

NOTICE OF FILING

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Details of Filing

Document Lodged: Statement of Agreed Facts
File Number: WAD613/2019
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v
THETA ASSET MANAGEMENT LIMITED (ACN 071 807 684) & ANOR
Registry: WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF
AUSTRALIA



A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 23/10/2020 2:20:46 PM AWST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



STATEMENT OF AGREED FACTS

Pursuant to section 191 of the *Evidence Act* (Cth), the Australian Securities and Investments Commission (**ASIC**) and each of the Defendants agree the following facts for the purposes of these proceedings.

This Statement of Agreed Facts (**Statement**) is made jointly by ASIC, Theta Asset Management Limited (ACN 071 807 684) (in liquidation) (**Theta** or **First Defendant**) and Robert Patrick Marie (**Mr Marie** or the **Second Defendant**) in support of the Consent Orders filed with this Statement.

ASIC, Theta and Mr Marie (referred to collectively as the **Parties**) consent to and agree to seek from the Court declarations as to the relevant contraventions and the agreed penalties as set out in the Consent Orders on the basis that they are satisfactory, appropriate and within the permissible range in all the circumstances.

Parties

1. The Plaintiff is a body corporate:
 - a. established by s 7 of the *Australian Securities and Investments Commission Act 1989* (Cth);
 - b. continued by s 261 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**); and
 - c. able to sue in its corporate name by reason of s 8 of the *ASIC Act*.

2. Theta was at all material times:
 - a. a corporation registered pursuant to the *Corporations Act 2001* (Cth) (**Act**) and capable of being sued;
 - b. the responsible entity of the Sterling Income Trust (ARSN 158 828 105), which was registered by Theta on 19 June 2012 as a retail managed investment scheme domiciled in Australia pursuant to s 601EB(1) of the Act, and originally named 'Rental Express Investment Trust' (**SIT**); and

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- c. as the responsible entity of the SIT, subject to the requirements of ss 601FC and 1041H of the Act.
3. At all material times, Theta:
 - a. had established and maintained a due diligence committee in respect of the issue of each Product Disclosure Statement (**PDS**) that it issued for the SIT (**SIT Due Diligence Committee**);
 - b. had prepared, lodged with ASIC and amended from time-to-time a compliance plan for the SIT (**SIT Compliance Plan**); and
 - c. had established and maintained a compliance committee for the purpose of seeking to ensure that the SIT complied with its legal obligations, ASIC regulatory guides and class orders, the constitution of the SIT as amended from time to time (**SIT Constitution**), the SIT Compliance Plan and any current PDS of the SIT (**SIT Compliance Committee**).
4. At all material times, Mr Marie:
 - a. was the managing director and only executive director of Theta;
 - b. was the chairman of the SIT Due Diligence Committee; and
 - c. attended meetings of the SIT Compliance Committee and the SIT Due Diligence Committee.
5. In his position as managing director of Theta, Mr Marie's duties and responsibilities included:
 - a. authorising the issue of each PDS for the SIT and ensuring that each of them was not defective, in particular, that they did not contain:
 - i. misleading or deceptive statements; or
 - ii. omissions in respect to the statements and information required to be disclosed under s 1013C of the Act;
 - b. ensuring that Theta complied with the SIT Compliance Plan; and
 - c. taking all reasonable steps to ensure that Theta complied with its obligations under the Act.

- 5A. In discharging his duties and responsibilities referred to in paragraph 5 above, Mr Marie relied upon:
- a. legal sign-offs provided by Theta's lawyers, PMC Legal and HWL Ebsworth, based on the information provided to them, that the PDSs complied with the Act before the PDS were finalised and released;
 - b. advice and information provided by Theta's auditors, Pitcher Partners; and
 - c. express or implied representations made by Mr Simon Bell of Sterling Corporate Services Pty Ltd (ACN 158 361 507) (**SCS**) in the course of drafting the PDSs, to the effect that the PDSs were not misleading or deceptive and that there were no material omissions from the PDSs.

The Sterling Group

6. SCS, which was originally named Acquest Corporate Services Pty Ltd, was at all material times:
 - a. the investment manager of the SIT; and
 - b. a wholly owned subsidiary of Sterling First (Aust) Limited (ACN 610 352 826) (**SFAL**).
7. At all material times, SCS and SFAL were part of a corporate group comprising various corporations that operated in the Western Australian property management market (**Sterling Group**).
8. The Sterling Group included the following corporations:
 - a. Rental Management Australia Developments Pty Ltd (ACN 146 806 662) (**RMAD**), which was registered in Western Australia on 12 October 2010;
 - b. Acquest Capital Pty Ltd (ACN 149 170 927) (**Acquest Capital**), which was registered in Western Australia on 7 February 2011;
 - c. Sterling First Limited (ACN 601 159 773) (**SFL**), which was registered in Western Australia on 8 August 2014;
 - d. Sterling Corporate Services Pty Ltd (**SCS**), which was registered in Western Australia on 15 May 2012;

- e. Rental Management Australia Pty Ltd (ACN 160 167 108) (**RMA**) which was registered in Western Australia on 31 August 2012;
 - f. Sterling First Group Pty Ltd (ACN 160 953 140) (**SFG**), which was registered in Western Australia on 26 October 2012 (formerly known as Sterling First Group Ltd and Heritage Rental Developments Ltd);
 - g. Sterling First Projects Pty Ltd (ACN 162 801 425) (**Sterling Projects**), which was registered in Western Australia on 12 March 2013;
 - h. Acquest Property Pty Ltd (ACN 167 584 572), which was registered in Western Australia on 16 January 2014;
 - i. SFAL, which was registered in Western Australia on 22 January 2016;
 - j. Sterling First Property Pty Ltd (ACN 610 765 976) (**SFAL Property**), which was registered in Western Australia on 15 February 2016;
 - k. SHL Management Services Pty Ltd (ACN 616 583 281), which was registered in Western Australia on 22 December 2016;
 - l. Silver Link Securities Pty Ltd (ACN 622 598 823) (**Silver Link Securities**), which was registered in Western Australia on 1 November 2017; and
 - m. Silverlink Investment Company Limited (ACN 623 500 407) (**Silver Link Investment**), which was registered in Western Australia on 19 December 2017.
9. At all material times:
- a. Acquest Capital was the parent company of RMA; and
 - b. SFAL was the parent company of Sterling Projects, RMAD and SCS.
10. At all material times, RMA was in the business of acquiring property management agreements (**PMAs**) and providing property management services under those PMAs.
11. At all material times, RMA earned:
- a. fees associated with the delivery of the services referred to in paragraph 10; and
 - b. proceeds from the sale of PMAs,

(together, **Income Rights**).

The SIT

12. The primary purposes of the SIT included:
 - a. funding the acquisition of PMAs by RMA; and
 - b. offering unitholders in the SIT exposure to Australian residential property, specifically through PMAs acquired by RMA.
13. Pursuant to the PDS identified in paragraphs 20 to 22 below, actual and potential investors in the SIT were given the opportunity to invest in the following unit classes:
 - a. Income Units;
 - b. Development Units;
 - c. Management Company Units; and
 - d. Growth Units,

(each a **Unit Class** and together, the **Unit Classes**).
14. The monies subscribed for each Unit Class were invested in several trusts that were described by Theta in each of the PDS identified in paragraphs 20 to 22 below, as sub-trusts of the SIT, namely:
 - a. a trust known as the Income Trust, which was originally named the RMA Holding Trust (**Income Trust**);
 - b. a trust known as the Property Development Trust (**Property Trust**);
 - c. a trust known as the Management Company Share Trust (**Management Company Share Trust**); and
 - d. a trust known as the Growth Trust (**Growth Trust**).
15. On or about 2 May 2013, the first units in the SIT were issued.
16. On or about 18 May 2015, the name of the SIT was changed to its present name, the Sterling Income Trust.

The 2012 Investment Management Agreement

17. On 5 November 2012, Theta and SCS executed an agreement establishing SCS as the investment manager of the SIT (**2012 Investment Management Agreement**).
18. The responsibilities of Theta pursuant to Clauses 3.2 and 3.3(b)(1) of the 2012 Investment Management Agreement included:
 - a. reviewing, and providing written feedback to SCS regarding any PDS or promotional materials prepared by SCS in connection with the SIT;
 - b. conducting all reasonable due diligence required under or in connection with any PDS or promotional materials (as directed by SCS and in conjunction with SCS' legal advisor);
 - c. preparing and maintaining the SIT Compliance Plan;
 - d. establishing and maintaining the SIT Due Diligence Committee;
 - e. establishing and maintaining the SIT Compliance Committee; and
 - f. engaging a service provider as nominated by SCS to act as the custodian of the SIT.
19. Under Clause 4.4(b) of the 2012 Investment Management Agreement, Theta also had the power to vary any decision of SCS that, in Theta's opinion, would contravene or be likely to contravene its duties and obligations under the law, the SIT Constitution, the SIT Compliance Plan, any PDS or its Australian Financial Services Licence (**AFSL**).

The SIT PDS

20. On 20 May 2016:
 - a. a PDS for the issue of Income Units (**Income Units PDS**) was released, under which \$1,852,728 was raised in the period 20 May 2016 to 10 August 2017;
 - b. a PDS for the issue of Management Company Units (**Management Company Units PDS**) was released, under which \$1,692,103 was raised in the period 20 May 2016 to 23 December 2016; and
 - c. a PDS for the issue of Development Units (**Development Units PDS**) was released, under which \$4,673,514 was raised in the period 20 May 2016 to 10 August 2017.

21. On 31 January 2017, a PDS for the issue of Income Units and Growth Units (**Income & Growth Units PDS**) was released, under which \$3,435,783 was raised in the period 31 January 2017 to 10 August 2017.
22. On 27 October 2017, a PDS for the issue of Income Units and Growth Units (**Revised Income & Growth Units PDS**) was released, under which \$5,056,541 was raised in the period 27 October 2017 to 1 May 2018.
23. In total, \$16,710,669 was raised under the SIT PDS from 20 May 2016 to 1 May 2018.

Agreements related to the operation of the SIT

24. From 2013, the SIT operated with reference to a:
 - a. Master Deed of Assignment dated 25 March 2013 between RMA and RMA in its capacity as trustee for the Income Trust (**Income Trust MDA**);
 - b. Business Development Agreement dated 2 May 2013 between RMA as trustee for the Income Trust, RMAD, and SFG (**Income Trust BDA**);
 - c. Master Deed of Assignment dated 2017 between RMAD and SCS in its capacity as trustee for the Growth Trust (**Growth Trust MDA**); and
 - d. Business Development Agreement dated February 2017 between RMA and RMAD (**RMA BDA**).
25. Pursuant to Clauses 2.1, 3.1, 3.2, 3.3, 3.4 and 4.1 of the Income Trust MDA:
 - a. RMA assigned to the Income Trust all its rights, title and interest in the Income Rights;
 - b. RMA was prohibited from selling, or seeking to sell, any PMA for which the Income Trust had Income Rights to any person without the prior written consent of RMA, as the trustee of the Income Trust;
 - c. RMA was required to sell a PMA, for which the Income Trust had the Income Rights, when directed to do so by RMA, as the trustee of the Income Trust;
 - d. when RMA sold a PMA with the requisite consent from, or at the direction of, RMA as trustee of the Income Trust, the sale proceeds formed part of the Income Rights and were payable to the Income Trust;

- e. RMA was required to take all reasonable action against third parties for any infringement of the Income Rights; and
 - f. as consideration for the assignment of the Income Rights, RMA as the trustee of the Income Trust was entitled, out of the Income Rights it received, to:
 - i. fund the acquisition of PMAs by RMA (such funding to be agreed at the time of purchase);
 - ii. pay to RMA 55% of the base fees earned under the PMAs and 100% of the remaining fees earned under the PMAs;
 - iii. pay for the replacement of RMAs through the organic growth process in accordance with the formula set out in the Income Trust BDA;
 - iv. pay any interest owing to Bankwest (with which the Sterling Group had a facility agreement in 2013) in connection with any facility provided by Bankwest from time to time; and
 - v. distribute any remaining funds to the SIT.
26. Pursuant to Clauses 2.1, 5.1(a) and 2.2 of the Income Trust BDA:
- a. RMAD was exclusively appointed to source and negotiate the acquisition of PMAs and rent rolls for the Income Trust;
 - b. for each new PMA, the Income Trust was required to pay to RMAD the New RMA Cost (1.75 times the aggregate of the fee income in respect of a specific PMA, unless otherwise agreed); and
 - c. SFAL Group Ltd, as Guarantor, guaranteed to the Income Trust the due and punctual performance of all RMAD's obligations pursuant to the Income Trust BDA.
27. Pursuant to Clauses 2.1, 3.1, 3.2, 3.3, 4.1, 7.1, 7.2, 7.3 and 7.4 of the Growth Trust MDA:
- a. RMAD assigned to the Growth Trust all its rights, title and interest in the Income Rights up to the Income Limit. For the purpose of the Growth Trust MDA, 'Income Rights' were defined as the right of RMAD to receive all amounts in respect of each rental management agreement entered into each month, being the RMA Cost or the SNLL RMA Cost as the case required less any RMA Rebate paid in that month (these capitalised terms were defined in the Growth Trust MDA);

- b. RMAD was required to provide the Growth Trust the amount up to the Income Limit no later than the 15th date of the month following receipt;
- c. if the actual entitlement of RMAD in respect of all rental management agreements entered into during a month, being the RMA Cost or the SNLL RMA Cost as the case required less any RMA Rebate paid in that month:
 - i. was less than the Income Limit, the Growth Trust would receive only the actual amount;
 - ii. was more than the Income Limit, RMAD would retain any amount over the Income Limit.
- d. RMAD undertook to the Growth Trust to use reasonable endeavours to perform its obligations under the Income Trust BDA and to maximise the amount to which RMAD was entitled in respect of each rental management agreement and to minimise the RMA Rebate;
- e. as consideration for the assignment of the Income Rights, the Growth Trust would pay RMAD the Price as set out in Schedule 1;
- f. if the parties agreed to alter the Income Limit (subject to a Maximum Income Limit) as set out in Schedule 1, there would be an adjustment to the Price, which was to be calculated by multiplying the increase or decrease by 12 and dividing it by 0.135; and
- g. if the Income Limit was:
 - i. decreased, RMAD agreed to pay the adjustment amount to the Growth Trust;
 - ii. increased, the Growth Trust agreed to pay the adjustment amount to RMAD.

28. Pursuant to Clauses 2.1, 4.4, 5.1, 5.2 and 5.3 of the RMA BDA:

- a. RMA exclusively appointed RMAD to source and negotiate the acquisition of PMAs and rent rolls for RMA;
- b. RMAD granted to RMA a right of first refusal in respect of any Option Deed associated with a new PMA opportunity;

- c. upon completion of the purchase of a rent roll or the acquisition of a stand-alone PMA by RMA, RMA was required to pay RMAD a fee in respect of that rent roll or PMA pursuant to the terms of the agreement; and
- d. for lost PMAs, RMAD was required to pay RMA, or such other entity as directed by RMA, the RMA Rebate as calculated according to the agreement.

Money flow between the SIT and the Sterling Group

- 29. The process by which monies invested in the SIT pursuant to the SIT PDS flowed between the SIT and the Sterling Group was as follows.
- 30. In relation to the Income Trust:
 - a. individual investors purchased Income Units;
 - b. those monies were invested in the Income Trust;
 - c. RMA (as trustee of the Income Trust) used those funds:
 - i. to pay for Income Rights assigned by RMA (in its own capacity), pursuant to the terms of the Income Trust MDA; and
 - ii. to pay RMA (in its own capacity) 55% of the base fees earned under the PMAs and 100% of the remaining fees earned under the PMAs; and
 - d. RMA (in its own capacity) used the funds received from the assignment of Income Rights to:
 - i. fund the acquisition of new rent rolls and PMAs; and
 - ii. pay RMAD a fee to source and negotiate the acquisition of PMAs and rent rolls for the Income Trust, pursuant to the Income Trust BDA.
- 31. In relation to the Growth Trust:
 - a. individual investors purchased Growth Units;
 - b. those monies were invested in the Growth Trust;

- c. SCS (as trustee of the Growth Trust) used those funds to pay for Growth Rights assigned by RMAD (in its own capacity), pursuant to the terms of the Growth Trust MDA;
 - d. the Growth Rights entitled the Growth Trust to 100% of the gross income of RMAD's property management fee income up to a cap that equalled 13.5% of the value of the Growth Rights acquired by the Growth Units, pursuant to the terms of the Growth Trust MDA; and
 - e. a portion of the specific fees earned by RMAD for arranging the rent rolls and PMAs for RMA was invested in Growth Units.
32. In relation to the Management Company Trust:
- a. individual investors purchased Management Company Units;
 - b. those monies were invested in the Management Company Unit Trust; and
 - c. SCS (as trustee of the Management Company Trust) used those funds to acquire ordinary shares and preference shares in SFAL.
33. In relation to the Property Development Trust:
- a. individual investors purchased Development Units;
 - b. those monies were invested in the Property Development Trust; and
 - c. SCS (as trustee of the Property Development Trust) used those funds to acquire subordinated debt mortgage loans.

Multi-Class Risk

34. At all material times, each Unit Class was referable to a particular pool of assets and liabilities held within the SIT so that:
- a. an investor who invested in a specific Unit Class acquired an interest in, and therefore exposure to, a specific pool of assets relevant to that class;
 - b. each Unit Class carried specific risks associated with the assets relevant to that class;
 - c. each Unit Class had a different risk profile; and

- d. the assets and liabilities of a specific Unit Class remained the assets and liabilities of the SIT as whole.

35. By reason of the matters at paragraph 34, if a specific Unit Class were to become insolvent or suffer an adverse event, it was likely that all Unit Classes would be affected (**Multi-Class Risk**).

Specific Risks associated with Unit Classes

36. At all material times, there were particular risks associated with each individual Unit Class.

37. The value of and potential returns to be derived from the Income Units were dependent upon:

- a. the ability of RMA to perform effectively services under its PMAs;
- b. the level of fees received by RMA, which correlated directly to the level of rent collected;
- c. the actual rate of replacement of lost PMAs compared with the anticipated replacement rate;
- d. the actual vacancy rate compared with the anticipated vacancy rate;
- e. expenses related to the running of the Income Trust;
- f. the pricing structure under the Income Trust MDA which impacted upon RMA's profitability;
- g. the ability of RMA to sell the Income Rights associated with its PMAs;
- h. the terms of and attrition rates of PMAs;
- i. the ability of RMA to recapitalise;
- j. the degree of competition in the real estate industry; and
- k. interest rates.

38. The value of and potential returns to be derived from the Growth Units were dependent upon:

- a. RMAD being able to secure new PMAs for RMA, which in turn relied on RMA being able to pay RMAD;
- b. the level of fees received by RMAD from RMA;

- c. the number and value of the Income Rights growing as anticipated;
 - d. the ability of the RMA and RMAD to identify suitable acquisitions and agree with the vendors on the terms of those acquisitions;
 - e. specific expenses related to the running of the Growth Trust;
 - f. the degree of competition in the real estate industry; and
 - g. the ongoing performance and financial viability of RMA.
39. The value of and potential returns to be derived from the Management Company Units were dependent upon the performance and ongoing financial viability of SFAL.
40. The value of and potential returns to be derived from the Development Units were dependent upon:
- a. a range of construction and development risks;
 - b. credit and credit assessment risks; and
 - c. the repayment of moneys advanced and interest pursuant to loan agreements made by the Development Trusts secured by second or lower-ranking securities.

Sterling New Life Leases

41. In early 2016, Sterling Projects trading as Sterling New Life launched a product described as a Sterling New Life Lease (SNLL).
42. The SNLLs were marketed by Sterling Projects as:
- a. a product that would enable retirees and seniors to release cash for the purpose of living a more comfortable retirement; and
 - b. a retirement village alternative, with a long-term secure residential lease of up to 40 years on a property owned by a third-party investor and located in the general community.
43. Properties subject to a SNLL were:
- a. owned by either Acquest Property Pty Ltd (as trustee for a trust known as Residential Property Trust), or individual owners; and

- b. managed by RMA.
44. SCS was paid an application fee of 8.8% of an applicant's investment amount inclusive of GST.
45. In entering into a SNLL, a lessee received security of tenure for 40 years by way of an initial 5-year lease plus seven 5-year options for the exclusive occupancy of the residence.
46. To enter into a SNLL, each lessee was required to choose between two options, namely:
- a. an investment in units in the SIT; or
 - b. an investment in preference shares in Silverlink Investment Company or Silver Link Securities.
47. Lessees applying for a SNLL who chose to invest in units in the SIT were required to:
- a. pay an application fee and an initial rent payment to a bank account nominated by SCS;
 - b. pay the amount of their investment (less the application fee and the initial rent payment) to a bank account referable to a specific SIT PDS; and
 - c. make an application pursuant to the relevant SIT PDS to invest the amount of their investment (less the application fee and the initial rent payment) by the end of the application period; and
 - d. authorise and direct SCS to deal with each distribution from the lessee's units received by SCS into its bank account by:
 - i. paying any rent that was due and which had not been paid;
 - ii. reimbursing SCS for any rent paid to the lessor by SCS on behalf of the lessee during the period prior to the first distribution; and
 - iii. reinvesting on behalf of the lessee the balance of any surplus remaining after the payment of (i) and (ii) into the same units as the current lessee's units.
48. SCS was required to deal with the proceeds of the redemption of a SNLL Investor's units received by SCS into its bank account by:
- a. first, paying any rent that was due and which had not been paid;

- b. second, upon the term ending, paying any money payable by the tenant under the SNLL including any loss suffered or incurred by the landlord arising from the failure of the tenant to comply with its obligations; and
 - c. third, to the extent of any surplus, paying that amount to the SNLL Lessee.
49. From 25 May 2016 to 9 March 2018, SNLL Investors invested a total of \$10,975,121 in units in the SIT pursuant to the following SIT PDS:
- a. Income Units PDS;
 - b. Development Units PDS;
 - c. Income & Growth Units PDS; and
 - d. Revised Income & Growth Units PDS.

Conflicts of Interest

50. The rent rolls and PMAs acquired by and held by RMA constituted the principal asset held by the Sterling Group.
51. By reason of the matters at paragraph 50, the performance and ongoing financial viability of the Sterling Group, including SFAL and SCS, materially depended upon the performance and ongoing financial viability of RMA.
52. SCS:
- a. was a 100% subsidiary of SFAL and a member of the Sterling Group at all material times; and
 - b. was party to a Management Services Agreement dated 1 July 2016 between SCS and RMA and was obliged under this contract to provide management services to RMA including financial management, corporate administration, preparation of tax related statements, recruitment, training and management of staff, operational issues and other consulting services as deemed to be necessary.
53. By reason of the matters in paragraphs 50-52 above, SCS had a material incentive to conduct itself in a way that promoted the performance and ongoing financial viability of SFAL and other entities in the Sterling Group.

54. By reason of matters in paragraph 44 and paragraphs 52-53 above, SCS had a material incentive:
- a. to encourage individual applicants to apply for a SNLL;
 - b. to encourage individual applicants to invest in the SIT at the same time that they applied for an SNLL; and
 - c. to delay the processing of redemptions when SNLL holders sought to redeem their units in the SIT.
55. At all material times the SIT had significant related party receivables, related party loans and related party expenses with various entities in the Sterling Group, including SCS, RMAD and SFG as disclosed in the consolidated financial report for the SIT and its controlled entities for the year ended 30 June 2016.
56. At all material times, SCS was:
- a. the investment manager of the SIT; and
 - b. the trustee of the Growth Trust, Property Development Trust and the Management Company Trust.
57. Pursuant to the 2012 Investment Management Agreement, SCS in its capacity as Investment Manager was required to:
- a. manage the overall operations of the SIT;
 - b. value the underlying investments of the SIT;
 - c. process redemption requests in the SIT;
 - d. prepare any PDS and other promotional material for the SIT on behalf of Theta; and
 - e. provide regular reports to Theta in connection to the SIT, its assets, any conflicts of interest and other compliance matters.
58. As trustee of each of the Growth Trust, Property Development Trust and the Management Company Trust, SCS had a duty to act in the best interests of SIT unitholders.
59. By reason of the matters in paragraphs 50-55, it was not possible for SCS to bring an impartial mind to the execution of its duties as set out in paragraphs 57-58.

Targeted Returns

60. Each of the Income Units PDS, the Development Units PDS, the Income & Growth Units PDS and the Revised Income & Growth Units PDS included representations as to the targeted returns for each Unit Class as follows:
- a. in the Income Units PDS, the targeted returns for the Income Units were represented as 9.25% in the context of historically paying a distribution of 9.25%;
 - b. in the Development Units PDS, the targeted returns for the Development Units were represented as 20.00% in the context of historically paying a distribution of 20.00%; and
 - c. in the Income & Growth Units PDS:
 - i. the targeted returns for the Income Units were represented as 9.25% in the context of historically paying a distribution of 9.25%; and
 - ii. the targeted returns for the Growth Units were represented as 12.00% (as the Growth Units were a new offering, no historical annual distribution was stated)

Income Support

61. On or about 19 August 2016, Mr Kenneth Pratt (SFG) wrote a letter to Mr Marie (Theta) and Mr Chris Chandran (Pitcher Partners) dated 15 August 2015. In that letter, Mr Pratt represented to Theta that SFG would continue to support the financial operations of the SIT and the Income Trust, Property Development Trust and Management Company Share Trust through the rebate of the cost of lost PMAs, limited to the level that enabled the SIT to maintain a distribution yield of 9.25% per annum and to meet its obligations as and when they fell due, for all financial periods subsequent to 30 June 2015.
62. On or about 14 March 2016, Mr Phil Lucks (SFG) wrote a letter to Mr Marie (Theta) and Mr Chandran (Pitcher Partners). In that letter, Mr Lucks represented to Theta that SFG would continue to support the financial operations of the SIT and the Income Trust, Property Development Trust and Management Company Share Trust through the rebate of the cost of lost PMAs, limited to the level that enabled the SIT to maintain a distribution yield of 9.25% per annum and to meet its obligations as and when they fell due, for all financial periods subsequent to 30 December 2015.

63. On or about 6 October 2016, Mr Ray Jones (SFAL) wrote a letter to Mr Marie (Theta) and Mr Chandran (Pitcher Partners). In that letter, Mr Jones represented to Theta that SFAL would continue to support the financial operations of the SIT and the Income Trust through the rebate of the cost of lost PMAs, limited to the level that enabled the SIT to maintain a distribution yield of 9.25% per annum and to meet its obligations as and when they fell due, for all financial periods subsequent to 30 June 2016.
64. On or about 21 September 2017, Mr Ray Jones (SFAL) wrote a letter to Mr Marie (Theta) and Mr Chandran (Pitcher Partners). In that letter, Mr Jones represented to Theta that SFG would continue to support the financial operations of the SIT and its controlled entities, limited to the level that enabled the SIT to maintain the distribution yields listed below and to meet its obligations as and when they fell due, for all financial periods subsequent to 30 June 2017:
- a. Development Units – 20% per annum;
 - b. Income Units – 9.25% per annum; and
 - c. Growth Units – 12% per annum.
65. The income support provided by SFG and SFAL during each of the financial years from 30 June 2014 to 30 June 2017 is set out in the table below:

Year	Income Support			
	Income Units	Development Units	Management Company Units	Growth Units
FY 14	\$215,660	-	-	-
FY 15	\$80,330	-	-	-
FY 16	\$88,111	\$47,517	-	-
FY 17	\$463,521	\$203,382	\$5,719	\$35,714
Total	\$847,622	\$250,899	\$5,719	\$35,174

66. If SFG, SFAL or another Sterling entity had not provided the income support as referred to in paragraph 65 above, the SIT would have been unable to make the distributions which formed the basis of the rationale for the targeted returns as referred to in paragraph 60.

The Macquarie Bank Facility

67. On 17 November 2014, RMA (as trustee for the Income Trust) entered into a revolving line of credit facility with Macquarie Bank Limited (**MBL**) with a limit of \$2,750,000 for a period of five (5) years (**MBL Line of Credit**).

68. The MBL Line of Credit required RMA to provide a registered first ranking security over all the present and after-acquired assets and undertakings of RMA, acting alone and acting as trustee for the Income Trust, including without limitation all PMAs under which management fees were received by SFAL, Rental Management Australia (QLD) Pty Limited (ACN 158 361 507), Acquest Capital and Westbold Investments Pty Ltd (ACN 088 980 563).
69. On 8 February 2016:
- a. the limit of the MBL Line of Credit was increased to \$2,875,000; and
 - b. the security provided for in the original MBL Line of Credit was confirmed and RMA (as trustee for the Income Trust) agreed that it ranked in priority over the rights and claims of beneficiaries of the SIT and of RMA.
70. On 4 May 2016, MBL wrote a letter to the directors of RMA agreeing to increase the limit of the MBL Line of Credit to \$3,008,000.
71. On 28 September 2017, MBL and RMA signed a Finance Agreement that provided for:
- a. the limit of the MBL Line of Credit to be increased to \$3,283,000; and
 - b. the grant by RMA to MBL of a registered first ranking security over the assets and undertakings (present and future) of RMA, including all PMAs under which management fees were received, Rental Management Australia (QLD) Pty Limited ACN 158 361 507, Acquest Capital and Westbold Investments Pty Ltd (ACN 088 980 563).
72. By reason of the first ranking security referred to in paragraphs 68, 69(b) and 71(b), any monies owed to MBL pursuant to the MBL Line of Credit ranked in priority to any entitlements of the SIT unitholders in any winding up of the SIT.

ASIC Stop Orders and Pitcher Partners Auditor's Report

73. On 9 August 2017, ASIC issued an interim stop order in relation to each of the Development Units PDS, the Management Company Units PDS and the Income & Growth Units PDS.
74. On 29 August 2017, ASIC issued a final stop order in relation to each of the Development Units PDS, the Management Company Units PDS and the Income & Growth Units PDS.

75. On 29 September 2017, Mr Chandran of Pitcher Partners prepared and signed an Independent Auditor's Report. That report included a section at page 38 entitled 'Emphasis of Matter' in which it was stated that:
- a. the Sterling Group's liabilities exceeded its assets by \$524,350;
 - b. the Sterling Group's net liability position would increase to \$9,737,564;
 - c. ASIC had issued a Final Stop Order dated 29 August 2017 in respect of the Sterling Group which prohibited the making of any offers, issues, sales or transfers of interests in connection to the SIT; and
 - d. these events indicated that a material uncertainty existed that may cast significant doubt on the Sterling Group's ability to continue as a going concern.

Misleading and Deceptive Statements

Rental Payment Representation

76. Theta stated *inter alia* in each of the:
- a. Development Units PDS at page 14 under the heading 'Property Services'; and
 - b. Management Company Units PDS at page 13 under the heading 'Sterling New Life Leases'
- that the income each SNLL Investor would receive from the SIT would be sufficient to enable each SNLL Lessee to pay all of the rent due on their particular SNLL.
77. By the making of the statement set out in paragraph 76, Theta represented, expressly and in writing, that the distributions from the SIT payable to each SNLL Investor would be sufficient for them to pay all of the rent due on their particular SNLL (**Rental Payment Representation**).
78. The ability of the SIT to make distributions equivalent to the rental liabilities incurred by each SNLL Investor was dependent upon the performance of the underlying assets of the SIT, namely PMAs held by the Income Trust.
79. However, at all material times, the income stream from the PMAs was uncertain due to:
- a. fluctuations in the property markets in connection to PMAs;
 - b. the potential for non-payment of rent by tenants;

- c. the potential for unpredicted vacancies by tenants;
 - d. the potential for unpredicted loss of PMAs;
 - e. the potential for replacement costs of PMAs being higher or lower than budgeted;
 - f. the availability of funding to acquire PMAs to replace PMAs that had been lost;
 - g. the capacity of entities within the Sterling Group to provide income subsidies;
 - h. the potential for variations in the multiplier factor used to value the PMAs; and
 - i. the maintenance of the stated distribution yields for each Unit Class.
80. By reason of the matters in paragraphs 78-79, Theta did not have reasonable grounds to make the Rental Payment Representation.
81. By reason of the matters in paragraphs 78-80, the Rental Payment Representation was:
- a. insofar as it was a representation as to a present matter or present matters, was misleading or deceptive, or likely to mislead or deceive; and
 - b. insofar as it was a representation as to a future matter or future matters, was made without reasonable grounds.
82. By reason of the matters in paragraphs 76-81, Theta in making the Rental Payment Representation engaged in conduct in relation to financial products, namely Development Units and Management Company Units, that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H of the Act.
83. By reason of the matters in paragraphs 76-80, each of the Development Units PDS and the Management Company Units PDS:
- a. contained material statements that were misleading or deceptive; and therefore
 - b. was defective within the meaning of s 1022A(1)(a) of the Act.
84. A reasonable person in Theta's circumstances would have, in acting with care and diligence:
- a. taken all steps necessary to ensure that they had sufficient knowledge of the operations of the SIT and the products offered in each of the SIT PDS to enable them to sufficiently carry out their responsibilities;

- b. taken all steps necessary to ensure that each of the SIT PDS did not contain any representations in relation to the SIT that were misleading or deceptive or likely to mislead or deceive;
- c. carefully reviewed each of the PDS to ensure that all representations contained therein were accurate;
- d. recognised that each of the Development Units PDS and the Management Company Units PDS contained the Rental Payment Representation;
- e. taken all steps necessary, including making reasonable enquiries with SCS, to determine the financial position of the Sterling Group;
- f. recognised that the ability of the SIT to make distributions equivalent to the rental liabilities incurred by the SNLL was dependent upon the provision of income support by SFAL or another Sterling entity;
- g. recognised that the provision of income support by SFAL or another Sterling entity was dependent upon the ongoing performance and cashflow of the entities comprising the Sterling Group;
- h. recognised that it was necessary to determine the financial position of the Sterling Group in order to determine the reliability of income support;
- i. recognised that the limit on the MBL Line of Credit had been increased each year;
- j. recognised that Theta did not have reasonable grounds to represent that the ongoing performance and cashflow of the Sterling Group were assured;
- k. recognised that the distributions from the SIT were not sufficiently certain so that each SNLL Investor would be able to pay all of the rent due on his or her particular SNLL;
- l. recognised that the Rental Payment Representation was inaccurate, incomplete or misleading by reason of the fact that Theta did not have reasonable grounds to represent that distributions from the SIT were guaranteed or independent from the ongoing performance and cashflow of the Sterling Group;
- m. brought the inclusion of the Rental Payment Representation to the attention of the Due Diligence Committee, of which Mr Marie was Chairman; and

- n. prior to authorising or otherwise permitting the release of each of the Development Units PDS and the Management Company Units PDS, taken all steps necessary to remove or correct the Rental Payment Representation as set out in each of the Development Units PDS and the Management Company Units PDS.
85. Theta failed to:
- a. take sufficient of the necessary steps in sub-paragraphs 84 (a), (b), (c), (e), (m) and (n); and
 - b. take sufficient of the necessary steps in sub-paragraphs 84 (d), (f)-(l) required to obtain the knowledge to permit it to carry out the duties and responsibilities required by its position with care and diligence.
86. By reason of the matters in paragraphs 84-85, Theta contravened s 601FC(1)(b) of the Act in issuing each of the Development Units PDS and the Management Company Units PDS in that it failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in Theta's position.

Contraventions by Second Defendant

87. Paragraphs 77-83 are repeated against Mr Marie.
88. At the time that Mr Marie signed and authorised or otherwise permitted the release of each of the Development Units PDS and the Management Company Units PDS, Mr Marie ought to have been aware that:
- a. the ability of the SIT to make distributions equivalent to the rental liabilities incurred by the SNLL was dependent upon the provision of income support by SFAL or another Sterling entity;
 - b. the provision of income support by SFAL or another Sterling entity was dependent upon the ongoing performance and cashflow of the entities comprising the Sterling Group;
 - c. it was necessary to determine the financial position of the Sterling Group in order to determine the reliability of income support;
 - d. the limit on the MBL Line of Credit had been increased each year;

- e. Theta did not have reasonable grounds to represent that the ongoing performance and cashflow of the Sterling Group were assured; and
 - f. the distributions from the SIT were not sufficiently certain so that each SNLL Investor would be able to pay all of the rent due on his or her particular SNLL.
89. A reasonable director of a responsible entity in Theta's circumstances who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would have, in acting with care and diligence:
- a. taken all steps necessary to ensure that they had sufficient knowledge of the operations of the SIT and the products offered in each of the SIT PDS to enable them to sufficiently carry out their responsibilities;
 - b. taken all steps necessary to ensure that each of the SIT PDS did not contain any representations in relation to the SIT that were misleading or deceptive or likely to mislead or deceive;
 - c. carefully reviewed each of the PDS to ensure that all representations contained therein were accurate;
 - d. recognised that each of the Development Units PDS and the Management Company Units PDS contained the Rental Payment Representation;
 - e. taken all steps necessary, including making reasonable enquiries with SCS, to determine the financial position of Sterling Group;
 - f. recognised that the ability of the SIT to make distributions equivalent to the rental liabilities incurred by the SNLL was dependent upon the provision of income support by SFAL or another Sterling entity;
 - g. recognised that the provision of income support by SFAL or another Sterling entity was dependent upon the ongoing performance and cashflow of the entities comprising the Sterling Group;
 - h. recognised that it was necessary to determine the financial position of the Sterling Group in order to determine the reliability of income support;
 - i. recognised that the limit on the MBL Line of Credit had been increased each year;

- j. recognised that Theta did not have reasonable grounds to represent that the ongoing performance and cashflow of the Sterling Group were assured;
 - k. recognised that the distributions from the SIT were not sufficiently certain so that each SNLL Lessee would be able to pay all of the rent due on his or her particular SNLL;
 - l. recognised that the Rental Payment Representation was inaccurate, incomplete or misleading by reason of the fact that Theta did not have reasonable grounds to represent that distributions from the SIT were guaranteed or independent from the ongoing performance and cashflow of the Sterling Group;
 - m. brought the inclusion of the Rental Payment Representation to the attention of the Due Diligence Committee, of which he was Chairman; and
 - n. prior to signing and authorising or otherwise permitting the release of each of the Development Units PDS and the Management Company Units PDS, taken all steps necessary to remove or correct the Rental Payment Representation as set out in each of the Development Units PDS and the Management Company Units PDS.
90. Mr Marie failed to:
- a. take sufficient of the necessary steps in sub-paragraphs 89(a), (b), (c), (e), (m) and (n); and
 - b. take sufficient of the necessary steps in sub-paragraphs 89(d), (f)-(l) required to obtain the knowledge to permit him to carry out the duties and responsibilities required by his position with care and diligence.
91. At the time that Mr Marie signed and authorised or otherwise permitted the release of each of the Development Units PDS and the Management Company Units PDS, he ought to have been aware that:
- a. it was necessary for the proper discharge of his duties as an officer of Theta to satisfy himself that each of the Development Units PDS and the Management Company Units PDS did not contain representations that were misleading or likely to mislead or deceive actual or potential investors in the SIT, including investors who were lessees under the SNLLs;

- b. if Theta released a PDS containing representations about future matters for which Theta had no reasonable basis, then it would be harmful, or potentially harmful, to Theta in that:
 - i. in conveying that representation, Theta would risk releasing misleading or deceptive information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance;
 - ii. if Theta released misleading or deceptive information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance, it would be harmful to Theta's reputation and expose Theta to the risk of litigation and regulatory action; and
 - iii. in releasing misleading or deceptive information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance, Theta would contravene or risk contravening s 1041H of the Act;
- c. if Theta released a PDS containing representations that were misleading or deceptive or likely to mislead or deceive, that PDS would be defective pursuant to s 1022A of the Act; and
- d. if Theta released a PDS containing representations that were misleading or deceptive or likely to mislead or deceive, Theta would contravene or risk contravening ss 601FC(1)(b) and 1041H of the Act.

92. By reason of the matters in paragraphs 87-81, Mr Marie:

- a. contravened s 601FD(1)(b) of the Act, in that he failed to exercise the degree of care and diligence that a reasonable director of a responsible entity in Theta's circumstances and who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would exercise if they were in his position in authorising the issue of each of the Development Units PDS and the Management Company Units PDS to ensure that neither was defective within the meaning of s 1022A of the Act; and
- b. contravened s 601FD(1)(f)(i) of the Act, in that he failed to take all necessary steps that a reasonable director of a responsible entity in Theta's circumstances and who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would

take if they were in his position to ensure that Theta complied with its statutory obligations pursuant to ss 601FC(1)(b) and 1041H of the Act.

Sterling Guarantee Representations

93. Theta stated *inter alia* in the Income & Growth Units PDS at: (i) page 17 under the heading ‘Sterling Income Support Agreement; (ii) page 18 under each of the headings ‘Income Distribution Risk: Income Units’ and ‘Income Distribution Risk: Growth Units’; and (iii) page 27 under the heading ‘Income Support Agreement between SIT, SCS and SCS as trustee for Sterling Capital Reserve Fund’ that:
- a. Sterling had agreed to provide income support to the SIT if the distributions to holders of Income Units and/or Growth Units fell below their respective targeted distributions **(Sterling Income Support Agreement)**;
 - b. the terms of the Sterling Income Support Agreement included:
 - i. SCS must establish a fund to be known as the ‘Sterling Capital Reserve Fund’ **(Reserve Fund)**, which must by 12 months from the date of the deed (31 January 2017) hold a balance equal to 1.5 times the amount required to pay the targeted distributions in respect of each of the Income Trust and the Growth Trust;
 - ii. the Reserve Fund provides a guarantee in support of the Sterling Income Support Agreement; and
 - iii. in the event that Sterling fails to meet its obligations under the Sterling Income Support Agreement, the SIT can draw the required funds from the Reserve Fund; and
 - c. the SIT has the benefit of a General Security Agreement in respect of the Reserve Fund.
94. By the making of the statements set out in paragraph 93, Theta represented, expressly or by necessary implication, that:
- a. the SIT had entered into the Sterling Income Support Agreement;
 - b. the Sterling Group and/or SCS had provided the SIT with a secured and enforceable guarantee for the purpose of ensuring that the SIT had sufficient funds to pay the targeted distributions in respect of each of the Income Trust and the Growth Trust;

- c. the Sterling Group and/or SCS had established a Reserve Fund for the purpose of holding 1.5 times the amount required to pay the targeted distributions in respect of each of the Income Trust and the Growth Trust;
- d. the Reserve Fund provided a guarantee that could be drawn upon in the event that Sterling failed to meet its obligations; and
- e. the SIT had the benefit of a General Security Agreement between the SIT and Sterling Group in respect of the Reserve Fund.

(together, **Sterling Guarantee Representations**).

95. At the time of the issue of the Income & Growth Units PDS:
- a. SFAL or another Sterling entity had not entered into an Income Support Agreement with the SIT;
 - b. SFAL or another Sterling entity had not provided the SIT with a secured and enforceable guarantee for the purpose of ensuring that the SIT had sufficient funds to pay the targeted distributions in respect of each of the Income Trust and the Growth Trust;
 - c. SFAL or another Sterling entity had not established a Reserve Fund for the purpose of holding 1.5 times the amount required to pay the targeted distributions in respect of each of the Income Trust and the Growth Trust;
 - d. no Reserve Fund provided a guarantee that could be drawn upon in the event that the Sterling Group failed to meet its obligations; and
 - e. the SIT did not have the benefit of a General Security Agreement between the SIT and SFAL or another Sterling entity in respect of any Reserve Fund.
96. By reason of the matters in paragraphs 93-95, Theta did not have reasonable grounds to make the Sterling Guarantee Representations.
97. By reason of the matters in paragraphs 93-96, the Sterling Guarantee Representations were:
- a. insofar as they were representations as to a present matter or present matters, misleading or deceptive, or likely to mislead or deceive; and

- b. insofar as they were representations as to a future matter or future matters, made without reasonable grounds.
98. By reason of the matters in paragraphs 93-97, Theta in making the Sterling Guarantee Representations engaged in conduct in relation to financial products, namely Income Units and Growth Units in the SIT, that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H of the Act.
99. By reasons of the matters in paragraphs 93-98, the Income & Growth Units PDS:
- a. contained material statements that were misleading or deceptive; and therefore
 - b. was defective within the meaning of s 1022A(1)(a) of the Act.
100. A reasonable person in Theta's circumstances would have, in acting with care and diligence:
- a. taken all steps necessary to ensure that they had sufficient knowledge of the operations of the SIT and the products offered in each of the SIT PDS to enable them to sufficiently carry out their responsibilities;
 - b. taken all steps necessary to ensure that each of the SIT PDS did not contain any representations in relation to the SIT that were misleading or deceptive or likely to mislead or deceive;
 - c. carefully reviewed each of the PDS to ensure that all representations contained therein were accurate;
 - d. recognised that the Income & Growth Units PDS contained the Sterling Guarantee Representations;
 - e. taken all steps necessary, including making reasonable enquiries with SCS, to determine whether:
 - i. SFAL or another Sterling entity had provided the SIT with a secured and enforceable guarantee for the purpose of ensuring that the SIT had sufficient funds to pay the targeted distributions in respect of each of the Income Trust and the Growth Trust;
 - ii. a Reserve Fund holding 1.5 times the amount required to pay the targeted distributions in respect of each of the Income Trust and the Growth Trust had in fact been created; and

- iii. there existed a General Security Agreement between the SIT and SFAL or another Sterling entity in relation to the Reserve Fund;
- f. recognised that the Sterling Guarantee Representations were inaccurate, incomplete or misleading by reason of the fact that:
 - i. SFAL or another Sterling entity had not provided the SIT with a secured and enforceable guarantee for the purpose of ensuring that the SIT had sufficient funds to pay the targeted distributions in respect of each of the Income Trust and the Growth Trust;
 - ii. a Reserve Fund holding 1.5 times the amount required to pay the targeted distributions in respect of each of the Income Trust and the Growth Trust had not in fact been created; and
 - iii. there was no General Security Agreement between the SIT and SFAL or another Sterling entity in relation to the Reserve Fund;
- g. recognised that there was no reasonable basis for the Sterling Guarantee Representations;
- h. brought the inclusion of the Sterling Guarantee Representations to the attention of the Due Diligence Committee, of which Mr Marie was Chairman; and
- i. prior to authorising or otherwise permitting the release of the Income & Growth Units PDS, taken all steps necessary to remove or correct the Sterling Guarantee Representations from that PDS.

101. Theta failed to:

- a. take sufficient of the necessary steps in sub-paragraphs 100(a), (b), (c), (e), (h) and (i); and
- b. take sufficient of the necessary steps in sub-paragraphs 100(d), (f) and (g) required to obtain the knowledge to permit it to carry out its duties and responsibilities with care and diligence.

102. By reason of the matters in paragraphs 100-101, Theta contravened s 601FC(1)(b) of the Act in issuing the Income & Growth Units PDS in that it failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in Theta's position.

Contraventions by Second Defendant

103. Paragraphs 93-99 are repeated against Mr Marie.
104. At the time that Mr Marie signed and authorised or otherwise permitted the release of the Income & Growth Units PDS, Mr Marie ought to have been aware that:
- a. SFAL or another Sterling entity had not entered into an Income Support Agreement with the SIT;
 - b. SFAL or another Sterling entity had not provided the SIT with a secured and enforceable guarantee for the purpose of ensuring that the SIT had sufficient funds to pay the targeted distributions in respect of each of the Income Trust and the Growth Trust;
 - c. SFAL or another Sterling entity had not established a Reserve Fund for the purpose of holding 1.5 times the amount required to pay the targeted distributions in respect of each of the Income Trust and the Growth Trust;
 - d. no Reserve Fund had provided a guarantee that could be drawn upon in the event that the Sterling Group failed to meet its obligations; and
 - e. the SIT did not have the benefit of a General Security Agreement between the SIT and Sterling Group in respect of the Reserve Fund.
105. A reasonable director of a responsible entity in Theta's circumstances who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would have, in acting with care and diligence:
- a. taken all steps necessary to ensure that they had sufficient knowledge of the operations of the SIT and the products offered in each of the SIT PDS to enable them to sufficiently carry out their responsibilities;
 - b. taken all steps necessary to ensure that each of the SIT PDS did not contain any representations in relation to the SIT that were misleading or deceptive or likely to mislead or deceive;
 - c. carefully reviewed each of the PDS to ensure that all representations contained therein were accurate;

- d. recognised that the Income & Growth Units PDS contained the Sterling Guarantee Representations;
- e. taken all steps necessary, including making reasonable enquiries with SCS, to determine whether:
 - i. SFAL or another Sterling entity had provided the SIT with a secured and enforceable guarantee for the purpose of ensuring that the SIT had sufficient funds to pay the targeted distributions in respect of each of the Income Trust and the Growth Trust;
 - ii. a Reserve Fund holding 1.5 times the amount required to pay the targeted distributions in respect of each of the Income Trust and the Growth Trust had in fact been created; and
 - iii. there existed a General Security Agreement between the SIT and SFAL or another Sterling entity in relation to the Reserve Fund;
- f. recognised that the Sterling Guarantee Representations were inaccurate, incomplete or misleading by reason of the fact that:
 - i. SFAL or another Sterling entity had not provided the SIT with a secured and enforceable guarantee for the purpose of ensuring that the SIT had sufficient funds to pay the targeted distributions in respect of each of the Income Trust and the Growth Trust;
 - ii. a Reserve Fund holding 1.5 times the amount required to pay the targeted distributions in respect of each of the Income Trust and the Growth Trust had not in fact been created; and
 - iii. there was no General Security Agreement between the SIT and SFAL or another Sterling entity in relation to the Reserve Fund;
- g. recognised that there was no reasonable basis for the Sterling Guarantee Representations;
- h. brought the inclusion of the Sterling Guarantee Representations to the attention of the Due Diligence Committee, of which he was Chairman; and

- i. prior to signing and authorising or otherwise permitting the release of the Income & Growth Units PDS, taken all steps necessary to remove or correct the Sterling Guarantee Representations from that PDS.

106. Mr Marie failed to:

- a. take sufficient of the necessary steps in sub-paragraphs 105(a), (b), (c), (e), (h) and (i); and
- b. take sufficient of the necessary steps in sub-paragraphs 105(d), (f) and (g) required to obtain the knowledge to permit him to carry out the duties and responsibilities required by his position with care and diligence.

107. At the time that Mr Marie signed and authorised or otherwise permitted the release of the Income & Growth Units PDS, he ought to have been aware that:

- a. it was necessary for the proper discharge of his duties as an officer of Theta to satisfy himself that the Income & Growth Units PDS did not contain representations that were misleading or likely to mislead or deceive actual or potential SNLL Investors;
- b. if Theta released a PDS containing representations about future matters for which Theta had no reasonable basis, then it would be harmful, or potentially harmful, to Theta in that:
 - i. in conveying that representation, Theta would risk releasing misleading or deceptive information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance;
 - ii. if Theta released misleading or deceptive information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance, it would be harmful to Theta's reputation and expose Theta to the risk of litigation and regulatory action; and
 - iii. in releasing misleading or deceptive information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance, Theta would contravene or risk contravening s 1041H of the Act;

- c. if Theta released a PDS containing representations that were misleading or deceptive or likely to mislead or deceive, that PDS would be defective pursuant to s 1022A of the Act; and
- d. if Theta released a PDS containing representations that were misleading or deceptive or likely to mislead or deceive, Theta would contravene or risk contravening ss 601FC(1)(b) and 1041H of the Act.

108. By reason of the matters in paragraphs 103-107, Mr Marie:

- a. contravened s 601FD(1)(b) of the Act, in that he failed to exercise the degree of care and diligence that a reasonable director of a responsible entity in Theta's circumstances and who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would exercise if they were in his position in authorising the issue of the Income & Growth Units PDS to ensure that it was not defective within the meaning of s 1022A of the Act; and
- b. contravened s 601FD(1)(f)(i) of the Act, in that he failed to take all necessary steps that a reasonable director of a responsible entity in Theta's circumstances and who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would take if they were in his position to ensure that Theta complied with its statutory obligations pursuant to ss 601FC(1)(b) and 1041H of the Act.

Suitability Representations

109. Theta stated *inter alia* in the Revised Income & Growth Units PDS (p.7) that an investment in the SIT would suit actual or potential investors who sought income preservation and not capital growth.

110. By the making of the statement set out in paragraph 109 Theta represented expressly, or by necessary implication, that purchasing units in the SIT was an investment option that:

- a. would particularly suit an investor looking for income and capital preservation and not capital growth; and
- b. presented minimal financial risk.

(Suitability Representations).

111. By reason of the matters in paragraphs 35-48 and 72, at the time of the issue of the Revised Income & Growth Units PDS, purchasing units in the SIT was an investment option that:
 - a. would not particularly suit an investor looking for income and capital preservation and not capital growth; and
 - b. presented material financial risk.
112. By reason of the matters in paragraphs 109-111, Theta did not have reasonable grounds to make the Suitability Representations.
113. By reason of the matters in paragraphs 109-112, the Suitability Representations were:
 - a. insofar as they were representations as to a present matter or present matters, were misleading or deceptive, or likely to mislead or deceive; and
 - b. insofar as they were a representation as to a future matter or future matters, were made without reasonable grounds.
114. By reason of the matters in 109-113, Theta in making the Suitability Representations engaged in conduct in relation to financial products, namely Income Units and Growth Units in the SIT, that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H of the Act.
115. By reason of the matters in paragraphs 109-114, the Revised Income and Growth Units PDS:
 - a. contained material statements that were misleading or deceptive; and therefore
 - b. was defective within the meaning of s 1022A(1)(a) of the Act.
116. A reasonable person in Theta's circumstances would have, in acting with care and diligence:
 - a. taken all steps necessary to ensure that they had sufficient knowledge of the operations of the SIT and the products offered in each of the SIT PDS to enable them to sufficiently carry out their responsibilities;
 - b. taken all steps necessary to ensure that each of the SIT PDS did not contain any representations in relation to the SIT that were misleading or deceptive or likely to mislead or deceive;

- c. carefully reviewed each of the PDS to ensure that all representations contained therein were accurate;
- d. recognised that the Revised Income & Growth Units PDS contained the Suitability Representation;
- e. recognised that there were no reasonable grounds for making the Suitability Representation;
- f. recognised that the Suitability Representation was inaccurate, incomplete or misleading;
- g. recognised that investing in the SIT would not particularly suit an investor looking for income and capital preservation and not capital growth;
- h. brought the inclusion of the Suitability Representation to the attention of the Due Diligence Committee, of which Mr Marie was Chairman; and
- i. prior to signing and authorising or otherwise permitting the release of the Revised Income & Growth Units PDS, taken all steps necessary to remove or correct the Suitability Representation.

117. Theta failed to:

- a. take sufficient of the necessary steps in paragraph 116(a), (b), (c), (h) and (i) above; and
- b. take sufficient of the necessary steps in paragraph 116(d), (e), (f) and (g) required to obtain the knowledge to permit it to carry out its duties and responsibilities with care and diligence.

118. By reason of the matters in paragraphs 116-117, Theta contravened s 601FC(1)(b) of the Act in issuing the Revised Income & Growth Units PDS in that it failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in Theta's position.

Contraventions by Second Defendant

119. Paragraphs 109-115 are repeated against Mr Marie.

120. At the time that Mr Marie signed and authorised or otherwise permitted the release of the Revised Income & Growth Units PDS, Mr Marie ought to have been aware that:

- a. there were inherent risks associated with investing in the SIT that were more than minimal; and
 - b. investment in the SIT would not particularly suit an investor looking for income and capital preservation and not capital growth.
121. A reasonable director of a responsible entity in Theta's circumstances who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would have, in acting with care and diligence:
- a. taken all steps necessary to ensure that they had sufficient knowledge of the operations of the SIT and the products offered in each of the SIT PDS to enable them to sufficiently carry out their responsibilities;
 - b. taken all steps necessary to ensure that each of the SIT PDS did not contain any representations in relation to the SIT that were misleading or deceptive or likely to mislead or deceive;
 - c. carefully reviewed each of the PDS to ensure that all representations contained therein were accurate;
 - d. recognised that the Revised Income & Growth Units PDS contained the Suitability Representation;
 - e. recognised that there were no reasonable grounds for making the Suitability Representation;
 - f. recognised that the Suitability Representation was inaccurate, incomplete or misleading;
 - g. recognised that investing in the SIT would not particularly suit an investor looking for income and capital preservation and not capital growth;
 - h. brought the inclusion of the Suitability Representation to the attention of the Due Diligence Committee, of which he was Chairman; and
 - i. prior to signing and authorising or otherwise permitting the release of the Revised Income & Growth Units PDS, taken all steps necessary to remove or correct the Suitability Representation.
122. Mr Marie failed to:

- a. take sufficient of the necessary steps in sub-paragraphs 121(a), (b), (c), (h) and (i) above; and
 - b. take sufficient of the necessary steps in sub-paragraphs 121(d), (e), (f) and (g) required to obtain the knowledge to permit him to carry out the duties and responsibilities required by his position with care and diligence.
123. At the time that Mr Marie signed and authorised or otherwise permitted the release of the Revised Income & Growth Units PDS, he ought to have been aware that:
- a. it was necessary for the proper discharge of his duties as an officer of Theta to satisfy himself that the Revised Income & Growth Unit PDS did not contain representations that were misleading or likely to mislead or deceive actual or potential SNLL Investors;
 - b. if Theta released a PDS containing representations about future matters for which Theta had no reasonable basis, then it would be harmful, or potentially harmful, to Theta in that:
 - i. in conveying that representation, Theta would risk releasing misleading or deceptive information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance;
 - ii. if Theta released misleading or deceptive information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance, it would be harmful to Theta's reputation and expose Theta to the risk of litigation and regulatory action; and
 - iii. in releasing misleading or deceptive information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance, Theta would contravene or risk contravening s 1041H of the Act;
 - c. if Theta released a PDS containing representations that were misleading or deceptive or likely to mislead or deceive, that PDS would be defective pursuant to s 1022A of the Act; and
 - d. if Theta released a PDS containing representations that were misleading or deceptive or likely to mislead or deceive, Theta would contravene or risk contravening ss 601FC(1)(b) and 1041H of the Act.

124. By reason of the matters in paragraphs 119-123, Mr Marie:
- a. contravened s 601FD(1)(b) of the Act, in that he failed to exercise the degree of care and diligence that a reasonable director of a responsible entity in Theta's circumstances and who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would exercise if they were in his position in authorising the issue of the Revised Income & Growth Units PDS to ensure that it was not defective within the meaning of s 1022A of the Act; and
 - b. contravened s 601FD(1)(f)(i) of the Act, in that he failed to take all necessary steps that a reasonable director of a responsible entity in Theta's circumstances and who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would take if they were in his position to ensure that Theta complied with its statutory obligations pursuant to ss 601FC(1)(b) and 1041H of the Act.

Disclosure in the SIT PDS

Income Support

125. The matters in paragraphs 61-65 relating to the provision of income support by the Sterling Group to the SIT, and the impact of that income support as referred to in paragraph 66, (together **Income Support Information**) constituted information:
- a. about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to the product within the meaning of s 1013D(1)(f) of the Act; and
 - b. that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act.
126. At all material times the Income Support Information was information that was known to Mr Marie and was known to Theta by reason of the attribution to it of the knowledge of Mr Marie.
127. By reason of the matters in paragraphs 125 and 126, the Income Support Information constituted information that was required to be disclosed pursuant to s 1013C(1)(a) by reason of ss 1013D(1)(f) and 1013E of the Act in a clear, concise and effective manner.
128. None of the SIT PDS disclosed the Income Support Information or alternatively none disclosed it in a clear, concise and effective manner.

Targeted Returns

129. None of the Income Units PDS, the Development Units PDS nor the Income & Growth Units PDS disclosed, or alternatively did not disclose in a clear, concise and effective manner:
- a. the basis upon which the historical targeted returns as in paragraph 60 were calculated; and
 - b. the fact that the historical targeted returns were dependent upon the provision of income support by SFAL or another Sterling entity as referred to in paragraphs 61-66 (together the **Targeted Returns Information**).
130. The Targeted Returns Information constituted:
- a. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
 - b. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
 - c. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act.
131. At all material times the Targeted Returns Information was information that was known to Mr Marie and was known to Theta by reason of the attribution to it of the knowledge of Mr Marie.
132. By reason of the matters in paragraphs 130 and 131, the Targeted Returns Information constituted information that was required to be disclosed pursuant to s 1013C(1)(a) by reason of ss 1013D(1)(f) and 1013E of the Act in a clear, concise and effective manner.

The SNLL Unit Allocation Policy

133. At all material times, SCS, as investment manager of the SIT, determined the investment mix of units from each of the Unit Classes in respect of individual SNLL Investors as follows:
- a. solely on the property type;
 - b. at its discretion and control;

- c. with regard to the specific characteristics of each relevant property; and
- d. so that the proportion of units required to be purchased from each of the Unit Classes by any individual SNLL Investor was pre-determined,

(SNLL Unit Allocation Policy).

134. By reason of the SNLL Unit Allocation Policy, SNLL Investors were not given an opportunity to determine a mix of units in the SIT to suit their particular goals and objectives.
135. The SNLL Unit Allocation Policy and the consequence of that policy as referred to in paragraph 134 (together the **SNLL Unit Allocation Policy Information**), constituted:
- a. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
 - b. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
 - c. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act.
136. At all material times, the SNLL Unit Allocation Policy Information was known to at least Mr Simon Bell of SCS, being a person who participated in the preparation of each of the SIT PDS.
137. By reason of the matters in paragraphs 135 and 136, each of the SIT PDS was required to disclose information relating to the SNLL Unit Allocation Policy Information pursuant to s 1013C(1)(a) by reason of ss 1013D(1)(f) and 1013E of the Act in a clear, concise and effective manner.
138. None of the SIT PDS disclosed the SNLL Unit Allocation Policy Information or alternatively none disclosed it in a clear, concise and effective manner.

The MBL Line of Credit

139. By reason of the matters in paragraph 72, the income generated from the RMAs used to pay the returns to the Income Units was the subject of first ranking registered security interest (PPSR 201412180047441 dated 18 December 2014) under the *Personal Properties Securities Act 2009* (Cth) (**MBL Line of Credit Information**).

140. The MBL Line of Credit Information constituted:
- a. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
 - b. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
 - c. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act.
141. At all material times the MBL Line of Credit Information was information that was known to Mr Marie and was known to Theta by reason of the attribution to it of the knowledge of Mr Marie.
142. By reason of the matters in paragraphs 140 and 141, each of the Income Units PDS, the Income & Growth Units PDS and the Revised Income & Growth Units PDS was required to disclose the MBL Line of Credit Information pursuant to s 1013C(1)(a) by reason of ss 1013D(1)(f) and 1013E of the Act in a clear, concise and effective manner.
143. None of the Income Units PDS, the Income & Growth Units PDS or the Revised Income & Growth Units PDS disclosed the MBL Line of Credit Information, or alternatively none disclosed it in a clear, concise and effective manner.

Conflicts of Interest

144. The matters in paragraphs 50 to 58 and the consequences of those matters in paragraph 59 (together the **Conflicts of Interest Information**) constituted:
- a. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
 - b. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or

- c. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act.

145. At all material times, the Conflicts of Interest Information was information that was known to Mr Marie and was known to Theta by reason of the attribution to it of the knowledge of Mr Marie.
146. By reason of the matters in paragraphs 144 and 145, each of the SIT PDS was required to disclose the Conflicts of Interest Information pursuant to s 1013C(1)(a) by reason of ss 1013D(1)(f) and 1013E of the Act in a clear, concise and effective manner.
147. None of the SIT PDS disclosed the Conflicts of Interest Information, or alternatively none disclosed it in a clear, concise and effective manner.

Risks attached to Income and Growth Units

148. By reason of the matters in paragraphs 37 and 38, there were differences and disparities in the risks attached to investments in Income Units and Growth Units and there was no adequate disclosure in either the:
- a. Income & Growth Units PDS; or
 - b. Revised Income and Growth Units
- of how funds invested were to be applied between Income Units and Growth Units (together the **Income and Growth Units Information**).
149. The Income and Growth Units Information constituted:
- a. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
 - b. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
 - c. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act.

150. By reason of the matters in paragraph 149, each of the:

- a. Income & Growth Units PDS; and
- b. Revised Income & Growth Units PDS,

was required to disclose the Income and Growth Units Information pursuant to s 1013C(1)(a) by reason of ss 1013D(1)(f) and 1013E of the Act in a clear, concise and effective manner.

151. Neither the:

- a. Income & Growth Units PDS; nor
- b. Revised Income & Growth Units PDS,

disclosed the Income and Growth Units Information, or alternatively neither disclosed it in a clear, concise and effective manner.

PMA Attrition Rates

152. By reason of the matters in paragraphs 25, 28 and 30 and sub-paragraphs 37.c and 37(h) above, the actual rate of replacement of lost PMAs compared with anticipated replacement rates, the terms and the attrition rates of PMAs and the impact of those attrition rates on the income of the SIT (**PMA Attrition Rates Information**) constituted:

- a. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
- b. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
- c. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act.

153. By reason of the matters in paragraph 152 above, each of the:

- a. Income Units PDS;
- b. Income & Growth Units PDS; and

- c. Revised Income & Growth Units PDS,

was required to disclose the PMA Attrition Rates Information pursuant to s 1013C(1)(a) by reason of ss 1013D(1)(f) and 1013E of the Act in a clear, concise and effective manner.

154. None of the:

- a. Income Units PDS;
- b. Income & Growth Units PDS; or
- c. Revised Income & Growth Units PDS,

disclosed the Income and Growth Units Information, or alternatively none disclosed it in a clear, concise and effective manner.

Multi-Class Risk

155. By reason of the matters at paragraph 34-40, the rights and interests attached to the different classes of units were different but interrelated and gave rise to competing rights and interests between holders of different classes of units in the SIT (**Multi-Class Risk Information**).

156. The Multi-Class Risk Information constituted:

- a. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
- b. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
- c. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act.

157. At all material times the Multi-Class Risk Information was information that was known to Mr Marie and was known to Theta by reason of the attribution to it of the knowledge of Mr Marie.

158. By reason of the matters in paragraphs 155 and 157, each of the SIT PDS was required to disclose the Multi-Class Risk Information pursuant to s 1013C(1)(a) by reason of ss 1013D(1)(f) and 1013E of the Act in a clear, concise and effective manner.

159. None of the SIT PDS disclosed the Multi-Class Risk Information or alternatively none disclosed it in a clear, concise and effective manner.

Constraints on investors' ability to redeem their investment

160. At all material times the SIT was illiquid, meaning that any redemption of interests was required to be undertaken pursuant to Part 5C.6 of the Act (**Redemption Information**).
161. The Management Company Units PDS (pages 3 and 6) included express and unqualified representations that the attributes of Management Company Units included "Redemption for cash or shares" and that after the issue of Management Company Units, "Unitholders could elect to redeem their investment in cash, or for a distribution in specie of the underlying Shares, or a combination of both".
162. By reason of the matters in paragraph 161, the Redemption Information constituted:
- a. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
 - b. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
 - c. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act.
163. At all material times the Redemption Information was information that was known to Mr Marie and was known to Theta by reason of the attribution to it of the knowledge of Mr Marie.
164. By reason of the matters in paragraphs 161-163, the Management Company Units PDS was required to disclose the Redemption Information pursuant to s 1013C(1)(a) by reason of ss 1013D(1)(f) and 1013E of the Act in a clear, concise and effective manner.
165. The Management Company Units PDS did not disclose the Redemption Information or alternatively did not disclose the Redemption Information in a clear, concise and effective manner.

SFAL Information

166. By reason of the matters in paragraph 32 above, at all material times the financial position of SFAL and the identity of its directors and shareholders (**SFAL Information**) constituted:
- a. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
 - b. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
 - c. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act.
167. At all material times the SFAL Information was information that was known to Mr Marie and was known to Theta by reason of the attribution to it of the knowledge of Mr Marie.
168. By reason of the matters in paragraphs 166-167, the Management Company Units PDS was required to disclose the SFAL Information pursuant to s 1013C(1)(a) by reason of ss 1013D(1)(f) and 1013E of the Act in a clear, concise and effective manner.
169. The Management Company Units PDS did not disclose the SFAL Information or alternatively did not disclose the SFAL Information in a clear, concise and effective manner.

Home Loans Risk Information

170. By reason of the matters in paragraph 33 above, at all material times 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 (**Home Loans Risk Information**) constituted:
- a. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
 - b. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
 - c. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act.

171. At all material times the Home Loans Risk Information was information that was known to Mr Marie and was known to Theta by reason of the attribution to it of the knowledge of Mr Marie.
172. By reason of the matters in paragraphs 170-171, the Development Units PDS was required to disclose the Home Loans Risk Information pursuant to s 1013C(1)(a) by reason of ss 1013D(1)(f) and 1013E of the Act in a clear, concise and effective manner.
173. The Development Units PDS did not disclose the Home Loans Risk Information or alternatively did not disclose the Home Loans Risk Information in a clear, concise and effective manner.

Disclosure of Auditors' Concerns

174. The matters in paragraph 75 (**Auditors' Concerns Information**), constituted:
- a. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
 - b. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
 - c. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act.
175. At all material times leading up to the issue of the Revised Income & Growth Units PDS, the Auditors' Concerns Information was information that was known to Mr Marie and was known to Theta by reason of the attribution to it of the knowledge of Mr Marie.
176. By reason of the matters in paragraphs 174 and 175, the Revised Income & Growth PDS was required to disclose the Auditors' Concerns Information pursuant to s 1013C(1)(a) by reason of ss 1013D(1)(f) and 1013E of the Act in a clear, concise and effective manner.
177. The Revised Income & Growth Units PDS did not disclose the Auditors' Concerns Information or alternatively did not disclose it in a clear, concise and effective manner.

SNLL Unsuitability Information

178. By reason of the matters in paragraphs 78-79 and each of:
- a. the Income Support Information;

- b. the Targeted Returns Information;
- c. the SNLL Unit Allocation Policy Information;
- d. the MBL Line of Credit Information;
- e. the Conflicts of Interest Information;
- f. the Income and Growth Units Information;
- g. the PMA Attrition Rates Information;
- h. the Multi-Class Risk Information;
- i. the Redemption Information;
- j. the SFAL Information;
- k. the Home Loans Risk Information; and
- l. the Auditors' Concerns Information,

at all material times the SIT was not a suitable investment for SNLL Investors who were looking for a stable and secure long-term income stream to meet rental payments under their respective SNLL (**SNLL Unsuitability Information**).

179. The SNLL Unsuitability Information constituted:
- a. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
 - b. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
 - c. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act.
180. At all material times the SNLL Unsuitability Information (with the possible exception of the SNLL Unit Allocation Policy Information) was information that was known to Mr Marie and was known to Theta by reason of the attribution to it of the knowledge of Mr Marie and the

SNLL Unit Allocation Policy Information was known to at least, Mr Simon Bell of SCS, being a person who participated in the preparation of each of the SIT PDS.

181. By reason of the matters in paragraphs 140 and 141, each of the SIT PDS was required to disclose the SNLL Unsuitability Information pursuant to s 1013C(1)(a) by reason of ss 1013D(1)(f) and 1013E of the Act.
182. None of the SIT PDS disclosed the SNLL Unsuitability Information or alternatively disclosed it in a clear, concise and effective manner.

Disclosure in the Income Units PDS

183. By reason of the matters in:
- a. paragraphs 125-128 (in relation to the Income Support Information);
 - b. paragraphs 129-131 (in relation to the Targeted Returns Information);
 - c. paragraphs 133-138 (in relation to the SNLL Unit Allocation Policy Information);
 - d. paragraphs 139-143 (in relation to the MBL Line of Credit Information);
 - e. paragraphs 144-147 (in relation to the Conflicts of Interest Information);
 - f. paragraphs 152-154 (in relation to the PMA Attrition Rates Information);
 - g. paragraphs 155-159 (in relation to the Multi-Class Risk Information); and
 - h. paragraphs 178-182 (in relation to the SNLL Unsuitability Information),

the Income Units PDS was defective within the meaning of s 1022A(1)(a) of the Act.

184. A reasonable person in Theta's circumstances would have, in acting with care and diligence:
- a. taken all steps necessary to ensure that they had sufficient knowledge of the operations of the SIT and the products offered in each of the SIT PDS to enable them to sufficiently carry out their responsibilities;
 - b. carefully reviewed each of the PDS to ensure that all information required to be disclosed pursuant to s 1013C(1)(a) of the Act was disclosed;

- c. recognised that the Income Units PDS failed to disclose, or alternatively failed to disclose in a clear concise and effective manner the:
 - i. the Income Support Information;
 - ii. the Targeted Returns Information;
 - iii. the SNLL Unit Allocation Policy Information;
 - iv. the MBL Line of Credit Information;
 - v. the Conflicts of Interest Information;
 - vi. the PMA Attrition Rates Information;
 - vii. the Multi-Class Risk Information); and
 - viii. the SNLL Unsuitability Information;
- d. recognised that each of the matters referred to in sub-paragraph 184(c) constituted:
 - i. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
 - ii. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
 - iii. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act;
- e. brought the failures to disclose referred to in sub-paragraph 184(c) to the attention of the Due Diligence Committee, of which Mr Marie was Chairman; and
- f. prior to authorising or otherwise permitting the release of the Income Units PDS, taken all steps necessary to remedy the failures to disclose referred to in sub-paragraph 184(c) by including additional or clarifying information as required.

185. Theta failed to:

- a. take sufficient of the necessary steps in sub-paragraphs 184(a), (b), (e) and (f); and

- b. take sufficient of the necessary steps in sub-paragraphs 184(c) and (d) required to obtain the knowledge to permit it to carry out the duties and responsibilities required by its position with care and diligence.

186. By reason of the matters in paragraphs 183-185, Theta contravened s 601FC(1)(b) of the Act in issuing the Income Units PDS in that it failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in Theta's position.

Contraventions by Second Defendant

187. Paragraph 183 is repeated against Mr Marie.

188. At the time that Mr Marie signed and authorised or otherwise permitted the release of the Income Units PDS, Mr Marie ought to have been aware that each of:

- a. the Income Support Information;
- b. the Targeted Returns Information;
- c. the SNLL Unit Allocation Policy Information;
- d. the MBL Line of Credit Information;
- e. the Conflicts of Interest Information;
- f. the PMA Attrition Rates Information;
- g. the Multi-Class Risk Information; and
- h. the SNLL Unsuitability Information,

constituted:

- i. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
- j. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or

- k. information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act.
189. A reasonable director of a responsible entity in Theta's circumstances who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would have, in acting with care and diligence:
- a. taken all steps necessary to ensure that they had sufficient knowledge of the operations of the SIT and the products offered in each of the SIT PDS to enable them to sufficiently carry out their responsibilities;
 - b. carefully reviewed each of the PDS to ensure that all information required to be disclosed pursuant to s 1013C(1)(a) of the Act was disclosed;
 - c. recognised that the Income Units PDS failed to disclose, or alternatively failed to disclose in a clear, concise and effective manner:
 - i. the Income Support Information;
 - ii. the Targeted Returns Information;
 - iii. the SNLL Unit Allocation Policy;
 - iv. the MBL Line of Credit Information;
 - v. the Conflicts of Interest Information;
 - vi. the PMA Attrition Rates Information;
 - vii. the Multi-Class Risk Information; and
 - viii. the SNLL Unsuitability Information.
 - d. recognised that each of the matters in sub-paragraph 189(c) constituted:
 - i. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
 - ii. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or

- iii. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act;
 - e. brought the failures to disclose referred to in sub-paragraph 189(c) to the attention of the Due Diligence Committee, of which he was Chairman; and
 - f. prior to authorising or otherwise permitting the release of the Income Units PDS, taken all steps necessary to remedy the failures to disclose referred to in sub-paragraph 189(c) by including additional or clarifying information as required.
190. Mr Marie failed to:
- a. take sufficient of the necessary steps in sub-paragraphs 189(a), (b), (e) and (f); and
 - b. take sufficient of the necessary steps in sub-paragraphs 189(c) and (d) required to obtain the knowledge to permit him to carry out the duties and responsibilities required by his position with care and diligence.
191. At the time that Mr Marie signed and authorised or otherwise permitted the release of the Income Units PDS, he ought to have been aware that:
- a. it was necessary for the proper discharge of his duties as an officer of Theta to satisfy himself that the Income Units PDS included all the information that was required to be disclosed pursuant to s 1013C(1)(a) of the Act;
 - b. if Theta released a PDS including no or inadequate disclosure of the matters in sub-paragraph 189(c), then it would be harmful, or potentially harmful, to Theta in that:
 - i. Theta would risk releasing insufficient information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance;
 - ii. if Theta released insufficient information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance, it would be harmful to Theta's reputation and expose Theta to the risk of litigation and regulatory action; and
 - iii. in releasing insufficient information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and

performance, Theta would contravene or risk contravening s 1013C(1)(a) of the Act;

- c. if Theta released a PDS omitting information required by s 1013C(1)(a), that PDS would be defective pursuant to s 1022A of the Act; and
- d. if Theta released a PDS omitting information required by s 1013C(1)(a), Theta would contravene or risk contravening s 601FC(1)(b) of the Act.

192. By reason of the matters in paragraphs 187-191, Mr Marie:

- a. contravened s 601FD(1)(b) of the Act, in that he failed to exercise the degree of care and diligence that a reasonable director of a responsible entity in Theta's circumstances and who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would exercise if they were in his position in authorising the issue of the Income Units PDS to ensure that Theta did not issue a PDS that was defective within the meaning of s 1022A of the Act; and
- b. contravened s 601FD(1)(f)(i) of the Act, in that he failed to take all necessary steps that a reasonable director of a responsible entity in Theta's circumstances and who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would take if they were in his position to ensure that Theta complied with its statutory obligations pursuant to s 601FC(1)(b) of the Act.

Disclosure in the Income & Growth Units PDS

193. By reason of the matters in:

- a. paragraphs 125-128 (in relation to the Income Support Information);
- b. paragraphs 129-131 (in relation to the Targeted Returns Information);
- c. paragraphs 133-138 (in relation to the SNLL Unit Allocation Policy Information);
- d. paragraphs 139-143 (in relation to the MBL Line of Credit Information);
- e. paragraphs 144-147 (in relation to the Conflicts of Interest Information);
- f. paragraphs 148-151 (in relation to the Income Units and Growth Units Information);
- g. paragraphs 152-154 (in relation to the PMA Attrition Rates Information);

- h. paragraphs 155-159 (in relation to the Multi-Class Risk Information); and
- i. paragraphs 178-182 (in relation to the SNLL Unsuitability Information),

the Income & Growth Units PDS was defective within the meaning of s 1022A(1)(a) of the Act.

194. A reasonable person in Theta's circumstances would have, in acting with care and diligence:
- a. taken all steps necessary to ensure that they had sufficient knowledge of the operations of the SIT and the products offered in each of the SIT PDS to enable them to sufficiently carry out their responsibilities;
 - b. carefully reviewed each of the PDS to ensure that all information required to be disclosed pursuant to s 1013C(1)(a) of the Act was disclosed;
 - c. recognised that the Income & Growth Units PDS failed to disclose or alternatively failed to disclose in a clear, concise and effective manner each of:
 - i. the Income Support Information;
 - ii. the Targeted Returns Information;
 - iii. the SNLL Unit Allocation Policy Information;
 - iv. the MBL Line of Credit Information;
 - v. the Conflicts of Interest Information;
 - vi. the Income and Growth Units Information;
 - vii. the PMA Attrition Rates Information;
 - viii. the Multi-Class Risk Information; and
 - ix. the SNLL Unsuitability Information.
 - d. recognised that the matters referred to in sub-paragraph 194(c) constituted:
 - i. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;

- ii. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
 - iii. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act.
- e. brought the failures to disclose referred to in sub-paragraphs 194(c) to the attention of the Due Diligence Committee, of which Mr Marie was Chairman; and
 - f. prior to authorising or otherwise permitting the release of the Income & Growth Units PDS, taken all steps necessary to remedy the failures to disclose referred to in sub-paragraph 194(c) by including additional or clarifying information as required.
195. Theta failed to:
- a. take sufficient of the necessary steps in sub-paragraphs 194(a), (b), (e) and (f); and
 - b. take sufficient of the necessary steps in sub-paragraphs 194(c) and (d) required to obtain the knowledge to permit it to carry out the duties and responsibilities required by its position with care and diligence.
196. By reason of the matters in paragraphs 193-195, Theta contravened s 601FC(1)(b) of the Act in issuing the Income & Growth Units PDS in that it failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in Theta's position.

Contraventions by Second Defendant

197. Paragraph 193 is repeated against Mr Marie.
198. At the time that Mr Marie signed and authorised or otherwise permitted the release of the Income & Growth Units PDS, Mr Marie ought to have been aware that each of:
- a. the Income Support Information;
 - b. the Targeted Returns Information;
 - c. the SNLL Unit Allocation Policy Information;
 - d. the MBL Line of Credit Information;

- e. the Conflicts of Interest Information;
- f. the Income and Growth Units Information;
- g. the PMA Attrition Rates Information;
- h. the Multi-Class Risk Information; and
- i. the SNLL Unsuitability Information,

constituted:

- j. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
- k. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
- l. information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act.

199. A reasonable director of a responsible entity in Theta's circumstances who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would have, in acting with care and diligence:

- a. taken all steps necessary to ensure that they had sufficient knowledge of the operations of the SIT and the products offered in each of the SIT PDS to enable them to sufficiently carry out their responsibilities;
- b. carefully reviewed each of the PDS to ensure that all information required to be disclosed pursuant to s 1013C(1)(a) of the Act was disclosed;
- c. recognised that the Income & Growth Units PDS failed to disclose or alternatively failed to disclose in a clear, concise and effective manner each of:
 - i. the Income Support Information;
 - ii. the Targeted Returns Information;
 - iii. the SNLL Unit Allocation Policy Information;

- iv. the MBL Line of Credit Information;
 - v. the Conflicts of Interest Information;
 - vi. the Income and Growth Units Information;
 - vii. the PMA Attrition Rates Information;
 - viii. the Multi-Class Risk Information; and
 - ix. the SNLL Unsuitability Information;
- d. recognised that the matters in sub-paragraph 199(c) constituted:
- i. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
 - ii. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
 - iii. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act;
- e. brought the failures to disclose referred to in sub-paragraph 199(c) to the attention of the Due Diligence Committee, of which he was Chairman; and
- f. prior to authorising or otherwise permitting the release of the Income & Growth Units PDS, taken all steps necessary to remedy the failures to disclose referred to in sub-paragraph 199(c) by including additional or clarifying information as required.

200. Mr Marie failed to:

- a. take sufficient of the necessary steps in sub-paragraphs 199(a), (b), (e) and (f); and
- b. take sufficient of the necessary steps in sub-paragraphs 199(c) and (d) required to obtain the knowledge to permit him to carry out the duties and responsibilities required by his position with care and diligence.

201. At the time that Mr Marie signed and authorised or otherwise permitted the release of the Income & Growth Units PDS, he ought to have been aware that:

- a. it was necessary for the proper discharge of his duties as an officer of Theta to satisfy himself that the Income & Growth Units PDS included all the information that was required to be disclosed pursuant to s 1013C(1)(a) of the Act;
- b. if Theta released a PDS including no or inadequate disclosure of the matters in subparagraph 199(c), then it would be harmful, or potentially harmful, to Theta in that:
 - i. Theta would risk releasing insufficient information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance;
 - ii. if Theta released insufficient information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance, it would be harmful to Theta's reputation and expose Theta to the risk of litigation and regulatory action; and
 - iii. in releasing insufficient information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance, Theta would contravene or risk contravening s 1013C(1)(a) of the Act;
- c. if Theta released a PDS omitting information required by s 1013C(1)(a), that PDS would be defective pursuant to s 1022A of the Act; and
- d. if Theta released a PDS omitting information required by s 1013C(1)(a), Theta would contravene or risk contravening s 601FC(1)(b) of the Act.

202. By reason of the matters in paragraphs 197-201, Mr Marie:

- a. contravened s 601FD(1)(b) of the Act, in that he failed to exercise the degree of care and diligence that a reasonable director of a responsible entity in Theta's circumstances and who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would exercise if they were in his position in authorising the issue of the Income and Growth Units PDS to ensure that it was not defective within the meaning of s 1022A of the Act; and
- b. contravened s 601FD(1)(f)(i) of the Act, in that he failed to take all necessary steps that a reasonable director of a responsible entity in Theta's circumstances and who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would

take if they were in his position to ensure that Theta complied with its statutory obligations pursuant to s 601FC(1)(b) of the Act.

Disclosure in the Management Company Units PDS

203. By reason of the matters in:

- a. paragraphs 125-128 (in relation the Income Support Information);
- b. paragraphs 133-138 (in relation to the SNLL Unit Allocation Policy Information);
- c. paragraphs 144-147 (in relation to the Conflicts of Interest Information);
- d. paragraphs 166-169 (in relation to the SFAL Information);
- e. paragraphs 155-159 (in relation to the Multi-Class Risk Information);
- f. paragraphs 160-165 (in relation to the Redemption Information); and
- g. paragraphs 178-182 (in relation to the SNLL Unsuitability Information),

the Management Company Units PDS was defective within the meaning of s 1022A(1)(a) of the Act.

204. A reasonable person in Theta's circumstances would have, in acting with care and diligence:

- a. taken all steps necessary to ensure that they had sufficient knowledge of the operations of the SIT and the products offered in each of the SIT PDS to enable them to sufficiently carry out their responsibilities;
- b. carefully reviewed each of the PDS to ensure that all information required to be disclosed pursuant to s 1013C(1)(a) of the Act was disclosed;
- c. recognised that the Management Company Units PDS failed to disclose or alternatively failed to disclose in a clear, concise and effective manner each of:
 - i. the Income Support Information;
 - ii. the SNLL Unit Allocation Policy;
 - iii. the Conflicts of Interest Information;
 - iv. the SFAL Information;

- v. the Multi-Class Risk Information;
 - vi. the Redemption Information; and
 - vii. the SNLL Unsuitability Information;
- d. recognised that the matters referred to in sub-paragraph 204(c) constituted:
- i. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
 - ii. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
 - iii. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act;
- e. brought the failures to disclose referred to in sub-paragraph 204(c) to the attention of the Due Diligence Committee, of which Mr Marie was Chairman; and
- f. prior to authorising or otherwise permitting the release of the Management Company Units PDS, taken all steps necessary to remedy the failures to disclose referred to in sub-paragraph 204(c) by including additional or clarifying information as required.

205. Theta failed to:

- a. take sufficient of the necessary steps in sub-paragraphs 204(a), (b), (e) and (f); and
- b. take sufficient of the necessary steps in sub-paragraphs 204(c) and (d) required to obtain the knowledge to permit it to carry out the duties and responsibilities required by its position with care and diligence.

206. By reason of the matters in paragraphs 203-205, Theta contravened s 601FC(1)(b) of the Act in issuing the Management Company Units PDS in that it failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in Theta's position.

Contraventions by Second Defendant

207. Paragraph 203 is repeated against Mr Marie.

208. At the time that Mr Marie signed and authorised or otherwise permitted the release of the Management Company Units PDS, Mr Marie ought to have been aware that each of:
- a. the Income Support Information;
 - b. the SNLL Unit Allocation Policy;
 - c. the Conflicts of Interest Information;
 - d. the SFAL Information;
 - e. the Multi-Class Risk Information;
 - f. the Redemption Information; and
 - g. the SNLL Information,
- constituted:
- h. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
 - i. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
 - j. information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act.
209. A reasonable director of a responsible entity in Theta's circumstances who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would have, in acting with care and diligence:
- a. taken all steps necessary to ensure that they had sufficient knowledge of the operations of the SIT and the products offered in each of the SIT PDS to enable them to sufficiently carry out their responsibilities;
 - b. carefully reviewed each of the PDS to ensure that all information required to be disclosed pursuant to s 1013C(1)(a) of the Act was disclosed;

- c. recognised that the Management Company Units PDS failed to disclose or alternatively failed to disclose in a clear, concise and effective manner:
 - i. the Income Support Information;
 - ii. the SNLL Unit Allocation Policy Information;
 - iii. the Conflicts of Interest Information;
 - iv. the SNLL Information;
 - v. the Multi-Class Risk Information;
 - vi. the Redemption Information; and
 - vii. the SNLL Unsuitability Information;
- d. recognised that the matters in sub-paragraph 209(c) constituted:
 - i. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
 - ii. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
 - iii. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act;
- e. brought the failures to disclose referred to in sub-paragraph 209(c) to the attention of the Due Diligence Committee, of which he was Chairman; and
- f. prior to authorising or otherwise permitting the release of the Income Units PDS, taken all steps necessary to remedy the failures to disclose referred to in sub-paragraph 209(c) by including additional or clarifying information as required.

210. Mr Marie failed to:

- a. take sufficient of the necessary steps in sub-paragraphs 209(a), (b), (e) and (f); and

- b. take sufficient of the necessary steps in sub-paragraphs 209(c) and (d) required to obtain the knowledge to permit him to carry out the duties and responsibilities required by his position with care and diligence.

211. At the time that Mr Marie signed and authorised or otherwise permitted the release of the Management Company Units PDS, he ought to have been aware that:

- a. it was necessary for the proper discharge of his duties as an officer of Theta to satisfy himself that the Management Company Units PDS included all the information that was required to be disclosed pursuant to s 1013C(1)(a) of the Act;
- b. if Theta released a PDS including no or inadequate disclosure of the matters in sub-paragraph 209(c), then it would be harmful, or potentially harmful, to Theta in that:
 - i. Theta would risk releasing insufficient information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance;
 - ii. if Theta released insufficient information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance, it would be harmful to Theta's reputation and expose Theta to the risk of litigation and regulatory action; and
 - iii. in releasing insufficient information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance, Theta would contravene or risk contravening s 1013C(1)(a) of the Act;
- c. if Theta released a PDS omitting information required by s 1013C(1)(a), that PDS would be defective pursuant to s 1022A of the Act; and
- d. if Theta released a PDS omitting information required by s 1013C(1)(a), Theta would contravene or risk contravening s 601FC(1)(b) of the Act.

212. By reason of the matters in paragraphs 207-211, Mr Marie:

- a. contravened s 601FD(1)(b) of the Act, in that he failed to exercise the degree of care and diligence that a reasonable director of a responsible entity in Theta's circumstances and who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would exercise if they were in his position in authorising the issue of the

Management Company Units PDS to ensure that it was not defective within the meaning of s 1022A of the Act; and

- b. contravened s 601FD(1)(f)(i) of the Act, in that he failed to take all necessary steps that a reasonable director of a responsible entity in Theta's circumstances and who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would take if they were in his position to ensure that Theta complied with its statutory obligations pursuant to s 601FC(1)(b) of the Act.

Disclosure in the Development Units PDS

213. By reason of the matters in:

- a. paragraphs 125-128 (in relation to the Income Support Information);
- b. paragraphs 129-131 (in relation to the Targeted Returns Information);
- c. paragraphs 133-138 (in relation to the SNLL Unit Allocation Policy Information);
- d. paragraphs 144-147 (in relation to the Conflicts of Interest Information);
- e. paragraphs 155-159 (in relation to the Multi-Class Risk Information);
- f. paragraphs 170-173 (in relation to the Home Loans Risk Information); and
- g. paragraphs 178-182 (in relation to the SNLL Unsuitability Information),

the Development Units PDS was defective within the meaning of s 1022A(1)(a) of the Act.

214. A reasonable person in Theta's circumstances would have, in acting with care and diligence:

- a. taken all steps necessary to ensure that they had sufficient knowledge of the operations of the SIT and the products offered in each of the SIT PDS to enable them to sufficiently carry out their responsibilities;
- b. carefully reviewed each of the PDS to ensure that all information required to be disclosed pursuant to s 1013C(1)(a) of the Act was disclosed;
- c. recognised that the Development Units PDS failed to disclose or failed to disclose in a clear, concise and effective manner:
 - i. the Income Support Information;

- ii. the Targeted Returns Information;
 - iii. the SNLL Unit Allocation Policy Information;
 - iv. the Conflicts of Interest Information;
 - v. the Multi-Class Risk Information;
 - vi. the Home Loans Risk Information; and
 - vii. the SNLL Unsuitability Information;
- d. recognised that the matters referred to in sub-paragraph 214(c) constituted:
- i. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
 - ii. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f); and/or
 - iii. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E;
- e. brought the failures to disclose referred to in sub-paragraph 214(c) to the attention of the Due Diligence Committee; and
- f. prior to authorising or otherwise permitting the release of the Income Units PDS, taken all steps necessary to remedy the failures to disclose referred to in sub-paragraph 241(c) by including additional or clarifying information as required.

215. Theta failed to:

- a. take sufficient of the necessary steps in sub-paragraphs 214(a), (b), (e) and (f); and
- b. take sufficient of the necessary steps in sub-paragraphs 214(c) and (d) required to obtain the knowledge to permit it to carry out the duties and responsibilities required by its position with care and diligence.

216. By reason of the matters in paragraphs 213-215, Theta contravened s 601FC(1)(b) of the Act in issuing the Income Units PDS in that it failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in Theta's position.

Contraventions by Second Defendant

217. Paragraph 213 is repeated against Mr Marie.
218. At the time that Mr Marie signed and authorised or otherwise permitted the release of the Development Units PDS, Mr Marie ought to have been aware that each of:
- a. the Income Support Information;
 - b. the Targeted Returns Information;
 - c. the SNLL Unit Allocation Policy;
 - d. the Conflicts of Interest Information;
 - e. the Home Loans Risk Information;
 - f. the Multi-Class Risk Information; and
 - g. the SNLL Unsuitability Information,
- each constituted:
- h. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
 - i. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
 - j. information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act.
219. A reasonable director of a responsible entity in Theta's circumstances who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would have, in acting with care and diligence:

- a. taken all steps necessary to ensure that they had sufficient knowledge of the operations of the SIT and the products offered in each of the SIT PDS to enable them to sufficiently carry out their responsibilities;
- b. carefully reviewed each of the PDS to ensure that all information required to be disclosed pursuant to s 1013C(1)(a) of the Act was disclosed;
- c. recognised that the Development Units PDS failed to disclose or failed to disclose in a clear, concise and effective manner:
 - i. the Income Support Information;
 - ii. the Targeted Returns Information;
 - iii. the SNLL Unit Allocation Policy Information;
 - iv. the Conflicts of Interest Information;
 - v. the Home Loans Risk Information;
 - vi. the Multi-Class Risk Information; and
 - vii. the SNLL Unsuitability Information;
- d. recognised that the matters in sub-paragraph 219(c) constituted:
 - i. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
 - ii. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
 - iii. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act.
- e. brought the failures to disclose referred to in sub-paragraph 219(c) to the attention of the Due Diligence Committee, of which he was Chairman; and

- f. prior to authorising or otherwise permitting the release of the Development Units PDS, taken all steps necessary to remedy the failures to disclose referred to in sub-paragraph 219(c) by including additional or clarifying information as required.

220. Mr Marie failed to:

- a. take sufficient of the necessary steps in sub-paragraphs 189(a), (b), (e) and (f); and
- b. take sufficient of the necessary steps in sub-paragraphs 189(c) and (d) required to obtain the knowledge to permit him to carry out the duties and responsibilities required by his position with care and diligence.

221. At the time that Mr Marie signed and authorised or otherwise permitted the release of the Development Units PDS, he ought to have been aware that:

- a. it was necessary for the proper discharge of his duties as an officer of Theta to satisfy himself that the Development Units PDS included all the information that was required to be disclosed pursuant to s 1013C(1)(a) of the Act;
- b. if Theta released a PDS including no or inadequate disclosure of the matters in sub-paragraph 189(c), then it would be harmful, or potentially harmful, to Theta in that:
 - i. Theta would risk releasing insufficient information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance;
 - ii. if Theta released insufficient information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance, it would be harmful to Theta's reputation and expose Theta to the risk of litigation and regulatory action; and
 - iii. in releasing insufficient information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance, Theta would contravene or risk contravening s 1013C(1)(a) of the Act.
- c. if Theta released a PDS omitting information required by s 1013C(1)(a), that PDS would be defective pursuant to s 1022A of the Act; and

- d. if Theta released a PDS omitting information required by s 1013C(1)(a), Theta would contravene or risk contravening s 601FC(1)(b) of the Act.

222. By reason of the matters in paragraphs 217-221, Mr Marie:

- a. contravened s 601FD(1)(b) of the Act, in that he failed to exercise the degree of care and diligence that a reasonable director of a responsible entity in Theta's circumstances and who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would exercise if they were in his position in authorising the issue of the Development Units PDS to ensure that it was not defective within the meaning of s 1022A of the Act; and
- b. contravened s 601FD(1)(f)(i) of the Act, in that he failed to take all necessary steps that a reasonable director of a responsible entity in Theta's circumstances and who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would take if they were in his position to ensure that Theta complied with its statutory obligations pursuant to s 601FC(1)(b) of the Act.

Disclosure in the Revised Income & Growth Units PDS

223. By reason of the matters in:

- a. paragraphs 125-128 (in relation to the Income Support Information);
- b. paragraphs 133-138 (in relation to the SNLL Unit Allocation Policy Information);
- c. paragraphs 139-143 (in relation to the MBL Line of Credit Information);
- d. paragraphs 144-147 (in relation to the Conflicts of Interest Information);
- e. paragraphs 152-154 (in relation to the PMA Attrition Rates Information);
- f. paragraphs 155-159 (in relation to the Multi-Class Risk Information);
- g. paragraphs 174-177 (in relation to the Auditors' Concerns Information); and
- h. paragraphs 178-182 (in relation to the SNLL Unsuitability Information),

the Revised Income & Growth Units PDS was defective within the meaning of s 1022A(1)(a) of the Act.

224. A reasonable person in Theta's circumstances would have, in acting with care and diligence:

- a. taken all steps necessary to ensure that they had sufficient knowledge of the operations of the SIT and the products offered in each of the SIT PDS to enable them to sufficiently carry out their responsibilities;
- b. carefully reviewed each of the PDS to ensure that all information required to be disclosed pursuant to s 1013C(1)(a) of the Act was disclosed;
- c. recognised that the Revised Income & Growth Units PDS failed to disclose, or alternatively failed to disclose in a clear, concise and effective manner each of:
 - i. the Income Support Information;
 - ii. the SNLL Unit Allocation Policy Information;
 - iii. the MBL Line of Credit Information;
 - iv. the Conflicts of Interest Information;
 - v. the PMA Attrition Rates Information;
 - vi. the Multi-Class Risk Information;
 - vii. the Auditors' Concerns Information; and
 - viii. the SNLL Unsuitability Information;
- d. recognised that the matters referred to in sub-paragraph 224(c) constituted:
 - i. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
 - ii. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
 - iii. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act;
- e. brought the failures to disclose referred to in sub-paragraph 224(c) to the attention of the Due Diligence Committee, of which Mr Marie was Chairman; and

- f. prior to authorising or otherwise permitting the release of the Revised Income & Growth Units PDS, taken all steps necessary to remedy the failures to disclose referred to in sub-paragraph 224(c) by including additional or clarifying information as required.

225. Theta failed to:

- a. take sufficient of the necessary steps in sub-paragraphs 224(a), (b), (e) and (f); and
- b. take sufficient of the necessary steps in sub-paragraphs 224(c) and (d) required to obtain the knowledge to permit it to carry out the duties and responsibilities required by its position with care and diligence.

226. By reason of the matters in paragraphs 223-225, Theta contravened s 601FC(1)(b) of the Act in issuing the Revised Income & Growth Units PDS in that it failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in Theta's position.

Contraventions by Second Defendant

227. Paragraph 223 is repeated against Mr Marie.

228. At the time that Mr Marie signed and authorised or otherwise permitted the release of the Revised Income & Growth Units PDS, Mr Marie ought to have been aware that each of:

- a. the Income Support Information;
- b. the SNLL Unit Allocation Policy;
- c. the MBL Line of Credit Information;
- d. the Conflicts of Interest Information;
- e. the PMA Attrition Rates Information;
- f. the Multi-Class Risk Information;
- g. the Home Loan Risks Information; and
- h. the SNLL Unsuitability Information,

constituted:

- i. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act;
 - j. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
 - k. information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act.
229. A reasonable director of a responsible entity in Theta's circumstances who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would have, in acting with care and diligence:
- a. taken all steps necessary to ensure that they had sufficient knowledge of the operations of the SIT and the products offered in each of the SIT PDS to enable them to sufficiently carry out their responsibilities;
 - b. carefully reviewed each of the SIT PDS to ensure that all information required to be disclosed pursuant to s 1013C(1)(a) of the Act was disclosed;
 - c. recognised that the Revised Income & Growth Units PDS failed to disclose the:
 - i. the Income Support Information;
 - ii. the SNLL Unit Allocation Policy;
 - iii. the MBL Line of Credit Information;
 - iv. the Conflicts of Interest Information;
 - v. the PMA Attrition Rates Information;
 - vi. the Multi-Class Risk Information;
 - vii. the Home Loans Risk Information; and
 - viii. the SNLL Unsuitability Information;
 - d. recognised that the matters in sub-paragraphs 229(c) constituted:

- i. information about significant risks associated with holding the product within the meaning of s 1013D(1)(c) of the Act
 - ii. information about significant characteristics or features of a product or of the rights, terms, conditions and obligations attaching to a product within the meaning of s 1013D(1)(f) of the Act; and/or
 - iii. information that might reasonably be expected to have a material influence on the decisions of a reasonable person, as a retail client, whether to acquire the product within the meaning of s 1013E of the Act;
- e. brought the failures to disclose referred to in sub-paragraph 229(c) to the attention of the Due Diligence Committee, of which he was Chairman; and
 - f. prior to authorising or otherwise permitting the release of the Revised Income & Growth Units PDS, taken all steps necessary to remedy the failures to disclose referred to in sub-paragraph 229(c) by including additional or clarifying information as required.

230. Mr Marie failed to:

- a. take sufficient of the necessary steps in sub-paragraphs 229(a), (b), (e) and (f); and
- b. take sufficient of the necessary steps in sub-paragraphs 229(c) and (d) required to obtain the knowledge to permit him to carry out the duties and responsibilities required by his position with care and diligence.

231. At the time that Mr Marie signed and authorised or otherwise permitted the release of the Revised Income & Growth Units PDS, he ought to have been aware that:

- a. it was necessary for the proper discharge of his duties as an officer of Theta to satisfy himself that the Revised Income & Growth Units PDS included all the information that was required to be disclosed pursuant to s 1013C(1)(a) of the Act;
- b. if Theta released a PDS including no or inadequate disclosure of the matters in sub-paragraph 229(c), then it would be harmful, or potentially harmful, to Theta in that:
 - i. Theta would risk releasing insufficient information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance;

- ii. if Theta released insufficient information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance, it would be harmful to Theta's reputation and expose Theta to the risk of litigation and regulatory action; and
 - iii. in releasing insufficient information to the market with respect to the current status and value of the operating assets of the SIT and its financial position and performance, Theta would contravene or risk contravening s 1013C(1)(a) of the Act;
 - c. if Theta released a PDS omitting information required by s 1013C(1)(a), that PDS would be defective pursuant to s 1022A of the Act; and
 - d. if Theta released a PDS omitting information required by s 1013C(1)(a), Theta would contravene or risk contravening s 601FC(1)(b) of the Act.
232. By reason of the matters in paragraphs 227-231, Mr Marie:
- a. contravened s 601FD(1)(b) of the Act, in that he failed to exercise the degree of care and diligence that a reasonable director of a responsible entity in Theta's circumstances and who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would exercise if they were in his position in authorising the issue of the Revised Income & Growth Units PDS to ensure that it was not defective within the meaning of s 1022A of the Act; and
 - b. contravened s 601FD(1)(f)(i) of the Act, in that he failed to take all necessary steps that a reasonable director of a responsible entity in Theta's circumstances and who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would take if they were in his position to ensure that Theta complied with its statutory obligations pursuant to s 601FC(1)(b) of the Act.

Failure to Comply with SIT Compliance Plan

233. Pursuant to Theta's obligations under the 2012 Investment Management Agreement as in paragraph 18, Theta prepared the SIT Compliance Plan in May 2012.
234. Rule 7B of the SIT Compliance Plan provided that:
- a. Theta must satisfy itself that the relevant activities provided by each external service provider were carried out adequately; and

- b. Key Performance Indicators were to be established for all relevant service providers to help monitor adherence to service level agreements.

235. At all material times, Theta failed to take all steps necessary to:

- a. monitor effectively the performance of SCS as the investment manager of the SIT. The failure of Theta to monitor effectively the performance of SCS can be inferred from the following:
 - i. the issue of PDS by Theta that had been substantially been prepared by SCS that contained misleading and deceptive statements and failed to disclose material information or failed to disclose material information in a clear, concise and effective manner as set out in paragraphs 76-232 above;
 - ii. compliance reports for the SIT were not prepared in a timely manner;
 - iii. financial reports for the SIT were not prepared and lodged with ASIC on or prior to their respective lodgement dates;
 - iv. reports were not prepared in a timely fashion detailing the value of the SIT and the value of the separate Unit Classes, including the details of each investment and any material pricing errors;
 - v. redemptions were not processed in accordance with the SIT Constitution and each of the SIT PDS; and
 - vi. distributions for the SIT were not distributed in accordance with the SIT Constitution and each of the SIT PDS;
- b. satisfy itself that SCS had carried out its contractual obligations adequately. Theta failed to satisfy itself that:
 - i. SCS provided Regular Reports and Compliance Reports as required by Clauses 4.2(c), 6.1, 6.2 and Items 1-2 of Schedule 3 of the 2012 Investment Management Agreement;
 - ii. SCS had complied with each of the SIT PDS with respect to the processing of distributions and redemptions, as SCS was required to do pursuant to Clause 4.2(j) of the 2012 Investment Management Agreement; and

- iii. SCS would not cause Theta to be in breach of its legal obligations under the Act pursuant to Clause 4.2 (k) of the 2012 Investment Management Agreement;
 - c. ensure that SCS did not contravene the personal advice provisions of the Act by its implementation of the SNLL Unit Allocation Policy; and
 - d. establish or use Key Performance Indicators in relation to measuring the performance of SCS as the investment manager of the SIT.
236. By reason of the matters in paragraphs 234-235, Theta contravened Rule 7B of the SIT Compliance Plan.
237. Rule 8A of the SIT Compliance Plan provided that:
- a. Theta must maintain a register of all related parties;
 - b. Theta must satisfy itself that all potential conflicts of interests had been disclosed; and
 - c. all significant, non-standard transactions were subject to prior review by the Board, which was required to obtain external legal advice and/or disclosure details of transactions, where necessary.
238. Theta failed to maintain a register of all related parties with respect to the SIT.
239. By reason of the matters in paragraphs 144-147 above, Theta failed to:
- a. assess, evaluate, manage and control the matters comprising the Conflicts of Interest Information; and
 - b. ensure that the Conflicts of Interest Information was disclosed in each of the SIT PDS in a clear, concise and effective manner.
240. By reason of the matters in paragraphs 237-239 above, Theta contravened Rule 8A of the Compliance Plan.
241. Rule 8B of the Compliance Plan provided that the Board was required to ensure that disclosure documents, including any PDS, contained all relevant references to related parties as required by law and/or disclosed the relevant information to SIT unitholders as appropriate.
242. By reason of the matters in paragraphs 144-147 above, Theta:

- a. issued SIT PDS that were defective within the meaning of s 1022A(1); and
 - b. failed to ensure that the Conflicts of Interest Information had been disclosed in each of the SIT PDS.
243. By reason of the matters in paragraphs 241-242 above, Theta contravened Rule 8B of the Compliance Plan.
244. Rule 8C of the Compliance Plan provided that:
 - a. Theta must identify and document all conflicts of interest; and
 - b. the documentation referred to in paragraph 244(a) was required to include:
 - i. an assessment and evaluation of each identified conflict; and
 - ii. the steps required to ensure it was avoided or, where necessary, managed and controlled.
245. Theta failed to prepare documentation that included:
 - a. an assessment and evaluation of each identified conflict; and
 - b. the steps required to ensure those conflicts were avoided or, where necessary, managed and controlled.
246. By reason of the matters in paragraphs 244-245 above, Theta contravened Rule 8C of the Compliance Plan.
247. Rule 11A provided that Theta was to ensure that material released to the public was reviewed and signed off by the Board and the Managing Director of Theta prior to release to ensure that the material was accurate and not misleading in any way.
248. By reason of the matters in:
 - a. paragraphs 183-186, 193-196, 203-206, 213-216 and 223-226 above, Theta issued SIT PDS that were defective within the meaning of s 1022A(1) of the Act; and
 - b. paragraphs 76-86, 93-102 and 109-118 above, Theta failed to ensure that each of the SIT PDS was accurate and not misleading prior to release.

249. By reason of the matters in paragraphs 247-248 above, Theta contravened Rule 11A of the Compliance Plan.
250. Rule 12A provided that:
- a. Theta would use the services of a reputable independent provider to process applications and redemptions on behalf of the SIT; and
 - b. as part of this appointment, required the provider to ensure all applications and redemptions were processed in a timely manner.
251. Theta failed to ensure all redemptions, including redemptions for the months of January, February and March 2017, were processed in a timely manner.
252. By reason of the matters in paragraphs 250-251 above, Theta contravened Rule 12A of the SIT Compliance Plan.
253. Rule 14A of the SIT Compliance Plan provided that:
- a. Theta would obtain the services of a reputable independent provider to value the SIT and calculate the prices of the units in each of the Unit Classes; and
 - b. as part of this appointment, the provider was required to:
 - i. ensure that valuations and unit prices were correct and calculated in a timely manner; and
 - ii. ensure any identified unit pricing error was reported to Theta in a timely manner.
254. Theta failed to obtain the services of a reputable independent provider to value the SIT and failed to ensure that all valuations and unit prices for the SIT were correct and calculated in a timely manner. This can be inferred from the fact that:
- a. SCS was engaged by Theta to value the SIT and calculate the prices of the units in each of the Unit Classes;
 - b. by reason of the Conflicts of Interest Information, SCS could not be a reputable independent provider to value the SIT and calculate the prices of the units in each of the Unit Classes; and

- c. the approach to unit valuations and methodologies employed by SCS to value the SIT and calculate the prices of the units in each of the Unit Classes was not consistent, was the subject of breach reports and incident reports and from time to time led to incorrect valuations.
255. By reason of the matters in paragraphs 253-254 above, Theta contravened Rule 14A of the Compliance Plan.
256. Rule 19C provided that:
- a. Theta adopt a due diligence program and follow this in relation to each SIT PDS;
 - b. all material statements in each of the SIT PDS must be verified to source documents, kept in central due diligence files;
 - c. expert legal opinion was to be sought by Theta when drafting and issuing new material;
 - d. the Board must ensure that each of the SIT PDS remained accurate with no material omissions at all times; and
 - e. an external legal review and signoff must be obtained on all new and supplementary disclosure documents (including PDS) as applicable.
257. Theta:
- a. failed to verify all material statements in the SIT PDS against source documents. This can be inferred from Theta issuing the SIT PDS notwithstanding each of the misleading and deceptive statements set out in paragraphs 76-77, 93-94 and 109-110 above; and
 - b. failed to ensure that each of the SIT PDS remained accurate with no material omissions. This can be inferred from each of the matters set out in paragraphs 76-232 above.
258. By reason of the matters in paragraphs 256-257 above, Theta contravened Rule 19C of the SIT Compliance Plan.
259. Rule 19E provided that the Board of Theta was required to ensure that all financial statements of Theta and the SIT were completed and available for audit within two (2) months of the relevant year end.
260. Theta failed to ensure that all financial statements of the SIT were: (a) completed and available for audit within two (2) months of the relevant period; and (b) lodged with ASIC on or before

the lodgement date. This included the financial statements for the half year ended 31 December 2013, the year ended 30 June 2014, the half year ended 31 December 2015, the half year ended 31 December 2016, the half year ended 31 December 2017 and the year ended 30 June 2018.

261. By reason of the matters in paragraphs 256-260 above, Theta contravened Rule 19E of the Compliance Plan.
262. By reason of each of the matters in paragraphs 233-261 above, Theta contravened s 601FC(1)(h) of the Act.

Contraventions by Second Defendant

263. Paragraphs 233-262 are repeated against Mr Marie.
264. A reasonable director of a responsible entity in Theta's circumstances who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would have, in acting with care and diligence:
- a. taken all steps necessary to ensure that they had sufficient knowledge of the operations of the SIT and the products offered in each of the SIT PDS to enable them to sufficiently carry out their responsibilities;
 - b. taken all steps necessary to closely monitor the performance of SCS as investment manager of the SIT;
 - c. satisfied himself that SCS had carried out its contractual obligations under the 2012 Investment Management Agreement adequately and independently;
 - d. satisfied himself that SCS had prepared and retained appropriate records in relation to the SIT;
 - e. established and used Key Performance Indicators for the purpose of measuring the performance of SCS as the investment manager of the SIT;
 - f. satisfied himself that SCS had not contravened the personal advice provisions of the Act by its implementation of the SNLL Unit Allocation Policy;
 - g. assessed, evaluated, managed and controlled the conflicts of interest the subject of the Conflicts of Interest Information;

- h. ensured that the true financial position of the SCS and the Sterling Group was disclosed in each of the SIT PDS, given the extent to which the SIT was dependent upon the viability of the Sterling Group;
 - i. ensured that Theta did not issue defective PDS, particularly given the extent to which investments in the SIT were targeted at SNLL Investors who were seniors and retirees;
 - j. ensured that Theta obtained an external legal review and sign off in connection to each of the SIT PDS; and
 - k. given the fundamental conflicts that SCS and the Sterling Group had in relation to the SIT, engaged alternative, independent and competent external service providers to value the underlying investments of the SIT and process redemption requests in a timely manner.
265. Had a reasonable director of a responsible entity in Theta's circumstances and who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, taken the steps specified in paragraph 264 above, Theta would not have failed to comply with the SIT Compliance Plan.
266. Mr Marie failed to take sufficient of the necessary steps in sub-paragraphs 264(a)-(k) above to ensure that Theta complied with the SIT Compliance Plan.
267. By reason of the matters in paragraphs 233-266, Mr Marie:
- a. contravened s 601FD(1)(f)(iv) of the Act, in that he failed to take all steps that a reasonable director of a responsible entity in Theta's circumstances and who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would take if they were in his position to ensure that Theta complied with the SIT Compliance Plan; and
 - b. contravened s 601FD(1)(f)(i) of the Act, in that he failed to take all steps that a reasonable director of a responsible entity in Theta's circumstances and who occupied the offices held by Mr Marie, and had the same responsibilities as Mr Marie, would take if they were in his position to ensure that Theta complied with its statutory obligations pursuant to ss 601FC(1)(b) and 1041H of the Act.
268. The contraventions by Mr Marie of the Act were not accompanied by:
- a. dishonesty;

- b. an intention to deprive SIT investors of funds with a view to procuring some personal benefit or enrichment of Mr Marie;
- c. knowledge of the contraventions' character as contraventions of the Act.

Date: 23 October 2020



Signed by Ingrid McCormick
Solicitor for the Plaintiff



Signed by
Solicitor for the Second Defendant



Signed by
Solicitor for the Second Defendant

Schedule

Federal Court of Australia

No. WAD 613 of 2019

District Registry: Western Australia

Division: General

IN THE MATTER OF Theta Asset Management Limited

ACN 071 807 684 (in liquidation)

Defendants

Second Defendant:

Mr Robert Patrick Marie