

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 22/10/2021 11:01:48 AM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Concise Statement
File Number: NSD1114/2021
File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v
KEITH CHARLES COHEN & ANOR
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 22/10/2021 2:37:40 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 2021

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

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

KEITH CHARLES COHEN and Another
(named in the attached schedule)

Defendants

A. INTRODUCTION

1. In the period 15 November 2017 to 2 October 2018 (inclusive) (**Relevant Period**), Freedom Insurance Pty Ltd (ACN 138 864 543) (in liquidation) (**Freedom Insurance**) held Australian Financial Services Licence (**AFSL**) number 341082 (**Freedom AFSL**). Under that AFSL, Freedom Insurance marketed and sold to consumers (until on or about 2 October 2018) certain insurance products including final expenses insurance, accidental death insurance and accidental injury insurance (**Insurance Products**) issued by and on behalf of Swiss Re Life & Health Australia Limited (ACN 000 218 306) (**Swiss Re**) under the 'Freedom' brand name.
2. During the Relevant Period, Insurance Network Services Australia Pty Ltd (ACN 137 632 770) (in liquidation) (**INSA**) employed sales agents (**Sales Agents**), who represented Freedom Insurance in its dealings with consumers and who were 'representatives' of Freedom Insurance within the meaning of s.910A of the *Corporations Act 2001* (Cth) (**Corporations Act**).
3. During the Relevant Period, non-monetary benefits in the form of a Vespa scooter and two sets of holiday packages to Bali were given by INSA to, and accepted by, Sales Agents (collectively, **the Incentives**). Freedom Insurance failed to take reasonable steps to ensure that its representatives did not accept the Incentives. The Incentives were conflicted remuneration and prohibited by the Corporations Act.
4. By reason of the Incentives, Freedom Insurance and INSA each breached provisions of Division 4 of Part 7.7A of the Corporations Act and additionally Freedom Insurance breached its obligations as a financial services licensee under the Corporations Act.
5. The First Defendant, Keith Charles Cohen (**Keith Cohen**), was a director of Freedom Insurance from 14 August 2009 to 17 October 2018, a director of INSA from 12 June 2009 to 17 October 2018, and a Responsible Manager on the Freedom Insurance AFSL throughout the Relevant Period. Keith Cohen was knowingly concerned in, or party to, the provision of conflicted remuneration by INSA and acceptance thereof by Freedom Insurance's representatives (being INSA's employees), as well as Freedom Insurance's failure to take reasonable steps to ensure that its representatives did not accept conflicted remuneration, and the associated breaches of Freedom Insurance's obligations as a

financial services licensee. Keith Cohen also breached the director's duties he owed to Freedom Insurance and INSA under s.180(1) of the Corporations Act.

6. The Second Defendant, Robert Rafec Oayda (**Robert Oayda**), was engaged by INSA as a consultant to deliver services to INSA and Freedom Insurance during the period from about 7 September 2016 to about 17 September 2018, and acted as Freedom Insurance's Quality Assurance (**QA**) Manager from about late 2016/early 2017 to about January 2018. He was knowingly concerned in, or party to, the acceptance of conflicted remuneration by Freedom Insurance's representatives, Freedom Insurance's failure to take reasonable steps to ensure that its representatives did not accept conflicted remuneration, and the associated breaches of Freedom Insurance's obligations as a financial services licensee.

B. IMPORTANT FACTS GIVING RISE TO THE CLAIM

B.1 Freedom Corporate Structure

7. During the Relevant Period, the Freedom group of companies (**Freedom Group**) included Freedom Insurance Group Ltd (ACN 608 717 728) (in liquidation) (**FIG**) (a publicly listed company), Freedom Insurance, INSA and Freedom Insurance Administration Pty Ltd (ACN 164 880 193) (now deregistered) (**Freedom Administration**).
8. Freedom Insurance and INSA were related bodies corporate, as FIG held 100 percent of the shares of INSA, which in turn held 100 percent of the shares of each of Freedom Insurance and Freedom Administration. During the Relevant Period, Keith Cohen was a director and the Chief Executive Officer (**CEO**) (or Managing Director) of each of FIG, Freedom Insurance, Freedom Administration and INSA.
9. INSA was the entity within the Freedom Group that employed personnel who undertook work for Freedom Insurance (and other Freedom Group companies). Each employee and director of INSA was a representative of Freedom Insurance as a financial services licensee, within the meaning of s.910A, and for the purposes of Chapter 7, of the Corporations Act.
10. The Freedom Group entered external administration, and liquidators were appointed to each of Freedom Insurance and INSA, on 13 February 2020.

B.2 Freedom AFSL and Insurance Products

11. During the Relevant Period, Freedom Insurance held the Freedom AFSL, which authorised it to carry on a financial services business providing financial product advice to retail clients in relation to certain Insurance Products and dealing in those products for or on behalf of retail clients.
12. From 21 October 2016, Freedom Insurance and Swiss Re were parties to a 'Product Development and Distribution Agreement', pursuant to which Freedom Insurance agreed to exclusively market and distribute under the Freedom AFSL certain Insurance Products that were developed by Swiss Re and Freedom Insurance, that were issued by Swiss Re and that were branded 'Freedom'. Freedom Insurance was responsible for, amongst other matters, promoting and offering the Insurance Products to consumers, including providing general financial product advice in relation to the same. Moreover, from 1 February 2017, Freedom Administration and Swiss Re were parties to a 'Life Insurance Administration Agreement', and INSA and Swiss Re were parties to a 'Services Agreement', pursuant to which Freedom Administration and INSA agreed to provide certain 'administration services' and other services, respectively, in relation to the Insurance Products. These agreements provided Freedom Insurance, INSA and Freedom Administration, with entitlement to

commissions, fees and other payments in connection with the Insurance Products marketed and distributed and other services provided.

13. The Insurance Products marketed and sold to consumers by Freedom Insurance for and on behalf of Swiss Re pursuant to the 'Product Development and Distribution Agreement' under the 'Freedom' brand name included Final Expenses Cover (**FEC**), Accidental Death Cover (**ADC**) and, for holders of ADC, optional Accidental Injury Cover (**AIC**) (together, **Freedom Protection Plan Products**).
14. The Freedom Protection Plan Products were financial products within the meaning of Chapter 7 of the Corporations Act. In marketing and distributing the Insurance Products, Freedom Insurance provided financial services, including providing financial product advice (consisting of recommendations or statements of opinion that were, or could reasonably be regarded as, intended to influence a person in making a decision in relation to a financial product), within the meaning of Chapter 7 of the Corporations Act, or alternatively, provided information within the meaning of s.963AA of the Corporations Act and regulation 7.7A.11B(1) of the *Corporations Regulations 2001* (Cth) (**Corporations Regulations**).
15. Freedom Insurance, on behalf of Swiss Re, marketed and distributed the Freedom Protection Plan Products to consumers via a call centre, which received inbound telephone calls and made outbound telephone calls (**Call Centre**), and which was staffed by Sales Agents employed by INSA.

B.3 Incentives - non-monetary benefits provided to Sales Agents

16. During the Relevant Period, the following Incentive programs were conducted, and the following Incentives were given to and accepted by Sales Agents who sold (or attempted to sell) Freedom Protection Plan Products:
 - 16.1. from 15 November 2017 to 25 January 2018, the '**Vespa Incentive**' was conducted, pursuant to which the Sales Agent with the most 'points' (being the Sales Agent who sold the highest number of Freedom Protection Plan Products during the qualifying period) qualified for, was given and accepted a Vespa scooter;
 - 16.2. from 15 November 2017 to about 30 January 2018, the '**First Bali Sales Incentive**' was conducted, pursuant to which each Sales Agent was given an individual target that required them to sell a specific number of Freedom Protection Plan Products during the qualifying period, and at least 15 qualifying Sales Agents were given and accepted a holiday package to Bali for two people including return flights, airport transfers, seven nights' accommodation, and daily buffet breakfast; and
 - 16.3. from 15 January 2018 to about 24 March 2018, the '**Second Bali Sales Incentive**' was conducted, pursuant to which each Sales Agent was given an individual target that required them to sell a specific number of Freedom Protection Plan Products during the qualifying period, and at least nine qualifying Sales Agents were given and accepted a holiday package to Bali for two people. For Sales Agents who had not previously qualified for the First Bali Sales Incentive, the benefit was the same 'basic' holiday package as given for the First Bali Sales Incentive, and for Sales Agents who had previously qualified for the First Bali Sales Incentive the benefit was the option of either another 'basic' holiday package, or an 'upgrade' to the 'basic' holiday package, which included a room upgrade, eight nights' accommodation, eight complimentary dinners or lunches (in addition to buffet breakfast), free drinks, a beach club voucher, and massages.
17. Keith Cohen was involved in the decision to conduct each of the Incentives. He approved the offering of the Incentives to the Sales Agents, approved the qualifying criteria and budgets, and received reports on the progress of the Incentives. He knew what each of the

Incentives was to be, and was, given to Sales Agents who met the qualifying criteria, and took no steps to prevent the Incentives being accepted by the Sales Agents.

18. Robert Oayda was involved in the decision to conduct each of the Incentives. He offered and/or announced and promoted the Incentives to the Sales Agents and encouraged them to participate. Mr Oayda also played a role in developing the qualifying criteria and budgets for the Incentives, and received reports on the progress of the Incentives. He personally arranged for the purchase of the Vespa and was personally involved in facilitating some of the logistical arrangements for the Bali holiday packages taken by the Sales Agents, and handling queries from the Sales Agents about the same. He knew that each of the Incentives was to be, and was, given to Sales Agents who met the qualifying criteria, and took no steps to prevent the Incentives being accepted by the Sales Agents.

C. SUMMARY OF RELIEF SOUGHT FROM THE COURT

19. ASIC seeks the relief set out in the accompanying Originating Process.

D. PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT

20. Each of the Incentives is presumed to be conflicted remuneration by operation of s.963L of the Corporations Act and further or in any event, is conflicted remuneration within the meaning of s.963A (in that, the nature of the benefits or the circumstances in which they were given could reasonably be expected to have influenced the financial product advice given by Freedom Insurance's representatives). Further and alternatively, each of the Incentives is also conflicted remuneration by operation of s.963AA of the Corporations Act and reg. 7.7A.11B(1) of the Corporations Regulations.
21. Given that each of the Sales Agents was a representative of Freedom Insurance, the relevant responsible licensee, Freedom Insurance contravened s.963E when each of the Sales Agents accepted the Incentives. Freedom Insurance also contravened s.963F because it failed to take reasonable steps to ensure that each of the Sales Agents did not accept the Incentives. By paying for the Incentives, INSA gave conflicted remuneration to its employees in contravention of s.963J.
22. By reason of the matters referred to in paragraphs 20 and 21 above, the contraventions of ss.963E and 963F by Freedom Insurance also constitute a failure by it to comply with the financial services laws in Division 4 of Part 7.7A of the Corporations Act and Freedom Insurance breached the general obligations it owed as a financial services licensee under s.912A(1)(c) of the Corporations Act.
23. Keith Cohen was knowingly concerned in, or party to, each of the contraventions of ss.963E, 963F and 912A(1)(c) by Freedom Insurance and of s.963J by INSA, by reason of the matters referred to in paragraphs 17, and 20 to 22 above.
24. Robert Oayda was knowingly concerned in, or party to, each of the contraventions of ss.963E, 963F and 912A(1)(c) by Freedom Insurance, by reason of the matters referred to in paragraphs 18, and 20 to 22 above.
25. By reason of the matters referred to in paragraphs 5, 17 and 20 to 23 above, Keith Cohen failed to exercise his powers and discharge his duties to Freedom Insurance and INSA with the care and diligence required by s.180(1) of the Corporations Act, in exposing Freedom Insurance and INSA to a foreseeable risk of harm. It was foreseeable that, causing or allowing Freedom Insurance to contravene ss.963E, 963F and/or 912A(1)(c), and/or INSA to contravene s.963J, and/or failing to take reasonable steps, or any steps, to prevent those contraventions, would expose Freedom Insurance and/or INSA to the risk of reputational harm, litigation and/or regulatory action. Further or in the alternative, Keith Cohen, through

his conduct, exposed Freedom Insurance and/or INSA to a foreseeable risk of harm, because his conduct created a significant risk of non-compliance with financial services laws, and was likely to result in future contraventions by those companies, whether or not those contraventions ultimately eventuated.

E. ALLEGED HARM

26. The contraventions do not require proof of actual harm to consumers.

Date: 22 October 2021

A handwritten signature in black ink, appearing to read "Stephen Dalton". The signature is written in a cursive style with a large, sweeping initial 'S'.

Lawyer, ASIC

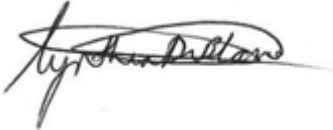
For and on behalf of the Australian Securities and Investments Commission

This pleading was prepared by Tiffany Wong SC and Meg O'Brien of Counsel and Cynthia Di Blasio, Lawyer.

Certificate of lawyer

I, Cynthia Di Blasio, certify to the Court that, in relation to the Concise Statement filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 22 October 2021

A handwritten signature in black ink, appearing to read 'Cynthia Di Blasio', written over a horizontal dotted line.

Signed by Cynthia Di Blasio

Lawyer for the Plaintiff

SCHEDULE OF PARTIES

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

KEITH CHARLES COHEN

First Defendant

ROBERT RAFEC OAYDA

Second Defendant