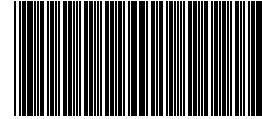




Filed: 24 November 2021 7:35 PM



D0001HY09H

Commercial List Response

COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	Commercial
Registry	Supreme Court Sydney
Case number	2019/00193556

TITLE OF PROCEEDINGS

First Plaintiff	Kerry Michael Quirk
First Defendant	Suncorp Portfolio Services Limited in its capacity as trustee for the Suncorp Master Trust
Second Defendant	Geoffrey Edward Summerhayes
Number of Defendants	3

FILING DETAILS

Filed for	Suncorp Portfolio Services Limited in its capacity as trustee for the Suncorp Master Trust, Defendant 1
Legal representative	Alexander Basil Morris
Legal representative reference	
Telephone	9296 2845

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Commercial List Response (20211124 CLR to FACLS - 1D (signed).pdf)

[attach.]

COMMERCIAL LIST RESPONSE

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity Division
List	Commercial List
Registry	Sydney
Case number	2019/193556

TITLE OF PROCEEDINGS

Plaintiff Kerry Michael Quirk
First defendant **Suncorp Portfolio Services Limited in its capacity as trustee for the
Suncorp Master Trust**

Number of defendants 3

FILING DETAILS

Filed for The First Defendant

Address King & Wood Mallesons DX: DX 113 Sydney
Level 61 Governor Phillip Tower T: +61 2 9296 2000
1 Farrer Place F: +61 2 9296 3999
Sydney 2000 NSW Ref: ABM/AV
Matter no: 602-0044662

A NATURE OF DISPUTE

- 1 The Plaintiff claims that the first defendant, Suncorp Portfolio Services Limited (“**SPSL**”) contravened various laws by charging fees to members of the Suncorp Master Trust in order to pay commissions to third parties, notwithstanding that the charging of those fees was expressly authorised by the terms of the trust (and the terms of individual products by which SPSL and members were bound) and not prohibited by any law. The Plaintiff’s claim rests on premises which are inconsistent with basic principles of trust law and should be dismissed.
 - 2 A premise of the Plaintiff’s claim is that a trustee may breach their duties (at general law and under the *Superannuation Industry (Supervision) Act 1993* (Cth) (“**SIS Act**”)) by charging fees and deriving profit from trust property even where the charging of those fees by the trustee is expressly authorised by the terms of the trust. That premise is wrong. The derivation of a profit by the trustee or a third party is not prohibited where it is authorised by the terms of the trust. A trustee does not commit a breach of trust by adhering to the express terms of the trust.
 - 3 Another premise of the Plaintiff’s claim is that a trustee’s duty to act in the best interests of beneficiaries may positively oblige a trustee to exercise a power to amend the terms of the trust so as to forego or diminish the trustee’s entitlement to charge fees. That premise is also wrong. Were it right, the logical consequence of the Plaintiff’s claim would be that commercial (i.e. “for profit”) trustees are prohibited under the SIS Act as trustees are duty-bound to

forsake any profit so as to prioritise the interests of members, even where that profit is authorised by the terms of the trust.

- 4 Similarly, the Plaintiff contends that a trustee's duty may oblige the trustee unilaterally to alter product terms (or to transfer a beneficiary to a product other than the one for which the beneficiary has voluntarily contracted), so as to provide to the beneficiary a more generous fee structure. There is no such obligation. This paternalistic conception of the duties of a trustee, unmoored from the terms of the trust, has no foundation in the general law. It is inconsistent with appellate authority that the relevant covenants in s 52 of the SIS Act codify and do not materially enlarge a trustee's duties at general law.
- 5 While the Plaintiff's amended claim makes reference to the Future of Financial Advice ("FOFA") reforms, that reference is largely vestigial. The Plaintiff now claims that the payment of commissions and the charging of fees for the purpose of paying commissions constitutes a breach of trust, *irrespective* of whether the payment of those commissions was prohibited or permitted by the FOFA reforms. The logical consequence of this claim is that the prohibition of payment of conflicted remuneration introduced by the FOFA reforms (s 963K of the *Corporations Act 2001* (Cth) ("Corporations Act")) was superfluous as regards superannuation trustees, as those trustees' general law and SIS Act duties obliged them to perform "Cessation of Arrangement Acts" and "Cessation of Payment Acts" in any event. This is incorrect. The Plaintiff's residual claim that certain payments made by SPSL to advisers were prohibited by the FOFA reforms is also incorrect as it mischaracterises the grandfathering exceptions in the FOFA reforms, which permitted all such payments.
- 6 The Plaintiff also claims that SPSL breached its duties to members by executing certain Distribution Agreements in June 2013 so as to avail itself of those grandfathering exceptions. However, the execution of those Distribution Agreements could only have affected members who acquired interests in the Master Trust after June 2013, to whom SPSL owed no relevant duties at the time of execution.
- 7 Finally, the Plaintiff makes a broad claim that the continued levying of fees by SPSL constituted unconscionable conduct. There is nothing unconscionable in SPSL charging fees in accordance with the terms of individual products by which members and SPSL were bound, from which products members were free to depart. This claim effectively seeks to gainsay the Federal Parliament's policy decision to include grandfathering exceptions in the FOFA reforms, and to use the general prohibition on unconscionable conduct to rewrite the specific provisions of the Corporations Act governing conflicted remuneration.

B ISSUES LIKELY TO ARISE

The issues likely to arise for determination at the initial trial are those set out in the common questions subject of the Orders of the Court made on 5 July 2021, understood in the context of the individual

claims of the Plaintiff and identified sample group members, Mr Dean Mibus and Mrs Angela Thompson, and any issues individual to those claims.

C FIRST DEFENDANT'S RESPONSES TO CONTENTIONS

In response to the Further Amended Commercial List Statement ("FACLS") filed by the Plaintiff on 9 November 2021, SPSL says as follows, adopting the definitions in the FACLS unless otherwise indicated.

A Parties

1 In response to paragraph 1 of the FACLS, SPSL:

- (a) refers to and repeats paragraph 3 below; and
- (b) otherwise does not admit the paragraph.

2 In response to paragraph 2 of the FACLS, SPSL:

- (a) admits that the Plaintiff at all material times since at least 30 June 2008 has been a member of a superannuation fund, of which SPSL was trustee, being the Master Trust, and has held accounts with investment(s) in one or more of the Suncorp Products; and
- (b) otherwise denies the paragraph.

3 In response to paragraph 3 of the FACLS, SPSL:

- (a) says that it does not adopt the defined term 'Conflicted Remuneration' for the purposes of this CLR. Instead, SPSL uses the defined term 'Advisor Remuneration' in place of the Plaintiff's defined term 'Conflicted Remuneration';
- (b) says that, to the extent the definition of Group Members contained in paragraph 3 of the FACLS extends to persons whose accounts were affected by the payment of Advisor Remuneration to Financial Services Licensees in the period 1 July 2013 to 21 June 2019, inclusive, for reasons other than the conduct alleged against SPSL and the Directors in the FACLS, this proceeding is not validly commenced as a representative proceeding pursuant to Part 10 of the *Civil Procedure Act 2005 (NSW)*;

Particulars

Civil Procedure Act 2005 (NSW), ss 157 and 161.

- (c) says that amendments made to the definition of 'Group Members' in the Amended Commercial List Statement ("ACLS") and the Amended Summons ("AS") filed 20

December 2019 take effect from 16 December 2019, being the date on which leave was granted to file the ACLS; and

- (d) otherwise denies the paragraph.
- 3A SPSL acknowledges paragraph 3A of the FACLS, and adopts the qualification therein of the definition of Group Members in this CLR, with the additional qualification that references to 'Group Member' in paragraphs of this CLR which respond to the paragraphs of the FACLS enumerated in paragraph 3A of the FACLS are also references to any deceased member referred to at paragraph 3(c) of the FACLS or any member of the Master Trust who has a spouse of the kind referred to in paragraph 3(d) of the FACLS.
- 4 In response to paragraph 4 of the FACLS, SPSL:
- (a) admits paragraphs 4(a), 4(b), 4(c), and 4(d) of the FACLS;
 - (b) as to paragraph 4(e) of the FACLS:
 - (i) admits that SPSL was at all material times, and is, the trustee of the Master Trust; and
 - (ii) refers to paragraphs 8, 15, and 40 below;
 - (c) as to paragraph 4(f) of the FACLS:
 - (i) admits that SPSL was at all material times, and is, a body corporate carrying on the business of acting as a trustee of registrable superannuation entities and investing money in its capacity as trustee of those superannuation entities; and
 - (ii) otherwise denies that SPSL was at all material times, and is, investing money on behalf of the beneficiaries of those superannuation entities;
 - (d) admits paragraphs 4(g), 4(h), and 4(i); and
 - (e) otherwise denies the paragraph.
- 5 SPSL acknowledges paragraph 5 of the FACLS.
- 6 In response to paragraph 6 of the FACLS, SPSL:
- (a) admits paragraphs 6(a) and 6(c) of the FACLS;
 - (b) admits that Suncorp Life provided administrative services to SPSL as trustee of the Master Trust; and

- (c) otherwise denies the paragraph.
- 7 In response to paragraph 7 of the FACLS, SPSL:
- (a) says that Suncorp Financial Services Pty Ltd (ACN 010 844 621) (**Suncorp Financial**) at all material times was, and is:
- (i) a financial services licensee under the Corporations Act;
 - (ii) a provider of financial product advice to persons as retail clients under the Corporations Act; and
 - (iii) an associate of SPSL for the purposes of the SIS Act;
- (b) says that Standard Pacific Consulting Ltd (ACN 003 315 802) (**Standard Pacific**) was:
- (i) until 9 December 2014, a financial services licensee under the Corporations Act;
 - (ii) a provider of financial product advice to persons as retail clients under the Corporations Act until a date on or prior to 9 December 2014; and
 - (iii) until 18 July 2019, an associate of SPSL for the purposes of the SIS Act;
- (c) says that ACN 000 036 626:
- (i) is named 'Guardian Financial Planning Pty Limited', rather than 'Guardian Group Financial Planning Pty Ltd';
 - (ii) does not hold, and has never held, a financial services license;
 - (iii) was not a provider of financial product advice to persons as retail clients under the Corporations Act; and
 - (iv) is an associate of SPSL for the purposes of the SIS Act;
- (d) says that GuardianFP Limited (ACN 003 677 334) at all material times was, and is:
- (i) a financial services licensee under the Corporations Act;
 - (ii) a provider of financial product advice to persons as retail clients under the Corporations Act; and
 - (iii) an associate of SPSL for the purposes of the SIS Act;

- (e) says that, throughout this CLR, SPSL uses the term 'Guardian' to refer only to GuardianFP Limited (ACN 003 677 334);
 - (f) says further that, where this CLR pleads in response to any pleading which uses the defined term 'Guardian', that pleading does not include admissions in respect of Guardian Financial Planning Pty Limited (ACN 000 036 626), and hereby denies all allegations made in the FACLS in respect to Guardian Financial Planning Pty Limited (ACN 000 036 626); and
 - (g) otherwise denies the paragraph.
- 8 SPSL admits paragraph 8 of the FACLS.
- 9 SPSL admits paragraph 9 of the FACLS.
- 10 In response to paragraph 10 of the FACLS, SPSL:
- (a) admits paragraph 10(a) of the FACLS;
 - (b) admits paragraph 10(aa) of the FACLS;
 - (c) in answer to paragraph 10(ab) of the FACLS, says that Carroll had a senior executive position within the Suncorp Group, which included responsibilities with respect to Suncorp's superannuation business from at least January 2012 until 1 March 2016;
 - (d) admits paragraph 10(b) of the FACLS;
 - (e) in response to paragraph 10(c) of the FACLS, admits that the receipt, reading, authorisation or participation in authorisation and signing or execution of the Distribution Agreements by the Directors as particularised at paragraphs 47 and 57(b) and alleged at paragraphs 57(a), 59(b), and 59(c) of the FACLS would, so far as that occurred, constitute conduct for and on behalf of SPSL;
 - (f) in response to paragraph 10(d) of the FACLS:
 - (i) to the extent that the directors had the knowledge particularised at paragraph 47, and alleged at paragraph 57 (but not otherwise), admits that the knowledge of the directors is attributed to SPSL; and
 - (ii) says that the FACLS does not identify any facts which Cathy Duncan is alleged to have known; and
 - (g) otherwise denies the paragraph.

B Background

B.1 Superannuation funds and Suncorp Products

11 SPSL admits paragraph 11 of the FACLS.

11A SPSL admits paragraph 11A of the FACLS.

11B In response to paragraph 11B of the FACLS, SPSL:

- (a) in response to paragraph 11B(a) of the FACLS says that it was a term of the Trust Deed that "Relevant Law means: (a) the SIS Act; (b) the *Corporations Act 2001* (Cth); (c) the *Income Tax Assessment Act 1936* (Cth) and the *Income Tax Assessment Act 1997* (Cth); (d) the *Superannuation (Resolution of Complaints) Act 1993* (Cth); (e) the *Family Law Act 1975* (Cth); (f) the *Bankruptcy Act 1966* (Cth); (g) the *Anti-Money Laundering and Counter-Terrorist Financing Act 2006* (Cth); (h) any other present or future law of Australia or a State or Territory of Australia which the Fund, this Deed, the Trustee or a Beneficiary must comply with or satisfy to secure or better secure a concession for the Fund in respect of Tax or to avoid, in the opinion of the Trustee, a penalty, detriment or disadvantage to the Fund, Trustee or a Beneficiary; (i) any direction, instruction, ruling or guideline given by a person duly authorised by a competent Parliament for this purpose which the Trustee determines is legally required to be followed or non compliance with which may result in the Fund ceasing to be a complying superannuation fund; (j) any direction, instructions, ruling, guideline, license or registration condition issued by any person authorised by a competent Parliament for this purpose; and (k) any present or future law of Australia or a State or Territory of Australia which the Trustee determines to be a Relevant Law for the purpose of this Deed";

Particulars

Trust Deed, clause 1.2.

- (b) and further, in response to paragraph 11B(a) of the FACLS, says that it was a term of the Trust Deed that "(b) The provisions of this Deed are subject to the Relevant Law and if: (i) there is any inconsistency between the provisions of this Deed and the Relevant Law, the requirements of the Relevant Law prevail";

Particulars

Trust Deed, clause 2.2(b)(i).

- (c) in response to paragraph 11B(b) of the FACLS, says that it was a term of the Trust Deed that “(a) Subject to clause 2.3(b), the Trustee may, by deed: (i) change, amend or replace all or any of the provisions of this Deed including clause 2.3”;

Particulars

Trust Deed, clause 2.3(a)(i).

- (d) in response to paragraph 11B(c) of the FACLS, says that it was a term of the Trust Deed that “(a) Subject to the Relevant Law, the Trustee may charge for the administration and operation of the Fund, a Division, a Sub-Division or a Plan or a class of membership of a Plan an amount disclosed to the Beneficiaries in the Disclosure Document provided that such amount is no greater than any maximum amount (if any) set out in the Governing Rules of the relevant Division, Sub-Division or Plan.”;

Particulars

Trust Deed, clause 3.7(a).

- (e) in further response to paragraph 11B(c) of the FACLS, says that the following terms were defined terms in the Trust Deed:
- (i) **Fund** means the superannuation fund known as The Suncorp Master Trust that is established and continued by this Deed and each Division, Sub-Division or Plan under this Deed and comprises the assets held by, and for, the Trustee in respect of that superannuation fund;
 - (ii) **Division** means a division of the Fund established by the Trustee pursuant to clause 4.1 (a) and set out in a schedule to this Deed;
 - (iii) **Sub-Division** means a sub-division of the Fund as established by the Trustee pursuant to clause 4.1 (a) as set out in a schedule to this Deed;
 - (iv) **Plan** means a membership group which has been established by the Trustee or which is established by the Trustee under clause 4.1(a);
 - (v) **Beneficiary** means a Member, a Dependant of a Member or any other person who is entitled to be paid a benefit from, or has an interest in, the Fund;
 - (vi) **Member** means a person admitted as a member of the Fund and who has not ceased to be a member of the Fund;

- (vii) **Disclosure Document** means the following document for a Plan that is issued by the Trustee: (a) if new Members are still being admitted into the Plan, the document provided to a Beneficiary prior to (or, where permitted by the Relevant Law, after) the issue of an interest in the Fund to the Beneficiary; or (b) if new Members are no longer being admitted into the Plan, the document provided to a Beneficiary on an annual basis;
- (viii) **Governing Rules** means: (a) unless paragraph (b) applies in relation to a Division, Sub-Division or Plan, the terms and conditions of the Division, Sub-Division or Plan that are disclosed from time to time in one or more of the following: (i) the Rules; (ii) the current Disclosure Document for the Division, Sub-Division or the Plan; (iii) the information sent to Members of the Division, Sub-Division or Plan: or (iv) any other communication by whatever method used by the Trustee. (b) where a Participating Employer has made special arrangements with the Trustee in accordance with clause 5.5 in relation to participation in a Division, Sub-Division or Plan, the Rules of the Division, Sub-Division or Plan as varied in accordance with those special arrangements;
- (ix) **Rules** means, subject to clause 5.5, the rules set out in each Division, Sub-Division or Plan of this Deed;

Particulars

Trust Deed, clause 1.2.

- (f) in response to paragraph 11B(d)(i) of the FACLS, says that it was a term of the Trust Deed that "(a) Subject to the Relevant Law and clause 4.3(b), the Trustee may: (i) without a Member's consent, transfer the Member's interest in the Fund or benefit between the Division, Sub-Division or Plan or classes of members in a Division, Sub-Division or Plan (provided that the transfer does not increase the amount that a Member must contribute to the Fund); and (ii) without a Participating Employer's consent, alter the Participating Employer's Plan. (b) The Trustee cannot transfer a Member between Death Benefit Membership Categories.";

Particulars

Trust Deed, clause 4.3.

- (g) in response to paragraph 11B(d)(ii) of the FACLS, says that it was a term of the Trust Deed that "(a) Subject to clause 4.4(b), the Trustee may determine that any liability that relates to: (i) a Division, Sub-Division or Plan, must not be satisfied from the assets that are attributable to any other Division, Sub-Division or Plan; or (ii) a class

of members established by a Division, Sub-Division or Plan, a class of members of the Division, Sub-Division or Plan must not be satisfied from the assets that are attributable to any other class of members or the Division, Sub-Division or Plan. (b) The Trustee can decide that clause 4.4(a) does not apply to certain liabilities provided that such a determination by the Trustee must be in accordance with the Statutory Covenants and the Relevant Law, and must not operate so as to reduce the accrued benefits of the affected members.”;

Particulars

Trust Deed, clause 4.4.

- (h) in response to paragraph 11B(e) of the FACLS, says that it was a term of the Trust Deed that “The Trustee: (c) may establish a Reserve Account for each Division, Sub-Division or Plan and credit to it any: (i) contributions required to be credited to that account; or (ii) amounts transferred from other funds which must be credited to the account under the transfer arrangements; or (iii) proceeds of insurance policies which are not credited to a Member's Account; or (iv) amount which the Trustee determines is a reasonable provision for the payment of any Tax levied on the Fund, Division, Sub-Division or Plan, provided that the Reserve Account can only be applied for the following purposes; (v) payment of insurance premiums not otherwise payable from Member Accounts; (vi) payment of benefits to Members or Beneficiaries which are not payable from Member Accounts; (vii) payment of Fund Expenses (including Tax); and (viii) replacement of contributions otherwise payable by an Employer.”;

Particulars

Trust Deed, clause 5.6(c).

- (i) in response to paragraph 11B(f) of the FACLS, says that ‘Fund Expenses’ is a defined term in the Trust Deed, and is defined as “Fund Expenses means the costs and expenses of and incidental to the establishment, operation, management, administration, investment and termination of the Fund, including Tax, insurance costs and any fees or charges imposed on, or paid by, the Trustee.”;

Particulars

Trust Deed, clause 1.2.

- (j) says further that the Trust Deed contained the following terms, under the heading ‘Absolute discretion in exercising Powers’ '(a) Except as otherwise expressly provided in this Deed, the Trustee has absolute and uncontrolled discretion in the exercise of any Power at any time and from time to time and is not required to justify the exercise of any Power. (b) The Powers conferred on the Trustee by this Deed are additional to

the powers exercisable by a trustee at law. (c) Subject to the Relevant Law, any determination made by the Trustee under this Deed to pay or apply any amount of assets to or for the benefit of a Beneficiary may at any time in the absolute discretion of the Trustee be varied, altered, revoked or replaced. (d) Without limiting this clause 3.6, in exercising any Power, subject to clause 5A and the Relevant Law, the Trustee may discriminate between Investment Options, Divisions, Sub-Divisions, Plans or Beneficiaries.';

Particulars

Trust Deed, clause 3.6.

- (k) otherwise relies upon the totality of the Trust Deed; and
 - (l) otherwise denies paragraph 11B of the FACLS.
- 12 SPSL admits paragraph 12 of the FACLS.
- 13 Not used as paragraph 13 of the FACLS is intentionally left blank.
- 14 Not used as paragraph 14 of the FACLS is intentionally left blank.
- 14A In response to paragraph 14A of the FACLS, SPSL:
- (a) refers to and repeats paragraph 8 above and paragraphs 15 and 40 below;
 - (b) admits paragraph 14A(f) of the FACLS, except to the extent that it is now alleged that a person who was an existing member of the Master Trust who moved from a Division, Sub-Division or Plan of the Master Trust to a different Division, Sub-Division or Plan of the Master Trust was thereby issued a financial product or provided a financial service; and
 - (c) otherwise denies the paragraph.
- 14B In response to paragraph 14B of the FACLS, SPSL:
- (a) says that the paragraph is embarrassing as it does not specify what aspect(s) of SPSL's conduct is alleged to involve the provision of a financial service within the meaning of s 12BAB of the ASIC Act in trade or commerce;
 - (b) admits that SPSL's dealing in interests in the Master Trust involves the provision of a financial service within the meaning of s 12BAB of the ASIC Act and is in trade or commerce; and
 - (c) under cover of the objection in 14B(a) above, otherwise denies the paragraph.

15 SPSL admits paragraph 15 of the FACLS.

16 Not used as paragraph 16 of the FACLS is intentionally left blank.

B.2 SIS Act

17 SPSL admits paragraph 17 of the FACLS.

18 In response to paragraph 18 of the FACLS, SPSL;

(a) refers to and repeats paragraphs 3 and 3A above;

(b) further says that SPSL's covenants to:

(i) perform the trustee's duties and exercise the trustee's powers in the best interests of members of the Master Trust was a duty to do those things in the best interests of existing members of the Master Trust, and did not extend to a duty to do those things in the best interests of the Plaintiff and group members except to the extent and for the periods during which the Plaintiff and each group member was a member of the Master Trust; and

(ii) act fairly in dealing with classes of beneficiaries within the entity and to act fairly in dealing with beneficiaries within a class were covenants to do those things in relation to existing members of the Master Trust, and did not extend to the Plaintiff and group members except to the extent and for the periods during which the Plaintiff and each group member was a member of the Master Trust;

(c) subject to those qualifications, admits the paragraph; and

(d) otherwise denies the paragraph.

B.3 Equitable and legal duties

18A In response to paragraph 18A of the FACLS, SPSL:

(a) refers to and repeats paragraph 3 above;

(b) admits the paragraph insofar as the Plaintiff and Group Members were, at the relevant time, beneficiaries of the Master Trust; and

(c) otherwise denies the paragraph.

18B In response to paragraph 18B of the FACLS, SPSL:

- (a) admits the paragraph insofar as the Plaintiff and Group Members were, at the relevant time, beneficiaries of the Master Trust; and
- (b) otherwise denies the paragraph.
- 18C SPSL denies paragraph 18C of the FACLS.
- B.4 FOFA**
- 19 In response to paragraph 19 of the FACLS, SPSL:
- (a) admits that Schedule 1 to the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth) commenced on 1 July 2012;
- (b) admits that Schedule 1 to the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) commenced on 1 July 2012; and
- (c) otherwise denies the paragraph.
- 20 In response to paragraph 20 of the FACLS, SPSL:
- (a) refers to and repeats paragraph 3(a) above and, subject thereto, acknowledges the definitions adopted by the Plaintiff in paragraph 20 of the FACLS; and
- (b) further says, for the avoidance of doubt, to the extent that it pleads in response to any allegation which uses the term 'Conflicted Remuneration', that pleading does not include an admission or concession that conflicted remuneration, within the meaning of the Corporations Act, was paid or was paid in circumstances prohibited by Part 7.7A of the Corporations Act (or at all).

Particulars

A benefit will not constitute 'conflicted remuneration' in the meaning of the Corporations Act in circumstances where, for example, Division 4 of Part 7.7A of the Corporations Act does not apply to the benefit, or s 963B(1) of the Corporations Act applies to the benefit.

- 20A In response to paragraph 20A of the FACLS, SPSL:
- (a) admits that many, but not all, Commissions were FOFA Conflicted Remuneration;
- (b) says that whether a particular Commission was FOFA Conflicted Remuneration is a matter which depends on the nature of the Commission and/or the circumstances in which it was given; and

- (c) denies that each payment of Commission was necessarily FOFA Conflicted Remuneration.
- 21 SPSL denies paragraphs 21 to 24B of the FACLS, and says that they do not accurately or comprehensively state the scope of the prohibition and exceptions which they purport to record, including, without being exhaustive, because they do not account for the operation of s 963B of the Corporations Act and do not account for all of the regulations contained in Chapter 7, Part 7.7A, Division 4 of the Corporations Regulations from time to time.
- 22 Not used because paragraph 22 of the FACLS is intentionally left blank.
- 23 [Intentionally left blank].
- 24 [Intentionally left blank].
- 24A [Intentionally left blank].
- 24B [Intentionally left blank].
- 24C SPSL admits paragraph 24C of the FACLS.
- B.5 Unconscionable conduct**
- 24D In response to paragraph 24D of the FACLS, SPSL:
- (a) relies upon the terms of s 12CB of the ASIC Act for their full force and effect; and
 - (b) otherwise denies the paragraph.
- C Payment of Advisor Remuneration before and after 1 July 2013**
- C.1 Advisor Remuneration prior to 1 July 2013**
- 24E In response to paragraph 24E of the FACLS, SPSL denies that it entered into the Superseded Distribution Agreement in its capacity as the trustee of the Master Trust as pleaded in paragraph 5 of the FACLS and, otherwise:
- (a) In response to paragraph 24E(a) says that it was a term of the Superseded Distribution Agreement that “(a) The Issuer authorises SFS to include in Financial Services Distribution Agreements provision for the payment to the Distributor of commission or other remuneration (“**Commission**”).”;

Particulars

Superseded Distribution Agreement, clause 7.1(a).

- (b) In response to paragraph 24E(b) says that it was a term of the Superseded Distribution Agreement that “(b) The Issuer will notify SFS from time to time of the Commission rates applicable to each of the Products (“**Commission Schedule**”).”;

Particulars

Superseded Distribution Agreement, clause 7.1(b).

- (c) In response to paragraph 24E(c) says that it was a term of the Superseded Distribution Agreement that “(c) Without limiting clause 3.1, SFS must ensure that: (i) the Commission payable under each Financial Services Distribution Agreement is in accordance with the Commission Schedule applicable at the time the Financial Services Distribution Agreement is entered into; and (ii) each Financial Services Distribution Agreement authorises SFS to vary Commission rates in a manner consistent with the Issuer’s procedures for variation of commission rates.”;

Particulars

Superseded Distribution Agreement, clause 7.1(c).

- (d) In response to paragraph 24E(d) says that it was a term of the Superseded Distribution Agreement that “As between the issuer and SFS, the Issuer is solely responsible for payment of commission to Distributors. SFS must however provide all details the Issuer needs, in respect of each Distributor each month, to: (i) calculate the Commission due to the Distributor; (ii) generate the recipient created tax invoice in respect of the Commission (where applicable); (iii) pay the Commission in accordance with the Distributor’s instructions.”;

Particulars

Superseded Distribution Agreement, clause 7.1(d).

- (e) In response to paragraph 24E(e) says that it was a term of the Superseded Distribution Agreement that “SFS is not entitled to any remuneration under this Agreement. However the parties may from time to time enter into arrangement by which the Product Issuer pays to SFS amounts to cover the costs of distributing and promoting the Products under this Agreement.”;

Particulars

Superseded Distribution Agreement, clause 7.2(a).

- (f) In response to paragraph 24E(f) says that it was a term of the Superseded Distribution Agreement that "Either party may terminate this Agreement by giving the other party 4 weeks' (or such other period as the Parties may agree) notice in writing.";

Particulars

Superseded Distribution Agreement, clause 9.1.

- (g) otherwise refers to and relies upon the totality of the Superseded Distribution Agreement; and
- (h) otherwise denies paragraph 24E of the FACLS.

25 In response to paragraph 25 of the FACLS, SPSL:

- (a) admits that Advisor Remuneration was paid to Financial Services Licensees (**Advisor Remuneration Payments**) in relation to the Suncorp Products prior to 30 June 2013;

Particulars

Advisor Remuneration Payments were made in respect of the following Suncorp Products prior to 30 June 2013:

1. AMSF Complying LifeTime Pension Plan
2. AMSF Complying Term Pension
3. Connelly Temple Allocated Pension Plan (APP)
4. Connelly Temple Allocated Pension Plan Investments (APP Investments)
5. Connelly Temple Complying Term Pension Plan
6. Connelly Temple Employer Super Plan (ESP)
7. Connelly Temple Lifetime Pension
8. Connelly Temple Super Allocated Pension Plan (SAPP)
9. Connelly Temple Super Savings Plan (SSP)
10. Connelly Temple Superannuation Plan (SP)
11. Connelly Temple Workforce Retirement (WF)
12. INVESCO Accumulations Plan
13. INVESCO Lifestyle Retirement Plan
14. Optimum Professional Allocated Pension
15. Optimum Professional Superannuation Savings Plan
16. Partnership Allocated Pension Plan
17. Partnership CPI Pension Plan
18. Partnership Complying Lifetime Pension Plan
19. Partnership Superannuation Plan
20. Suncorp WealthSmart Business Super
21. Suncorp WealthSmart Pension
22. Suncorp WealthSmart Personal Super
23. Suncorp WealthSmart Term Allocated Pension
24. Connelly Temple Lifetime Allocated Pension Plan
25. Oceanic Savings Plan (OES)
26. Royal & Sun Alliance Endowment (Participating Super) (RBS)
27. Royal & Sun Alliance Horizon/Fidelity Super (LXS)
28. Royal & Sun Alliance IB Capital Guaranteed (LJS)
29. Royal & Sun Alliance Investment Fund Super (LOS)
30. Royal & Sun Alliance Personal Savings Plan Super (L5S)
31. Royal & Sun Alliance Super Bond (LIS)

- 32. Royal & Sun Alliance Universal Plan Super (L4S)
- 33. Royal & Sun Alliance Whole of Life (Non-Participating Super) (RES)
- 34. Royal & Sun Alliance Whole of Life (Participating Super) (RFS)
- 35. Suncorp \$UPERBOND (SBS)
- 36. Suncorp Personal Super Whole of Life – 1975 Series (SWS)
- 37. Suncorp Personal Super Endowment (SES)
- 38. Suncorp Personal Super Life\$aver (SLS)
- 39. Suncorp Personal Super Whole of Life Cover (SXS)
- 40. Suncorp Personal Super Saver Plus (SSS)
- 41. Suncorp Personal Super Invest Endowment (SPS)
- 42. Suncorp Super Life Saver (SUPB)
- 43. Suncorp Super Bond (SUP)
- 44. Tandem IB Capital Guaranteed (XAS)
- 45. Tyndall Endowment Participating Super (X7S)
- 46. Tyndall Monitor Money Accumulation (XWS)
- 47. Tyndall Quantum Investment (XPS)
- 48. Tyndall Quantum Life (XXS)
- 49. Tyndall Quantum Savings Bond (XES)
- 50. Tyndall Residual Term Life Participating Super (X4S)
- 51. Tyndall Whole of Life Non Participating Super (X1S)
- 52. Tyndall Whole of Life Participating Super (X5S)
- 53. Royal & Sun Alliance Vested Investment Plan (LMS)
- 54. Asteron Longevity Income Stream (LPS)
- 55. Royal & Sun Alliance IB Life Pack Super (LZS)
- 56. Oceanic Whole of Life Non Participating (O1S)
- 57. Oceanic Whole of Life Participating Super (O2S)
- 58. Oceanic Endowment Participating Super (O6S)
- 59. Oceanic Investment Bond (OAS)
- 60. Oceanic Monthly Investment (OCS)
- 61. Oceanic Personal Super Plan (ODS)
- 62. Oceanic MXT Investment Plan (OGS)
- 63. Tyndall Performance Bond (XBS)
- 64. Tyndall Personal Investment (XCS)
- 65. Tyndall Term Life (XRS)
- 66. Tyndall Maximum Investment Plan (XZS)
- 67. Oceanic Pure Endowment Participating Super (O7S)
- 68. Oceanic Money Back Non Participating Super (O5S)
- 69. Royal & Sun Alliance Pure Endowment - Participating Super (RCS)
- 70. Scheme Super Endowment (SHS)
- 71. Personal Super Pure Endowment (SDS)
- 72. Royal & Sun Alliance Endowment Non-Participating Super (RAS)
- 73. Tyndall Endowment Non-Participating Super (X6S)
- 74. Tyndall Quantum Bond (XDS)
- 75. Tyndall Wealth Plan (XKS)
- 76. Tyndall Personal Investment (XLS)
- 77. Royal & Sun Alliance Guaranteed Super Bond (L7S)
- 78. Optimum Superannuation Master Plan – Corporate
- 79. Optimum Superannuation Master Plan – Personal
- 80. Optimum Corporate Super for Standard Pacific
- 81. Workforce Superannuation

- (b) denies that Advisor Remuneration was paid to Financial Services Licensees in relation to the Suncorp Products on 30 June 2013, that day being a Sunday; and
- (c) says that it does not adopt the defined term 'Conflicted Remuneration Payments' for the purposes of this CLR. Instead, SPSL uses the defined term 'Advisor Remuneration Payments' in place of the Plaintiff's defined term 'Conflicted Remuneration Payments'.

26 SPSL denies that it acted in every instance in its capacity as trustee of the Master Trust, but otherwise admits paragraph 26 of the FACLS in that:

- (a) SPSL made Advisor Remuneration Payments in respect of Suncorp Products prior to 30 June 2013 other than in its capacity as trustee of the Master Trust and by drawing on its general revenue;

Particulars

SPSL made Advisor Remuneration Payments prior to 30 June 2013 in relation to the products identified at items 1 to 24 of the particulars to paragraph 25(a) above.

- (b) SPSL caused fees (including premiums) to be paid to Suncorp Life in respect of certain Suncorp Products prior to 30 June 2013; and

Particulars

Suncorp Life received fees (including premiums) prior to 30 June 2013 in relation to the products identified at items 25 to 81 of the particulars to paragraph 25(a) above.

- (c) Suncorp Life made Advisor Remuneration Payments in respect of Suncorp Products prior to 30 June 2013.

Particulars

Suncorp Life made Advisor Remuneration Payments prior to 30 June 2013 in relation to the products identified at items 25 to 81 of the particulars to paragraph 25(a) above.

26A SPSL admits paragraph 26A of the FACLS and says further that SPSL did not 'set' administration costs, fees and charges for Members for all Suncorp Products.

Particulars

In respect of certain older products, which were originally issued by entities other than SPSL and were transferred into the Master Trust by way of successor fund transfer, administration costs, fees and charges for Members will not necessarily have been 'set' by SPSL.

27 In response to paragraph 27 of the FACLS, SPSL:

- (a) says that prior to 20 June 2013, there were in place arrangements within the meaning of section 1528 of the Corporations Act, or regulation 7.7A.16 of the Corporations Regulations (or otherwise) for the payment of commission in respect of persons who

were then members of the Master Trust that would involve ongoing payment of commission in respect of those members following 1 July 2013 (**Existing Arrangements**);

- (b) says that the Existing Arrangements could be constituted by, among other things, contracts, agreements, understandings, schemes or other arrangements (as existing from time to time):
- (i) whether formal or informal, or partly formal and partly informal; and
 - (ii) whether written or oral, or partly written and partly oral; and
 - (iii) whether or not enforceable, or intended to be enforceable, by legal proceedings and whether or not based on legal or equitable rights; and

Particulars

Section 761A of the *Corporations Act 2001* (Cth).

- (c) otherwise denies the paragraph.
- 28 Not used as paragraph 28 of the FACLS is intentionally left blank.
- 29 In response to paragraph 29 of the FACLS, SPSL:
- (a) refers to and repeats paragraph 27;
 - (b) says that the paragraph is embarrassing to the extent that it alleges that SPSL was "capable" of ceasing arrangements of the kind alleged on or by 1 July 2013 and at any time thereafter;
 - (c) under cover of the objection above in paragraph 29(b), says that:
 - (i) the question of whether a particular Existing Arrangement with a Financial Services Licensee was able to be terminated depends on the nature of that individual arrangement (as to which, see paragraph 27(b) above), including whether it was contractual, and, if so, the terms of that contract; and
 - (ii) the Superseded Distribution Agreement provided that either party could terminate that agreement on 4 weeks notice, but that 'Termination of the Superseded Distribution Agreement does not prejudice the rights of either party to it in connection with anything that occurred before such termination', which would include the liability of SPSL to SFS for payment of commission to existing distributors;

Particulars

Superseded Distribution Agreement, clauses 7.1(d), 9.1, and 9.5.

- (d) says that it was under no duty or obligation to undertake any Cessation of Arrangement Act; and
 - (e) otherwise denies the paragraph.
- 29A In response to paragraph 29A of the FACLS, SPSL:
- (a) refers to and repeats paragraph 29 above;
 - (b) says that it was under no duty or obligation to undertake any Cessation of Payment Act; and
 - (c) otherwise denies the paragraph.
- 29B In response to paragraph 29B of the FACLS, SPSL:
- (a) refers to and repeats paragraphs 29 and 29A above;
 - (b) says that it was under no duty or obligation to undertake any Cessation of Member Charging Act; and
 - (c) otherwise denies the paragraph.
- 30 SPSL admits paragraph 30 of the FACLS.
- 31 SPSL denies paragraph 31 of the FACLS.

Particulars

SPSL repeats the particulars at paragraph 31 of the FACLS, and says that the particularised email does not attach any documents, and instead states 'these agreements have been previously issued by Legal for comment and **will be issued for signoff early next week.**' [Emphasis added].

- 32 In response to paragraph 32 of the FACLS, SPSL:
- (a) admits that, on or about 23 or 24 June 2013, SPSL prepared three documents titled "Document Approval Process" for the distinct approval of each of the Distribution

- Agreements, but denies that it did so as Trustee of the Master Trust as pleaded in paragraph 5 of the FACLS; and
- (b) otherwise denies the paragraph.
- 33 In response to paragraph 33 of the FACLS, SPSL:
- (a) denies the paragraph; and
- (b) refers to and repeats the particulars to paragraph 46 below.
- 34 In response to paragraphs 34 of the FACLS, SPSL:
- (a) in answer to paragraph 34(a) of the FACLS, says that the final decisions by each of the Directors to execute the Distribution Agreements occurred at the time that each of the Distribution Agreements was executed, on or about 27 June 2013;
- (b) denies that it entered the Suncorp Financial Distribution Agreement in its capacity as the trustee of the Master Trust as pleaded in paragraph 5 of the FACLS, but otherwise admits paragraph 34(b); and
- (c) otherwise denies the paragraph.
- 35 Not used as paragraph 35 of the FACLS is intentionally left blank.
- 36 In response to paragraph 36 of the FACLS, SPSL:
- (a) in response to paragraph 36(a) says that it was a term of the Suncorp Financial Distribution Agreement that "(a) The Issuers will pay commission to SFS on the Products in accordance with the commission rates applicable for each of the Products (**“Commission Schedule”**)";
- Particulars**
- Suncorp Financial Distribution Agreement, cl 7.1(a).
- (b) in answer to paragraph 36(b);
- (i) says that it was a term of the Suncorp Financial Distribution Agreement that "(b) The Issuers authorise SFS to include in the CAR Agreement provision for the payment to the Distributor of commission or other remuneration (**“Commission”**)";
- (ii) says that 'Distributor' was a defined term in the Suncorp Financial Distribution Agreement, with the definition "means a person that distributes and promotes Products, and includes Suncorp Group employees and Authorised

Representatives of SFS”;

Particulars

Suncorp Financial Distribution Agreement, cl 1 and 7.1(b).

- (c) in response to paragraph 36(c), says that it was a term of the Suncorp Financial Distribution Agreement that “(c) The Issuers will notify SFS from time to time of the Commission in the **Commission Schedule** for each of the Products.”;

Particulars

Suncorp Financial Distribution Agreement, cl 7.1(c).

- (d) in response to paragraph 36(d), says that it was a term of the Suncorp Financial Distribution Agreement that “(d) Without limiting clause 7.1, SFS must ensure that: i. the Commission payable under each CAR Agreement is in accordance with the Commission Schedule applicable at the time the CAR Agreement is entered into; and ii. each CAR Agreement authorises SFS to vary Commission rates in a manner consistent with the relevant Issuer’s procedures for variation of commission rates.”;

Particulars

Suncorp Financial Distribution Agreement, cl 7.1(d).

- (e) in response to paragraph 36(e), says that it was a term of the Suncorp Financial Distribution Agreement that “(e) As between the Issuers and SFS, the Issuers are solely responsible for payment of Commission to SFS for Distributors. SFS must however provide all details the Issuer needs, in respect of each Distributor each month, to; i. calculate the Commission due to the Distributor; ii. generate the recipient created tax invoice in respect of the Commission (where applicable); iii. pay the Commission in accordance with the Distributor’s instructions.”;

Particulars

Suncorp Financial Distribution Agreement, cl 7.1(e).

- (f) in response to paragraph 36(f), says that it was a term of the Suncorp Financial Distribution Agreement that “(a) The parties may from time to time enter into arrangements by which the Product Issuers pay to SFS amounts to cover costs of distributing and promoting the Products under this Agreement.”;

Particulars

Suncorp Financial Distribution Agreement, cl 7.2(a).

- (g) in response to paragraph 36(g), says that it was a term of the Suncorp Financial Distribution Agreement that "In consideration of SFS agreeing hereunder to distribute the Products, the Issuers agree to pay to SFS the Fees as agreed in writing between SFS and the Issuers from time to time";

Particulars

Suncorp Financial Distribution Agreement, cl 7.3.

- (h) in response to paragraph 36(h), says that it was a term of the Suncorp Financial Distribution Agreement that "Either party may terminate this Agreement by giving the other party 4 weeks' (or such other period as the Parties may agree) notice in writing.";

Particulars

Suncorp Financial Distribution Agreement, cl 9.1.

- (i) otherwise relies on the totality of the Suncorp Financial Distribution Agreement; and
- (j) otherwise denies paragraph 36 of the FACLS.

37 In response to paragraph 37 of the FACLS, SPSL:

- (a) says that the final decisions by each of the Directors to execute the Distribution Agreements occurred at the time that each of the Distribution Agreements was executed, on or about 27 June 2013;
- (b) in answer to paragraph 37(a), says that the Guardian Distribution Agreement contained substantially the same terms as those in the Suncorp Financial Distribution Agreement pleaded above in paragraph 36 of the CLR;
- (c) in answer to paragraph 37(b), says that the Standard Pacific Distribution Agreement contained substantially the same terms as those in the Suncorp Financial Distribution Agreement pleaded above in paragraph 36 of the CLR, save for the exclusion of the terms pleaded at paragraphs 36(b)(i) and 36(d) of the CLR;
- (d) denies that it entered the Guardian Distribution Agreement or the Standard Pacific Distribution Agreement in its capacity as the trustee of the Master Trust as pleaded in paragraph 5 of the FACLS; and
- (e) otherwise denies the paragraph.

37A In response to paragraph 37A of the FACLS, SPSL:

- (a) relies on the terms of the:

- (i) Suncorp Financial Distribution Agreement;
 - (ii) Guardian Distribution Agreement;
 - (iii) Standard Pacific Distribution Agreement; and
 - (iv) Superseded Distribution Agreement;
- for their full force and effect; and
- (b) otherwise denies the paragraph.
- 37B SPSL denies paragraph 37B of the FACLS.
- 37C SPSL denies paragraph 37C of the FACLS.
- 38 In response to paragraph 38 of the FACLS, SPSL:
- (a) refers to paragraph 25(c) above; and
 - (b) admits that Advisor Remuneration Payments were made in relation to Suncorp Products on or after 1 July 2013.

Particulars

Advisor Remuneration Payments were made in respect of the following Suncorp Products on or after 1 July 2013.

1. AMSF Complying LifeTime Pension Plan
2. AMSF Complying Term Pension
3. Connelly Temple Allocated Pension Plan (APP)
4. Connelly Temple Allocated Pension Plan Investments (APP Investments)
5. Connelly Temple Complying Term Pension Plan
6. Connelly Temple Employer Super Plan (ESP)
7. Connelly Temple Lifetime Pension
8. Connelly Temple Super Allocated Pension Plan (SAPP)
9. Connelly Temple Super Savings Plan (SSP)
10. Connelly Temple Superannuation Plan (SP)
11. Connelly Temple Workforce Retirement (WF)
12. INVESCO Accumulations Plan
13. INVESCO Lifestyle Retirement Plan
14. Optimum Professional Allocated Pension
15. Optimum Professional Superannuation Savings Plan
16. Partnership Allocated Pension Plan
17. Partnership CPI Pension Plan
18. Partnership Complying Lifetime Pension Plan
19. Partnership Superannuation Plan
20. Suncorp WealthSmart Business Super
21. Suncorp WealthSmart Pension
22. Suncorp WealthSmart Personal Super
23. Suncorp WealthSmart Term Allocated Pension
24. Suncorp Brighter Super
25. Suncorp Brighter Super Personal Super

26. Suncorp Brighter Super for Business
27. Suncorp Brighter Super Pension
28. Suncorp Brighter Super Term Allocated Pension
29. Connelly Temple Lifetime Allocated Pension Plan
30. Suncorp Classic Pension
31. Oceanic Savings Plan (OES)
32. Royal & Sun Alliance Endowment (Participating Super) (RBS)
33. Royal & Sun Alliance Horizon/Fidelity Super (LXS)
34. Royal & Sun Alliance IB Capital Guaranteed (LJS)
35. Royal & Sun Alliance Investment Fund Super (LOS)
36. Royal & Sun Alliance Personal Savings Plan Super (L5S)
37. Royal & Sun Alliance Super Bond (LIS)
38. Royal & Sun Alliance Universal Plan Super (L4S)
39. Royal & Sun Alliance Whole of Life (Non-Participating Super) (RES)
40. Royal & Sun Alliance Whole of Life (Participating Super) (RFS)
41. Suncorp \$UPERBOND (SBS)
42. Suncorp Personal Super Whole of Life – 1975 Series (SWS)
43. Suncorp Personal Super Endowment (SES)
44. Suncorp Personal Super Life\$aver (SLS)
45. Suncorp Personal Super Whole of Life Cover (SXS)
46. Suncorp Personal Super Saver Plus (SSS)
47. Suncorp PersonalSuper Invest Endowment (SPS)
48. Suncorp Super Life Saver (SUPB)
49. Suncorp Super Bond (SUP)
50. Tandem IB Capital Guaranteed (XAS)
51. Tyndall Endowment Participating Super (X7S)
52. Tyndall Monitor Money Accumulation (XWS)
53. Tyndall Quantum Investment (XPS)
54. Tyndall Quantum Life (XXS)
55. Tyndall Quantum Savings Bond (XES)
56. Tyndall Residual Term Life Participating Super (X4S)
57. Tyndall Whole of Life Non Participating Super (X1S)
58. Tyndall Whole of Life Participating Super (X5S)
59. Royal & Sun Alliance Vested Investment Plan (LMS)
60. Asteron Longevity Income Stream (LPS)
61. Royal & Sun Alliance IB Life Pack Super (LZS)
62. Oceanic Whole of Life Non Participating (O1S)
63. Oceanic Whole of Life Participating Super (O2S)
64. Oceanic Endowment Participating Super (O6S)
65. Oceanic Investment Bond (OAS)
66. Oceanic Monthly Investment (OCS)
67. Oceanic Personal Super Plan (ODS)
68. Oceanic MXT Investment Plan (OGS)
69. Tyndall Performance Bond (XBS)
70. Tyndall Personal Investment (XCS)
71. Tyndall Term Life (XRS)
72. Tyndall Maximum Investment Plan (XZS)
73. Oceanic Pure Endowment Participating Super (O7S)
74. Oceanic Money Back Non Participating Super (O5S)
75. Royal & Sun Alliance Pure Endowment - Participating Super (RCS)
76. Scheme Super Endowment (SHS)
77. Personal Super Pure Endowment (SDS)
78. Royal & Sun Alliance Endowment Non-Participating Super (RAS)
79. Tyndall Endowment Non-Participating Super (X6S)
80. Tyndall Quantum Bond (XDS)
81. Tyndall Wealth Plan (XKS)
82. Tyndall Personal Investment (XLS)
83. Royal & Sun Alliance Guaranteed Super Bond (L7S)
84. Optimum Superannuation Master Plan – Corporate
85. Optimum Superannuation Master Plan – Personal

86. Optimum Corporate Super for Standard Pacific
87. Workforce Superannuation

39 SPSL denies that it acted in every instance in its capacity as trustee of the Master Trust but otherwise admits paragraph 39 of the FACLS in that:

- (a) SPSL made Advisor Remuneration Payments in respect of Suncorp Products on or after 1 July 2013 other than in its capacity as trustee of the Master Trust by drawing on its general revenue;

Particulars

SPSL made Advisor Remuneration Payments on or after 1 July 2013 in relation to the products identified at items 1 to 30 of the particulars to paragraph 38(b) above.

- (b) SPSL caused fees (including premiums) to be paid to Suncorp Life in respect of certain Suncorp Products on or after 1 July 2013; and

Particulars

Suncorp Life received fees (including premiums) on or after 1 July 2013 in relation to the products identified at items 31 to 87 of the particulars to paragraph 38(b) above.

- (c) Suncorp Life made Advisor Remuneration Payments in respect of Suncorp Products on or after 1 July 2013.

Particulars

Suncorp Life made Advisor Remuneration Payments on or after 1 July 2013 in relation to the products identified at items 31 to 87 of the particulars to paragraph 38(b) above.

39A SPSL admits paragraph 39A of the FACLS.

39B SPSL denies paragraph 39B of the FACLS.

39C SPSL denies paragraph 39C of the FACLS.

C.2 Advisor Remuneration prohibited on acquisitions after 1 July 2014

39D In response to paragraph 39D of the FACLS, SPSL

- (a) denies the paragraph;

- (b) says further that SPSL was at all material times and in relation to the Plaintiff and each Group Member the provider of a custodial arrangement within the meaning of section 1526 of the Corporations Act;

Particulars

SPSL refers to:

- a. sections 1526 and 1012IA of the Corporations Act;
- b. section 58(2)(d) of the SIS Act;
- c. regulation 4.02A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) ("SIS Regulations"); and
- d. the product terms applicable to each product listed at the particulars to paragraph 38(b) above.

- (c) says further that, irrespective of whether SPSL was acting in the capacity of a platform operator, Division 4 of Part 7.7A of Chapter 7 of the Corporations Act did not apply to Advisor Remuneration Payments; and

Particulars

Corporations Regulations r 7.7A.16 or, in the alternative, Corporations Act s 1528(1) says, in the alternative, that ss 963B(1)(c) and/or 963B(1)(d) will apply in respect of certain Advisor Remuneration Payments such that they do not constitute "conflicted remuneration", even if Division 4 of Part 7.7A of Chapter 7 applies to them which is not an issue common to all group members.

D Super Simplification program

40 SPSL admits paragraph 40 of the FACLS.

41 In response to paragraph 41 of the FACLS, SPSL:

- (a) admits paragraph 41(a); and
- (b) otherwise denies the paragraph.

41A In response to paragraph 41A of the FACLS, SPSL:

(a) in answer to paragraph 41A(a), says:

- (i) the PDSs particularised at (i), (ii), (v), (vi), and (vii) contain the words "We don't charge any Advice fees. However, if you wish, you can have amounts deducted from your account to pay fees to your financial adviser" and "You

- can authorise us to pay a fee for personal advice to your financial adviser (agreed by us) and have the fee charged to the account. It can be: ·a one-off fixed dollar fee, or ·an ongoing fixed monthly dollar amount or percentage of your account balance up to a maximum of 2% pa. Talk to your financial adviser or refer to your financial adviser's 'Statement of Advice' for details of this fee";
- (ii) the PDSs particularised at (iii), and (iv) contain the words "You can authorise us to pay a fee for personal advice to your financial adviser (agreed by us) and have the fee charged to your account. It can be: ·a one-off fixed dollar fee, or ·an ongoing fixed monthly dollar amount or percentage of your account balance up to a maximum of 2% pa. Talk to your financial adviser or refer to your financial adviser's 'Statement of Advice' for details of this fee"; and
- (iii) otherwise refers to the full terms and effect of each of the particularised PDSs; and
- (b) otherwise denies paragraph 41A.
- 42 SPSL denies paragraph 42 of the FACLS.
- 43 In response to paragraph 43 of the FACLS, SPSL:
- (a) says that members were transferred from the Original Superannuation Products to the New Superannuation Products in two tranches, on 3 December 2016 and 27 May 2017; and
- (b) otherwise denies the paragraph.
- 44 In response to paragraph 44 of the FACLS, SPSL:
- (a) admits that Advisor Remuneration Payments were made in relation to Suncorp Products, including certain New Superannuation Products, on or after 1 August 2016; and
- Particulars**
- The particulars to paragraph 38(b) above are repeated in relation to the period on or after 1 August 2016.
- (b) otherwise denies the paragraph.
- 45 SPSL denies that it acted in every instance in its capacity as trustee of the Master Trust, but otherwise admits paragraph 45 of the FACLS in that:

- (a) SPSL made Advisor Remuneration Payments in respect of Suncorp Products on or after 1 August 2016 other than in its capacity as trustee of the Master Trust by drawing on its general revenue;

Particulars

SPSL made any Advisor Remuneration Payments on or after 1 August 2016 in relation to the products identified at items 1 to 30 of the particulars to paragraph 38(b) above.

- (b) SPSL caused fees (including premiums) to be paid to Suncorp Life in respect of certain Suncorp Products on or after 1 August 2016; and

Particulars

Suncorp Life received fees (including premiums) on or after 1 August 2016 in relation to products identified at items 31 to 87 of the particulars to paragraph 38(b) above.

- (c) Suncorp Life made Advisor Remuneration Payments in respect of Suncorp Products on or after 1 August 2016.

Particulars

Suncorp Life made any Advisor Remuneration Payments on or after 1 August 2016 in relation to the products identified at items 31 to 87 of the particulars to paragraph 38(b) above.

45A SPSL admits paragraph 45A of the FACLS.

45B SPSL denies paragraph 45B of the FACLS.

E Failure to advise

45C SPSL denies paragraph 45C of the FACLS.

45D SPSL denies paragraph 45D of the FACLS.

F Contraventions

F.1 SIS Act Contravention and breaches of trust

46 SPSL denies paragraph 46 of the FACLS.

Particulars

In response to the particulars to paragraph 46 of the FACLS, SPSL:

- a. admits that (all other things being equal) the Plaintiff and each of the Group Members had a financial interest in being charged lower fees rather than higher fees;
- b. admits that (all other things being equal) SPSL had a financial interest in receiving higher fees rather than lower fees;
- c. admits that Advisor Remuneration Payments made to financial services licensees were a financial benefit to those financial services licensees; and
- d. admits that SPSL had an interest in maintaining good relations with financial services licensees in relation to the promotion and distribution of Suncorp Products.

47 SPSL denies paragraph 47 of the FACLS.

48 SPSL denies paragraph 48 of the FACLS.

49 SPSL denies paragraph 49 of the FACLS.

50 SPSL denies paragraph 50 of the FACLS.

51 SPSL denies paragraph 51 of the FACLS.

51A SPSL denies paragraph 51A of the FACLS.

51B SPSL denies paragraph 51B of the FACLS.

51C SPSL denies paragraph 51C of the FACLS.

F.2 UNCONSCIONABLE CONDUCT

51D In response to paragraph 51D of the FACLS, SPSL:

(a) in answer to paragraph 51D(a):

- (i) says that members or prospective members of the Master Trust were entitled to negotiate with their advisors a full or partial refund of amounts referable to certain fees, relevantly including Advisor Remuneration;

- (ii) says that members or prospective members of the Master Trust were entitled to compare their Suncorp Products or prospective Suncorp Products to other products offered within the market, and to elect to invest in those other products;
- (b) in answer to paragraph 51D(b) refers to and repeats paragraph 18A; and
- (c) otherwise denies the paragraph.

51E SPSL denies paragraph 51E of the FACLS.

51F In response to paragraph 51F of the FACLS, SPSL refers to and repeats paragraphs 29, 29A, 29B, 39B, 45B, 47 and 48 above.

51G SPSL denies paragraph 51G of the FACLS.

51H SPSL denies paragraph 51H of the FACLS.

G LOSS OR DAMAGE

52 In the premises of paragraphs 1 to 51H above, SPSL denies paragraphs 52 and 53 to 56C.

Particulars in respect of denial of paragraph 56 of the FACLS

If, which is denied, SPSL has misappropriated any assets of the Master Trust by deducting funds in breach of a Statutory Covenant (as alleged in paragraphs 49, 50, 51 and 51A of the FACLS), then SPSL, as trustee of the Master Trust, is obliged to (and will) make good the assets of the Master Trust, and the appropriate relief is an order that it do so. Upon the assets of the Master Trust being made good, no loss or damage will have been suffered by the Plaintiff or by any Group Member who remains a member of the Master Trust and there is no loss or damage to be recovered under s 55 of the SIS Act.

Further, if, which is denied, SPSL is liable under s 55 of the SIS Act to compensate the Plaintiff or any of the Group Members for any loss or damage alleged in the FACLS, any such compensation must be effected by payment into the relevant person's superannuation balance. No payment can (or, alternatively, should) be ordered which would effect a de facto release of preserved benefits inconsistent with the scheme

established by the SIS Regulations including by the payment of sums to any third party litigation funder.

Further, SPSL denies that the making of Advisor Remuneration Payments reduced the value of any interests of Group Members who, at the time of payment, had not satisfied a condition of release or were not entitled to access unrestricted non-preserved benefits.

SPSL refers to the decision in *Shimshon v MLC Nominees* [2020] VSC 640.

52A In response to paragraph 52A of the FACLS, SPSL:

- (a) admits that the Plaintiff and each Group Member who is or has been a member of the Master Trust has from time to time had a beneficial interest in the Master Trust, but that the precise form and quantum of such interest is or was contingent on particular events and circumstances personal to individual members;
- (b) in respect of the Plaintiff:
 - (i) admits that, from 11 January 2020, the Plaintiff had unrestricted non-preserved benefits in the meaning of the SIS Regulations in the Master Trust;
 - (ii) says that the quantum of those benefits at any given time was subject, inter alia, to the charging of costs against such benefits pursuant to SIS Regulations r 5.02;
 - (iii) admits that, from 11 January 2020, the Plaintiff was entitled to payment of those benefits in accordance with ss 31-34 of the SIS Act and Part 6 of the SIS Regulations and subject, inter alia, to the charging of costs against such benefits pursuant to SIS Regulations r 5.02; and
 - (iv) admits that from 11 January 2020, the Plaintiff's interest in the Master Trust has been an equitable proprietary interest in a share of the assets of the Master Trust, such share to be determined in accordance with the governing rules of the Master Trust, the SIS Act and the SIS Regulations;
- (c) denies that any member of the Master Trust had any interest (including any proprietary interest) in any individual piece of trust property, or any identifiable portion of the Master Trust, or any immediate right to payment in respect of preserved or restricted non-preserved benefits;
- (d) says further that any interest in respect of any benefits was subject to the governing rules of the Master Trust, the SIS Act and the SIS Regulations; and

(e) otherwise denies the paragraph.

H INVOLVEMENT

53 SPSL denies paragraph 57 of the FACLS.

54 Not used as paragraph 58 of the FACLS is intentionally left blank.

55 SPSL denies paragraphs 59 to 62A of the FACLS.

HA Limitation

56 The following paragraphs [57]-[77] are raised by SPSL in further answer to the whole FACLS.

SIS Act s 55(3): original group members, original claims

57 If, which is denied, the Plaintiff or any Group Member (other than a person who became a Group Member by reason of the filing of the ACLS and/or AS) has a cause of action sounding in relief pursuant to section 55(3) of the SIS Act on the basis of matters alleged in the Commercial List Statement ("CLS") prior to its amendment in the ACLS, any such cause of action that accrued before:

(a) 21 June 2013; or

(b) 28 June 2013,

is not maintainable by operation of sub-section 55(4) of the SIS Act.

Particulars

The Summons and CLS were filed on 21 June 2019 and served on 28 June 2019.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members' claims have been provided.

SIS Act s 55(3): ACLS group members, original allegations

58 If, which is denied, any person who became a Group Member by reason of the filing of the ACLS and/or AS has a cause of action sounding in relief pursuant to section 55(3) of the SIS Act on the basis of matters alleged in the CLS prior to its amendment in the ACLS, any such cause of action that accrued before:

(a) 21 June 2013; or

- (b) 28 June 2013; or
- (c) 16 December 2013; or
- (d) 20 December 2013,

is not maintainable by operation of sub-section 55(4) of the SIS Act.

Particulars

The Summons and CLS were filed on 21 June 2019 and served on 28 June 2019.

Leave to file the ACLS was given on 16 December 2019.

The AS and ACLS were filed on 20 December 2019.

SPSL refers to and repeats paragraph 3(c) above.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members' claims have been provided.

SIS Act s 55(3): original group members, ACLS allegations

59 If, which is denied, the Plaintiff or any Group Member (other than a person who became a Group Member by reason of the filing of the ACLS and/or AS) has a cause of action sounding in relief pursuant to section 55(3) of the SIS Act on the basis of the amendments to the CLS set out in the ACLS (other than the amendment to the definition of "Group Member" therein), any such cause of action that accrued before:

- (a) 21 June 2013; or
- (b) 28 June 2013; or
- (c) 16 December 2013; or
- (d) 20 December 2013,

is not maintainable by operation of sub-section 55(4) of the SIS Act.

Particulars

The particulars to [58] above are repeated.

SIS Act s 55(3): ACLS group members, ACLS allegations

- 60 If, which is denied, any person who became a Group Member by reason of the filing of the ACLS and/or AS has a cause of action sounding in relief pursuant to section 55(3) of the SIS Act on the basis of the amendments to the CLS set out in the ACLS (other than the amendment to the definition of "Group Member" therein), any such cause of action that accrued before:
- (a) 21 June 2013; or
 - (b) 28 June 2013; or
 - (c) 16 December 2013; or
 - (d) 20 December 2013,

is not maintainable by operation of sub-section 55(4) of the SIS Act.

Particulars

The particulars to [58] above are repeated.

SIS Act s 55(3): FACLS allegations

- 60A If, which is denied, the Plaintiff or any Group Member has a cause of action sounding in relief pursuant to section 55(3) of the SIS Act on the basis of the amendments to the ACLS set out in the FACLS, any such cause of action that accrued before:
- (a) 21 June 2013; or
 - (b) 28 June 2013; or
 - (c) 16 December 2013; or
 - (d) 20 December 2013; or
 - (e) 9 November 2015,

is not maintainable by operation of sub-section 55(4) of the SIS Act

Particulars

The Summons and CLS were filed on 21 June 2019 and served on 28 June 2019.

Leave to file the ACLS was given on 16 December 2019.

The AS and ACLS were filed on 20 December 2019.

Leave to file the FAS and FACLS was given on 9 November 2021.

The FAS and FACLS were filed on 9 November 2021.

Further particulars will be provided after the initial trial, when proper particulars of individual Group Members' claims have been provided.

SIS Act s 315(11)

- 61 If, which is denied, the Court's discretion to make an order under s 315(11) of the SIS Act is enlivened in respect of the Plaintiff or any Group Member, the Court ought decline to make such an order where such an order would have the effect of circumventing a limitation period prescribed by s 55(4) of the SIS Act.

Breach of trust: original group members, original claims

- 62 If, which is denied, the Plaintiff or any Group Member (other than a person who became a Group Member by reason of the filing of the ACLS and/or AS) has a cause of action in respect of a breach of trust on the basis of matters alleged in the CLS prior to its amendment in the ACLS, any such cause of action that accrued before:
- (a) 21 June 2013; or
 - (b) 28 June 2013,

is not maintainable and has been extinguished by operation of sections 48, 50 and 63 of the Limitation Act 1969 (NSW).

Particulars

The particulars to [57] above are repeated.

Breach of trust: ACLS group members, original allegations

- 63 If, which is denied, any person who became a Group Member by reason of the filing of the ACLS and/or AS has a cause of action in respect of a breach of trust on the basis of matters alleged in the CLS prior to its amendment in the ACLS, any such cause of action that accrued before:
- (a) 21 June 2013; or
 - (b) 28 June 2013; or
 - (c) 16 December 2013; or
 - (d) 20 December 2013;

is not maintainable and has been extinguished by operation of sections 48, 50 and 63 of the Limitation Act 1969 (NSW).

Particulars

The particulars to [58] above are repeated.

Breach of trust: original group members, ACLS allegations

- 64 If, which is denied, the Plaintiff or any Group Member (other than a person who became a Group Member by reason of the filing of the ACLS and/or AS) has a cause of action in respect of a breach of trust on the basis of the amendments to the CLS set out in the ACLS (other than the amendment to the definition of "Group Member" therein), any such cause of action that accrued before:
- (a) 21 June 2013; or
 - (b) 28 June 2013; or
 - (c) 16 December 2013; or
 - (d) 20 December 2013,

is not maintainable and has been extinguished by operation of sections 48, 50 and 63 of the Limitation Act 1969 (NSW).

Particulars

The particulars to [58] above are repeated.

Breach of trust: ACLS group members, ACLS allegations

- 65 If, which is denied, any person who became a Group Member by reason of the filing of the ACLS and/or AS has a cause of action in respect of a breach of trust on the basis of the amendments to the CLS set out in the ACLS (other than the amendment to the definition of "Group Member" therein), any such cause of action that accrued before:
- (a) 21 June 2013; or
 - (b) 28 June 2013; or
 - (c) 16 December 2013; or
 - (d) 20 December 2013,

is not maintainable and has been extinguished by operation of sections 48, 50 and 63 of the Limitation Act 1969 (NSW).

Particulars

The particulars to [58] above are repeated.

FACLS allegations

65A If, which is denied, the Plaintiff or any Group Member has a cause of action in respect of a breach of trust on the basis of the amendments to the ACLS set out in the FACLS, any such cause of action that accrued before:

- (a) 21 June 2013; or
- (b) 28 June 2013; or
- (c) 16 December 2013; or
- (d) 20 December 2013; or
- (e) 9 November 2015,

is not maintainable and has been extinguished by operation of sections 48, 50 and 63 of the Limitation Act 1969 (NSW).

Particulars

The particulars to paragraph 60A above are repeated.

Causes of action founded on equity otherwise than in respect of a breach of trust

66 If, which is denied, the Plaintiff or any Group Member has any cause of action for equitable relief to which no statutory limitation period applies, the Court ought apply by analogy the limitation period found in s 55(4) of the SIS Act and/or s 48 of the Limitation Act, such that proceedings pursuing the cause of action may not be commenced more than 6 years after the cause of action arose.

ASIC Act s 12GF: original group members, original allegations

67 If, which is denied, the Plaintiff or any Group Member (other than a person who became a Group Member by reason of the filing of the ACLS and/or AS) has a cause of action sounding in relief pursuant to section 12GF(1) of the ASIC Act on the basis of matters alleged in the CLS prior to its amendment in the ACLS, any such cause of action that accrued before:

- (a) 21 June 2013; or
- (b) 28 June 2013,

is not maintainable by operation of sub-section 12GF(2) of the ASIC Act.

Particulars

The particulars to [57] above are repeated.

ASIC Act s 12GF: ACLS group members, original allegations

- 68 If, which is denied, any person who became a Group Member by reason of the filing of the ACLS and/or AS has a cause of action sounding in relief pursuant to section 12GF(1) of the ASIC Act on the basis of matters alleged in the CLS prior to its amendment in the ACLS, any such cause of action that accrued before:
- (a) 21 June 2013; or
 - (b) 28 June 2013; or
 - (c) 16 December 2013; or
 - (d) 20 December 2013,

is not maintainable by operation of sub-section 12GF(2) of the ASIC Act.

Particulars

The particulars to [58] above are repeated.

ASIC Act s 12GF: original group members, ACLS allegations

- 69 If, which is denied, the Plaintiff or any Group Member (other than a person who became a Group Member by reason of the filing of the ACLS and/or AS) has a cause of action sounding in relief pursuant to section 12GF(1) of the ASIC Act on the basis of the amendments to the CLS set out in the ACLS (other than the amendment to the definition of "Group Member" therein), any such cause of action that accrued before:
- (a) 21 June 2013; or
 - (b) 28 June 2013; or
 - (c) 16 December 2013; or
 - (d) 20 December 2013,

is not maintainable by operation of sub-section 12GF(2) of the ASIC Act.

Particulars

The particulars to [58] above are repeated.

ASIC Act s 12GF: ACLS group members, ACLS allegations

- 70 If, which is denied, any person who became a Group Member by reason of the filing of the ACLS and/or AS has a cause of action sounding in relief pursuant to section 12GF(1) of the ASIC Act on the basis of the amendments to the CLS set out in the ACLS (other than the amendment to the definition of "Group Member" therein), any such cause of action that accrued before:
- (a) 21 June 2013; or
 - (b) 28 June 2013; or
 - (c) 16 December 2013; or
 - (d) 20 December 2013,

is not maintainable by operation of sub-section 12GF(2) of the ASIC Act.

Particulars

The particulars to [58] above are repeated.

ASIC Act s 12GF: FACLS allegations

- 70A If, which is denied, the Plaintiff or any Group Member has a cause of action sounding in relief pursuant to section 12GF(1) of the ASIC Act on the basis of the amendments to the ACLS set out in the FACLS, any such cause of action that accrued before:
- (a) 21 June 2013; or
 - (b) 28 June 2013; or
 - (c) 16 December 2013; or
 - (d) 20 December 2013; or
 - (e) 9 November 2015,

is not maintainable by operation of sub-section 12GF(2) of the ASIC Act.

Particulars

The particulars to paragraph 60A above are repeated.

ASIC Act s 12GM: original group members, original allegations

- 71 If, which is denied, the Plaintiff or any Group Member (other than a person who became a Group Member by reason of the filing of the FACLS and/or AS) has a cause of action

sounding in relief pursuant to section 12GM of the ASIC Act on the basis of matters alleged in the CLS prior to its amendment in the FACLS, any such cause of action that accrued before:

- (a) 21 June 2013; or
- (b) 28 June 2013,

is not maintainable by operation of sub-section 12GM(5) of the ASIC Act.

Particulars

The particulars to [57] above are repeated.

ASIC Act s 12GM: ACLS group members, original allegations

72 If, which is denied, any person who became a Group Member by reason of the filing of the ACLS and/or AS has a cause of action sounding in relief pursuant to section 12GM of the ASIC Act on the basis of matters alleged in the CLS prior to its amendment in the ACLS, any such cause of action that accrued before:

- (a) 21 June 2013; or
- (b) 28 June 2013; or
- (c) 16 December 2013; or
- (d) 20 December 2013,

is not maintainable by operation of sub-section 12GM(5) of the ASIC Act.

Particulars

The particulars to [58] above are repeated.

ASIC Act s 12GM: original group members, ACLS allegations

73 If, which is denied, the Plaintiff or any Group Member (other than a person who became a Group Member by reason of the filing of the ACLS and/or AS) has a cause of action sounding in relief pursuant to section 12GM of the ASIC Act on the basis of the amendments to the CLS set out in the ACLS (other than the amendment to the definition of "Group Member" therein), any such cause of action that accrued before:

- (a) 21 June 2013; or
- (b) 28 June 2013; or
- (c) 16 December 2013; or

(d) 20 December 2013,

is not maintainable by operation of sub-section 12GM(5) of the ASIC Act.

Particulars

The particulars to [58] above are repeated.

ASIC Act s 12GM: ACLS group members, ACLS allegations

74 If, which is denied, any person who became a Group Member by reason of the filing of the ACLS and/or AS has a cause of action sounding in relief pursuant to section 12GM of the ASIC Act on the basis of the amendments to the CLS set out in the ACLS (other than the amendment to the definition of "Group Member" therein), any such cause of action that accrued before:

(a) 21 June 2013; or

(b) 28 June 2013; or

(c) 16 December 2013; or

(d) 20 December 2013,

is not maintainable by operation of sub-section 12GM(5) of the ASIC Act.

Particulars

The particulars to [58] above are repeated.

ASIC Act s 12GM: FACLS allegations

74A If, which is denied, the Plaintiff or any Group Member has a cause of action sounding in relief pursuant to section 12GM of the ASIC Act on the basis of the amendments to the ACLS set out in the FACLS, any such cause of action that accrued before:

(a) 21 June 2013; or

(b) 28 June 2013; or

(c) 16 December 2013; or

(d) 20 December 2013; or

(e) 9 November 2015,

is not maintainable by operation of sub-section 12GM(5) of the ASIC Act.

Particulars

The particulars to paragraph 60A above are repeated.

ASIC Act s 12GM(1): discretion

- 75 If, which is denied, the Court's discretion to make an order under s 12GM(1) of the ASIC Act is enlivened in respect of the Plaintiff or any Group Member, the Court ought decline to make such an order where such an order would have the effect of circumventing a limitation period prescribed by s 12GF(2) or 12GM(5) of the ASIC Act.

HB Other Defences

- 76 Further to paragraphs [57]-[75] above, SPSL indicates its intent to raise in answer to the claims of the Plaintiff or any of the Group Members such limitation periods (whether applying directly or by analogy in equity) and defences of acquiescence, laches or delay as may be available following the further particularisation of the Plaintiff's claim, and the proper pleading and particularisation of individual Group Member claims and the setting down of any such claims for trial.
- 77 If, which is denied, the substantive law of any place other than New South Wales governs any of the non-statutory claims of the Plaintiff or any of the Group Members, SPSL indicates its intent to rely upon the limitations legislation of that place to the extent possible in opposition to that claim in accordance with s 5 of the *Choice of Law (Limitation Periods) Act 1993* (NSW). If, which is not apparent, the Plaintiff or any Group Member contends that any of their non-statutory claims is governed by the substantive law of a place other than New South Wales, SPSL will, following articulation of that contention, give particulars of the precise limitations legislation of that place that is relied upon by SPSL.
- 78 In further response to the whole of the FACLS, if it appears to the Court that SPSL is or may be liable in respect of the matters alleged in the FACLS (which liability is denied), the Court should relieve SPSL either wholly or partly from the liability on such terms as the Court thinks fit on the basis that SPSL has acted honestly and having regard to all the circumstances of the case it ought fairly to be excused for the matters alleged in the FACLS.

Particulars

SIS Act, s 310.

I RELIEF CLAIMED

- 79 In response to paragraph 63 of the FACLS, SPSL denies that the Plaintiff is entitled, for himself or on behalf of each of the Group Members, to the relief set out in the Further Amended Summons.

D QUESTIONS APPROPRIATE FOR REFERRAL TO A REFEREE

Nil.

**E A STATEMENT AS TO WHETHER THE PARTIES HAVE ATTEMPTED MEDIATION;
WHETHER THE PARTY IS WILLING TO PROCEED TO MEDIATION AT AN
APPROPRIATE TIME**

SPSL is willing to participate in mediation at an appropriate time.

SIGNATURE

Signature of solicitor

Name	Alexander Basil Morris	 <i>Christopher Andrews</i>
Solicitor for	The First Defendant	<i>by his employed solicitor, with authority,</i>
Date	24 November 2021	<i>CHRISTOPHER ANDREWS</i>