



Federal Court of Australia

District Registry: Victoria

Division: General

No: VID183/2020

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

COLONIAL FIRST STATE INVESTMENTS LIMITED

Defendant

ORDER

JUDGE: JUSTICE MURPHY

DATE OF ORDER: 06 September 2021

WHERE MADE: Melbourne

THE COURT DECLARES THAT:

1. By sending letters on or about 22 April 2014 to 12,911 members of its FirstChoice Personal Super product who had been identified as members from whom the Defendant (**CFSIL**) did not hold an investment direction and had accepted superannuation contributions into the FirstChoice Personal Super product in breach of section 29WA of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) (**Letters**), CFSIL:
 - (a) engaged in conduct, in trade or commerce:
 - (i) in relation to a financial product or a financial service, that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**) and
 - (ii) in relation to financial services, that was misleading or deceptive or likely to mislead or deceive in contravention of s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);



- (b) made, in trade or commerce, in connection with the supply or possible supply of financial services, false or misleading representations concerning the need for any services in contravention of s 12DB(1)(h) of the ASIC Act; and
- (c) made, in trade or commerce, in connection with the supply or possible supply of financial services, false or misleading representations concerning the existence, exclusion or effect of a condition, warranty, guarantee, right or remedy in contravention of s 12DB(1)(i) of the ASIC Act;

in that the Letters represented that:

- (d) the member was required to take urgent action (in the form of providing an investment direction) in order for CFSIL to continue to receive the members' superannuation contributions, when that was not the case;
- (e) recent legislative changes required CFSIL to hold investment directions from its members, when that was not the case; and
- (f) the "recent change to superannuation legislation" referred to in the Letters applied only to future contributions paid into FirstChoice Personal Super in relation to which CFSIL did not hold an investment direction but not to previous contributions paid into FirstChoice Personal Super in relation to which CFSIL had not held an investment direction, when that was not the case.

(collectively, **Letter Representations**).

2. Between 18 March 2014 and 21 July 2016, in 67 calls between CFSIL and members of its FirstChoice Personal Super product who had been identified as members from whom CFSIL did not hold an investment direction and had accepted superannuation contributions into the FirstChoice Personal Super product in breach of section 29WA of the SIS Act, CFSIL:

- (a) engaged in conduct, in trade or commerce:
 - (i) in relation to a financial product or a financial service, that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H(1) of the Corporations Act; and
 - (ii) in relation to financial services, that was misleading or deceptive or



likely to mislead or deceive in contravention of s 12DA(1) of the ASIC Act;

- (b) made, in trade or commerce, in connection with the supply or possible supply of financial services, false or misleading representations concerning the need for any services in contravention of s 12DB(1)(h) of the ASIC Act; and
- (c) made, in trade or commerce, in connection with the supply or possible supply of financial services, false or misleading representations concerning the existence, exclusion or effect of a condition, warranty, guarantee, right or remedy in contravention of s 12DB(1)(i) of the ASIC Act,

in that:

- (d) CFSIL represented in the Calls that:
 - (i) recent legislative changes required CFSIL to contact the member in relation to the investment of the member's superannuation contributions, when that was not the case;
 - (ii) recent legislative changes required CFSIL to obtain a direction, instruction or confirmation from the member in relation to the investment of their superannuation contributions, when that was not the case; and
 - (iii) the member was required to take action in the form of providing a direction, instruction or confirmation in relation to the investment of their superannuation contributions, when that was not the case; and
- (e) CFSIL failed to disclose that if CFSIL did not receive an investment direction from the member, it was required to transfer the member's superannuation contributions into a MySuper product.

- 3. On 27 March 2014, in a call between CFSIL and a member of its FirstChoice Personal Super product who had been identified as a member from whom CFSIL did not hold an investment direction and had accepted superannuation contributions into the FirstChoice Personal Super product in breach of section 29WA of the SIS Act, CFSIL:



- (a) engaged in conduct, in trade or commerce:
 - (i) in relation to a financial product or a financial service, that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H(1) of the Corporations Act; and
 - (ii) in relation to financial services, that was misleading or deceptive or likely to mislead or deceive in contravention of s 12DA(1) of the ASIC Act;
- (b) made, in trade or commerce, in connection with the supply or possible supply of financial services, false or misleading representations concerning the need for any services in contravention of s 12DB(1)(h) of the ASIC Act; and
- (c) made, in trade or commerce, in connection with the supply or possible supply of financial services, false or misleading representations concerning the existence, exclusion or effect of a condition, warranty, guarantee, right or remedy in contravention of s 12DB(1)(i) of the ASIC Act,

in that:

- (d) CFSIL represented in the call that:
 - (i) recent legislative changes required CFSIL to contact the member in relation to the investment of the member's superannuation contributions, when that was not the case; and
 - (ii) the member was required to take action in the form of providing a direction, instruction or confirmation in relation to the investment of their superannuation contributions, when that was not the case; and
 - (e) CFSIL failed to disclose that if CFSIL did not receive an investment direction from the member, it was required to transfer the member's superannuation contributions into a MySuper product.
4. On 18 March 2014, in a call between CFSIL and a member of its FirstChoice Personal Super product who had been identified as a member from whom CFSIL did not hold an investment direction and had accepted superannuation contributions into the



FirstChoice Personal Super product in breach of section 29WA of the SIS Act, CFSIL:

- (a) engaged in conduct, in trade or commerce:
 - (i) in relation to a financial product or a financial service, that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H(1) of the Corporations Act; and
 - (ii) in relation to financial services, that was misleading or deceptive or likely to mislead or deceive in contravention of s 12DA(1) of the ASIC Act;
- (b) made, in trade or commerce, in connection with the supply or possible supply of financial services, false or misleading representations concerning the need for any services in contravention of s 12DB(1)(h) of the ASIC Act; and
- (c) made, in trade or commerce, in connection with the supply or possible supply of financial services, false or misleading representations concerning the existence, exclusion or effect of a condition, warranty, guarantee, right or remedy in contravention of s 12DB(1)(i) of the ASIC Act,

in that:

- (d) CFSIL represented in the call that:
 - (i) recent industry changes required CFSIL to contact the member in relation to the investment of the member's superannuation contributions, when that was not the case;
 - (ii) recent industry changes required CFSIL to obtain a direction, instruction or confirmation from the member in relation to the investment of their superannuation contributions, when that was not the case; and
 - (iii) the member was required to take action in the form of providing a direction, instruction or confirmation in relation to the investment of their superannuation contributions, when that was not the case; and



(e) CFSIL failed to disclose that if CFSIL did not receive an investment direction from the member, it was required to transfer the member's superannuation contributions into a MySuper product.

5. On 29 May 2014, in a call between CFSIL and a member of its FirstChoice Personal Super product who had been identified as a member from whom CFSIL did not hold an investment direction and had accepted superannuation contributions into the FirstChoice Personal Super product in breach of section 29WA of the SIS Act, CFSIL:

- (a) engaged in conduct, in trade or commerce:
 - (i) in relation to a financial product or a financial service, that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H(1) of the Corporations Act; and
 - (ii) in relation to financial services, that was misleading or deceptive or likely to mislead or deceive in contravention of s 12DA(1) of the ASIC Act;
- (b) made, in trade or commerce, in connection with the supply or possible supply of financial services, false or misleading representations concerning the need for any services in contravention of s 12DB(1)(h) of the ASIC Act; and
- (c) made, in trade or commerce, in connection with the supply or possible supply of financial services, false or misleading representations concerning the existence, exclusion or effect of a condition, warranty, guarantee, right or remedy in contravention of s 12DB(1)(i) of the ASIC Act,

in that:

- (d) CFSIL represented in the call that:
 - (i) the regulator required, or alternatively requested, CFSIL to contact the members in relation to the investment of the members' superannuation contributions, when that was not the case; and
 - (ii) the member was required to take action in the form of providing a direction, instruction or confirmation in relation to the investment of



their superannuation contributions, when that was not the case; and

- (e) failed to disclose that if CFSIL did not receive an investment direction from the member, it was required to transfer the member's superannuation contributions into a MySuper product.
6. Between 19 March 2014 and 18 June 2014, in 17 calls between CFSIL and members of its FirstChoice Personal Super product who had been identified as members from whom CFSIL did not hold an investment direction and had accepted superannuation contributions into the FirstChoice Personal Super product in breach of section 29WA of the SIS Act, CFSIL contravened s 949A of the Corporations Act by reason that in each of the calls, CFSIL:
- (a) provided general advice within the meaning of section 766B of the Corporations Act in that it made a recommendation or statement of opinion that the member should continue to have his or her superannuation contributions invested with FirstChoice Personal Super; and
 - (b) failed to warn the member that:
 - (i) the advice had been prepared without taking account of the member's objectives, financial situation or needs;
 - (ii) because of the fact referred to in (i) above, the member should, before acting on the advice, consider the appropriateness of the advice, having regard to the member's objectives, financial situation and needs; and
 - (iii) the member should obtain a Product Disclosure Statement relating to the product and consider the Statement before making any decision about whether to acquire the product.
7. By its conduct in each of:
- (a) making the Letter Representations in the circumstances referred to in paragraph 1 above;
 - (b) making the representations referred to in paragraphs 2 to 5 above (**Call Representations**) in the circumstances referred to therein;



- (c) failing in the Letters and in the calls referred to in paragraphs 2 to 5 above (**Calls**) to inform members that CFSIL had breached its legislative obligations by failing to treat the members' superannuation contributions since 1 January 2014 as being contributions to be paid into a MySuper product of the FirstChoice Fund; and
- (d) failing in the Calls to inform members that:
 - (i) if CFSIL did not receive an investment direction from the members, it was required to transfer the members' superannuation contributions into a MySuper product; and
 - (ii) MySuper products were simple, low fee super products that met certain minimum requirements set by government, including default levels of insurance, as CFSIL believed to be the case,

CFSIL failed to do all things necessary to ensure the financial services covered by its financial services licence were provided efficiently, honestly and fairly in contravention of s 912A(1)(a) of the Corporations Act.

- 8. By reason of the contraventions referred to in paragraphs 1 to 7 above, CFSIL failed to comply with financial services laws in contravention of s 912A(1)(c) of the Corporations Act.

THE COURT ORDERS BY CONSENT THAT:

- 9. The defendant pay the plaintiff's costs of the proceeding to date.
- 10. By 4.00 pm on 17 September 2021, the parties are to endeavour to agree a statement of agreed facts as to penalty and other relief (**SOAF**) and, if agreement is reached, to file the SOAF. If agreement cannot be reached by this date, the parties are to file a proposal, or competing proposals, for the timetabling of evidence in relation to penalty and other relief.
- 11. If the SOAF is filed by 17 September 2021, by 4.00 pm on 23 September 2021, ASIC is to file and serve any additional affidavit material on which it intends to rely on the question of relief.



12. By 4.00 pm on 30 September 2021, CFSIL is to file and serve any additional affidavit material on which they intend to rely on the question of relief.
13. By 4.00 pm on 5 October 2021, ASIC is to file and serve any affidavit material in reply on which it intends to rely on the question of relief.
14. By 4.00 pm on 5 October 2021, ASIC is to file and serve:
 - (a) a proposed form of final order; and
 - (b) a written outline of submissions in support of its proposed form of order.
15. By 4.00 pm on 8 October 2021, CFSIL is to file and serve:
 - (a) a proposed form of final order; and
 - (b) a written outline of submissions in support of its proposed form of order.
16. The matter be fixed for hearing as to penalty and other relief at 10.15 am on 12 October 2021 on an estimate of 1 day.
17. There be liberty to apply.

Date that entry is stamped: 6 September 2021

Sia Lagos
Registrar