

FURTHER 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	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	Geoffrey Edward Summerhayes , Second Defendant
Filed in relation to	Plaintiff's Amended Commercial List Statement
Legal representative	Jonathan Milner, Arnold Bloch Leibler
Legal representative reference	021911271
Contact names and telephone	Jonathan Milner (02) 9226 7237
Contact emails	jmilner@abl.com.au

A. NATURE OF DISPUTE

1. Unless indicated otherwise, the Second Defendant (**Summerhayes**) adopts in this Further Amended Commercial List Response (FACLR) the definitions in the Plaintiff's Further Amended Commercial List Statement filed on 9 November 20~~December 2021~~¹⁴⁹ (**FACLS**). 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.

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 Further Amended Commercial List Responses.

C. SECOND DEFENDANT'S RESPONSES TO PLAINTIFF'S CONTENTIONS

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

A Parties

1. In response to paragraph 1, Summerhayes refers to and repeats paragraph 3 of the FACLR below and otherwise does not admit the paragraph.
2. In response to paragraph 2, Summerhayes:
 - (a) admits that the Plaintiff at all material times since at least 30 June 2008 has been a member of a superannuation fund, of which 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) otherwise denies the paragraph.

3. In response to paragraph 3, Summerhayes:

(a) says that he does not adopt the defined term 'Conflicted Remuneration' for the purposes of this FACL_R. 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 persons whose accounts were "affected by the payment of Advisor Remuneration" to Financial Services Licensees in the period 1 July 2013 to 21 June 2019, inclusive, for reasons other than the conduct alleged against Suncorp and the Directors in the FACL_S, 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) says that amendments made to the definition of 'Group Members' in the FACL_S 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 FACL_S; and

(d) otherwise denies the paragraph.

3A. Summerhayes acknowledges paragraph 3A and adopts the qualification therein of the definition of Group Members in this FACL_R, with the additional qualification that references to 'Group Member' in paragraphs of this FACL_R which respond to the paragraphs of the FACL_S enumerated in paragraph 3A are also references to any deceased member referred to at paragraph 3(c) of the FACL_S or any member of the Master Trust who has a spouse of the kind referred to in paragraph 3(d) of the FACL_S.

4. In response to paragraph 4, Summerhayes:

(a) admits sub-paragraph 4(a);

- (b) admits sub-paragraph 4(b);
 - (c) admits sub-paragraph 4(c);
 - (d) admits sub-paragraph 4(d);
 - (e) in response to sub-paragraph 4(e):
 - (i) admits that 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 FACLR below;
 - (f) in response to sub-paragraph 4(f):
 - (i) admits that 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 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.
6. In response to paragraph 6, Summerhayes:
- (a) admits sub-paragraph 6(a);
 - (b) in relation to sub-paragraph 6(b), admits that Suncorp Life provided administrative services to Suncorp;
 - (c) admits sub-paragraph 6(c); and

(d) otherwise denies the 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 FACLR, he uses the term 'Guardian' to refer only to GuardianFP Limited (ACN 003 677 334);
 - (f) says further that, where this FACLR pleads in response to any pleading which uses the defined term 'Guardian', that pleading does not include admissions in respect of Guardian Financial Planning Pty Limited (ACN 000 036 626), and hereby denies all allegations made in the FACLS in respect to Guardian Financial Planning Pty Limited (ACN 000 036 626); and
 - (g) otherwise denies the paragraph.
8. Summerhayes admits paragraph 8.
9. Summerhayes admits paragraph 9:
10. In response to paragraph 10, Summerhayes:
- (a) 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) admits sub-paragraph 10(b);
 - (c) 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) 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 FACLS 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. Summerhayes admits paragraph 12.
- 13. Not used as paragraph 13 is intentionally left blank.
- 14. Not used as paragraph 14 is intentionally left blank.
- 14A. In response to Paragraph 14A, Summerhayes:
 - (a) refers to and repeats paragraphs 8, 15 and 40 of this FACLR;
 - (b) admits sub-paragraph 14A(f), except to the extent that it is now alleged that a person who was an existing member of the Master Trust who moved from a Division, Sub-Division or Plan of the Master Trust to a different Division, Sub-

Division or Plan of the Master Trust was thereby issued a financial product or provided a financial service; and

(c) 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. Summerhayes admits paragraph 15.

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) refers to and repeats paragraphs 3 and 3A of the FACLR above;

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

(c) says that Suncorp's covenants to:

(i) 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 Ggroup Mmembers except to the extent and for the periods during which the Plaintiff and each Ggroup Mmember was a member of the Master Trust; and

(ii) act fairly in dealing with classes of beneficiaries within the entity and to act fairly in dealing with beneficiaries within a class were covenants to do those things in relation to existing members of the Master Trust, and did not extend to the Plaintiff and Group Members except to the

extent and for the periods during which the Plaintiff and each Group Member was a member of the Master Trust.

B.3 Equitable and legal duties

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

- (a) refers to and repeats paragraph 3 of the FACLR 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) otherwise denies the paragraph.

20. In response to paragraph 20, Summerhayes:

- (a) refers to and repeats sub-paragraph 3(a) of the FACLR above and, subject thereto, acknowledges the definitions adopted by the Plaintiff in paragraph 20 of the FACLS; and
- (b) further says, for the avoidance of doubt, to the extent that it pleads in response to any allegation which uses the term 'Conflicted Remuneration', that pleading

does not include an admission or concession that conflicted remuneration, within the meaning of the Corporations Act was paid, or was paid in circumstances prohibited by Part 7.7A of the Corporations Act (or at all); and

- (c) otherwise does not admit the paragraph.

Particulars

A benefit will not constitute 'conflicted remuneration' in the meaning of the Corporations Act in circumstances where, for example, Division 4 of Part 7.7A of the Corporations Act does not apply to the benefit, or s 963B(1) of the Corporations Act applies to the benefit.

- 20A. Summerhayes denies paragraph 20A.
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, including, without being exhaustive, because they do not account for the operation of s 963B of the Corporations Act and do not account for all of the regulations contained in Chapter 7, Part 7.7A, Division 4 of the Corporations Regulations from time to time.
22. Not used as paragraph 22 is intentionally left blank.
23. [Intentionally left blank].
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. 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 EACL R;
- (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(a) of the EACL R 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.:

26A. Summerhayes admits paragraph 26A.

27. In response to paragraph 27, Summerhayes:

- (a) 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 ongoing payment of commission in respect of those members following 1 July 2013 (**Existing Arrangements**);

- (b) says that the Existing Arrangements could be constituted by, among other things, contracts, agreements, understandings, schemes or other arrangements (as existing from time to time):
 - (i) whether formal or informal, or partly formal and partly informal;
 - (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. Not used as paragraph 28 is intentionally left blank.
29. In response to paragraph 29, Summerhayes:
- (a) refers to and repeats paragraph 278 of the FACLR above;
 - (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 FACLR, 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 FACLR 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 FACLR 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 FACLR 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) 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 FACLS; and
 - (b) otherwise denies the paragraph.

33. In response to paragraph 33, Summerhayes:
- (a) admits sub-paragraph 33(a);
 - (b) in response to sub-paragraph 33(b):
 - (i) refers to and repeats paragraph 27 of the FACLR 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), says that the final decisions by the Directors to execute the Distribution Agreements occurred at the time that each of the Distribution Agreements was executed, on or about 27 June 2013;
 - (b) in response to sub-paragraph 34(b), denies that SPSL entered the Suncorp Financial Distribution Agreement in its capacity as the trustee of the Master Trust as pleaded in paragraph 5 of the FACLS, but otherwise admits sub-paragraph 34(b);
 - (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 FACLR above; and
 - (d) otherwise denies the 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 their full force and effect.
37. In response to paragraph 37, Summerhayes:

- (a) says that the final decisions by each of the Directors to execute the Distribution Agreements occurred at the time that each of the Distribution Agreements was executed, on or about 27 June 2013;
- (b) 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 FACLS; and
- (c) refers to and relies upon the terms of the Guardian Distribution Agreement and Standard Pacific Distribution Agreement for their full force and effect; and
- (d) otherwise denies the paragraph.

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. Summerhayes admits paragraph 38.

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

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. [Intentionally left blank]

41A. [intentionally left blank]

42. [Intentionally left blank]

43. [Intentionally left blank]

44. [Intentionally left blank]

45. [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 EACL_R above; and
- (b) otherwise denies paragraphs 46 to 51C.

- 47. [Intentionally left blank]
- 48. [Intentionally left blank]
- 49. [Intentionally left blank]
- 50. [Intentionally left blank]
- 51. [Intentionally left blank]
- 51A. [Intentionally left blank]
- 51B. [Intentionally left blank]
- 51C. [Intentionally left blank]

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 FACLR; and
- (c) otherwise denies the paragraph.

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

- (a) refers to and repeats paragraph 40 of the FACLR 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 FACLR above.

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

- (a) refers to and repeats paragraph 40 of the FACLR 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 FACLR above; and
- (b) otherwise denies the paragraph.

G. Loss or Damage

52. Summerhayes denies paragraph 52.

52A. In response to paragraph 52A, Summerhayes:

- (a) admits that the Plaintiff and each Group Member who is or has been a member of the Master Trust has from time to time had a beneficial interest in the Master Trust, but that the nature of such interest is or was contingent on particular events and circumstances personal to individual members;
- (b) in respect of the Plaintiff:
 - (i) admits that, from 11 January 2020, the Plaintiff had unrestricted non-preserved benefits in the meaning of the SIS Regulations in the Master Trust;
 - (ii) says that the quantum of those benefits at any given time was subject, inter alia, to the charging of costs against such benefits pursuant to SIS Regulations r 5.02;
 - (iii) admits that, from 11 January 2020, the Plaintiff was entitled to payment of those benefits in accordance with ss 31-34 of the SIS Act and Part 6 of the SIS Regulations and subject, inter alia, to the charging of costs against such benefits pursuant to SIS Regulations r 5.02; and

- (iv) admits that from 11 January 2020, the Plaintiff's interest in the Master Trust has been an equitable proprietary interest in a share of the assets of the Master Trust, such share to be determined in accordance with the governing rules of the Master Trust, the SIS Act and the SIS Regulations;
- (c) denies that any member of the Master Trust had any interest (including any proprietary interest) in any individual piece of trust property, or any identifiable portion of the Master Trust, or any immediate right to payment in respect of preserved or restricted non-preserved benefits;
- (d) says further that any interest in respect of any benefits was subject to the governing rules of the Master Trust, the SIS Act and the SIS Regulations; and
- (e) otherwise denies the paragraph.
53. In response to paragraph 53, Summerhayes:
- (a) refers to and repeats paragraph 40 of the FACLR above; and
- (b) otherwise denies the paragraph.
54. In response to paragraph 54, Summerhayes refers to and repeats paragraph 40 of the FACLR 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 of the FACLR above; and
- (b) otherwise denies the paragraph.
- 55A. In the premises of paragraphs 1 to 55 above, Summerhayes denies paragraph 55A.
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 FACLS), 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.

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

56C. Summerhayes does not admit paragraph 56C as that paragraph does not make any allegations against him.

H. Involvement

57. In response to paragraph 57, Summerhayes:

- (a) denies sub-paragraph 57(a);
- (b) except as otherwise pleaded in paragraphs 34 to 39C and 46 of the FACLR 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. Not used as paragraph 58 is intentionally left blank.

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) denies sub-paragraph 59(d);
- (e) denies 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 FACLR above.

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

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

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

J. Exemption, indemnity, and circuity of action

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

Particulars

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 in respect of any liability incurred while acting as a director of SPSL as the Trustee of the Master Trust.

Particulars

Trust Deed, cl 3.8.

SIS Act, s 57.

67. The relief claimed in the FACLS 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 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 FACLS.
69. Alternatively, Summerhayes is entitled to be indemnified from the Master Trust in respect of any liability that might be established upon the allegations in the FACLS.
70. Summerhayes' right to be indemnified from the Master Trust in respect of any liability that might be established upon the allegations in the FACLS 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, 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 FACLS 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 FACLS; 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 FACLS (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

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 FACLS.

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 FACLS 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 FACLS, 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 FACLS 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 FACLS, 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 FACLS was given on 16 December 2019.

The AS and FACLS were filed on 20 December 2019.

Summerhayes refers to and repeats sub-paragraph 3(c) of the FACLR 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 FACLS 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 FACLS (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 FACLR 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 FACLS 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 FACLS (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 FACLR 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 FACLS 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 FACLS, 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 FACLR 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 FACLS 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 FACLS, 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 FACLR 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 FACLS 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 FACLS (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 FACLR 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 FACLS 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 FACLS (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 FACLR 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 FACLS 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 FACLS, 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 FACLR 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 FACLS 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 FACLS, 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 FACLR 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 FACLS 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 FACLS (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 FACLR 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 FACLS 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 FACLS (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 FACLR 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 FACLS 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 FACLS, 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 FACLR 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 FACLS 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 FACLS, 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 FACLR 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 FACLS 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 FACLS (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 FACLR 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 FACLS 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 FACLS (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 FACLR 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

3 December 2021