

## **AMENDED COMMERCIAL LIST RESPONSE**

### **COURT DETAILS**

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

### **TITLE OF PROCEEDINGS**

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

### **FILING DETAILS**

Filed for	<b>Geoffrey Edward Summerhayes</b> , Second Defendant
Filed in relation to	Plaintiff's <u>Amended</u> Commercial List Statement
Legal representative	Jonathan Milner, Arnold Bloch Leibler
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**A. NATURE OF DISPUTE**

1. Unless indicated otherwise, the Second Defendant (**Summerhayes**) adopts in this Amended Commercial List Response (ACLR) the definitions in the Plaintiff's Amended Commercial List Statement filed on 24 June 20 December 2019 (ACLS). He does so only for convenience and without admission of any matter that the Plaintiff might allege by those definitions.
2. The Plaintiff claims that the First Defendant, Suncorp, contravened various laws by charging fees to members of the Suncorp Master Trust in order to pay commissions to third parties. The charging of those fees was expressly authorised by the terms of the trust (and the terms of individual products by which Suncorp and members were bound) and not prohibited by any law.
3. A trustee does not breach its duties (at general law or under the SIS Act) by charging fees and deriving profit from trust property where the charging of those fees by the trustee is expressly authorised by the terms of the trust. Nor does a trustee's duty to act in the best interests of beneficiaries oblige the trustee to forego or diminish its entitlement under the express terms of the trust to charge fees.
4. The Plaintiff also claims 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). There is no such obligation. The contention 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. The Plaintiff claims that Suncorp breached its duties to members by executing certain Distribution Agreements in June 2013 so as to avail itself of 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 Suncorp owed no relevant duties at the time of execution.
6. The Plaintiff's alternative claim that certain payments made by Suncorp to advisers were prohibited by the FOFA Reforms mischaracterises the grandfathering exceptions in the FOFA reforms, which permitted all such payments.
7. Finally, the Plaintiff makes a broad claim that the continued levying of fees by Suncorp constituted statutory unconscionable conduct within the meaning of s 12CB of the ASIC Act. There is nothing unconscionable in Suncorp charging fees in accordance with the

terms of individual products by which members and Suncorp were bound, from which products members were free to depart. The content of the statutory obligation not to engage in unconscionable conduct is in any event moulded to the express permission in the FOFA Reforms for grandfathering.

8. The Plaintiff claims that Summerhayes was involved in Suncorp's alleged contraventions to the extent that he was a director of Suncorp at the time. Summerhayes ceased being a director of Suncorp on 30 September 2015, which precedes the date of the 'Super Simplification Decision' by nearly six months. To the extent that a contravention occurred with respect to payments made by Suncorp to advisors during the time he was a director (which is denied), he denies that he was involved in any such contravention.
  
9. In any event, the Plaintiff's claim is inutile and cannot benefit him or the Group Members whom he represents. Pursuant to cl 3.8 of the Master Trust Deed, each of the defendants is exempted from and indemnified against any liability they might otherwise have for the alleged breaches of covenants that are contained in the Master Trust Deed pursuant to s 55(3) of the SIS Act.
  
- ~~10. The Plaintiff's claim with respect to "Grandfathering" is premised upon misapprehensions as to the relevant factual circumstances and the application of both the SIS Act and the FOFA legislation to the affairs of the Master Trust, including but not limited to:~~
  - ~~(a) an erroneous construction of the conflicted remuneration provisions contained within Division 4 of Part 7.7A of the *Corporations Act 2001* (Cth) (**Corporations Act**);~~
  
  - ~~(b) lack of clarity as to whether the Plaintiff alleges that the First Defendant (**SPSL**) was or was not a platform operator. If (which is not admitted) it was not a platform operator, SPSL is entitled to the benefit of s 1528(1) of the *Corporations Act*. If SPSL was a platform operator, it is entitled to the benefit of s 1528(2) of the *Corporations Act* and regulation 7.7A.16 of the *Corporations Regulations 2001* (Cth) (**Corporations Regulations**);~~
  
  - ~~(c) misconceptions as to the purpose and effect of entry into the Distribution Agreements by SPSL;~~

~~(d) a misconception that commissions paid in respect of persons who were members of the Master Trust as at 20 June 2013 were not paid pursuant to “arrangements” for the purposes of s 1528 of the Corporations Act (or otherwise); and~~

~~(e) overlooking the fact that commissions would only be paid in respect of persons who first invested into the Master Trust during the period from 1 July 2013 to 31 June 2014 if those persons chose to enter into an arrangement under which commissions were payable.~~

~~3. The Plaintiff’s claim with respect to the Super Simplification Program (**SSP**) does not include any allegation that Summerhayes contravened or was involved in any contravention(s). Further, the SSP is not relied upon in support of any relief against Summerhayes.~~

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

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

## **C. SECOND DEFENDANT’S RESPONSES TO PLAINTIFF’S CONTENTIONS**

In response to the allegations in the ACLS, Summerhayes says as follows (unless indicated otherwise, all paragraph references are to the ACLS):

### **A Parties**

1. In response to paragraph 1, Summerhayes refers to and repeats paragraph 3 of the ACLR below and otherwise does not admit the paragraph.

2. In response to paragraph 2, Summerhayes:

(a) repeats paragraph 4(e) of the CLR below admits that the Plaintiff at all material times since at least 30 June 2008 has been a member of a superannuation fund, of which Suncorp Portfolio Services Limited (SPSL) was trustee, being the Master Trust, and has held accounts with investment(s) in one or more of the Suncorp Products; and

- (b) ~~says that, at all material times from 5 August 2013, the Plaintiff has been a member of only one superannuation fund of which SPSL was trustee, being the Master Trust; and otherwise denies the paragraph.~~

**Particulars**

~~Letter from SPSL to the Plaintiff dated 6 August 2013.~~

- (c) ~~otherwise denies the paragraph.~~

3. In response to paragraph 3, Summerhayes:

- (a) ~~says that the definition of Group Members is imprecise and embarrassing he does not adopt the defined term 'Conflicted Remuneration' for the purposes of this ACLR. Instead, he 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 extends to encompasses persons whose accounts were "affected by the payment of Conflicted Advisor Remuneration" to Financial Services Licensees in the period 1 July 2013 to 21 June 2019, inclusive, by matters or for reasons other than the wrongful conduct alleged against SPSL Suncorp and the Directors in the ACLS, such persons are not persons on whose behalf this proceeding has not been 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) ~~refers to paragraphs 11 and 12 of the CLR below and responds to the remainder of the CLS on the basis that the Group Members do not include the persons referred to in paragraph 3(b) above says that amendments made to the definition of 'Group Members' in the ACLS and the Amended Summons filed on 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. Summerhayes acknowledges paragraph 3A and adopts the qualification therein of the definition of Group Members in this ACLR, with the additional qualification that

references to 'Group Member' in paragraphs of this ACLR which respond to the paragraphs of the ACLS enumerated in paragraph 3A 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, Summerhayes:

- (a) admits sub-paragraph 4(a);
- (b) admits sub-paragraph 4(b);
- (c) ~~in response to sub-paragraph 4(c)~~ admits sub-paragraph 4(c);:
  - (i) ~~denies the sub-paragraph;~~
  - (ii) ~~says that the AFSL number stated at paragraph 4(c) is that of Colonial First State Investments Limited; and~~

#### **Particulars**

~~AFSL of Colonial First State Investments Limited.~~

- (iii) ~~says that SPSL is the holder of an AFSL numbered 237905;~~
- (d) admits sub-paragraph 4(d);
- (e) in response to sub-paragraph 4(e):
  - (i) admits that ~~SPSL Suncorp~~ was at all material times, and is, the trustee of the Master Trust; and
  - (ii) refers to and repeats paragraphs 8, 15 and 40 of the ACLR below;
- (f) in response to sub-paragraph 4(f):
  - (i) admits that ~~SPSL Suncorp~~ was at all material times, and is, a body corporate carrying on the business of acting as a trustee of registerable superannuation entities and investing money in its capacity as trustee of those superannuation entities; and

- (ii) otherwise denies the sub-paragraph that Suncorp was at all material times, and is, investing money on behalf of the beneficiaries of those superannuation entities;
  - (g) admits sub-paragraph 4(g);
  - (h) admits sub-paragraph 4(h);
  - (i) admits sub-paragraph 4(i); and
  - (j) otherwise denies the paragraph.
5. Summerhayes acknowledges paragraph 5 ~~and says further that, unless context otherwise requires, each reference to SPSL in this CLR is to be read as a reference to SPSL in its capacity as the trustee of the Master Trust.~~
6. In response to paragraph 6, Summerhayes:
- (a) admits sub-paragraph 6(a);
  - (b) ~~denies sub-paragraph 6(b) and says that in relation to sub-paragraph 6(b), admits that Suncorp Life provided administrative services to Suncorp SPSL as trustee of the Master Trust; and~~
  - (c) admits sub-paragraph 6(c); and
  - (d) otherwise denies the paragraph.
7. ~~Summerhayes admits paragraph 7.~~ In response to paragraph 7, Summerhayes:
- (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 ACLR, he uses the term 'Guardian' to refer only to GuardianFP Limited (ACN 003 677 334);
- (f) says further that, where this ACLR 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. In response to paragraph 8, Summerhayes admits paragraph 8:
- (a) ~~admits that, at all material times, SPSL was, and is, the issuer of superannuation interests in the Master Trust, which are financial products for the purposes of the Corporations Act (**Relevant Financial Products**); and~~
  - (b) ~~otherwise does not admit the paragraph and says it is embarrassing since no other "Financial Products" are identified in the CLS.~~
9. In response to paragraph 9, Summerhayes admits paragraph 9:
- (a) ~~repeats paragraph 8 of the CLR above;~~
  - (b) ~~admits that the Relevant Financial Products were distributed by members of the Suncorp Adviser Network and other Financial Services Licensees; and~~
  - (c) ~~otherwise denies the paragraph.~~
10. In response to paragraph 10, Summerhayes:
- (a) ~~says that he was a director of SPSL from 30 June 2008 to 30 September 2015, and Carroll was a director of SPSL from 17 December 2012 to 16 April 2014~~ admits sub-paragraph 10(a);
  - (aa) admits that he was a senior executive of the Suncorp Group from June 2008 to September 2015 to whom persons with responsibilities with respect to Suncorp's superannuation business ultimately reported, but otherwise denies sub-paragraph 10(aa);
  - (ab) admits that Sean Carroll had a senior executive position within the Suncorp Group with responsibilities with respect to Suncorp's superannuation business from January 2012, but otherwise does not admit sub-paragraph 10(ab);
  - (b) ~~says that Duncan was the Executive Manager Superannuation, Product and Portfolio Management at SPSL from 28 February 2014 to 3 October 2015~~ admits sub-paragraph 10(b);
  - (c) ~~does not admit sub-paragraph 10(c) because "the conduct" is not specified or limited in any way in response to sub-paragraph 10(c),~~ 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 sub-paragraph 57(b), and alleged at sub-paragraphs 57(a), 59(b), and 59(c), so far as that occurred, constitute conduct for and on behalf of Suncorp;

(d) ~~does not admit sub-paragraph 10(d) because “the knowledge” is not specified or limited in any way; and in response to sub-paragraph 10(d):~~

(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 Suncorp; and

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

(e) otherwise denies the paragraph.

## **B. Background**

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

11. Summerhayes admits paragraph 11.

11A. Summerhayes admits paragraph 11A.

11B. In response to paragraph 11B, Summerhayes:

(a) relies on the terms of the Trust Deed for their full force and effect; and

(b) otherwise does not admit the paragraph.

### **Particulars**

Summerhayes relies in addition on cl 3.6 ‘Absolute discretion in exercising Powers’.

12. In response to paragraph 12, Summerhayes admits paragraph 12.:

(a) says that, at all material times:

(i) SPSL was the issuer of superannuation interests in the Master Trust;

(ii) the Master Trust was a regulated superannuation fund within the meaning of s 19(1) of the SIS Act and thus a registrable superannuation entity within the meaning of s 10(1) of the SIS Act; and

(b) — otherwise denies the paragraph.

13. In response to paragraph 13, Summerhayes Not used as paragraph 13 is intentionally left blank.:

(a) — ~~refers to paragraph 6 above and further says that Suncorp Life provided administrative services to SPSL as trustee of the Master Trust in respect of three divisions of the Master Trust and SPSL itself provided administrative services in respect of the remaining divisions of the Master Trust;~~

### **Particulars**

~~Deed of Amendment in relation to the Services Deed dated 22 August 2014 between SPSL and Suncorp Life~~

(b) — ~~says that the relative proportion of funds under management within the Master Trust that were the subject of administration by Suncorp Life and SPSL has changed over time from approximately 55% (SPSL), 45% (Suncorp Life) to 92% (SPSL), 8% (Suncorp Life); and~~

(c) — otherwise denies the paragraph.

14. In response to paragraph 14, Summerhayes Not used as paragraph 14 is intentionally left blank.:

(a) — ~~admits that the Plaintiff and Group Members became members of the Master Trust through one of the methods described in sub-paragraphs 14(a), 14(b) or 14(c);~~

(b) — ~~refers to and repeats paragraph 15 of the CLR below; and~~

(c) — otherwise denies the paragraph.

14A. In response to Paragraph 14A, Summerhayes:

(a) refers to and repeats paragraphs 8, 15 and 40 of this ACLR;

(b) admits sub-paragraph 14A(f); and

(c) otherwise denies the paragraph.

14B. In response to paragraph 14B, Summerhayes:

(a) admits that Suncorp'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

(b) otherwise denies the paragraph.

15. In response to paragraph 15, Summerhayes admits paragraph 15.:

~~(a) repeats paragraph 4(e)(i) of the CLR above;~~

~~(b) says that the descriptors given at sub-paragraphs 15(a) to 15(bb) are not of distinct superannuation funds, but are of offers available within five divisions of the Master Trust as at 24 March 2016; and~~

~~(c) otherwise denies the paragraph.~~

16. ~~Summerhayes denies paragraph 16~~ Not used as paragraph 16 is intentionally left blank.

## **B.2 SIS Act**

17. Summerhayes admits paragraph 17.

18. In response to paragraph 18, Summerhayes:

~~(a) Does not admit sub-paragraph 18(a) and relies upon the terms of ss 52(1) and 52(2)(b) of the SIS Act for their full force and effect refers to and repeats paragraphs 3 and 3A of the ACLR above;~~

~~(b) denies sub-paragraphs 18(b)-18(aa)-(d) and relies upon the terms of s 52(2)(c) ss 52(1) and 52(2) of the SIS Act for their full force and effect; and~~

~~(c) does not admit sub-paragraph 18(c) and relies upon the terms of s 52(2)(d) of the SIS Act for their full force and effect says that Suncorp'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

- (a) ~~says further that the covenants contained in the Master Trust Deed pursuant to s 52(1) of the SIS Act only obliged SPSL to act in the interests of the Plaintiff and each Group Member during the periods when the Plaintiff and that Group Member was a member of the Master Trust.~~

### **B.3 FOFA Equitable and legal duties**

18A. In response to paragraph 18A, Summerhayes:

- (a) refers to and repeats paragraph 3 of the ACLR 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, Summerhayes:

- (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. Summerhayes denies paragraph 18C.

### **B4. FOFA**

19. In response to paragraph 19, Summerhayes:

- (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) ~~says that the phrase “compliance with those amendments became mandatory” is embarrassing and under cover of that objection otherwise denies the paragraph otherwise denies the paragraph.~~

20. In response to paragraph 20, Summerhayes; denies paragraph 20 and relies upon the terms of ss 963A, 1528(1), 1528(2), and 1528(4) of the Corporations Act and regs 7.7A.16 and 7.7A.16F of the Corporations Regulations for their full force and effect.

(a) refers to and repeats sub-paragraph 3(a) of the ACLR 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; and

(c) otherwise does not admit the paragraph.

20A. Summerhayes denies paragraph 20A.

21. In response to paragraph 21, Summerhayes denies paragraphs 21 to 24B and says that they do not accurately or comprehensively state the scope of the prohibition and exceptions which they purport to record.:

(a) ~~repeats paragraph 20 of the CLR above and paragraph 24 of the CLR below;~~  
and

(b) ~~denies the paragraph.~~

22. In response to paragraph 22, Summerhayes-Not used as paragraph 22 is intentionally left blank.:

(a) ~~repeats paragraph 20 of the CLR above and paragraph 24 of the CLR below;~~  
and

(b) ~~denies the paragraph.~~

23. In response to paragraph 23, Summerhayes-[Intentionally left blank].:

(a) ~~repeats paragraph 20 of the CLR above and paragraph 24 of the CLR below;~~  
and

(b) ~~denies the paragraph.~~

24. ~~Summerhayes repeats paragraph 20 of the CLR above and denies paragraph 24~~  
[Intentionally left blank].

24A. [Intentionally left blank].

24B. [Intentionally left blank].

24C. Summerhayes admits paragraph 24C.

**B.4 Unconscionable conduct**

24D. In response to paragraph 24D, Summerhayes:

(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. Grandfathering 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, Summerhayes:

(a) denies that SPSL entered into the Superseded Distribution Agreement in its  
capacity as the trustee of the Master Trust as pleaded in paragraph 5;

(b) relies on the terms of the Superseded Distribution Agreement for their full force  
and effect; and

(c) otherwise does not admit the paragraph.

25. In response to paragraph 25, Summerhayes:

(a) refers to and repeats sub-paragraph 3(a) of this ACLR; says that, prior to 1  
July 2013, benefits provided to financial services licensees were not benefits  
within the meaning of s 963A of the Corporations Act and Division 4  
(Conflicted remuneration) of Part 7.7A of the Corporations Act did not apply in  
respect of those benefits;

**Particulars**

Corporations Act, ss 1528(1), 1528(2) and 1528(4).

## Corporations Regulations, regs 7.7A.16 and 7.7A.16F

- (b) admits that Advisor Remuneration was paid to Financial Services Licensees (**Advisor Remuneration Payments**) in relation to the Suncorp Products prior to 30 June 2013
- (c) 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;
- (d) repeats sub-paragraph 27(b)(a) of the ACLR below; and
- (e) otherwise denies the paragraph.
26. In response to paragraph 26, Summerhayes denies that Suncorp acted in each instance in its capacity as trustee of the Master Trust, and otherwise does not admit the paragraph.:
- (a) ~~repeats paragraphs 16 and 25 of the CLR above, and sub-paragraph 27(b) of the CLR below; and~~
- (b) ~~denies the paragraph.~~
- 26A. Summerhayes admits paragraph 26A.
27. In response to paragraph 27, Summerhayes:
- (a) ~~refers to and repeats paragraphs 25 and 26 of the CLR above; says that prior to 20 June 2013, there were in place arrangements within the meaning of s 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, including for ongoing payments of commission in respect of those members after following 1 July 2013 (**Existing Arrangements**); and~~
- (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;



- (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.

- (c) otherwise denies the paragraph.
28. ~~In response to paragraph 28, Summerhayes~~ Not used as paragraph 28 is intentionally left blank.:
- (a) ~~repeats paragraphs 20 to 25 and 27 of the CLR above and paragraphs 30 to 39 of the CLR below; and~~
  - (b) ~~denies the paragraph.~~
29. In response to paragraph 29, Summerhayes:
- (a) refers to and repeats paragraph 278 of the ACLR above; ~~and~~
  - (b) says that the paragraph is embarrassing to the extent that it alleges that Suncorp 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 sub-paragraph 29(b) of the ACLR, 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 sub-paragraph 27(b) of the ACLR 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 in connection with anything that occurred before the

termination', which would include the liability of Suncorp 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, Summerhayes:

(a) refers to and repeats paragraph 29 of the ACLR 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, Summerhayes:

(a) refers to and repeats paragraphs 29 and 29A of the ACLR 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. Summerhayes admits paragraph 30.

31. Summerhayes denies paragraph 31.

32. In response to paragraph 32, Summerhayes:

(a) ~~repeats paragraph 27 of the CLR above~~ 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) ~~says that the Distribution Agreements did not alter the substance of the Existing Arrangements otherwise denies the paragraph.~~

~~(c) says that the Distribution Agreements were not required in order lawfully to continue paying commissions in respect of persons who were or became members of the Master Trust before 1 July 2013; and~~

~~(d) denies the paragraph.~~

33. In response to paragraph 33, Summerhayes:

(a) admits sub-paragraph 33(a); ~~and~~

(b) in response to sub-paragraph 33(b):

(i) refers to and repeats paragraph 27 of the ACLR above; and

(ii) denies the sub-paragraph;

(c) does not admit sub-paragraph 33(c);

(d) denies sub-paragraph 33(d); and

(e) denies sub-paragraph 33(e).

34. In response to paragraph 34, Summerhayes:

(a) in response to sub-paragraph 34(a):

~~(i) says that each of the Distribution Agreements was executed on or about 27 June 2013;~~

(ii) says that the final decisions by the Directors to execute the Distribution Agreements occurred at ~~or about~~ the time that each of the Distribution Agreements was executed, on or about 27 June 2013; and

~~(iii) otherwise denies the sub-paragraph; and~~

(b) in response to sub-paragraph 34(b):

~~(i) refers to and repeats paragraphs 16, 20 and 32(c) above~~ denies that SPSL entered the Suncorp Financial Distribution Agreement in its capacity as

the trustee of the Master Trust as pleaded in paragraph 5 of the ACLS, but otherwise admits sub-paragraph 34(b); and

(ii) ~~\_\_\_\_\_ otherwise denies the sub-paragraph.~~

(c) in response to sub-paragraphs 34(c) and 34(d), refers to and repeats paragraphs 25, 26 and 27, and sub-paragraphs 34(a) and 34(b), of the ACLR above; and

(d) otherwise denies the paragraph.

35. ~~Summerhayes admits paragraph 35~~ Not used as paragraph 35 is intentionally left blank.

36. Summerhayes does not admit paragraph 36 and relies on cll 7.1, 7.2, 7.3 and 9.1 of the Suncorp Financial Distribution Agreement for ~~its~~ their full force and effect.

37. In response to paragraph 37, Summerhayes:

(a) ~~admits sub-paragraph 37(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; and

(a)(b) denies that SPSL 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

(c) refers to and relies upon the terms of the Guardian Distribution Agreement between SPSL, Suncorp Life and Standard Pacific Distribution Agreement for their full force and effect; and

(d) otherwise denies the paragraph ~~37(b).~~

37A. In response to paragraph 37A, Summerhayes:

(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. Summerhayes denies paragraph 37B.

37C. Summerhayes denies paragraph 37C.

38. In response to paragraph 38, Summerhayes admits paragraph 38.:

(a) ~~refers to paragraphs 20 and 27 of the CLR above; and~~

(b) ~~denies the paragraph.~~

### **Particulars**

~~Corporations Act, ss 1528(1), 1528(2) and 1528(4).~~

~~Corporations Regulations, regs 7.7A.16 and 7.7A.16F.~~

39. In response to paragraph 39, Summerhayes denies that SPSL acted in each instance in its capacity as trustee of the Master Trust, but otherwise admits paragraph 39.:

(a) ~~refers to and repeats paragraphs 16 and 38 of the CLR above; and~~

(b) ~~denies the paragraph.~~

39A. Summerhayes admits paragraph 39A.

39B. Summerhayes denies paragraph 39B.

39C. Summerhayes denies paragraph 39C.

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

39D. Summerhayes denies paragraph 39D.

### **D. SSP**

40. Summerhayes does not admit paragraphs 40 to 45B, as those paragraphs do not make any allegations against him and concern events that allegedly occurred after he ceased to be a director of SPSL.

41. [~~Not used~~ Intentionally left blank]

41A. [intentionally left blank]

42. [~~Not used~~ Intentionally left blank]

43. [~~Not used~~ Intentionally left blank]

44. [~~Not used~~ Intentionally left blank]

45. [~~Not used~~ Intentionally left blank]

45A. [Intentionally left blank]

45B. [Intentionally left blank]

**E. Failure to advise**

45C. Summerhayes denies paragraph 45C.

45D. Summerhayes denies paragraph 45D.

**F. Contraventions**

**F.1. SIS Act Contraventions and breaches of trust**

46. In response to paragraphs 46 to 51C, Summerhayes:

(a) refers to and repeats paragraph 40 of the ACLR above; and

(b) ~~in the premises of paragraphs 1 to 40 of the CLR above,~~ otherwise denies paragraphs 46 to 51C.

47. [~~Not used~~ Intentionally left blank]

48. [~~Not used~~ Intentionally left blank]

49. [~~Not used~~ Intentionally left blank]

50. [~~Not used~~ Intentionally left blank]

51. [~~Not used~~ Intentionally left blank]

51A. [Intentionally left blank]

51B. [Intentionally left blank]

51C. [Intentionally left blank]

**F.1. Unconscionable Conduct**

51D. In response to paragraph 51D, Summerhayes:

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

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

(ii) says that members or prospective members of the Master Trust were entitled to compare their Suncorp Products or prospective Suncorp Products to other products offered within the market, and to elect to invest in those other products;

(b) in answer to paragraph 51D(b), refers to and repeats paragraphs 18A of the ACLR; and

(c) otherwise denies the paragraph.

51E. In response to paragraph 51E, Summerhayes:

(a) refers to and repeats paragraph 40 of the ACLR above; and

(b) otherwise denies the paragraph.

51F. In response to paragraph 51F, Summerhayes refers to and repeats paragraphs 29, 29A, 29B, 39B, 45B, and 46 of the ACLR above.

51G. In response to paragraph 51G, Summerhayes:

(a) refers to and repeats paragraph 40 of the ACLR above; and

(b) otherwise denies the paragraph.

51H. In response to paragraph 51H:

(a) refers to and repeats paragraphs 24D, and 51D to 51G of the ACLR above; and

(b) otherwise denies the paragraph.

**G. Loss or Damage**

52. ~~Summerhayes denies paragraph 52 and refers to and repeats paragraphs 38 and 39 of the CLR above.~~

53. ~~Summerhayes denies~~ In response to paragraph 53, Summerhayes:-

(a) refers to and repeats paragraph 40 of the ACLR above; and

(b) otherwise denies the paragraph.

54. In response to paragraph 54, Summerhayes refers to and repeats paragraph 40 of the ACLR above and in the premises does not admit the paragraph.

55. In response to paragraph 55, Summerhayes:

(a) refers to and repeats paragraphs 46, 51H and 54 40 of the ACLR above; and

(b) otherwise in the premises does not admit ~~denies~~ the paragraph.

56. Summerhayes denies paragraph 56.

**Particulars**

If, which is denied, Suncorp 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 the appropriate relief is an order that SPSL, as trustee of the Master Trust, make good the assets of the Master Trust. 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, Suncorp 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 CLS, 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 affect 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.

56A. Summerhayes denies paragraph 56A.

## H. Involvement

57. In response to paragraph 57, Summerhayes:

- (a) denies sub-paragraph 57(a);
- (b) except as otherwise pleaded in paragraphs 34 to ~~37~~39C and 46 of the ACLR above, denies sub-paragraph 57(b); and
- (c) to the extent that the allegations in paragraph 57 do not relate to him, does not admit the paragraph.

58. In response to paragraph 58, Summerhayes Not used as paragraph 58 is intentionally left blank.:

- (a) ~~denies sub-paragraph 58(a); and~~
- (b) ~~in response to sub-paragraph 58(b):~~
  - (i) ~~admits that, with Sean Carroll, he executed the Distribution Agreements on behalf of SPSL;~~
  - (ii) ~~admits that he executed the Distribution Agreements with Guardian and Standard Pacific on behalf of those companies; and~~
  - (iii) ~~otherwise denies the paragraph.~~

59. In response to paragraph 59, To the extent that the allegations in paragraph 59 relate to him, Summerhayes:

- (a) denies sub-paragraph 59(a);
- (b) denies sub-paragraph 59(b);
- (c) admits sub-paragraph 59(c);

- (d) ~~in response to paragraph 59(d):~~
- (i) ~~refers to paragraph 38 of the CLR above; and~~
- (ii) ~~denies the sub-paragraph 59(d); and~~
- (e) ~~in response to paragraph 59(e):~~
- (i) ~~refers to paragraph 39 of the CLR above; and~~
- (ii) ~~denies the sub-paragraph 59(e); and~~
- (f) to the extent that the allegations in paragraph 59 do not relate to him, does not admit the paragraph.

60. In response to paragraph 60, Summerhayes repeats paragraph 52 of the ACLR above.

61. To the extent that the allegations in paragraph 61 relate to him, Summerhayes denies the paragraph-61 and otherwise does not admit the paragraph.

62. To the extent that the allegations in paragraph 62 relates to him, Summerhayes denies the paragraph-62 and otherwise does not admit the paragraph.

**I. Relief claimed**

63. In response to paragraph 63, Summerhayes denies that the Plaintiff is entitled, for himself or on behalf of each of the Group Members, to the relief set out in the Summons AS.

**J. Exemption, indemnity, and circuity of action**

64. In further answer to the whole of the ACLS and the whole of the relief claimed against him, Summerhayes says as follows in paragraphs 65 to 71 of the ACLR below.

65. Subject to exceptions that are not presently engaged, Summerhayes is exempted from any liability incurred while acting as a director of SPSL as the Trustee of the Master Trust Fund.

**Particulars**

Clause 3.8 of the Master Fund Trust Deed, cl 3.8.

66. Further, subject to exceptions that are not presently engaged, Summerhayes has a right to be indemnified from the Master Trust Fund in respect of any liability incurred while acting as a director of SPSL as the Trustee of the Master Trust Fund.

### Particulars

~~Clause 3.8 of the Master Fund Trust Deed, cl 3.8.~~

~~Section 57 of the SIS Act, s 57.~~

67. The relief claimed in the ACLS against Summerhayes would, if established (which is denied), be a liability incurred by him while acting as a director of SPSL within the meaning of cl 3.8 of the ~~Master Fund Trust Deed~~.
68. In the premises, Summerhayes is exempt from any liability that might otherwise be capable of being established upon the allegations in the ACLS.
69. Alternatively, Summerhayes is entitled to be indemnified from the Master Trust Fund in respect of any liability that might be established upon the allegations in the ACLS.
70. Summerhayes' right to be indemnified from the Master Trust Fund in respect of any liability that might be established upon the allegations in the ACLS; gives rise to a circuitry of action which operates as a defence to the Plaintiff's claim against Summerhayes.

### Particulars

Under s 55(3) of the SIS Act, any recovery of an amount of loss or damage suffered by the Plaintiff and Group Members would be awarded by way of an order to restore the Master Trust Fund, rather than an order for payment to the Plaintiff and Group Members (or their litigation funder).

71. In further answer to the whole of the ACLS and the whole of the relief claimed against him, Summerhayes says:
- (a) he has acted honestly at all material times;
  - (b) having regard to all the circumstances of the case he ought fairly to be excused for any negligence, default, breach of trust or breach of duty alleged in the ACLS; and

- (c) in the premises, if it appears to the Court that he is or may be liable in respect of the matters alleged in the ACLS (which liability is denied), then he ought to be relieved either wholly or partly from the liability on such terms as the Court thinks fit.

### **Particulars**

Section 310 of the SIS Act, s 310.

#### **K. Limitation of actions**

72. The following paragraphs 73 to 93 are raised by Summerhayes in further answer to the whole ACLS.

#### **K.1. SIS Act s 55(3): original group members, original claims**

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 s 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 s 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.

#### **K.2. SIS Act s 55(3): new group members, original 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 s 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;
- (b) 28 June 2013;
- (c) 16 December 2013; or
- (d) 20 December 2013,

is not maintainable by operation of s 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.

Summerhayes refers to and repeats sub-paragraph 3(c) of the ACLR above.

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

### **K.3. SIS Act s 55(3): original group members, new allegations**

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

is not maintainable by operation of s 55(4) of the SIS Act.

**Particulars**

The particulars to paragraph 74 of the ACLR above are repeated.

**K.4. SIS Act s 55(3): new group members, new allegations**

76. 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 s 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;

(b) 28 June 2013;

(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 paragraph 74 of the ACLR above are repeated.

**K.5. SIS Act s 315(11)**

77. 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.

**K.6. Breach of trust: original group members, original claims**

78. 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 ss 48, 50 and 63 of the Limitation Act 1969 (NSW) (Limitation Act).

**Particulars**

The particulars to paragraph 73 of the ACLR above are repeated.

**K.7. Breach of trust: new group members, original allegations**

79. 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;

(b) 28 June 2013;

(c) 16 December 2013; or

(d) 20 December 2013.

is not maintainable and has been extinguished by operation of ss 48, 50 and 63 of the Limitation Act.

**Particulars**

The particulars to paragraph 74 of the ACLR above are repeated.

**K.8. Breach of trust: original group members, new allegations**

80. 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;

(b) 28 June 2013;

(c) 16 December 2013;

(d) 20 December 2013,

is not maintainable and has been extinguished by operation of ss 48, 50 and 63 of the Limitation Act.

### **Particulars**

The particulars to paragraph 74 of the ACLR above are repeated.

#### **K.9. Breach of trust: new group members, new allegations**

81. 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;

(b) 28 June 2013;

(c) 16 December 2013; or

(d) 20 December 2013,

is not maintainable and has been extinguished by operation of ss 48, 50 and 63 of the Limitation Act.

### **Particulars**

The particulars to paragraph 74 of the ACLR above are repeated.

#### **K.10. Causes of action founded on equity otherwise than in respect of a breach of trust**

82. 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.



**K.11. ASIC Act s 12GF: original group members, original allegations**

83. 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 s 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 s 12GF(2) of the ASIC Act.

**Particulars**

The particulars to paragraph 73 of the ACLR above are repeated.

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

84. 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 s 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;

(b) 28 June 2013;

(c) 16 December 2013; or

(d) 20 December 2013,

is not maintainable by operation of s 12GF(2) of the ASIC Act.

**Particulars**

The particulars to paragraph 74 of the ACLR above are repeated.

**K.13. ASIC Act s 12GF: original group members, new allegations**

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

is not maintainable by operation of s 12GF(2) of the ASIC Act.

#### **Particulars**

The particulars to paragraph 74 of the ACLR above are repeated.

#### **K.14. ASIC Act s 12GF: new group members, new allegations**

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

is not maintainable by operation of s 12GF(2) of the ASIC Act.

#### **Particulars**

The particulars to paragraph 74 of the ACLR above are repeated.

**K.15. ASIC Act s 12GM: original group members, original allegations**

87. 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 s 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 s 12GM(5) of the ASIC Act.

**Particulars**

The particulars to paragraph 73 of the ACLR above are repeated.

**K.16. ASIC Act s 12GM: new group members, original allegations**

88. 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 s 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;

(b) 28 June 2013;

(c) 16 December 2013; or

(d) 20 December 2013,

is not maintainable by operation of s 12GM(5) of the ASIC Act.

**Particulars**

The particulars to paragraph 74 of the ACLR above are repeated.

**K.17. ASIC Act s 12GM: original group members, new allegations**

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

is not maintainable by operation of s 12GM(5) of the ASIC Act.

#### **Particulars**

The particulars to paragraph 74 of the ACLR above are repeated.

#### **K.18. ASIC Act s 12GM: new group members, new allegations**

90. 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 s 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;
- (b) 28 June 2013;
- (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 paragraph 74 of the ACLR above are repeated.

**K.19. ASIC Act s 12GM(1): discretion**

91. 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 s 12GM(5) of the ASIC Act.

**L. Other defences**

92. Further to paragraphs 73 to 91 above, Summerhayes indicates his 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.

93. If, which is denied, the substantive law of any place other than New South Wales governs any of the non-statutory claims of the Plaintiff or any of the Group Members, Summerhayes indicates his 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, Summerhayes will, following articulation of that contention, give particulars of the precise limitations legislation of that place that is relied upon by Summerhayes.

**D. QUESTIONS APPROPRIATE FOR REFERRAL TO A REFEREE**

1. Nil.

**E. STATEMENT AS TO MEDIATION**

1. The parties have not yet attempted mediation.
2. Summerhayes is willing to proceed to mediation at an appropriate time.

**SIGNATURE**

Signature of legal representative

Capacity  
Date of signature

Solicitor  
5 March 2020