FEDERAL COURT OF AUSTRALIA

Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Limited (No 5)

[2024] FCA 477

SUMMARY

In accordance with the practice of the Federal Court in cases of public interest, importance or complexity, the following summary has been prepared to accompany the orders made today. This summary is intended to assist in understanding the outcome of these proceedings and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment which will be available on the Court's website after a relatively short period when the reasons will be published only to the parties and their legal advisors to enable them to check that there has been no inadvertent disclosure of information that is currently protected by existing non-disclosure orders. This summary will be available, however, on the Court's website today.

On 3 August 2017, the Chief Executive Officer of the Australian Transaction Reports and Analysis Centre commenced a proceeding against the respondent, Commonwealth Bank of Australia Limited (the **Bank**), for civil penalties and other relief (the **civil penalty proceeding**) because the Bank failed to comply with its obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (the **AML/CTF Act**). As events transpired, the Bank made various admissions of contravention for the purposes of that proceeding. On 20 June 2018, the Court granted declarations in relation to the Bank's contraventions and imposed a pecuniary penalty pursuant to s 175(1) of the AML/CTF Act in the sum of $700 million: *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Commonwealth Bank of Australia Limited* [2018] FCA 930.

The present proceedings (*Zonia Holdings Pty Ltd v Commonwealth Bank of Australia*: VID 1085 of 2017 and *Philip Anthony Baron and Joanne Baron v Commonwealth Bank of Australia*: NSD 1158 of 2018) concern events and circumstances that, in part, gave rise to the civil penalty proceeding. They are, however, separate from the civil penalty proceeding and involve markedly different questions of legal liability.

The applicants allege that the Bank breached its obligations of continuous disclosure under Ch 6CA of the *Corporations Act 2001* (Cth) (the **Corporations Act**)—specifically, s 674(2)—because, in the period 16 June 2014 and 1.00 pm on 3 August 2017, it had information relating to some of (what were later found to be) its contraventions of the AML/CTF Act which it did not disclose to the market operated by the Australian Securities Exchange on which its shares

were traded. This information, which the applicants plead in various forms, is conveniently categorised as the Late TTR Information, the Account Monitoring Failure Information, the IDM ML/TF Risk Assessment Non-Compliance Information, and the Potential Penalty Information (together, the **Information**). The applicants allege that the Bank was required by r 3.1 of the ASX Listing Rules to disclose this information. They allege, further, that, had this information (or a combination of it) been disclosed, it would have had a material effect on the market price of CBA shares.

Relatedly, the applicants allege that, throughout the relevant period, the Bank engaged in misleading or deceptive conduct on a continuous basis by publishing, and failing to correct or modify, various representations. These representations included representations to the effect that the Bank had in place effective policies, procedures, and systems to ensure its compliance with relevant regulatory requirements (the **Compliance Representations**), and with its continuous disclosure obligations (the **Continuous Disclosure Representation)**.

The applicants contend that these representations were misleading or deceptive because the Bank did not have effective policies, procedures, and systems in place to ensure compliance with the AML/CTF Act or to ensure compliance with its continuous disclosure obligations under Ch 6CA of the Corporations Act.

The applicants allege that, by engaging in this conduct, the Bank contravened s 1041H(1) of the Corporations Act, s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**) and, or alternatively, s 18(1) of Sch 2 to the *Competition and Consumer Act 2010* (Cth) (the **Australian Consumer Law**).

Further, the applicants allege that, in connection with a pro-rata renounceable entitlement offer of new CBA shares that was made to shareholders in September and October 2015 to raise $5 billion in capital, the Bank issued a cleansing notice that was defective within the meaning of s 708AA(11), and which was not corrected as required by s 708AA(10), of the Corporations Act.

The applicants allege that, because the Bank did not comply with its continuous disclosure obligations as it should have done, or because the Bank engaged in misleading or deceptive conduct, or because the Bank issued and did not correct the allegedly defective cleansing notice, CBA shares traded on the ASX at an artificially inflated price (i.e., at a price above the price that a properly informed market would have set). They contend that they acquired CBA

shares in that inflated market and, as a consequence, paid too much for them. They seek to recover, by way of damages, the amount of that inflation or an amount referable to that inflation.

I am satisfied that, as at 26 October 2015, the Bank was constructively aware of the IDM ML/TF Risk Assessment Non-Compliance Information pleaded as the August 2015 IDM ML/TF Risk Assessment Non-Compliance Information.

I am also satisfied that, as at 24 April 2017, the Bank was aware of the Late TTR Information pleaded as the September 2015 Late TTR Information and the Account Monitoring Failure Information pleaded as the September 2015 Account Monitoring Failure Information, together with the Potential Penalty Information (to the extent that it was dependent on the Bank's awareness of the September 2015 Late TTR Information and the September 2015 Account Monitoring Failure Information).

Even so, I have found that there are a number of deficiencies in the pleaded expression of the Late TTR Information, the Account Monitoring Failure Information, the IDM ML/TF Risk Assessment Non-Compliance Information, and the Potential Penalty Information. Those deficiencies are such that I am not satisfied that r 3.1 of the ASX Listing Rules required the Bank to disclose that information to the ASX in any of its pleaded forms.

Furthermore, and in any event, I am not satisfied that the Information, in any of its pleaded forms, was information that, if disclosed at the relevantly pleaded times, would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of CBA shares. More generally, I am not satisfied that the Information, in any of its pleaded forms, was information that a reasonable person would expect to have a material effect on the price or value of CBA shares if that information were to have been generally available at the relevantly pleaded times.

These conclusions and findings mean that the applicants have not established that the Bank contravened s 674(2) of the Corporations Act.

As to the applicants' case on misleading or deceptive conduct, I am not satisfied that the Bank made the Compliance Representations or the Continuous Disclosure Representation. Even if I had found that the Bank had made the Continuous Disclosure Representation, the applicants' case on misleading or deceptive conduct, based on that representation, lies in establishing that

the Bank failed to comply with its continuous disclosure obligations. As I have said, the applicants have not established the latter case.

Therefore, the applicants have not established that the Bank contravened s 1041H(1) of the Corporations Act, s 12DA(1) of the ASIC Act, or s 18(1) of the Australian Consumer Law.

Further, I am not satisfied that the applicants have established their additional case that the 2015 Cleansing Notice was defective within the meaning of s 708AA(11) of the Corporations Act, and was not corrected as required by s 708AA(10) thereof.

Even if the applicants had established their various allegations of statutory contravention by the Bank, I would not have found that they had established their case on the causation of loss arising from those contraventions, or the quantification of that loss.

It follows that the proceedings will be dismissed. However, the only orders that I will make today will be orders: (a) limiting, for a relatively short period, the publication of the full reasons for judgment to only the parties and their legal advisors and not to any other person, and (b) providing the parties with the opportunity to bring in agreed orders, and agreed answers to the common questions, to enable the proceedings to be finalised.

JUSTICE DAVID YATES

10 May 2024
Sydney