



Administrative
Appeals Tribunal

**DECISION AND
REASONS FOR DECISION**

Division: Taxation and Commercial Division

File Number(s): **2019/4941**

Re: **Allegra Financial Services Pty Limited**

APPLICANT

And **Australian Securities and Investments Commission**

RESPONDENT

DECISION

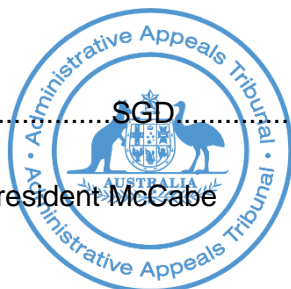
Tribunal: **Deputy President McCabe
Professor Ann O'Connell, Senior Member**

Date: **30 November 2020**

Place: **Adelaide**

The decision is affirmed.

Deputy President McCabe



CATCHWORDS

CORPORATIONS – application for review of decision to refuse Australian Financial Services Licence (AFSL) – whether no reason to believe that applicant is likely to contravene obligations in s 912A of the Corporations Act 2001 – obligations under s 912A – decision affirmed

LEGISLATION

Corporations Act 2001 (Cth)

The Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures)) Act 2020 (Cth)

CASES

Australian Securities and Investments Commission v Camelot Derivatives Pty Limited (In Liquidation) [2012] FCA 414

McDermott and Australian Securities and Investments Commission [2020] AATA 3362

Re Hres and Australian Securities and Investments Commission [2008] AATA 707

Rent-To-Own Australia Pty Ltd and Australian Securities and Investments Commission [2011] AATA 689

R J Elrington Nominees Pty Ltd v Corporate Affairs Commission (SA) (1989) 1 ACSR 93

Story v National Companies and Securities Commission (1988) 13 NSWLR 661at 672

SECONDARY MATERIALS

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry conducted by the Honourable Kenneth Madison Hayne AC QC

REASONS FOR DECISION

Deputy President McCabe
Professor Ann O'Connell, Senior Member

30 November 2020

1. The Applicant, Allegra Financial Services Pty Ltd (Allegra), applied to the Australian Securities and Investment Commission (ASIC) for an Australian Financial Services Licence (AFSL) on 17 April 2018. Section 911A of the *Corporations Act 2001* (Cth) says an entity may not carry on a financial services business without an AFSL. The AFSL the Applicant applied for would have allowed it to provide financial product advice and to deal in financial products to retail and wholesale clients.
2. On 15 July 2019, a delegate of ASIC refused the application for an AFSL under s 913B of the *Corporations Act 2001*. The delegate was particularly concerned about the history of Mr Lachlan Schonfelder, Allegra's sole director and majority shareholder, who was nominated as the company's sole responsible manager. Allegra has asked the Tribunal to review the decision.
3. We are satisfied the outcome of the case depends on whether the Tribunal has no reason to believe the applicant is likely to contravene the obligations that will apply under section 912A if the licence is granted. The enquiry is derived from s 913B(1)(b) of the *Corporations Act 2001*. Our conclusion turns on our assessment of Mr Schonfelder's past conduct, and on his potential future conduct, given the central role he plays in the business and operations of Allegra.

The legislation

4. Section 913B(1) sets out the grounds on which ASIC may refuse an application for an AFSL. These include the ground referred to in s 913B(1)(b) which provides:

(1) ASIC must grant an applicant an Australian financial services licence if (and must not grant such a licence unless):...

(b) ASIC has no reason to believe that the applicant is likely to contravene the obligations that will apply under section 912A if the licence is granted;...
5. We will come to all the obligations set out in s 912A later in the course of these reasons.

6. The Corporations Act was amended in February 2020 in the wake of the Hayne Royal Commission.¹ The *Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures)) Act 2020* (Cth) (the FSR Act) was passed in the wake of that report. The FSR Act was intended to modify existing laws to introduce more robust regulation of those engaged in the provision of financial services. Sub-sections 913B(2), (3) and (4) of the Corporations Act were amended as part of these reforms however the text of s 913B(1)(b) (reproduced above) was not changed. The general obligations in s 912A are also unchanged.
7. We asked the parties to consider whether the Tribunal should formally apply the law as set out in the Corporations Act at the time of the application (the old law), or the Corporations Act as amended by the FSR Act (the new law). The parties agreed the Tribunal should apply the old law although their reasons for doing so were different. ASIC says the argument should be resolved having regard to the transitional provision in the Corporations Act applying to s 913B, which states:

Section 1665 Application—applications made before commencement

(1) The following applications made before the commencement day, and not yet granted or refused at the start of the commencement day, are to be dealt with, on and after the commencement day, in accordance with this Act as amended by the amending Part:

(a) an application under section 913A for an Australian financial services licence;.....

8. After the hearing concluded, a (differently constituted) Tribunal delivered a decision in *McDermott and Australian Securities and Investments Commission* [2020] AATA 3362 (*McDermott*). In the course of its reasons in *McDermott*, the Tribunal suggested the new law would be applicable in circumstances like those before us in this case: at [122]. We resumed the hearing in these proceedings to discuss the implications of that decision. Both parties remained of the view that the old law was applicable.
9. We are satisfied we can deal with the present case without having to reach a view on the applicability of the new law. The central question that must be resolved in this case remains

¹ *The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry conducted by the Honourable Kenneth Madison Hayne AC QC.*

part of the test required under both the pre- and post-amendment versions of s 913B. Given the answer we have supplied to that question below, there is no need to consider the other issues potentially raised under the new version of s 913B and associated provisions, assuming they apply.

The background facts

10. Mr Schonfelder is a financial planner providing professional financial advice and services to clients. He was certified by the Financial Planning Association in 2004. He has been working in the business and finance sector for 25 years and as an authorised representative of several AFSL holders for the last 14 years. Mr Schonfelder was an authorised representative at MW Planning Pty Ltd for 9 years, and at Carnbrea & Co Ltd (Carnbrea) for 2 years. He has worked for the last 3 years at Havana Financial Services Pty Ltd (Havana).
11. Mr Schonfelder established Allegra in February 2018 for the purpose of conducting his own financial planning and advice business. With that end in mind, Allegra applied to ASIC for an AFSL in April 2018. Mr Schonfelder engaged an agent – My Dealer Services Pty Ltd (MDS) – to assist him in preparing and lodging Allegra’s application. MDS fielded correspondence with ASIC which included a request for information from Mr Schonfelder about the circumstances in which he parted ways with Carnbrea. Mr Schonfelder provided a response to ASIC’s questions about his involvement with Carnbrea through MDS by email dated 4 October 2018.
12. ASIC wrote to Allegra and Mr Schonfelder on 14 May 2019 to advise ASIC was minded to refuse the application in light of (a) its concerns about the circumstances of Mr Schonfelder’s departure from Carnbrea and (b) the quality of Mr Schonfelder’s disclosure in response to ASIC’s requests for information. (It turns out ASIC had become aware of information about the circumstances surrounding Mr Schonfelder’s departure from Carnbrea which did not square with the information Mr Schonfelder had provided.) Allegra and Mr Schonfelder were invited to appear before a delegate before the final decision was made. At the hearing before the delegate, Mr Schonfelder offered an explanation of what had occurred at Carnbrea and acknowledged shortcomings in the 4 October 2018 email response to ASIC’s request for further material.

13. After considering the evidence, ASIC's delegate refused to grant Allegra an AFSL. Allegra was informed of the reviewable decision in a letter dated 15 July 2019.

Some preliminary observations about the test we must apply

14. Both parties agreed the Tribunal's task under s 913B(1)(b) is to assess whether it is satisfied there is no reason to believe the Applicant is likely to contravene its obligations under s 912A. There was also general agreement on the principles applicable to s 913B(1)(b), and what the Tribunal should consider when making the relevant assessment.
15. There is no discretion in the application of s 913B. If the applicant meets the criteria set out in subsection (1), ASIC must grant the AFSL. If the applicant does not meet the criteria, ASIC (or the Tribunal standing in ASIC's shoes) must refuse the application.
16. The parties were in general agreement as to what was required under s 913B. They accept there will be 'no reason to believe' within the meaning of the sub-section in the absence of an actual belief by the decision-maker that has a rational foundation. The parties also agreed the words 'likely to contravene' do not focus on whether the applicant *definitely will* or *might possibly* engage in contraventions. The word 'likely' bears its ordinary meaning.
17. The parties also agreed it is appropriate to have regard to past conduct when assessing likely future conduct. Since Mr Schonfelder was the nominated sole responsible manager and sole director of Allegra, it was his past conduct that is relevant.

Relevant obligations in s 912A

18. There are several obligations in s 912A which are potentially relevant in this case including the obligation:
- to do all things necessary to ensure the financial services are provided efficiently, honestly and fairly (s 912A(1)(a));
 - to comply with the financial services laws (s 912A(1)(c)); and
 - to maintain organisational competence to provide those financial services (s 912A(1)(e)).

19. The obligation on a financial services licensee to provide financial services 'efficiently, honestly and fairly' became the focus in this case. Section 912A(1)(a) invites scrutiny of the integrity and competence of the licence-holder. Commissioner Hayne described the requirement embodied in s 912(1)(a) as an 'overarching' and 'fundamental' obligation of a licensee in his report.²
20. The phrase 'efficiently, honestly and fairly' in the context of the obligations imposed on the holder of an AFSL was considered by Foster J in *Australian Securities and Investments Commission v Camelot Derivatives Pty Limited (In Liquidation)* [2012] FCA 414. His Honour expressly adopted submissions (at [69]) which explained:
- (a) The words "*efficiently, honestly and fairly*" must be read as a compendious indication meaning a person who goes about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty: *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 at 672. ([126])
- (b) The words "*efficiently, honestly and fairly*" connote a requirement of competence in providing advice and in complying with relevant statutory obligations: *Re Hres and Australian Securities and Investments Commission* [2008] AATA 707; (2008) 105 ALD 124 at [237]. They also connote an element not just of even handedness in dealing with clients but a less readily defined concept of sound ethical values and judgment in matters relevant to a client's affairs: *Re Hres and Australian Securities and Investments Commission* [2008] AATA 707; (2008) 105 ALD 124 at [237]. ([127])
- (c) The word "*efficient*" refers to a person who performs his duties efficiently, meaning the person is adequate in performance, produces the desired effect, is capable, competent and adequate: *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 at 672. Inefficiency may be established by demonstrating that the performance of a licensee's functions falls short of the

² Final Report: *The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (February, 2019), 9.

reasonable standard of performance by a dealer that the public is entitled to expect: *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 at 679. ([128])

(d) It is not necessary to establish dishonesty in the criminal sense: *R J Elrington Nominees Pty Ltd v Corporate Affairs Commission* (SA) (1989) 1 ACSR 93 at 110. The word “honestly” may comprehend conduct which is not criminal but which is morally wrong in the commercial sense: *R J Elrington Nominees Pty Ltd v Corporate Affairs Commission* (SA) (1989) 1 ACSR 93 at 110. ([129])

(e) The word “*honestly*” when used in conjunction with the word “*fairly*” tends to give the flavour of a person who not only is not dishonest, but also a person who is ethically sound: *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 at 672. ([130])

The conduct of Mr Schonfelder

21. With that reasoning in mind, we turn to consider the conduct of Mr Schonfelder in more detail. We have already explained Mr Schonfelder was the nominated sole responsible manager of the Applicant. His conduct and capacity is therefore of central relevance to these proceedings. The parties agreed two incidents involving Mr Schonfelder were of particular importance to the assessment under s 913B(1)(b). They were (i) the circumstances surrounding the discussion of a loan from a client (Client A) to Mr Schonfelder while Mr Schonfelder was an authorised representative of Carnbrea; and (ii) Mr Schonfelder’s answers to ASIC in the course of Allegra’s application for an AFSL about the circumstances in which he left Carnbrea in the wake of the interaction referred to in (i). ASIC argued the two incidents called into question the Applicant’s ability to provide financial services efficiently, honestly and fairly and that – in those circumstances – the Tribunal could not be satisfied there is no reason to believe the Applicant is likely to contravene obligations under s 912A. The Applicant disagreed with some aspects of the description of those incidents however it conceded they were problematic. The Applicant argued that, notwithstanding those problematic incidents, the Tribunal should balance Mr Schonfelder’s conduct against other factors, including his otherwise good character and record, and the monitoring and accountability arrangements that would be established.

(i) The negotiation of a loan from Client A

22. The first incident relates to what occurred while Mr Schonfelder worked at Carnbrea. The incident involved Client A. It led to Mr Schonfelder's termination by Carnbrea.
23. There was some dispute about precisely what occurred between Mr Schonfelder and Client A. In particular, it was unclear whether Mr Schonfelder exercised undue influence over Client A. We did not have the benefit of evidence from Client A, so it is difficult to form a view of the extent (if any) to which the will of Client A might have been overborne. However, certain facts were acknowledged during the course of Mr Schonfelder's oral evidence and cross-examination. Those facts included:
- (i) On 25 August 2016, at a one-on-one meeting with Client A, Mr Schonfelder, an authorised representative of Carnbrea, disclosed details of a personal debt he owed and discussed the fact he had recently received a demand for repayment. Mr Schonfelder and Client A discussed Client A providing money to pay the debt. We note there is a dispute over how that discussion was initiated and whether Client A actively volunteered to provide the money. Mr Schonfelder claimed the client pressed him to accept funds. In any event, Mr Schonfelder prepared a Macquarie Bank funds' transfer form at the meeting or shortly thereafter. He filled out the form with the amount (\$11,217) and Client A signed the form so that Client A's personal funds would be made available to pay off Mr Schonfelder's personal debt;
 - (ii) Mr Schonfelder failed to discuss any terms of the loan with Client A, including what interest rate would be payable, the duration of the loan, the date or frequency of repayments or whether any security would be provided;
 - (iii) Mr Schonfelder sent the funds' transfer form to Macquarie Bank directly either that day or the following day;
 - (iv) when called by Macquarie Bank in relation to the proposed transfer, Mr Schonfelder told Macquarie Bank to speak to Client A;
 - (v) Mr Schonfelder did not take steps or call his client to cancel the proposed loan after he was contacted by Macquarie Bank;

- (vi) When Client A cancelled the proposed loan, Mr Schonfelder stated in evidence that he paid off the debt from his 'savings and some cash I had seven days later, or ten days later';
- (vii) Mr Schonfelder did not notify the compliance officer or anyone else at Carnbrea about the abortive arrangement at the time;
- (viii) in July 2017, Client A made a complaint to Carnbrea in which he detailed his concerns in relation to the proposed loan. That complaint brought the whole matter to light.

24. There are several troubling aspects of Mr Schonfelder's evidence regarding his interactions with Client A. Mr Schonfelder said he met Client A in October 2014 in a professional capacity and claimed they had developed a close personal relationship. At the time they met, Client A was a professional sportsman, had no savings and a credit card debt of \$60,000. Mr Schonfelder's evidence about the relationship included the following:

Sometimes he was quite depressed when he would call me on the telephone in the mornings, and sometimes he would ask me advice in relation to personal matters of which I would just, you know, basically provide him with that advice³.

25. Mr Schonfelder added:

I gave him a lot of service because I was looking after his super fund as well and I had a strong relationship with him, you know, I liked him, he's like a brother.....⁴

26. He also said in his statement (at [39]):

I told Client A about the debt because we had grown relatively close personally over the time that I had known him. He and I had shared a number of conversations about not only financial matters, but personal matters, mainly concerning Client A and his challenges with the club, his health and future plans, but also on occasion my own personal circumstances.

27. Mr Schonfelder accepted when questioned that Client A was a retail client. Mr Schonfelder was also asked whether he was aware Client A had suffered a number of concussions as a result of his involvement in sport. Mr Schonfelder responded he thought Client A often

³ Transcript dated 31 July 2020 page 55 line 20

⁴ Transcript dated 31 July 2020 page 48 line 5

suffered from low mood and depression (including around the time of the abortive loan arrangement) and recalled⁵:

... I didn't realise until he later told me in later meetings that he'd actually had suffered some serious injuries. Because that's - that was part of the negotiation with the club when he left. And I thought it was a bit weird that he offered to help me and, you know, when I - when I spoke to him about that, he was pretty flat at times, but where we - sometimes on the phone you'd - you'd speak to him and he'd be all right, then he'd buck up. And then every time he'd come - he'd - he'd call in and see me of an afternoon, we'd have an afternoon meeting and he was - he seemed okay. But sometimes if he called me in the morning, it was like a different person. So I think there was a bit going on there that I should have made further questions and investigations into for him.

28. We were unable to make a finding that Client A suffered from an impairment in the absence of further evidence, but we are satisfied from the description of the interaction provided by Mr Schonfelder that Client A was not a sophisticated investor and that Client A was *to the knowledge of the Mr Schonfelder* a vulnerable individual who had come to depend on Mr Schonfelder to some extent. Mr Schonfelder should have realised the client required careful handling, at a minimum.
29. In those circumstances, it is troubling Mr Schonfelder agreed to entertain and accept an offer of financial help from Client A. As noted above, there was uncertainty over whether Mr Schonfelder applied undue influence to secure the loan. Even if we accept Mr Schonfelder's claim that he did not exert undue influence, the whole transaction is deeply problematic. Assuming it is accepted the arrangement was proposed by the client, it was clearly not appropriate for a person in Mr Schonfelder's position to accept it. The terms of the arrangement (insofar as they can be ascertained) do not meet the minimum requirements one would expect of an arrangement suggested by a professional adviser to *any* client, let alone a vulnerable one that was considering an arrangement with the adviser. There was no agreement to pay interest on the advance, for example, notwithstanding Mr Schonfelder's claims that *of course* he would have paid interest in an unspecified amount. There was also no agreement as to when and how the loan would be repaid, and there was no agreement about the security for the advance. At a minimum, the evidence establishes Mr Schonfelder had lost perspective about his role as a professional adviser and exercised exceptionally poor judgment in his dealings with a client.

⁵ Transcript dated 31 July 2020 page 83 line 30

30. The loss of perspective and the poor judgment on display at the meeting with Client A was not a momentary lapse. Mr Schonfelder had the opportunity when he returned to the office following the meeting to refrain from sending the request to Macquarie Bank. He had another opportunity to pull back from the brink when a Macquarie Bank officer contacted him with a query regarding the transaction. Mr Schonfelder did not at that late stage withdraw the request. Instead, he let the request go forward and said it was up to Client A to take action because 'he was free to change his mind'. As it happens, Client A did indicate he changed his mind in the course of the next day or so and the transaction did not proceed. That does not do Mr Schonfelder any credit. Mr Schonfelder did not subsequently report the incident to Carnbrea's compliance officer. He simply let the matter lie until Client A raised the matter sometime later in a complaint.

(ii) Failure to disclose details of termination

31. Allegra's application for an AFSL mentioned Mr Schonfelder's engagement as an authorised representative of Carnbrea. The application did not disclose the reasons why Mr Schonfelder's agreement with Carnbrea came to an end. The reasons for his departure, and his failure to disclose those reasons, are crucial in dealing with this case.

32. The termination of the agreement between Mr Schonfelder and Carnbrea occurred on or around 5 September 2017. Mr Schonfelder was informed his agreement with Carnbrea was being terminated for breaches of his contractor agreement as a result of the dealings with Client A. That was made clear in the termination letter Carnbrea sent to Mr Schonfelder. Specifically, Carnbrea stated they were terminating Mr Schonfelder's appointment due to:

Breaches of the Contractor Agreement, including:

clause 2.5(2): failure to perform the Services with a very high level of professional skill, expertise, care and diligence

clause 2.5(5): non-compliance with Carnbrea's policies and procedures as outlined in the Carnbrea Licensee Manual and the Carnbrea Representative Manual

Clause 5.1(3): where the consultant is responsible for conduct which in Carnbrea's opinion is likely to bring Carnbrea into disrepute or adversely affect Carnbrea's business.

33. On 7 September 2017, and unbeknownst to Mr Schonfelder, Carnbrea lodged a breach report with ASIC. The breach report stated:

'...the breach first occurred during August 2016 when Authorised Representative, Lachlan Scholfelder [sic] had sent a funds transfer form to Macquarie, requesting a personal loan of funds from a client'.

34. In the breach report, Carnbrea notified ASIC:

'The breach was identified following investigation of a complaint made by a client in July 2017. Among other points of issue, the client had claimed briefly in his complaint email that:

"Mr Schonfelder made an unethical request during a financial planning appointment. He requested that I transfer my personal funds to pay off his personal debt of \$11,217".

35. When it was reviewing Allegra's application, ASIC sought additional information relating to Mr Schonfelder's work experience because he was the sole nominated responsible manager under the proposed licence. On 14 September 2018, ASIC sent an email to the Applicant (addressed to MDS, agent for the Applicant) requesting information in relation to the employment history of Mr Schonfelder, including at Carnbrea. Specifically, ASIC asked:

With regard to Mr [Schonfelders'] appointment from 20/10/2015 to 05/09/2017 as an authorised representative (Rep no. 00271129) on the Carnbrea & Co Ltd AFSL (233763), please advise the terms and any specific grounds or details upon which this appointment was ended.

36. On 4 October 2018, ASIC received a response from the Applicant, through its agent MDS. MDS's email reproduced Mr Schonfelder's answers to ASIC's questions about the circumstances of his termination. Mr Schonfelder said:

I worked from September 2015 to September 2017. Carnbrea was part of the Bangarra Group at the time. Bangarra owned Bennelong Funds Management. The Bangarra Group were looking at building an advisory business in the net high worth space in competition with a (indistinct) divisions of the big four banks in Australia. Not long after my appointment, it was made clear to me that the group were no longer committed to the business and that the focus of the organisation was going to be funds management business. Previous management had neither the expertise, nor the will to continue running the business (Bangarra Group) and due to differences of opinion.

37. At the hearing on 24 June 2019 before the ASIC delegate, Mr Schonfelder was asked to explain the apparent inconsistency between the breach report from Carnbrea and his own response. He said he had a very different view of the circumstances of the dismissal than Carnbrea had, and therefore he did not consider he had been less than fulsome in his answer to ASIC. At the hearing before the delegate, Mr Schonfelder claimed he was overseas at the time MDS forwarded ASIC's questions on to him, and that he had not

realised his email response to MDS would be the definitive response provided to ASIC. The delegate accepted Mr Schonfelder may have sent a 'somewhat off the cuff response', but the delegate noted the response does not say Mr Schonfelder's contract was terminated, or the reason why. When Mr Schonfelder returned to Australia, it was open him to provide further details to ASIC. He did not do this.

38. At the hearing before the ASIC delegate Mr Schonfelder said he was not previously aware that Carnbrea had lodged a breach report with ASIC, despite speaking to Carnbrea after his contract was terminated. Mr Schonfelder told the delegate he might have provided a more fulsome answer to ASIC if he had known about the breach report.

APPLYING THE TEST

39. It is clear the circumstances in which the loan was proposed and arranged set in motion a chain of events which led to the termination of the agreement between Mr Schonfelder and Carnbrea following a complaint by Client A one year later. It was the failure to disclose that fact which helped persuade the ASIC delegate to reject Allegra's application for an AFSL. The Tribunal must now decide whether it is satisfied there is no reason to believe the Applicant is likely to contravene its obligations under s 912A, in particular the obligation to do all things necessary to ensure the financial services covered by the licence are provided 'efficiently, honestly and fairly'.
40. Mr Schonfelder asked the Tribunal to balance the conduct we have identified (and which he has substantially admitted) against:
- a) his otherwise good character and record (and in this regard Mr Schonfelder asked the Tribunal to consider character references provided by Mr Robert Pierce, a client of over 20 years, who attested to Mr Schonfelder's 'solid character' and his 'understanding, empathy and impressive professionalism'; and Mr Paul Tosin, a colleague at MW Planning who attested to the fact that, in all of his dealings with Mr Schonfelder, he found Mr Schonfelder to be 'ethical, hard-working, knowledgeable and his conduct to always be in the best interests of his clients'; and

b) the fact that the loan incident with Client A was the only time his honesty has been called into question by a client.

41. In the absence of evidence to the contrary, the Tribunal is prepared to accept Mr Schonfelder is otherwise of good character. ASIC has not produced evidence of problematic interactions with other clients. Yet the evidence we have before us about his interactions with Client A and ASIC is a problem. The interaction with Client A was not a one-off mistake made in the heat of the moment. Mr Schonfelder allowed the relationship to become close and potentially compromised the client's interests in the process. Mr Schonfelder had several opportunities to correct the error in judgment that he made in agreeing to the loan arrangement. If there was any doubt about his judgment on this issue, that doubt was compounded by his misleading answers to ASIC. Mr Schonfelder did not just fail to provide a fulsome answer to ASIC's request for information. His response to that request was actively misleading because it conveyed the impression he had left Carnbrea because of differences of opinion, concerns over the expertise of Carnbrea's management and other matters suggestive of a philosophical dispute over the direction of the business. That is not what occurred, which is clear from the letter of termination. We take no comfort from Mr Schonfelder's comment at the hearing that he would have approached the matter differently if he had known ASIC possessed a breach report from Carnbrea that contradicted his story.
42. Mr Schonfelder's conduct falls well short of the expectation that the financial services would be provided efficiently, honestly and fairly. Mr Schonfelder has failed to demonstrate "even handedness in dealing with clients" nor did he exhibit "sound ethical values and judgment in matters relevant to a client's affairs": *Camelot Derivatives* per Foster J at [69]. The lack of candour in his dealings with ASIC also raises serious doubts over whether the Applicant would be able to deal honestly.
43. Mr Schonfelder says he has learned from the experience and will not do it again. However, the question over his judgment is such that we cannot say we have no reason to believe that the Applicant is likely to contravene the obligations – in particular, the obligation to do all things necessary to ensure the financial services covered by the licence are provided efficiently, honestly and fairly - if the licence is granted.

OTHER SECTION 912A OBLIGATIONS

44. Our conclusions in relation to s 913B(1)(b) and the obligation under s 912A to provide financial services efficiently, honestly and fairly dictates the outcome in these proceedings. We note ASIC argued the Applicant would be unlikely to satisfy other obligations set out in s 912A, including the obligation to comply with financial services laws, and the obligation to ensure organisational competence. We do not need to make findings in relation to those other obligations. However, we would add the finding of fact we made about Mr Schonfelder's misleading interaction with ASIC when asked for information about the circumstances of his departure from Carnbrea points to a likelihood that he or the Applicant would not comply with financial services laws. Those laws include an obligation not to engage in misleading or deceptive conduct.

DO THE PROPOSED COMPLIANCE MEASURES FILL THE GAP?

45. The Applicant asks that we take comfort from arrangements it proposes with a third-party service provider that will assist in compliance. ASIC raised questions at the hearing over the adequacy and appropriateness of the services to be provided at the hearing. As it happens, the detail of the proposed arrangements remains unclear: Mr Schonfelder indicated at the hearing it might be necessary to re-think the arrangements given the service provider was located in one city and Allegra was located in another. That was likely to be an issue during the coronavirus pandemic where travel was curtailed. But the paucity of detail in those arrangements is beside the point. The arrangements described to us are not an adequate or appropriate response to the problems we have identified.
46. The key responsibility for managing the business and overseeing the provision of financial services lies with Mr Schonfelder on behalf of the Applicant. Serious questions have been raised over his judgment. The Applicant is asking the Tribunal to accept it can develop measures that will provide reassurance about compliance notwithstanding Mr Schonfelder's shortcomings.
47. The Applicant asks the compliance arrangements involving a third party to do too much work. Arrangements with third parties can only work when the key people in the organisation are appropriate in the first place. We have serious concerns about whether Mr Schonfelder is up to the task which he is supposed to perform; we do not derive any reassurance from the fact he will rely on a third party to make up for his shortcomings. And nor should we: as

Downes J and DP Hack pointed out in *Rent-To-Own Australia Pty Ltd and Australian Securities and Investments Commission* [2011] AATA 689 at [47], the regulator and the Tribunal should not be overanxious to find ways in which we can permit regulated activity.

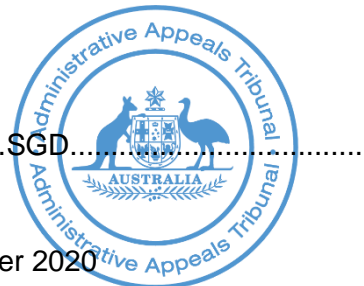
DECISION

48. For the reasons we have given, the Tribunal affirms the decision under review, made by a delegate of the Australian Securities and Investments Commission on 15 July 2019, to refuse the application of Allegra Financial Services Pty Ltd for an Australian Financial Services Licence, dated 17 April 2018.

I certify that the preceding forty-eight (48) paragraphs are a true copy of the reasons for the decision herein of Deputy President Bernard J McCabe and Professor Ann O'Connell, Senior Member.

.....
Associate

Dated: 30 November 2020



Date(s) of hearing: **31 July 2020; 28 August 2020; 2 October 2020.**

Counsel for the Applicant: **Mr Daniel McCredden**

Solicitors for the Applicant: **Brand Partners Commercial Lawyers**

Counsel for the Respondent: **Ms Jillian Williams**

Solicitors for the Respondent: **Self Represented**