

COMMERCIAL LIST RESPONSE

COURT DETAILS

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

TITLE OF PROCEEDINGS

Plaintiff	Kerry Michael Quirk
First defendant	Suncorp Portfolio Services Limited in its capacity as trustee for the Suncorp Master Trust
Number of defendants	3

FILING DETAILS

Filed for	The First Defendant		
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A NATURE OF DISPUTE

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

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

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

B ISSUES LIKELY TO ARISE

The issues likely to arise for determination at the initial trial 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 by the

Plaintiff of any reply to this Commercial List Response (CLR) and/or the commercial list responses of the second and third defendants.

C FIRST DEFENDANT'S RESPONSES TO CONTENTIONS

In response to the Amended Commercial List Statement (**ACLS**) filed by the Plaintiff on 20 December 2019, SPSL says as follows, adopting the definitions in the ACLS unless otherwise indicated.

A Parties

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

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

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

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

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

- (a) says that it does not adopt the defined term 'Conflicted Remuneration' for the purposes of this CLR. Instead, SPSL uses the defined term 'Advisor Remuneration' in place of the Plaintiff's defined term 'Conflicted Remuneration';
- (b) says that, to the extent the definition of Group Members contained in paragraph 3 of the ACLS 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 ACLS, 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 ACLS 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 ACLS; and

- (d) otherwise denies the paragraph.
- 3A SPSL acknowledges paragraph 3A of the ACLS, 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 ACLS enumerated in paragraph 3A of the ACLS are also references to any deceased member referred to at paragraph 3(c) of the ACLS or any member of the Master Trust who has a spouse of the kind referred to in paragraph 3(d) of the ACLS.
- 4 In response to paragraph 4 of the ACLS, SPSL:
- (a) admits paragraphs 4(a), 4(b), 4(c), and 4(d) of the ACLS;
 - (b) as to paragraph 4(e) of the ACLS:
 - (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 ACLS:
 - (i) admits that SPSL was at all material times, and is, a body corporate carrying on the business of acting as a trustee of registrable superannuation entities and investing money in its capacity as trustee of those superannuation entities; and
 - (ii) otherwise denies that SPSL was at all material times, and is, investing money on behalf of the beneficiaries of those superannuation entities;
 - (d) admits paragraphs 4(g), 4(h), and 4(i); and
 - (e) otherwise denies the paragraph.
- 5 SPSL acknowledges paragraph 5 of the ACLS.
- 6 In response to paragraph 6 of the ACLS, SPSL:
- (a) admits paragraphs 6(a) and 6(c) of the ACLS;
 - (b) admits that Suncorp Life provided administrative services to SPSL as trustee of the Master Trust; and
 - (c) otherwise denies the paragraph.
- 7 In response to paragraph 7 of the ACLS, SPSL:

- (a) says that Suncorp Financial Services Pty Ltd (ACN 010 844 621) (**Suncorp Financial**) at all material times was, and is:
 - (i) a financial services licensee under the Corporations Act;
 - (ii) a provider of financial product advice to persons as retail clients under the Corporations Act; and
 - (iii) an associate of SPSL for the purposes of the SIS Act;

- (b) says that Standard Pacific Consulting Ltd (ACN 003 315 802) (**Standard Pacific**) was:
 - (i) until 9 December 2014, a financial services licensee under the Corporations Act;
 - (ii) a provider of financial product advice to persons as retail clients under the Corporations Act until a date on or prior to 9 December 2014; and
 - (iii) until 18 July 2019, an associate of SPSL for the purposes of the SIS Act;

- (c) says that ACN 000 036 626:
 - (i) is named 'Guardian Financial Planning Pty Limited', rather than 'Guardian Group Financial Planning Pty Ltd';
 - (ii) does not hold, and has never held, a financial services license;
 - (iii) was not a provider of financial product advice to persons as retail clients under the Corporations Act; and
 - (iv) is an associate of SPSL for the purposes of the SIS Act;

- (d) says that GuardianFP Limited (ACN 003 677 334) at all material times was, and is:
 - (i) a financial services licensee under the Corporations Act;
 - (ii) a provider of financial product advice to persons as retail clients under the Corporations Act; and
 - (iii) an associate of SPSL for the purposes of the SIS Act;

- (e) says that, throughout this CLR, SPSL uses the term 'Guardian' to refer only to GuardianFP Limited (ACN 003 677 334);

(f) says further that, where this CLR pleads in response to any pleading which uses the defined term 'Guardian', that pleading does not include admissions in respect of Guardian Financial Planning Pty Limited (ACN 000 036 626), and hereby denies all allegations made in the ACLS in respect to Guardian Financial Planning Pty Limited (ACN 000 036 626); and

(g) otherwise denies the paragraph.

8 SPSL admits paragraph 8 of the ACLS.

9 SPSL admits paragraph 9 of the ACLS.

10 In response to paragraph 10 of the ACLS, SPSL:

(a) admits paragraph 10(a) of the ACLS;

(b) admits paragraph 10(aa) of the ACLS;

(c) in answer to paragraph 10(ab) of the ACLS, says that Carroll had a senior executive position within the Suncorp Group, which included responsibilities with respect to Suncorp's superannuation business from at least January 2012 until 1 March 2016;

(d) admits paragraph 10(b) of the ACLS;

(e) in response to paragraph 10(c) of the ACLS, 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 ACLS would, so far as that occurred, constitute conduct for and on behalf of SPSL;

(f) in response to paragraph 10(d) of the ACLS:

(i) to the extent that the directors had the knowledge particularised at paragraph 47, and alleged at paragraph 57 (but not otherwise), admits that the knowledge of the directors is attributed to SPSL; and

(ii) says that the ACLS does not identify any facts which Cathy Duncan is alleged to have known; and

(g) otherwise denies the paragraph.

B Background

B.1 Superannuation funds and Suncorp Products

11 SPSL admits paragraph 11 of the ACLS.

11A SPSL admits paragraph 11A of the ACLS.

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

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

Particulars

Trust Deed, clause 1.2.

- (b) and further, in response to paragraph 11B(a) of the ACLS, 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 ACLS, 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 ACLS, 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 ACLS, 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 ACLS, 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 ACLS, 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 ACLS, 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 ACLS, 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 ACLS.
- 12 SPSL admits paragraph 12 of the ACLS.
- 13 Not used as paragraph 13 of the ACLS is intentionally left blank.
- 14 Not used as paragraph 14 of the ACLS is intentionally left blank.
- 14A In response to paragraph 14A of the ACLS, SPSL:
- (a) refers to and repeats paragraph 8 above and paragraphs 15 and 40 below;
 - (b) admits paragraph 14A(f) of the ACLS; and
 - (c) otherwise denies the paragraph.
- 14B In response to paragraph 14B of the ACLS, SPSL:
- (a) says that the paragraph is embarrassing as it does not specify what aspect(s) of SPSL's conduct is alleged to involve the provision of a financial service within the meaning of s 12BAB of the ASIC Act in trade or commerce;
 - (b) admits that SPSL's dealing in interests in the Master Trust involves the provision of a financial service within the meaning of s 12BAB of the ASIC Act and is in trade or commerce; and
 - (c) under cover of the objection in 14B(a) above, otherwise denies the paragraph.
- 15 SPSL admits paragraph 15 of the ACLS.
- 16 Not used as paragraph 16 of the ACLS is intentionally left blank.

B.2 SIS Act

17 SPSL admits paragraph 17 of the ACLS.

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

- (a) refers to and repeats paragraphs 3 and 3A above;
- (b) further says that SPSL's covenant to perform the trustee's duties and exercise the trustee's powers in the best interests of members of the Master Trust was a duty to do those things in the best interests of existing members of the Master Trust, and did not extend to a duty to do those things in the best interests of the Plaintiff and group members except to the extent and for the periods during which the Plaintiff and each group member was a member of the Master Trust; and
- (c) subject to those qualifications, admits the paragraph; and
- (d) otherwise denies the paragraph.

B.3 Equitable and legal duties

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

- (a) refers to and repeats paragraph 3 above;
- (b) admits the paragraph insofar as the Plaintiff and Group Members were, at the relevant time, beneficiaries of the Master Trust; and
- (c) otherwise denies the paragraph.

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

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

18C SPSL denies paragraph 18C of the ACLS.

B.4 FOFA

19 In response to paragraph 19 of the ACLS, SPSL:

- (a) admits that Schedule 1 to the *Corporations Amendment (Future of Financial Advice) Act 2012 (Cth)* commenced on 1 July 2012;

(b) admits that Schedule 1 to the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) commenced on 1 July 2012; and

(c) otherwise denies the paragraph.

20 In response to paragraph 20 of the ACLS, SPSL:

(a) refers to and repeats paragraph 3(a) above and, subject thereto, acknowledges the definitions adopted by the Plaintiff in paragraph 20 of the ACLS; 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.

20A SPSL denies paragraph 20A of the ACLS.

21 SPSL denies paragraphs 21 to 24B of the ACLS, and says that they do not accurately or comprehensively state the scope of the prohibition and exceptions which they purport to record.

22 Not used because paragraph 22 of the ACLS is intentionally left blank.

23 [Intentionally left blank].

24 [Intentionally left blank].

24A [Intentionally left blank].

24B [Intentionally left blank].

24C SPSL admits paragraph 24C of the ACLS.

B.5 Unconscionable conduct

24D In response to paragraph 24D of the ACLS, SPSL:

(a) relies upon the terms of s 12CB of the ASIC Act for their full force and effect; and

(b) otherwise denies the paragraph.

C Payment of Advisor Remuneration before and after 1 July 2013

C.1 Advisor Remuneration prior to 1 July 2013

24E In response to paragraph 24E of the ACLS, SPSL denies that it entered into the Superseded Distribution Agreement in its capacity as the trustee of the Master Trust as pleaded in paragraph 5 of the ACLS and, otherwise:

- (a) In response to paragraph 24E(a) says that it was a term of the Superseded Distribution Agreement that “(a) The Issuer authorises SFS to include in Financial Services Distribution Agreements provision for the payment to the Distributor of commission or other remuneration (“**Commission**”).”;

Particulars

Superseded Distribution Agreement, clause 7.1(a).

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

Particulars

Superseded Distribution Agreement, clause 7.1(b).

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

Particulars

Superseded Distribution Agreement, clause 7.1(c).

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

Particulars

Superseded Distribution Agreement, clause 7.1(d).

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

Particulars

Superseded Distribution Agreement, clause 7.2(a).

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

Particulars

Superseded Distribution Agreement, clause 9.1.

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

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

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

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

26A SPSL admits paragraph 26A of the ACLS.

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

- (a) says that prior to 20 June 2013, there were in place arrangements within the meaning of section 1528 of the Corporations Act, or regulation 7.7A.16 of the Corporations Regulations 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 oral; and
 - (iii) whether or not enforceable, or intended to be enforceable, by legal proceedings and whether or not based on legal or equitable rights; and

Particulars

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

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

which would include the liability of SPSL to SFS for payment of commission to existing distributors;

Particulars

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

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

Particulars

SPSL repeats the particulars at paragraph 31 of the ACLS, 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 ACLS, SPSL:

- (a) admits that, on or about 23 or 24 June 2013, SPSL prepared three documents titled “Document Approval Process” for the distinct approval of each of the Distribution Agreements, but denies that it did so as Trustee of the Master Trust as pleaded in paragraph 5 of the ACLS; and
 - (b) otherwise denies the paragraph.
- 33 SPSL denies paragraph 33 of the ACLS.
- 34 In response to paragraphs 34 of the ACLS, SPSL:
- (a) in answer to paragraph 34(a) of the ACLS, says that the final decisions by each of the Directors to execute the Distribution Agreements occurred at the time that each of the Distribution Agreements was executed, on or about 27 June 2013;
 - (b) denies that it entered the Suncorp Financial Distribution Agreement in its capacity as the trustee of the Master Trust as pleaded in paragraph 5 of the ACLS, but otherwise admits paragraph 34(b); and
 - (c) otherwise denies the paragraph.
- 35 Not used as paragraph 35 of the ACLS is intentionally left blank.
- 36 In response to paragraph 36 of the ACLS, SPSL:
- (a) in response to paragraph 36(a) says that it was a term of the Suncorp Financial Distribution Agreement that “(a) The Issuers will pay commission to SFS on the Products in accordance with the commission rates applicable for each of the Products (“**Commission Schedule**”);

Particulars

Suncorp Financial Distribution Agreement, cl 7.1(a).

- (b) in answer to paragraph 36(b);
 - (i) says that it was a term of the Suncorp Financial Distribution Agreement that “(b) The Issuers authorise SFS to include in the CAR Agreement provision for the payment to the Distributor of commission or other remuneration (“**Commission**”);
 - (ii) says that ‘Distributor’ was a defined term in the Suncorp Financial Distribution Agreement, with the definition “means a person that distributes and promotes Products, and includes Suncorp Group employees and Authorised

Representatives of SFS”;

Particulars

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

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

Particulars

Suncorp Financial Distribution Agreement, cl 7.1(c).

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

Particulars

Suncorp Financial Distribution Agreement, cl 7.1(d).

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

Particulars

Suncorp Financial Distribution Agreement, cl 7.1(e).

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

Particulars

Suncorp Financial Distribution Agreement, cl 7.2(a).

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

Particulars

Suncorp Financial Distribution Agreement, cl 7.3.

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

Particulars

Suncorp Financial Distribution Agreement, cl 9.1.

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

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

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

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

- (a) relies on the terms of the;

- (i) Suncorp Financial Distribution Agreement;
- (ii) Guardian Distribution Agreement;
- (iii) Standard Pacific Distribution Agreement; and
- (iv) Superseded Distribution Agreement;

for their full force and effect; and

- (b) otherwise denies the paragraph.

37B SPSL denies paragraph 37B of the ACLS.

37C SPSL denies paragraph 37C of the ACLS.

38 SPSL admits paragraph 38 of the ACLS.

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

39A SPSL admits paragraph 39A of the ACLS.

39B SPSL denies paragraph 39B of the ACLS.

39C SPSL denies paragraph 39C of the ACLS.

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

39D SPSL denies paragraph 39D of the ACLS.

D Super Simplification program

40 SPSL admits paragraph 40 of the ACLS.

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

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

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

- (a) in answer to paragraph 41A(a), says:
 - (i) the PDSs particularised at (i), (ii), (v), (vi), and (vii) contain the words “We don’t charge any Advice fees. However, if you wish, you can have amounts

deducted from your account to pay fees to your financial adviser” and “You can authorise us to pay a fee for personal advice to your financial adviser (agreed by us) and have the fee charged to the account. It can be: ·a one-off fixed dollar fee, or ·an ongoing fixed monthly dollar amount or percentage of your account balance up to a maximum of 2% pa. Talk to your financial adviser or refer to your financial adviser’s ‘Statement of Advice’ for details of this fee”;

(ii) the PDSs particularised at (iii), and (iv) contain the words “You can authorise us to pay a fee for personal advice to your financial adviser (agreed by us) and have the fee charged to your account. It can be: ·a one-off fixed dollar fee, or ·an ongoing fixed monthly dollar amount or percentage of your account balance up to a maximum of 2% pa. Talk to your financial adviser or refer to your financial adviser’s ‘Statement of Advice’ for details of this fee”;

(iii) otherwise refers to the full terms and effect of each of the particularised PDSs; and

(b) otherwise denies paragraph 41A.

42 SPSL denies paragraph 42 of the ACLS.

43 In response to paragraph 43 of the ACLS, SPSL:

(a) says that members were transferred from the Original Superannuation Products to the New Superannuation Products in two tranches, on 3 December 2016 and 27 May 2017; and

(b) otherwise denies the paragraph.

44 SPSL admits paragraph 44 of the ACLS.

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

45A SPSL admits paragraph 45A of the ACLS.

45B SPSL denies paragraph 45B of the ACLS.

E Failure to advise

45C SPSL denies paragraph 45C of the ACLS.

45D SPSL denies paragraph 45D of the ACLS.

F Contraventions

F.1 SIS Act Contravention and breaches of trust

46 SPSL denies paragraph 46 of the ACLS.

47 SPSL denies paragraph 47 of the ACLS.

48 SPSL denies paragraph 48 of the ACLS.

49 SPSL denies paragraph 49 of the ACLS.

50 SPSL denies paragraph 50 of the ACLS.

51 SPSL denies paragraph 51 of the ACLS.

51A SPSL denies paragraph 51A of the ACLS.

51B SPSL denies paragraph 51B of the ACLS.

51C SPSL denies paragraph 51C of the ACLS.

F.2 UNCONSCIONABLE CONDUCT

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

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

(i) says that 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 SPSL denies paragraph 51E of the ACLS.

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

51G SPSL denies paragraph 51G of the ACLS.

51H SPSL denies paragraph 51H of the ACLS.

G LOSS OR DAMAGE

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

Particulars in respect of denial of paragraph 56 of the ACLS

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 ACLS), 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 ACLS, any such compensation must be effected by payment into the relevant person's superannuation balance. No payment can (or, alternatively, should) be ordered which would effect a de facto release of preserved benefits inconsistent with the scheme established by the Superannuation Industry (Supervision) Regulations 1994 (Cth) including by the payment of sums to any third party litigation funder.

H INVOLVEMENT

53 SPSL denies paragraph 57 of the ACLS.

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

55 SPSL denies paragraph 59 to 62 of the ACLS.

HA Limitation

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

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

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

(a) 21 June 2013; or

(b) 28 June 2013,

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

Particulars

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

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

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

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

(a) 21 June 2013; or

(b) 28 June 2013; or

(c) 16 December 2013; or

(d) 20 December 2013,

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

Particulars

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

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

The AS and ACLS were filed on 20 December 2019.

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

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

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

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

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

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

Particulars

The particulars to [58] above are repeated.

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

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

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

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

Particulars

The particulars to [58] above are repeated.

SIS Act s 315(11)

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

Breach of trust: original group members, original claims

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

(a) 21 June 2013; or

(b) 28 June 2013

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

Particulars

The particulars to [57] above are repeated.

Breach of trust: new group members, original allegations

- 63 If, which is denied, any person who became a Group Member by reason of the filing of the ACLS and/or AS has a cause of action in respect of a breach of trust on the basis of matters alleged in the CLS prior to its amendment in the ACLS, any such cause of action that accrued before:

(a) 21 June 2013; or

(b) 28 June 2013; or

(c) 16 December 2013; or

(d) 20 December 2013;

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

Particulars

The particulars to [58] above are repeated.

Breach of trust: original group members, new allegations

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

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

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

Particulars

The particulars to [58] above are repeated.

Breach of trust: new group members, new allegations

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

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

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

Particulars

The particulars to [58] above are repeated.

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

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

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

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

(a) 21 June 2013; or

(b) 28 June 2013,

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

Particulars

The particulars to [57] above are repeated.

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

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

(a) 21 June 2013; or

(b) 28 June 2013; or

(c) 16 December 2013; or

(d) 20 December 2013,

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

Particulars

The particulars to [58] above are repeated.

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

69 If, which is denied, the Plaintiff or any Group Member (other than a person who became a Group Member by reason of the filing of the ACLS and/or AS) has a cause of action sounding in relief pursuant to section 12GF(1) of the ASIC Act on the basis of the amendments to the CLS set out in the ACLS (other than the amendment to the definition of “Group Member” therein), any such cause of action that accrued before:

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

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

Particulars

The particulars to [58] above are repeated.

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

70 If, which is denied, any person who became a Group Member by reason of the filing of the ACLS and/or AS has a cause of action sounding in relief pursuant to section 12GF(1) of the ASIC Act on the basis of the amendments to the CLS set out in the ACLS (other than the amendment to the definition of “Group Member” therein), any such cause of action that accrued before:

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

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

Particulars

The particulars to [58] above are repeated.

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

71 If, which is denied, the Plaintiff or any Group Member (other than a person who became a Group Member by reason of the filing of the 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,

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

Particulars

The particulars to [57] above are repeated.

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

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

(a) 21 June 2013; or

(b) 28 June 2013; or

(c) 16 December 2013; or

(d) 20 December 2013,

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

Particulars

The particulars to [58] above are repeated.

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

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

(a) 21 June 2013; or

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

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

Particulars

The particulars to [58] above are repeated.

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

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

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

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

Particulars

The particulars to [58] above are repeated.

ASIC Act s 12GM(1): discretion

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

HB Other Defences

76 Further to paragraphs [57]-[75] above, SPSL indicates its intent to raise in answer to the claims of the Plaintiff or any of the Group Members such limitation periods (whether applying directly or by analogy in equity) and defences of acquiescence, laches or delay as may be available following the further particularisation of the Plaintiff's claim, and the proper pleading

and particularisation of individual Group Member claims and the setting down of any such claims for trial.

- 77 If, which his denied, the substantive law of any place other than New South Wales governs any of the non-statutory claims of the Plaintiff or any of the Group Members, SPSL indicates its intent to rely upon the limitations legislation of that place to the extent possible in opposition to that claim in accordance with s 5 of the *Choice of Law (Limitation Periods) Act 1993* (NSW). If, which is not apparent, the Plaintiff or any Group Member contends that any of their non-statutory claims is governed by the substantive law of a place other than New South Wales, SPSL will, following articulation of that contention, give particulars of the precise limitations legislation of that place that is relied upon by SPSL.
- 78 In further response to the whole of the ACLS, if it appears to the Court that SPSL is or may be liable in respect of the matters alleged in the ACLS (which liability is denied), the Court should relieve SPSL either wholly or partly from the liability on such terms as the Court thinks fit on the basis that SPSL has acted honestly and having regard to all the circumstances of the case it ought fairly to be excused for the matters alleged in the ACLS.

Particulars

SIS Act, s 310.

I RELIEF CLAIMED

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

D QUESTIONS APPROPRIATE FOR REFERRAL TO A REFEREE

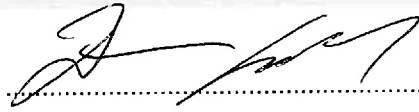
Nil.

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

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

SIGNATURE

Signature of solicitor



.....

Name

Alexander Basil Morris *by his partner DAMIAN LOVELL*

Solicitor for

The First Defendant

Date

28 February 2020