FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v BT Funds Management Limited [2021] FCA 844

File number(s):	VID 552 of 2020
Judgment of:	**WHEELAHAN J**
Date of judgment:	22 July 2021
Catchwords:	**CORPORATIONS** – where admitted contraventions of the ss 12DA and 12DB of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and ss 912A(1)(a) and 1041H of the *Corporations Act 2001* (Cth) relating to the unauthorised deduction of fees from customers' accounts and misrepresentations to customers in statements of account – imposition of appropriate penalties pursuant to s 12GBA of the ASIC Act for admitted contraventions of s 12DB(1)(g) – where the quantum of penalties was contested.
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12DA, 12DA(1), 12DB, 12DB(1)(g), 12GBA, 12GBB(5)(e), 12GBC(2) and 12GLB(1)(a) *Corporations Act 2001* (Cth) ss 912A, 912A(1)(a), 913B, 1041H, s 1101B and 1101B(1) *Crimes Act 1914* (Cth), s 4AA *Evidence Act 1995* (Cth) s 191 *Fair Work Act 2009* (Cth) s 557 Commonwealth of Australia, House of Representatives, Explanatory Memorandum to the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020
Cases cited:	*Australian Building and Construction Commissioner v Construction Forestry Mining and Energy Union* [2017] FCAFC 113; 254 FCR 68 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; 250 CLR 640 *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; 165 FCR 560 *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No 3)* [2020] FCA 1421 *Commonwealth v Director, Fair Work Building Industry*

Inspectorate [2015] HCA 46; 258 CLR 482
Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421
Markarian v The Queen [2005] HCA 25; 228 CLR 357
Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd [2004] FCAFC 72; ATPR 41-993
NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission [1996] FCA 1134; 71 FCR 285
Pattinson v Australian Building and Construction Commissioner [2020] FCAFC 177; 299 IR 404
Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd [1921] 2 AC 438
Singtel Optus Pty Ltd v Australian Competition and Consumer Commission [2012] FCAFC 20; 287 ALR 249
Tax Practitioners Board v Caolboy [2020] FCA 1559
Trade Practices Commission v CSR Ltd [1990] FCA 762; 13 ATPR 41-076
Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission [2021] FCAFC 49

Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	53
Date of hearing:	22 July 2021
Counsel for the Plaintiff:	Ms C M Harris QC and Ms A M Folie
Solicitors for the Plaintiff:	Johnson Winter & Slattery
Counsel for the Defendants:	Ms R C A Higgins SC and Ms A Smith
Solicitors for the Defendants:	Gilbert + Tobin

ORDERS

VID 552 of 2020

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**BT FUNDS MANAGEMENT LIMITED (ACN 002 916 458)** First Defendant
	ASGARD CAPITAL MANAGEMENT LIMITED (ACN 009 279 592) Second Defendant

ORDER MADE BY: **WHEELAHAN J**

DATE OF ORDER: **23 JULY 2021**

THE COURT NOTES THAT:

1. In these declarations and orders, terms which are defined in the Statement of Agreed Facts and Admissions dated 18 December 2020 have the same meaning as they do in that document.

2. The Statement of Agreed Facts and Admissions may be inspected by a person pursuant to r 2.32(2)(d) of the *Federal Court Rules 2011* (Cth).

THE COURT DECLARES THAT:

1. The first defendant, BT Funds Management Limited (ACN 002 916 458), by the Account Statements for superannuation products provided to customers in relation to whom a request had been made to remove a financial adviser from their account and in all the circumstances, on at least 487 occasions during the period September 2014 to August 2017, represented to a customer in trade or commerce that:

   (a) no ongoing adviser fee was deducted from the customer's account for the period after the request was processed (No Adviser Fee Representations),

   which representations were each:

(b) a false or misleading representation as to the price of services, in connection with the supply or possible supply of financial services, in contravention of s 12DB(1)(g) of the ASIC Act; and

(c) misleading or deceptive conduct, or conduct that was likely to mislead or deceive in relation to financial services, in contravention of s 12DA(1) of the ASIC Act and s 1041H of the Corporations Act.

2. The second defendant, Asgard Capital Management Limited (ACN 009 279 592) by the Account Statements for superannuation products provided to customers in relation to whom a request had been made to remove a financial adviser from their account and in all the circumstances, on at least 487 occasions during the period September 2014 to August 2017, represented to a customer in trade or commerce that:

(a) no ongoing adviser fee was deducted from the customer's account for the period after the request was processed (No Adviser Fee Representations),

which representations were each:

(b) a false or misleading representation as to the price of services, in connection with the supply or possible supply of financial services, in contravention of s 12DB(1)(g) of the ASIC Act; and

(c) misleading or deceptive conduct, or conduct that was likely to mislead or deceive in relation to financial services, in contravention of s 12DA(1) of the ASIC Act and s 1041H of the Corporations Act.

3. The second defendant, Asgard Capital Management Limited (ACN 009 279 592), by its conduct in each of:

(a) putting in place ineffective processes and systems to cease charging adviser fees to Affected Customers, in that the administrative steps to do so were processed by a third party provider which did not have access to necessary systems;

(b) erroneously applying a coding change to the Affected Products, which caused ongoing adviser fees to continue to be included in accounts but under the description of administration or account management fees, thereby 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 charged following a request to remove an adviser from an account, in that

controls only reviewed a sample of customers each month and the form of the review did not pick up the errors;

(d) retaining until no later than December 2017 ongoing adviser fees to which it had no entitlement;

(e) 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,

breached its obligation to do all things necessary to ensure the financial services covered by its financial services licence, being 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.

THE COURT ORDERS THAT:

1. In respect of the first defendant BT Funds Management Limited's conduct declared to be contraventions of section 12DB(1)(g) of the ASIC Act, BT Funds Management Limited pay a pecuniary penalty in the sum of $1.5 million, to the Commonwealth of Australia within 14 days of this order.

2. In respect of the second defendant Asgard Capital Management Limited's conduct declared to be contraventions of section 12DB(1)(g) of the ASIC Act, Asgard Capital Management Limited pay a pecuniary penalty in the sum of $1.5 million, to the Commonwealth of Australia within 14 days of this order.

3. BT Funds Management Limited and Asgard Capital Management Limited shall take all reasonable steps to cause to be published, at their own expense, within 30 days, a notice in the terms set out in **Annexure A** to these orders, in font no less than 10 point, in a readily accessible part of the following web addresses maintained by them:

   (a) https://asgard.com.au/

   (b) https://www.bt.com.au/

   (c) http://www.asgard.com.au/about-us/media-centre.jsp

   (d) https://www.bt.com.au/about-bt/media-centre/media-releases/latest-media-releases.html

   and ensure that a link to the notice:

(e) is identified by text as follows: 'Notice ordered by the Federal Court in a proceeding issued by ASIC against BT and Asgard concerning IDPS and superannuation products.'

(f) appears immediately upon access by a person to the home page of the websites; and

(g) is maintained on the web addresses for 180 days from the date of these orders.

4. The defendants pay the plaintiff's costs of and incidental to these proceedings.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(Ex tempore, revised)

WHEELAHAN J:

Introduction

1 This proceeding concerns conduct which, to use the description employed by the final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, involves the charging of "fees for no service". The plaintiff (**ASIC**) brings this proceeding against the first defendant, BT Funds Management Limited (**BT**), and the second defendant, Asgard Capital Management Limited (**Asgard**), each of which conducts a business involving the provision of financial services to retail customers. Each is a wholly owned subsidiary of Westpac Banking Corporation (**Westpac**) and holds an Australian financial services licence granted pursuant to s 913B of the *Corporations Act 2001* (Cth).

2 As I will explain in more detail, the crux of the conduct the subject of ASIC's allegations was as follows –

(a) BT and Asgard represented to customers holding particular investment products that ongoing financial adviser fees would not be charged after a financial adviser was removed from a customer's account;

(b) Asgard, in fact, continued to charge customers ongoing financial adviser fees after the adviser was removed, when Asgard was not authorised to do so and no financial advice services were being received by the customers; and

(c) BT and Asgard represented to customers in hard copy and online account statements that they were not being charged ongoing adviser fees when, in fact, an amount equivalent to the adviser fee was added to customers' usual monthly administration fee which had the consequence that the ongoing adviser fee was disguised as an administration fee.

3 ASIC alleged that, between September 2014 and August 2017, by representing that no adviser fees were being charged when in fact such fees were being charged, each of BT and Asgard made false or misleading representations as to the price of services in contravention of s 12DB(1)(g) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), and 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*. ASIC further alleged that by its conduct, Asgard breached its obligation to do all things necessary to ensure that the financial services covered by its Australian financial services licence were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the *Corporations Act*.

4 BT and Asgard do not dispute liability in this proceeding. By the parties' statement of agreed facts and admissions, which was received into evidence pursuant to s 191 of the *Evidence Act 1995* (Cth), BT and Asgard admitted that they had made the representations alleged by ASIC, and that on at least 487 occasions, BT and Asgard engaged in the contraventions of the ASIC Act and of the *Corporations Act* alleged against them. Asgard further admitted that it contravened s 912A(1)(a) of the *Corporations Act*, as alleged. Accordingly, I heard the parties at the hearing on 22 July 2021 on the question of relief, and this judgment deals only with that question. As ASIC's allegations were addressed towards both entities jointly, the defendants made joint admissions and written submissions, and were jointly represented at the hearing.

5 ASIC sought relief in the form of declarations regarding the defendants' admitted contraventions of the ASIC Act and *Corporations Act*, an order that BT and Asgard pay pecuniary penalties in respect of the admitted contraventions of s 12DB(1)(g) of the ASIC Act, adverse publicity orders against BT and Asgard, and costs. There was some agreement between the parties as to relief, with the outstanding question for determination being the amount at which pecuniary penalties should be fixed.

6 Whilst ASIC has sought penalties for contraventions from September 2014 only, this is explicable by the limitation period of six years in s 12GBC(2) of the ASIC Act as in force at the time of the contravening conduct. The unauthorised charging of adviser fees by BT and Asgard, following the removal of an adviser from a customer's account, was occurring from August 2001. Since then, over 660 customers were incorrectly charged over $630,000 in adviser fees which BT and Asgard retained as revenue, and subsequently refunded, with interest, as part of a remediation scheme. During the period September 2014 to August 2017, 404 customers were incorrectly charged $130,006. During that period, Asgard benefited a total of $133,138 in incorrectly charged fees received as revenue, including interest, prior to the refund of those fees.

Agreed facts

7 Details of the conduct giving rise to the admitted contraventions were contained in the parties' statement of agreed facts and admissions, and is relevantly summarised as follows.

8 The contraventions occurred in connection with six financial products offered by BT and Asgard: one "investor directed portfolio service" product issued and administered by Asgard; and five superannuation products for which BT was the trustee and in respect of which Asgard provided custodial and administration services (together, the "**affected products**"). The affected products operated under a "wrap platform" structure, whereby all of a customer's listed securities, managed funds, shares, insurance, and superannuation are combined in one place and transactions are made through a single cash account. These 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 as part of the affected products. Rather, customers had separate agreements with their financial advisers for the provision of financial advice. For each affected product, the fees deducted on a monthly basis by Asgard from customer accounts included: (1) an administration or management fee for the administration services provided in relation to the account, which fee was retained by Asgard; and (2) an adviser fee for ongoing financial advice, where applicable, which fee was to be passed on in full by Asgard to the third-party financial adviser.

9 A financial adviser could be removed from a customer's account upon request from the customer, BT or Asgard, or the financial adviser. From September 2014 to August 2017, BT and Asgard represented to customers holding affected products, in product disclosure statements and a document titled "Policy for Investors without a Financial Adviser", that upon the removal of a financial adviser from their account, the customer would no longer pay a financial adviser fee. That document also stated that "[a]ny administration fee discounts that applied to your account under the arrangement with your financial adviser will cease. This is because your financial adviser (or their dealer group) may have negotiated with us a reduction in your administration fee. On ending the relationship between you and your financial adviser, this reduction will no longer apply". Following a request to remove an adviser, Asgard was responsible for removing the financial adviser from the customer's account and reducing the adviser fees for the account to zero.

10 The contravening conduct was attributed to two system errors, and inadequate review and control mechanisms.

11 *First*, from 1 July 2014, Asgard introduced new internal procedures for removing a customer's financial adviser from an affected product, part of which involved reducing any adviser fees to zero. One of the systems used to change the adviser fees could not, in fact, process changes to ongoing fees for a particular brand of products known as "Infinity". Three of the affected products were Infinity-branded products. From at least 1 July 2014, part of the process for removing financial advisers was outsourced to a provider which conducted the process offshore. The offshore provider was provided only with the fee change system which could not process changes to ongoing fees for Infinity products. The consequence was that, from 1 July 2014, customers holding an Infinity-branded affected product who had made a request to remove their financial adviser continued to be charged financial adviser fees because the offshore service provider was unable to terminate the charging of the fees. Asgard retained those fees as revenue. Of the 404 affected customers, 396 held Infinity-branded products, with the remaining eight customers continuing to pay adviser fees due to unrelated human errors. Those eight customers held other branded products, all of which were superannuation products.

12 *Second*, prior to 1 July 2014, Asgard made a coding change to its fee system, which was erroneously applied to five of the affected products, being the superannuation products (**affected superannuation products**). The effect of the coding change in relation to the affected superannuation products was that, upon the removal of a financial adviser from a customer's account, an amount equal to the adviser fee was added to the administration fee. This resulted in the continued charging of the adviser fee, but under the guise of an administration fee.

13 In addition, neither of the two controls Asgard had in place identified the continued and unauthorised charging of adviser fees. Those two controls were described by the parties as –

> (a) A 'fee sampling process' which could involve a review of a small sample of [previously advised customer] accounts, to check the correct amount of fees were being charged on accounts. The process did not check that the customer's financial adviser had been removed or that the adviser fees had been appropriately switched off.
>
> (b) For at least part of the [period between September 2014 to August 2017], the Asgard Customer Service Delivery **(CSD)** team conducted a monthly sample of the [previously advised customer] process for two customers (across all Asgard administered products) to check that when an adviser was removed from a customer's account the fee had been appropriately switched off.

No accounting control was in place to identify the receipt of additional fee revenue to which Asgard was not entitled. BT and Asgard only identified the errors after they was reported by a customer.

14 BT and Asgard, through issuing account statements, made representations to customers holding affected products about the fees charged to their accounts, in the following forms: (1) customers could access an online portal which displayed separate line items for adviser fees and administration fees; (2) customers received annual or half-yearly hard copy account statements which also included separate line items for adviser fees and administration fees; and (3) where accounts were closed prior to annual or half-yearly statements, customers received a final benefit statement which included a detailed summary about fees and expenses paid by the customer. Account statements for the affected superannuation products were issued by BT and prepared and issued by Asgard. During September 2014 to August 2017, at least 487 hard copy account statements were issued in connection with the affected superannuation products. BT and Asgard do not know on how many occasions customers accessed their account statement through the online portal.

15 Between September 2014 and August 2017, customers who held an affected superannuation product and who had made a request for the removal of a financial adviser received account statements which no longer included monthly line items for ongoing adviser fees, but which continued to show the deduction of a monthly administration fee, the quantum of which was the sum of the amount of the administration fee actually payable, and the amount of the financial adviser fee which would have been payable had the financial adviser continued to provide the advice and not been removed from the account. By reason of the statement made in the Policy for Investors without a Financial Adviser, extracted at [9] above, the parties agreed that a customer holding an affected superannuation product may have expected that the higher administration or management fee was explicable by the loss of adviser-negotiated discounts, rather than indicating an error. To the contrary, no customer with an affected superannuation product had their administration fee increased due to the loss of adviser discounts following the request to remove the financial adviser.

Case study

16 The parties agreed the details of one customer who held an Infinity-branded affected superannuation product, during the period of contravention. The customer's account was opened in March 2013, with a financial adviser attached to it. Each month, a monthly fee

comprising an ongoing adviser fee and management fee was deducted from the customer's account. On 5 August 2015, the customer submitted to Asgard, using Asgard's designated form, a request to remove the financial adviser from the customer's account. The designated form stated that the adviser fees on the customer's account would be "reduced to nil" once the form was processed. The form was processed on 14 August 2015, however, due to system errors, Asgard did not reduce the adviser fee on the customer's account to nil.

17 The customer received a hard copy account statement, issued by BT and Asgard, for the period of 1 July 2015 to 30 June 2016. The account statement contained the following items under the heading "Fees and Costs" –

01/07/15 Monthly Management Fee	$24.55
01/07/15 Adviser Fee - Ongoing/Adviser Remuneration	$133.56
01/08/15 Monthly Management Fee	$24.54
01/08/15 Adviser Fee - Ongoing/Adviser Remuneration	$133.56
01/09/15 Monthly Management Fee	$157.78
01/10/15 Monthly Management Fee	$156.90
01/11/15 Monthly Management Fee	$156.64
01/12/15 Monthly Management Fee	$155.77
01/01 /16 Monthly Management Fee	$155.17
01/02/16 Monthly Management Fee	$154.96
01/03/16 Monthly Management Fee	$153.54
01/04/16 Monthly Management Fee	$154.30
01/05/16 Monthly Management Fee	$153.72
01/06/16 Monthly Management Fee	$154.95

It is apparent that, from September 2015, following the removal of the financial adviser from the customer's account, the quantum of the monthly management fee was increased by approximately the quantum of the adviser fee.

18 The overcharging in respect of this customer was identified by BT and Asgard and remediated in March 2017. The next account statement received by the customer in July 2017 for the preceding year showed an inflated management fee had been charged for the months of July 2016 to April 2017. For May and June 2017, following the identification and remediation of the error, the customer's account statement showed the charging of a correct, and significantly lower, management fee of approximately $16.

Identification, notification and remedial action

19 On 26 October 2016, a customer who held an Infinity-branded affected product and had in August 2016 requested the removal of a financial adviser from their account, telephoned Asgard and informed Asgard that they had been charged adviser fees notwithstanding their request for their financial adviser to be removed. Asgard investigated, and on 10 November 2016 emailed the customer to inform them that the adviser fees incorrectly deducted from their account had been refunded. In the email Asgard stated that the correction would ensure that no further adviser fees were paid from the customer's account, without approval. On 9 December 2016, Asgard had again incorrectly deducted an adviser fee, which the customer identified and brought to Asgard's attention on 19 December 2016. Asgard refunded the adviser fee on 21 December 2016. Asgard undertook further investigations to identify the root cause of the overcharging notified to it by the customer.

20 In February 2017, BT identified the system error whereby adviser fees continued to be charged, and Asgard notified its offshore provider that the system it used to process the removal of financial advisers could not change the ongoing fees for Infinity-branded affected products, and commenced an investigation to identify customers who were being incorrectly charged fees due to the systemic error. In April 2017, the offshore provider was instructed to direct requests to remove a financial adviser to the Asgard onshore team for relevant products, including the Infinity-branded products. Asgard's onshore team processed the change of fees using a different system, which was not available to the offshore provider.

21 In July 2017, Westpac's "Breach Consideration Forum" considered a report about the unauthorised continued charging of adviser fees. On 17 July 2017, Westpac, BT and Asgard notified ASIC of the issue in a voluntary breach notification made under s 912D of the *Corporations Act*. By August 2017, Asgard had effectively switched off the adviser fees for customers holding affected products and implemented new processes for Infinity-branded products which allowed ongoing adviser fees to be reduced to zero. BT and Asgard had also implemented a new fee control process which, in contrast to the previously ineffective processes described at [13] above, required a report to be run each month to identify any accounts to which fees for financial advice were being charged where a financial adviser had been removed. This report was then reviewed by a member of Asgard's customer service delivery team to identify incorrectly charged fees, and prevent them being charged in the next fee cycle.

22 Westpac, BT, and Asgard undertook remedial action including restitution and in January 2018 they informed ASIC that most customers holding affected products had been notified of the error and compensation had been paid by way of a refund of the incorrectly charged fees, plus interest. There was a group of customers who did not receive restitution of the amounts incorrectly charged because they had closed their accounts and the amount to be paid to them was less than $20, and a decision had been taken that such customers would not be informed of the overcharging of fees nor would they receive remediation. Instead, any amounts owing to such customers was "applied to the fund" for the benefit of current members of the relevant fund.

Relief sought

23 ASIC sought the following relief –

(a) Declarations pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth), or alternatively s 1101B of the *Corporations Act*, regarding the defendants' admitted contraventions. The form of declarations was agreed between the parties, and thus the parties jointly sought that the court make the proposed declarations.

(b) An order pursuant to s 12GBA(1) of the ASIC Act, as in force at the time of the contravening conduct, that BT and Asgard pay to the Commonwealth of Australia such pecuniary penalties as the court determines to be appropriate in respect of the contraventions of s 12DB(1)(g) of the ASIC Act. The parties agree that each defendant should pay a pecuniary penalty to the Commonwealth in respect of its contraventions of s 12DB(1)(g). ASIC submitted that a penalty of $2.5 million for each of BT and Asgard, giving an aggregate of $5 million, was appropriate; BT and Asgard submitted that lower penalties which gave an aggregate penalty of $2.5 million was appropriate. For completeness I note that contraventions of s 12DA of the ASIC Act, and s 1041H and s 912A(1)(a) of the *Corporations Act*, do not sound in pecuniary penalties under the legislation as in force at the relevant time.

(c) An adverse publicity order pursuant to s 12GLB(1)(a) of the ASIC Act that, within 30 days, BT and Asgard take all reasonable steps to cause to be published, at its own expense, a notice stating that it has been ordered to pay a pecuniary penalty because it has made false or misleading representations, in a manner and form approved by the court.

(d) Further or alternatively to (c), an order pursuant to s 12GLB(1)(a) of the ASIC Act that, within 30 days, Asgard take all reasonable steps to cause to be published, at its own expense, a notice stating that it has been found by the court to have breached its obligation to do all things necessary to ensure the financial services covered by its financial services licence were provided efficiently, honestly and fairly, in a manner and form approved by the court. I note that there is a corresponding provision in s 1101B(1) of the *Corporations Act* in relation to contraventions of Chapter 7 of that Act, in which s 912A is found.

(e) An order that the defendants pay ASIC's costs of and incidental to the proceeding. The defendants did not oppose this order.

24 In my consideration of relief, I will address the issues in the following order. First, the question of an appropriate pecuniary penalty; second, the adverse publicity orders sought; and third, whether this court should make the declarations sought. I will make orders as to costs substantially in the form agreed by the parties. Where I refer to legislative provisions, I refer to those provisions as in force during the period September 2014 to August 2017, unless otherwise indicated.

An appropriate pecuniary penalty

25 If the court is satisfied that a person has contravened a provision of Subdivision D of Division 2 of Part 2 of the ASIC Act, which relevantly includes s 12DB(1)(g), the court may impose a pecuniary penalty: s 12GBA(1), as in force before its repeal by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth). The terms of s 12GBA(1) were not amended during the period September 2014 to August 2017. By the agreed statement of facts and admissions, I am satisfied that BT and Asgard contravened s 12DB(1)(g) of the ASIC Act.

26 In determining the appropriate pecuniary penalty, the court must consider the matters set out in s 12GBA(2) of ASIC Act –

> (2) In determining the appropriate pecuniary penalty, the Court must have regard to all relevant matters including:
>
> (a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and
>
> (b) the circumstances in which the act or omission took place; and
>
> (c) whether the person has previously been found by the Court in proceedings under this Subdivision to have engaged in any similar

conduct.

27 Section 12GBA(3), extracted below, sets out the maximum pecuniary penalty per contravention. It will usually be necessary to give careful attention to the maximum penalty in arriving at an appropriate penalty, though rarely should maximum penalties be a starting point: *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 at [31] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

> (3) The pecuniary penalty payable under subsection (1) is not to exceed the number of penalty units worked out using the following table:
>
> | **Number of penalty units** | | |
> |---|---|---|
> | **Item** | **For each act or omission to which this section applies that relates to ...** | **the number of penalty units is not to exceed ...** |
> | 2 | a provision of Subdivision C or D (other than section 12DA) | (a) if the person is a body corporate–10,000; or
(b) if the person is not a body corporate–2,000. |
>
> …

28 For the purposes of s 12GBA(3), the value of a penalty unit, and therefore maximum penalty for contraventions by a body corporate, varied between September 2014 and August 2017, as follows –

(a) from 1 September 2014 to 30 July 2015: $170, giving a maximum penalty of $1.7 million per contravention;

(b) from 31 July 2015 to 30 June 2017: $180, giving a maximum penalty of $1.8 million per contravention; and

(c) from 1 July 2017 to 31 August 2017: $210, giving a maximum penalty of $2.1 million per contravention.

See: *Crimes Act 1914* (Cth), s 4AA.

29 In the main, the general principles as to arriving at an appropriate penalty were not in dispute between the parties. I will summarise them only briefly. The starting point is s 12GBA, including the mandatory considerations in s 12GBA(2) (see [26] above). The principal, if not the only object of a pecuniary penalty is deterrence, both general and specific: *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 at [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ) (***Agreed Penalties Case***), citing *Trade Practices Commission v CSR Ltd* [1990] FCA 762; 13 ATPR 41-076 at 52,152 (French J)

(***CSR***). This object of deterrence will inform the assessment of an appropriate penalty. An appropriate penalty should place a price on contravention that is sufficiently high to deter repetition by the contravener, and by others: the cost of complying with a penalty cannot be regarded as an acceptable cost of doing business: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; 250 CLR 640 at [64], citing *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; 287 ALR 249 at [68]. The parties submitted that there are a number of other, non-exhaustive, factors that may arise in the assessment of a penalty of appropriate deterrent value, and I will address those which are relevant in my analysis. No single factor will be decisive. Instead, "[t]he fixing of a penalty involves the identification and balancing of all the factors relevant to the contravention[s] and the circumstances of the defendant[s], and making a value judgment as to what is the appropriate penalty in light of the protective and deterrent purpose of a pecuniary penalty": *Australian Building and Construction Commissioner v Construction Forestry Mining and Energy Union* [2017] FCAFC 113; 254 FCR 68 at [100] (Dowsett, Greenwood and Wigney JJ), as affirmed in *Pattinson v Australian Building and Construction Commissioner* [2020] FCAFC 177; 299 IR 404 at [115] (Allsop CJ, White and Wigney JJ, Besanko and Bromwich JJ agreeing).

30 As I have mentioned, ASIC submitted that a penalty of $2.5 million payable by each of BT and Asgard for their contraventions of s 12DB(1)(g) is appropriate, in aggregate giving a total of $5 million. BT and Asgard submitted that an aggregate penalty of $5 million is too high in the circumstances, and that an appropriate penalty, across both BT and Asgard, is no more than $2.5 million. The aggregation of the penalties between the defendants is relevant because the defendants submitted that Westpac will ultimately bear any pecuniary penalty ordered against them, and ASIC relied on Westpac's financial position as informing an appropriate level of penalty. Each party made submissions in support of its proposed penalty, and I will address the main points that were advanced during the course of my analysis.

31 Three preliminary matters arise.

32 *First*, whilst the parties have proposed competing penalties, the court's task is not to choose which of the parties' proposals it prefers. Rather, the text of the legislation requires the court to fix a penalty which it determines to be appropriate: see, eg, *Agreed Penalties Case* at [48]. Rather than there being a single appropriate penalty, there is a permissible range of penalties in which "a particular figure cannot necessarily be said to be more appropriate than another":

Agreed Penalties Case at [47], citing *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72; ATPR 41-993 (***Mobil Oil***) at [51] (Branson, Sackville and Gyles JJ). A penalty may be considered appropriate if it falls within the permissible range, though the court is not "bound to start with the proposed penalty and then limit itself to considering whether that penalty is within the permissible range": *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49 at [127]-[128] (Wigney, Beach and O'Bryan JJ), referring to *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; 71 FCR 285 at 290-291 (Burchett and Kiefel JJ), and *Mobil Oil* at [47], [51] and [54].

33 *Second*, the defendants admitted to at least 487 contraventions of a single provision of the ASIC Act. Where multiple contraventions arise from a course of conduct, the court must take care in imposing penalties so as to avoid double punishment. While s 12GBA(4) of the ASIC Act provides that a person is liable for only one pecuniary penalty if conduct constitutes a contravention of two or more relevant provisions of the ASIC Act, that limitation is not engaged in the present case as only one such provision, s 12DB, has been contravened. Notwithstanding, in an appropriate case, the court may order payment of a single sum for multiple contraventions, at least if that course is agreed or accepted as being appropriate by the parties: *Australian Building and Construction Commissioner v Construction Forestry Mining and Energy Union* [2017] FCAFC 113; 254 FCR 68 at [149] (Dowsett, Greenwood and Wigney JJ). I conclude from the parties' submissions, and in particular from the absence of any attempt to calculate a penalty based on the number of contraventions, that they accept one global sum for the 487 contraventions is appropriate in the case of each defendant. There is, however, a dispute as to whether the contraventions comprised one single course of conduct.

34 ASIC submitted that BT and Asgard engaged in two distinct courses of conduct constituted by: (1) the representations made on 487 occasions in the hard copy statements; and (2) the representations made on an unknown number of occasions by the online account statements accessible by customers via the online portal. ASIC submitted that each distinct method of communicating the false or misleading representation was independently capable of misleading or deceiving the recipients. Further, ASIC submitted that by making the representations in both hard copy and online account statements, customers had no means of cross-checking the information to ascertain the true state of affairs with respect to the deduction of fees from their account. On the other hand, counsel for BT and Asgard submitted that there is no reason to distinguish between the modes of communication when they are both examples of account

statements that are automatically produced and direct products of the same system errors. The defendants further submitted that there was a single course of conduct as across BT and Asgard, distinguishable from a situation where two entities, by their separate acts, simultaneously engaged in conduct that was false or misleading. Rather, the defendants characterised the situation as one where there was a lack of clarity as to which of BT and Asgard was truly responsible for the representations made. What this submission amounted to was that while both defendants accepted responsibility, their relative culpability could not be reliably evaluated. I will address the competing submissions in the course of my analysis.

35 *Third*, the parties made submissions as to application of the totality principle, which when applicable requires the court to consider the entirety of the contravening conduct to determine whether the aggregate penalty is just and appropriate: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; 254 FCR 68 at [117]. The guidance given by appellate authorities is that the correct course is to first arrive at a proposed appropriate penalty and then to consider whether a reduction is required: *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; 165 FCR 560 at [23] (Gray J), [71] (Graham J) and [102] (Buchanan J). I will also address this question in the course of my analysis.

Analysis

36 I will first address the mandatory considerations of s 12GBA(2) of the ASIC Act, followed by considerations of general and specific deterrence.

37 ASIC submitted that it is significant that the contraventions occurred with respect to superannuation products, and that the contraventions were committed by BT acting in its capacity as trustee, and Asgard acting in its capacity as custodian, of such products. ASIC submitted that because of the special nature of superannuation products, being a financial product of fundamental public importance, members of superannuation funds have particular pressing interests in the proper management and administration of the funds. ASIC appeared to submit that some distinguishable approach to assessing penalties should be taken in connection with superannuation products as opposed to other financial products. BT and Asgard disputed this characterisation and the emphasis placed on the relevance of the superannuation products. I prefer the approach advocated by the defendants, that s 12DB of the ASIC Act reflects a policy that all financial services providers must provide accurate information to their customers, including as to fees. In the context of the ASIC Act's

proscription on false or misleading statements, the obligation does not arise in some special way in connection with superannuation products compared to other products, nor for trustees or custodians of superannuation products. Nor does the language of s 12GBA suggest as much. For this reason, labelling the financial services as the provision of superannuation products is not in itself a significant factor going to the assessment of a penalty. Rather, what is relevant are the underlying circumstances, and in this way I accept ASIC's submissions that attention should be given to the nature of the relationship between the defendants and their customers. The nature of the relationship between the defendants and their customers in relation to the superannuation products placed the defendants in a position of relative control, and the customers to whom the contravening conduct was directed were vulnerable in that they were not able to control the defendants' systems, and they were entitled to rely upon the defendants for the provision of information that was not misleading. I accept ASIC's submission that there was an asymmetry of knowledge between BT and Asgard on the one hand, and their customers on the other, and that as a result customers likely placed a high level of trust in the defendants with respect to the administration of their funds. These features of this case may arise in many other circumstances involving conduct in relation to the provision of financial products or services, and are not unique to superannuation. For instance, in relation to banks, Allsop CJ observed in *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No 3)* [2020] FCA 1421 at [13] and [17], that the relationship between banker and customer is founded upon trust and good faith in a commercial sense in which there is a degree of customer vulnerability in dealing with banks. Furthermore, the statutory norms of conduct in s 912A of the *Corporations Act*, including the obligation to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly, and fairly, are imposed on all financial services licensees.

38 I note, for completeness, that the ASIC Act now provides for specific consideration of the impact that *the penalty under consideration* would have on the beneficiaries of a superannuation entity where the contravention is committed by a trustee, which is a different consideration: see s 12GBB(5)(e) of the ASIC Act as currently in force; Commonwealth of Australia, House of Representatives, Explanatory Memorandum to the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 at [9.169]-[9.173], and [9.185].

39 I have had regard to the confined number of affected products, being six, and the number of customers affected, being 404, which though not insignificant, is relatively low in the context of retail financial services. The contraventions for which penalties are to be imposed occurred

for approximately two and a half years without being identified, during which time four customers' accounts were, on six occasions, sold down so that the unauthorised adviser fees could be deducted. Whilst the penalties in question are for the false or misleading representations made, it is pertinent that but for the misrepresentations, customers may have been in a better position to identify the deduction of unauthorised fees and potentially avoid the sell down of their accounts. It is also relevant that, as ASIC submitted, though the total amount of overcharged fees was relatively low, the individual impact on customers was significant, as was the negative impact on consumer trust in financial services providers, including those who provide superannuation services.

40 It took close to a year from the first notification in October 2016 of the overcharging, for BT and Asgard to rectify the errors causing the contraventions. Remediation of customers was commenced some months later, in December 2017, which included notifying affected customers of the unauthorised charging of fees and compensation in the sum of the unauthorised fees that had been charged and interest. Though the conduct had the potential to expose customers to loss, following remediation undertaken by Westpac, BT and Asgard, most customers holding affected products did not suffer loss or damage, but for the small group who did not receive remediation, referred to at [22] above. Conversely, whilst Asgard initially retained the overcharged fees, following remediation neither of the defendants profited from the contraventions. The amount owing to the customers who were not the subject of remediation was applied to the fund, and thus for the benefit of all members, as distinct from the defendants.

41 It is agreed between the parties, and I accept, that the conduct giving rise to the contraventions was inadvertent, not deliberate, and the result of system errors and inadequacies. The cause of the contraventions had many strands, and the errors arose at multiple points in the totality of BT and Asgard's operations, with no adequate system in place to identify the errors. At the same time, it is relevant that the inadvertent conduct did not involve, and was not sanctioned by, senior management.

42 BT and Asgard submitted, and I accept, that neither of the defendants, nor Westpac, has been found to have previously contravened s 12DB of the ASIC Act.

43 Inadvertent system errors which have the capacity to cause undetected losses of the kind that occurred here are serious. That is particularly so when during the period relevant to this proceeding the errors went undetected for a period of over two years until one customer

challenged the charging of an adviser fee. Financial services providers in the position of the defendants should not be able to take the benefits which arise from automated and offshore processes and systems, which it may be inferred contribute to substantial profits, without also undertaking the burden of ensuring that those systems work, and that they promptly identify occasions where they do not. An appropriate penalty should have the effect of deterring the defendants, and financial services providers generally, from maintaining defective systems, and conversely, providing an incentive to establish and maintain systems that are reliable.

44 ASIC submitted that a penalty should reflect the very substantial resources of Westpac. On the other hand, counsel for BT and Asgard submitted that Westpac's size is not a sensible yardstick for an appropriate penalty, nor does it warrant a higher penalty than would otherwise be imposed, especially where Westpac did not seek to take advantage of its strong financial position to pursue a course of conduct which it knew to be contrary to the ASIC Act. A number of Westpac's recent annual reports were in evidence before the court, showing a market capitalisation of $61 billion with $912 billion of total assets as at 30 September 2020 and a net profit after tax of $2.29 billion in the year ending 30 September 2020, and stronger financial results in the years prior. I consider Westpac's size and financial position relevant to both specific and general deterrence. The significance of any penalty calculated to have a deterrent effect should in this case have regard to the defendants' financial circumstances and capacity to pay.

45 It is also important to take account of the fact that Westpac made a timely disclosure of the errors to ASIC, albeit that the information initially provided to ASIC later had to be corrected in relation to some of the details. It is also relevant that remediation was undertaken, both of affected customers and the systems which led to the contraventions; that Westpac cooperated with ASIC; that liability was admitted at the earliest opportunity; and that Westpac issued an announcement to the ASX admitting the contraventions alleged by ASIC on the same day that the proceeding was commenced. In relation to this proceeding, the resources of the regulator and the court have been employed to the minimum degree necessary, thus saving public expense, and making those resources available for other purposes. I have taken these matters into account in a way favourable to the defendants in reaching a view as to appropriate penalties.

46 Though regard should normally be had to the maximum penalty, in this case that is of very limited assistance. Amongst other things, reference to the maximum penalty for each

contravention would not be possible, because the number of online contraventions cannot be established. Further, having as a reference point an accumulation of maximum penalties in relation to the 487 contraventions by the production of hard copy statements would be liable to result in a distorted and therefore inappropriate response to a series of contraventions that should be addressed in their totality.

47 As I mentioned, the parties made submissions in relation to the course of conduct principle. ASIC submitted that there were two courses of conduct, namely representations made in hard copy statements, and representations made online. On the other hand, counsel for the defendants submitted that there is no reason to distinguish between different forms of communication. The defendants' submissions in this regard should be accepted. The division between hard copy and electronic communications into separate courses of conduct as advocated by ASIC is artificial and lacking in utility. There is a danger in civil penalty proceedings that the relevant guiding principles are overanalysed or applied in a way that diverts attention from the primary question that is raised by the statute, which is to ask what is an appropriate penalty, having regard to the object of deterrence, and having regard to all relevant matters as required by s 12GBA(2) of the ASIC Act. Some statutes may require that attention be directed to whether there was a single course of conduct for the purposes of aggregating what otherwise might be multiple contraventions: eg, *Fair Work Act 2009* (Cth), s 557. That is not the case here because there is no express statutory requirement to aggregate the defendants' conduct. Nonetheless, it is appropriate to stand back from the individual contraventions and look at the picture painted by the accumulation of detail in order to evaluate an appropriate penalty.

48 I have had regard to all the circumstances that I have summarised in these reasons. While the penalty to be imposed is for the making of false or misleading misrepresentations in contravention of the ASIC Act, rather than the unauthorised overcharging of fees, significant regard should be had to that latter feature of the case. That is for two related reasons. The first is that the misrepresentations to the customers in the account statements, which omitted the line items for adviser fees and increased the administration fees, had the effect of suppressing the errors that had occurred. If the misrepresentations had not been made, then there was a greater likelihood that more than one customer would have detected the errors, and would have done so much earlier than October 2016. The second reason is that looking at the question of an appropriate penalty through the prism of the object of deterrence, it is proper to have regard

to the underlying causes of the misrepresentations, because the causes of the conduct must be deterred.

49 I approach the question of penalty taking account of all the matters in the defendants' favour to which I have referred, including the absence of deliberate conduct, the absence of any question of dishonesty, the timely self-reporting to ASIC, the remedial action that was taken, the high level of co-operation in this proceeding, and the defendants' express acknowledgments of wrongdoing and regret. These features of the defendants' conduct bear upon the level of deterrence required. Taking account of these matters, the main consideration to which I have had regard in arriving at an appropriate penalty is to fix a figure which puts a price on the defendants' non-compliance with statutory norms that is sufficiently high as to induce the defendants and others to put the necessary resources into developing and maintaining sound systems and controls that will ensure such contraventions do not occur, and that when they do occur, remedial action is taken with due dispatch. In viewing the matter in this way, I have sought to give attention to the underlying causes of the conduct that is to be deterred, and to take a global view of the contraventions. Approached in this manner, the totality principle is really the starting point in assessing appropriate penalties, because I have put to one side any idea that separate penalties should be assessed for individual contraventions: see, *Tax Practitioners Board v Caolboy* [2020] FCA 1559 at [65].

50 I consider that an appropriate penalty for the defendants, which are part of the Westpac group, is $3 million. The case was not conducted on the basis that there was any reliable way of apportioning responsibility for the contravening conduct between the defendants. The appropriate penalties are, therefore, that each defendant should pay a penalty to the Commonwealth in the sum of $1.5 million. Each penalty is a significant sum that is calculated to have the intended deterrent effect to which I have referred above.

Adverse publicity orders

51 The parties were in agreement that there should be adverse publicity orders substantially in the form sought by ASIC, and it is appropriate that those orders be made.

Declarations

52 Notwithstanding the parties' agreement that the declarations should be made, whether that relief is appropriate is a matter for the court to decide. Section 21 of the *Federal Court of Australia Act 1976* (Cth) confers a broad discretionary power on the court to make declarations

of right. The discretion may be exercised in favour of making a declaration if the question in issue is a real and not theoretical one; the person raising the question has a real interest to raise it; and there is a proper contradictor: *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437-438 (Gibbs J), citing *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448. More particularly, declarations relating to contraventions of legislative provisions are likely to be appropriate where they serve to record the court's disapproval of the contravening conduct, vindicate a regulator's claim that a party contravened the provisions, assist the regulator to carry out its duties, and deter other persons from contravening the provisions: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; 254 FCR 68 at [93] (Dowsett, Greenwood and Wigney JJ). I am satisfied that declarations are an appropriate remedy in this case, and will accordingly make the declarations substantially in the terms proposed by the parties. Though it is not necessary separately to consider the power to make declarations under s 1101B(1) of the *Corporations Act*, I note that that would be a suitable alternative basis on which to make declarations regarding the admitted contraventions of ss 912A(1)(a) and 1041H of the *Corporations Act*.

Conclusion

53 I will direct counsel for the parties to confer, and to present amended draft orders for my consideration which reflect the conclusions in these reasons.

I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wheelahan.

Associate:

Dated: 23 July 2021