IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Revised
Not Restricted
Suitable for Publication

Case No. CR-21-02557

THE QUEEN

v

AVANTEOS INVESTMENTS LIMITED (ACN 096 259 979)

JUDGE:	HIS HONOUR JUDGE WRAIGHT
WHERE HELD:	Melbourne
DATE OF HEARING:	1 June 2022
DATE OF SENTENCE:	15 June 2022
CASE MAY BE CITED AS:	The Queen v Avanteos Investments Ltd
MEDIUM NEUTRAL CITATION:	[2022] VCC 869

REASONS FOR SENTENCE

Subject:	CRIMINAL LAW – Sentencing.
Catchwords:	Plea of guilty – Not ensure defective disclosure notified to distributor – 18 charges – Body corporate – Very serious failure of corporate governance – Individual fines imposed in relation to each charge – No prior criminal record.
Legislation Cited:	*Corporations Act 2001* (Cth) s 1021J(1); Part 1B of the *Crimes Act 1914* (Cth) ss 16A(1), 16A(2); *Sentencing Act 1991* s 6AAA.
Cases Cited:	*Worboyes v The Queen* [2021] VSCA 169; *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235; *The Queen v Kilic* (2016) 259 CLR 256; *Budget Nursery Pty Ltd v Commissioner of Taxation* (1989) 42 A Crim R 81.
Sentence:	Convicted and fined $95,000 in relation to each of the 18 charges; total fine of $1,710,000.

APPEARANCES:	Counsel	Solicitors
For the DPP	Mr N. Robinson QC with Mr M. Keks	Commonwealth Office of Public Prosecutions
For the Accused	Mr N. Clelland QC with Ms A. Dixon	Herbert Smith Freehills

HIS HONOUR:

Introduction

1 Avanteos Investments Limited ('AIL') has pleaded guilty to 18 charges of 'Not ensure defective disclosure notified to distributor' contrary to s 1021J(1) of the *Corporations Act 2001* (Cth) ('the Act'), which, for a body corporate at the relevant time, carried a maximum penalty of 1000 penalty units or $180,000.

2 AIL has no prior Criminal Record.

Circumstances of the offending

3 A Summary of Prosecution Opening for Plea with an attached Agreed Statement of Facts signed by both parties was tendered on the plea, together with Schedule A outlining the list of affected superannuation products, and Schedule B outlining the defective disclosure documents prepared by AIL.

4 The Agreed Statement of Facts contains extensive background information in relation to AIL's:

- preparation of disclosure documents;
- its awareness of the Affected Disclosure Documents the subject of this prosecution; and
- its failure to take steps to ensure that financial advisors to whom the Affected Disclosure Documents had been provided were given a direction not to further distribute the Affected Disclosure Documents.

5 As such, I will only briefly summarise the offending, relying on the helpful 'Overview' provided in Part A of the Agreed Statement of Facts, which was also read at the plea hearing.

6 At the relevant time, AIL was a trustee of superannuation funds. It issued superannuation products, which were offered to retail customers via financial advisers.

7 As the trustee of the funds, AIL deducted various fees from its members' cash accounts. One such fee was an Adviser Service Fee**,** which was a fee paid to a member's financial adviser for financial advice, provided to the member by the adviser. Pursuant to an authority granted by the member to AIL, in accordance with its usual processes, AIL routinely deducted Adviser Service Fees from its members' accounts and remitted the amounts to their advisers.

8 Until May 2018, AIL's practice was to continue to deduct and remit Adviser Service Fees from a member's account after it had been notified that the member had died. Unless it received an instruction to cease the payment, AIL continued to deduct the Adviser Service Fees until the account was closed.

9 As an issuer of financial products, AIL was required to prepare a Product Disclosure Statement for each product it offered. In those disclosure documents that related to its superannuation products, AIL did not disclose that it would continue to deduct Adviser Service Fees after a member's death, or the circumstances in which it would make those deductions. The superannuation products in respect of which AIL deducted Adviser Service Fees after death are listed in Schedule A of the Agreed Statement of Facts.

10 By at least 6 January 2016, AIL (by its senior management) became aware that its disclosure documents for its superannuation products were defective, because the documents:

(a) contained a misleading or deceptive statement about the deduction of Adviser Service Fees after a member's death, namely an implied representation that AIL would not continue to deduct Adviser Service Fees after a member's death; and

(b) did not contain information that the documents were required to include, namely information about the circumstances in which an Adviser Service Fee would be deducted from a member's account after a member's death;

each of which was materially adverse from the point of view of a reasonable person considering whether to proceed to acquire the superannuation product concerned.

11 The defective disclosure documents that were prepared by AIL are listed in Schedule B of the Agreed Statement of Facts.

12 Between 6 January 2016 and 1 May 2018, AIL continued to deduct Adviser Service Fees from the accounts of deceased members after notification of their death and continued to prepare and distribute to financial advisers Product Disclosure Statements for its superannuation products that were defective as described above.

13 After becoming aware of those defects on 6 January 2016, AIL did not take any steps to ensure that the financial advisers (being regulated persons for the purposes of the Act) to whom the disclosure documents had been provided for further distribution, were given a direction not to distribute the disclosure documents.

14 Therefore, for each of the 18 superannuation products listed in Schedule A in respect of which it prepared disclosure documents, AIL failed to give the requisite direction as soon as practicable, such failure being for each superannuation product a contravention of s 1021J(1) of the Act. AIL's failure to give the requisite direction continued until 1 May 2018, during which period it prepared and distributed further defective disclosure documents. The defective disclosure documents which had been or were prepared and distributed during the relevant period are those listed in Schedule B.

15 During the relevant period, there were 499 deceased superannuation members whose death was notified to AIL and from whose accounts AIL deducted a total of $696,557.86 across 5,399 occasions.

Nature and gravity of the offending

16 In relation to each of the 18 charges on the indictment, the offending period falls between 6 January 2016 and 1 May 2018. It is not in dispute that over that approximately 28 month period, AIL was aware that its disclosure documents for the 18 superannuation products contained misleading statements and omitted information about its practise of continuing to deduct and remit fees from its members accounts following the death of the member.

17 Mr Clelland QC who appeared with Ms Dixon on behalf of AIL, made concessions in relation to a number of matters that are relevant to the assessment of the gravity of the offending including:

- that the defective Product Disclosure Statements went further than a mere omission, and that each of them made a misleading implied representation that AIL would continue to deduct advisor service fees after the members death;
- that the contraventions, as particularised in the charges, extended for almost 28 months;
- that there was a power imbalance between AIL and the affected members and their beneficiaries;
- that AIL held a trusted position within the market as they held an Australian Financial Services Licence; and
- that persons at the highest level of the company had received information that advisor service fees were being deducted and remitted after members' deaths, and that this process was not being disclosed.

18 It was submitted on behalf of AIL that the cause of the failure to cure the defects in the Product Disclosure Statements was due to a failure to appropriately prioritise the taking of steps to correct the defects. Thus it was submitted that as the failure was not calculated or deliberate, the offending should not be classified

as at the high end or worst type of case within the prohibition imposed by s 1021J(1) of the Act.

19 Mr Robertson QC who appeared with Mr Keks on behalf of the Commonwealth Director of Public Prosecutions submitted that AIL's offending was at the upper end of objective seriousness for offending of this kind and as such, its culpability is high.

20 Mr Robinson relied on similar matters that were conceded by AIL, however submitted that in the circumstances while the offending was not intentional offending, given the position of the company in the market, its failure to take steps for some 28 months after becoming aware of the defect, and the fact that the awareness of the failure was at a high level as it was known to management, the objective gravity must be assessed as being at a high level.

21 What is not in dispute is that AIL, through its senior management, became aware of the defect by at least 6 January 2016 but simply did not think it was seriousness enough to act upon as soon as practicable as required by the legislation.

22 As part of the Agreed Statement of Facts, some internal correspondence is reproduced. For example, in an email of 6 January 2016 to various people who were in a leadership role, including the General Manager, AIL's Senior Manager Product Compliance and Governance acknowledges the process of continuing to pay advisor fees after the death of a member and states in the email, 'We do not disclose our process to members currently. Regardless of the outcome we will be looking to include in offer docs at the next opportunity…'.[1]

23 The email concluded by asking if legal advice should be sought. In a response to the email, the General Manager of AIL states, 'I don't like the idea of turning off the fees..' noting that advisors are involved in the activities of the estate following

[1] Agreed Statement of Facts at [50].

the death of a member. The General Manager further states, 'No legal advice at this stage'.[2]

24 However on 8 February 2016, Colonial First State engaged Lander & Rogers to provide legal advice in respect of advisor service fees. The advice was to be provided to both Colonial First State and AIL. On 29 February 2016 a letter of advice was received from Lander & Rogers. In short, the advice noted the defect in the disclosure documents and lack of reference to the continuation of advisor fees after the investors death, assuming that it was an 'unintentional omission'.

25 Despite management's knowledge of the defect from 6 January 2016, confirmed by formal legal advice, nothing was done to cure the defect for the following 28 months. The focus, which is confirmed by various internal emails, remained on the business and whether or not to continue to charge fees following the death of a member, rather than seeking to correct the defect as required by law.

26 In my view it was clearly practicable to have taken reasonable steps to remedy the defect once it became known. AIL was and is a very large, well-resourced company. AIL was advised by top tier legal firms and as noted above, had indeed received advice confirming the defect. Despite AIL knowing of the defect, it continued to charge fees after being informed of an investors death and did so for some 28 months, resulting in 499 deceased members having fees deducted from their accounts.

27 In my view in all the circumstances, the offending can only be described as a very serious failure of corporate governance and an example of a financial corporation putting its own interests above those of its investors in breach of the law. It is therefore, in all the circumstances in my view a serious example of corporate offending and the company's culpability is relatively high.

[2] Ibid at [51].

Sentencing considerations

28 As the Charges to which AIL has pleaded guilty are Commonwealth charges, I am required to sentence the company in accordance with Part 1B of the *Crimes Act 1914* (Cth) ('*Crimes Act*'). Pursuant to s 16A(1) of the *Crimes Act*, the overarching principle is that any sentence I impose must be of 'a severity appropriate in all the circumstances of the offence'. As part of that process, I must take into account the non-exhaustive list of matters pursuant to s 16A(2) of the *Crimes Act.*

29 First, I take in to account AIL's plea of guilty. It is not in dispute that AIL entered its pleas at the earliest opportunity. The pleas of guilty have saved the court considerable time and expense. A case of this nature would have been a lengthy and complex matter requiring a large number of witness, including expert witnesses. In the circumstances the company's pleas demonstrate a willingness to facilitate the course of justice and have a significant utilitarian benefit which I take into account in the company's favour.

30 The pleas of guilty carry additional weight which must be reflected in a further amelioration in sentence, as the pleas have been entered in circumstances where the pandemic has created a substantial backlog of cases in the criminal justice system.[3]

31 Secondly, pursuant to s 16A(2)(f), I accept that the company has shown contrition, demonstrated by its remediation of the losses to its members. Following the disclosure of the offending, AIL refunded the fees taken to members estates or beneficiaries and also refunded amounts to reflect lost investment earnings. As such, it was submitted that any loss resulting from the offending, which is to be considered pursuant to s 16A(2)(e), is mitigated as the victims were only out of pocket for a short period of time.

[3] *Worboyes v The Queen* [2021] VSCA 169 at [39].

32 Thirdly, pursuant to s 16A(2)(h) I take into account the degree to which AIL co-operated with law enforcement agencies in the investigation of the offending. It is not in dispute that AIL self-reported to ASIC and APRA, pursuant to its obligations under the Act. Once an investigation had commenced, AIL produced relevant documents without resistance and without claiming any privileges. Further AIL continued to consult with ASIC as to its remediation methodology in relation to the affected victims by providing regular updates on the status of the remediation program.

33 Fourthly, in considering the company's prospects of rehabilitation pursuant to s 16A(2)(n), it was submitted that following the disclosure to the authorities, AIL commissioned an independent review of the circumstances relating to the breaches, in addition to conducting a root cause analysis workshop. As a result, processes were implemented to ensure that advisor service fees are no longer charged following the death of a member.

34 It was submitted that when consideration is given to the post offence remedial measures, together with the lack of prior criminal history, AIL's prospects of rehabilitation can be considered positively. I accept that submission however as was conceded on behalf of the company, the weight that can be given to this sentencing principle is somewhat limited as following the disclosure, APRA imposed licence conditions requiring compliance measures to prevent any further breaches. In other words the post offence changes have become requirements of the company in order for it to continue to provide superannuation products.

35 I was told at the plea hearing that ASIC will seek the costs of the investigation from AIL which are in the order of $1.3 million. AIL has consented to meet those costs and as such, the parties agreed that this is a matter I can take into account when arriving at the appropriate penalty. In my view the fact AIL is willing to pay the ASIC costs is a further demonstration of the company's acceptance of responsibility and its contrition.

36 Undoubtedly, general deterrence is the paramount sentencing consideration in this instance. The prosecution contend that a severe penalty is required to achieve that purpose. The prosecution's submissions refer to the comments of Wigney J in *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* ('*Nippon Yusen*'),[4] a cartel case, in the sense that cartel offending results in a particular detriment to consumers of the market. However, as pointed out by Mr Clelland, unlike the case here, the *Nippon Yusen* case involved deliberate conspiratorial behaviour, designed to deceive.

37 As I understand the prosecution's submission, in this case the failure to disclose the defect in a timely manner, has an impact on the consumer who, when making a decision on a financial product, is unable to make a confident and informed decision. As such, the failure to correct the defect for some 28 months calls for a penalty that sends a message to the market that this kind of procrastination will not be tolerated, particularly in a trusted and well-resourced company that was a subsidiary of one of Australia's largest banks.

38 Focusing more specifically on the contravention of s 1021J(1) of the Act, it was submitted on behalf of AIL that the conduct of the company was not pursued as a matter of strategy. While I accept that submission, in my view the offending nonetheless represents a high level of objective gravity as a result of AIL's failure of governance and procrastination in circumstance where it should have acted in a timely manner when the defect became known to the management. Therefore in my view general deterrence must weigh heavily in the sentencing calculus.

39 While specific deterrence has some role play, given the company's lack of antecedents together with its appropriate and thorough response, in my view specific deterrence only need carry little weight.

40 As to the appropriate penalty, the prosecution submitted that as the offending was at the upper end of objective seriousness, a fine approaching the maximum

[4] (2017) 254 FCR 235, [271]-[273].

available should be imposed. Against that submission, AIL relies on the fact that the company has pleaded guilty, it has no antecedents, that the breach was not deliberate or calculated and that its response in terms of the remediation program has meant the members have not suffered loss. Further, as noted above, the plea entered in the circumstances of the pandemic, must carry additional weight, which is necessarily reflected in a greater discount.

41 As noted in *The Queen v Kilic*,[5] an offence in the worst category is one that is so grave it warrants the imposition of the maximum prescribed penalty. Clearly here while the offending is very serious and prolonged, it does not fall 'within the worst category' where for example there was a deliberate, calculated plan to withhold information in order to make a greater profit. Rather, it is a case where a company, knowing of a defect, focused on itself and its own business model, rather than its obligations to its members whose funds they were entrusted with.

42 Finally, while it is not in dispute that it is open to the court to impose an aggregate fine, as there are 18 charges on the indictment, each representing a separate superannuation product with distinct Affected Disclosure Documents that had been distributed to individual members, the prosecution contends that the court should not impose an aggregate fine as each offence represents separate criminality.

43 Further, although it is necessary to have regard to the principle of totality, AIL concedes that while a systemic breakdown led to the failed disclosure in relation to all of the 18 funds, the criminality necessarily affected distinctly separate funds resulting in undisclosed deductions being made from 499 deceased members accounts on many occasions, over the course of 28 months. As such, it was conceded in the circumstances that totality may not result in a moderation of the appropriate penalty. However totality remains relevant is the sense that

[5] (2016) 259 CLR 256, [19].

regardless of whether the court imposes separate fines for each charge or one fine to cover all charges, totality dictates that the result should be the same.[6]

44 In my view in the circumstances, individual fines should be imposed in relation to each charge.

Sentence

45 Would the representative of Avanteos Investments Limited please stand.

46 On Charges 1 to 18, Avanteos Investments Limited will be convicted and fined $95,000 on each charge, making for a total fine of $1,710,000.

47 Pursuant to s 6AAA of the *Sentencing Act 1991,* if not for the company's plea of guilty I would have fined the company a total of $2,700,000.

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[6] *Budget Nursery Pty Ltd v Commissioner of Taxation* (1989) 42 A Crim R 81, 86.