

NOTICE OF FILING

Details of Filing

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File Title: EQUITY FINANCIAL PLANNERS PTY LTD v AMP FINANCIAL PLANNING PTY LTD
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

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 of the filing of the document is determined pursuant to the Court's Rules.



Further Amended Points of claim

No. VID 498 of 2020

Federal Court of Australia
District Registry: Victoria
Division: General

Equity Financial Planners Pty Limited

Applicant

AMP Financial Planning Pty Limited

Respondent

The points of claim of the sample group member WealthStone Pty Ltd (**WealthStone**) are below.

Capitalised terms have the same meaning as in the Third Further Amended Statement of Claim.

- 1 WealthStone is a group member in this proceeding.
- 2 WealthStone is a company registered under the *Corporations Act 2001* (Cth).
- 3 The sole director and majority shareholder of WealthStone is, and at all relevant times has been, Michael Colin Finch (**Mr Finch**).

Authorised Representative Agreement

- 4 In about December 2009 WealthStone and Mr Finch entered into an Authorised Representative Agreement with AMPFP naming WealthStone as the Practice.
- 5 WealthStone repeats paragraphs 5-6, 9-17, 20-36, and 39-46 and 51A-51G of the Third Further Amended Statement of Claim.

BOLR application

- 6 On 7 December 2018 WealthStone lodged an application to invoke the buyer of last resort facility.
- 7 On 20 December 2018, AMPFP confirmed an exercise date of 8 December 2019.

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[Form approved 01/08/2011]

- 8 On 31 January 2020 AMPFP provided WealthStone and Mr Finch with a Buy-Back Agreement (**First Draft BBA**), which contained a Purported Release, and requested that WealthStone and Mr Finch execute the First Draft BBA.
- 9 On 3 February 2020 WealthStone requested that AMPFP make certain alterations to clause 3.4 of the First Draft BBA and remove the Purported Release from the First Draft BBA.
- 10 On 4 February 2020 AMPFP provided a revision of the First Draft BBA (**Final Draft BBA**), in which certain alterations were made to clause 3.4, but refused to remove the Purported Release.
- 11 On 4 February 2020, WealthStone and Mr Finch executed the Final Draft BBA.
- 12 On or after 4 February 2020, AMPFP executed the Final Draft BBA (**WealthStone's BBA**).

WealthStone's BBA

- 13 In WealthStone's BBA:
- a. "BOLR Benefit" means "\$176,121.41 (excl GST), being the Register Value calculated by AMPFP";
 - b. "BOLR Policy" means "The Register and Buyer of Last Resort Policy applicable from time to time that forms part of the AR Agreement";
 - c. "Completion" means "Completion of the sale and purchase of the Register Rights in accordance with this Agreement";
 - d. "Completion Date" means "21 February 2020 or such other date agreed between AMPFP and the Practice";
 - e. "Deferred Payment" means "The amount calculated as 50% of the BOLR Benefit less the Deferred Payment adjustment calculated in accordance with clause 4 and Lookback Costs (if any)";
 - f. "Deferred Payment Date" means, in effect:
 - i. subject to (ii) below, the date which is 12 months after the Completion Date;
 - ii. if the Practice Principal has died or has been assessed as totally and permanently disabled in accordance with the BOLR Policy, the date which is 6 months after the Completion Date.
 - g. "Initial Payment" means "\$33,656.10 (excl GST) being 50% of the BOLR Benefit, less Initial Remediation";

- h. “Liabilities” means “All liabilities, claims, obligations, losses, damages, outgoings, costs and expenses of whatever description”;
- i. “Practice” means WealthStone;
- j. “Register Value” means “The value of the Register Rights calculated in accordance with the buyer of last resort valuation methodology as set out in the BOLR Policy (as amended from time to time) and as determined by AMPFP to be applicable to the Practice and in this regard, the determination by AMPFP shall be final in the absence of manifest error”;
- k. “Relevant Parties” means, jointly and severally, the Practice and Mr Finch.

14 It is a term of WealthStone’s BBA that:

- a. The Practice agrees to surrender its Register Rights to AMPFP, on certain terms, in exchange for the BOLR Benefit (clause 2.1(a));
- b. Subject to certain terms and conditions, AMPFP will pay the BOLR Benefit to the Practice or as the Practice otherwise directs on Completion (clause 3.1);
- c. The BOLR Benefit will be paid in two instalments, being:
 - i. the Initial Payment on the Completion Date; and
 - ii. the Deferred Payment on the Deferred Payment Date (subject to certain other terms)

(clause 3.3).

15 Clause 5 of WealthStone’s BBA contains a Purported Release, which is in the following terms: “On payment by AMPFP of the BOLR Benefit to the Practice, each of the Relevant Parties hereby releases AMPFP from all and any present or future claims, proceedings, suits and Liabilities arising out of or in connection with the facts or circumstances giving rise to the BOLR Benefit” (clause 5).

Manifest error

16 AMPFP determined to use a buyer of last resort valuation methodology that included the 8 August 2019 Changes for the purpose of calculating the value of the Register Rights for WealthStone’s BBA.

17 AMPFP’s purported determination in paragraph 16 was affected by manifest error because the 8 August 2019 Changes are invalid and of no effect.

18 AMPFP has not made a valid determination of the valuation methodology to be used for the purpose of calculating the value of WealthStone’s Register Rights for WealthStone’s BBA.

- 19 AMPFP calculated the value of WealthStone's Register Rights, for WealthStone's BBA, in accordance with a valuation methodology that included the 8 August 2019 Changes.
- 20 AMPFP's calculation in paragraph 19:
- a. was not made in accordance with the buyer of last resort valuation methodology set out in the BOLR Policy;
 - b. was not made in accordance with a buyer of last resort valuation methodology validly determined by AMPFP;
 - c. was itself a determination by AMPFP that was affected by manifest error, because the 8 August 2019 Changes are invalid and of no effect;
 - d. was not a calculation or determination made in accordance with the terms of WealthStone's BBA.
- 21 On or about 2 March 2020, AMPFP paid WealthStone an amount of \$51,268.24, purportedly in discharge of the Initial Payment (\$33,656.10) and GST on the whole of the BOLR Benefit (\$17,612.141).
- 22 On or about 16 March 2021, AMPFP paid WealthStone an amount of \$82,425.76, purportedly in discharge of the Deferred Payment.
- 23 The payments in paragraphs 21 and 22, which together purported to be payment of the BOLR Benefit under WealthStone's BBA, were:
- a. the amount calculated by AMPFP pleaded in paragraph 19 above, plus GST; and
 - b. less than the value of WealthStone's Register Rights, plus GST, properly calculated in accordance with the valuation methodology set out in the BOLR Policy (which does not include the 8 August 2019 Changes).
- 24 By reason of the matters in paragraphs 16 to 23 above, for the purpose of WealthStone's BBA:
- a. AMPFP has not made a valid determination of the valuation methodology to be applied for the purpose of calculating the value of WealthStone's Register Rights;
 - b. AMPFP has not made a valid calculation or determination of the value of WealthStone's Register Rights;
 - c. AMPFP has not paid WealthStone a BOLR Benefit in accordance with the terms of WealthStone's BBA;
 - d. AMPFP has not satisfied the condition for the operation of the Purported Release in WealthStone's BBA (namely, payment of the BOLR Benefit);

- e. the Purported Release in WealthStone's BBA does not operate to release AMPFP from the claims advanced on behalf of WealthStone in this proceeding.

Unfair contract term

25 Paragraphs 26 to 44 below are in the alternative to paragraphs 16 to 24.

Small business contract

- 26 WealthStone's BBA was a contract for the supply of services within the meaning of section 23(4)(a) of the *Australian Consumer Law (ACL)*.
- 27 The Initial Payment was the upfront price payable under WealthStone's BBA, within the meaning of section 23(4)(c) of the ACL.
- 28 Alternatively, the BOLR Benefit was the upfront price payable under WealthStone's BBA, within the meaning of section 23(4)(c) of the ACL.
- 29 The upfront price payable under WealthStone's BBA, within the meaning of section 23(4)(c) of the ACL, was less than \$300,000.
- 30 At the time WealthStone's BBA was entered into, WealthStone employed fewer than 20 persons.
- 31 In the premises, WealthStone's BBA is a small business contract, within the meaning of section 23(4) of the ACL.

Standard form contract

- 32 WealthStone's BBA is a standard form contract for the purposes of section 23 of the ACL and WealthStone relies on section 27(1) of the ACL.

Purported Release is an unfair contract term

Significant imbalance in the rights of the parties

- 33 AMPFP had no right, under WealthStone's Authorised Representative Agreement, to require WealthStone to give a Purported Release in order to receive a buyer of last resort payment to which WealthStone was entitled.
- 34 By reason of the matter in paragraph 33, an effect of the Purported Release in WealthStone's BBA would be to give greater rights to AMPFP than it is entitled to under WealthStone's Authorised Representative Agreement.
- 35 By reason of the matters pleaded in paragraph 36 or alternatively 46 of the Amended Statement of Claim, WealthStone has suffered loss or damage because WealthStone has not received, under WealthStone's BBA, the measure of the buyer of last resort payment that WealthStone would have received had AMPFP performed WealthStone's Authorised Representative Agreement without breach.

36 The Purported Release in WealthStone’s BBA would prevent WealthStone obtaining compensation from AMPFP for the loss or damage referred to in paragraph 35 (assuming that the Purported Release is not ineffective on some other basis).

37 By reason of the matters in paragraphs 35 and 36, an effect of the Purported Release in WealthStone’s BBA would be to give WealthStone lesser rights under WealthStone’s BBA than it is entitled to under its Authorised Representative Agreement

38 WealthStone’s BBA contains no commensurate or reciprocal benefit to WealthStone.

39 In the premises, the Purported Release in WealthStone’s BBA would cause a significant imbalance in the rights of the parties.

Not reasonably necessary in order to protect the legitimate interests of AMPFP

40 The Purported Release in WealthStone’s BBA would advantage AMPFP.

41 The Purported Release in WealthStone’s BBA is not reasonably necessary in order to protect the legitimate interests of AMPFP and WealthStone relies on section 24(4) of the ACL.

Detriment to WealthStone if relied upon

42 The Purported Release in WealthStone’s BBA would cause detriment to WealthStone if relied upon by AMPFP.

Purported Release is unfair

43 In light of the matters in paragraphs 33 to 42, the Purported Release in WealthStone’s BBA is an unfair term for the purposes of section 24(1) of the ACL.

Purported Release is void

44 In the light of the matters pleaded in paragraphs 31, 32, 33 and 43 above, the Purported Release in WealthStone’s BBA is void.

Unconscionable conduct

45 Paragraphs 46 to 51 are pleaded further or alternatively to paragraphs 16 to 44.

46 At the time of entering into WealthStone’s BBA, AMPFP knew or ought to have known (as was the case) that:

aa. the matters in paragraphs 34A–34C and 51A–51E of the Third Further Amended Statement of Claim;

a. the legal validity of the 8 August 2019 Changes was likely to be challenged;

b. the release of claims related to the 8 August 2019 Changes was not reasonably necessary to protect AMPFP’s legitimate commercial interests;

- c. WealthStone's BBA was a standard form contract;
- d. AMPFP had no right, under the Authorised Representative Agreement with WealthStone, to require WealthStone to give the Purported Release in order for WealthStone to receive the BOLR Benefit;
- e. in entering into the WealthStone BBA, WealthStone was in a vulnerable economic position;
- f. in entering into the WealthStone BBA, WealthStone was in an inferior bargaining position to AMPFP;
- g. WealthStone had no viable alternative, if it wished to receive (even part of) the BOLR Benefit, but to enter into the WealthStone BBA containing a Purported Release.

Particulars

WealthStone refers to and repeats the matters in the particulars subjoined to paragraph 102(a)(i) to (iii), (b) and (d) of the further amended statement of claim (FASOC).

As to (c), AMPFP knew that the WealthStone BBA was the same or similar to the Buy-Back Agreement being offered to other Practices.

As to (e)-(g), WealthStone refers to and repeats the matters in the particulars subjoined paragraph 102(e)-(g)(i), (ii), (iv) and (v) of the FASOC and says further that:

- (a) it relies on the matters pleaded at paragraphs 33 to 39 above;
- (b) it sought removal of the Purported Release from the First Draft BBA, which AMPFP refused; and
- (c) following that refusal, WealthStone and Mr Finch proceeded to execute the WealthStone BBA containing the Purported Release in circumstances where:
 - i. the refusal to remove the Purported Release came two months after WealthStone's confirmed exercise date of 8 December 2019;
 - ii. AMPFP conveyed to Mr Finch that AMPFP would not let WealthStone exit unless the WealthStone BBA was signed with the Purported Release;
 - iii. Mr Finch had contracted to start work for another employer and had taken steps to wind-down WealthStone's operations.

including not taking steps to renew the lease of the premises from which WealthStone operated; and

iv. Mr Finch had existing financial commitments which the BOLR Benefit would help him satisfy.

47 AMPFP adopted a procedure in respect of the WealthStone BBA under which AMPFP:

- a. determined to use the valuation methodology referred to in paragraph 16 above; and
- b. would not pay the BOLR Benefit to WealthStone unless WealthStone agreed to give the Purported Release.

48 The procedure referred to in paragraph 47 was designed by AMPFP to exploit its superior bargaining position vis-à-vis WealthStone.

Particulars

WealthStone refers to and repeats the particulars subjoined to paragraph 104 of the FASOC.

49 By reason of the matters pleaded in paragraphs 46 to 48 above, AMPFP engaged in conduct that was, in all the circumstances, unconscionable:

- a. in trade or commerce;
- b. in connection with the supply or possible supply of services to WealthStone;
- c. in contravention of s 21 of the ACL (**Unconscionable Conduct**).

50 WealthStone will, in the event the Purported Release is otherwise effective to preclude them from recovering the loss referred to in paragraph 35 above, suffer loss as a result of AMPFP's Unconscionable Conduct.

51 By reason of the matters pleaded in paragraphs 49 and 50 above, WealthStone is entitled to:

- a. an order pursuant to s 237 of the ACL declaring the Purported Release in the WealthStone BBA void; alternatively
- b. an order pursuant to s 237(2) and/or s 232(1) of the ACL restraining AMPFP from enforcing the Purported Release in the WealthStone BBA; alternatively
- c. damages.

Amended: 13 July 2021 ~~14 June~~ 15 October 2022



Signed by Chris Pagent
Lawyer for the Applicant