FCA 2147

JUDGMENT SUMMARY

In accordance with the practice of the Federal Court in cases of public interest, the following summary has been prepared to accompany the orders made today. This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment which will be available on the internet at the Court's website. This summary is also available there.

This case concerns the liability of **Westpac** Banking Corporation for the failure by one of its representatives to comply with the "best interests obligations" in Div 2 of Pt 7.7A of the *Corporations **Act** 2001* (Cth) when he provided personal advice concerning financial products to certain retail clients.

In addition to its banking business, Westpac engaged in a financial services business which included the provision of advice to individuals about financial products, including insurance and superannuation products. Between 2001 and late 2014, Westpac employed the services of Mr Sudhir **Sinha** in its financial services business. The relationship between Westpac and Mr Sinha was structured so that Mr Sinha was able to share in the commissions and fees earned or derived when, as a result of his advice or recommendations, clients signed-up for financial products in which Westpac or associated companies had an interest. As the facts of this case reveal, that rather cosy arrangement turned out to be fruitful for both Mr Sinha and Westpac, but not always for their clients.

This case focussed on advice and recommendations that Mr Sinha, as a representative of Westpac, gave to four couples during 2013 and 2014. As a result of the advice and recommendations given by Mr Sinha, each of the couples altered their existing superannuation or insurance arrangements and acquired interests in or took out superannuation or insurance products or policies with companies or entities associated with Westpac. Both Westpac or its

associated companies and, indirectly, Mr Sinha earned not insubstantial fees and commissions from the implementation of Mr Sinha's recommendations.

Unfortunately for the clients, it was subsequently discovered that the recommendations that Mr Sinha made, and the circumstances in which he made them, were deficient and defective, both as a matter of process and in substance. That should not have come as a complete surprise to Westpac. That is because Mr Sinha's less than satisfactory conduct as a financial adviser had previously come to the attention of certain senior officers of Westpac as a result of various internal compliance reviews, audits or investigations. In any event, upon investigation and scrutiny of the advice and recommendations that Mr Sinha had provided to the four client couples in question in this case, it was ascertained that Mr Sinha had failed to act in the best interests of those clients, had provided advice which was inappropriate to them and, in circumstances where there was an obvious conflict between his interests and the interests of the clients, had failed to give priority to the clients' interests. Mr Sinha had also failed to warn some of the cleints that his advice was, or may have been, based on incomplete or inaccurate information. Mr Sinha's services were eventually terminated by Westpac in late 2014.

The Australian Securities and Investments **Commission** alleged that, in providing the advice and recommendations to the four couples in question, Mr Sinha had contravened ss 961B, 961G, 961H and 961J of the Act and that Westpac, as the "responsible licensee" in relation to Mr Sinha's contraventions, had contravened subs 961K(2) of the Act. The Commission also alleged that Westpac had contravened s 912A of the Act because, as the holder of a financial services licence, it had failed to do all things necessary to ensure that the financial services covered by the licence were provided efficiently, honestly and fairly and had failed to comply with the "financial services laws", which include s 961K of the Act.

Westpac admitted that it had contravened those various provisions of the Act as alleged by the Commission. It did not dispute that declarations should be made in respect of those contraventions. Nor did it dispute that it was liable to pay civil penalties in respect of its contraventions of subs 961K(2) of the Act. There was, however, a dispute between the Commission and Westpac concerning the number of those contraventions. For the reasons given in the judgment, I have resolved that dispute in favour of the Commission and found that there were 22 contraventions of subs 961K(2 by Westpac, each of which corresponds with a separate contravention of ss 961B, 961G, 961H or 961J by Mr Sinha.

There was also a dispute between the Commission and Westpac concerning the particulars of one of its contravention of s 912A of the Act. The Commission contended that from 1 July 2013, Westpac had actual knowledge that there was a significant risk that Mr Sinha would not comply with the best interests obligations in Div 2 of Pt 7.7A of the Act. Westpac contended that the facts and evidence revealed only that it ought reasonably to have known of that risk. For the reasons given in the judgment, I have resolved that dispute in favour of Westpac. The evidence did not support an inference or conclusion that any senior officer of Westpac, whose knowledge could be imputed to Westpac, actually knew that Mr Sinha presented such a risk in July 2013 or thereafter, at least until Mr Sinha was suspended and in due course dismissed in late 2014.

The primary task for the Court in this matter was the fixing of appropriate pecuniary penalties for Westpac's contraventions of subs 961K(2) of the Act. It was necessary to fix separate penalties in relation to each separate contravention of subs 961K(2) of the Act having regard to the accepted principles concerning the fixing of civil or pecuniary penalties. Those principles include the so-called course of conduct principle, which requires the Court to consider whether multiple contraventions of a statutory provision arose out of a single course of conduct, or perhaps a number of different courses of conduct, and if so, to adjust the penalties accordingly. Having determined the appropriate penalties for each contravention, the Court is then required to step back and consider whether the aggregate penalty is just and appropriate.

For the reasons explained in the judgment, I have decided that the appropriate civil penalties for Westpac's contraventions of subs 961K(2) range from $300,000 to $550,000, depending on the particular facts and circumstances of the underlying contraventions by Mr Sinha and the application of the course of conduct principle. The total or aggregate pecuniary penalty in respect of all the contraventions is $9,150,000. I will also make declarations in respect of each of Westpac's contraventions of both subs 961K(2) and s 912A of the Act. The terms of those declarations are set out in the judgment and the accompanying orders.

JUSTICE MICHAEL WIGNEY

19 December 2019