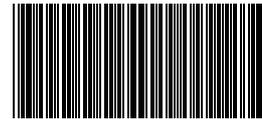




Filed: 25 November 2021 8:34 AM



D0001HY2XS

### 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	Sean Carroll, Defendant 3
Legal representative	Moira Leonie Saville
Legal representative reference	
Telephone	9296 2528
Your reference	602-0044733

#### 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 (Third Defendant - Commercial List Response - 24112021.pdf)

[attach.]

Practice Note No. SC Eq. 3

## 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	<b>Kerry Michael Quirk</b>
First Defendant	<b>Suncorp Portfolio Services Limited</b> in its capacity as trustee for the Suncorp Master Trust
Second Defendant	<b>Geoffrey Edward Summerhayes</b>
Third Defendant	<b>Sean Carroll</b>

### FILING DETAILS

Filed for	<b>Sean Carroll</b> , the Third Defendant
Filed in relation to	Plaintiff's Amended Commercial List Statement
Legal representative	Moira Leonie Saville, King & Wood Mallesons
Legal representative reference	602-0044733
Contact names and telephone	Moira Leonie Saville, (02) 9296 2311 Jack Power, (02) 9296 2130
Contact emails	moira.saville@au.kwm.com jack.power@au.kwm.com

## **A. NATURE OF DISPUTE**

Unless indicated otherwise, Sean Carroll, the Third Defendant, adopts in his Commercial List Response (**CLR**) the definitions in the Plaintiff's Further Amended Commercial List Statement (**FACLS**). He does so only for convenience and without admission of any matter that the Plaintiff might allege by those definitions.

- 1 The Third Defendant adopts the description of the nature of the dispute set out in the Commercial List Response of the First Defendant, Suncorp Portfolio Services Limited (**SPSL**), dated 24 November 2021.
- 2 Further, the Third Defendant notes that of the two topics the subject of the FACLS, being (i) allegations about the payment of so-called 'Conflicted Remuneration', and (ii) allegations about the Super Simplification Program (**SSP**), the second has no relevance to the Third Defendant. No relief is sought against the Third Defendant in respect of the SSP. As to (i), the Third Defendant denies that SPSL breached s 55(3) of the *Superannuation Industry (Supervisions) Act 1993* (Cth) (**SIS Act**) or ss12GF and 12GM of the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**), and further denies the Plaintiff's allegations against him that he was involved in SPSL's alleged breaches.

## **B. ISSUES LIKELY TO ARISE**

- 1 The issues likely to arise for determination at the initial trial of the Plaintiff's case and the issues of law or fact common to the Plaintiff and the Group Members are to be determined following the filing of the Plaintiff's replies (if any) to the Commercial List Responses.

## **C. THIRD DEFENDANT'S RESPONSES TO PLAINTIFF'S CONTENTIONS**

In response to the FACLS filed by the Plaintiff on 20 December 2019, the Third Defendant says as follows, adopting the definitions in the FACLS unless otherwise indicated.

### **A Parties**

- 1 In response to paragraph 1, the Third Defendant:
  - (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, the Third Defendant:
- (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, the Third Defendant:
- (a) says that it does not adopt the defined term 'Conflicted Remuneration' for the purposes of this CLR. Instead, the Third Defendant 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 FACLS and the Amended Summons filed 20 December 2019 (**AS**) take effect from 16 December 2019, being the date on which leave was granted to file the FACLS; and
  - (d) otherwise denies the paragraph.
- 3A The Third Defendant 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, Third Defendant:

- (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 The Third Defendant acknowledges paragraph 5 of the FACLS.

6 In response to paragraph 6 of the FACLS, the Third Defendant:

- (a) admits paragraph 6(a) of the FACLS;
- (b) in response to paragraph 6(b) of the FACLS:
  - (i) admits that Suncorp Life provided administrative services to SPSL for the period referred to at paragraph 10(c) of the CLR;
  - (ii) he does not know and cannot admit the balance of paragraph 6(b) of the FACLS for the period after 1 March 2016;
- (c) admits paragraph 6(c) of the FACLS; and

(d) otherwise denies the paragraph.

7 In response to paragraph 7 of the FACLS, the Third Defendant:

(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, the Third Defendant uses the term 'Guardian' to refer only to Guardian FP 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 The Third Defendant admits paragraph 8 of the FACLS.

9 In response to paragraph 9 of the CLS, the Third Defendant:

- (a) admits that for the period referred to at paragraph 10(c) of the CLR above, the Financial Products were promoted and distributed by the members of the Suncorp Adviser Network through their own representatives and other financial services licensees or their authorised representatives; and
- (b) otherwise does not know and cannot admit the paragraph.

10 In response to paragraph 10 of the FACLS, the Third Defendant:

- (a) admits paragraph 10(a) of the FACLS;
- (b) admits paragraph 10(aa) of the FACLS;
- (c) in response to paragraph 10(ab) of the FACLS, says that he 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 (which is denied) particularised as paragraph 47, and alleged at paragraph 57 (but not

otherwise), admits that the knowledge of the directors is attributed to SPSL;

(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**

### **B1 Superannuation funds and Suncorp Products**

11 The Third Defendant admits paragraph 11 of the FACLS.

11A The Third Defendant admits paragraph 11A of the FACLS.

11B In response to paragraph 11B of the FACLS, the Third Defendant:

(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 noncompliance 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 The Third Defendant admits paragraph 12 of the FACLS.
- 13 [Intentionally left blank].
- 14 [Intentionally left blank].
- 14A In response to paragraph 14A of the FACLS, the Third Defendant:
- (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) and otherwise denies the paragraph.
- 14B In response to paragraph 14B of the ACL, the Third Defendant:
- (a) says that the paragraph is embarrassing as it does not specify what aspect(s) of Suncorp'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 The Third Defendant admits paragraph 15 of the FACLS.
- 16 [Intentionally left blank].

**B2 SIS Act**

17 In response to paragraph 17 of the FACLS, the Third Defendant:

- (a) relies on s52(2) of the SIS Act for its full force and effect at all material times (including as amended); and
- (b) otherwise admits the paragraph.

18 In response to paragraph 18 of the FACLS, the Third Defendant;

- (a) refers to and repeats paragraphs 3 and 3A above;
- (b) further says that SPSL's covenants to:
  - (i) perform the trustee's duties under the various sections of the SIS Act listed in paragraph 18 of the FACLS were duties owed 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; 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; and
- (c) otherwise admits the paragraph.

**B3 Equitable and legal duties**

18A In response to paragraph 18A of the FACLS, the Third Defendant:

- (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, the Third Defendant:
- (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 The Third Defendant denies paragraph 18C of the FACLS.

**B4 FOFA**

- 19 In response to paragraph 19 of the FACLS, the Third Defendant:
- (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, the Third Defendant:
- (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 The Third Defendant denies paragraph 20A of the ACLS.

21 The Third Defendant 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 [Intentionally left blank].

23 [Intentionally left blank].

24 [Intentionally left blank].

24A [Intentionally left blank].

24B [Intentionally left blank].

24C The Third Defendant admits paragraph 24C of the FACLS.

24D In response to paragraph 24D of the FACLS, the Third Defendant:

(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**

### **C1 Advisor Remuneration prior to 1 July 2013**

24E In response to paragraph 24E of the FACLS, the Third Defendant denies that SPSL 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 “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 “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 “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) 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, the Third Defendant:

- (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;
- (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, the Third Defendant uses the defined term ‘Advisor Remuneration Payments’ in place of the Plaintiff’s defined term ‘Conflicted Remuneration Payments’.

26 The Third Defendant does not now recall and cannot admit paragraph 26 of the FACLS.

26A In response to paragraph 26A, the Third Defendant:

- (a) admits the allegations for the period referred to in paragraph 10(c) above; and
- (b) otherwise does not know and cannot admit the balance of paragraph 26A of the FACLS for the period after 1 March 2016.

27 In response to paragraph 27 of the FACLS, the Third Defendant:

- (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 2001 (Cth) (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; 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.

- (c) otherwise denies the paragraph.

28 [Intentionally left blank].

29 In response to paragraph 29 of the FACLS, the Third Defendant:

- (a) refers to and repeats paragraph 27;

- (b) says that the paragraph is embarrassing to the extent that it alleges 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 SPSL 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, the Third Defendant:
- (a) refers to and repeats paragraph 29 above;
  - (b) says that SPSL 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, the Third Defendant:
- (a) refers to and repeats paragraphs 29 and 29A above;

- (b) says that SPSL was under no duty or obligation to undertake any Cessation of Member Charging Act; and
  - (c) otherwise denies the paragraph.
- 30 The Third Defendant admits paragraph 30 of the FACLS.
- 31 The Third Defendant denies paragraph 31 of the FACLS.

### **Particulars**

The Third Defendant 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, the Third Defendant:
- (a) admits that, on or around 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, the Third Defendant:
- (a) does not know and therefore does not admit paragraph 33(a) of the FACLS; and
  - (b) otherwise denies the paragraph.
- 34 In response to paragraph 34 of the FACLS, the Third Defendant:
- (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 around 27 June 2013;

- (b) denies that SPSL 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 [Intentionally left blank].

36 As to paragraph 36 of the FACLS, the Third Defendant:

- (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(c).

- (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, the Third Defendant:

- (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 around 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 the First Defendant 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, the Third Defendant:

- (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 The Third Defendant denies paragraph 37B of the FACLS.

37C The Third Defendant denies paragraph 37C of the FACLS.

38 In response to paragraph 38 of the FACLS, the Third Defendant:

- (a) admits that Conflicted Remuneration Payments were continued to be made in relation to Suncorp Products on and after 1 July 2013 for the period referred to at paragraph 10(c) of the CLR; and
- (b) does not know and cannot admit the balance of paragraph 38 of the FACLS for the period after 1 March 2016.

39 The Third Defendant does not now recall and cannot admit paragraph 39 of the FACLS.

39A The Third Defendant admits paragraph 39A for the period referred to at paragraph 10(c) above and otherwise does not know and cannot admit the balance of the paragraph.

39B The Third Defendant denies paragraph 39B of the FACLS.

39C The Third Defendant denies paragraph 39C of the FACLS.

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

39D The Third Defendant denies paragraph 39D of the FACLS.

## **D Super Simplification program**

40 The Third Defendant does not admit paragraph 40 of the FACLS as this paragraph contains no allegations against him.

41 The Third Defendant does not admit paragraph 41 of the FACLS as this paragraph contains no allegations against him.

41A The Third Defendant does not admit paragraph 41A of the FACLS as this paragraph contains no allegations against him.

42 The Third Defendant does not admit paragraph 42 of the FACLS as this paragraph contains no allegations against him.

43 The Third Defendant does not admit paragraph 43 of the FACLS as this paragraph contains no allegations against him.

44 The Third Defendant does not admit paragraph 44 of the FACLS as this paragraph contains no allegations against him.

45 The Third Defendant does not admit paragraph 45 of the FACLS as this paragraph contains no allegations against him.

45A The Third Defendant does not admit paragraph 45A of the FACLS as this paragraph contains no allegations against him.

45B The Third Defendant does not admit paragraph 45B of the FACLS as this paragraph contains no allegations against him.

**E Failure to advise**

45C The Third Defendant denies paragraph 45C of the FACLS.

45D The Third Defendant denies paragraph 45D of the FACLS.

**F Contraventions**

46 In the premises of paragraphs 1 to 45 above, the Third Defendant denies paragraphs 46 to 51C of the FACLS to the extent that those paragraphs contain allegations against him.

47 [Intentionally left blank].

48 [Intentionally left blank].

49 [Intentionally left blank].

50 [Intentionally left blank].

51 [Intentionally left blank].

51A [Intentionally left blank].

51B [Intentionally left blank].

51C [Intentionally left blank].

**F1. Unconscionable Conduct**

51D In response to paragraph 51D of the FACLS, the Third Defendant:

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

(i) says that during the period referred to in paragraph 10(c) above members or prospective members of the Suncorp 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 SMT 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 paragraphs 18A; and

(c) otherwise denies the paragraph.

51E The Third Defendant denies paragraph 51E of the FACLS.

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

51G The Third Defendant denies paragraph 51G for the period referred to at paragraph 10(c) above and otherwise does not know and cannot admit the paragraph.

51H The Third Defendant denies paragraph 51H of the FACLS.

**G Loss or Damage**

52 In the premises of paragraphs 1 to 51H above, the Third Defendant denies paragraph 52 of the FACLS.

**Particulars in respect of denial of paragraph 52 of the FACLS**

If, which is denied, SPSL has misapplied 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 SIS Regulations including by the payment of sums to any third party litigation funder.

Further, the Third Defendant 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.

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

52A In response to paragraph 52A of the FACLS, the Third Defendant :

- (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 nature 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.

53 In the premises of paragraphs 1 to 52A above, the Third Defendant denies paragraph 53 of the FACLS.

54 The Third Defendant does not plead to paragraph 54 of the FACLS as this paragraph contains no allegations against him.

55 The Third Defendant does not plead to paragraph 55 of the FACLS as this paragraph contains no allegations against him.

56 In the premises of paragraphs 1 to 52 above, the Third Defendant denies paragraph 56 of the FACLS to the extent that the paragraph contains allegations against him.

56A In the premises of paragraphs 1 to 52 above, the Third Defendant denies paragraph 56A of the FACLS to the extent that the paragraph contains allegations against him.

#### **H Involvement**

57 To the extent that the allegations in paragraph 57 of the FACLS relate to the Third Defendant, he denies the paragraph.

58 [Intentionally left blank].

59 In response to paragraph 59 of the FACLS, the Third Defendant:

- (a) admits that he participated in authorising the execution of the Distribution Agreements;

#### **Particulars**

- (i) Product Issue and Distribution Agreement between SPSL, SLSL and SFS;
- (ii) Product Issue and Distribution Agreement between SPSL, SLSL and Guardian Limited;
- (iii) Product Issue and Distribution Agreement between SPSL, SLSL and Standard Pacific Consulting Limited;

- (b) admits that he executed the Distribution Agreements; and

#### **Particulars**

- (i) Product Issue and Distribution Agreement between SPSL, SLSL and SFS;
  - (ii) Product Issue and Distribution Agreement between SPSL, SLSL and Guardian Limited;
  - (iii) Product Issue and Distribution Agreement between SPSL, SLSL and Standard Pacific Consulting Limited;
- (c) otherwise denies paragraph 59 of the FACLS.

60 The Third Defendant refers to and repeats his response to paragraph 52 above and otherwise denies the paragraph.

61 To the extent that the allegations in paragraph 61 of the FACLS relate to the Third Defendant, he denies the paragraph and otherwise does not admit the paragraph.

62 The Third Defendant denies the allegations in paragraph 62 to the extent that they relate to him, and otherwise does not admit the paragraph.

**HA Limitation**

63 The following paragraphs 64-80 are raised by the Third Defendant in further answer to the whole FACLS.

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

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 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*

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 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.

The Third Defendant 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*

66 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 [65] above are repeated.

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

67 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 [65] above are repeated.

*SIS Act s 55(3): FACLS allegations*

68 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.

*ASIC Act s 12GF: original group members, original 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 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 [64] above are repeated.

#### *ASIC Act s 12GF: ACLS group members, original 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 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 [65] above are repeated.

#### *ASIC Act s 12GF: original group members, ACLS 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 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 [65] above are repeated.

#### *ASIC Act s 12GF: ACLS group members, ACLS 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 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 [65] above are repeated.

#### *ASIC Act s 12GF: FACLS allegations*

73 If, which is denied, the Plaintiff of 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 65 above are repeated.

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

74 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 [64] above are repeated.

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

75 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 [65] above are repeated.

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

76 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 [65] above are repeated.

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

77 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 [65] above are repeated.

#### *ASIC Act s 12GM: FACLS allegations*

78 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 65 above are repeated.

#### *ASIC Act s 12GM(1): discretion*

79 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.

*SIS Act s 315(11)*

- 80 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.

**HB Other Defences**

- 81 Further to paragraphs 63-80 above, the Third Defendant 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.
- 82 If, which is denied, the Third Defendant has any liability to the Plaintiff as pleaded, he ought in all the circumstances of the case fairly be excused within the meaning of s310 of the SIS Act and seeks relief, wholly or in part, from any liability under that section.

**Particulars**

SIS Act, s 310.

**Section 1318 of the Corporations Act**

- 83 If, which is denied, the Third Defendant has any liability to the Plaintiff as pleaded, he ought in all the circumstances of the case fairly be excused within the meaning of s 1318 of the Corporations Act and seeks relief, wholly or in part, from any liability under that section.

**Particulars**

Corporations Act, s 1318.

**I. Relief claimed**

84 In response to paragraph 63 of the FACLS, the Third Defendant denies that the Plaintiff is entitled, for himself or on behalf of each of the Group Members, to the relief set out in the 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**

The Third Defendant is willing to participate in mediation at an appropriate time.

**SIGNATURE**

Signature of solicitor

  
.....

Name

Moira Leonie Saville

*By her employed solicitor,  
John Power with authority*

Solicitor for

Sean Carroll, the Third Defendant

Date

24 November 2021