



Federal Court of Australia

District Registry: Western Australia

Division: General

No: WAD 613/2019

AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION

Plaintiff

THETA ASSET MANAGEMENT LIMITED (ACN 071 807 684) and another named in
the schedule

Defendants

ORDER

JUDGE: JUSTICE MCKERRACHER

DATE OF ORDER: 19 November 2020

WHERE MADE: Perth

**IN RELATION TO THE FIRST DEFENDANT, THETA ASSET MANAGEMENT LIMITED
(IN LIQUIDATION), THE COURT DECLARES THAT:**

1. Pursuant to section 1317E(1) of the *Corporations Act 2001* (Cth) (**the Act**) the first defendant, Theta Asset Management Limited (in liquidation), contravened sub-section 601FC(1)(b) of the Act in issuing the Development Units Product Disclosure Statement (**PDS**) in that it was defective within the meaning of section 1022A of the Act in that it contained a misleading or deceptive statement to the effect that the distributions from the Sterling Income Trust (ARSN 158 828 105) (**SIT**) would be sufficient to enable investors, being retirees and seniors, who had entered into a Sterling New Life Lease (**SNLL**) to pay all of the rent due on their respective SNLL (**Rental Payment Representation**) and there was no or no clear, concise and effective disclosure of:
 - (a) the conflicts of interests that existed in relation to the SIT including those in respect of the various roles undertaken by Sterling First Limited (**Sterling First**) and its wholly owned subsidiaries (together **Sterling Group**) and the related transactions outlined in the financial statements for the SIT for the financial year ending 30 June 2016;



- (b) the risks attached to the different classes of investment units in the SIT by reason of the competing rights and interests attached to each of those unit classes;
 - (c) the provision and extent of the income support provided by the Sterling Group to the SIT to enable it to meet its obligations as and when they fell due, in particular the targeted rates of return to investors in the SIT (**Sterling income support**) and the financial position of the Sterling Group;
 - (d) the allocation policy utilised by Sterling Corporate Services Pty Ltd (**SCS**), as investment manager of the SIT, to determine the investment mix of units in the SIT for each of the investors in the SIT who were retirees and seniors and who had entered into SNLLs (**SNLL investors**);
 - (e) the risks relating to the underlying investment of the Development Units, being loans issued to fund the building of residential homes in connection with SNLLs;
 - (f) the assumptions used and contingencies relied on in stating that the target distributions for the Development Units was 20%; and
 - (g) the inherent risks by reason of the matters outlined above of any investment in the SIT for SNLL investors who were looking for a stable and secure long term income stream to meet rental payments under their respective SNLL and capital preservation.
2. Pursuant to section 1317E(1) of the Act, the first defendant, Theta Asset Management Limited (in liquidation), contravened sub-section 601FC(1)(b) of the Act in issuing the Management Company Units PDS in that it was defective within the meaning of section 1022A of the Act in that it contained a misleading or deceptive statement, namely the Rental Payment Representation and there was no or no clear, concise and effective disclosure of:
- (a) the conflicts of interests that existed in relation to the SIT including those in respect of the various roles undertaken by the Sterling Group and the related transactions outlined in the financial statements for the SIT for the financial year ending 30 June 2016;
 - (b) the risks attached to the different classes of investment units in the SIT by reason of the competing rights and interests attached to each of those unit classes;
 - (c) the provision and extent of the Sterling income support and the financial position of the Sterling Group;



- (d) the allocation policy utilised by SCS, as investment manager of the SIT, to determine the investment mix of units in the SIT for each of the SNLL investors (**SNLL unit allocation policy**);
 - (e) the constraints on investors' ability to redeem their investment;
 - (f) information relating to the underlying assets of the Management Company Units being shares in Sterling First, including its financial position, board constitution and shareholdings; and
 - (g) the inherent risks by reason of the matters outlined above of any investment in the SIT for SNLL investors who were looking for a stable and secure long term income stream to meet rental payments under their respective SNLL and capital preservation.
3. Pursuant to section 1317E(1) of the Act, the first defendant, Theta Asset Management Limited (in liquidation), contravened sub-section 601FC(1)(b) of the Act in issuing the Income Units PDS in that it was defective within the meaning of section 1022A of the Act in that there was no or no clear, concise and effective disclosure of:
- (a) the conflicts of interests that existed in relation to the SIT including those in respect of the various roles undertaken by the Sterling Group and the related transactions outlined in the financial statements for the SIT for the financial year ending 30 June 2016;
 - (b) the risks attached to the different classes of investment units in the SIT by reason of the competing rights and interests attached to each of those unit classes;
 - (c) the provision and extent of the Sterling income support financial position of the Sterling Group;
 - (d) the SNLL unit allocation policy;
 - (e) the assumptions used and contingencies relied on in stating that the target distributions were 9.25% for Income Units;
 - (f) the terms of and attrition rates for the rental management agreements;
 - (g) the fact that income generated from the rental management agreements used to pay the returns to the Income Units was also the subject of a first ranking registered security interest under the *Personal Property Securities Act 2009* (Cth) (**PPSA**) held by Macquarie Bank Limited; and



- (h) the inherent risks by reason of the matters outlined above of any investment in the SIT for SNLL investors who were looking for a stable and secure long term income stream to meet rental payments under their respective SNLL and capital preservation.
4. Pursuant to section 1317E(1) of the Act, the first defendant, Theta Asset Management Limited (in liquidation), contravened sub-section 601FC(1)(b) of the Act in issuing the Income and Growth Units PDS in that it was defective within the meaning of section 1022A of the Act in that it contained a misleading and deceptive statement to the effect that the Sterling Group had provided a secured and enforceable guarantee of the payment of distributions to be made to unitholders (**Sterling Guarantee Representation**) and there was no or no clear, concise and effective disclosure of:
- (a) the conflicts of interests that existed in relation to the SIT including those in respect of the various roles undertaken by the Sterling Group and the related transactions outlined in the financial statements for the SIT for the financial year ending 30 June 2016;
 - (b) the risks attached to the different classes of investment units in the SIT by reason of the competing rights and interests attached to each of those unit classes;
 - (c) the provision and extent of the Sterling income support and the financial position of the Sterling Group;
 - (d) the SNLL unit allocation policy;
 - (e) the differences and disparity in the risks attached to in Income Units as opposed to Growth Units;
 - (f) the allocation policy or statement regarding how investors' funds were to be applied between Income Units and Growth Units;
 - (g) the assumptions used and contingencies relied on in stating that the target distributions were 9.25% for Income Units and 12% for Growth Units;
 - (h) the terms of and attrition rates for the rental management agreements;
 - (i) the fact that income generated from the rental management agreements used to pay the returns to the Income Units was also the subject of a first ranking registered security interest under the PPSA held by Macquarie Bank Limited; and



- (j) the inherent risks by reason of the matters outlined above of any investment in the SIT for SNLL investors who were looking for a stable and secure long term income stream to meet rental payments under their respective SNLL and capital preservation.
5. Pursuant to section 1317E(1) of the Act, the first defendant, Theta Asset Management Limited (in liquidation), contravened sub-section 601FC(1)(b) of the Act in issuing the Revised Income and Growth Units PDS in that it was defective within the meaning of section 1022A of the Act in that it contained a misleading or deceptive statement to the effect that the SIT was a particularly suitable investment for investors looking for income and capital preservation and not capital growth (**Suitability Representation**) and there was no or no clear, concise and effective disclosure of:
- (a) the conflicts of interests that existed in relation to the SIT including those in respect of the various roles undertaken by the Sterling Group and the related transactions outlined in the financial statements for the SIT for the financial year ending 30 June 2017;
 - (b) the risks attached to the different classes of investment units in the SIT by reason of the competing rights and interests attached to each of those unit classes;
 - (c) the provision and extent of the Sterling income support and the financial position of the Sterling Group;
 - (d) the SNLL unit allocation policy;
 - (e) the terms of and attrition rates for the rental management agreements;
 - (f) the fact that income generated from the rental management agreements used to pay the returns to the Income Units was also the subject of a first ranking registered security interest under the PPSA held by Macquarie Bank Limited;
 - (g) the concerns of the auditors of the SIT as to the financial viability of the SIT; and
 - (h) the inherent risks by reason of the matters outlined above of any investment in the SIT for SNLL investors who were looking for a stable and secure long term income stream to meet rental payments under their respective SNLL and capital preservation.
6. The first defendant, Theta Asset Management Limited (in liquidation), contravened section 1041H of the Act in that in making each of the Rental Payment Representation, the Sterling Guarantee Representation and the Suitability Representation it engaged in conduct in relation to a financial product, being



units in the SIT, that was misleading or deceptive or likely to mislead or deceive investors.

7. Pursuant to section 1317E(1) of the Act, the first defendant, Theta Asset Management Limited (in liquidation), contravened sub-section 601FC(1)(h) of the Act in that it failed to comply with the SIT compliance plan in that it:
 - (a) failed to take all steps necessary to monitor effectively the performance of SCS as the investment manager of the SIT and satisfy itself that SCS had carried out its contractual obligations adequately, that SCS had prepared and retained appropriate records to document the actions that it had taken as the SIT investment manager and that SCS had not contravened the personal advice provisions in the Act by its implementation of the SNLL unit allocation policy;
 - (b) issued defective PDS, being each of the SIT PDS;
 - (c) failed to ensure that the valuations and unit prices for the SIT were correct and calculated in a timely manner;
 - (d) failed to ensure that all redemptions were processed in a timely manner;
 - (e) failed to identify, document, assess, evaluate and effectively manage and control all conflicts of interest; and
 - (f) failed to ensure all financial statements of the SIT were completed and available for audit within 2 months of the relevant period and were lodged with the Australian Securities and Investments Commission (**ASIC**) on or before the lodgement date.



IN RELATION TO THE SECOND DEFENDANT, ROBERT PATRICK MARIE, THE COURT DECLARES THAT:

8. Pursuant to section 1317E(1) of the Act, the second defendant, Robert Patrick Marie, contravened s 601FD(1)(b) of the Act in that he failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in his position as the managing director of Theta in authorising the issue of the Development Units PDS in that it was defective within the meaning of s 1022A of the Act in that it contained a misleading or deceptive statement, namely the Rental Payment Representation and there was no or no clear, concise and effective disclosure of:
- (a) the conflicts of interests that existed in relation to the Sterling Group including those in respect of the various roles undertaken by the Sterling Group and the related transactions outlined in the financial statements for the SIT for the financial year ending 30 June 2016;
 - (b) the risks attached to the different classes of investment units in the SIT by reason of the competing rights and interests attached to each of those unit classes;
 - (c) the provision and extent of the Sterling income support and the financial position of the Sterling Group;
 - (d) the SNLL unit allocation policy;
 - (e) the risks relating to the underlying investment of the Development Units, being loans issued to fund the building of residential homes in connection with SNLL;
 - (f) the assumptions used and contingencies relied on in stating that the target distributions for the Development Units was 20%; and
 - (g) the inherent risks by reason of the matters outlined above of any investment in the SIT for SNLL investors who were looking for a stable and secure long term income stream to meet rental payments under their respective SNLL and capital preservation.
9. Pursuant to section 1317E(1) of the Act, the second defendant, Robert Patrick Marie, contravened s 601FD(1)(b) of the Act in that he failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in his position as the managing director of Theta in authorising the issue of the Management Company Units PDS in that it was defective within the meaning of section 1022A of the Act in



that it contained a misleading or deceptive statement, namely the Rental Payment Representation and there was no or no clear, concise and effective disclosure of:

- (a) the conflicts of interests that existed in relation to the SIT including those in respect of the various roles undertaken by the Sterling Group and the related transactions outlined in the financial statements for the SIT for the financial year ending 30 June 2016;
- (b) the risks attached to the different classes of investment units in the SIT by reason of the competing rights and interests attached to each of those unit classes;
- (c) the provision and extent of the Sterling income support and the financial position of the Sterling Group;
- (d) the SNLL unit allocation policy;
- (e) the constraints on investors' ability to redeem their investment;
- (f) information relating to the underlying assets of the Management Company Units being shares in Sterling First, including its financial position, board constitution and shareholdings; and
- (g) the inherent risks by reason of the matters outlined above of any investment in the SIT for SNLL investors who were looking for a stable and secure long term income stream to meet rental payments under their respective SNLL and capital preservation.

10. Pursuant to section 1317E(1) of the Act, the second defendant, Robert Patrick Marie, contravened s 601FD(1)(b) of the Act in that he failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in his position as the managing director of Theta in authorising the issue of the Income Units PDS in that it was defective within the meaning of section 1022A of the Act in that there was no or no clear, concise and effective disclosure of:

- (a) the conflicts of interests that existed in relation to the SIT including those in respect of the various roles undertaken by the Sterling Group and the related transactions outlined in the financial statements for the SIT for the financial year ending 30 June 2016;
- (b) the risks attached to the different classes of investment units in the SIT by reason of the competing rights and interests attached to each of those unit classes;



- (c) the provision and extent of the Sterling income support and the financial position of the Sterling Group;
 - (d) the SNLL unit allocation policy;
 - (e) the assumptions used and contingencies relied on in stating that the target distributions were 9.25% for Income Units;
 - (f) the terms of and attrition rates for the rental management agreements;
 - (g) the fact that income generated from the rental management agreements used to pay the returns to the Income Units was also the subject of a first ranking registered security interest under the PPSA held by Macquarie Bank Limited; and
 - (h) the inherent risks by reason of the matters outlined above of any investment in the SIT for SNLL investors who were looking for a stable and secure long-term income stream to meet rental payments under their respective SNLL and capital preservation.
11. Pursuant to section 1317E(1) of the Act, the second defendant, Robert Patrick Marie, contravened sub-section 601FD(1)(b) of the Act in that he failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in his position as the managing director of Theta in authorising the issue of the Income and Growth Units PDS in that it was defective within the meaning of section 1022A of the Act in that it contained a misleading or deceptive statement, namely the Sterling Guarantee Representation and there was no or no clear, concise and effective disclosure of:
- (a) the conflicts of interests that existed in relation to the SIT including those in respect of the various roles undertaken by the Sterling Group and the related transactions outlined in the financial statements for the SIT for the financial year ending 30 June 2016;
 - (b) the risks attached to the different classes of investment units in the SIT by reason of the competing rights and interests attached to each of those unit classes;
 - (c) the provision and extent of the Sterling income support and the financial position of the Sterling Group;
 - (d) the SNLL unit allocation policy;
 - (e) the differences and disparity in the risks attached to investments in Income Units as opposed to Growth Units;



- (f) the allocation policy or statement regarding how investors' funds were to be applied between Income Units and Growth Units;
 - (g) the assumptions used and contingencies relied on in stating that the target distributions were 9.25% for Income Units and 12% for Growth Units;
 - (h) the terms of and attrition rates for the rental management agreements;
 - (i) the fact that income generated from the rental management agreements used to pay the returns to the Income Units was also the subject of a first ranking registered security interest under the PPSA held by Macquarie Bank Limited; and
 - (j) the inherent risks by reason of the matters outlined above of any investment in the SIT for SNLL investors who were looking for a stable and secure long-term income stream to meet rental payments under their respective SNLL and capital preservation.
12. Pursuant to section 1317E(1) of the Act, the second defendant, Robert Patrick Marie, contravened sub-section 601FD(1)(b) of the Act in that he failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in his position as the managing director of Theta in authorising the issue of the Revised Income and Growth Units PDS in that it was defective within the meaning of section 1022A of the Act in that contained a misleading or deceptive statement, namely the Suitability Representation, and there was no or no clear, concise and effective disclosure of:
- (a) the conflicts of interests that existed in relation to the SIT including those in respect of the various roles undertaken by the Sterling Group and the related transactions outlined in the financial statements for the SIT for the financial year ending 30 June 2017;
 - (b) the risks attached to the different classes of investment units in the SIT by reason of the competing rights and interests attached to each of those unit classes;
 - (c) the provision and extent of the Sterling income support and the financial position of the Sterling Group;
 - (d) the SNLL unit allocation policy;
 - (e) the terms of and attrition rates for the rental management agreements;
 - (f) the fact that income generated from the rental management agreements used to pay the returns to the Income Units was also the subject of a first ranking registered security interest under the PPSA held by Macquarie Bank Limited;



- (g) the concerns of the auditors of the SIT as to the financial viability of the SIT; and
 - (h) the inherent risks by reason of the matters outlined above of any investment in the SIT for SNLL investors who were looking for a stable and secure long-term income stream to meet rental payments under their respective SNLL and capital preservation.
13. Pursuant to section 1317E(1) of the Act, the second defendant, Robert Patrick Marie, contravened sub-section 601FD(1)(f)(i) of the Act in that he failed to take all necessary steps that a reasonable person in his position as the managing director of Theta would take if they were in his position to ensure that Theta complied with its statutory obligations pursuant to:
- (a) sub-section 601FC(1)(b) of the Act in that Theta failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in the position of Theta as each of SIT PDS issued by Theta was defective; and
 - (b) section 1041H of the Act in that in making each of the Rental Payment Representation, the Sterling Guarantee Representation and the Suitability Representation, Theta engaged in conduct in relation to a financial product, being units in the SIT, that was misleading or deceptive or likely to mislead or deceive investors.
14. Pursuant to section 1317E(1) of the Act, the second defendant, Robert Patrick Marie, contravened sub-section 601FD(1)(f)(iv) of the Act in that he failed to take all necessary steps that a reasonable person in his position as the managing director of Theta would take if they were in his position to ensure that Theta complied with the SIT compliance plan in that Theta:
- (a) failed to take all steps necessary to monitor effectively the performance of SCS as the investment manager of the SIT and satisfy itself that SCS had carried out its contractual obligations adequately, that SCS had prepared and retained appropriate records to document the actions that it had taken as the SIT investment manager and that SCS had not contravened the personal advice provisions in the Act by its implementation of the SNLL unit allocation policy;
 - (b) issued defective PDS, being each of the SIT PDS;



- (c) failed to ensure that the valuations and unit prices for the SIT were correct and calculated in a timely manner;
- (d) failed to ensure that all redemptions were processed in a timely manner;
- (e) failed to identify, document, assess, evaluate and effectively manage and control all conflicts of interest; and
- (f) failed to ensure all financial statements of the SIT were completed and available for audit within 2 months of the relevant period and were lodged with ASIC on or before the lodgement date.

AND THE COURT ORDERS THAT:

Disqualification Orders

15. Pursuant to section 206C of the Act, the second defendant, Robert Patrick Marie, be disqualified from managing corporations for a period of four years from the date of this order in respect of the contraventions of the Act referred to in the declarations of contravention numbered [8] to [14].

Pecuniary Penalties

16. Pursuant to section 1317G of the Act:
- (a) the first defendant, Theta, pay to the Commonwealth a pecuniary penalty of \$2,000,000.00 in respect of the contraventions of the Act referred to in the declarations of contravention numbered [1] to [5] and [7].
 - (b) the second defendant, Robert Patrick Marie, pay to the Commonwealth a pecuniary penalty of \$100,000.00 in respect of the contraventions of the Act referred to in the declarations of contravention numbered [8] to [14].

Costs

17. The first defendant and the second defendant pay the plaintiff's costs of and incidental to the proceeding fixed in the amount of \$300,000.00.

Date that entry is stamped: 19 November 2020

Sia Lagos
Registrar



Schedule

No: WAD 613/2019

Federal Court of Australia

District Registry: Western Australia

Division: General

Second Defendant ROBERT MARIE