



Equity Division Supreme Court New South Wales

Case Name: **Quirk v Suncorp Portfolio Services Ltd in its capacity as trustee for the Suncorp Master Trust**

Medium Neutral Citation: **[2022] NSWSC 398**

Hearing Date(s): 20 March 2022

Date of Orders: 7 April 2022

Date of Decision: 7 April 2022

Jurisdiction: Equity - Commercial List

Before: Rees J

Decision: Motion dismissed.

Catchwords: CIVIL PROCEDURE – pleadings – admissions – whether amendment withdraws admission without leave – rule 12.6(2), Uniform Civil Procedure Rules 2005 (NSW) – principles at [52]-[61] – dangers of multiple allegations of fact in single paragraph of pleading – on plain reading of pleadings, there was either no withdrawal of admissions or any withdrawal made no difference to plaintiff’s pleaded case – no leave required.

Legislation Cited: *Australian Securities and Investments Commission Act 2001* (Cth)
Corporations Act 2001 (Cth)
Superannuation Industry (Supervision) Act 1993 (Cth)
Uniform Civil Procedure Rules 2005 (NSW)

Cases Cited: *Forbes Engineering (Asia) Pte Ltd v Forbes (No 3)* [2007] FCA 1637
Matland Holdings Pty Ltd v NTZ Pty Ltd [2002] FCA 1590
Nanevski Developments Pty Ltd v Slaveski [2020] NSWSC 617
National Australia Bank Ltd v C&O Voukidis Pty Ltd [2015] NSWSC 185
Otsuka Pharmaceutical Co Ltd v Generic Health Pty Ltd (No 3) [2020] FCA 222

Ryde Developments Pty Ltd v The Property Investors Alliance Pty Ltd [2016] NSWSC 728
Sergi v Sergi [2019] NSWSC 865

Texts Cited:

Macquarie Dictionary
Ritchie's Uniform Civil Procedure NSW

Category:

Procedural rulings

Parties:

Kerry Michael Quirk (Plaintiff)
Suncorp Portfolio Limited in its capacity as trustee for the Suncorp Master Trust (First Defendant)
Geoffrey Summerhayes (Second Defendant)
Sean Carroll (Third Defendant)

Representation:

Counsel:
Mr S Habib SC / Mr C McMeniman (Plaintiff)
Mr I Jackman SC / Mr H Atkin (First Defendant)
Mr B Lim (Second Defendant)
Ms F Roughley (Third Defendant)

Solicitors:
William Roberts Lawyers (Plaintiff)
King & Wood Mallesons (First Defendant)
Arnold Bloch Leibler (Second Defendant)
King & Wood Mallesons (Third Defendant)

File Number(s):

2019/193556

JUDGMENT

- 1 **HER HONOUR:** The plaintiff seeks to strike out amendments to the Commercial List Response filed by the first defendant, pursuant to rule 12.6(2) or rule 14.28 of the Uniform Civil Procedure Rules 2005 (NSW) (*UCPR*). In short, the plaintiff contends that, by the amendments, the first defendant has withdrawn admissions without leave. The issue is whether the first defendant has, in fact, “withdraw[n] any admission, or any other matter that operates for the benefit of another party”, within the meaning of rule 12.6(2).

- 2 This is a representative proceeding. Put shortly, the plaintiff was a member of a superannuation fund (the Suncorp Master Trust) of which the first defendant is trustee. Prior to 1 July 2013, commissions were paid to financial services licensees who promoted superannuation products to persons such as the group members. From 1 July 2013 onwards, the issuers of financial products were prohibited from paying “Conflicted Remuneration” by reason of amendments to the *Corporations Act 2001* (Cth). The prohibition did not apply to commissions paid under arrangements entered into before 1 July 2013, subject to certain conditions. The plaintiff contends that the first defendant breached its duties under the *Superannuation Industry (Supervision) Act 1993* (Cth), the trust deed and at general law by continuing to pay commissions after 1 July 2013 and by charging group members fees to fund the commissions. The first defendant defends the proceeding on the basis that the fees were authorised by the terms of the trust and the commissions were lawfully paid pursuant to arrangements with licensees.

Previous pleadings

- 3 These proceedings commenced in June 2019 and Commercial List Responses were filed in September 2019 (the second and third defendants were officeholders in the first defendant and filed separate responses). In December 2019, the plaintiff filed amended pleadings. Part A and Part B of the Amended Commercial List Statement introduced the parties and facts, including that the fund was established in 1979 and the plaintiff became a member of the fund in about 1986. Various defined terms were introduced, which become important

when considering the contentious paragraphs of the Commercial List Response. The first defendant is defined as “**Suncorp**”, where reference to Suncorp in the Commercial List Statement is to be read as a reference to Suncorp in its capacity as the trustee of the Master Trust: at [4], [5], Amended Commercial List Statement. “**Suncorp Life**” was defined as Suncorp Life & Superannuation Ltd: at [6]. “**Suncorp Adviser Network**” specified associated companies of Suncorp, referred to in the pleadings by the defined terms **Suncorp Financial**, **Standard Pacific** and **Guardian**: at [7]. “**Suncorp Products**” were products issued by Suncorp under the *Corporations Act* or *Australian Securities and Investments Commission Act 2001* (Cth) under the Master Trust: at [8(a)]. “**Financial Services Licensees**” are members of the Suncorp Adviser Network through their own representatives, or other financial services licensees or their authorised representatives: at [9].

- 4 The Amended Commercial List Statement then described the provisions of the trust deed and the Suncorp Products on offer as at 1 July 2013. In particular, paragraph 15 referred to “various Suncorp Products (**Original Superannuation Products**)” issued by Suncorp as at 1 July 2013, of which an inclusive list of 26 Original Superannuation Products was given. The legislative reforms were then described and “**Conflicted Remuneration**” defined as any commission paid to Financial Services Licensees in relation to Suncorp Products and any benefit given to a Financial Services Licensee who provided financial advice to retail clients that, because of the nature of the benefit or the circumstances in which it was given, could reasonably be expected to influence the choice of financial product recommended or the financial product advice given: at [20], Amended Commercial List Statement.
- 5 Part C.1 is entitled “Conflicted Remuneration prior to 1 July 2013”. Paragraph 25 of the Amended Commercial List Statement alleged:

Conflicted Remuneration was paid to Financial Services Licensees (**Conflicted Remuneration Payments**) in relation to the Suncorp Products, on and prior to 30 June 2013.

In its Commercial List Response, the first defendant sought to deploy different defined terms, admitting “that Advisor Remuneration was paid to Financial Services Licensees (“**Advisor Remuneration Payments**”) in relation to the Suncorp Products prior to 30 June 2013.”

- 6 The plaintiff then alleged that the first defendant made the payments in question. Paragraph 26 of the Amended Commercial List Statement alleged: (emphasis added)

Suncorp:

- (a) *made* each of the Conflicted Remuneration Payments referred to in paragraph 25 above; *or*
- (b) *reimbursed* members of the Suncorp Adviser Network *or Suncorp Life* for each of the Conflicted Remuneration Payments *that they made* referred to in paragraph 25 above,

by:

- (c) directly deducting the payments from members’ funds; *or*
- (d) alternatively, drawing on Suncorp’s general revenue.

- 7 To this, first defendant simply responded:

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

- 8 Paragraph 26A of the Amended Commercial List Statement alleged:

Suncorp set administration costs, fees and charges for Members (**Fees**) at the level they were set to enable part or all of those Fees (**Excess Fees**) to be used to fund the Conflicted Remuneration Payments referred to in paragraph 25 above (**Suncorp Fee Purpose**).

The first defendant admitted this paragraph in its Commercial List Response.

- 9 In paragraph 34(c), it is pleaded that, on or about 27 June 2013, the first defendant decided to continue making Conflicted Remuneration Payments or to reimburse Financial Services Licensees for any Conflicted Remuneration Payments that they made, which decision formed part of a “**Continuation of**

Conflicted Remuneration Decision". Paragraph 38 of the Amended Commercial List Statement made, essentially, the same allegation as paragraph 25 but in respect of payments on and after 1 July 2013. Paragraph 39 of the Amended Commercial List Statement essentially repeated paragraph 26 in respect of that timeframe, alleging:

On and after 1 July 2013, Suncorp:

- (a) made each of the Conflicted Remuneration Payments referred to in paragraph 38 above; or
- (b) reimbursed members of the Suncorp Adviser Network or Suncorp Life for each of the Conflicted Remuneration Payments they made referred to in paragraph 38 above,

by:

- (c) directly deducting the payments from members' funds; or
- (d) alternatively, drawing on Suncorp's general revenue,

(each act of which, separately, constitutes an act in **Implementing the Continuation of Conflicted Remuneration Decision**).

10 To this, first defendant pleaded in its Commercial List Response as per paragraph 26:

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

11 Paragraph 39A essentially repeated the allegation in paragraph 26A in respect of the post-1 July 2013 timeframe, which the first defendant, again, admitted.

12 Part D of the Amended Commercial List Statement, "Super Simplification program", concerned events in 2016, when the trust deed was amended. A further eight Suncorp Products are defined as "**New Superannuation Products**", said to have been introduced after amendment of the trust deed and to which members of Original Superannuation Products were transferred: at [40]. On or about 24 March 2016, the first defendant is said to have decided not to cease reimbursing members of the Suncorp Adviser Network for Conflicted Remuneration Payments that they made (such decision forming part of the "**Super Simplification Decision**"): at [41(c)]. The pleading then followed

a now familiar pattern. Paragraph 44 alleged that, on and after 1 August 2016, Conflicted Remuneration Payments continued to be made in relation to Suncorp Products, including the New Superannuation Products. Paragraph 45 of the Amended Commercial List Statement alleged, like paragraph 26 and paragraph 39 before it:

On and after 1 August 2016, Suncorp:

- (a) made each of the Conflicted Remuneration Payments referred to in paragraph 44 above; or
- (b) reimbursed members of the Suncorp Adviser Network or Suncorp Life for each of the Conflicted Remuneration Payments referred to in paragraph 44 above,

by:

- (c) directly deducting the payments from members' funds; or
- (d) alternatively, drawing on Suncorp's general revenue,

(each act of which, separately, constitutes an act in **Implementing the Superannuation Simplification Decision**).

13 To this, first defendant again pleaded in its Commercial List Response:

SPSL denies that it acted in every instance in its capacity as trustee of the Master Trust, but otherwise admits paragraph 45 of the ACLS.

14 The Suncorp Fee Purpose was then said to have continued in respect of this timeframe (at paragraph 45A, Amended Commercial List Statement), which the first defendant admitted, as it had for paragraphs 26A and 39A.

15 Part G pleads loss and damage. It is said that, had the first defendant complied with its duties and obligations, it would not have made the Continuation of Conflicted Remuneration Decision or engaged in the act of Implementing the Continuation of Conflicted Remuneration Decision, including charging members Excess Fees to make the Conflicted Remuneration Payments referred to in paragraph 39, nor made any of the Conflicted Remuneration Payments referred to in paragraph 39: at [52]. The plaintiff and each group member is said to have suffered loss or damage by the deduction of Excess Fees to fund the Conflicted Remuneration Payments or, alternatively, such

payments reduced the assets of the superannuation funds under the Suncorp Master Trust: at [53].

Disclosure and interrogatories

16 The second round of pleadings having closed, discovery and an opt-out process followed. On 20 May 2020, Alexander Morris swore an affidavit on behalf of the first defendant in respect of the plaintiff's proposed disclosure, setting out the relevant history and record-keeping practices of the first defendant and the Suncorp Master Trust and the difficulties which the first defendant may face if ordered to provide discovery as proposed by the plaintiff. In particular, Mr Morris deposed:

- (a) the first defendant was registered as a public company in 1994;
- (b) the first defendant was granted a licence by the Australian Prudential Regulatory Authority in 2006;
- (c) between 2008 and 2011, members of predecessor funds were transferred to the Suncorp Master Trust; fees charged to those members were specific to the predecessor funds and may have been determined in different fashions; and
- (d) the fees charged to members by the first defendant in relation to products issued out of the Suncorp Master Trust differed historically according to the terms of each product type and also varied depending upon negotiations with members, their employers or financial advisors.

17 Orders were made for discovery on 13 August 2020 and varied by further orders made on 14 September 2020, 6 October 2020 (and, most recently, on 1 September 2021). On 2 June 2021, Hammerschlag J listed the matter for hearing with an estimate of 25 days commencing on 23 May 2022. On 5 July 2021, his Honour settled the common questions to be determined at the initial trial. On 27 August 2021, his Honour made orders for interrogatories and

identified sample group members. On 20 September 2021, points of claim were filed by sample group members.

- 18 On 21 September 2021, the first defendant gave answers to interrogatories. Some of the interrogatories were directed to the issue raised by the first defendant's response to paragraph 26 of the Amended Commercial List Statement, being whether the first defendant had paid commission in its capacity as trustee of the Suncorp Master Trust or in some other capacity. By its answers, the first defendant stated that *all* commissions were paid in a capacity *other than* as trustee. Further, 34 products were identified where the first defendant said it had paid such commissions and 53 products were identified "which were administered by Suncorp Life and in respect of which Suncorp Life received fees and premiums and paid any commissions".
- 19 Likewise, in respect of the pleading in paragraph 26(b) of the Amended Commercial List Statement – that the first defendant had reimbursed members of the Suncorp Adviser Network or Suncorp Life – the first defendant stated that it had made no reimbursements in its capacity as trustee nor in any other capacity. Further, "Suncorp Life did, however, receives fees and premiums in respect of products that it administered", being the products already identified. As I read these answers, the first defendant stated that it had not "reimbursed ... Suncorp Life for each of the Conflicted Remuneration Payments [made] ..." in respect of any Suncorp Product.
- 20 Of course, answers to interrogatories are not pleadings nor necessarily of any import in the proceedings, unless and until the plaintiff tenders an answer, or part of an answer, in support of his case: rule 22.6, UCPR. If the answer given did not advance the plaintiff's case, then he could ignore it.
- 21 On 7 October 2021, the first defendant served a Notice to Admit, seeking admissions that Suncorp did not pay commissions in its capacity as trustee of the Suncorp Master Trust. Further, the first defendant sought an admission that there were no products issued under the Suncorp Master Trust in respect of which Suncorp reimbursed members of the Suncorp Adviser Network or

Suncorp Life for commissions paid made by them. On 11 October 2021, points of defence were filed by Suncorp in answer to the points of claim by sample group members. On 20 October 2021, the plaintiff served a Notice Disputing Facts. On 26 October 2021, Ball J made orders for service of evidence.

- 22 On 27 October 2021, the plaintiff's solicitor wrote to the first defendant's solicitor, pointing to a suggested inconsistency between the first defendant's answers to interrogatories and admissions made in paragraphs 25, 39 and 45 of the Commercial List Response:

... we take those answers and admissions to mean that Suncorp says, insofar as commissions were paid in relation to advisers in or associated with the Suncorp Advisor Network, Suncorp made the relevant payments. Please confirm that this is Suncorp's position.

Further, the first defendant's answers to interrogatories, taken together, were said to result in a position inconsistent with these admissions. It was said to be incumbent on the first defendant to clarify the position, in particular, whether the first defendant paid Suncorp Life "fees and premiums" and, if so, in what capacity and whether from members' accounts in the Suncorp Master Trust or otherwise. Further, "If Suncorp intends to seek leave to withdraw any aspect of the[se] admissions ... the appropriate course is for your client to indicate the nature of any such withdrawal so that the Plaintiff may consider his position."

- 23 On 5 November 2021, Suncorp's solicitors replied, noting that the use of the disjunctive "or" in paragraphs 26, 39 and 45 of the Amended Commercial List Statement had the consequence that Suncorp's admission of those paragraphs should not be read as admissions that Suncorp *both* made Conflicted Remuneration Payments *and* reimbursed members of the Suncorp Adviser Network or Suncorp Life for Conflicted Remuneration Payments they made. "We are instructed that Suncorp's answers to interrogatories are accurate and that Suncorp did not specifically 'reimburse' Suncorp Life or any commissions Suncorp Life paid. Suncorp Life did, however, receive fees (including premiums) chargeable on the products which it administered." Whilst the first defendant did not consider this detail to be material to the plaintiff's claims, the first defendant intended to consider the issue further when preparing its

response to a then proposed Further Amended Commercial List Statement.
Further:

Once that has occurred, if your client continues to contend that our client has 'withdrawn' any admission in a manner to which he objects, the issue should be ventilated at that stage and our client will consider whether leave is required to "withdraw" any admission said to have been made.

Amended pleadings

- 24 On 9 November 2021, a Further Amended Summons and Further Amended Commercial List Statement was filed by consent. In the Further Amended Commercial List Statement, none of the paragraphs to which I have already referred were amended, in particular, paragraphs 26, 26A, 39 and 45. Directions were made for the defendants to file and serve any Commercial List Responses to the Further Amended Commercial List Statement by 24 November 2021. The consent orders, made by Ball J, did not make the usual order that any costs thrown away by reason of the amendments be paid by the amending party.
- 25 On 19 November 2021, the plaintiff's solicitors set out their understanding of the first defendant's position concerning who made payments of Conflicted Remuneration in relation to Suncorp Products, having regard to answers to interrogatories and the letter of 5 November 2021. Having regard to the admissions in paragraphs 25, 26A, 39 and 45 of the Commercial List Response, the first defendant was considered to have admitted that in relation to *each* Conflicted Remuneration Payment made *in relation to* a Suncorp Product, the first defendant either made the payment or reimbursed the payment. Confirmation of the first defendant's position was sought, together with further details in respect of the fees and premiums paid by Suncorp to Suncorp Life.
- 26 On 24 November 2021, Suncorp replied, both by letter and service of its Commercial List Response to the Further Amended Commercial List Statement. Contrary to the requirements of rule 19.5(2)(b), UCPR ("the insertion of new matter *must* be indicated in such a manner (such as the use of

underlining ...) as distinguishes it from existing matter”), amendments to the previous version of the pleading were not marked.

27 In paragraph 25, the first defendant *added* particulars, listing 81 products in respect of which Advisor Remuneration Payments were made up to 30 June 2013, including a product held by the plaintiff.

28 Paragraph 26 of the Commercial List Response now pleaded (changes underlined and particulars omitted):

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;

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

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

29 The particulars added to paragraph 26 also identified that the first defendant made Advisor Remuneration Payments in respect of the first 24 products now particularised in paragraph 25, whilst Suncorp Life received fees (including premiums) and made Advisor Remuneration Payments in respect of the remaining 57 products.

30 Paragraph 26A of the Commercial List Response now pleaded (changes underlined):

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.

- 31 Similar amendments were made in respect of the post-1 July 2013 and post-2016 portions of the pleading. More specifically, the first defendant added particulars to paragraph 38, listing 87 products in respect of which Advisor Remuneration Payments were made after 1 July 2013. Paragraph 39 was amended in like fashion to paragraph 26 such that the first defendant admitted the paragraph “in that” the first defendant made Advisor Remuneration Payments in respect of the first 30 products listed whilst the first defendant caused fees (including premiums) to be paid to Suncorp Life in respect of the remaining 57 products, for which Suncorp Life made Advisor Remuneration Payments. Interestingly, and perhaps an oversight, paragraph 39A was not amended to correspond with paragraph 26A.
- 32 In respect of post-2016, paragraph 44 was amended by adding particulars of the same 87 products now particularised in paragraph 39 and otherwise denying the paragraph. (The plaintiff takes no objection to this amendment). The same amendments were made to paragraph 45 as had been made to paragraph 39 but, again, no amendment was made to paragraph 45A as had been made to paragraph 26A.

Correspondence

- 33 The parties have since exchanged ten letters as to whether the amended pleading withdrew admissions without leave and whether an application for leave to withdraw admissions ought be made. Such correspondence is of limited assistance, albeit *inter partes* correspondence may inform why it was thought necessary to amend the pleading and whether leave to withdraw an admission should be granted (if an application for leave is made).
- 34 On 13 December 2021, the plaintiff’s solicitor advised that they considered that the amendments to the Commercial List Response amounted to the withdrawal of admissions without leave. Further information was sought.
- 35 On 17 December 2021, the first defendant disagreed, considering that the amendments clarified the manner in which commissions were paid, this being desirable in light of the potentially uncertain meaning of the term “reimbursed”

used in paragraphs 26, 39 and 45 of the Further Amended Commercial List Statement. As to paragraph 26A, the first defendant's solicitors stated: (emphasis added)

Our client does not understand paragraph 26A to include an allegation that SPSL set all the fees (including premiums) payable in respect of each and every product at all times. Such an allegation would have been self-evidently incorrect, given that many of the products at issue in the proceeding predate the existence of our client. For example, the LifeSaver products in respect of which your client advances his claim were issued to him in 1981, 1986 and 1989 respectively, several years before the incorporation of our client in 1994. Our client understood paragraph 26A to allege that when setting fees for the Suncorp Products, SPSL set the fees at the level they were set to enable part or all of the fees to be used to fund the so-called "Conflicted Remuneration Payments" made – i.e. that SPSL was motivated by the "Suncorp Fee Purpose" when setting fees. The admission of that allegation has not been withdrawn.

36 Further, the first defendant's solicitors advised that the plaintiff's policies were transferred into the Suncorp Master Trust on 30 June 2008 as part of the successor fund transfer from the Suncorp Personal Superannuation Fund. The first defendant's solicitors sought confirmation as to whether the plaintiff maintained that the first defendant had withdrawn admissions, so that it could consider whether it was necessary to raise the matter with the Court. Further:

... the asserted withdrawal of admissions are each in the nature of a clarification of a potential ambiguity arising from the generality of certain of the allegations made on behalf of group members. That generality is understandable in the representative proceeding, but seems to have produced a degree of misunderstanding as to the ambit and nature of certain of the allegations made by your client, which it is proper to clarify. In any event, our client does not understand what prejudice your client can suffer from these matters having been clarified well before evidence is to be served.

37 On 20 January 2022, the plaintiff sought further clarification of the first defendant's position in light of the amended pleading. The plaintiff also sought additional information. On 28 January 2022, the first defendant's solicitors replied: (formatting added for ease of comprehension)

Suncorp Life received fees (including premiums) in respect of Suncorp Life Administered Products.

Suncorp Life paid commissions in respect of those products from those amounts received by Suncorp Life, and in that sense Suncorp Life was "reimbursed" from payments made by [the first defendant].

The potential ambiguity and uncertainty derives both from the use of the word “reimbursed” and the fact that your client’s allegation is made in respect of more than 80 different products, which have a variety of terms.

The receipt of fees and premiums by Suncorp Life (from which commissions were then paid by Suncorp Life) was, on one view, not a typical form of “reimbursement”, in that:

- (a) fee were received by Suncorp Life in advance of (rather than after) the payment by Suncorp Life of commissions; and
- (b) it was not a *specific* reimbursement, in that [the first defendant’s] liability to pay fees (including premiums) to Suncorp Life was not necessarily contingent upon Suncorp Life paying commissions – i.e. Suncorp Life’s entitlement to receive fees (including premiums) was not necessarily dependent upon Suncorp Life paying commissions.

Nevertheless, the receipt of fees (including premiums) by Suncorp Life put it in funds from which it paid commissions, and in that sense Suncorp Life was “reimbursed” (albeit in advance) in respect of commission payments it subsequently made. [The first defendant] has admitted that it “reimbursed” Suncorp Life in that sense and on that basis (notwithstanding the answers given to interrogatories).

38 The first defendant’s solicitor asked to be informed whether the plaintiff needed any further information before stating whether he contended that any admission had been withdrawn in a manner to which he objected. Further:

As stated previously and above, each of the alleged “withdrawals” is in truth in the nature of a clarification of or elaboration, designed to state the true factual position with more precision than some of the more general allegations found in the [Further Amended Commercial List Statement]. The generality of aspects of the [Further Amended Commercial List Statement] is understandable given the representative nature of the proceeding and the fact that certain allegations related to in excess of 80 products, which have a variety of terms. It is nevertheless desirable (and unobjectionable) that the true factual position be stated by our client with greater precision, so as to avoid any uncertainty as to the matters in dispute at trial. Your client has not disputed the factual accuracy of any of the clarifications and elaborations, nor is your client unfairly prejudiced by any of those clarifications or elaborations, which were articulated months ago.

39 Further correspondence ensued between the parties concerning the commissions paid in respect of the plaintiff’s products. On 11 February 2022, the first defendant’s solicitors advised that the fees (including premiums) payable to the life insurer in relation to the policies held by the plaintiff were set prior to 30 June 2008 and not subsequently changed by the first defendant. On 17 February 2022, the plaintiff’s solicitor replied that this was inconsistent with

the admission made in paragraph 26A of the Commercial List Response. The plaintiff was said to prepared his lay evidence, and was in the course of finalising expert evidence, on the basis of the admissions which were now clearly withdrawn. Further:

Those are significant admissions. They have the effect of SPSL admitting that it was responsible for controlling the Excess Fees levied on the Plaintiff to fund Conflicted Remuneration Payments that SPSL made itself or caused others to make (which they were reimbursed by SPSL for) in respect of the Plaintiff's accounts.

Further, according to the first defendant's recent correspondence, neither of these propositions now held true in respect of the plaintiff's claim. If the first defendant was granted leave to withdraw the admissions, the fundamental premises upon which the plaintiff had been proceeding to prove his claim would no longer exist which would, at least, affect the timing of the service of the plaintiff's expert evidence and the cost of that evidence. It was suggested that the first defendant ought re-list the matter.

- 40 The first defendant placed considerable emphasis on its response of 18 February 2022 as it, essentially, set out its position at the hearing of the motion. Again, the first defendant said it had "done no more than clarify ambiguities latent in your client's pleading, and positively plead facts which your client has not sought to controvert whether in pleading, correspondence, evidence or otherwise and which our client assumes are not genuinely in dispute." The amendments to paragraphs 26, 39 and 45 of the Further Amended Commercial List Statement reflected the details conveyed in correspondence on 5 November 2021 and 28 January 2022. The issue was said to be one of semantics and characterisation, being whether "reimbursement" was intended to connote *specific* reimbursement after the fact, as opposed to a genuine dispute as to an underlying allegation of fact. The first defendant was said to have clearly articulated the manner in which it understood paragraphs 26, 39 and 45 of the Commercial List Statement and the basis upon which it admitted the allegation. The plaintiff was invited to say whether it actually disputed the additional pleading in sub-paragraphs (a), (b) and (c) of the Commercial List Response.

41 As to the amendment to paragraph 26A, the first defendant's solicitors professed that it was not until 17 February 2022 that the plaintiff asserted that paragraph 26A was intended to have any broader meaning than that articulated by the first defendant's solicitors on 17 December 2021. An assertion that the first defendant "set" the fees referable to each product at all times prior to 30 June 2013 was self-evidently false where such products, including the plaintiff's products, pre-dated the first defendant's incorporation. It was said that this should have come as no surprise to the plaintiff where this information was contained in Mr Morris' affidavit of 20 May 2020 and the terms of the policy held by the plaintiff. The plaintiff's policy documents stated that the fees charged in relation to his accounts included fees charged by the life insurer, where the policy stipulated that it could not be varied without the insurer's consent. "Fees under such policies could no more be 'set' by our client as ultimate policyholder than by your client as life insured." Further:

Stated simply, the position is that Suncorp Life collected contributions made by your client under the terms of three individual life policies in respect of which he was the life insured and our client was the ultimate policyholder (being a successor to the original policyholder). Suncorp Life credited those contributions to investment accounts it established under those policies, from which Suncorp Life charged fees (including premiums). Our client's position is that Suncorp Life was entitled to charge those fees (including premiums) under the terms of those policies. This was stated in plain terms in our letter of 17 December 2021 ...

42 The first defendant's solicitor inquired when the plaintiff expected to serve his now late expert evidence, in the absence of which, the first defendant proposed to approach the trial judge to have the matter relisted. It appears that some steps were taken to re-list the matter, prompting an email from the associate to Stevenson J to the parties on 23 February 2022, noting that, if any party had an application to make, they should put on a notice of motion.

43 On 27 February 2022, the plaintiff's solicitors suggested that the appropriate course was for the first defendant to file a motion seeking to withdraw the admissions, failing which, the plaintiff would invite the Court to strike out the amendments. On 28 February 2022, the first defendant's solicitors maintained that their client had not sought to withdraw any admissions and thus did not

propose to file a motion seeking leave to do so. On 10 March 2022, the plaintiff filed his motion.

Plaintiff's submissions

44 The plaintiff submitted that, until filing the Commercial List Response on 24 November 2021, the first defendant had admitted that:

(a) it set the Excess Fees for the plaintiff's (and group members') products, which were used to fund the Conflicted Remuneration Payments.

(b) it made each of the Conflicted Remuneration Payments or reimbursed members of the Suncorp Adviser Network/Suncorp Life for each of the Conflicted Remuneration Payments they made.

45 The effect of these admissions was said to be that the first defendant acceded to a finding that it was responsible at all times for controlling the Excess Fees levied on the plaintiff (and group members) to fund, in relation to Suncorp Products, Conflicted Remuneration Payments in respect of the plaintiff's (and group members') accounts that Suncorp made itself or in relation to which it reimbursed others. The amendments to paragraphs 26, 39 and 45 in the Commercial List Response were said to narrow the ambit of the admissions. An admission that once applied to "Conflicted Remuneration Payments" for all Suncorp Products now only applied to the specific products particularised in each of the new sub-paragraphs. By alleging that Suncorp Life made Conflicted Remuneration Payments in respect of certain products which it administered, Suncorp now sought to carve out from its admission those products it wished to allege were administered by Suncorp Life, suggesting that commissions were not paid by Suncorp directly to Financial Services Licensees in respect of products administered by Suncorp Life and that Suncorp did not "reimburse" Suncorp Life for those commissions that it paid.

46 The amendment to paragraphs 26A was said to significantly qualify what was an unqualified admission. Whilst the first defendant previously admitted that it set the Fees to enable part or all of those Fees (the Excess Fees) to be used to fund the Conflicted Remuneration Payments in furtherance of the Suncorp Fee Purpose, the first defendant now wished to assert the opposite in relation to “certain older products”. The cumulative effect of the amendments to paragraph 26 and 26A was that the first defendant now asserted that in relation to some unparticularised “certain older products” it neither set the fees nor made Conflicted Remuneration Payments nor reimbursed others for such payments, this being diametrically opposed to the pre-amendment position.

First defendant’s submissions

47 As to paragraphs 26, 39 and 45, the first defendant submitted that the paragraphs contained two alternatives: the first defendant had either paid commissions itself or reimbursed others (including Suncorp Life) who made such payments. The first defendant had previously admitted the allegation but without specifying which alternative it was admitting, or for which products, or for which (if any) reimbursees. The amendment now specified these matters and could not fairly be criticised. The true position was that the first defendant paid commissions in respect of some Suncorp Products whilst Suncorp Life paid commissions in respect of other products (which it administered) and received fee revenue under life policies held by the first defendant from which such commissions were paid. The first defendant had admitted that this constituted reimbursement of Suncorp Life by the first defendant in respect of commissions Suncorp Life paid. That admission had not been withdrawn.

48 Whilst the first defendant’s answers to interrogatories included a response that the first defendant did not reimburse Suncorp Life, the response expressly noted that Suncorp Life did receive fees and premiums and pay any commissions in respect of products that it administered. Notwithstanding that answer, the first defendant had admitted for the purposes of this proceeding that the receipt of fees by Suncorp Life constituted reimbursement by the first defendant of Suncorp Life in respect of payments of commission by Suncorp

Life. The first defendant had not sought to derogate from that admission but had now specified the manner in which that reimbursement occurred.

49 The first defendant submitted that the way in which it was prepared to accept that it had “reimbursed” Suncorp Life may not fall within the classic meaning of the term, but the commercial effect was the same as it put Suncorp Life in funds from which Suncorp paid commissions, and there was no reason why one should not regard that as a form of reimbursement. The first defendant admitted that allegation and did not try to depart from it. Nor was this a Court of strict pleading. The first defendant was said to have done the plaintiff “a kindness” by both admitting the allegation and putting the plaintiff on notice of matters which now seemed to arise from an ambiguity in the word “reimbursement” which emerged during the process of answering interrogatories by clarifying the flow of funds. Nor did the first defendant see how this would make any practical difference.

50 The first defendant submitted that paragraph 26A did not allege that it set all the fees (including premiums) payable in respect of each and every product at all times. Rather, when setting fees for Suncorp Products, the first defendant set the fees at the level they were set to enable part or all of the fees to be used to fund the “Conflicted Remuneration Payments” made, that is, that the first defendant was motivated by the “Suncorp Fee Purpose” when setting fees. The admission of that allegation had not been withdrawn. The additional words added to the admission in paragraph 26A were said to be no more than clarifying the admission made. Being now aware of a latent ambiguity in paragraph 26A, the first defendant had stated the qualification which had to be inserted if the plaintiff reads paragraph 26A in the way in which it claims to do so, despite the “self-evident nonsense” which such an allegation was said to involve. The plaintiff was thereby on notice of what the first defendant said in addition to the admission which it adhered to.

51 Overall, the first defendant submitted that, by the amendments, the first defendant made positive allegations but did not withdraw or contradict any admission it had made (or understood itself to have made). This dispute had

revealed latent ambiguities and a want of particularisation in the Further Amended Commercial List Statement, with parties potentially having understood certain allegations and responses in earlier list statements in different ways. Any such confusion had long since been dispelled, with the amended pleaded filed almost four months ago and the subject of detailed correspondence dating back to 27 October 2021. Even if there had been a technical withdrawal of admission, it would be unobjectionable in circumstances where it is a product of the generality and ambiguity of aspects of the plaintiff's pleading, reflects genuine confusion between the parties, was clarified months ago, and has caused the plaintiff no prejudice: *Nanevski Developments Pty Ltd v Slaveski* [2020] NSWSC 617 at [190]-[193] (per Ward CJ in Eq); *Matland Holdings Pty Ltd v NTZ Pty Ltd* [2002] FCA 1590 at [48]-[52] (per Kenny J).

Withdrawal of admissions

52 Rule 12.6 of the UCPR provides:

12.6 Withdrawal of matter in defence or subsequent pleading

- (1) A party raising any matter in a defence or subsequent pleading may withdraw the matter at any time.
- (2) Despite subrule (1), a party may not withdraw any admission, or any other matter that operates for the benefit of another party, except with the consent of the other party or by leave of the court.

...

53 As observed in *Ritchie's Uniform Civil Procedure NSW* at [12.6.5], the rule principally applies where a defendant either does not wish to contest the proceedings or does not wish to pursue a particular ground of defence. However, as rule 12.6(2), UCPR makes plain, where the matter sought to be withdrawn is either an admission or "any other matter that operates for the benefit of the other party", the matter cannot be withdrawn without consent or leave of the Court.

54 As to what an admission is, some basic rules of pleading warrant restatement. A pleading must contain only a summary of the material facts on which the party relies (rule 14.7) although may also raise a point of law (rule 14.19). An

allegation of fact made by a party in a pleading is taken to be admitted by the opposite party unless traversed or there is a joinder of issues under rule 14.27: rule 14.26. Admissions may also be made in answer to a notice to admit. Such admissions can also be withdrawn by consent or with leave: rules 17.2 to 17.4. As the learned authors of *Ritchie's Uniform Civil Procedure NSW* explain at [17.2.6]: (some citations omitted)

[17.2.6] Withdrawal of admissions

... The discretion to grant leave to withdraw a formal admission is stated in general terms. Its exercise therefore attracts the provisions of [the *Civil Procedure Act 2005* (NSW)] ss 56–58 (ie, “overriding purpose” and “dictates of justice”): *Jeans v Commonwealth Bank of Australia Ltd* (2003) 204 ALR 327; [2003] FCAFC 309 ... at [18]–[19] ... Consistent with the potentially relevant factors mandated by those provisions, an applicant for leave must establish proper grounds for withdrawal of the admission ...

What constitutes proper grounds in any particular case will necessarily depend on the nature of the admission, the existence of a genuine dispute, and the stage of the proceedings when the application is made. It will ordinarily require explanation of the circumstances in which the admission was made and those relied on to justify the withdrawal

The same considerations apply where an admission in a defence is sought to be withdrawn: *Nanevski* at [187]–[193] and the authorities there cited.

55 Whether, by an amended pleading, a party has withdrawn an admission may be the subject of argument of some subtlety. For example, in *Matland Holdings*, the amendments were not significant; any admission was acknowledged by the applicants’ counsel to be “difficult to define in some respects” and the respondents’ counsel did not “particularly mind if those words go back in”: at [49]. Kenny J proceeded on the basis, “Let it be assumed, for present purposes, that the amendments ... constituted the withdrawal of admissions.” Where the amendments were designed to state the respondents’ case more clearly than before and the applicants did not assert that they would suffer any prejudice by reason of the amendments, her Honour granted leave *nunc pro tunc* having regard to the “true object of pleadings”: at [48]–[52].

56 In *Forbes Engineering (Asia) Pte Ltd v Forbes (No 3)* [2007] FCA 1637, the defendant submitted that an amended defence did not withdraw an allegation

of fact but sought to give a different legal characterisation to those facts. Collier J considered that the change of pleading from “admits” to “denies” and “does not admit” was *prima facie* a withdrawal of admissions: at [11]. Her Honour noted the dictionary definition of “withdrawal” as including “to retract or recall” where “retract” meant “to draw or shrink back”: at [14]-[15]. Her Honour considered that, on a plain reading of the amended defence, an admission of fact had been withdrawn, “To characterise this withdrawal as a variation in the legal characterisation of an agreement, and not a withdrawal of the admission as to the agreement ... does not accurately state the effect of the amendment ...”: at [18]. As the amended defence had been filed without leave to withdraw admissions, the defence was struck out.

57 Likewise, in *National Australia Bank Ltd v C&O Voukidis Pty Ltd* [2015] NSWSC 185, the defendant submitted that the admissions were matters of law and no admissions as to fact had been withdrawn. Davies J did not agree; “A reading of the paragraphs ... shows that facts are clearly asserted. While some of them may also involve conclusions related to legal matters ... the allegations are essentially factual assertions [which were] admitted clearly and without qualification.” at [54]. The defence was struck out to the extent that the pleading extended beyond admissions made in the earlier defence: at [112].

58 A different result pertained in *Ryde Developments Pty Ltd v The Property Investors Alliance Pty Ltd* [2016] NSWSC 728, where the pleadings concerned whether the defendants sought to recover commissions as licensee within the meaning of section 55 of the *Property, Stock and Business Agents Act 2002* (NSW). Whether section 55 applied turned on whether the defendants did certain things as licensee, which raised issues concerning the correct characterisation of the relationship between the parties and the interpretation of the Act, being a complicated mixed question of law and fact. Ball J observed [23]:

In those circumstances, in my opinion, it was not particularly helpful to characterise what the defendants sought to do as the withdrawal of an admission and to look for the rules applicable to the withdrawal of the admissions to determine whether they should be permitted to do so or not. Rather, in my view, it was preferable to view what the defendants sought to do

as raising a defence which they had not raised or at least not raised properly before filing their Amended Commercial List Response. The question was whether they should be permitted to do so at this stage of the proceedings.

An attempt to rely on *Ryde Developments* failed in *Otsuka Pharmaceutical Co Ltd v Generic Health Pty Ltd (No 3)* [2020] FCA 222, where Yates J was not persuaded that the amendments could be viewed as running an argument not presently pleaded, rather than the withdrawal of an admission: at [52].

- 59 In *Sergi v Sergi* [2019] NSWSC 865, Darke J concluded that the defendants' assertion, in a cross claim, of the existence of a partnership did not fall within rule 12.6(2). It was not an admission as, in the context of pleadings, an admission by a party can arise in response to an allegation made by an opposite party, which was not the case where a party made an assertion in a cross-claim: at [23]. Further, it was not a "matter that operates for the benefit of another party" where, viewed objectively, the assertion did not itself render it more likely that the plaintiffs would obtain the relief they sought: at [25]. Further, at [27]:

... In my view, the question whether a matter operates for the benefit of another party within the meaning of UCPR 12.6(2) must be determined objectively by viewing the matter in its context as part of the pleadings. That is to say, whether a matter in a pleading should be regarded as one that operates for the benefit of another party must be objectively apparent from the pleadings themselves. Examples would include a statement that liability is admitted for breach of a contract or breach of a duty, a statement that an available defence under a limitation provision or a Statute of Frauds provision will not be relied upon ...

In that case, the matter formed part of a claim to be asserted by the defendants and was not in the nature of a concession: at [28].

- 60 *Sergi v Sergi* was distinguished in *Nanevski*, where Ward CJ in Eq (as her Honour then was) observed that the fact that a party chooses to go further than what might have been required for strict pleading purposes does not of itself lead to the conclusion that no admission is made in the course of doing so: at [176]. There, the statement of claim pleaded that the plaintiff had paid \$135,000 towards the deposit for a property. In a fulsome defence to that pleading, the defendant admitted/asserted a range of factual matters set out in the defence, concluding that, "in the premises", the parties had contributed a certain

proportion of the deposit. Her Honour concluded that the defence contained admissions of particular facts there set out, followed by a conclusion drawn from those facts in the context of raising an affirmative case that any contribution to the purchase price by a specified party was, and was no more than, 50% of the deposit: at [178]. Thus, the alleged admissions were on their face made in the context of responding to an allegation made by the opposing party and the position in *Sergi v Sergi* could be distinguished. The conclusion sought to be drawn from the admitted facts, raising as it did an affirmative case, may not amount to an admission on the approach in *Sergi v Sergi*: at [179]-[181].

61 Thus, in considering whether a defendant requires leave under rule 12.6(2), the following questions may assist:

- (a) Did the defence, now sought to be amended, admit an allegation of fact or simply a legal argument or characterisation said to arise from facts elsewhere admitted or asserted by the defendant?
- (b) Viewed objectively, is the defendant seeking to withdraw a matter which made it more likely that the plaintiff would succeed?
- (c) Did the defence contain a concession in response to an allegation made by the plaintiff or make an assertion in support of an affirmative case?

In considering this matter, the Court will rely on a plain, objective reading of the pleadings. This may not be straightforward where the pleadings contain a mixture of factual allegations and legal conclusions or mixed questions of law and fact.

Conclusion

62 Ascertaining whether, by an amended pleading, a party has withdrawn an admission in an action between, say, the parties to a contract or the participants in a singular business venture, may be relatively straightforward. Applying these principles to a pleading in a representative proceeding may be more

complex where the pleadings are drafted at a level of generality intended to capture a large number of similar contracts or events said to affect group members, of which the plaintiff is but one.

- 63 The pleading in paragraphs 26, 38 and 45 of the Further Amended Commercial List Statement (reproduced at [6], [9] and [12]) contains a number of permutations and combinations as to whether the commissions were paid by the first defendant directly or by reimbursing other entities who had made the payments, such payments being funded, presumably in any of the possible scenarios, by two different methods. The pleading is certainly complex, including by reason of putting multiple propositions in a single paragraph, to which may be added the propositions inherent in the embedded definitions, in particular, whether any particular payment met the description of “Conflicted Remuneration”. (It is always easier to obtain a clear admission of fact if each paragraph of a pleading puts forward a single proposition, accepting of course that it is also easier to judge someone else’s pleading than to draft it oneself).
- 64 The pleading in question, by and large, contains allegations of fact. Whether a commission met the description of a “Conflicted Remuneration Payment” may involve a mixed question of fact and law as it depends upon whether the commission was “Conflicted Remuneration”: see the definition at [4]. That portion of the pleading is, however, admitted and thus what remains to be considered are allegations of fact, albeit multiple allegations of fact.
- 65 The admission by the first defendant to these paragraphs – denying that it acted in every instance in its capacity as trustee but otherwise admitting the said paragraph – did not shed any light on which of the permutations and combinations applied, either as to the method of payment (direct payment or reimbursement), who was reimbursed (members of the Suncorp Adviser Network or Suncorp Life) or the method of funding (deducting payments from members’ funds or drawing on Suncorp’s general revenue), and simply put in issue whether, when so acting, the first defendant had done so in its capacity as trustee of the Suncorp Master Trust (being the capacity in respect of which the plaintiff seeks relief) or in some other capacity.

- 66 On the basis of this admission, the plaintiff (and group members) could proceed on the basis that, for any particular payment of commission, the first defendant had either paid the commission, or reimbursed members of the Suncorp Adviser Network for a commission that the member had made, or reimbursed Suncorp Life for a commission that it had made. Which precise method of payment applied for any particular commission was not identified by the admission and, self-evidently, commission was paid by one, but not all three, potential methods of payment.
- 67 Likewise, the plaintiff (and group members) could proceed on the basis that the first defendant admitted that it had funded the commissions by either directly deducting the payments from members' funds or drawing on its general revenue, but not both. Which precise method of funding applied for any particular commission was not identified by the admission.
- 68 By the amended pleading (reproduced at [28]), the first defendant provided additional detail as to which of the permutations and combinations applied. First, where the first defendant paid the commissions itself (sub-paragraph (a) of the Further Amended Commercial List Statement), the first defendant contends that, on every such occasion, it paid commissions *other* than in its capacity as trustee of the Suncorp Master Trust, this being consistent with the previous denial. Further, in each such instance, the first defendant funded the payment of commission by drawing on its general revenue (and thereby selecting sub-paragraph (d)) of the potential methods of funding identified in the Further Amended Commercial List Statement). The additional detail provided in sub-paragraph (a) of the Commercial List Response falls comfortably within the envelope of the previous pleading, that is, there is no retraction or shrinking back from what had already been admitted: *Forbes Engineering* at [14]-[15].
- 69 Turning to sub-paragraph (b) of the Further Amended Commercial List Statement, as I read it, the first defendant continues to admit that it reimbursed commissions paid by other entities. "Reimbursed" is not defined in the Further Amended Commercial List Statement. The plaintiff relied on a definition in the *Macquarie Dictionary*.

“1. To make repayment to for expense or loss incurred.

2. To pay back; refund, repay.”

70 New sub-paragraphs (b) and (c) of the Commercial List Response now assert *how* Suncorp Life was reimbursed, being that the first defendant caused fees, including premiums, to be paid to Suncorp Life, which paid commissions. The new pleading does not state whether the first defendant paid the fees before or after Suncorp Life paid the commissions but, if the new pleading is read as describing the sequence in chronological order, then the first defendant paid Suncorp Life *before* it paid the commissions. In the ordinary usage of “reimbursed”, Suncorp Life would pay the commission *and then* the first defendant would provide funds (whether as fees, premiums or otherwise) to Suncorp Life from which Suncorp Life would replenish its funds to the extent that those funds had been depleted by the payment of commission. The additional pleading in the amended Commercial List Response suggests that the sequence of events was other than “reimbursement” in the ordinary sense. That said, the first defendant still admits that the process which was followed may fairly be characterised as “reimbursement”. The method of funding the commission does not neatly fall within either sub-paragraph (c) or (d) of the Further Amended Commercial List Statement.

71 The particulars now added in the amended Commercial List Response assert that some of the commissions were paid by the first defendant directly, as now detailed in sub-paragraph (a) of the amended Commercial List Response, whilst the bulk were “reimbursed” by the means now detailed in sub-paragraphs (b) and (c). It appears that the first defendant contends that it did not otherwise reimburse members of the Suncorp Adviser Network. Although the admission of paragraphs 26, 38 and 45 of the Further Amended Commercial List Statement still stands, ostensibly at least, the “in that” clarification provided in sub-paragraphs (b) and (c) of the Commercial List Response does retract or shrink back from what was previously admitted.

72 To the extent that there has been any withdrawal of an admission by sub-paragraph (b) and (c) of the Commercial List Response – and any withdrawal

appears subtle – the question is whether it matters. Beyond the allegation in paragraphs 26, 39 and 45 that the first defendant “reimbursed” Suncorp Life – in various timeframes – for Conflicted Remuneration Payments that Suncorp Life made, it is alleged in paragraph 34 of the Further Amended Commercial List Statement that the first defendant decided *to continue* reimbursing Financial Services Licensees (the **Continuation of Conflicted Remuneration Decision**) and, in paragraph 41 of the Further Amended Commercial List Statement, it is alleged that the first defendant *decided not to cease* reimbursing members of the Suncorp Adviser Network for Conflicted Remuneration Payments that they made (the **Super Simplification Decision**). Beyond this, the fact of “reimbursement” is not further mentioned but appears to ‘feed into’ the Continuation of Conflicted Remuneration Decisions and the Super Simplification Decision – together with a number of other actions and decisions – to broadly form the basis of allegations of breach of duty causing loss and damage.

- 73 Whether the commissions were “reimbursed” within the ordinary meaning of that word, or in a different sequence of events as now described in the Commercial List Response, does not appear – on a plain, objective reading of the pleading – to make any difference to the allegations sought to be advanced by the plaintiff (and group members) nor the relief sought where the first defendant continues to admit that it reimbursed commissions paid by Suncorp Life, albeit after the fact.
- 74 While the plaintiff’s senior counsel submitted that whether the first defendant reimbursed Suncorp Life was “an integer” in the breach of trust, it is simply not obvious to me, based on the pleadings, how the admission that the first defendant reimbursed commissions paid by Suncorp Life in the manner now particularised in sub-paragraphs (b) and (c) of the amended Commercial List Response makes any difference to the plaintiff’s position. It does rather appear to fall within the territory of *Matland Holdings*, where the admission was “difficult to define in some respects” and the amendments were directed to stating the defendants’ case more clearly, in line with the “true object of pleadings”: at [48]-[52]. Put another way, it is just not clear how the amended Commercial List

Response withdraws a matter that operated for the benefit of the plaintiff. In the result, I do not consider that the first defendant needed leave to withdraw an admission in respect of paragraphs 26, 38 and 45 of the Commercial List Response.

- 75 Turning to paragraph 26A, as I read it, the pleading supplements the allegation in paragraph 26(c) and (d) of Commercial List Statement by adding an allegation that Suncorp set members' fees at a level sufficient to pay commissions and for that purpose. The focus of paragraph 26A is on the first defendant's *purpose*. The first defendant admitted that, when setting fees, it did so with the alleged purpose in mind. As amended, the admission remains.
- 76 I do not read paragraph 26A as containing two allegations of fact being, first, the first defendant set the fees and, second, when setting the fees, the first defendant held the Suncorp Fee Purpose. I accept that the paragraph *can* be read that way but confess that I did not. This is the vice of complex pleadings which include multiple allegations of fact in a single paragraph. Whilst the "says further" portion of the amended Commercial List Response does appear to resile from the admission in respect of "certain older products" – including the Suncorp Product held by the plaintiff – it is directed to the introductory portion of the paragraph, being the setting of fees, and does not detract from the admission of *the import* of paragraph 26A, which remains admitted. As such, no leave was needed to amend the pleading in this respect.

Orders

- 77 The second and third defendants did not actively participate in the hearing of the motion. For these reasons, I make the following orders:
- (1) Direct the first defendant to file a Commercial List Response in the same form as that filed on 24 November 2021 but complying with rule 19.5 of the Uniform Civil Procedure Rules 2005 (NSW) by 13 April 2022.
 - (2) Dismiss the plaintiff's motion filed on 10 March 2022.

- (3) Order that the defendants' costs of the motion be their respective costs in the cause.

- (4) List the matter for directions in the Commercial List on 22 April 2022 and grant liberty to the parties to approach the Associate to Ball J if this date is either unsuitable or unnecessary.

I certify that this and the 30 preceding pages are a true copy of the reasons for judgment herein of the Honourable Justice Kelly Rees.

7 April 2022	<i>K. Adams</i>
.....
Dated	Associate