

NOTICE OF FILING

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Details of Filing

Document Lodged: Concise Statement
File Number: VID552/2020
File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v BT FUNDS MANAGEMENT LIMITED & ANOR
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagos".

Dated: 20/08/2020 11:33:35 AM AEST

Registrar

Important Information

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

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Concise Statement

No. of 2020

Federal Court of Australia
 District Registry: Victoria
 Division: General

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

BT FUNDS MANAGEMENT LIMITED AND ANOTHER

Defendants

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. BT Funds Management Limited (**BT**) is the wealth management and insurance arm of the Westpac Banking Corporation (**Westpac**) group, and it is a registered superannuation entity. Asgard Capital Management Limited (**Asgard**) is also a member of the Westpac group, and it administers and provides custodial services for a significant number of investment and superannuation accounts. BT and Asgard offered financial services including “investor directed portfolio service” (**IDPS**) products and superannuation products. Between September 2014 and August 2017, Asgard charged customers fees for financial advice after requests were made for customers’ financial advisers to be removed from their product accounts, and after the advisers ceased providing advice. Asgard retained those fees as revenue.
2. The adviser fees were charged on eight different financial products, as set out in the Annexure to this Concise Statement, being one IDPS product issued and administered by Asgard, and seven superannuation products for which BT was the trustee and Asgard provided custodial and administration services (**Affected Products**). The fees were incorrectly charged on 2,643 occasions to 404 different customers in relation to whom a request had been made for the removal of their financial adviser (**Affected Customers**). The total amount of incorrectly charged fees was \$130,006.

Background to the conduct

3. The IDPS product and most of the affected superannuation products operated under a “wrap platform” structure, pursuant to which customers direct their investments. The products were established to be used with a financial adviser, and transactions on customer accounts were usually carried out by a financial adviser linked to the customer’s account. BT and Asgard did not provide financial advice to customers as part of the services provided for the Affected Products. Customers had separate agreements with their financial advisers for the provision of financial advice and for any fees payable for that advice.
4. The fees deducted on a monthly basis by Asgard from customer accounts for each Affected Product included (a) an administration fee for the administration services provided in relation to the account which was retained by Asgard (sometimes referred to as a management fee); and (b) an adviser fee for ongoing financial advice (where applicable). Any adviser fee was negotiated between the customer and their financial adviser, and deducted by Asgard from the customer’s account to be passed on in full to the third party financial adviser.

Filed on behalf of (name & role of party)	Australian Securities and Investments Commission, the Plaintiff		
Prepared by (name of person/lawyer)	Tom Jarvis, lawyer for the plaintiff		
Law firm (if applicable)	Johnson Winter & Slattery		
Tel	+613 8611 1333	Fax	+613 8611 1300
Email	tom.jarvis@jws.com.au		
Address for service (include state and postcode)	c/- Johnson Winter & Slattery, level 34, 55 Collins Street, Melbourne VIC 3000		
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5. Customers who no longer wanted financial advice in connection with the product were able to remove the linked financial adviser from their account, following which customers were referred to by Asgard as “previously advised clients” (**PACs**). To become a PAC a customer was required to complete and submit a form to Asgard. A customer could also become a PAC by an internal request initiated by BT or Westpac to remove an adviser from a customer account. Information for the Affected Products about operating the accounts without an adviser stated that “*as a result of your financial adviser being removed from your account, all adviser fees (if applicable) will be reduced to zero in respect of your account*”. Those documents also stated that if a customer were to become a PAC, the customer may lose the benefit of any lower administration fees negotiated by their financial adviser with Asgard.

Overcharging conduct

6. Asgard implemented new processes from 1 July 2014 for processing requests from customers to remove their financial advisers across the Affected Products. Under the new PAC process, upon receipt of a completed customer request form or internal request, Asgard would remove the linked adviser from the customer’s account; the client would be linked to a “PAC” adviser code; and any adviser fees were to be reduced to zero.
7. Asgard had two systems in which adviser fees could be changed: AdviserNET and “Application For Service 2” (**AFS2**). However, the AFS2 system could not process changes to ongoing fees for “Infinity” branded products. AFS2 could process changes to upfront fees for Infinity branded products, and it could process changes to ongoing and upfront fees for other products.
8. Asgard outsourced part of the PAC process (including the process to reduce fees to zero) to a third party services provider, Genpact Australia Pty Ltd, which conducted the process offshore. However, Asgard only provided Genpact with access to the AFS2 system. Accordingly, for all requests in relation to customers of Infinity branded products to remove their financial adviser which were processed by Genpact, the ongoing adviser fees were not reduced to zero. Of the Affected Customers, 397 had Infinity branded products (see Annexure).
9. Of the remaining 11 Affected Customers, the failure to reduce adviser-related fees to zero following a request to remove the financial adviser was due to unrelated human error.
10. Prior to 1 July 2014, Asgard also made a coding change to its fee system. The coding change was intended to apply to other products, but it erroneously also applied to the Affected Products. The effect of the coding change was that when a linked adviser was removed from an Affected Product account and the fees were removed (due to the matters in paragraph 7 to 9 above), an amount equal to the adviser fee was added to the administration fee.
11. By reason of these matters, following a request to remove a financial adviser, Asgard continued to deduct the amount of the adviser fee from Affected Customers’ accounts, and Asgard retained the amount as revenue. On six occasions, for four customers, Asgard sold down customers’ investments to pay the adviser fees. Asgard had no accounting controls which identified the receipt of this additional revenue to which it was not entitled.
12. The coding error also had consequences for the information BT and Asgard provided to Affected Customers about their accounts and fees. Customers of the Affected Products received half-yearly or annual hard copy account statements, and at any time could access an online portal with their account details called “InvestorOnline” (together, **Account Statements**). BT issued and Asgard prepared the Account Statements for the Affected Products which were superannuation products, and Asgard issued and prepared the Account Statements for the Affected Product which was an IDPS product. The Account Statements listed the fees charged each month to customers’ accounts, which included separate line items for administration or management fees and any adviser fees.

13. In the Account Statements of the Affected Customers, for the month following the request to remove the financial adviser and thereafter, the listed fees no longer included a line item for ongoing adviser fees. The Account Statements continued to show an administration or management fee had been charged, the quantum of which was higher than prior to the removal request but without any explanation for the higher fee. The administration or management fee shown as having been deducted was the sum of (a) the amount of the administration fee which was actually payable, and (b) the amount of the adviser fee which would have been payable in the event the adviser continued to provide advice and had not been removed from the account.
14. Each Affected Customer paid the same amount in fees following removal of their adviser as they had prior to the removal, however the account information provided to customers conveyed that only an administration or management fee had been deducted. Accordingly, customers could not readily identify any error in the fees they were charged. By reason of statements in documents about operating accounts without an adviser (referred to in paragraph 5 above), a customer may have expected that the higher administration or management fee following the adviser removal was explicable by loss of adviser-negotiated discounts (which was not in fact the case), rather than indicating an error.
15. By the conduct in paragraphs 13 and 14 above, by the Account Statements for the superannuation products BT and Asgard each represented, and by the Account Statements for the IDPS product Asgard represented, to those customers in relation to whom a request to remove their financial adviser from the customer's account had been made that no ongoing adviser fee was deducted from the customer's account for the period after the request was made (**No Adviser Fee Representations**). In the alternative, by the Account Statements for the superannuation products BT and Asgard each represented, and by the Account Statement for the IDPS product, Asgard represented to those customers that the administration or management fee shown on the Account Statements was an amount charged *only* for the administration or management of the customer's account for the period after the request was made (**Administration Fee Representations**).
16. Asgard had put in place two controls for the PAC process, which purported to check that fee reductions were processed accurately. Both controls only reviewed a sample of accounts. Neither of these controls identified the overcharging conduct.

Rectification and remediation

17. The overcharging conduct was only identified following a customer complaint in October 2016 that the total amount of fees charged on the customer's account had remained the same after becoming a PAC.
18. Following an internal investigation into the causes of the overcharging conduct, in 2017 new processes were implemented for PAC requests. For Infinity branded products, an internal Asgard team became responsible for reducing ongoing adviser fees using the AdviserNet system. A new control process was implemented which checked that all PAC requests (not just a sample) for that month had been appropriately processed.
19. By 21 December 2017, Asgard refunded to most of the Affected Customers the overcharged fees plus an amount referable to interest (**Remediation Program**).

B. THE RELIEF SOUGHT FROM THE COURT

20. The Plaintiff seeks the relief set out in the accompanying originating process.

C. THE PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

21. The Affected Products were each a financial product within the meaning of s 12BAA of the ASIC Act. The No Adviser Fee Representations, alternatively, the Administration Fee Representations,

were made in trade or commerce and in connection with the supply or possible supply of financial services, within the meaning of s 12DB(1) of the ASIC Act.

22. The No Adviser Fee Representations, alternatively, the Administration Fee Representations, were each a representation with respect to the price of services within the meaning of s 12DB(1)(g) of the ASIC Act.
23. By reason of the matters referred to in paragraphs 11 to 14 above, by making the No Adviser Fee Representations, alternatively, the Administration Fee Representations, BT and Asgard each:
 - (a) made a false or misleading representation in contravention of s 12DB(1)(g) of the ASIC Act; and
 - (b) engaged in misleading or deceptive conduct or conduct that was likely to mislead or deceive, in contravention of s 12DA(1) of the ASIC Act and s 1041H of the Corporations Act.
24. By its conduct in each of:
 - (a) putting in place ineffective processes and systems to cease charging adviser fees to customers in relation to whom a request to remove their financial adviser had been made, in that the administrative steps to do so were processed by a third party provider which did not have access to the necessary systems;
 - (b) erroneously applying a coding change to the Affected Products, which caused ongoing adviser fees for PACs to be added to administration fees instead of being cancelled, thereby causing ongoing adviser fees to continue to be charged without basis and making it difficult for the overcharging to be identified by the Affected Customers;
 - (c) having ineffective controls in place to check that ongoing adviser fees were not being incorrectly charged, in that controls only reviewed a sample of clients each month and the form of the review did not pick up the error;
 - (d) retaining until no later than December 2017 the adviser fees to which it had no entitlement;
 - (d) providing Affected Customers with account information conveying that the ongoing adviser fees were no longer being charged, when in fact amounts for those fees were being deducted from the Affected Customers' accounts,

Asgard breached its obligation to do all things necessary to ensure the financial services covered by its financial services license, being the custodial services provided in respect of each Affected Product, were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act.

D. THE HARM SUFFERED AND PROFITS EARNED FROM THE CONDUCT

25. As a result of the matters referred to above, 404 BT and Asgard customers were harmed on 2,643 occasions in circumstances where Asgard deducted charges totalling \$130,006 from their accounts. Four Asgard customers were harmed by the forced sale of their investments to pay the adviser fees.
26. Asgard benefited from a total of \$133,138 in incorrectly charged fees received as revenue (and interest) prior to refunding of fees and interest in the Remediation Program.

Date: 20 August 2020

This concise statement was prepared by counsel, C M Harris and A M Folie.

Annexure: Affected Products

	Affected Product	Type of product	Number of Affected Customers	AFSL issuer	Provider of custodial services
1	Asgard Infinity eWRAP Investment Account*	IDPS	14	Asgard	Asgard
2	Asgard Infinity eWRAP Pension Account*	Superannuation	26	BT	Asgard
3	Asgard Infinity eWRAP Super Account*	Superannuation	357	BT	Asgard
4	Asgard Open eWRAP Pension Account	Superannuation	1	BT	Asgard
5	Asgard Open eWRAP Super Account	Superannuation	2	BT	Asgard
6	Asgard Rollover Service	Superannuation	5	BT	Asgard
7	Asgard Superannuation Account	Superannuation	1	BT	Asgard
8	Asgard Employee Superannuation Account	Superannuation	2	BT	Asgard

* Infinity branded product (see paragraph 8 of the Concise Statement)

Certificate of lawyer

I **Thomas Litchfield Jarvis** certify to the Court that, in relation to the originating process filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 20 August 2020



Signed by Tom Jarvis
Lawyer for the Plaintiff