NOTICE OF FILING

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Details of Filing

Document Lodged:	Concise Statement
File Number:	NSD1374/2020
File Title:	AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v SQUIRREL SUPERANNUATION SERVICES PTYLTD ACN 169 366 750
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

SEAL OF THE FEDERAL COURT OF AUSTRALIA

Sia Lagos

Dated: 23/12/2020 12:20:23 PM AEDT Registrar

Important Information

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

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

Form NCF1

Concise Statement

No. of 2020

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

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Plaintiff

SQUIRREL SUPERANNUATION SERVICES PTY LTD ACN 169 366 750
Defendant

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. The Respondent (**Squirrel**) is a financial technology company which holds a financial service licence. From around January 2015, Squirrel marketed and sold its services of helping customers to establish and operate a self-managed superannuation fund (**SMSF**) for the purchase of established residential property.

The brochure

2. In around March 2015, Squirrel first published and disseminated a brochure headed "*How buying established residential property can super charge your superannuation?* [sic]". A copy of the brochure is **Annexure A**. Squirrel disseminated the brochure, largely by email and also in hard copy at a seminar conducted by Squirrel on 28 April 2015, to several thousand members of the public, between around March 2015 and July 2018. In around July 2018, Squirrel ceased distributing the brochure following communications from ASIC.

Representations

3. The brochure contains a series of representations, all designed to persuade the reader that the choice of using Squirrel's services to establish an SMSF to purchase residential property will lead to remarkably superior results in comparison with investing the same funds in a regular superannuation fund (whether retail or industry).

4. The **first representation** (page 2 of the brochure) is that the "*old rule of thumb is that residential property in metropolitan locations doubles in value every 7-10 years and generates a rental return of around 4 – 5% per annum*".

5. This representation is false or misleading in that in truth:

   (a) the average annual growth in residential property prices in metropolitan locations in Australia in the:

      (i). 10 years leading up to 30 December 2014, 2015, 2016 and 2017 respectively was approximately in the order of 5.42% (2014), 6.12% (2015), 6.04% (2016), and 5.22% (2017); and

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(ii). 7 years leading up to 30 December 2014 to 2017 respectively was 4.11% (2014), 6.06% (2015), 5.39% (2016), and 5.5% (2017); and

(b) accordingly, the average total growth in residential property prices in metropolitan locations in Australia in the:

(i). 10 years leading up to 30 December 2014, 2015, 2016 and 2017 respectively was approximately in the order of 69.57% (2014), 81.21% (2015), 79.75% (2016), and 66.45% (2017); and

(ii). 7 years leading up to 30 December 2014 to 2017 respectively was 32.57% (2014), 50.97% (2015), 44.38% (2016), and 45.54% (2017).

6. Further, to the extent that the first representation was with respect to a future matter, namely the likely future average growth in residential property prices and the likely future average rent returns, Squirrel had no reasonable grounds for making the representation.

7. The **second representation** (page 2 of the brochure, from the paragraph beginning "*Consider the numbers...*" to the end of the table under that paragraph), is that, if one were to purchase a residential investment property worth $800,000 using a 25% deposit from one's superannuation fund, and taking out a mortgage for the balance ($600,000), one would obtain:

(a) an average annual return in the form of capital growth of 10%, and hence annual capital growth of $80,000;

(b) an average annual rental income of 4%, thus $32,000; and

(c) an average total return of $112,000 (or a total of 14%).

8. The second representation was false or misleading because it was premised on the first representation (which was false or misleading), and further:

(a) there were no reasonable grounds for representing that 10% annual capital growth would be obtained;

(b) there were no reasonable grounds for projecting an average annual return of $112,000;

(c) the asterisked qualification below the table, to the effect that return is gross, is in small print, is insufficiently prominent to counter the dominant message comprising the second representation and does not properly or fully explain the fact that costs and charges (see (e) below) would substantially reduce the (in any event overstated) returns, and indeed would be likely to more than offset them, resulting in a (pre-tax) negative cash flow, at least in the early years;

(d) there is no disclosure of the significant upfront establishment costs, which, for setting up an SMSF and purchasing an $800,000 residential investment property, could reasonably be expected to be in the order of around $40,000 (comprising stamp duty, loan establishment costs, SMSF trustee and SMSF establishment costs, and conveyancing fees);

(e) there is no or no adequate disclosure of the significant ongoing annual costs of this approach (in addition to the upfront establishment costs referred to in (d)) including:

(i). the annual repayment costs on a $600,000 loan (likely to be in the order of around $35,000 to 50,000);

(ii). other costs and expenses including property management fees, repairs and maintenance, rates, insurance, SMSF administration fees and levies, likely to be in the order of $8,000 per annum

9. The **third representation** (at the bottom of page 2 of the brochure) is that:

(a) if one took the "*traditional approach*" of investing $200,000 in a regular superannuation fund, one would obtain an average annual return of $14,000 (or 7%), as compared with the average annual return of $112,000 (or 14%) from taking the approach referred to in the second representation above; and

(b) as such, the difference between the two strategies is "*remarkable*".

10. This representation is false or misleading:

(a) because the second representation as to the total return of $112,000 is false or misleading (both by overstating the level of returns, and understating and not disclosing the costs and expenses) for the reasons stated above; and

(b) for the following further reasons.

11. First, while the figures in the table illustrating the (in any event overstated) returns for the approach of investing in residential property through an SMSF are gross, the figures table illustrating returns from a regular superannuation fund was net of fees and taxes and adjusted for inflation.

12. Secondly, the second representation failed to disclose any of the comparative disadvantages or risks in the approach of investing in residential property through an SMSF, compared with investing in a regular superannuation fund, including that:

(a) there is a significant and unhedged concentration of risk from the absence of diversification of investments;

(b) real property as an investment is far less liquid (or readily sold) than assets such as cash or shares which are options for investments in a regular superannuation fund;

(c) the maintenance of an SMSF is potentially time-consuming and complicated with members being responsible for decisions and legal compliance; and

(d) borrowing heavily ($600,000 out of $800,000) against the value of a property exposes the fund to interest rate fluctuations and other vicissitudes including the risk of a forced sale (at less than full value).

13. Thirdly, the misleading omissions (concerning costs, risks and disadvantages) were not remedied by the "*FAQs*" section on page 4 of the brochure which:

(a) did not detract from the dominant message contained in the third representation; and

(b) in any event did not disclose, or adequately address, the costs, risks and disadvantages described above.

14. Fourthly, being a representation with respect to a future matter, namely the returns which one would obtain, Squirrel had no reasonable grounds for making the third representation.

15. The **fourth representation** is contained in the text and under the heading "*Understanding fees*" on page 3 of the brochure. The representation is that the costs to manage an investment property through an SMSF are "*surprisingly low*" compared with using a financial planner to select a series of managed investment funds and, in particular, that the annual costs of the former (given an investment property valued at $800,000) are around $2,400, whereas the annual costs of the latter (given a managed investment of $800,000) are around $8,800.

16. This representation is false or misleading in the following respects:

(a) the premise of the representation is that it is necessary to use a financial planner, on an ongoing basis, in order to invest in managed investment funds generally, and most pertinently in a regular superannuation fund. In truth, to contribute to or invest in a managed investment fund, and most pertinently, a regular superannuation fund, it is not necessary to use a financial planner at all, and certainly not on an ongoing basis;

(b) in any event, the role of a property manager in managing an investment property does not correspond to the role of a financial planner advising in regard to a regular superannuation fund. The true costs of using an SMSF to purchase an investment property will far exceed the yearly management fees of the property manager, and will extend to loan repayments, initial establishment fees, stamp duty, repairs and maintenance, taxes, rates, insurance, strata levies and fees (where applicable), and other costs and expenses; and

(c) the false or misleading nature of the representation is compounded by the concluding words under the "*Understanding fees*" heading which assert that, if one took the $6,400 difference and invested it, one would have an extra $379,701 in 30 years. In truth, for the reasons set out in (a) and (b) above, there is no proper comparison to be made between the expenses of a property manager and the fees which a financial planner might charge, even if they were used on an ongoing basis for ongoing advice. To the extent that these concluding words are a representation about a future matter, namely, what one would obtain by investing the "*difference*", there were no reasonable grounds for making it.

B. THE RELIEF SOUGHT FROM THE COURT (AND AGAINST WHOM)

17. The relief sought against Squirrel is set out in the accompanying originating application, namely, declarations, pecuniary penalties, and costs.

C. THE PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

18. Squirrel's conduct in disseminating the brochure was:

(a) in trade or commerce within the meaning of ss12DA(1), 12DB(1)(e) and 12DF(1) of the *Australian Securities and Investments Commissions Act* 2001 (Cth) (***ASIC Act***);

(b) conduct in connection with the supply or possible supply of financial services or in connection with the promotion of the supply or use of financial services, within the meaning of s 12DB(1)(e) of the *ASIC Act*, and conduct in relation to financial services within the meaning of s 12DA(1) of the *ASIC Act*.

19. The impugned representations:

(a) were representations that "*services*" have performance characteristics, uses or benefits within the meaning of s12DB(1)(e) of the *ASIC Act*;

(b) were representations which were liable to mislead the public as to the nature, the characteristics or the suitability of financial services within the meaning of s12DF(1) of the *ASIC Act*;

(c) amounted to conduct which was misleading or deceptive or likely to mislead or deceive within the meaning of s 12DA(1) of the *ASIC Act*; and

(d) to the extent that they were with respect to future matters, as set out above, were made without Squirrel having any reasonable grounds for making them, within the meaning of s12BB of the *ASIC Act*.

20. Hence, Squirrel's conduct breached ss 12DA(1), 12DB(1)(e) and 12DF(1) of the *ASIC Act*.

Certificate of lawyer

I Susan Donnelly certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 18 December 2020

Sue Donnelly

Signed by Susan Donnelly

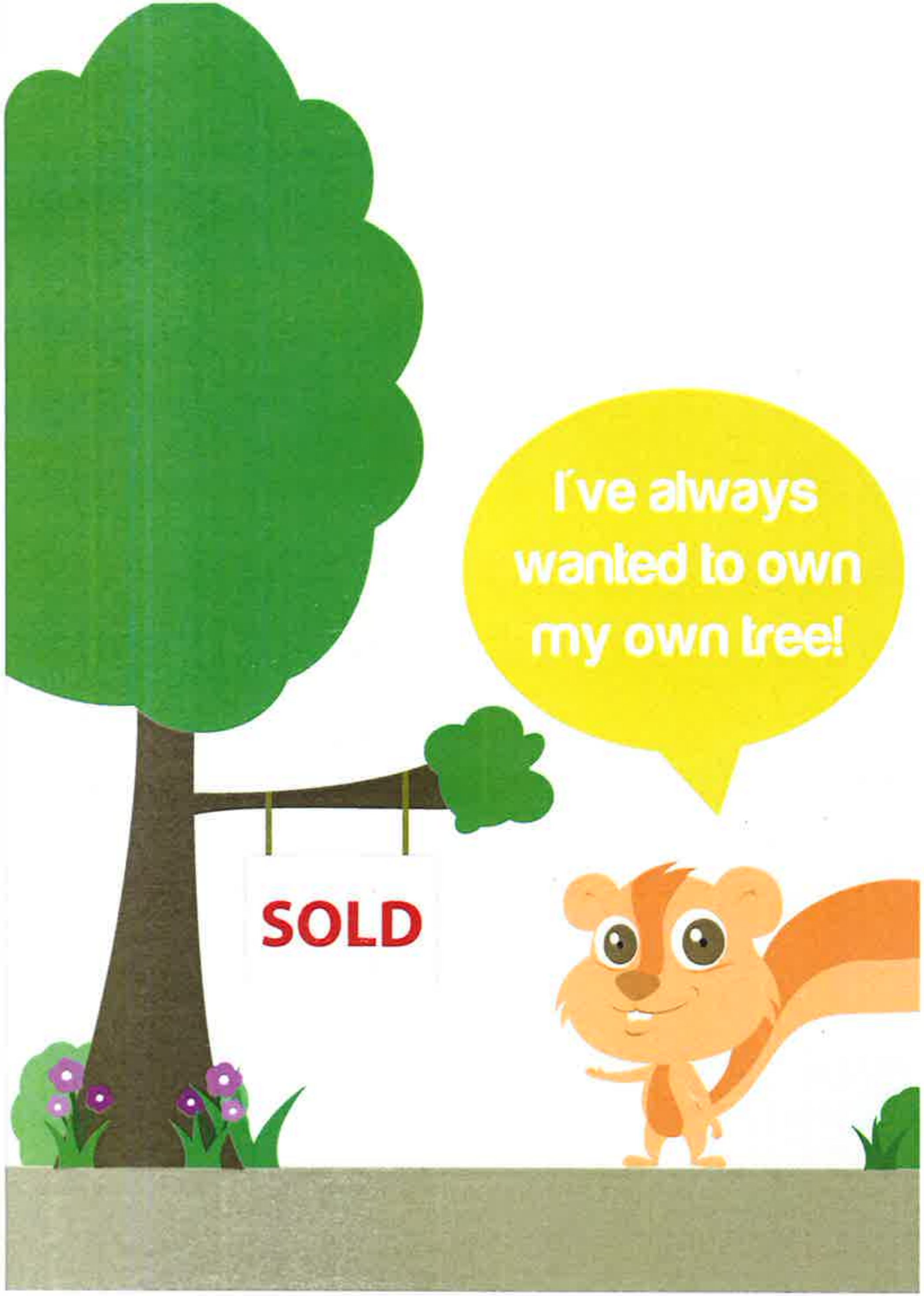
Lawyer for the Applicant

Annexure A

SQU.2000.0015.0002

squirrel Superannuation

www.squirrelsuper.com.au 1300 500 499



How buying established residential property can super charge your superannuation

Australians love property – there is something about owning an investment we can touch, feel and see that makes it real. Buying and holding an apartment or house has delivered significant long-term capital growth and regular rental income for thousands of people.

The old rule of thumb is that residential property in metropolitan locations doubles in value every 7 – 10 years and generates a rental return of around 4-5% per annum. Importantly these returns are based on the total value of the property purchased, not the equity you hold in it.

Consider the numbers; if you were to purchase an investment property using a 25% deposit from your super, your super fund then takes a mortgage for the balance:

Self Managed Super Fund – residential property	
Starting Assets of Fund:	$200,000
Borrowed to purchase property	$600,000
Value of Fund Assets	**$800,000**
Ave Annual Return (capital growth 10%)	$80,000
Ave Annual Rental Income (4%)	$32,000
Ave Total Return*	**$112,000**

* Indication only. Ave Total Return is gross and excludes costs like property management, smsf administration, loan repayments.

The difference between the above strategy and the traditional approach below is remarkable. It's an example of how important the power of leverage is to achieving long-term financial security.

Regular Superannuation Fund	
Assets of Fund:	$200,000
Ave Annual Return (7%):	**$14,000**

Understanding fees

Believe it or not, the costs to manage an investment property are surprisingly low compared to using a financial planner to select a series of managed investment funds.

The key difference is a property manager receives a percentage of your rental income while a financial planner takes a percentage of your total portfolio whether your investment increases or even when it goes backwards.

	Investment Property#	Managed Investment*
Value of Investment	$800,000	$800,000
Management Fees	$2,400	$8,800

Notes:

- Fees based on annual rental income of $40,000 (5%) and property mgt cost of 6% of rental.
* - Fees based on Financial Planner charging 1.1% of total investment.
^ - The above comparison excludes other costs like rates, insurance for property and ICR/MER for manged investments, it compares the costs of professional managers.

If you took the $6,400 difference and each year invested in a term deposit (4% return compounding annually), by retirement in 30 years you would have an extra $379,701.

Lower (or no) Tax

While you are accumulating, any capital gains made within superannuation are taxed at just 10%; in addition any rental income your super fund receives is taxed at 15% – much lower than outside of your SMSF.

Now here are the best bits. Once you start drawing a pension (not the government aged pension) from your SMSF the tax rate on all income and capital gains is ZERO for the pension account. In other words if you were to sell your investment property once in pension phase you would pay zero capital gains tax and all rental income you receive can also be tax free.

Why haven't you been told about this?

In Australia, financial planning is controlled by the big four banks and life insurers. Typically financial planners are licensed by subsidiaries of these institutions commonly called 'dealer groups'. The majority of these dealer groups are run at a loss and used (even referred to internally) as distribution channels for the parent company's products and services. There profit is achieved when planners sell or advise their clients to buy more of the institution's products e.g.: super funds, wrap accounts, managed investments and insurance.

Here is an example of the fees a Sydney based Dealer Group owned by a major bank charges a client with $500,000 in their superannuation:

Amount in Super: $500,000

Type of Fee	Amount
Admin Fee – Wrap Account	$1,700.00*
Super Admin Fee	$250.00
Investment Fee	$2,711.67
Adviser Fee	$5,500.00
TOTAL FEES PER ANNUM	**$10,161.66**

*Admin Fee – Wrap Account is based on investments in group products, this fee increases by 10% where fund is invested in managed funds not owned by this particular institution.

SQU.2000.0015.0005

Squirrel is here to help

Traditionally there were lots of steps and mountains of paperwork required to set up a Self Managed Super Fund (SMSF), especially one that borrows to purchase a property; that's why the big banks and financial planners have got away with charging enormous fees on your money for years.

At Squirrel we've developed brilliant technology to take the pain (and paperwork) out of setting up and managing your own SMSF.

And you won't believe how easy we've made it.

Make a great decision and take control of your superannuation. Visit **www.squirrelsuper.com.au** or **call 1300 500 499** and book a 15 minute phone consultation to see if SMSF might be right for you.

FAQs

What are the risks?

Like any type of investment, buying an investment property in super carries risks. For example, bad tenants, interest rate movement, extended periods of vacancy and natural disasters can all affect the performance of the investment. Essentially many of the same risks encountered when purchasing outside of the superannuation system.

Is residential property guaranteed to increase in value?

No. It is true that property has historically increased in value, especially over the long term however, like all investments there is no guarantee it will continue. A major driver of property growth is supply and demand; therefore if you believe what you buy will be in demand for both renters and purchasers – it's a good bet it will continue to increase in value and generate income.

What type of property can I purchase?

We can assist you to purchase just about any established residential or commercial property in Australia.

Can you recommend a particular property to purchase?

Squirrel is independent and don't make property recommendations. We suggest that you conduct your own research as if you were purchasing a home to live in. We provide free access to comprehensive property research through our partnership with RP data so you can arm yourself with quality information to make an informed purchasing decision.

I have an existing investment property – can I transfer that into my super?

Unfortunately no. This would breach superannuation legislation concerning to related party transactions. This extends to family members, for example you couldn't purchase a property from a member of your family.

Can I live in the property?

Not until you have retired. After meeting a condition of release, being fully retired and a few other steps you can transfer the property from your SMSF and live in it.

Who is responsible for rates, insurance, maintenance, strata fees?

As your super fund would 'own' the property it is responsible for outgoings and these costs are paid by your fund's bank account.

Who pays stamp duty, conveyancing fees on purchase?

As with ongoing costs, your super fund pays for these costs.

I own my own business including the office / factory it operates from – can my super buy the building?

Yes – commercial property is one of the few exceptions to the related party rules. This can be an attractive method to free cash in your business and provide a tax effective way to pay down the debt on your commercial property. Remember that superannuation contributions for the self employed are tax deductible.

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squirrel
Superannuation

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