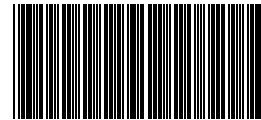




Filed: 13 September 2019 3:29 PM



D00016KE7Y

Commercial List Response

COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	Commercial
Registry	Supreme Court Sydney
Case number	2019/00193556

TITLE OF PROCEEDINGS

First 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
Number of Defendants	3

FILING DETAILS

Filed for	Geoffrey Edward Summerhayes, Defendant 2
Legal representative	Jonathan Milner
Legal representative reference	
Telephone	02 9226 7237
Your reference	021911271

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Commercial List Response (Commercial List Response.pdf)

[attach.]

Practice Note No. SC Eq. 3

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 Commercial List Statement
Legal representative	Jonathan Milner, Arnold Bloch Leibler
Legal representative reference	021911271
Contact names and telephone	Jonathan Milner (02) 9226 7237 Liam Cavell (02) 9226 7292
Contact emails	jmilner@abl.com.au lcavell@abl.com.au

A. NATURE OF DISPUTE

Unless indicated otherwise, the Second Defendant (**Summerhayes**) adopts in this Commercial List Response (**CLR**) the definitions in the Plaintiff's Commercial List Statement filed on 21 June 2019 (**CLS**). He does so only for convenience and without admission of any matter that the Plaintiff might allege by those definitions.

1. 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.
2. The Plaintiff's claim with respect to "Grandfathering" is premised upon misapprehensions as to the relevant factual circumstances and the application of both the SIS Act and the FOFA legislation to the affairs of the Master Trust, including but not limited to:
 - (a) an erroneous construction of the conflicted remuneration provisions contained within Division 4 of Part 7.7A of the *Corporations Act 2001* (Cth) (**Corporations Act**);
 - (b) lack of clarity as to whether the Plaintiff alleges that the First Defendant (**SPSL**) was or was not a platform operator. If (which is not admitted) it was not a platform operator, SPSL is entitled to the benefit of s 1528(1) of the Corporations Act. If SPSL was a platform operator, it is entitled to the benefit of s 1528(2) of the Corporations Act and regulation 7.7A.16 of the Corporations Regulations 2001 (Cth) (**Corporations Regulations**);
 - (c) misconceptions as to the purpose and effect of entry into the Distribution Agreements by SPSL;
 - (d) a misconception that commissions paid in respect of persons who were members of the Master Trust as at 20 June 2013 were not paid pursuant to "arrangements" for the purposes of s 1528 of the Corporations Act (or otherwise); and
 - (e) overlooking the fact that commissions would only be paid in respect of persons who first invested into the Master Trust during the period from 1 July 2013 to

31 June 2014 if those persons chose to enter into an arrangement under which commissions were payable.

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

B. ISSUES LIKELY TO ARISE

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

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

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

A Parties

1. In response to paragraph 1, Summerhayes repeats paragraph 3 of the CLR below and otherwise does not admit the paragraph.
2. In response to paragraph 2, Summerhayes:
 - (a) repeats paragraph 4(e) of the CLR below;
 - (b) says that, at all material times from 5 August 2013, the Plaintiff has been a member of only one superannuation fund of which SPSL was trustee, being the Master Trust; and

Particulars

Letter from SPSL to the Plaintiff dated 6 August 2013.

- (c) otherwise denies the paragraph.
3. In response to paragraph 3, Summerhayes:
 - (a) says that the definition of Group Members is imprecise and embarrassing;

- (b) says that, to the extent the definition of Group Members encompasses persons whose accounts were “affected by the payment of Conflicted Remuneration” by matters or for reasons other than the wrongful conduct alleged against SPSL and the Directors in the CLS, such persons are not persons on whose behalf this proceeding has been validly commenced as a representative proceeding pursuant to Part 10 of the *Civil Procedure Act 2005* (NSW);

Particulars

Civil Procedure Act 2005 (NSW), ss 157 and 161.

- (c) refers to paragraphs 11 and 12 of the CLR below and responds to the remainder of the CLS on the basis that the Group Members do not include the persons referred to in paragraph 3(b) above; and
 - (d) otherwise denies the paragraph.
4. In response to paragraph 4, Summerhayes:
- (a) admits sub-paragraph 4(a);
 - (b) admits sub-paragraph 4(b);
 - (c) in response to sub-paragraph 4(c):
 - (i) denies the sub-paragraph;
 - (ii) says that the AFSL number stated at paragraph 4(c) is that of Colonial First State Investments Limited; and

Particulars

AFSL of Colonial First State Investments Limited.

- (iii) says that SPSL is the holder of an AFSL numbered 237905;
- (d) admits sub-paragraph 4(d);
- (e) in response to sub-paragraph 4(e):
 - (i) admits that SPSL was at all material times, and is, the trustee of the Master Trust; and

- (ii) refers to and repeats paragraph 15 of the CLR below;
 - (f) in response to sub-paragraph 4(f):
 - (i) admits that SPSL was at all material times, and is, carrying on the business of acting as a trustee of registerable superannuation entities; and
 - (ii) otherwise denies the sub-paragraph;
 - (g) admits sub-paragraph 4(g);
 - (h) admits sub-paragraph 4(h);
 - (i) admits sub-paragraph 4(i); and
 - (j) otherwise denies the paragraph.
5. Summerhayes acknowledges paragraph 5 and says further that, unless context otherwise requires, each reference to SPSL in this CLR is to be read as a reference to SPSL in its capacity as the trustee of the Master Trust.
6. In response to paragraph 6, Summerhayes:
- (a) admits sub-paragraph 6(a);
 - (b) denies sub-paragraph 6(b) and says that Suncorp Life provided administrative services to SPSL as trustee of the Master Trust; and
 - (c) admits sub-paragraph 6(c).
7. Summerhayes admits paragraph 7.
8. In response to paragraph 8, Summerhayes:
- (a) admits that, at all material times, SPSL was, and is, the issuer of superannuation interests in the Master Trust, which are financial products for the purposes of the Corporations Act (**Relevant Financial Products**); and
 - (b) otherwise does not admit the paragraph and says it is embarrassing since no other "Financial Products" are identified in the CLS.
9. In response to paragraph 9, Summerhayes:
- (a) repeats paragraph 8 of the CLR above;

- (b) admits that the Relevant Financial Products were distributed by members of the Suncorp Adviser Network and other Financial Services Licensees; and
- (c) otherwise denies the paragraph.

10. In response to paragraph 10, Summerhayes:

- (a) says that he was a director of SPSL from 30 June 2008 to 30 September 2015, and Carroll was a director of SPSL from 17 December 2012 to 16 April 2014;
- (b) says that Duncan was the Executive Manager Superannuation, Product and Portfolio Management at SPSL from 28 February 2014 to 3 October 2015;
- (c) does not admit sub-paragraph 10(c) because “the conduct” is not specified or limited in any way;
- (d) does not admit sub-paragraph 10(d) because “the knowledge” is not specified or limited in any way; and
- (e) otherwise denies the paragraph.

B. Background

11. Summerhayes admits paragraph 11.

12. In response to paragraph 12, Summerhayes:

- (a) says that, at all material times:
 - (i) SPSL was the issuer of superannuation interests in the Master Trust;
 - (ii) the Master Trust was a regulated superannuation fund within the meaning of s 19(1) of the SIS Act and thus a registrable superannuation entity within the meaning of s 10(1) of the SIS Act; and
- (b) otherwise denies the paragraph.

13. In response to paragraph 13, Summerhayes:

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

Particulars

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

- (b) says that the relative proportion of funds under management within the Master Trust that were the subject of administration by Suncorp Life and SPSL has changed over time from approximately 55% (SPSL), 45% (Suncorp Life) to 92% (SPSL), 8% (Suncorp Life); and
 - (c) otherwise denies the paragraph.
14. In response to paragraph 14, Summerhayes:
- (a) admits that the Plaintiff and Group Members became members of the Master Trust through one of the methods described in sub-paragraphs 14(a), 14(b) or 14(c);
 - (b) refers to and repeats paragraph 15 of the CLR below; and
 - (c) otherwise denies the paragraph.
15. In response to paragraph 15, Summerhayes:
- (a) repeats paragraph 4(e)(i) of the CLR above;
 - (b) says that the descriptors given at sub-paragraphs 15(a) to 15(bb) are not of distinct superannuation funds, but are of offers available within five divisions of the Master Trust as at 24 March 2016; and
 - (c) otherwise denies the paragraph.
16. Summerhayes denies paragraph 16.
- B.2 SIS Act**
17. Summerhayes admits paragraph 17.
18. In response to paragraph 18, Summerhayes:
- (a) does not admit sub-paragraph 18(a) and relies upon the terms of ss 52(1) and 52(2)(b) of the SIS Act for their full force and effect;

- (b) denies sub-paragraph 18(b) and relies upon the terms of s 52(2)(c) of the SIS Act for their full force and effect;
- (c) does not admit sub-paragraph 18(c) and relies upon the terms of s 52(2)(d) of the SIS Act for their full force and effect; and
- (a) says further that the covenants contained in the Master Trust Deed pursuant to s 52(1) of the SIS Act only obliged SPSSL to act in the interests of the Plaintiff and each Group Member during the periods when the Plaintiff and that Group Member was a member of the Master Trust.

B.3 FOFA

19. In response to paragraph 19, Summerhayes:

- (a) admits that Schedule 1 to the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth) commenced on 1 July 2012;
- (b) admits that Schedule 1 to the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) commenced on 1 July 2012; and
- (c) says that the phrase “compliance with those amendments became mandatory” is embarrassing and under cover of that objection otherwise denies the paragraph.

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

21. In response to paragraph 21, Summerhayes:

- (a) repeats paragraph 20 of the CLR above and paragraph 24 of the CLR below; and
- (a) denies the paragraph.

22. In response to paragraph 22, Summerhayes:

- (a) repeats paragraph 20 of the CLR above and paragraph 24 of the CLR below; and
- (b) denies the paragraph.

23. In response to paragraph 23, Summerhayes:
- (a) repeats paragraph 20 of the CLR above and paragraph 24 of the CLR below; and
 - (b) denies the paragraph.
24. Summerhayes repeats paragraph 20 of the CLR above and denies paragraph 24.

C. Grandfathering

25. In response to paragraph 25, Summerhayes:
- (a) says that, prior to 1 July 2013, benefits provided to financial services licensees were not benefits within the meaning of s 963A of the Corporations Act and Division 4 (Conflicted remuneration) of Part 7.7A of the Corporations Act did not apply in respect of those benefits; and

Particulars

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

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

- (b) repeats sub-paragraph 27(b) of the CLR below; and
 - (c) denies the paragraph.
26. In response to paragraph 26, Summerhayes:
- (a) repeats paragraphs 16 and 25 of the CLR above, and sub-paragraph 27(b) of the CLR below; and
 - (b) denies the paragraph.
27. In response to paragraph 27, Summerhayes:
- (a) refers to and repeats paragraphs 25 and 26 of the CLR above;
 - (b) says that prior to 20 June 2013, there were in place arrangements within the meaning of s 1528 of the Corporations Act (or otherwise) for the payment of commission in respect of persons who were then members of the Master Trust, including for ongoing payments of commission in respect of those members after 1 July 2013 (**Existing Arrangements**); and

- (c) denies the paragraph.
28. In response to paragraph 28, Summerhayes:
- (a) repeats paragraphs 20 to 25 and 27 of the CLR above and paragraphs 30 to 39 of the CLR below; and
 - (b) denies the paragraph.
29. In response to paragraph 29, Summerhayes:
- (a) refers to and repeats paragraph 28 of the CLR above; and
 - (b) denies the paragraph.
30. Summerhayes admits paragraph 30.
31. Summerhayes denies paragraph 31.
32. In response to paragraph 32, Summerhayes:
- (a) repeats paragraph 27 of the CLR above;
 - (b) says that the Distribution Agreements did not alter the substance of the Existing Arrangements;
 - (c) says that the Distribution Agreements were not required in order lawfully to continue paying commissions in respect of persons who were or became members of the Master Trust before 1 July 2013; and
 - (d) denies the paragraph.
33. In response to paragraph 33, Summerhayes:
- (a) admits sub-paragraph 33(a); and
 - (b) in response to sub-paragraph 33(b):
 - (i) refers to and repeats paragraph 27 of the CLR above; and
 - (ii) denies the sub-paragraph.
34. In response to paragraph 34, Summerhayes:
- (a) in response to sub-paragraph 34(a):

- (i) says that each of the Distribution Agreements was executed on or about 27 June 2013;
 - (ii) says that the final decisions by the Directors to execute the Distribution Agreements occurred at or about the time that each of the Distribution Agreements was executed; and
 - (iii) otherwise denies the sub-paragraph; and
- (b) in response to paragraph 34(b):
- (i) refers to and repeats paragraphs 16, 20 and 32(c) above; and
 - (ii) otherwise denies the sub-paragraph.
35. Summerhayes admits paragraph 35.
36. Summerhayes does not admit paragraph 36 and relies on cl 7.1 of the Suncorp Financial Distribution Agreement for its full force and effect.
37. In response to paragraph 37, Summerhayes:
- (a) admits sub-paragraph 37(a); and
 - (a) refers to and relies upon the terms of the Distribution Agreement between SPSL, Suncorp Life and Standard Pacific for their full force and effect, and otherwise denies paragraph 37(b).
38. In response to paragraph 38, Summerhayes:
- (a) refers to paragraphs 20 and 27 of the CLR above; and
 - (b) denies the paragraph.

Particulars

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

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

39. In response to paragraph 39, Summerhayes:
- (a) refers to and repeats paragraphs 16 and 38 of the CLR above; and
 - (b) denies the paragraph.

D. SSP

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

41. [Not used]

42. [Not used]

43. [Not used]

44. [Not used]

45. [Not used]

E. Contraventions

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

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

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

47. [Not used]

48. [Not used]

49. [Not used]

50. [Not used]

51. [Not used]

F. Loss or Damage

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

53. Summerhayes denies paragraph 53.

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

55. In response to paragraph 55, Summerhayes refers to and repeats paragraph 40 of the CLR above and in the premises does not admit the paragraph.

56. Summerhayes denies paragraph 56.

G. Involvement

57. In response to paragraph 57, Summerhayes:

- (a) denies sub-paragraph 57(a);
- (b) except as otherwise pleaded in paragraphs 34 to 37 of the CLR above, denies sub-paragraph 57(b).

58. In response to paragraph 58, Summerhayes:

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

59. In response to paragraph 59, Summerhayes:

- (a) denies sub-paragraph 59(a);
- (b) denies sub-paragraph 59(b);
- (c) admits sub-paragraph 59(c);
- (d) in response to paragraph 59(d):
 - (i) refers to paragraph 38 of the CLR above; and
 - (ii) denies the sub-paragraph; and
- (e) in response to paragraph 59(e):
 - (i) refers to paragraph 39 of the CLR above; and
 - (ii) denies the sub-paragraph.

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

61. Summerhayes denies paragraph 61.

62. Summerhayes denies paragraph 62.

H. Relief claimed

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

I. Exemption, indemnity, and circuity of action

64. In answer to the whole of the CLS and the whole of the relief claimed against him, Summerhayes says as follows in paragraphs 65 to 70 of the CLR 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 Fund.

Particulars

Clause 3.8 of the Master Fund

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

Particulars

Clause 3.8 of the Master Fund

Section 57 of the SIS Act

67. The relief claimed in the CLS against Summerhayes would, if established (which is denied), be a liability incurred by him while acting as a director of SPSL within the meaning of cl 3.8 of the Master Fund.

68. In the premises, Summerhayes is exempt from any liability that might otherwise be capable of being established upon the allegations in the CLS.

69. Alternatively, Summerhayes is entitled to be indemnified from the Fund in respect of any liability that might be established upon the allegations in the CLS.
70. Summerhayes' right to be indemnified from the Fund in respect of any liability that might be established upon the allegations in the CLS, 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 Fund, rather than an order for payment to the plaintiff and Group Members (or their litigation funder).

71. In further answer to the whole of the CLS 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 CLS; 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 CLS (which liability is denied), then he ought to be relieved either wholly or partly from the liability on such terms as the Court thinks fit.

Particulars

Section 310 of the SIS Act

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

13 September 2019