

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 16/04/2020 2:36:07 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Reply - Form 34 - Rule 16.33
File Number: NSD544/2019
File Title: JONES ASIRIFI-OTCHERE v SWANN INSURANCE (AUST) PTY LTD
ABN 80 000 886 680 & ANOR
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Dated: 16/04/2020 2:36:12 PM AEST

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.



Form 34
Rule 16.33

Reply

NSD544 of 2019

Federal Court of Australia
District Registry: New South Wales
Division: General

Filed pursuant to leave given in
order 6 of the orders of
Gleeson J of 19 March 2020

Jones Asirifi-Otchere

Applicant

Swann Insurance (Aust) Pty Ltd (ABN 80 000 886 680) and another

Respondents

1. The Applicant joins issue with the allegations in the Amended Defence to Further Amended Statement of Claim filed ~~6 September 2019~~ 8 April 2020 (Defence), save insofar as the same consists of admissions, or are the subject of specific comment in this Reply. Unless otherwise indicated, defined terms used in this Reply have the meaning given in the Further Amended Statement of Claim (FASOC).
2. In reply to paragraph 7 of the Defence, the Applicant:
 - a. admits sub-paragraphs (a) to (j) inclusive;
 - b. otherwise denies the paragraph.
3. In reply to paragraph 11 of the Defence, the Applicant:
 - a. admits sub-paragraph (b);
 - b. otherwise denies the paragraph.
4. In reply to paragraph 17 of the Defence, the Applicant:
 - a. admits sub-paragraphs (a) and (b);
 - b. otherwise denies the paragraph.
5. In reply to paragraph 18 of the Defence, the Applicant:

Filed on behalf of Jones Asirifi-Otchere
Prepared by (name of person/lawyer) Paul Reidy
Law firm (if applicable) Johnson Winter & Slattery
Tel (02) 8274 9544 Fax (02) 8274 9500
Email Paul.reidy@jws.com.au
Address for service Level 25, 20 Bond Street, Sydney, NSW, 2000
(include state and postcode)

- a. admits sub-paragraphs (a) to (d);
 - b. in respect of sub-paragraph (e):
 - i. denies sub-paragraph (e)(iii);
 - ii. says that clause 5.5 of the Template Authorised Representative Agreement provided that in the course of providing any Authorised Services in accordance with the Template Authorised Representative Agreement, the Intermediary agreed to comply with all policies, procedures, guidelines and any reasonable requirement or direction given to it by Swann including in relation to enabling Swann to monitor the provision by the Intermediary of any Authorised Services in accordance with the Template Authorised Representative Agreement; and
 - iii. otherwise admits sub-paragraph (e);
 - c. otherwise denies the paragraph.
6. In reply to paragraph 20 of the Defence, the Applicant:
- a. admits sub-paragraphs (a) and (b);
 - b. does not admit sub-paragraph (d); and
 - c. otherwise denies the paragraph.
7. In reply to paragraph 22 of the Defence, the Applicant:
- a. admits sub-paragraphs (b) and (c); and
 - b. otherwise denies the paragraph.
- 7A. In reply to paragraph 26 of the Defence, the Applicant says in respect of sub-paragraph (l)(iv) that the reference to “protected loans” was made with respect to all Add On Insurance Products, not merely LPI.

Particulars

1. F&I Road to a Sale dated 7 May 2010 [IAG.802.003.5608].
2. Package Selling Step by Step Process dated 11 June 2010 [IAG.802.002.5557].
3. Business Manager Sales Skills dated 29 August 2011 [IAG.802.004.8068].
4. Menu Selling Blueprint dated 5 August 2014 [IAG.802.001.7330].
5. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.

7B. In reply to paragraph 28A of the Defence, the Applicant:

a. admits sub-paragraph (a)(ii), but:

- i. repeats the matters in paragraphs 26b and 27Cd (and any particulars thereto) of the FASOC; and
- ii. says that package selling was automated in Activ8;

Particulars

- 1. 7 Reasons Why The Bradstreet Group should be with Swann Insurance dated 7 September 2009 [IAG.500.207.6213].
- 2. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.

b. says in respect of sub-paragraph (e)(iii):

- i. that Swann produced materials on the assumption that the PDS would not or may not be provided to a customer until after the customer had communicated their intention to purchase the relevant Add On Insurance Products;
- ii. Authorised Representatives did not take any steps to ensure that customers had actually received, read and properly understood the PDS before they communicated their agreement to purchase the relevant Add On Insurance Products;
- iii. Authorised Representatives were aware that customers were unlikely to have reviewed the PDS before communicating their agreement to purchase the relevant Add On Insurance Products;
- iii. in any event, the PDS for each of the relevant Add On Insurance Products did not disclose or adequately disclose to prospective purchasers of such products each of the matters pleaded in paragraph 31 of the FASOC.

Particulars

- 1. Finance & Insurance Selling Process dated 23 January 2008 [IAG.500.218.8792]
- 2. Sales Process – Activ8 dated 23 January 2008 [IAG.500.218.8794]
- 3. Swann Insurance ActiV8 Training Manual V1.2 dated 10 August 2009 [IAG.802.003.5937].

4. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.

c. otherwise denies the paragraph.

7C. In reply to paragraph 30 of the Defence, the Applicant:

a. refers to and repeats the matters in paragraphs 14C, 15c, 15A, 24, 26f, 26h, 26i, 26k.i, 26l, 26m, 26n, 27A (and any particulars thereto) of the FASOC;

b. says that Swann promoted to Authorised Representatives, or potential Authorised Representatives, the ability of Swann's training to "improve Finance & Insurance results" and its accounts management activity to "Review all aspects of Finance & Insurance (ie penetrations, income etc) and plan training and areas of attention" and to "Review all aspects of Finance & Insurance using a comparison graph format";

Particulars

1. 7 Reasons Why The Bradstreet Group should be with Swann Insurance dated 7 September 2009.

2. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.

c. says that the Activ8 Sales System facilitated the payment for Add On Insurance Products by way of the Finance Agreement;

Particulars

1. The Applicant repeats particulars 1, 4, 5 and 6 to paragraph 28Ae of the FASOC.

2. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.

d. says that Swann referred to itself having "Strategic Alliances" with St George, AMP, Commonwealth Bank, Macquarie Bank and Bank of Melbourne in respect of Motor Vehicle finance; and

Particulars

1. 2015/6 National Sales Strategy dated 3 July 2015 [IAG.503.017.0001].

2. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.

e. otherwise denies the paragraph.

8. In reply to paragraph 31 of the Defence, the Applicant:
- a. admits sub-paragraph ~~(b)~~(f), but says further that:
 - i. the Loan Schedule signed by the Applicant contained the following statement: *“However, if this contract says so, you must take out insurance over any mortgaged property that is used as security, such as a house or car”*;
 - ii. the phrase “consumer credit insurance” was not defined in the Loan Schedule;
 - iii. the Applicant did not purchase a “consumer credit insurance” product;
 - b. does not admit sub-paragraph ~~(e)~~(g);
 - c. admits sub-paragraph ~~(d)~~(h)(i) and sub-paragraph ~~(e)~~(g)(i);
 - d. repeats, in response to sub-paragraph (k), the matters in paragraphs 26b and 26l of the FASOC and paragraph 7Aa above;
 - e. in response to sub-paragraph (s):
 - i. repeats the matters in paragraph 28Ac of the FASOC; and
 - ii. says that the quantum of the commission or bonuses for the sale of Add On Insurance Products received by the Authorised Representatives, or the staff of the Authorised Representatives, was not disclosed to the Applicant or Group Members;
 - f. says, in response to sub-paragraph (v):
 - i. that the product training provided to the Authorised Representatives with respect to the MBI (as referred to in paragraph 26a of the FASOC) instructed the Authorised Representatives to refer to purported benefits of the policies in addition to those referred to in subparagraphs (v)(i) and (ii), including purported benefits which constituted statutory obligations pursuant to the provisions of the Trade Practices Act 1974 (Cth) or, after 1 January 2011, the Australian Consumer Law;

Particulars

1. Motor Vehicle & Motorcycle Warranty dated 14 November 2008 [IAG.801.003.5137].
2. Motor Vehicle & Motorcycle Warranty + Tyre & Rim Insurance dated 16 August 2010 [IAG.801.003.5208].

3. Facilitator Guide – Warranty Insurance dated February 2011 [IAG.801.002.0881].
 4. Warranty Content Guide dated 20 May 2014 [IAG.801.002.1052].
 5. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.
- ii. that Swann represented to customers of Authorised Representatives that if their vehicle suffered any mechanical failure after the expiry of a manufacturer’s warranty, or statutory warranty (in respect of the purchase of a used car) they would be responsible for the payment of all costs of the repairs of that vehicle;

Particulars

1. Acknowledgement of Offer of Consumer Vehicle Purchase Protection dated 4 November 2007 [IAG.800.164.3078]
 2. Acknowledgement of Offer of Consumer Vehicle Purchase Protection dated 4 October 2011 [IAG.803.016.3474].
 3. Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.
- iii. that the purported “benefit” of a transfer of policy was not a benefit beyond existing statutory obligations, as any owner of a vehicle, including subsequent owners of the vehicle, would be able to claim against the seller or manufacturer of the vehicle on the basis of those statutory obligations; and

d.g. otherwise denies the paragraph.

9. The Applicant denies paragraphs 58 and 58A of the Defence, and says further that no Group Member’s claim for monies had and received by Swann to the use of the Group Member is time barred, because:
 - a. in respect of any Group Member’s claim for monies had and received by Swann to the use of the Group Member that is governed by the law of New South Wales and that accrued before 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an entity):
 - i. the claim is a claim for relief from the consequences of a mistake (as set out in paragraphs 43 to 47 of the ~~Amended Statement of Claim FASOC~~) within the meaning of section 56 of the *Limitation Act 1969* (NSW) (**NSW Limitation Act**);

- ii. the time which elapsed after any limitation period fixed by the NSW Limitation Act in respect of the claim commenced to run and before the date on which the Group Member first discovered, or may with reasonable diligence have discovered, the mistake, does not count in the reckoning of the limitation period for the claim by reason of section 56 of the NSW Limitation Act; and
- iii. the Group Member did not discover, nor could with reasonable diligence have discovered, the mistake at any time prior to:
 - 1. 10 April 2013, in the case of a natural person; or
 - 2. 15 August 2013, for those entities that are Group Members and did not discover, nor could with reasonable diligence have discovered the mistake at any time prior to that date.

Particulars

Paragraph 1A of the ~~Amended Statement of Claim FASOC~~ is repeated. A person is only a Group Member if they did not discover, and could not with reasonable diligence have discovered, the mistakes pleaded in paragraph 43 of the ~~Amended Statement of Claim FASOC~~ prior to 10 April 2013 (in the case of a natural person) or ~~13~~¹⁵ August 2013 (in the case of an entity). The Applicant accepts that for entities, the relevant date is 15 August 2013.

- b. in respect of any Group Member's claim for monies had and received by Swann to the use of the Group Member that is governed by the law of Victoria and that accrued before 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an entity):
 - i. the claim is a claim for relief from the consequences of a mistake (as set out in paragraphs 43 to 47 of the ~~Amended Statement of Claim FASOC~~) within the meaning of section 27 of the *Limitation of Actions Act 1958* (Vic) (**Victorian Limitations Act**);
 - ii. any period of limitation prescribed by the Victorian Limitations Act in respect of the claim did not begin to run against the Group Member until he, she or it discovered the mistake, or could with reasonable diligence have discovered the mistake by reason of section 27 of the Victorian Limitation Act; and

iii. the Group Member did not discover, nor could with reasonable diligence have discovered, the mistake at any time prior to:

1. 10 April 2013, in the case of a natural person; or
2. 15 August 2013, for those entities that are Group Members and did not discover, nor could with reasonable diligence have discovered the mistake at any time prior to that date.

Particulars

Paragraph 1A of the ~~Amended Statement of Claim FASOC~~ is repeated. A person is only a Group Member if they did not discover, and could not with reasonable diligence have discovered, the mistakes pleaded in paragraph 43 of the ~~Amended Statement of Claim FASOC~~ prior to 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an entity). The Applicant accepts that for entities, the relevant date is 15 August 2013.

c. in respect of any Group Member's claim for monies had and received by Swann to the use of the Group Member that is governed by the law of Queensland and accrued before 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an entity):

- i. the claim is a claim for relief from the consequences of a mistake (as set out in paragraphs 43 to 47 of the ~~Amended Statement of Claim FASOC~~) within the meaning of section 38 of the *Limitation of Actions Act 1974* (Qld) (**Queensland Limitation Act**);
- ii. the limitation period fixed by the Queensland Limitation Act in respect of the claim did not begin to run against the Group Member until he, she or it discovered the mistake, or could with reasonable diligence have discovered the mistake by reason of section 38 of the Queensland Limitation Act; and
- iii. the Group Member did not discover, nor could with reasonable diligence have discovered, the mistake at any time prior to:
 1. 10 April 2013, in the case of a natural person; or
 2. 15 August 2013, for those entities that are Group Members and did not discover, nor could with reasonable diligence have discovered the mistake at any time prior to that date.

Particulars

Paragraph 1A of the ~~Amended Statement of Claim FASOC~~ is repeated. A person is only a Group Member if they did not discover, and could not with reasonable diligence have discovered, the mistakes pleaded in paragraph 43 of the ~~Amended Statement of Claim FASOC~~ prior to 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an entity). The Applicant accepts that for entities, the relevant date is 15 August 2013.

- d. in respect of any Group Member's claim for monies had and received by Swann to the use of the Group Member that is governed by the law of Tasmania and accrued before 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an entity):
- i. the claim is a claim for relief from the consequences of a mistake (as set out in paragraphs 43 to 47 of the ~~Amended Statement of Claim FASOC~~) within the meaning of section 32 of the *Limitation Act 1974* (Tas) (**Tasmanian Limitation Act**);
 - ii. the limitation period fixed by the Tasmanian Limitation Act in respect of the claim did not begin to run against the Group Member until he, she or it discovered the mistake, or could with reasonable diligence have discovered the mistake by reason of section 32 of the Tasmanian Limitation Act; and
 - iii. the Group Member did not discover, nor could with reasonable diligence have discovered, the mistake at any time prior to:
 1. 10 April 2013, in the case of a natural person; or
 2. 15 August 2013, for those entities that are Group Members and did not discover, nor could with reasonable diligence have discovered the mistake at any time prior to that date.

Particulars

Paragraph 1A of the ~~Amended Statement of Claim FASOC~~ is repeated. A person is only a Group Member if they did not discover, and could not with reasonable diligence have discovered, the mistakes pleaded in paragraph 43 of the ~~Amended Statement of Claim FASOC~~ prior to 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an

entity). The Applicant accepts that for entities, the relevant date is 15 August 2013.

- e. in respect of any Group Member's claim for monies had and received by Swann to the use of the Group Member that is governed by the law of South Australia and accrued before 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an entity):
- i. the Group Member's failure to institute an action against Swann within the period of the limitation prescribed by the *Limitation of Actions Act 1936* (SA) (**South Australian Limitation Act**) in respect of the claim resulted from conduct on the part of Swann, or a person whom the Group Member reasonably believed to be acting on behalf of Swann, namely an Authorised Representative;

Particulars

The Group Member's failure to institute an action resulted from Swann's non-disclosures to the Group Member, pleaded in paragraph 31 of the Amended Statement of Claim FASOC.

- ii. the Group Member's failure to institute an action against Swann within the period of the limitation prescribed by the South Australian Limitation Act in respect of the claim was reasonable in view of Swann's non-disclosure of the matters pleaded in paragraph 31 of the ~~Amended Statement of Claim~~ FASOC, which matters constituted material information that would have been relevant to the Group Member's decision whether to proceed with the purchase of Add On Insurance Products as pleaded in paragraph 32 of the ~~Amended Statement of Claim~~ FASOC, in the context of the circumstances pleaded in paragraphs 29 and 30 of the ~~Amended Statement of Claim~~ FASOC; and
- iii. in all the circumstances, it is just that the Group Member be granted an extension of time until 10 April 2019, in the case of natural person Group Members, and until 15 August 2019, in the case of entity Group Members, to institute this proceeding under s 48 of the South Australian Limitation Act, and the Applicant seeks an order accordingly.
- f. in respect of any Group Member's claim for monies had and received by Swann to the use of the Group Member that is governed by the law of Western Australia and accrued before 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an entity), the failure to commence the present proceedings within time was attributable to improper conduct on the part of Swann, and the

Applicant therefore seeks an order under s 38 of the *Limitation Act 2005* (WA), by separate Summons in accordance with s 43 of that Act, to extend time in respect of such claims.

Particulars

Paragraphs ~~37~~38 to 39 of the Amended Statement of Claim FASOC are repeated.

- g. in respect of any Group Member's claim for monies had and received by Swann to the use of the Group Members that is governed by the law of the Northern Territory and accrued before 10 April 2016 (in the case of a natural person) or 15 August 2016 (in the case of an entity):
- i. the claim is a claim for relief from the consequences of a mistake (as set out in paragraphs 43 to 47 of the ~~Amended Statement of Claim FASOC~~ within the meaning of section 43 of the *Limitation Act 1981* (NT) (**NT Limitation Act**);
 - ii. the time that elapsed after any limitation period fixed by the NT Limitation Act in respect of the claim commenced to run and before the date on which the Group Member first discovered, or may with reasonable diligence have discovered, the mistake, does not count in the reckoning of the limitation period for the claim by reason of section 43 of the NT Limitation Act; and
 - iii. the Group Member did not discover, nor could with reasonable diligence have discovered, the mistake at any time prior to:
 1. 10 April 2016, in the case of a natural person; or
 2. 15 August 2016, for those entities that are Group Members and did not discover, nor could with reasonable diligence have discovered the mistake at any time prior to that date.

Particulars

Paragraph ~~1A~~B of the Amended Statement of Claim FASOC is repeated. A person whose claim is governed by the law of the Northern Territory is only a Group Member if they did not discover, and could not with reasonable diligence have discovered, the mistakes pleaded in paragraph 43 of the Amended Statement of Claim FASOC prior to 10 April 2016 (in the case of a natural person) or 15 August 2016 (in the case of an entity). The Applicant accepts that for Group Members whose claims are

governed by the law of the Northern Territory, the relevant date is 13 April 2016 for natural persons, and 15 August 2016 for entities.

- h. in respect of any Group Member's claim for monies had and received by Swann to the use of the Group Member that is governed by the law of the Australian Capital Territory and accrued before 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an entity):
- i. that claim is a claim for relief from the consequences of a mistake (as set out in paragraphs 43 to 47 of the ~~Amended Statement of Claim FASOC~~) within the meaning of section 34 of the *Limitation Act 1985* (ACT) (**ACT Limitation Act**);
 - ii. the time that elapsed after any limitation period fixed by the ACT Limitation Act in respect of the claim began to run and before the date when the Group Member first discovered, or may with reasonable diligence have discovered, the mistake, does not count in the reckoning of the limitation period for the claim by reason of section 34 of the ACT Limitation Act;
 - iii. the Group Member did not discover, nor could with reasonable diligence have discovered, the mistake at any time prior to:
 1. 10 April 2013, in the case of a natural person; or
 2. 15 August 2013, for those entities that are Group Members and did not discover, nor could with reasonable diligence have discovered the mistake at any time prior to that date.

Particulars

Paragraph 1A of the ~~Amended Statement of Claim FASOC~~ is repeated. A person is only a Group Member if they did not discover, and could not with reasonable diligence have discovered, the mistakes pleaded in paragraph 43 of the ~~Amended Statement of Claim FASOC~~ prior to 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an entity). The Applicant accepts that for entities, the relevant date is 15 August 2013.

10. The Applicant denies paragraph 58B of the Defence, and says further that:
- a. the date from which the amendments to the Statement of Claim contained in the Amended Statement of Claim should take effect is the date upon which the Statement of Claim was filed;

- b. there is no natural person Group Member whose claim for monies had and received by Swann to the use of the Group Member arose by reason of the amendments to the Statement of Claim appearing in the Amended Statement of Claim ~~filed on 15 August 2019~~.

11. The Applicant denies paragraphs 58C and 58D of the Defence, and says further that:

- a. the date from which the amendments to the Amended Statement of Claim contained in the FASOC should take effect is the date upon which the Statement of Claim was filed or, alternatively, the date upon which the Amended Statement of Claim was filed;
- b. no Group Member's claim for monies had and received by Swann to the use of the Group Member on the basis of the amendments to the Amended Statement of Claim by the FASOC is time barred, because:
 - i. in respect of any such claim that is governed by the law of New South Wales and that accrued before 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an entity) or, in the alternative, before 10 March 2014 (in the case of both natural persons and entities):
 - 1. the claim is a claim for relief from the consequences of a mistake (as set out in paragraphs 43 to 47 of the FASOC) within the meaning of section 56 of the NSW Limitation Act;
 - 2. the time which elapsed after any limitation period fixed by the NSW Limitation Act in respect of the claim commenced to run and before the date on which the Group Member first discovered, or may with reasonable diligence have discovered, the mistake, does not count in the reckoning of the limitation period for the claim by reason of section 56 of the NSW Limitation Act; and
 - 3. the Group Member did not discover, nor could with reasonable diligence have discovered, the mistake at any time prior to:
 - a. 10 April 2013 or, in the alternative, 10 March 2014, in the case of a natural person; or
 - b. 15 August 2013 or, in the alternative, 10 March 2014, in the case of an entity.

Particulars

Paragraph 1A of the FASOC is repeated. A person is only a Group Member if they did not discover, and could not with

reasonable diligence have discovered, the mistakes pleaded in paragraph 43 of the FASOC prior to 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an entity).

Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.

- ii. in respect of any such claim that is governed by the law of Victoria and that accrued before 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an entity) or, in the alternative, before 10 March 2014 (in the case of both natural persons and entities):
 1. the claim is a claim for relief from the consequences of a mistake (as set out in paragraphs 43 to 47 of the FASOC) within the meaning of section 27 of the Victorian Limitations Act;
 2. any period of limitation prescribed by the Victorian Limitations Act in respect of the claim did not begin to run against the Group Member until he, she or it discovered the mistake, or could with reasonable diligence have discovered the mistake by reason of section 27 of the Victorian Limitation Act; and
 3. the Group Member did not discover, nor could with reasonable diligence have discovered, the mistake at any time prior to:
 - a. 10 April 2013, or, in the alternative, 10 March 2014, in the case of a natural person; or
 - b. 15 August 2013, or, in the alternative, 10 March 2014, in the case of an entity.

Particulars

Paragraph 1A of the FASOC is repeated. A person is only a Group Member if they did not discover, and could not with reasonable diligence have discovered, the mistakes pleaded in paragraph 43 of the FASOC prior to 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an entity).

Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.

- iii. in respect of any such claim that is governed by the law of Queensland and accrued before 10 April 2013 (in the case of a natural person) or 15 August

2013 (in the case of an entity) or, in the alternative, before 10 March 2014 (in the case of both natural persons and entities):

1. the claim is a claim for relief from the consequences of a mistake (as set out in paragraphs 43 to 47 of the FASOC) within the meaning of section 38 of the Queensland Limitation Act;
2. the limitation period fixed by the Queensland Limitation Act in respect of the claim did not begin to run against the Group Member until he, she or it discovered the mistake, or could with reasonable diligence have discovered the mistake by reason of section 38 of the Queensland Limitation Act; and
3. the Group Member did not discover, nor could with reasonable diligence have discovered, the mistake at any time prior to:
 - a. 10 April 2013, or, in the alternative, 10 March 2014, in the case of a natural person; or
 - b. 15 August 2013, or, in the alternative, 10 March 2014, in the case of an entity.

Particulars

Paragraph 1A of the FASOC is repeated. A person is only a Group Member if they did not discover, and could not with reasonable diligence have discovered, the mistakes pleaded in paragraph 43 of the FASOC prior to 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an entity).

Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.

- iv. in respect of any such claim that is governed by the law of Tasmania and accrued before 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an entity) or, in the alternative, before 10 March 2014 (in the case of both natural persons and entities):
 1. the claim is a claim for relief from the consequences of a mistake (as set out in paragraphs 43 to 47 of the FASOC) within the meaning of section 32 of the Tasmanian Limitation Act;
 2. the limitation period fixed by the Tasmanian Limitation Act in respect of the claim did not begin to run against the Group Member until he, she or it discovered the mistake, or could with

reasonable diligence have discovered the mistake by reason of section 32 of the Tasmanian Limitation Act; and

3. the Group Member did not discover, nor could with reasonable diligence have discovered, the mistake at any time prior to:
 - a. 10 April 2013, or, in the alternative, 10 March 2014, in the case of a natural person; or
 - b. 15 August 2013, or, in the alternative, 10 March 2014, in the case of an entity.

Particulars

Paragraph 1A of the FASOC is repeated. A person is only a Group Member if they did not discover, and could not with reasonable diligence have discovered, the mistakes pleaded in paragraph 43 of the FASOC prior to 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an entity).

Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.

- v. in respect of any such claim that is governed by the law of South Australia and accrued before 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an entity) or, in the alternative, before 10 March 2014 (in the case of both natural persons and entities):
 1. the Group Member's failure to institute an action against Swann within the period of limitation prescribed by the South Australian Limitation Act in respect of the claim resulted from conduct on the part of Swann, or a person whom the Group Member reasonably believed to be acting on behalf of Swann, namely an Authorised Representative;

Particulars

The Group Member's failure to institute an action resulted from Swann's non-disclosures to the Group Member, pleaded in paragraph 31 of the FASOC.

2. the Group Member's failure to institute an action against Swann within the period of the limitation prescribed by the South Australian Limitation Act in respect of the claim was reasonable in view of Swann's non-disclosure of the matters pleaded in

paragraph 31 of the FASOC, which matters constituted material information that would have been relevant to the Group Member's decision whether to proceed with the purchase of Add On Insurance Products as pleaded in paragraph 32 of the FASOC, in the context of the circumstances pleaded in paragraphs 29 and 30 of the FASOC; and

3. in all the circumstances, it is just that the Group Member be granted an extension of time until 10 April 2019, in the case of natural person Group Members, and until 15 August 2019, in the case of entity Group Members, or, in the alternative, 10 March 2020 in the case of all Group Members, to institute this proceeding under s 48 of the South Australian Limitation Act, and the Applicant seeks an order accordingly.
- vi. in respect of any such claim that is governed by the law of Western Australia and accrued before 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an entity), or, in the alternative, before 10 March 2014 (in the case of both natural persons and entities), the failure to commence the present proceedings within time was attributable to improper conduct on the part of Swann, and the Applicant therefore seeks an order under s 38 of the *Limitation Act 2005* (WA), by separate Summons in accordance with s 43 of that Act, to extend time in respect of such claims.

Particulars

Paragraphs 38 to 39 of the FASOC are repeated.

- vii. in respect of any such claim that is governed by the law of the Northern Territory and accrued before 10 April 2016 (in the case of a natural person) or 15 August 2016 (in the case of an entity) or, in the alternative, before 10 March 2017 (in the case of both natural persons and entities):
1. the claim is a claim for relief from the consequences of a mistake (as set out in paragraphs 43 to 47 of the FASOC) within the meaning of section 43 of the NT Limitation Act;
 2. the time that elapsed after any limitation period fixed by the NT Limitation Act in respect of the claim commenced to run and before the date on which the Group Member first discovered, or may with reasonable diligence have discovered, the mistake, does

not count in the reckoning of the limitation period for the claim by reason of section 43 of the NT Limitation Act; and

3. the Group Member did not discover, nor could with reasonable diligence have discovered, the mistake at any time prior to:
 - a. 10 April 2016, or, in the alternative, 10 March 2017, in the case of a natural person; or
 - b. 15 August 2016, or, in the alternative, 17 March 2017, in the case of an entity.

Particulars

Paragraph 1B of the FASOC is repeated. A person whose claim is governed by the law of the Northern Territory is only a Group Member if they did not discover, and could not with reasonable diligence have discovered, the mistakes pleaded in paragraph 43 of the FASOC prior to 10 April 2016 (in the case of a natural person) or 15 August 2016 (in the case of an entity).

Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.

- viii. in respect of any such claim that is governed by the law of the Australian Capital Territory and accrued before 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an entity) or, in the alternative, before 10 March 2014 (in the case of both natural persons and entities):
 1. that claim is a claim for relief from the consequences of a mistake (as set out in paragraphs 43 to 47 of the FASOC) within the meaning of section 34 of the ACT Limitation Act;
 2. the time that elapsed after any limitation period fixed by the ACT Limitation Act in respect of the claim began to run and before the date when the Group Member first discovered, or may with reasonable diligence have discovered, the mistake, does not count in the reckoning of the limitation period for the claim by reason of section 34 of the ACT Limitation Act;
 3. the Group Member did not discover, nor could with reasonable diligence have discovered, the mistake at any time prior to:
 - a. 10 April 2016, or, in the alternative, 10 March 2017, in the case of a natural person; or
 - b. 15 August 2016, or, in the alternative, 17 March 2017, in the case of an entity.

- a. 10 April 2013, or, in the alternative, 10 March 2014, in the case of a natural person; or
- b. 15 August 2013, or, in the alternative, 10 March 2014, in the case of an entity.

Particulars

Paragraph 1A of the FASOC is repeated. A person is only a Group Member if they did not discover, and could not with reasonable diligence have discovered, the mistakes pleaded in paragraph 43 of the FASOC prior to 10 April 2013 (in the case of a natural person) or 15 August 2013 (in the case of an entity).

Further particulars may be provided by way of evidence or after further discovery at an appropriate stage in the Proceedings.

12. In reply to paragraph 59 of the Defence, the Applicant:

- a. admits the claims referred to in sub-paragraph (a) are apportionable;
- ~~b. otherwise denies the paragraph;~~
- c. say that if, which is denied, the Respondents are concurrent wrongdoers with the Motor Vehicle Dealers:
 - i. ~~that the Respondents bear primary responsibility for the Applicant's and the Group Members' loss and damage;~~
 - ii. the financial service(s) provided by the Motor Vehicle Dealers were ones on which the Applicant and Group Members could reasonably be expected to rely;
 - iii. the Applicant and Group Members did in fact rely in good faith on those financial services;
 - iv. all the conduct of the Motor Vehicle Dealers as pleaded in the FASOC was conduct undertaken by the Motor Vehicle Dealers within the scope of their authority, or apparent authority, as Authorised Representatives;
 - v. in the alternative to paragraph 12.c.iv, the Motor Vehicle Dealers did not disclose to the Applicants or Group Members that they were not acting within their authority as Authorised Representatives and if they were acting outside of their authority, the Applicant and Group Members were unaware of that;

vi. in the premises of paragraphs 12.c.ii to 12.c.v, pursuant to ss 917A to 917E of the Corporations Act or otherwise within the general law, Swann is liable for the acts and omissions of the Motor Vehicle Dealers for any loss and damage caused by the Motor Vehicle Dealers whether as concurrent wrongdoers or otherwise and there is no legal basis for the liability of the Respondents to be reduced pursuant to principles of apportionment; and

d. otherwise denies the paragraph.

13. In reply to paragraph 60 of the Defence, the Applicant says that any collateral benefit received by the Applicant and Group Members, such as tax credits, tax deductions or other reductions in their tax liability, are not relevant to the calculation of their loss and damage pursuant to:

a. s 12GF(1) of the ASIC Act;

b. s 1041I(1) of the Corporations Act; and

c. s 991A(2) of the Corporations Act.

Date: ~~20 September 2019~~ 16 April 2020



Signed by Paul Reidy
Lawyer for the Applicant

This pleading was prepared by Robert Dick SC, Christopher Withers, Rob Clark and Kate Lindeman of counsel.

Certificate of lawyer

I, Paul Reidy, certify to the Court that, in relation to the reply filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: ~~20 September 2019~~ 16 April 2020



Signed by Paul Reidy
Lawyer for the Applicant