

NOTICE OF FILING AND HEARING

Filing and Hearing Details

Document Lodged: Notice of Appeal (Fee for Leave Not Already Paid) - Form 122 - Rule 36.01(1)(b)(c)
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)
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File Number: QUD331/2024
File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v BPS FINANCIAL PTY LTD (ACN 604 899 381)
Registry: QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing: To Be Advised
Time and date for hearing: To Be Advised
Place: To Be Advised



Sia Lagos

Registrar

Important Information

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 of the filing of the document is determined pursuant to the Court's Rules.

Form 122
Rules 36.01(1)(b); 36.01(1)(c)



Notice of appeal

No. QUD /2024

Federal Court of Australia
District Registry: Queensland
Division: General

On appeal from the Federal Court

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Appellant

BPS FINANCIAL PTY LTD (ACN 604 899 381)

Respondent

To the Respondent

The Appellant appeals from the judgment as set out in this notice of appeal.

1. The papers in the appeal will be settled and prepared in accordance with the Federal Court Rules Division 36.5.
2. The Court will make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence. You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place:

Date:

.....
Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party) Australian Securities and Investments Commission, Appellant
Prepared by (name of person/lawyer) Savas Miriklis
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(include state and postcode) Level 20, 240 Queen Street, Brisbane QLD 4000



The Appellant appeals from order 3 of the Federal Court given on 22 May 2024 at Brisbane in proceeding no. QUD380/2022 (**Order**).

The appeal is brought by leave of the Court granted on 24 May 2024. A copy of the order giving leave is annexed to this notice.

Grounds of appeal

1. The learned primary judge erred in holding that the respondent (**BPS**) was exempt under s 911A(2)(a) *Corporations Act* 2001 (Cth) (**Act**) from the requirement to hold an Australian Financial Services Licence (**AFSL**) by reason, and during the period of operation, of the Authorised Representative Agreement with PNI Financial Services Pty Ltd (**PNI**): [J154, J175].
2. The learned primary judge erred in holding that:
 - (a) the fact that BPS was an authorised representative of PNI was determinative of whether BPS provided the relevant financial services as representative of PNI within the meaning of s 911A(2)(a) of the Act; and
 - (b) section 911A(2)(a) of the Act did not require that in order to be providing a financial service “as representative of” PNI, BPS must be providing a financial service “on behalf of”, or “for”, PNI:
[J133, J143].
3. The learned primary judge erred in holding that:
 - (a) The definition of “on behalf of” in s 9 of the Act does not assist in resolving the meaning of the expression “on behalf of” in Part 7.6 of the Act;
 - (b) the phrase “on behalf of” is relevant only to determining whether and in what respect BPS was an authorised representative of PNI; and
 - (c) an AFSL holder is left to decide what an authorised representative acting “on its behalf” will look like in any given case:
[J136, J143, J148].
4. The learned primary judge erred in:
 - (a) rejecting the appellant’s submission that the concept that BPS as issuer of a financial product could issue that product as representative of another person who was not the issuer of the product was in conflict with the operation of s 761E of the Act; and
 - (b) holding that the text of the legislation does not support the imposition of a requirement that a person providing a financial service (**provider**) cannot issue a financial product as representative of an AFSL holder if the provider is itself the issuer of the financial product:
[J144, J145, J151, J152].



5. The learned primary judge erred in holding that an authorisation for the purposes of s 916A can have effect so as to authorise a person to issue on behalf of the AFSL holder a financial product of which the AFSL holder is not the issuer: [J146].
6. The learned primary judge erred in holding that s 911A(2)(a) of the Act applies:
 - (a) to a person who provides a financial service;
 - (b) if that person has been given a written notice by an AFSL licensee authorising the person, for the purposes of Chapter 7, to provide the specified financial service on behalf of the licensee; and
 - (c) where the AFSL licensee holds an AFSL that covers the provision of the service,
 regardless of whether, in truth and as a matter of fact, that person has provided that financial service in a representative capacity as agent for, on behalf of, as representative of, or for, the AFSL licensee: [J153].
7. The learned primary judge erred in finding that during the PNI period BPS had provided the financial services of:
 - (a) dealing in a financial product by issuing the Qoin Wallet;
 - (b) providing financial product advice consisting of statements of opinion relating to the Qoin Wallet published on the Qoin website and in promotional material,
 as representative of (within the meaning of paragraph 911A(2)(a) of the Act) PNI without having made findings of fact as to whether or not, in providing those services, or any of them, BPS was acting on its own behalf or was acting as representative of PNI.

Orders sought

1. The appeal be allowed.
2. The Order be set aside and in its place there be an order that:

The Court declares pursuant to section 1317E(1) of the Corporations Act that from 5 November 2020 to 31 August 2021 BPS carried on a financial services business in Australia in contravention of sub-section 911A(1) of the Corporations Act, being a business of:

 - (a) dealing in a financial product being the Qoin Wallet; and
 - (b) providing financial product advice in relation to the Qoin Wallet by publishing on its website and in promotional material accessible to the public, statements of opinion which were intended to influence persons in making a decision in relation to the Qoin Wallet,

when BPS did not have an Australian Financial Services Licence covering the provision of those financial services and thereby contravened section 911A(5B) of the Corporations Act.
3. The matter be remitted to the trial judge for determination of penalty and costs.
4. Alternatively to paragraphs 2 and 3:
 - (a) The Order be set aside;
 - (b) The matter be remitted to the trial judge for determination of



- (i) The question whether the financial services provided by BPS from 5 November 2020 to 31 August 2021, being:
1. The issue of the Qoin Wallet;
 2. The provision of financial product advice in relation to the Qoin Wallet by publishing on its website and in promotional material accessible to the public, statements of opinion which were intended to influence persons in making a decision in relation to the Qoin Wallet, were provided by BPS as representative of PNI;
- (ii) such further orders as the case may require,
5. The Respondent pay the Appellant's costs of the appeal.

Appellant's address

The Appellant's address for service is:

Place: Australian Securities and Investment Commission
Level 20
240 Queen St
Brisbane QLD 4000

Email: Savas.Miriklis@asic.gov.au

The Appellant's address is Level 20, 200 Queen St, Brisbane QLD 4000.

Service on the Respondent

It is intended to serve this notice of appeal on the Respondent.

Date: 18 June 2024

Savas Miriklis

Signed by Savas Miriklis
Lawyer for the Appellant



Federal Court of Australia

District Registry: Queensland Registry

Division: General

No: QUD380/2022

AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION

Plaintiff

BPS FINANCIAL PTY LTD (ACN 604 899 381)

Defendant

ORDER

JUDGE: Justice Downes

DATE OF ORDER: 24 May 2024

WHERE MADE: Brisbane

THE COURT ORDERS THAT:

1. The parties have leave to appeal and, if necessary, leave to cross-appeal.

Date that entry is stamped: 24 May 2024

Sia Lagos
Registrar