SMSFAdviser

A win and a warning for advisers following SMSF's Count litigation: expert

by Keeli Cambourne, Deputy Editor, SMSF Adviser and ***Matthew Burgess, Director, View Legal***

A high-profile court decision is a reminder for all professional advisers of the seriousness of their responsibilities, a legal expert has warned.

Matthew Burgess, director of View Legal, said the recent decision in the Count litigation concerned the fiduciary duties owed to clients by advisers as well as contraventions of the best interests and client priority duties (under the Corporations Act) in light of the Future of Financial Advice reforms.

"The court had to determine the ability of the trustee of an SMSF to recover damages due to the practice of financial advisers who continued to receive commissions or rebates from product providers following the introduction of the FoFA reforms (R and N Hunter Pty Ltd ATF The Hunter Family Superannuation Fund v Count Financial Limited [2025] FCA 54)," Burgess said.

"While the SMSF was unsuccessful (pending any appeal) in having the advisers held liable for breaches of fiduciary duties, the case is a stark reminder for all professional advisers of the seriousness of their responsibilities."

Burgess said in dismissing all the claims of the SMSF and imposing a costs order against it, there was a particular focus on the fiduciary obligations owed by financial advisers to clients.

"The court emphasised a number of key points. The first was that while here the relevant financial advisers owed fiduciary duties to the SMSF, the licensee (Count) did not owe any such duties, nor was it liable as a fiduciary for the conduct of its authorised advisers," he said.

"Additionally, the receipt of commissions and other benefits constituted part of the agreed remuneration to the financial advisers, and was disclosed or was otherwise the subject of fully informed consent of the SMSF - and thus the advisers had not breached any fiduciary duties."

The court also said that the fiduciary duties owed by the advisers included avoiding conflicts of interest and not profiting from their fiduciary position.

"The decision, which ran to 700 pages, continued that the characteristics which define a fiduciary relationship cannot be exhaustively defined (ABN AMRO Bank NV v Bathurst Regional Council (2014) 224 FCR 1), and said there are six key principles," Burgess said.

These principles are:

(a) To determine whether and to what extent a fiduciary duty may have arisen, regard must be had to the particular circumstances of the case (see Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (2007) 160 FCR 35).
(b) Where the parties are in a contractual relationship, the determination of whether a party is subject to fiduciary obligations and the scope of any fiduciary obligations is to be resolved by construing the contract as a whole in light of the surrounding circumstances known to the parties and the purpose and object of

the transaction; consistent with the ordinary principles of contract construction (see Howard v Commissioner for Taxation (2014) 253 CLR 83).
(c) Finding an actual relationship of confidence is neither necessary nor sufficient evidence of the existence of a fiduciary relationship (see Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41), thus the existence of a fiduciary relationship does not depend upon the motivation or desire of one party to establish a relationship of trust or confidence. Rather, it turns on whether the relationship involves the requisite undertaking, determined as a matter of objective characterisation, rather than by having regard to the subjective expectations of the parties.
(d) Reliance is an important element in determining whether a fiduciary duty has arisen (see Daly v Sydney Stock Exchange Ltd (1986) 160 CLR 371).
(e) Vulnerability has only a limited relevance to the existence and content of a fiduciary relationship. That is, vulnerability is not as a result of any notion of 'weakness' but rather because one party has agreed that another party may act on their behalf and thereby placed themselves in a position in which they are dependent in a practical or legal sense on another person to have regard to their best interests (see Naaman v Jaken Properties Australia Pty Ltd[2025] HCA 1).
(f) A person may be in a fiduciary relationship as to some aspects, but not with respect to other aspects. For example, a bank may be in a fiduciary relationship with its clients in providing financial advice as to the suitability of an investment, but may be expected to act in its own interests in taking security for the loan it might advance to facilitate the making of that investment (see Commonwealth Bank of Australia v Smith (1991) 42 FCR 390).

Furthermore, Burgess said the court also noted that while the role of an accountant or financial consultant is “not ordinarily” fiduciary (Wyse & Young International Pty Ltd v Sanna [2019] NSWSC 683), fiduciary duties can arise.

“For example, in the case of Porter & Anor v Mulcahy & Co Accounting Services Pty Ltd & Ors [2021] VSC 572,” he said.

“In this case the factors that were held relevant in establishing the accountant owed the client a duty as a fiduciary included that representations made by the accountant that he and his firm would be 'by [the client’s] side, and that the retainer sat within a full suite of services relationship that had been in place for over a decade.

“It also stated that there were implied terms of confidentiality on information provided by the client to the accountant and evidence that the client trusted the accountant ‘implicitly’ as his adviser and the accountant knew of that trust reposed in him.”

However, Burgess warned that despite these factors, their presence will not always lead to a conclusion that a fiduciary relationship exists.

“Even where (as here) a fiduciary relationship exists, there will be no breach of the duty to the extent there is either sufficient disclosure or informed consent.”

“In relation to sufficient disclosure, the court confirmed that it was neither necessary nor practical for the advisers to disclose the receipt of commissions and rebates with the degree of specificity the SMSF claimed was required.

“The receipt of the commissions and rebates, even those received indirectly, did not constitute any improper use of position by the advisers as fiduciaries to gain a benefit for themselves, nor give rise to any breach of the no conflict or no profit rules (Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq) [2012] FCA 1028).”