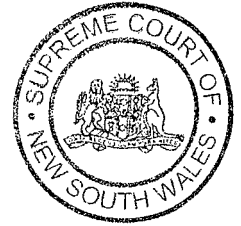


Form 4A (version 3)  
UCPR 6.2

FILED

21 JUN 2019

**COMMERCIAL LIST STATEMENT**



**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

Second Defendant **Geoffrey Edward Summerhayes**

Third Defendant **Sean Carroll**

**FILING DETAILS**

Filed for	Kerry Michael Quirk, Plaintiff
Legal representative	Bill Petrovski, William Roberts Lawyers
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## A. NATURE OF DISPUTE

- 1 The Plaintiff brings this claim on behalf of the Group Members identified in paragraph 3 in Section C below against Suncorp Portfolio Services Limited in its capacity as trustee of the Master Trust (**Suncorp**); and also against the Second Defendant, Sean Carroll (**Carroll**) and Third Defendant, Geoffrey Edward Summerhayes (**Summerhayes**), for involvement in Suncorp's contraventions.
- 2 Sections 52(2)(b),(c) and (d) *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) imposed various duties on Suncorp.
- 3 From 1 July 2013 onwards, authorised representatives of financial services licensees were prohibited from accepting Conflicted Remuneration by reason of amendments to the *Corporations Act 2001* (Cth) (**Corporations Act**) commonly called the Future of Financial Advice reforms. The ban on Conflicted Remuneration did not apply to benefits given to financial services licensees or their authorised representatives (**Financial Services Licensees**) under an arrangement entered into before 1 July 2013.
- 4 In late June 2013, Suncorp executed three agreements which had the effect of grandfathering the Conflicted Remuneration it was paying to Financial Services Licensees. The Plaintiff alleges that this conduct, and the decision which gave rise to it, were contraventions of the duties that Suncorp owed to the Plaintiff and the Group Members. In summary, the Plaintiff alleges that it was not in his or the Group Members' interests to continue paying these fees.
- 5 Further or in the alternative, between 1 August 2016 and February 2017, Suncorp transferred the members of its superannuation funds from at least 31 existing funds into at least 8 new funds and continued charging Conflicted Remuneration. The Plaintiff alleges that Suncorp's decision to continue charging Conflicted Remuneration was a contravention of its duties. In summary, the Plaintiff alleges that it was not in his or the Group Members' interests to keep paying these fees.
- 6 The Plaintiff also alleges that Carroll and Summerhayes were involved in the contraventions summarised in paragraph 4 above.

**B. ISSUES LIKELY TO ARISE**

- 1 The issues likely to arise are those set out in the Summons under the heading "Questions common to claims of the Plaintiff and the Group Members".

## C. PLAINTIFF'S CONTENTIONS

<b>A PARTIES .....</b>	<b>4</b>
<b>B BACKGROUND.....</b>	<b>8</b>
B.1 SUPERANNUATION FUNDS .....	8
B.2 SIS ACT.....	12
B.3 FOFA.....	13
<b>C GRANDFATHERING .....</b>	<b>14</b>
<b>D SUPER SIMPLIFICATION PROGRAM.....</b>	<b>20</b>
<b>E CONTRAVENTIONS .....</b>	<b>22</b>
<b>F LOSS OR DAMAGE .....</b>	<b>35</b>
<b>G INVOLVEMENT .....</b>	<b>37</b>
<b>H RELIEF CLAIMED .....</b>	<b>39</b>

### A Parties

- 1 The Plaintiff brings this proceeding as representative party for and on behalf of the Group Members pursuant to Part 10 of the *Civil Procedure Act 2005 (NSW)*.
- 2 The Plaintiff is and was at all material times a member of one or more of the Suncorp Funds (this term is defined in paragraph 4(e) below).

### Particulars

- (i) The Plaintiff was a member of Suncorp WealthSmart Personal Super and subsequently became and remained a member of Suncorp Brighter Super.
  - (ii) Plaintiff's membership No. 991013000.
- 3 The members of the group to whom this proceeding relates (**Group Members**) are those persons:
  - (a) who were members of a superannuation fund under the Master Trust (this term is defined in paragraph 11 below); and

- (b) whose accounts were affected by the payment of Conflicted Remuneration (as this term is defined in paragraph 20 below) to Financial Services Licensees in the period 1 July 2013 to 21 June 2019, inclusive (**Relevant Period**); and
- (c) were not during the Relevant Period, and are not, any of the following:
  - (i) a director, an officer, or a close associate (as defined by s. 9 of the Corporations Act) of Suncorp; or
  - (ii) a judge, judge of Appeal or the Chief Justice of the Supreme Court of NSW or a judge or the Chief Justice of the High Court of Australia.

### **Particulars**

At the time of the filing of the Statement of Claim there are more than seven Group Members who have claims against each of the Defendants.

- 4 Suncorp at all material times was, and is:
- (a) a company duly incorporated pursuant to the Corporations Act and capable of being sued;
  - (b) a trading corporation within the meaning of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);
  - (c) the holder of an Australian Financial Services licence (licence no: 232468) (**AFSL**);
  - (d) the holder of a registrable superannuation entity (**RSE**) licence (licence no L0002059);
  - (e) the trustee of the Master Trust (as defined in paragraph 11 below), which at various times has included the superannuation funds pleaded in paragraphs 15 and 40 below (**Suncorp Funds**) (references to the Suncorp Funds should be read as a reference to the relevant funds under the Master Trust that exist at the time relevant to the pleaded allegation);
  - (f) a body corporate:

- (i) carrying on the business of acting as a trustee of superannuation entities and investing money on behalf of the beneficiaries of those superannuation entities; and
  - (ii) holding itself out as having particular knowledge, skill and experience in carrying out such a business;
- (g) a wholly-owned subsidiary of Suncorp Life Holdings Limited (**Suncorp Holdings**) which in turn was at all material times a wholly owned subsidiary of Suncorp Group Limited;
- (h) part of a group of companies which are a related party (as defined by s. 228 of the Corporations Act), a related body corporate (as defined by s. 50 of the Corporations Act) or an associated entity (as defined by s 50AAA of the Corporations Act), of Suncorp Group Limited (**Suncorp Group**); and
- (i) a registrable superannuation entity licensee (**RSE licensee**) under s 10(1) of the SIS Act.
- 5 Each reference to Suncorp in this Commercial List Statement is to be read as a reference to Suncorp in its capacity as the trustee for the Suncorp Funds.
- 6 Suncorp Life and Superannuation Limited (ABN 87 073 979 530) (**Suncorp Life**) at all material times was, and is:
- (a) a company within the Suncorp Group;
  - (b) one of the administrators of the Master Trust with Suncorp; and
  - (c) an associate of Suncorp for the purpose of the SIS Act.
- 7 Suncorp Financial Services Pty Ltd (ACN: 010 844 621) (**Suncorp Financial**), Standard Pacific Consulting Ltd (ACN: 003 315 802) (**Standard Pacific**), Guardian Group Financial Planning Pty Ltd (ACN 000 036 626) and GuardianFP Limited (ACN: 003 677 334) (**Guardian**) at all material times were, and are:
- (a) financial services licensees under the Corporations Act;
  - (b) providers of financial product advice to persons as retail clients under the Corporations Act; and
  - (c) associates of Suncorp for the purposes of the SIS Act.

(together, **the Suncorp Adviser Network**)

### Particulars

Suncorp Financial Services Guide dated 22 December 2017 at page 1.

- 8 At all material times, Suncorp and Suncorp Life were and are the issuers of financial products under the Corporations Act (**Financial Products**).
- 9 At all material times, the Financial Products were, and are distributed and promoted by:
- (a) the members of the Suncorp Adviser Network through their own representatives; and
  - (b) other Financial Services Licensees.
- 10 At all material times:
- (a) the Second Defendant, Sean Carroll (**Carroll**) and Third Defendant, Geoffrey Edward Summerhayes (**Summerhayes**) were directors of Suncorp (together, **the Directors**);
  - (b) Cathy Duncan (**Duncan**) was the Executive Manager Superannuation, Product and Portfolio Management at Suncorp;
  - (c) the conduct of Carroll, Summerhayes and Duncan is to be taken to be the conduct of Suncorp by reason of the fact that:
    - (i) Carroll and Summerhayes at all material times were directors of Suncorp; and
    - (ii) Duncan at all material times was a senior employee of Suncorp; or
    - (iii) alternatively to (i) and (ii) above, Carroll, Summerhayes and Duncan were each an agent of Suncorp.
  - (d) the knowledge of Carroll, Summerhayes and Duncan is attributed to Suncorp by reason of the fact that:
    - (i) Carroll, Summerhayes and Duncan were each an agent of Suncorp, holding senior positions with Suncorp and as such were under a duty

to communicate to the board of Suncorp the knowledge gained by each of them in their positions; and

- (ii) Duncan was a senior employee of Suncorp and as such was under a duty to communicate to the board of Suncorp the knowledge gained by her in that position; or
- (iii) alternatively to (i) and (ii) above, Carroll, Summerhayes and Duncan were each the directing mind and will of Suncorp in relation to the matters alleged in this Commercial List Statement.

## **B Background**

### **B.1 Superannuation funds**

- 11 Suncorp at all material times was, and is the trustee of a trust (**Master Trust**) established by a trust deed dated 22 June 1979, as amended (**Trust Deed**).

#### **Particulars**

The Trust Deed was originally dated 22 June 1979 and has been subsequently amended by various amending deeds, including on 14 December 2012, in June 2015 on 19 April 2016 and on 5 December 2017.

- 12 Suncorp at all materials was, and is, the issuer of the Suncorp Funds which were:
- (a) registrable superannuation entities within the meaning of s 10(1) of the SIS Act; and
  - (b) regulated superannuation funds within the meaning of s 19(1) of the SIS Act.



- 13 Suncorp and Suncorp Life shared the administration of the Master Trust, with:
- (a) Suncorp Life administering 45% of the membership; and
  - (b) Suncorp administering the remaining 55% of the membership.

**Particulars**

The Royal Commission into Misconduct in the Banking,  
Superannuation and Financial Services Industry (**RC**) – Transcript – M.  
Pinto, 13 August 2018 at page 4813

- 14 The Plaintiff and the Group Members became members of the Suncorp Funds through:
- (a) distribution channels within the Suncorp Group;
  - (b) independent Financial Services Licensees; and/or
  - (c) employer-sponsored plans.

**Particulars**

RC – Witness statement of M. Pinto dated 5 August 2018 at [6].

- 15 As at 1 July 2013, Suncorp was the trustee of at least 31 superannuation funds, being:
- (a) Suncorp Everyday Super;
  - (b) Suncorp Everyday Super Pension;
  - (c) Suncorp WealthSmart Personal Super;
  - (d) Optimum Personal Super;
  - (e) Optimum Professional Superannuation Savings;
  - (f) Connelly Temple Super Savings Plan (two funds);
  - (g) Partnership Superannuation Plan (two funds);
  - (h) Connelly Temple Superannuation Plan;

- (i) INVESCO;
- (j) Connelly Temple Workforce – Personal;
- (k) Connelly Temple Suncorp Master Trust Superannuation;
- (l) Workforce Superannuation Personal;
- (m) Suncorp Employee Superannuation Plan;
- (n) Promina Corporate Superannuation Fund;
- (o) Optimum Corporate Super;
- (p) Optimum Corporate for Standard Pacific;
- (q) Suncorp WealthSmart Business Super;
- (r) Connelly Temple Employer Plan;
- (s) Connelly Temple Workforce – Employer;
- (t) Workforce Superannuation Corporate;
- (u) Suncorp WealthSmart Pension;
- (v) Optimum Professional Pension;
- (w) Connelly Temple Super Savings Plan Pension (two funds);
- (x) Connelly Temple Superannuation Allocated Pension Plan;
- (y) Partnership Allocated Pension Plan;
- (z) INVESCO Lifestyle Retirement Plan;
- (aa) Connelly Temple Suncorp Master Trust Allocated Pension; and
- (bb) Suncorp WealthSmart Term Allocated Pension.

(together, **Original Superannuation Funds**)

### Particulars

- (i) Suncorp Board Submission dated 17 March 2016 and signed by Cathy Duncan, Executive Manager Superannuation, Product and Portfolio Management, on behalf of the due diligence committee, Suncorp at pages 25 and 26.
- (ii) Suncorp WealthSmart Super PDS dated 1 November 2010;
- (iii) Suncorp WealthSmart Personal Super & Suncorp WealthSmart Pension PDS dated 30 November 2010;
- (iv) Suncorp WealthSmart Business Super PDS dated 30 November 2010;
- (v) Suncorp WealthSmart Business Super Employer PDS dated 30 November 2010;
- (vi) Suncorp Everyday Super PDS dated 1 December 2012;
- (vii) Suncorp Everyday Super Product Guide dated 1 December 2012;
- (viii) Suncorp WealthSmart Personal Super and Suncorp WealthSmart Pension PDS dated 4 July 2013;
- (ix) Suncorp WealthSmart Business Super PDS dated 17 February 2014;
- (x) Suncorp WealthSmart Product Guide dated 17 February 2014;
- (xi) Suncorp Brighter Super Product Guide dated 3 April 2013;
- (xii) Suncorp Everyday Super Product Guide dated 13 February 2013.
- (xiii) Further particulars to be provided following discovery.

16 Suncorp at all material times recovered the amounts that constitute the Conflicted Remuneration as administration costs, fees and charges from members' funds by:

- (a) separately determining the administration costs, fees and charges for each of the Suncorp Funds;
- (b) charging members those administration costs, fees and charges; and
- (c) allocating those administration costs, fees and charges to Suncorp's general revenue (**Suncorp's General Reserve**).

**Particulars**

RC – Witness statement of E. A. Cooley dated 25 July 2018 at [91].

**B.2 SIS Act**

- 17 At all material times the Trust Deed contained the covenants set out in s 52(2) of the SIS Act.

**Particulars**

SIS Act, s 52(1).

- 18 At all material times Suncorp covenanted to:
- (a) exercise, in relation to all matters affecting the entity, the same degree of care, skill and diligence as a prudent superannuation trustee would exercise in relation to an entity of which it is trustee and on behalf of the beneficiaries of which it makes investments;

**Particulars**

SIS Act, s 52(2)(b).

- (b) perform the trustee's duties and exercise the trustee's powers in the best interests of the Plaintiff and Group Members;

**Particulars**

SIS Act, s 52(2)(c).

- (c) where there is a conflict between the duties of the trustee to the beneficiaries, or the interests of the beneficiaries, and the duties of the trustee to any other person or the interests of the trustee or an associate of the trustee:

- (i) to give priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons; and
- (ii) to ensure that the duties to the beneficiaries are met despite the conflict; and
- (iii) to ensure that the interests of the beneficiaries are not adversely affected by the conflict; and
- (iv) to comply with the prudential standards in relation to conflicts.

### **Particulars**

SIS Act, s 52(2)(d).

(together, the **Statutory Covenants**)

### **B.3 FOFA**

- 19 The Future of Financial Advice (**FOFA**) amendments to the Corporations Act commenced on 1 July 2012 and compliance with those amendments became mandatory on and after 1 July 2013.

### **Particulars**

- (i) *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth), s 3 and Sch1;
  - (ii) *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth), s 3 and Sch 1.
- 20 From 1 July 2013 onwards, any benefit given to a financial services licensee, or an authorised representative of a financial services licensee, who provided financial product advice to persons as retail clients, was conflicted remuneration within the meaning of s 963A of the Corporation Act because of the nature of the benefit or the circumstances in which it was given:
- (a) could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients; or
  - (b) could reasonably be expected to influence the financial product advice given to retail clients by the licensee or representative.

**(Conflicted Remuneration)**

**Particulars**

Corporations Act, s 963A.

- 21 From 1 July 2013 onwards, subject to the qualification in paragraph 24 below, Financial Services Licensees were prohibited from accepting Conflicted Remuneration.

**Particulars**

Corporations Act, s 963E(1).

- 22 From 1 July 2013 onwards, subject to the qualification in paragraph 24 below, authorised representatives of financial services licensees were prohibited from accepting Conflicted Remuneration.

**Particulars**

Corporations Act, s 963G(1).

- 23 From 1 July 2013 onwards, subject to the qualification in paragraph 24 below, issuers of Financial Products were prohibited from giving a Financial Services Licensee, Conflicted Remuneration.

**Particulars**

Corporations Act, s 963K.

- 24 The ban on Conflicted Remuneration did not apply to benefits given to Financial Services Licensees under an arrangement entered into before 1 July 2013.

**Particulars**

Corporations Act, s 1528(1).

**C Grandfathering**

- 25 Prior to 1 July 2013, Suncorp Financial or, alternatively, Suncorp and Suncorp Life paid Conflicted Remuneration to Financial Services Licensees in relation to the Suncorp Funds.

**Particulars**

- (i) RC – Witness statement of E. A. Cooley dated 25 July 2018 at [121].
- (ii) RC – Witness statement of M. Pinto dated 5 August 2018 at [33] including question 12 immediately above [33] but below [32].

26 Prior to 1 July 2013, Suncorp reimbursed Suncorp Financial or, alternatively, Suncorp and Suncorp Life for each of the payments referred to in paragraph 25 above from members' funds by:

- (a) directly deducting the payments from members' funds; or
- (b) alternatively, drawing on Suncorp's General Reserve.

**Particulars**

- (i) RC – Witness statement of E. A. Cooley dated 25 July 2018 at [91] and [125].
- (ii) RC – Witness statement of M. Pinto dated 5 August 2018 at [33] including question 12 immediately above [33] but below [32].

27 As at 20 June 2013, the payments referred to in paragraph 25 and 26 above were:

- (a) not given pursuant to an arrangement within the meaning of s 1528(1) of the Corporations Act;
- (b) alternatively to (a) above, not given pursuant to an arrangement between the Plaintiff, the Group Members, Suncorp, Suncorp Financial, Suncorp Life or any financial services licensee; or

**Particulars**

As at 20 June 2013:

- (A) Suncorp was unable to identify which Financial Products were the subject of payments of Conflicted Remuneration (**Conflict Remuneration Payments**);

- (B) Suncorp was unable to identify the amount of Conflicted Remuneration payable to financial services licensees in relation to the Suncorp Funds; and
  - (C) the only basis for supporting an arrangement was that Suncorp kept a record of the amount of fees paid in respect of particular Financial Products.
- (c) alternatively to (a) and (b) above, not given pursuant to any contractual obligation between the Plaintiff, the Group Members, Suncorp, Suncorp Financial, Suncorp Life or any financial services licensee.

**Particulars**

The particulars to sub-paragraph (b) above are repeated.

- 28 By reason of the matters pleaded in paragraphs 20 to 24 and 27 above, if Suncorp had not taken the steps set out at paragraphs 30 to 39 below, any obligation to make the payments referred to in paragraph 25 would have become unenforceable on 1 July 2013.
- 29 By at least June 2013, Suncorp knew or ought to have known that, to the extent there was any obligation to make the payments referred to in paragraph 25 above, that obligation would cease on 1 July 2013.

**Particulars**

Email from Paul Girot, Project Manager - Business Improvement, Product and Service, Suncorp sent on 13 June 2013 at 5.31 pm to various staff members of the Suncorp Group.

- 30 At some point prior to 13 June 2013, Suncorp, Suncorp Life or Suncorp Holdings established the FOFA project.

**Particulars**

Suncorp Document Approval Process form dated 26 June 2013 for Distribution Agreements at page 00057.



31 On 13 June 2013, Suncorp provided draft Product Issue and Distribution Agreements with Suncorp Financial, Guardian and Standard Pacific (the **Distribution Agreements**) to various staff members at Suncorp and stated:

- (a) the purpose of the Distribution Agreements was to ensure compliance with the obligations imposed by the FOFA reforms; and
- (b) it was critical that the Distribution Agreement be executed by 30 June 2013 to ensure that commissions could continue to be paid.

**Particulars**

Email from Paul Girot Project Manager - Business Improvement, Product and Service, Suncorp sent on 13 June 2013 at 5.31 pm to various staff members of the Suncorp Group.

32 On or about 24 June 2013, Suncorp amended the Distribution Agreements for the purpose of maintaining the payment of Conflicted Remuneration.

**Particulars**

Suncorp, Document Approval Process form dated 26 June 2013 for Distribution Agreements at page .00057.

33 Prior to executing the Distribution Agreements:

- (a) Suncorp was unable to finalise a list of the Financial Products covered by the Distribution Agreements; and
- (b) the existence of an 'arrangement' in relation to these fees was based on records of what fees had been received for what Financial Products from which issuer.

**Particulars**

Email from Lucy Lowing, Senior Lawyer – Life, Legal and Secretariat, Suncorp sent on 24 June 2013 at 10.15 a.m. to various staff members of the Suncorp Group.

34 On a date prior to 27 June 2013, Suncorp decided to:

- (a) execute the Distribution Agreements; and

- (b) continue to charge its members, or allow Financial Services Licensees to charge its members, Conflicted Remuneration pursuant to the Distribution Agreements.

(the **Grandfathering Decision**).

- 35 On or about 27 June 2013, Suncorp entered into a "Product Issue and Distribution Agreement" with Suncorp Life and Suncorp Financial (**Suncorp Financial Distribution Agreement**).

#### **Particulars**

The Suncorp Financial Distribution Agreement was executed by Carroll and Summerhayes as directors of Suncorp.

- 36 The Suncorp Financial Distribution Agreement provided that:

- (a) Suncorp and Suncorp Life would pay commissions to Suncorp Financial on any Financial Products that had or would be issued by Suncorp and Suncorp Life in accordance with the commission rates applicable for each of the Financial Products;

#### **Particulars**

Suncorp Financial Distribution Agreement, cl 7.1 (a).

- (b) Suncorp and Suncorp Life authorised Suncorp Financial to include in any agreement pursuant to which Suncorp Financial distributed Financial Products for Suncorp and Suncorp Life (a **CAR Agreement**) a provision for the payment to Suncorp Financial of commission or other remuneration;

#### **Particulars**

Suncorp Financial Distribution Agreement, cl 7.1 (b).

- (c) Suncorp and Suncorp Life would notify Suncorp Financial from time to time of the commission in the commission schedule for each of the Financial Products;

#### **Particulars**

Suncorp Financial Distribution Agreement, cl 7.1 (c).

- (d) Suncorp Financial would ensure that:
- (i) the commission payable under each CAR Agreement was in accordance with the commission schedule applicable at the time the CAR Agreement was entered into; and
  - (ii) each CAR Agreement authorised Suncorp Financial 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) as between Suncorp and Suncorp Life on the one hand and Suncorp Financial on the other, Suncorp and Suncorp Life were solely responsible for payment of commission to Suncorp Financial for distributors. Suncorp Financial would however provide all details the issuer needed, 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; and
  - (iii) pay the commission in accordance with the distributor's instructions.

**Particulars**

Suncorp Financial Distribution Agreement, cl 7.1 (e).

37 Suncorp executed agreements in substantially the same terms as the Suncorp Financial Distribution Agreement with:

- (a) Guardian; and
- (b) Standard Pacific.

### Particulars

Email from Lucy Lowing, Senior Lawyer – Life, Legal and Secretariat, Suncorp sent on 24 June 2013 at 10.15 a.m. to various staff members of the Suncorp Group.

- 38 On and after 1 July 2013, Suncorp Financial or, alternatively, Suncorp and Suncorp Life made payments of Conflicted Remuneration (**Conflicted Remuneration Payments**) under the Distribution Agreements to Financial Services Licensees or their authorised representatives in relation to the Suncorp Funds.

### Particulars

The total amounts paid during the period from 1 July 2013 to 30 June 2018 are set out in the response to question 12(a) in the table at [33] of RC – Witness statement of M. Pinto dated 5 August 2018

- 39 On and after 1 July 2013, Suncorp reimbursed Suncorp Financial or, alternatively, Suncorp and Suncorp Life for each of the Conflicted Remuneration Payments referred to in paragraph 38 above from members' funds by:
- (a) directly deducting the payments from members' funds; or
  - (b) alternatively, drawing on Suncorp's General Reserve.

### Particulars

- (i) RC – Witness statement of E.A. Cooley dated 25 July 2018 at [91] and [125]; and
- (ii) RC – Witness statement of M. Pinto dated 5 August 2018 at [32] and [33].

## D Super Simplification program

- 40 On or about 17 March 2016, the Due Diligence Committee of Suncorp recommended to the board of Suncorp that the funds of members of the Original Superannuation Funds be transferred to at least the following 8 new superannuation funds (**New Superannuation Funds**) being:

- (a) Suncorp Everyday Super;

- (b) Suncorp Everyday Super Pension;
- (c) Suncorp Brighter Super;
- (d) Suncorp Brighter Super – Personal Super;
- (e) Suncorp Employee Superannuation Plan;
- (f) Suncorp Brighter Super – Employer Super;
- (g) Suncorp Brighter Super – Pension; and
- (h) Suncorp Brighter Super – Term Allocated Pension.

**(Super Simplification Proposal)**

**Particulars**

Suncorp Board Submission dated 17 March 2016 and signed by Duncan, Executive Manager Superannuation, Product and Portfolio Management, on behalf of the due diligence committee, Suncorp. Further particulars to be provided following discovery.

41 On or about 24 March 2016, Suncorp decided:

- (c) to approve the Super Simplification Proposal; and
- (d) not to cease charging its members, or ceasing to allow financial services licensees to charge its members, Conflicted Remuneration pursuant to the Distribution Agreements.

(the **Super Simplification Decision**).

**Particulars**

RC –Witness statement of E. A. Cooley dated 25 July 2018 at [87].

42 If it is found that there was a contract or arrangement to make the Conflicted Remuneration Payments referred to in paragraph 25 and 26 (contrary to the Plaintiff's primary contention), that contract or arrangement ceased to have the effect of grandfathering Conflicted Remuneration on the transfer of the funds of members from the Original Superannuation Funds to the New Superannuation Funds.

- 43 Between 1 August 2016 and February 2017, Suncorp transferred the funds of members from the Original Superannuation Funds to the New Superannuation Funds.

**Particulars**

- (i) Suncorp Board Submission dated 17 March 2016 and signed by Duncan, Executive Manager Superannuation, Product and Portfolio Management, on behalf of the Due Diligence Committee, Suncorp.
  - (ii) RC –Witness statement of E.A. Cooley dated 25 July 2018 at [87].
- 44 On and after 1 August 2016, Suncorp Financial or, alternatively, Suncorp and Suncorp Life continued to make the Conflicted Remuneration Payments to Financial Services Licensees in relation to the Suncorp Funds.

**Particulars**

The total amounts paid during the period from 1 August 2016 to 30 June 2018 are set out in the response to question 12(a) in the table at [33] of RC – Witness statement of M. Pinto dated 5 August 2018

- 45 On and after 1 August 2016, Suncorp reimbursed Suncorp Financial or, alternatively, Suncorp and Suncorp Life for each of the Conflicted Remuneration Payments referred to in paragraph 44 above from members' funds which had been transferred into the New Superannuation Funds by:
- (a) directly deducting the payments from members' funds; or
  - (b) alternatively, drawing on Suncorp's General Reserve.

**Particulars**

The particulars to subparagraph 39 above are repeated.

**E Contraventions**

- 46 At all material times, there was an actual conflict between the interests of the Plaintiff and each of the Group Members, on the one hand, and Suncorp's own interests and the interests of the members of the Suncorp Adviser Network and their authorised representatives, on the other hand.

### Particulars

- (i) It was in the financial interests of the Plaintiff and each of the Group Members not to pay Conflicted Remuneration.
- (ii) It was in the financial interests of Suncorp for the Plaintiff and each of the Group Members to continue paying the Conflicted Remuneration.
- (iii) It was in the interests of Suncorp to maintain good relations with the members of the Suncorp Adviser Network and their authorised representatives in relation to the promotion and distribution of the Financial Products.
- (iv) It was in the interests of Suncorp to maintain good relations with the other financial services licensees and their authorised representatives in relation to the promotion and distribution of the Financial Products.
- (v) Summerhayes, the executive director of Suncorp, was a member of the boards of the entities within the Suncorp Adviser Network.

47 At the time of making the Grandfathering Decision and the Super Simplification Decision, Suncorp knew that there was an actual conflict between the interests of the Plaintiff and Group Members, on the one hand, and Suncorp's own interests and the interests of the members of the Suncorp Adviser Network and their authorised representatives, on the other hand.

### Particulars

- (i) Each of the Directors received, read and signed the Distribution Agreements, and was aware of the contents and in particular, the terms of clause 7.1; and
- (ii) the knowledge of the Directors is to be attributed to Suncorp by reason of the matters pleaded in paragraph 10(d) above.

- 48 Alternatively to paragraph 47 above, at the time of making the Grandfathering Decision and the Super Simplification Decision, Suncorp ought to have known each of the matters pleaded in paragraphs 47 above.

**Particulars**

The Plaintiff repeats the particulars to paragraph 47 above.

- 49 Suncorp contravened the covenant in s 52(2)(b) of the SIS Act to exercise the degree of care, skill and diligence that a prudent superannuation trustee would have exercised if they were the trustee of the Suncorp Funds:

- (a) in making the Grandfathering Decision; and

**Particulars**

- (i) A prudent superannuation trustee in the position of trustee of the Suncorp Funds would have identified the following considerations as relevant:
- (A) what were the amounts that the Plaintiff and each of the Group Members would pay if the Conflicted Remuneration Payments were continued;
  - (B) what were the benefits or services, if any, that the Plaintiff and each of the Group Members would receive in return for the continuation of the Conflicted Remuneration Payments;
  - (C) if there were any benefits or services that the Plaintiff and each of the Group Members would receive in return for the continuation of the Conflicted Remuneration Payments, what was their estimated value;
  - (D) whether, and to what extent, the financial impact to the Plaintiff and each of the Group Members would outweigh any benefits or services they would otherwise receive if the Conflicted Remuneration Payments were continued;
  - (E) whether, and to what extent, there was any conflict between the interests of the Plaintiff and each of the Group Members on the one hand and its own interests and the interests of the



members of the Suncorp Adviser Network and their authorised representatives on the other;

- (F) whether the financial interests of the Plaintiff and each of the Group Members would be adversely affected by any such conflict;
  - (G) whether priority would be given to the financial interests of the Plaintiff and each of the Group Members over the interests of Suncorp, members of the Suncorp Adviser Network and their authorised representatives; and/or
  - (H) whether the decision was only made for proper purposes.
- (ii) A prudent superannuation trustee in the position of trustee of the Suncorp Funds would have taken all reasonable steps to obtain relevant information and advice so as to:
- (A) ascertain the amounts that the Plaintiff and each of the Group Members would pay if the Conflicted Remuneration Payments were continued;
  - (B) ascertain whether there were any benefits or services that the Plaintiff and each of the Group Members would receive in return for the continuation of the Conflicted Remuneration Payments;
  - (C) ascertain the value of those benefits or services that the Plaintiff and each of the Group Members would receive in return for the continuation of the Conflicted Remuneration Payments;
  - (D) ascertain whether, and to what extent, the financial impact to the Plaintiff and each of the Group Members would outweigh any benefits or services they would otherwise receive if the Conflicted Remuneration Payments were continued;
  - (E) ascertain whether, and to what extent, there was any conflict between the financial interests of the Plaintiff and each of the Group Members on the one hand and its own interests and the interests of the members of the Suncorp Adviser Network and their authorised representatives on the other hand;

- (F) ensure that the financial interests of the Plaintiff and each of the Group Members would not be adversely affected by any such conflict;
  - (G) ensure that priority was given to the financial interests of the Plaintiff and each of the Group Members over the interests of Suncorp, members of the Suncorp Adviser Network and their authorised representatives; and/or
  - (H) ensure that the decision was only made for proper purposes.
- (iii) A prudent superannuation trustee in the position of trustee of the Suncorp Funds would have taken into account the following relevant considerations:
- (A) the amounts the Plaintiff and each of the Group Members would pay if the Conflicted Remuneration Payments were continued;
  - (B) the fact that no additional benefits or services would be received by the Plaintiff and each of the Group Members in return for the continuation of the Conflicted Remuneration Payments;
  - (C) the fact that it was in the financial interests of the Plaintiff and each of the Group Members for the Conflicted Remuneration Payments to cease;
  - (D) the fact that there was a significant conflict between the financial interests of the Plaintiff and each of the Group Members on the one hand and its own interests and the interests of the members of the Suncorp Adviser Network and their authorised representatives on the other;
  - (E) the fact that the financial interests of the Plaintiff and each of the Group Members were adversely affected by that conflict in a significant way;
  - (F) the fact that priority had not been given to the financial interests of the Plaintiff and each of the Group Members over the

interests of Suncorp, members of the Suncorp Adviser Network and their authorised representatives; and/or

- (G) the fact that the decision was made for an improper purpose, namely, to ensure that the Conflicted Remuneration Payments continued in circumstances where those payments were prohibited from 1 July 2013 onwards and the financial interests of the Plaintiff and each of the Group Members were adversely affected in a significant way by the conflict that existed between those interests on the one hand and the interests of Suncorp, the members of the Suncorp Adviser Network and their authorised representatives on the other (the **Improper Purpose**).
- (iv) By reason of the matters particularised in (i) to (iii) above, a prudent superannuation trustee in the position of trustee of the Suncorp Funds would not have:
- (A) made the Grandfathering Decision;
  - (B) executed the Distribution Agreements;
  - (C) continued to make the Conflicted Remuneration Payments; or
  - (D) continued to reimburse the Conflicted Remuneration Payments from members' funds.
- (b) in making the Super Simplification Decision.

#### **Particulars**

- (i) A prudent superannuation trustee in the position of trustee of the Suncorp Funds would have identified the following considerations as relevant:
  - (A) whether it was lawful under the FOFA amendments to the Corporations Act for the Conflicted Remuneration Payments to be continued;

- (B) what were the amounts that the Plaintiff and each of the Group Members would pay if the Conflicted Remuneration Payments were continued;
  - (C) what were the benefits or services, if any, that the Plaintiff and each of the Group Members would receive in return for the continuation of the Conflicted Remuneration Payments;
  - (D) if there were any benefits or services that the Plaintiff and each of the Group Members would receive in return for the continuation of the Conflicted Remuneration Payments, what was their estimated value;
  - (E) whether, and to what extent, the financial impact to the Plaintiff and each of the Group Members would outweigh any benefits or services they would otherwise receive if the Conflicted Remuneration Payments were continued;
  - (F) whether, and to what extent, there was any conflict between the interests of the Plaintiff and each of the Group Members on the one hand and its own interests and the interests of the members of the Suncorp Adviser Network and their authorised representatives on the other;
  - (G) whether the financial interests of the Plaintiff and each of the Group Members would be adversely affected by any such conflict;
  - (H) whether priority would be given to the financial interests of the Plaintiff and each of the Group Members over the interests of Suncorp, members of the Suncorp Adviser Network and their authorised representatives; and/or
  - (I) whether the decision was only made for proper purposes.
- (ii) A prudent superannuation trustee in the position of trustee of the Suncorp Funds would have taken all reasonable steps to obtain relevant information and advice so as to:

- (A) ascertain whether it was lawful under the FOFA amendments to the Corporations Act for the Conflicted Remuneration Payments to be continued;
- (B) ascertain the amounts that the Plaintiff and each of the Group Members would pay if the Conflicted Remuneration Payments were continued;
- (C) ascertain the benefits or services that the Plaintiff and each of the Group Members would receive in return for the continuation of the Conflicted Remuneration Payments;
- (D) ascertain the value of those benefits or services that the Plaintiff and each of the Group Members would receive in return for the continuation of the Conflicted Remuneration Payments;
- (E) ascertain whether, and to what extent, the financial impact to the Plaintiff and each of the Group Members would outweigh any benefits or services they would otherwise receive if the Conflicted Remuneration Payments were continued;
- (F) ascertain whether, and to what extent, there was any conflict between the financial interests of the Plaintiff and each of the Group Members on the one hand and its own interests and the interests of the members of the Suncorp Adviser Network and their authorised representatives on the other hand;
- (G) ensure that the financial interests of the Plaintiff and each of the Group Members would not be adversely affected by any such conflict;
- (H) ensure that priority was given to the financial interests of the Plaintiff and each of the Group Members over the interests of Suncorp, members of the Suncorp Adviser Network and their authorised representatives; and/or
- (I) ensure that the decision was only made for proper purposes.

- (iii) A prudent superannuation trustee in a position of trustee of the Suncorp Funds would have taken into account the following relevant considerations:
  - (A) it may have been unlawful under the FOFA amendments to the Corporations Act for the Conflicted Remuneration Payments to be continued;
  - (B) the amounts the Plaintiff and each of the Group Members would pay if the Conflicted Remuneration Payments were continued;
  - (C) the fact that no additional benefits or services would be received by the Plaintiff and each of the Group Members in return for the continuation of the Conflicted Remuneration Payments;
  - (D) the fact that it was in the financial interests of the Plaintiff and each of the Group Members for the Conflicted Remuneration Payments to cease;
  - (E) the fact that there was a significant actual conflict between the financial interests of the Plaintiff and each of the Group Members on the one hand and its own interests and the interests of the members of the Suncorp Adviser Network and their authorised representatives on the other;
  - (F) the fact that the financial interests of the Plaintiff and each of the Group Members were adversely affected by that conflict in a significant way;
  - (G) the fact that priority had not been given to the financial interests of the Plaintiff and each of the Group Members over the interests of Suncorp, members of the Suncorp Adviser Network and their authorised representatives; and/or
  - (H) the fact that the decision was made for an Improper Purpose.
- (iv) By reason of the matters particularised in (i) to (iii) above, a prudent superannuation trustee in the position of trustee of the Suncorp Funds would not have

- (A) continued to make the Conflicted Remuneration Payments; or
- (B) continued to reimburse the Conflicted Remuneration Payments from members' funds.

50 Suncorp contravened the covenant in s 52(2)(c) of the SIS Act to perform the trustee's duties and exercise its powers in the best interests of the members of the Suncorp Funds:

- (a) in making the Grandfathering Decision; and

**Particulars**

- (i) a prudent superannuation trustee in the position of trustee of the Suncorp Funds would have done the things set out in the particulars to subparagraph 49(a) above;
- (ii) a prudent superannuation trustee in the position of trustee of the Suncorp Funds would have done the things set out in the particulars to sub paragraph 51(a) below; and
- (iii) by reason of the matters particularised in (i) and (ii) above, a prudent superannuation trustee in the position of trustee of the Suncorp Funds would not have:
  - (A) made the Grandfathering Decision;
  - (B) executed the Distribution Agreements;
  - (C) continued to make the Conflicted Remuneration Payments; or
  - (D) continued to reimburse the Conflicted Remuneration Payments from members' funds.

- (b) in making the Super Simplification Decision.

**Particulars**

- (i) a prudent superannuation trustee in the position of trustee of the Suncorp Funds would have done the things set out in the particulars to subparagraph 49(b) above.

- (ii) a prudent superannuation trustee in the position of trustee of the Suncorp Funds would have done the things set out in the particulars to subparagraph 51(b) below; and
- (iii) by reason of the matters particularised in (i) to (ii) above, a prudent superannuation trustee in the position of trustee of the Suncorp Funds would not have:
  - (A) continued to make the Conflicted Remuneration Payments; or
  - (B) continued to reimburse the Conflicted Remuneration Payments from members' funds.

51 Suncorp contravened the covenant in s 52(2)(d) of the SIS Act to give priority to the interests of its members over the interests of itself and the members of the Suncorp Adviser Network and their authorised representatives in circumstances where there was a conflict between the interests of its members and the interests of Suncorp or the members of the Suncorp Adviser Network and their authorised representatives:

- (a) in making the Grandfathering Decision;

#### **Particulars**

- (i) A prudent superannuation trustee in the position of trustee of the Suncorp Funds would have identified:
  - (A) the amounts that the Plaintiff and each of the Group Members would pay if the Conflicted Remuneration Payments were continued;
  - (B) the benefits or services that the Plaintiff and each of the Group Members would receive in return for the continuation of the Conflicted Remuneration Payments;
  - (C) if there were any benefits or services that the Plaintiff and each of the Group Members would receive in return for the continuation of the Conflicted Remuneration Payments, what was their estimated value;
  - (D) the extent to which the financial impact to the Plaintiff and each of the Group Members would outweigh any benefits or services



they would otherwise receive if the Conflicted Remuneration Payments were continued;

- (E) the financial interests of the Plaintiff and each of the Group Members set out in paragraph 46(i) above;
  - (F) its financial interests set out in paragraph 46(ii) above;
  - (G) its interests set out in paragraph 46(iii) and 46(iv) above;
  - (H) whether, and to what extent, there was any conflict between the interests of the Plaintiff and each of the Group Members on the one hand and its own interests and the interests of the members of the Suncorp Adviser Network and their authorised representatives on the other;
  - (I) whether the financial interests of the Plaintiff and each of the Group Members would be adversely affected by any such conflict; and/or
  - (J) whether priority would be given to the financial interests of the Plaintiff and each of the Group Members over the interests of Suncorp, members of the Suncorp Adviser Network and their authorised representatives.
- (ii) A prudent superannuation trustee in the position of trustee of the Suncorp Funds would not have:
- (A) preferred its financial interests over the financial interests of the members of the Suncorp Funds; or
  - (B) preferred its interests over the financial interests of the members of the Suncorp Funds.
- (iii) By reason of the matters particularised in (i) to (ii) above, a prudent superannuation trustee in the position of trustee of the Suncorp Funds would not have:
- (A) made the Grandfathering Decision;
  - (B) executed the Distribution Agreements;

- (C) continued to make the Conflicted Remuneration Payments; or
  - (D) continued to reimburse the Conflicted Remuneration Payments from members' funds.
- (b) in making the Super Simplification Decision.

**Particulars**

- (i) A prudent superannuation trustee in the position of trustee of the Suncorp Funds would have identified:
  - (A) the amounts that the Plaintiff and each of the Group Members would pay if the Conflicted Remuneration Payments were continued;
  - (B) the benefits or services that the Plaintiff and each of the Group Members would receive in return for the continuation of the Conflicted Remuneration Payments;
  - (C) if there were any benefits or services that the Plaintiff and each of the Group Members would receive in return for the continuation of the Conflicted Remuneration Payments, what was their estimated value;
  - (D) the extent to which the financial impact to the Plaintiff and each of the Group Members would outweigh any benefits or services they would otherwise receive if the Conflicted Remuneration Payments were continued;
  - (E) the financial interests of the Plaintiff and each of the Group Members set out in paragraph 46(i) above;
  - (F) its financial interests set out in paragraph 46(ii) above;
  - (G) its interests set out in paragraph 46(iii) and 46(iv) above;
  - (H) whether, and to what extent, there was any conflict between the interests of the Plaintiff and each of the Group Members on the one hand and its own interests and the interests of the

members of the Suncorp Adviser Network and their authorised representatives on the other;

- (I) whether the financial interests of the Plaintiff and each of the Group Members would be adversely affected by any such conflict; and/or
  - (J) whether priority would be given to the financial interests of the Plaintiff and each of the Group Members over the interests of Suncorp, members of the Suncorp Adviser Network and their authorised representatives.
- (ii) A prudent superannuation trust in the position of trustee of the Suncorp Funds would not have:
- (A) preferred its financial interests over the financial interests of the members of the Suncorp Funds; or
  - (B) preferred its interests over the financial interests of the members of the Suncorp Funds.
- (iii) By reason of the matters particularised in (i) to (ii) above, a prudent superannuation trustee in the position of trustee of the Suncorp Funds would not have:
- (A) continued to make the Conflicted Remuneration Payments; or
  - (B) continued to reimburse the Conflicted Remuneration Payments from members' funds.

**F Loss or Damage**

52 Had Suncorp complied with its Statutory Covenants in making the Grandfathering Decision, Suncorp would not have:

- (a) made the Grandfathering Decision;
- (b) entered into the Distribution Agreements;
- (c) made the Conflicted Remuneration Payments referred to in paragraph 38 above under the Distribution Agreements to financial services licensees or

their authorised representatives in relation to the Suncorp Funds from 1 July 2013 onwards; or

- (d) reimbursed Suncorp Financial or, alternatively, Suncorp and Suncorp Life of each of the Conflicted Remuneration Payments referred to in paragraph 39 above from members' funds from 1 July 2013 onwards.

53 By reason of the contraventions by Suncorp of its Statutory Covenants in making the Grandfathering Decision, the Plaintiff and each Group Member has suffered loss or damage.

### **Particulars**

If Suncorp had not made the Grandfathering Decision, Suncorp would not have:

- (i) made the Conflicted Remuneration Payments referred to in paragraph 38 above under the Distribution Agreements from 1 July 2013 onwards; or
- (ii) reimbursed the Conflicted Remuneration Payments referred to in paragraph 39 above from members' funds from 1 July 2013 onwards

54 Further or in the alternative to the allegations in paragraph 52 and 53 above, had Suncorp complied with its Statutory Covenants in making the Super Simplification Decision, Suncorp would not have:

- (a) made the Conflicted Remuneration Payments referred to in paragraph 44 above to financial advisers or their authorised representatives in relation to the Suncorp Funds from 1 August 2016 onwards; or
- (b) reimbursed Suncorp Financial or, alternatively, Suncorp and Suncorp Life of each of the Conflicted Remuneration Payments referred to in paragraph 45 from members' funds which had been transferred into the New Superannuation Funds from 1 August 2016 onwards.

55 By reason of the contraventions by Suncorp of its Statutory Covenants in making the Super Simplification Decision, the Plaintiff and each Group Member has suffered loss or damage.

### Particulars

If Suncorp had not made the Super Simplification Decision, Suncorp would not have:

- (i) made the Conflicted Remuneration Payments referred to in paragraph 44 above from 1 August 2016 onwards; or
- (ii) reimbursed of the Conflicted Remuneration Payments referred to in paragraph 45 above from members funds which had been transferred into the New Superannuation Funds from 1 August 2016 onwards.

56 By reason of the matters pleaded in paragraphs 52 to 55 above, Suncorp is liable to compensate the Plaintiff and each of the Group Members for the loss or damage referred to in paragraphs 53 and 55 above.

### Particulars

SIS Act, s 55(3).

## G Involvement

57 Each of the Directors knew, at the time of the making of the Grandfathering Decision:

- (a) the matters pleaded in paragraphs 25 to 28 above;

### Particulars

The knowledge of each of the Directors can be inferred from:

- (i) their positions as Directors of Suncorp; and
  - (ii) their roles as senior employees of Suncorp Group and Suncorp Life.
- (b) the matters pleaded in paragraphs 34 to 39 and 46 above.

### Particulars

- (i) Each of the Directors received, read and signed the Distribution Agreements, and was aware of their contents and in particular the terms of cl 7.1.

- (ii) Each of the Directors knew the FOFA amendments to the Corporations Act which commenced on 1 July 2012 and became mandatory on and after 1 July 2013.
- (iii) Further to particulars (i) and (ii) above, the knowledge of each of the Directors can be inferred from:
  - (A) their positions as Directors of Suncorp; and
  - (B) their roles as senior employees of Suncorp Group and Suncorp Life.

58 Each of the Directors was responsible for:

- (a) making the Grandfathering Decision; and
- (b) executing the Distribution Agreements.

59 By reason of the matters pleaded in paragraph 58, each of the Directors:

- (a) authorised, or participated in authorising the making of the Grandfathering Decision;
- (b) authorised, or participated in authorising the execution of, the Distribution Agreements;
- (c) executed the Distribution Agreements;
- (d) authorised, or participated in authorising the making of the Conflicted Remuneration Payments referred to in paragraph 38 above under the Distribution Agreements to financial services licensees or their authorised representatives from 1 July 2013 onwards; and
- (e) authorised, or participated in authorising the reimbursement of the Conflicted Remuneration Payments referred to in paragraph 39 above from the members' funds from 1 July 2013 onwards.

60 The Plaintiff repeats paragraph 52 above.

61 By reason of the matters pleaded in 57 to 60 above, each of the Directors was involved within the meaning of section 55(3) of the SIS Act in the contraventions in paragraphs 49(a), 50(a) and 51(a) above.

62 By reason of the matters pleaded in paragraphs 57 to 61 above, each of the Directors is liable to compensate the Plaintiff and each of the Group Members for the loss or damage pleaded in paragraphs 53 and 55 above.

**Particulars**

SIS Act, s 55(3).

**H Relief claimed**

63 The Plaintiff claims for himself and on behalf of each of the Group Members the relief set out in the accompanying Summons.

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

Nil

**E. STATEMENT AS TO MEDIATION**

The Plaintiff is willing to participate in a mediation at an appropriate time.

**SIGNATURE**

Signature of legal representative



Solicitor

Capacity

Date of signature

21 June 2019