



IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL COURT  
GROUP PROCEEDINGS LIST

Case: S ECI 2020 02946  
No. S ECI 2020 02946  
Filed on: 20/11/2020 03:53 PM

B E T W E E N

ALANNAH FOX

First Plaintiff

BRIDGET NASTASI

Second Plaintiff

-and-

WESTPAC BANKING CORPORATION (ACN 007 457 141)

First Defendant

ST. GEORGE FINANCE LIMITED (ACN 001 094 471)

Second Defendant

DEFENCE

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Date of Document:	20 November 2020	Solicitors Code:	8469
Filed on behalf of:	the Second Defendant	DX:	113 Sydney
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In answer to the Writ (**Writ**) and Statement of Claim (**SOC**) filed by the Plaintiffs on 15 July 2020, the Second Defendant (**St. George**) says as follows, adopting the definitions in the SOC unless otherwise stated and without admission as to the accuracy of those definitions:

**A. INTRODUCTION**

1 In answer to paragraph 1 of the SOC, St. George:

- (a) admits that the Plaintiffs seek to commence the proceeding as a representative proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) (**Supreme Court Act**) on their own behalf and on behalf of Group Members;
- (b) says that the Second Plaintiff:

- (i) does not allege a claim on her own behalf against the First Defendant (**Westpac**), and on that basis;
  - (ii) does not have a maintainable cause of action against Westpac on her own behalf, nor can she represent customers who had a Car Loan with Westpac;
- (c) says that the First Plaintiff:
  - (i) does not allege a claim on her own behalf against St. George, and on that basis;
  - (ii) does not have a maintainable cause of action against St. George on her own behalf, nor can she represent customers who had a Car Loan with St. George;
- (d) in the premises, each Plaintiff does not have a claim against each Defendant, as required by section 33C(1) of the Supreme Court Act, and therefore the proceeding is not validly commenced as a representative proceeding in accordance with Part 4A of the Supreme Court Act;
- (e) denies that any customer entered into a Car Loan with St. George on or after 1 March 2015, in which a Flex Commission (as defined in sub-paragraph 9(f) of this Defence) was paid to the Dealer (as defined in sub-paragraph 5(a) of this Defence);
- (f) denies that any customer entered into a Car Loan with Westpac before 1 March 2015, in which a Flex Commission (as defined in sub-paragraph 9(f) of this Defence) was paid to the Dealer (as defined in sub-paragraph 5(a) of this Defence);
- (g) denies that the Plaintiffs and Group Members have suffered loss or damage arising out of the same, similar or related circumstances by or because of the alleged conduct of Westpac or St. George as pleaded in the SOC; and
- (h) in the premises of the Writ, the SOC and this Defence, denies that all of the “common questions of law or fact” set out in the SOC are substantial questions of law or fact common to the claims of the Plaintiffs and Group Members; and
- (i) by reason of the matters alleged at sub-paragraphs 1(b) to (h) of this Defence, denies the allegations in paragraph 1 of the SOC.

- 1A Where the expression “Not Applicable” is used in this Defence, it refers to the fact that a paragraph or sub-paragraph of the SOC does not contain allegations against St. George and St. George does not admit and does not plead to the allegations in that paragraph or sub-paragraph.
- 1B The terms automobile and car have been used interchangeably in the SOC and likewise in this Defence.
- 1C Subject to St. George’s denial of the allegations in paragraph 1 of the SOC, St. George says by way of defence to the SOC as follows.
- 2 In answer to paragraph 2 of the SOC, St. George does not know the facts alleged and cannot admit the allegation in paragraph 2 of the SOC.
- 3 In answer to paragraph 3 of the SOC, St. George:
- (a) admits that it was incorporated pursuant to the *Corporations Act 2001* (Cth) **(Corporations Act)**;
  - (b) admits that it was capable of being sued in its own name during the period 1 March 2013 to 1 March 2015 (**Relevant Period**);
  - (c) admits that Westpac is and was a registered public company limited by shares for the purposes of section 5H of the Corporations Act and capable of being sued in its own name in the Relevant Period;
  - (d) admits the allegations in sub-paragraphs 3(b) to (e) of the SOC during the Relevant Period; and
  - (e) otherwise denies the allegations in paragraph 3 of the SOC.
- 4 St. George admits paragraph 4 of the SOC

## **B. THE CLAIMS OF GROUP MEMBERS**

- 5 In answer to paragraph 5 of the SOC, St. George:
- (a) admits that during the Relevant Period, it entered into agreements from time to time with automobile dealers (**Dealers**) to facilitate the introduction of credit business to St. George by Dealers (**Dealer Agreements**) until 1 March 2015, when it ceased to enter into Dealer Agreements or receive automobile loan offers from customers via Dealers; and

(b) otherwise denies the allegations in paragraph 5 of the SOC.

6 In answer to paragraph 6 of the SOC, during the Relevant Period, St. George:

(a) as to sub-paragraph 6(a) of the SOC, says that Dealer Agreements, among other things, set out the terms on which, and the form and manner in which Dealers were permitted to submit credit offers from customers to enter into Car Loans;

(b) as to sub-paragraph 6(b) of the SOC, says that the terms of Dealer Agreements, among other things, required Dealers to:

(i) comply with all laws and requirements of authorities in connection with the Dealer's licensing status;

**Particulars**

*Paragraph 2.2(b) of the Dealer Agreements.*

(ii) comply with any undertaking given by the Dealer to St. George, or any direction by St. George to the Dealer, about the conduct of the Dealer's business to the extent it relates to, or impacts on, St. George's business or results, or may result, in St. George suffering liability or loss. For example, the Dealer must complete any training required by St. George within the time frame St. George specifies and adhere to any procedures advised by St. George from time to time;

**Particulars**

*Paragraph 3.3 of the Dealer Agreements.*

(iii) comply with any direction St. George gives in connection with any advertising or use of St. George's logo or promotional material, use of St. George's reputation or the use of any of St. George's property which is in the Dealer's possession or control; and

**Particulars**

*Paragraph 10(a) of the Dealer Agreements.*

(iv) in relation to each credit offer, declare that the Dealer has complied and will comply with all instructions and procedures given by St. George at any time

in respect of the manner of completion and submission to St. George of each credit offer;

#### **Particulars**

*Paragraph 6(b) of Schedule 1 of the Dealer Agreements.*

- (c) admits sub-paragraph 6(c) of the SOC;
- (d) says that the terms of Dealer Agreements provided that Dealers were under no obligation to obtain or procure credit offers or to do business with St. George and Dealers acknowledged that if Dealers obtained any credit offer, they did so for the convenience of their customers and in the expectation that it would assist the Dealers' businesses;

#### **Particulars**

*Paragraph 13.2 of the Dealer Agreements.*

- (e) relies upon the terms of the Dealer Agreements for their full force and effect;
- (f) says that some of the Dealers with whom St. George had entered into Dealer Agreements had arrangements with other licensees (within the meaning of the NCCPA) to facilitate the introduction of credit business to other licensees; and
- (g) otherwise denies the allegations in paragraph 6 of the SOC.

7 In answer to paragraph 7 of the SOC, St. George refers to and repeats paragraph 6 of this Defence and, insofar as a customer sought to finance their acquisition of an automobile from a Dealer through a Car Loan and the Dealer submitted a loan application to St. George, says as follows:

- (a) as to sub-paragraph 7(a) of the SOC, says that the relevant employee of the Dealer who had direct contact with customers in relation to loan applications (**Dealer Business Manager**) was required to be accredited by St. George:
  - (i) to make reasonable inquiries about a customer's requirements, objectives and financial situation including:
    - (A) the loan amount required;
    - (B) the length of time the customer intended to keep the automobile;

- (C) the repayment structure the customer wanted or sought to avoid (for example, balloon payment); and
- (D) the term of the loan sought, including how quickly the customer planned to pay off the automobile; and
- (ii) to assess whether the loan was “not unsuitable” for the customer;
- (b) as to sub-paragraph 7(b) of the SOC:
  - (i) admits that, pursuant to the terms of the Dealer Agreements, Dealers who wished to submit an application for approval of a proposed credit offer and a customer’s credit offer to St. George were required to submit the application for approval of a proposed credit offer and credit offer in the form and manner required by St. George and following the procedures specified by St. George from time to time in connection with anything done before, at the same time as, or after the credit offer was made;
  - (ii) says that Dealers were permitted to submit a customer’s application for approval of a proposed credit offer;
  - (iii) says that an application for approval of a proposed credit offer could be made through St. George’s automated credit acceptance system (**Sovereign**) or any other method approved by St. George;
  - (iv) says that any approval was conditional and subject to final acceptance by St. George of a credit offer (referred to below as a Car Loan Offer);
  - (v) says that St. George had absolute discretion as to whether to accept or reject any credit offer (such acceptance not to be unreasonably withheld if St. George had approved the credit offer and the Dealer had complied with all of its obligations under the Dealer Agreement); and

**Particulars**

*Clauses 3 and 5 of the Dealer Agreements.*

- (vi) if a Dealer Business Manager submitted a customer’s application for approval of a proposed credit offer, the Dealer Business Manager entered

the customer's details into Sovereign, in accordance with the mandatory fields and selections available within Sovereign;

- (c) as to sub-paragraph 7(c) of the SOC, says that if St. George determined that supporting documentation was required from a customer, St. George requested that the Dealer Business Manager obtain and provide that supporting documentation;
- (d) as to sub-paragraph 7(d) of the SOC, says that if the details of the proposed credit offer for a customer met the necessary thresholds in Sovereign, or the proposed credit offer was otherwise allowed to progress by St. George, the Dealer Business Manager was notified and was provided access to automatically generated documentation which included:
  - (i) a completed application for finance, which included information that was entered into Sovereign by the Dealer Business Manager;
  - (ii) a credit guide;
  - (iii) a loan agreement, being an offer from the customer to borrow the loan amount from St. George (**Car Loan Offer**);
  - (iv) Fixed Rate Loan Agreement Standard Terms and Conditions; and
  - (v) a further copy of the Car Loan Offer, for the customer to keep;
- (e) as to sub-paragraph 7(e) of the SOC, says that the Dealer Business Manager provided the documents described in sub-paragraph 7(d) of this Defence to the customer;
- (f) as to sub-paragraph 7(f) of the SOC, says that if the customer wished to proceed with their application for finance, the customer was required to sign the completed application, and in so doing would:
  - (i) declare that the details of the application are true and correct and, after 8 June 2014, also that the details of the application are not by omission or otherwise misleading;
  - (ii) acknowledge that the Dealer named in the application is not acting as the customer's agent in relation to the application for finance and is not

- authorised to negotiate in relation to the loan contract on the customer's behalf;
- (iii) acknowledge that the Dealer may perform some activities under the NCCPA on behalf of St. George as its representative, but it is not St. George's agent, except in undertaking customer identification or providing documents as legally required;
  - (iv) acknowledge that, where an origination fee was charged, the customer is liable to pay an origination fee shown in the Car Loan Offer to the Dealer for reimbursement of its administrative costs; and
  - (v) acknowledge that, where an origination fee was charged, the customer authorises the origination fee to be included in the Car Loan Offer and for St. George to make the payment on the customer's behalf to the Dealer;
- (g) as to sub-paragraph 7(g) of the SOC, says that if the customer wished to proceed with the Car Loan Offer, the customer signed the Car Loan Offer, and in so doing:
- (i) declared that all of the information provided by the customer to St. George was accurate and not misleading and the customer was aware that St. George was relying on it;
  - (ii) acknowledged that before signing the Car Loan Offer, the customer received and read a copy of the Fixed Rate Loan Agreement Standard Terms and Conditions;
  - (iii) acknowledged that the customer could withdraw from the Car Loan Offer at any time before St. George accepted it; and
  - (iv) acknowledged that St. George would pay commission to the Dealer for the introduction of the customer's credit business;
- (h) as to sub-paragraph 7(h) of the SOC, says that the Dealer Business Manager submitted the following documents to St. George via Sovereign, among other documents:



- (i) the signed completed application for finance referred to in sub-paragraph 7(f) of this Defence and the signed Car Loan Offer referred to in sub-paragraph 7(g) of this Defence; and
- (ii) any necessary supporting documents from the customer, including:
  - (A) payslips; and
  - (B) identification documents;
- (i) in answer to sub-paragraph 7(i) of the SOC, St. George says that, following its internal verification and credit assessment processes, if the Car Loan Offer was accepted, the Car Loan Offer was signed on behalf of St. George and returned to the Dealer Business Manager through Sovereign;
- (j) in answer to sub-paragraph 7(j) of the SOC, St. George says that funds comprising the approved loan amount, less any amounts payable to St. George or which were to be paid directly to third parties pursuant to the Car Loan, were transferred to the Dealer;
- (k) in answer to sub-paragraph 7(k) of the SOC, says that once the Dealer Business Manager was satisfied that the Dealer had received, or would receive, the settled funds under the Car Loan, he or she would arrange for the car the subject of the Car Loan to be released to the customer;
- (l) in answer to sub-paragraph 7(l) of the SOC, admits that the Dealer Business Manager managed communications between the customer and St. George; and
- (m) otherwise denies the allegations in paragraph 7 of the SOC.

8 In answer to paragraph 8 of the SOC, St. George:

- (a) admits the allegations in paragraph 8 of the SOC during the Relevant Period; and
- (b) otherwise denies the allegations in paragraph 8 of the SOC.

9 In answer to paragraph 9 of the SOC, during the Relevant Period, St. George:

- (a) says that, as contemplated by Dealer Agreements, St. George agreed to pay commission to individual Dealers for the introduction of credit business;
- (b) says that St. George notified Dealers individually from time to time of a base rate of interest to be charged on Car Loans (**Base Rate**);

- (c) says that the Base Rate was typically reviewed monthly, and could be higher for used vehicles and/or loan terms greater than 60 months;
- (d) says that St. George authorised Dealers to set a rate of interest to be payable by a customer under a Car Loan (subject to St. George's approval) which was higher than, lower than or equal to the Base Rate (**Contract Rate**);
- (e) says that the difference between the Base Rate and the Contract Rate was called the "Margin";
- (f) says that, where the Base Rate was lower than the Contract Rate, St. George notified Dealers individually from time to time of the proportion of the Margin which was used by St. George to calculate the commission (**Flex Commission**) payable to the Dealer for the introduction of a customer's credit business;  
**(Flex Commission Calculation Method)**
- (g) says that the term of a Car Loan could not exceed 84 months (**Maximum Term**) and the commission payable to Dealers on Car Loans with a term greater than 60 months was capped as for a Car Loan with a 60 month term;
- (h) says that St. George notified Dealers individually of any minimum commission payable on Car Loans where the Contract Rate was equal to or below the Base Rate;
- (i) says that from time to time, St. George, as part of a time limited promotion agreed with the Dealer, paid the Dealer a flat commission for Car Loans originated at specified interest rates (**Promotional Rates**);
- (j) says that the commissions and origination fees were repayable by the Dealer to St. George if the Car Loan was paid out or was non-accrual within three months of settlement, or if the automobile was repossessed during the first two years from settlement of the Car Loan;
- (k) says that the Contract Rate for some Dealers was subject to a cap of up to 10 percentage points above the Base Rate (**Maximum Rate**);
- (l) says that St. George issued periodic statements to Dealers which recorded, among other things, any Flex Commission paid by St. George to the Dealer; and

(m) otherwise denies the allegations in paragraph 9 of the SOC.

10 In answer to paragraph 10 of the SOC, during the Relevant Period, St. George:

(a) as to sub-paragraph 10(a) of the SOC:

- (i) refers to and repeats paragraph 7 of this Defence;
- (ii) admits that the Flex Commissions and Flex Commission Calculation Method allowed Dealers to set the Contract Rate subject to any Promotional Rate and Maximum Rate, but says that this occurred subject to:
  - (A) negotiations with customers regarding the automobile to be purchased;
  - (B) negotiations with customers regarding the purchase price of the automobile including any accessories or sale extras;
  - (C) whether customers intended to finance the purchase with cash or credit;
  - (D) whether customers wished to use finance options available through automobile dealers (**Dealer Finance**), whether with St. George or not, or source their own finance; and
  - (E) if customers wished to use Dealer Finance, negotiations with customers regarding the terms of that finance including the amount, interest rate, repayment schedule and term of the loan;

(b) as to sub-paragraph 10(b) of the SOC, denies that the Flex Commissions and Flex Commission Calculation Method allowed Dealers to set the term of the Car Loan;

(c) further, says that:

- (i) customers were free to shop around and choose their own credit provider, and were not obliged to use Dealer Finance in order to make an automobile purchase;
- (ii) during the Relevant Period, loan comparison websites were available to customers to access and compare auto finance loans;

#### **Particulars**

A. <https://www.carloans.com.au/>

B. <https://mozo.com.au/>

C. <https://www.canstar.com.au/>

- (iii) during the Relevant Period, the Australian Securities and Investments Commission (**ASIC**) provided guidance to consumers in relation to finance for purchase of automobiles and recommended that consumers shop around for credit before shopping for a car to find a loan that suits the customer's budget and circumstances and that dealer finance may be convenient but that shopping around may get a better outcome;

### **Particulars**

*During the Relevant Period, the ASIC Moneysmart website stated that:*

(a) *"By shopping around for credit before you go shopping for a car, you can find a loan that suits your budget and circumstances"; and*

(b) *either:*

(i) *"While dealer finance might seem convenient you may get a better deal by shopping around"; or*

(ii) *"Dealer finance may be convenient, but it's important to shop around to make sure you get a good deal on your loan".*

*<http://www.moneysmart.gov.au/borrowing-and-credit/car-loans/>*

- (iv) customers were able to negotiate the proposed loan amount, loan term, repayments, payment schedule and interest rate included in their application for finance and Car Loan Offer, which were subject to St. George's credit approval processes and acceptance;
- (v) customers acknowledged that the Dealer was not authorised to negotiate in relation to Car Loan Offers on the customers' behalf; and
- (vi) customers were able to withdraw their Car Loan Offer at any time before it was accepted by St. George, and after acceptance by St. George before

customers obtained credit by telling St. George in writing, but customers remained liable for any fees or charges already incurred;

- (d) says that Contract Rates set by Dealers varied, and included Contract Rates above and below the Base Rate;
- (e) refers to and repeats sub-paragraphs 9(i) and 9(j) of this Defence;
- (f) says that Dealers were paid Flex Commissions by St. George calculated pursuant to the Flex Commission Calculation Method, and if Dealers did not set a Contract Rate above the Base Rate, Dealers would receive no commission or a minimum commission for the introduction of a customer's credit business, and so to that extent Dealers were self-interested;
- (g) as to sub-paragraph 10(a)(iii) of the SOC, St. George:
  - (i) says that the allegations in sub-paragraph 10(a)(iii) of the SOC are embarrassing and/or prejudicial, and liable to be struck out under rule 23.02(c) of the *Supreme Court (General Civil Procedure) Rules 2015(Vic) (Civil Procedure Rules)*, because the allegation that the Contract Rate was "significantly higher" than St. George "would have offered the Group Members", "or other consumers", had it been approached otherwise than through a Dealer is vague, lacking in detail and proper particulars and St. George is unable to understand the allegation it is required to meet at trial; and
  - (ii) under cover of that objection, denies the allegations in sub-paragraph 10(a)(iii) of the SOC;
- (h) as to sub-paragraph 10(c) of the SOC, says that:
  - (i) the First Plaintiff does not allege that Group Members were vulnerable; and
  - (ii) the purchase of an automobile and the negotiation of a Car Loan by a customer from a Dealer represents an arms-length commercial transaction;
- (i) as to sub-paragraph 10(e) of the SOC:

- (i) says that Dealers were not acting on behalf of customers in relation to the automobile purchase or the Car Loan, and in those circumstances, denies that an alleged conflict of interest or potential conflict of interest arose;
- (ii) denies that Dealers owed a duty to act in the interests of customers in relation to the Car Loan and avoid a conflict of interest;
- (iii) says that the Second Plaintiff has not identified material facts or a legal doctrine under which a duty to act in the interests of customers and avoid a conflict of interest arose, or a statutory obligation to avoid the alleged conflict of interest, and the allegation of a “conflict of interest” or “potential conflict of interest” is therefore embarrassing and/or prejudicial, and liable to be struck out under rule 23.02(c) of the Civil Procedure Rules; and
- (iv) under cover of that objection, St. George denies any obligation to avoid the alleged conflict of interest and denies the allegations in sub-paragraph 10(e) of the SOC;
- (j) in the premises set out above, denies that the setting of the Contract Rate by Dealers created unfairness or a risk of unfairness in relation to Car Loans; and
- (k) otherwise denies the allegations in paragraph 10 of the SOC.

11 In answer to paragraph 11 of the SOC, St. George:

- (a) refers to and repeats paragraphs 9 and 10 of this Defence;
- (b) says that, where an origination fee was charged, St. George disclosed that Dealers were paid an origination fee shown in the Car Loan Offer for reimbursement of its administrative costs and commission for the introduction of credit business, as required by section 17(14) of the Credit Code;
- (c) says that, during the Relevant Period, the payment of flex commissions was prevalent in the automobile industry;
- (d) says that other than the requirements as set out in sub-paragraph 11(b) of this Defence, there was no obligation to disclose the matters alleged in sub-paragraph 11(a) of the SOC;

- (e) otherwise admits that St. George did not disclose to customers the matters alleged in sub-paragraph 11(a) of the SOC, but refers to and repeats sub-paragraphs 7(a), 7(b)(vi), 7(g)(iv) and 10(c) of this Defence;
- (f) does not know and cannot admit whether Dealers disclosed to individual Group Members the matters alleged in sub-paragraph 11(a) of the SOC;
- (g) as to sub-paragraph 11(b) of the SOC:
  - (i) refers to and repeats sub-paragraphs 11(a) to (f) of this Defence;
  - (ii) says that St. George was not obliged to ensure that Dealers disclosed the matters alleged in sub-paragraph 11(a) of the SOC other than as set out in sub-paragraphs 11(a) to (e) of this Defence; and
  - (iii) in the premises, says that St. George was not obliged to have systems, procedures or processes in place to ensure that Dealers disclosed to Group Members the matters described at sub-paragraph 11(a) of the SOC;
- (h) as to sub-paragraph 11(c) of the SOC:
  - (i) says that sub-paragraph 11(c) of the SOC contains no allegations against St. George or in respect of St. George's conduct;
  - (ii) says that the allegations in sub-paragraph 11(c) of the SOC are embarrassing, and liable to be struck out under rule 23.02(c) of the Civil Procedure Rules, because the allegations are not material to any allegations pleaded against St. George;
  - (iii) under cover of that objection, refers to and repeats sub-paragraphs 10(a), 10(c), 10(d), 10(e), 10(i) and 11(b) of this Defence; and
  - (iv) otherwise denies the allegations in sub-paragraph 11(c) of the SOC.
- (i) as to sub-paragraph 11(d) of the SOC:
  - (i) refers to and repeats sub-paragraphs 10(c), 10(d), 10(e), 10(i) and 11(b) of this Defence; and
  - (ii) does not know and therefore cannot admit the allegations in sub-paragraph 11(d) of the SOC in relation to Group Members, who are not identified and whose claims are not particularised;

- (j) as to sub-paragraph 11(e) of the SOC:
  - (i) refers to and repeats sub-paragraphs 10(c), 10(d), 10(e), 10(i) and 11(b) of this Defence;
  - (ii) says that the Plaintiffs say that whether comparable Group Members were afforded equal Contract Rates was dependent upon the following metrics:
    - (A) vehicle model;
    - (B) dealer;
    - (C) purchase value;
    - (D) date; and
    - (E) risk profile;

#### **Particulars**

*By letter of 25 September 2020 from Maurice Blackburn to King & Wood Mallesons, the Plaintiffs said that the metrics of comparison for the purposes of sub-paragraph 11(e) of the SOC are limited to:*

- (a) vehicle model;*
- (b) dealer;*
- (c) purchase value;*
- (d) date; and*
- (e) risk profile.*

- (iii) does not know and therefore cannot admit the allegations in sub-paragraph 11(e) of the SOC in relation to Group Members, who are not identified and whose claims are not particularised; and
- (iv) denies that St. George had any obligation to ensure that customers were afforded the same Contract Rate; and

(k) otherwise denies the allegations in paragraph 11 of the SOC.

12 St. George admits the allegations in paragraph 12 of the SOC.

13 In answer to paragraph 13 of the SOC, St. George:

- (a) says that:



- (i) section 5 of the NCCPA adopts the definition of “credit contract” in the Credit Code;

**Particulars**

*Section 5 of the NCCPA.*

- (ii) section 4 of the Credit Code provides that a credit contract is one for the provision of credit to which the Credit Code applies;

**Particulars**

*Section 4 of the Credit Code.*

- (iii) section 5(1)(b) of the Credit Code provides that the Credit Code applies to the provision of credit provided or intended to be provided wholly or predominantly for personal, domestic or household purposes;

**Particulars**

*Section 5(1)(b) of the Credit Code.*

- (b) says that, in the premises, Car Loans which were not wholly or predominantly for personal, domestic or household purposes were not credit contracts within the meaning of section 4 of the Credit Code and section 5 of the NCCPA; and
- (c) otherwise admits the allegations in paragraph 13 of the SOC.

14 In answer to paragraph 14 of the SOC, St. George:

- (a) does not know and cannot admit the allegations in sub-paragraphs 14(a) and 14(b)(i) of the SOC;
- (b) denies the allegations in sub-paragraphs 14(b)(iii) and 14(b)(iv) of the SOC;
- (c) refers to and repeats paragraphs 18, 19, 25 and 26 of this Defence;
- (d) says that during the Relevant Period:
  - (i) where Dealers submitted a credit offer to St. George pursuant to the terms of Dealer Agreements, Dealers assisted customers to apply for Car Loans with St. George;
  - (ii) Dealers were not acting on behalf of these customers in undertaking such activity; and

(iii) subject to paragraph 25 of this Defence, Dealers were not acting on behalf of St. George in undertaking such activity; and

(e) otherwise denies the allegations in paragraph 14 of the SOC.

15 In answer to paragraph 15 of the SOC, St. George:

(a) refers to and repeats paragraph 14 of this Defence;

(b) subject to paragraph 14 of this Defence, admits the allegations in paragraph 15 of the SOC during the Relevant Period insofar as the allegations concern:

(i) the activity pleaded at sub-paragraph 14(d) of this Defence; and

(ii) credit assistance in respect of credit contracts wholly or predominantly for personal, household or domestic use;

(c) says that Dealers were not acting as representatives of St. George when providing credit assistance; and

(d) otherwise denies the allegations in paragraph 15 of the SOC.

16 As to paragraph 16 of the SOC, St. George:

(a) admits that Dealers carried on business in Australia during the Relevant Period; and

(b) otherwise does not admit the allegations in paragraph 16 of the SOC.

17 In answer to paragraph 17 of the SOC, St. George:

(a) says that during the Relevant Period, Dealers carried on business in one or more of the jurisdictions of:

(i) each referring State; and/or

(ii) each referring Territory; and

(b) otherwise does not admit the allegations in paragraph 17 of the SOC.

18 In answer to paragraph 18 of the SOC, St. George:

(a) admits that during the Relevant Period, Dealers acted as intermediaries between St. George and customers in respect of the activities pleaded at sub-paragraph 7(c) of this Defence; and

(b) otherwise denies the allegations in paragraph 18 of the SOC.

19 In answer to paragraph 19 of the SOC, St. George:

- (a) refers to and repeats paragraph 18 of this Defence;
- (b) subject to paragraph 18 of this Defence, admits the allegations in paragraph 19 of the SOC insofar as they concern:
  - (i) the activities pleaded at sub-paragraph 7(c) of this Defence; and
  - (ii) credit contracts provided to customers wholly or predominantly for personal, domestic or household use;
- (c) says that Dealers were not acting as representatives of St. George when acting as intermediaries; and
- (d) otherwise denies the allegations in paragraph 19 of the SOC.

20 In answer to paragraph 20 of the SOC, during the Relevant Period, St. George:

- (a) refers to and repeats paragraphs 15 and 19 of this Defence;
- (b) subject to paragraphs 15 and 19 of this Defence, admits the allegations in paragraph 20 of the SOC insofar as they concern credit contracts provided to customers wholly or predominantly for personal, domestic or household use; and
- (c) otherwise denies the allegations in paragraph 20 of the SOC.

21 In answer to paragraph 21 of the SOC, St. George:

- (a) as to sub-paragraph 21(a) of the SOC:
  - (i) refers to and repeats paragraphs 9 and 10 of this Defence;
  - (ii) says that whether individual Group Members were at a special disadvantage in dealing with Dealers in relation to Car Loans would depend on the idiosyncrasies and individual circumstances of Group Members;
  - (iii) refers to and repeats sub-paragraph 11(f) of this Defence;
  - (iv) says that it does not know what matters were known to individual Group Members; and
  - (v) denies the allegations in sub-paragraph 21(a) of the SOC;
- (b) as to sub-paragraph 21(b) of the SOC:
  - (i) says that it does not know and cannot admit the state of mind of individual Group Members;

- (ii) says that it does not know and cannot admit the applicability of the matters pleaded in sub-paragraph 21(b) of the SOC to the circumstances of individual Group Members who are not identified and whose claims are not particularised;
  - (iii) says that whether Group Members considered themselves unable to make a Car Loan with a credit provider other than St. George is subjective and would depend on the idiosyncrasies and individual circumstances of each Group Member who obtained a Car Loan;
  - (iv) says that customers could finance the purchase of the automobile with cash or credit and could source finance with a credit provider other than St. George; and
  - (v) says that St. George did not offer consumer leases through Dealers, that is, for the use of customers for wholly or predominantly personal, domestic or household use;
- (c) as to sub-paragraph 21(c) of the SOC, St. George:
- (i) refers to and repeats paragraphs 9 and 10 of this Defence; and
  - (ii) otherwise denies the allegations in sub-paragraph 21(c) of the SOC;
- (d) as to sub-paragraph 21(d) of the SOC:
- (i) says that, subject to its obligations under the NCCPA (with respect to credit contracts to which the NCCPA applied), St. George could determine the terms on which it was prepared to accept or approve a Car Loan Offer from a customer in its absolute discretion;
  - (ii) says that Group Members could seek finance from other credit providers;
  - (iii) refers to and repeats sub-paragraphs 10(c) and 10(d) of this Defence; and
  - (iv) otherwise denies the allegations in sub-paragraph 21(d) of the SOC;
- (e) as to sub-paragraph 21(e) of the SOC:
- (i) says that the allegations are embarrassing and/or prejudicial and liable to be struck out under rule 23.02(c) of the Civil Procedure Rules, because the allegation that the terms of Car Loans were “less favourable” to Group

Members than the terms of “a comparable transaction” is vague, lacking in detail and proper particulars and St. George is unable to determine the nature and scope of the allegation it is required to meet; and

(ii) under cover of that objection, denies the allegations in sub-paragraph 21(e) of the SOC; and

(f) otherwise denies the allegations in paragraph 21 of the SOC.

22 In answer to paragraph 22 of the SOC, St. George:

(a) refers to and repeats paragraph 21 of this Defence; and

(b) denies the allegations in paragraph 22 of the SOC.

23 In answer to paragraph 23 of the SOC, St. George:

(a) says it does not know and cannot admit the state of mind of Group Members;

(b) says that the reasons for entering into a Car Loan were subjective and would depend on the idiosyncrasies and individual circumstances of each Group Member at the time of the Car Loan;

(c) refers to and repeats paragraphs 21 and 22 of this Defence; and

(d) otherwise denies the allegations in paragraph 23 of the SOC.

24 In answer to paragraph 24 of the SOC, St. George:

(a) refers to and repeats paragraphs 21 to 23 of this Defence; and

(b) denies the allegations in paragraph 24 of the SOC.

25 In answer to paragraph 25 of the SOC, St. George:

(a) on the assumption that the reference to the Car Dealer Terms is intended to be a reference to the Dealer Terms, admits that during the Relevant Period, Dealers were persons acting on behalf of St. George as a holder of an Australian credit licence for the limited purposes set out in sub-paragraphs 7(a), 7(e) (for the purposes of providing the documents described in sub-paragraphs 7(d)(ii), 7(d)(iii), 7(d)(iv) and 7(d)(v)), and 7(h)(ii)(B) of this Defence;

(b) refers to and repeats paragraphs 15 and 19 of this Defence; and

(c) otherwise denies the allegations in paragraph 25 of the SOC.

26 In answer to paragraph 26 of the SOC, St. George:

- (a) refers to and repeats paragraphs 7, 15, 19 and 25 of this Defence;
- (b) subject to paragraphs 15, 19, 25 of this Defence, admits that during the Relevant Period, each Dealer was a representative of St. George within the meaning of section 5 of the NCCPA for the limited purposes set out in sub-paragraphs 7(a), 7(e) (for the purposes of providing the documents described in sub-paragraphs 7(d)(ii), 7(d)(iii), 7(d)(iv) and 7(d)(v)), and 7(h)(ii)(B) of this Defence; and
- (c) otherwise denies the allegations in paragraph 26 of the SOC.

27 In answer to paragraph 27 of the SOC, St. George:

- (a) refers to and repeats paragraphs 15, 19, 20, 22, 25, 26 and 40 of this Defence; and
- (b) denies the allegations in paragraph 27 of the SOC.

28 In answer to paragraph 28 of the SOC, St. George:

- (a) refers to and repeats paragraphs 20 and 22 and sub-paragraphs 10(c), 10(d), 10(e), 10(i) and 11(b) of this Defence; and
- (b) denies the allegations in paragraph 28 of the SOC.

29 In answer to paragraph 29 of the SOC, St. George:

- (a) says it does not know and cannot admit the state of mind of Group Members;
- (b) says that the reasons for entering into a Car Loan were subjective and would depend on the idiosyncrasies and individual circumstances of each Group Member at the time of the Car Loan;
- (c) refers to and repeats paragraphs 20 and 22 and sub-paragraphs 10(c), 10(d), 10(e), 10(i) and 11(b) of this Defence; and
- (d) otherwise denies the allegations in paragraph 29 of the SOC.

30 In answer to paragraph 30 of the SOC, St. George:

- (a) refers to and repeats paragraphs 27 to 29 of this Defence; and
- (b) denies the allegations in paragraph 30 of the SOC.

31 In answer to paragraph 31 of the SOC, St. George:

- (a) refers to and repeats paragraphs 15, 19, 20, 22, 25, 26 and 40 of this Defence;

- (b) denies that any impugned conduct by the Dealer was conduct as a representative for which St. George could be liable within the meaning of sections 74 and 77 of the NCCPA;
- (c) says that any loss or damage (which is denied) was caused by Group Members; and
- (d) otherwise denies the allegations in paragraph 31 of the SOC.

**Particulars**

- A. *Group Members entered into Car Loans in circumstances where they acknowledged that the Car Loan Offer could be negotiated.*
- B. *Group Members had the opportunity to shop around and make inquiries to determine whether St. George or other credit providers offered similar credit products on more favourable terms and, if they desired to do so, to withdraw their Car Loan Offer made to St. George.*
- C. *St. George refers to and repeats paragraph 10 of this Defence.*
- D. *Group Members were able to withdraw their Car Loan Offer at any time before it was accepted by St. George, and after acceptance by St. George before the customer obtained credit by telling St. George in writing, but the customer remained liable for any fees or charges already incurred.*
- E. *Any loss or damage (which is denied) was caused by Group Members' failure to make any or proper inquiries in relation to terms on which finance could be obtained otherwise than through Dealers.*

32 In answer to paragraph 32 of the SOC, St. George:

- (a) denies that Group Members have remedies against St. George; and
- (b) denies the allegations in paragraph 32 of the SOC.

33 St. George denies the allegations in paragraph 33 of the SOC.

33A In further answer to paragraphs 25 to 33 of the SOC, St. George says that if, which is denied, any Group Member has a claim for unfair conduct under section 180A of the NCCPA on the basis of the matters pleaded in the SOC, any such claim is not maintainable to the extent the alleged contravening conduct occurred before 15 July 2014.

### **Particulars**

*Section 180A(5) of the NCCPA.*

#### **Misleading or Deceptive Conduct**

34 In answer to paragraph 34 of the SOC, St. George:

- (a) refers and repeats paragraph 11 of this Defence; and
- (b) denies the allegations in paragraph 34 of the SOC.

35 In answer to paragraph 35 of the SOC, St. George:

- (a) refers to and repeats paragraph 34 of this Defence;
- (b) denies that it was required to disclose in the terms alleged in sub-paragraphs 34(a) to (c) of the SOC;
- (c) says that St. George does not know and cannot admit what matters were known to individual Group Members; and
- (d) admits that it did not disclose the matters pleaded in paragraph 35 of the SOC.

36 St. George denies the allegations in paragraph 36 of the SOC.

37 In answer to paragraph 37 of the SOC, St. George:

- (a) refers to and repeats paragraph 35 of this Defence;
- (b) denies that the conduct of St. George was conduct engaged in by St. George in relation to financial services within the meaning of section 1041H of the Corporations Act; and

### **Particulars**

*A credit facility is not a financial product within the meaning of sections 1041H and 765A(1)(h)(i) of the Corporations Act and regulation 7.1.06 of the Corporations Regulations 2001 (Cth) (Corporations Regulations).*



(c) otherwise denies the allegations in paragraph 37 of the SOC.

38 In answer to paragraph 38 of the SOC, St. George:

(a) refers to and repeats paragraphs 35 to 37 of this Defence;

(b) denies that the Second Plaintiff is entitled to bring an action for alleged contravention that accrued more than six years before the commencement of the proceeding and relies on section 1041I(2) of the Corporations Act and section 12GF(2) of the ASIC Act; and

(c) otherwise denies the allegations in paragraph 38 of the SOC.

39 In answer to paragraph 39 of the SOC, St. George:

(a) says it does not know and cannot admit the state of mind of Group Members;

(b) says that the reasons for entering into a Car Loan were subjective and would depend on the idiosyncrasies and individual circumstances of each Group Member at the time of the Car Loan;

(c) refers to and repeats paragraphs 35 to 38 and sub-paragraphs 10(c), 10(d), 10(e), 10(i) and 11(b) of this Defence; and

(d) otherwise denies the allegations in paragraph 39 of the SOC.

40 In answer to paragraph 40 of the SOC, St. George:

(a) refers to and repeats paragraph 39 of this Defence;

(b) says that any loss or damage (which is denied) was caused by Group Members; and

(c) otherwise denies the allegations in paragraph 40 of the SOC.

#### **Particulars**

A. *Group Members entered into Car Loans in circumstances where they acknowledged that the Car Loan Offer could be negotiated.*

B. *Group Members had the opportunity to shop around and make inquiries to determine whether St. George or other credit providers offered similar credit products on more*

*favourable terms and, if they desired to do so, to withdraw their Car Loan Offer made to St. George.*

- C. *St. George refers to and repeats paragraph 10 of this Defence.*
- D. *Group Members were able to withdraw their Car Loan Offer at any time before it was accepted by St. George, and after acceptance by St. George before the customer obtained credit by telling St. George in writing, but the customer remained liable for any fees or charges already incurred.*
- E. *Any loss or damage (which is denied) was caused by Group Members' failure to make any or proper inquiries in relation to terms on which finance could be obtained otherwise than through Dealers.*

40A For the purposes of this Defence only, St. George says that if, which is denied, the Court finds that St. George contravened section 1041H of the Corporations Act or section 12DA(1) of the ASIC Act and any Group Member suffered loss or damage that was caused by the actions of St. George in contravention of section 1041H of the Corporations Act or section 12DA(1) of the ASIC Act as alleged in the SOC, St. George says that::

- (a) Group Members are responsible in part or wholly for the loss that is the subject of the Group Members' claim against St. George, pleaded in the SOC, because the loss resulted partly or wholly from the Group Members' failure to take reasonable care to avoid such loss;

#### **Particulars**

*Group Members entered into Car Loans in circumstances where:*

- (a) *the terms of the Car Loan Offer disclosed payment of a commission to Dealers;*
- (b) *Group Members acknowledged that the Car Loan Offer was open to negotiation; and*

- (c) *Group Members failed to make any or proper inquiries in relation to terms on which finance could be obtained otherwise than through Dealers.*
- (b) St. George did not intend to cause the loss or damage (if the loss or damage is established, which is denied);
- (c) St. George did not fraudulently cause the loss or damage (if the loss or damage is established, which is denied); and
- (d) the damages that Group Members may recover in relation to the loss or damage are to be reduced to the extent to which the Court thinks it is just and equitable having regard to Group Members' share in the responsibility for such loss or damage, in accordance with:
  - (i) in respect of the alleged contravention of section 12DA(1) of the ASIC Act, section 12GF(1B) of the ASIC Act; and
  - (ii) in respect of the alleged contravention of section 1041H of the Corporations Act (if maintainable, which is denied), section 1041I(1B) of the Corporations Act.

40B In further answer to paragraphs 34 to 40 of the SOC, St. George says that:

- (a) any claim for compensation for loss or damage under section 1041I of the Corporations Act is not maintainable to the extent the alleged contravening conduct occurred before 15 July 2014; and
- (b) any claim for compensation for loss or damage under section 12GF of the ASIC Act is not maintainable to the extent the alleged contravening conduct occurred before 15 July 2014.

### **Particulars**

*Section 1041I(2) of the Corporations Act and section 12GF(2) of the ASIC Act.*

### **Mistake**

41 In answer to paragraph 41 of the SOC, St. George:

- (a) refers to and repeats paragraphs 9, 10, 11, 22, 31(c) and 33 of this Defence;

- (b) says that St. George does not know and cannot admit what matters were known to individual Group Members;
- (c) denies that St. George was obliged to inform Group Members of the matters pleaded in paragraph 41 of the SOC; and
- (d) otherwise denies the allegations in paragraph 41 of the SOC.

42 In answer to paragraph 42 of the SOC, St. George:

- (a) refers to and repeats paragraph 41 of this Defence;
- (b) says that St. George does not know and cannot admit what matters were known to individual Group Members;
- (c) says that St. George provided the information to Group Members which it was required to disclose under the NCCPA in relation to Car Loans;
- (d) denies that each of the matters alleged was material information that would have been relevant to the decision of Group Members as to whether to proceed with the entry into the Car Loan;
- (e) further or alternatively, says that whether a matter constituted material information relevant to the decision of a Group Member as to whether to enter into the Car Loan is subjective and would depend on the idiosyncrasies and individual circumstances of each Group Member; and
- (f) otherwise denies the allegations in paragraph 42 of the SOC.

43 In answer to paragraph 43 of the SOC, St. George:

- (a) refers to and repeats paragraph 42 of this Defence;
- (b) says it does not know and cannot admit the state of mind of Group Members;
- (c) says that the reasons for entering into the Car Loans were subjective and would depend on the idiosyncrasies and individual circumstances of each Group Member;
- (d) says that the matters alleged in paragraphs 43 to 48 of the SOC:
  - (i) do not relate to a fundamental term of the Car Loan; and
  - (ii) do not disclose a cause of action against St. George on the grounds of unilateral mistake; and
- (e) otherwise denies the allegations in paragraph 43 of the SOC.

- 44 In answer to paragraph 44 of the SOC, St. George:
- (a) refers to and repeats paragraphs 9, 10, 22, 33 and 43 of this Defence; and
  - (b) denies the allegations in paragraph 44 of the SOC.
- 45 In answer to paragraph 45 of the SOC, St. George:
- (a) refers to and repeats paragraphs 43 and 44 of this Defence;
  - (b) says that it does not know and cannot admit the state of mind of Group Members;
  - (c) says that the reasons for entering into Car Loans were subjective and would depend on the idiosyncrasies and individual circumstances of each Group Member;  
and
  - (d) otherwise denies the allegations in paragraph 45 of the SOC.
- 46 St. George denies the allegations in paragraph 46 of the SOC.
- 47 In answer to paragraph 47 of the SOC, St. George:
- (a) says that the parties to the Car Loans cannot be restored to substantially the position they were in before the Car Loans;
  - (b) denies that Group Members are entitled to rescission of the Car Loans;
  - (c) refers to and repeats paragraphs 45 and 46 of this Defence; and
  - (d) otherwise denies the allegations in paragraph 47 of the SOC.
- 48 In answer to paragraph 48 of the SOC, St. George:
- (a) refers to and repeats paragraphs 0 to 47 of this Defence;
  - (b) denies the allegations in paragraph 48 of the SOC; and
  - (c) further and in the alternative, says that interest paid under the Car Loans was money legally due and owing under an enforceable contract.
- 49 In answer to paragraph 49 of the SOC, St. George:
- (a) refers to and repeats paragraphs 45 to 48 of this Defence
  - (b) says that paragraph 49 of the SOC does not disclose a cause of action against St. George and is liable to be struck out under rule 23.02(a) of the Civil Procedure Rules; and
  - (c) under cover of that objection, denies the allegations in paragraph 49 of the SOC.
- 49A In further answer to paragraphs 41 to 49 of the SOC, St. George says that:

- (a) St. George, acting in good faith, relied to its detriment on the agreement by Group Members to pay interest charges referable to the Car Loans (**Interest Charges**) and the payment of those Interest Charges by financing the purchase of the car, incurring expenditure and/or other disadvantageous consequences that it would not have otherwise incurred; and

**Particulars**

*In reliance upon the agreement by Group Members to pay Interest Charges and payment of those Interest Charges, St. George:*

- (a) financed the purchase of the car;*
- (b) bore the cost associated with the maintenance of that finance;*
- (c) bore the risk associated with the provision of that finance including that a Group Member may cease to make repayments and the underlying assets would be insufficient to cover the balance of the loan; and*
- (d) complied with the prudential standards relating to lending imposed by APRA.*

- (b) by reason of the change of position pleaded in sub-paragraph 49A(a) of this Defence, it would be inequitable in all the circumstances to require St. George to repay the Interest Charges in whole or in part.

49B In further answer to paragraphs 41 to 49 of the SOC, St. George says that:

- (a) it gave good consideration to any Group Member from whom it received the payment of Interest Charges pursuant to terms of Group Members' respective Car Loans; and

**Particulars**

- A. *The particulars to paragraph 49A of this Defence are repeated.*

*B. Group Members received cars and other benefits, including insurances and improvements to the cars, and the use/enjoyment of the cars.*

(b) by reason of the provision of good consideration pleaded in sub-paragraph 49B(a) of this Defence, St. George is not obliged to repay to Group Members the Interest Charges received by it in whole or in part.

49C In further answer to paragraphs 41 to 49 of the SOC, St. George says that:

(a) the receipt and use of the cars purchased with the Car Loans constitute unequivocal words or conduct by which Group Members have elected to take the benefit of the Car Loans; and

(b) Group Members are not entitled to the repayment of Interest Charges paid in respect of those Car Loans in whole or in part.

49D In further answer to the claims on behalf of Group Members for relief at paragraphs 41 to 49 of the SOC, St. George says that:

(a) Group Members have received a benefit from the Car Loans, to the extent that the amount advanced under the Car Loans was used:

(i) to repay an amount owing by a Group Member under another credit contract;

(ii) to finance premiums for comprehensive motor insurance of any “add-on” insurance products;

(iii) to pay for accessories or extras in relation to the automobile purchased; and

(iv) to obtain a valuable asset, being the automobile purchased;

(b) in the premises of the benefit received, set out in sub-paragraph 49D(a) of this Defence, Group Members would be unjustly enriched at St. George’s expense if St. George were required to repay the Interest Charges received by it and Group Members are not entitled to the remedies or relief sought; and

(c) further or in the alternative, Group Members are not entitled to the remedies or relief sought unless they account for such benefit.

49E In further answer to paragraphs 41 to 49 of the SOC, St. George says that:

- (a) if, which is denied, any Group Member has a claim for monies had and received by St. George to the use of the Group Members on the basis of the matters pleaded in the SOC any such cause of action that is governed by the law of:
- (i) New South Wales and arose before the six year period prior to the commencement of this proceeding, or was first discovered by the Group Member or may with reasonable diligence have been discovered by the Group Member before that date, is not maintainable by reason of section 14 and/or section 56 of the *Limitation Act 1969* (NSW);
  - (ii) Victoria and arose before the six year period prior to the commencement of this proceeding, or was discovered by the Group Member or could with reasonable diligence have been discovered by the Group Member before that date, is not maintainable by reason of section 5 and/or section 27 of the *Limitation of Actions Act 1958* (Vic);
  - (iii) Queensland and arose before the six year period prior to the commencement of this proceeding, or was discovered by the Group Member or could with reasonable diligence have been discovered by the Group Member before that date, is not maintainable by reason of section 10 and/or section 38 of the *Limitation of Actions Act 1974* (Qld);
  - (iv) Tasmania and arose before the six year period prior to the commencement of this proceeding, or was discovered by the Group Member or could with reasonable diligence have been discovered by the Group Member before that date, is not maintainable by reason of section 4 and/or section 32 of the *Limitation Act 1974* (Tas);
  - (v) South Australia and arose before the six year period prior to the commencement of this proceeding is not maintainable by reason of section 38 of the *Limitation of Actions Act 1936* (SA);
  - (vi) Western Australia and arose before the six year period prior to the commencement of this proceeding is not maintainable by reason of section 13 of the *Limitation Act 2005* (WA);



- (vii) the Northern Territory and arose before the three year period prior to the commencement of this proceeding, or was first discovered by the Group Member or may with reasonable diligence have been discovered by the Group Member before that date, is not maintainable by reason of section 12 and/or section 43 of the *Limitation Act 1981* (NT); or
- (viii) the Australian Capital Territory and arose before the six year period prior to the commencement of this proceeding, or was first discovered by the Group Member or may with reasonable diligence have been discovered by the Group Member before that date, is not maintainable by reason of section 11 and/or section 34 of the *Limitation Act 1985* (ACT); and

### **Particulars**

*Further particulars will be provided after the initial trial, when proper particulars of individual Group Members' claims have been provided.*

- (b) by reason of the delay of Group Members in commencing these proceedings and the matters pleaded in sub-paragraph 49D(a) of this Defence, it would be inequitable in all the circumstances to require St. George to repay the Interest Charges it received from Group Members in whole or in part.

### **C. FIRST PLAINTIFF'S CLAIM AGAINST THE FIRST DEFENDANT**

50 Paragraphs 50 to 97 of the SOC are Not Applicable.

### **D. SECOND PLAINTIFF'S CLAIM AGAINST THE SECOND DEFENDANT**

98 In answer to paragraph 98 of the SOC, St. George:

- (a) admits the allegation in sub-paragraph 98(a) of the SOC; and
- (b) does not know the fact alleged and cannot admit the allegation in sub-paragraph 98(b) of the SOC.

99 In answer to paragraph 99 of the SOC, St. George:

- (a) as to sub-paragraph 99(a) of the SOC:
  - (i) says that it does not know and cannot admit when the Second Plaintiff entered into discussions with Springwood Nissan;
  - (ii) otherwise admits the allegations in sub-paragraph 99(a) of the SOC;

- (b) admits the allegations in sub-paragraph 99(b) of the SOC and says that the contract for sale between the Second Plaintiff and Springwood Nissan for the acquisition of the Nissan entered into on or around 29 August 2014 included:
- (i) a payout to Macquarie for finance on a trade in vehicle, a Ford Focus Hatchback registration 581TPS for an amount of \$22,638.56;
  - (ii) the trade-in of a Ford Focus Hatchback for a net allowance of \$4,638.56, being the difference between the trade in allowance for the Ford Focus Hatchback of \$18,000 and the payout to Macquarie of \$22,638.56; and
  - (iii) the following sale extras:
    - (A) full leather PK P/F/V/L;
    - (B) tint;
    - (C) registration; and
    - (D) extended 3 year warranty; and
- (c) admits the allegations in sub-paragraph 99(c) of the SOC and says that the deposit was paid to Springwood Nissan for the purchase of the Nissan on or before 29 August 2014.

100 In answer to paragraph 100 of the SOC, St. George:

- (a) on the assumption that the reference to the First Plaintiff is intended to be a reference to the Second Plaintiff, admits the allegations in paragraph 100 of the SOC; and
- (b) says that the interest rate of 12.99% per annum was fixed for the loan term.

101 In answer to paragraph 101 of the SOC, St. George admits that it entered into a dealer agreement with Springwood Nissan on or around 10 January 2012 (**Springwood Nissan Dealer Agreement**).

102 In answer to paragraph 102 of the SOC, during the Relevant Period, St. George:

- (a) as to sub-paragraph 102(a) of the SOC, says that the Springwood Nissan Dealer Agreement, among other things, set out the terms on which, and the form and manner in which Springwood Nissan was permitted to submit credit offers from customers to enter into Car Loans;

(b) as to sub-paragraph 102(b) of the SOC, says that the terms of the Springwood Nissan Dealer Agreement, among other things, required Springwood Nissan to:

- (i) comply with all laws and requirements of authorities in connection with Springwood Nissan's licensing status;

**Particulars**

*Paragraph 2.2(b) of the Springwood Nissan Dealer Agreement.*

- (ii) comply with any undertaking given by Springwood Nissan to St. George, or any direction by St. George to Springwood Nissan, about the conduct of Springwood Nissan's business to the extent it relates to, or impacts on, St. George's business or results, or may result, in St. George suffering liability or loss. For example, Springwood Nissan must complete any training required by St. George within the time frame St. George specifies and adhere to any procedures advised by St. George from time to time;

**Particulars**

*Paragraph 3.3 of the Springwood Nissan Dealer Agreement.*

- (iii) comply with any reasonable direction St. George gives in connection with any advertising or use of St. George's logo or promotional material, use of St. George's reputation or the use of any of St. George's property which is in Springwood Nissan's possession or control; and

**Particulars**

*Paragraph 10(a) of the Springwood Nissan Dealer Agreement.*

- (iv) in relation to each credit offer, declare that Springwood Nissan has complied and will comply with all instructions and procedures given by St. George at any time in respect of the manner of completion and submission to St. George of each credit offer;

**Particulars**

*Paragraph 6(b) of Schedule 1 of the Springwood Nissan Dealer Agreement.*

(c) admits sub-paragraph 102(c) of the SOC;

- (d) says that the terms of the Springwood Nissan Dealer Agreement provided that Springwood Nissan was under no obligation to obtain or procure credit offers or to do business with St. George, and Springwood Nissan acknowledged that if Springwood Nissan obtained any credit offer, it did so for the convenience of Springwood Nissan's customers and in the expectation that it would assist Springwood Nissan's business;

### **Particulars**

#### *Paragraph 13.2 of the Springwood Nissan Dealer Agreement.*

- (e) relies upon the terms of the Springwood Nissan Dealer Agreement for their full force and effect;
- (f) does not know if Springwood Nissan had arrangements with other licensees (within the meaning of the NCCPA) to facilitate the introduction of credit business to other licensees; and
- (g) otherwise denies the allegations in paragraph 102 of the SOC.

103 In answer to paragraph 103 of the SOC, St. George:

- (a) refers to and repeats paragraphs 7 and 102 of this Defence; and
- (b) otherwise denies the allegations in paragraph 103 of the SOC.

104 In answer to paragraph 104 of the SOC, St. George:

- (a) admits the allegations in paragraph 104 of the SOC during the Relevant Period; and
- (b) otherwise denies the allegations in paragraph 104 of the SOC.

105 In answer to paragraph 105 of the SOC, during the Relevant Period, St. George refers to and repeats paragraph 9 of this Defence and otherwise denies paragraph 105 of the SOC.

106 In answer to paragraph 106 of the SOC, during the Relevant Period, St. George:

- (a) as to sub-paragraph 106(a) of the SOC:
- (i) refers to and repeats paragraph 7 of this Defence;
- (ii) admits that the Flex Commissions and Flex Commission Calculation Method as at the time the Second Plaintiff entered into the St. George Finance Car Loan allowed Springwood Nissan to set the Contract Rate subject to a

Maximum Rate of 10 percentage points above the Base Rate, but says that this occurred subject to:

- (A) negotiations with the Second Plaintiff regarding the automobile to be purchased;
  - (B) negotiations with the Second Plaintiff regarding the purchase price of the Nissan including any accessories or sale extras;
  - (C) whether the Second Plaintiff intended to finance the purchase with cash or credit;
  - (D) whether the Second Plaintiff wished to use Dealer Finance, whether with St. George or not, or source her own finance; and
  - (E) negotiations with the Second Plaintiff regarding the terms of that finance including the amount, interest rate, repayment schedule and term of the loan;
- (b) as to sub-paragraph 106(b) of the SOC, denies that the Flex Commissions and Flex Commission Calculation Method allowed Springwood Nissan to set the term of the St. George Finance Car Loan;
- (c) further, says that:
- (i) the Second Plaintiff was free to shop around and choose her own credit provider, and was not obliged to use Dealer Finance in order to purchase the Nissan;
  - (ii) during the Relevant Period, loan comparison websites were available to the Second Plaintiff to access and compare auto finance loans;

#### **Particulars**

- A. <https://www.carloans.com.au/>
  - B. <https://mozo.com.au/>
  - C. <https://www.canstar.com.au/>
- (iii) during the Relevant Period, ASIC provided guidance to consumers in relation to finance for the purchase of automobiles and recommended that consumers shop around for credit before shopping for a car to find a loan

that suits the consumer's budget and circumstances and that dealer finance may be convenient but that shopping around may get a better outcome;

### **Particulars**

*During the Relevant Period, the ASIC Moneysmart website stated that:*

(a) *"By shopping around for credit before you go shopping for a car, you can find a loan that suits your budget and circumstances"; and*

(b) *either:*

(i) *"While dealer finance might seem convenient you may get a better deal by shopping around"; or*

(ii) *"Dealer finance may be convenient, but it's important to shop around to make sure you get a good deal on your loan".*

*<http://www.moneysmart.gov.au/borrowing-and-credit/car-loans/>*

- (iv) the Second Plaintiff was able to negotiate the proposed amount, loan term, repayments, payment schedule and interest rate included in her application for finance and offer of credit (**St. George Finance Car Loan Offer**), which were subject to St. George's credit approval processes and acceptance;
  - (v) the Second Plaintiff acknowledged that Springwood Nissan is not authorised to negotiate in relation to the St. George Finance Car Loan Offer on the Second Plaintiff's behalf; and
  - (vi) the Second Plaintiff was able to withdraw her St. George Finance Car Loan Offer at any time before it was accepted by St. George and after acceptance by St. George before the Second Plaintiff obtained credit by telling St. George in writing, but the Second Plaintiff would remain liable for any fees or charges already incurred;
- (d) says that Contract Rates set by Springwood Nissan varied, and included Contract Rates above and below the Base Rate;

- (e) refers to and repeats sub-paragraphs 9(i) and 9(j) of this Defence;
- (f) says that Springwood Nissan was paid Flex Commissions by St. George calculated pursuant to the Flex Commission Calculation Method, and if Springwood Nissan did not set a Contract Rate above the Base Rate, Springwood Nissan would receive no commission or a minimum commission for the introduction of a customer's credit business, and so to that extent Springwood Nissan was self-interested;
- (g) as to sub-paragraph 106(a)(iii) of the SOC, St. George:
  - (i) says that the allegations in sub-paragraph 106(a)(iii) of the SOC are embarrassing and/or prejudicial, and liable to be struck out under rule 23.02(c) of the Civil Procedure Rules, because the allegation that the Contract Rate was "significantly higher" than St. George "would have offered Ms Nastasi" had it been approached otherwise than through Springwood Nissan is vague, lacking in detail and proper particulars and St. George is unable to understand the allegation it is required to meet at trial; and
  - (ii) under cover of that objection, St. George denies the allegations in sub-paragraph 106(a)(iii) of the SOC;
- (h) as to sub-paragraph 106(c) of the SOC, says that:
  - (i) the Second Plaintiff does not allege that the Second Plaintiff was vulnerable; and
  - (ii) the purchase of the Nissan by the Second Plaintiff from Springwood Nissan represents an arms-length commercial transaction;
- (i) as to sub-paragraph 106(e) of the SOC:
  - (i) says that Springwood Nissan was not acting on behalf of the Second Plaintiff in relation to the purchase of the Nissan or the St. George Finance Car Loan, and in those circumstances, denies that an alleged conflict of interest or potential conflict of interest arose;

- (ii) denies that Springwood Nissan owed a duty to act in the interests of the Second Plaintiff in relation to the St. George Finance Car Loan and avoid a conflict of interest;
- (iii) says that the Second Plaintiff has not identified material facts or a legal doctrine under which a duty to act in the interests of the Second Plaintiff and avoid a conflict of interest arose, or a statutory obligation to avoid the alleged conflict of interest, and the allegation of a “conflict of interest” or “potential conflict of interest” is therefore embarrassing and/or prejudicial, and liable to be struck out under rule 23.02(c) of the Civil Procedure Rules; and
- (iv) under cover of that objection, denies any obligation to avoid the alleged conflict of interest and denies the allegations in sub-paragraph 106(e) of the SOC;
- (j) in the premises set out above, denies that the setting of the Contract Rate by Springwood Nissan created unfairness or a risk of unfairness in relation to the St. George Finance Car Loan; and
- (k) otherwise denies the allegations in paragraph 106 of the SOC.

107 In answer to paragraph 107 of the SOC, St. George:

- (a) refers to and repeats paragraphs 105 and 106 of this Defence;
- (b) says that St. George disclosed that Springwood Nissan was paid an origination fee shown in the St. George Finance Car Loan Offer to Springwood Nissan for reimbursement of its administrative costs, where an origination fee was charged, and commission for the introduction of credit business, as required by section 17(14) of the Credit Code;
- (c) says that, during the Relevant Period, the payment of flex commissions was prevalent in the automobile industry;
- (d) says that other than the requirements as set out in sub-paragraph 107(b) of this Defence, there was no obligation to disclose the matters alleged in sub-paragraph 107(a) of the SOC;



- (e) otherwise admits that St. George did not disclose to the Second Plaintiff the matters alleged in sub-paragraph 107(a) of the SOC, but refers to and repeats sub-paragraphs 7(a), 7(b)(vi), 7(g)(iv), and 10(c) of this Defence;
- (f) does not know and cannot admit whether Springwood Nissan disclosed to the Second Plaintiff the matters alleged in sub-paragraph 107(a) of the SOC;
- (g) as to sub-paragraph 107(b) of the SOC:
  - (i) refers to and repeats sub-paragraphs 107(a) to (f) of this Defence;
  - (ii) says that St. George was not obliged to ensure that Springwood Nissan disclosed the matters alleged in sub-paragraph 107(a) of the SOC other than as set out in sub-paragraphs 107(a) to (e) of this Defence; and
  - (iii) in the premises, says that St. George was not obliged to have systems, procedures or processes in place to ensure that Springwood Nissan disclosed to the Second Plaintiff the matters described at sub-paragraph 107(a) of the SOC;
- (h) as to sub-paragraph 107(c) of the SOC:
  - (i) says that sub-paragraph 107(c) of the SOC contains no allegations against St. George or in respect of St. George's conduct; and
  - (ii) says that the allegations in sub-paragraph 107(c) of the SOC are embarrassing, and liable to be struck out under rule 23.02(c) of the Civil Procedure Rules, because the allegations are not material to any allegations pleaded against St. George;
  - (iii) under cover of that objection, refers to and repeats sub-paragraphs 106(a), 106(c), 106(d), 106(e), 106(i) and 107(b) of this Defence; and
  - (iv) otherwise denies the allegations in sub-paragraph 107(c) of the SOC;
- (i) as to sub-paragraph 107(d) of the SOC:
  - (i) refers to and repeats sub-paragraphs 106(c), 106(d), 106(e), 106(i) and 107(b) of this Defence; and
  - (ii) denies the allegations in sub-paragraph 107(d) of the SOC;
- (j) as to sub-paragraph 107(e) of the SOC:

- (i) refers to and repeats sub-paragraphs 106(c), 106(d), 106(e), 106(i) and 107(b) of this Defence;
- (ii) says that the Second Plaintiff says that whether comparable Group Members were afforded equal Contract Rates was dependent upon the following metrics:
  - (A) vehicle model;
  - (B) dealer;
  - (C) purchase value;
  - (D) date; and
  - (E) risk profile;

### **Particulars**

*By letter of 25 September 2020 from Maurice Blackburn to King & Wood Mallesons, the Plaintiffs said that the metrics of comparison for the purposes of sub-paragraph 11(e) of the SOC are limited to:*

- (a) vehicle model;*
- (b) dealer;*
- (c) purchase value;*
- (d) date; and*
- (e) risk profile.*

- (iii) does not know and therefore cannot admit the allegations in sub-paragraph 107(e) of the SOC in relation to Group Members, who are not identified and whose claims are not particularised;
- (iv) denies that St. George had any obligation to ensure that customers were afforded the same Contract Rate; and
- (k) otherwise denies the allegations in paragraph 107 of the SOC.

108 St. George admits the allegations in paragraph 108 of the SOC.

109 In answer to paragraph 109 of the SOC, St. George:

- (a) says that:

- (i) section 5 of the NCCPA adopts the definition of “credit contract” in the Credit Code;

**Particulars**

*Section 5 of the NCCPA.*

- (ii) section 4 of the Credit Code provides that a credit contract is one for the provision of credit to which the Credit Code applies;

**Particulars**

*Section 4 of the Credit Code.*

- (iii) section 5(1)(b) of the Credit Code provides that the Credit Code applies to the provision of credit provided or intended to be provided wholly or predominantly for personal, domestic or household purposes; and

**Particulars**

*Section 5(1)(b) of the Credit Code.*

- (b) otherwise admits the allegations in paragraph 109 of the SOC.

110 In answer to paragraph 110 of the SOC, St. George:

- (a) does not know and cannot admit the allegations in sub-paragraphs 110(a) and 110(b)(i) of the SOC;

- (b) refers to and repeats paragraphs 114, 115, 121 and 122 of this Defence;

- (c) says that:

- (i) to the extent that Springwood Nissan submitted the St. George Car Loan Offer to St. George pursuant to the terms of the Springwood Nissan Dealer Agreement, Springwood Nissan assisted the Second Plaintiff to apply for the St. George Car Loan Offer;
- (ii) Springwood Nissan was not acting on behalf of the Second Plaintiff in undertaking such activity; and
- (iii) subject to paragraph 121 of this Defence, Springwood Nissan did not act on behalf of St. George in undertaking such activity; and

- (d) otherwise denies the allegations in paragraph 110 of the SOC.

111 In answer to paragraph 111 of the SOC, St. George:

- (a) refers to and repeats paragraph 110 of this Defence; and
- (b) subject to paragraph 110 of this Defence, admits the allegations in paragraph 111 of the SOC insofar as the allegations concern the activity pleaded at 110(c) of this Defence;
- (c) says that Springwood Nissan was not acting as a representative of St. George when providing credit assistance; and
- (d) otherwise denies the allegations in paragraph 111 of the SOC.

112 St. George admits the allegations in paragraph 112 of the SOC.

113 In answer to paragraph 113 of the SOC, St. George:

- (a) says that during the Relevant Period, Springwood Nissan carried on business in the State of Queensland, which is a referring State; and
- (b) otherwise does not admit the allegations in paragraph 113 of the SOC.

114 In answer to paragraph 114 of the SOC, St George:

- (a) admits that Springwood Nissan acted as an intermediary between St George and the Second Plaintiff in respect of the activities pleaded at sub-paragraph 7(c) of this Defence; and
- (b) otherwise denies the allegations in paragraph 114 of the SOC.

115 In answer to paragraph 115 of the SOC, St George:

- (a) refers to and repeats paragraph 114 of this Defence;
- (b) subject to paragraph 114 of this Defence, admits the allegations in paragraph 115 of the SOC insofar as they concern the activities pleaded at sub-paragraph 7(c) of this Defence;
- (c) says that Springwood Nissan was not acting as a representative of St. George when acting as an intermediary; and
- (d) otherwise denies the allegations in paragraph 115 of the SOC.

116 In answer to paragraph 116 of the SOC, during the Relevant Period, St. George:

- (a) refers to and repeats paragraphs 111 and 115 of this Defence;
- (b) subject to paragraphs 111 and 115 of this Defence, admits the allegations in paragraph 116 of the SOC; and

(c) otherwise denies the allegations in paragraph 116 of the SOC.

117 In answer to paragraph 117 of the SOC, St. George:

(a) as to sub-paragraph 117(a) of the SOC:

- (i) refers to and repeats paragraphs 105 and 106 of this Defence;
- (ii) denies that the Second Plaintiff was at a special disadvantage in dealing with Springwood Nissan in relation to the St. George Finance Car Loan;
- (iii) refers to and repeats sub-paragraph 107(f) of this Defence;
- (iv) says that it does not know what matters were known to the Second Plaintiff;  
and
- (v) otherwise denies the allegations in sub-paragraph 117(a) of the SOC;

(b) as to sub-paragraph 117(b) of the SOC, St. George:

- (i) does not know and cannot admit the state of mind of the Second Plaintiff, as to whether the Second Plaintiff considered herself unable to make a Car Loan with a credit provider other than St. George; and
- (ii) does not plead to the allegation that the Second Plaintiff was unable to make a Car Loan with a credit provider other than St. George as the Second Plaintiff does not press this allegation against St. George;

(c) denies the allegations in sub-paragraph 117(c) of the SOC and refers to and repeats paragraphs 105 and 106 of this Defence;

(d) as to sub-paragraph 117(d) of the SOC:

- (i) says that, subject to its obligations under the NCCPA (with respect to credit contracts to which the NCCPA applied), St. George could determine the terms on which it was prepared to accept or approve a St. George Finance Car Loan Offer from the Second Plaintiff in its absolute discretion;
- (ii) says that the Second Plaintiff could seek finance from other credit providers;  
and
- (iii) refers to and repeats sub-paragraphs 106(c) and 106(d) of this Defence;  
and
- (iv) otherwise denies the allegations in sub-paragraph 117(d) of the SOC;

- (e) as to sub-paragraph 117(e) of the SOC:
  - (i) says that the allegations in sub-paragraph 117(e) of the SOC are embarrassing and/or prejudicial, and liable to be struck out under rule 23.02(c) of the Civil Procedure Rules, because the allegation that the terms of the St. George Finance Car Loan were “less favourable” to the Second Plaintiff than the terms of “a comparable transaction” is vague, lacking in detail and proper particulars and St. George is unable to determine the nature and scope of the allegation it is required to meet;
  - (ii) under cover of that objection, denies the allegations in sub-paragraph 117(e) of the SOC; and
- (f) otherwise denies the allegations in paragraph 117 of the SOC.

118 In answer to paragraph 118 of the SOC, St. George:

- (a) refers to and repeats paragraph 117 of this Defence; and
- (b) denies the allegations in paragraph 118 of the SOC.

119 In answer to paragraph 119 of the SOC, St. George:

- (a) says it does not know and cannot admit the state of mind of the Second Plaintiff;
- (b) refers to and repeats paragraphs 117 and 118 of this Defence; and
- (c) denies the allegations in paragraph 119 of the SOC.

120 In answer to paragraph 120 of the SOC, St. George:

- (a) refers to and repeats paragraphs 117 to 119 of this Defence; and
- (b) denies the allegations in paragraph 120 of the SOC.

121 In answer to paragraph 121 of the SOC, St. George:

- (a) on the assumption that the reference to the Springwood Nissan Car Dealer Terms is intended to be a reference to the Springwood Nissan Dealer Terms, admits that during the Relevant Period, Springwood Nissan was a person acting on behalf of St. George as a holder of an Australian credit licence for the limited purposes set out in sub-paragraphs 7(a), 7(e) (for the purposes of providing the documents described in sub-paragraphs 7(d)(ii), 7(d)(iii), 7(d)(iv) and 7(d)(v)), and 7(h)(ii)(B) of this Defence;

- (b) refers to and repeats paragraphs 111 and 115 of this Defence; and
- (c) otherwise denies the allegations in paragraph 121 of the SOC.

122 In answer to paragraph 122 of the SOC, St. George:

- (a) refers to and repeats paragraphs 7, 111, 115 and 121 of this Defence;
- (b) subject to paragraphs 111, 115 and 121 of this Defence, admits that during the Relevant Period, Springwood Nissan was a representative of St. George within the meaning of section 5 of the NCCPA for the limited purposes set out in sub-paragraphs 7(a), 7(e) (for the purposes of providing the documents described in sub-paragraphs 7(d)(ii), 7(d)(iii), 7(d)(iv) and 7(d)(v)), and 7(h)(ii)(B) of this Defence; and
- (c) otherwise denies the allegations in paragraph 122 of the SOC.

123 In answer to paragraph 123 of the SOC, St. George:

- (a) refers to and repeats paragraphs 111, 115, 116, 118, 121, 122 and 136 of this Defence; and
- (b) denies the allegations in paragraph 123 of the SOC.

124 In answer to paragraph 124 of the SOC, St. George:

- (a) refers to and repeats paragraphs 116 and 118 and sub-paragraphs 106(c), 106(d), 106(e), 106(i) and 107(b) of this Defence; and
- (b) denies the allegations in paragraph 124 of the SOC.

125 In answer to paragraph 125 of the SOC, St. George:

- (a) says it does not know and cannot admit the state of mind of the Second Plaintiff;
- (b) refers to and repeats paragraphs 116 and 118 and sub-paragraphs 106(c), 106(d), 106(e), 106(i) and 107(b) of this Defence; and
- (c) denies the allegations in paragraph 125 of the SOC.

126 In answer to paragraph 126 of the SOC, St. George:

- (a) refers to and repeats paragraphs 123 to 125 of this Defence; and
- (b) denies the allegations in paragraph 126 of the SOC.

127 In answer to paragraph 127 of the SOC, St. George:

- (a) refers to and repeats paragraphs 111, 115, 116, 118, 121, 122 and 136 of this Defence;
- (b) denies that any impugned conduct by the Dealer was conduct as a representative for which St. George could be liable within the meaning of sections 74 and 77 of the NCCPA;
- (c) says that any loss or damage (which is denied) was caused by the Second Plaintiff; and
- (d) otherwise denies the allegations in paragraph 127 of the SOC.

### **Particulars**

- A. *The Second Plaintiff entered into the St. George Finance Car Loan in circumstances where she acknowledged that the St. George Finance Car Loan Offer could be negotiated.*
- B. *The Second Plaintiff had the opportunity to shop around and make inquiries to determine whether St. George or other credit providers offered similar credit products on more favourable terms and, if the Second Plaintiff desired to do so, to withdraw the St. George Car Loan Offer made to St. George.*
- C. *St. George refers to and repeats paragraph 10 of this Defence.*
- D. *The Second Plaintiff was able to withdraw the St. George Finance Car Loan Offer at any time before it was accepted by St. George, and after acceptance by St. George before the Second Plaintiff obtained credit by telling St. George in writing, but the Second Plaintiff remained liable for any fees or charges already incurred.*
- E. *Any loss or damage (which is denied) was caused by the Second Plaintiff's failure to make any or proper inquiries in*



*relation to terms on which finance could be obtained  
otherwise than through the Dealers.*

128 In answer to paragraph 128 of the SOC, St. George:

- (a) denies that the Second Plaintiff has remedies against St. George; and
- (b) denies the allegations in paragraph 128 of the SOC.

129 St. George denies the allegations in paragraph 129 of the SOC.

**Misleading or Deceptive Conduct**

130 In answer to paragraph 130 of the SOC, St. George:

- (a) refers to and repeats paragraph 107 of this Defence; and
- (b) denies the allegations in paragraph 130 of the SOC.

131 In answer to paragraph 131 of the SOC, St. George:

- (a) refers to and repeats paragraph 130 of this Defence;
- (b) denies that it was required to disclose in the terms alleged in sub-paragraphs 130(a) to (c) of the SOC;
- (c) says that St. George does not know and cannot admit what matters were known to the Second Plaintiff; and
- (d) admits that it did not disclose the matters pleaded in paragraph 131 of the SOC.

132 St. George denies the allegations in paragraph 132 of the SOC.

133 In answer to paragraph 133 of the SOC, St. George:

- (a) refers to and repeats paragraph 131 of this Defence;
- (b) denies that the conduct of St. George was conduct engaged in by St. George in relation to financial services within the meaning of section 1041H of the Corporations Act; and

**Particulars**

*A credit facility is not a financial product within the meaning of sections 1041H and 765A(1)(h)(i) of the Corporations Act and regulation 7.1.06 of the Corporations Regulations.*

- (c) otherwise denies the allegations in paragraph 133 of the SOC.

134 In answer to paragraph 134 of the SOC, St. George:

- (a) refers to and repeats paragraphs 131 to 133 of this Defence; and
- (b) otherwise denies the allegations in paragraph 134 of the SOC.

135 In answer to paragraph 135 of the SOC, St. George:

- (a) says it does not know and cannot admit the state of mind of the Second Plaintiff;
- (b) refers to and repeats paragraphs 131 to 134 and sub-paragraphs 106(c), 106(d), 106(e), 106(i) and 107(b) of this Defence; and
- (c) otherwise denies the allegations in paragraph 135 of the SOC.

136 In answer to paragraph 136 of the SOC, St. George:

- (a) refers to and repeats paragraph 135 of this Defence;
- (b) says that any loss or damage (which is denied) was caused by the Second Plaintiff;  
and
- (c) otherwise denies the allegations in paragraph 136 of the SOC.

#### **Particulars**

- A. *The Second Plaintiff entered into the St. George Finance Car Loan in circumstances where the Second Plaintiff acknowledged that the St. George Finance Car Loan Offer could be negotiated.*
- B. *The Second Plaintiff had the opportunity to shop around and make inquiries to determine whether St. George or other credit providers offered similar credit products on more favourable terms and, if the Second Plaintiff desired to do so, to withdraw the St. George Finance Car Loan Offer made to St. George.*
- C. *St. George refers to and repeats paragraph 106 of this Defence.*
- D. *The Second Plaintiff was able to withdraw the St. George Finance Car Loan Offer at any time before it was accepted by St. George, and after acceptance by St. George before the Second Plaintiff obtained credit by telling St. George in writing, but the Second Plaintiff remained liable for any fees or charges already incurred.*
- E. *Any loss or damage (which is denied) was caused by the Second Plaintiff's failure to make any or proper inquiries in relation to*

*terms on which finance could be obtained otherwise than through Springwood Nissan.*

136A For the purposes of this Defence only, St. George says that if, which is denied, the Court finds that St. George contravened section 1041H of the Corporations Act or section 12DA(1) of the ASIC Act and the Second Plaintiff suffered loss or damage that was caused by the actions of St. George in contravention of section 1041H of the Corporations Act or section 12DA(1) of the ASIC Act as alleged in the SOC, St. George says that:

- (a) the Second Plaintiff is responsible in part or wholly for the loss that is the subject of the Second Plaintiff's claim against St. George, pleaded in the SOC, because the loss resulted partly or wholly from the Second Plaintiff's failure to take reasonable care to avoid such loss;

#### **Particulars**

*The Second Plaintiff entered into the St. George Finance Car Loan in circumstances where:*

- (a) *the terms of the St. George Finance Car Loan Offer disclosed payment of a commission to Springwood Nissan;*
  - (b) *acknowledged that St. George Finance Car Loan Offer was open to negotiation; and*
  - (c) *the Second Plaintiff failed to make any or proper inquiries in relation to terms on which finance could be obtained otherwise than through Springwood Nissan.*
- (b) St. George did not intend to cause the loss or damage (if the loss or damage is established, which is denied);
  - (c) St. George did not fraudulently cause the loss or damage (if the loss or damage is established, which is denied); and
  - (d) the damages that the Second Plaintiff may recover in relation to the loss or damage are to be reduced to the extent to which the Court thinks it is just and equitable having regard to the Second Plaintiff's share in the responsibility for such loss or damage, in accordance with:

- (i) in respect of the alleged contravention of section 12DA(1) of the ASIC Act, section 12GF(1B) of the ASIC Act; and
- (ii) in respect of the alleged contravention of section 1041H of the Corporations Act (if maintainable, which is denied), section 1041I(1B) of the Corporations Act.

### **Mistake**

137 In answer to paragraph 137 of the SOC, St. George:

- (a) refers to and repeats paragraphs 105, 106, 107, 118, 128 and 129 of this Defence;
- (b) says that St. George does not know and cannot admit what matters were known to the Second Plaintiff;
- (c) denies that St. George was obliged to inform the Second Plaintiff of the matters pleaded in paragraph 137 of the SOC; and
- (d) otherwise denies the allegations in paragraph 137 of the SOC.

138 In answer to paragraph 138 of the SOC, St. George:

- (a) refers to and repeats paragraph 137 of this Defence;
- (b) says that St. George does not know and cannot admit what matters were known to the Second Plaintiff;
- (c) says that St. George provided the information to the Second Plaintiff which it was required to disclose under the NCCPA in relation to the St. George Finance Car Loan;
- (d) denies that each of the matters alleged was material information that would have been relevant to the decision of the Second Plaintiff as to whether to proceed to enter into the St. George Finance Car Loan; and
- (e) otherwise denies the allegations in paragraph 138 of the SOC.

139 In answer to paragraph 139 of the SOC, St. George:

- (a) says it does not know and cannot admit the state of mind of the Second Plaintiff;
- (b) says that the matters alleged in paragraphs 139 to 144 of the SOC:
  - (i) do not relate to a fundamental term of the St. George Finance Car Loan;and

(ii) do not disclose a cause of action against St. George on the grounds of unilateral mistake;

(c) refers to and repeats paragraph 138 of this Defence; and

(d) otherwise denies the allegations in paragraph 139 of the SOC.

140 In answer to paragraph 140 of the SOC, St. George:

(a) refers to and repeats paragraphs 9, 10, 104, 105, 118, 129 and 139 of this Defence; and

(b) denies the allegations in paragraph 140 of the SOC.

141 In answer to paragraph 141 of the SOC, St. George:

(a) refers to and repeats paragraphs 139 and 140 of this Defence;

(b) says that it does not know and cannot admit the state of mind of the Second Plaintiff; and

(c) otherwise denies the allegations in paragraph 141 of the SOC;

142 St. George denies paragraph 142 of the SOC.

143 In answer to paragraph 143 of the SOC, St. George:

(a) says that St. George and the Second Plaintiff cannot be restored to substantially the position they were in before the St. George Finance Car Loan;

(b) denies that the Second Plaintiff is entitled to rescission of the St. George Finance Car Loan;

(c) refers to and repeats paragraphs 141 and 142 of this Defence; and

(d) otherwise denies the allegations in paragraph 143 of the SOC.

144 In answer to paragraph 144 of the SOC, St. George:

(a) refers to and repeats paragraphs 137 to 143 of this Defence;

(b) denies the allegations in paragraph 144 of the SOC; and

(c) further and in the alternative, says that interest paid under the St. George Finance Car Loan was money legally due and owing under an enforceable contract.

145 In answer to paragraph 145 of the SOC, St. George:

(a) refers to and repeats paragraphs 141 to 144 of this Defence;

- (b) says that paragraph 145 does not disclose a cause of action against St. George and is liable to be struck out under rule 23.02(a) of the Civil Procedure Rules;
- (c) under cover of that objection, denies the allegations in paragraph 145 of the SOC.

145A In further answer to paragraphs 137 to 145 of the SOC, St. George says that:

- (a) St. George, acting in good faith, relied to its detriment on the agreement by the Second Plaintiff to pay interest charges referable to the St. George Finance Car Loan (**Second Plaintiff Interest Charges**), and the payment of those Second Plaintiff Interest Charges, by financing the purchase of the Nissan, incurring expenditure and/or other disadvantageous consequences that it would not have otherwise incurred; and

#### **Particulars**

*In reliance upon the agreement by the Second Plaintiff to pay the Second Plaintiff Interest Charges and payment of those Second Plaintiff Interest Charges, St. George:*

- (a) financed the purchase of the Nissan;*
  - (b) bore the cost associated with the maintenance of that finance;*
  - (c) bore the risk associated with the provision of that finance including that the Second Plaintiff may cease to make repayments and the underlying asset would be insufficient to cover the balance of the loan; and*
  - (d) complied with the prudential standards relating to lending imposed by APRA.*
- (b) by reason of the change of position pleaded in sub-paragraph 145A(a) of this Defence, it would be inequitable in all the circumstances to require St. George to repay the Second Plaintiff Interest Charges in whole or in part.

145B In further answer to paragraphs 137 to 145 of the SOC, St. George says that:

- (a) it gave good consideration to the Second Plaintiff from whom it received the payment of the Second Plaintiff Interest Charges pursuant to the terms of the St. George Finance Car Loan; and

**Particulars**

- A. *The particulars to paragraph 145A of this Defence are repeated.*
- B. *The Second Plaintiff received the Nissan and other benefits, including insurances and improvements to the car, and the use/enjoyment of the Nissan.*

- (b) by reason of the provision of good consideration pleaded in sub-paragraph 145B(a) of this Defence, St. George is not obliged to repay to the Second Plaintiff Interest Charges received by it in whole or in part.

145C In further answer to paragraphs 137 to 145 of the SOC, St. George says that:

- (a) the receipt and use of the Nissan purchased with the St. George Finance Car Loan constitute unequivocal words or conduct by which the Second Plaintiff has elected to take the benefit of the St. George Finance Car Loan; and
- (b) the Second Plaintiff is not entitled to the repayment of the Second Plaintiff Interest Charges paid in respect of the St. George Finance Car Loan in whole or in part.

145D In further answer to the claims on behalf of the Second Plaintiff for relief at paragraphs 137 to 145 of the SOC, St. George:

- (a) says that the Second Plaintiff has received a benefit from the St. George Finance Car Loan, on the basis that the amount advanced under the St. George Finance Car Loan was used:
- (i) to repay an amount of \$22,638.56 owed by the Second Plaintiff under a credit contract with Macquarie;
- (ii) to finance the premiums of the following insurance products;
- (A) Allianz Australia Limited Nissan Loan Protection Insurance for a term of 84 months (policy number 154E122589FPI);

- (B) Allianz Australia Limited Nissan Motor Equity Insurance for a period of 84 months (policy number 154E364676MEI); and
- (C) CTP Insurance;
- (iii) to pay for accessories or extras in relation to the automobile purchased including:
  - (A) gun metallic paint black trim;
  - (B) full leather PK P/F/V/L;
  - (C) tint; and
  - (D) extended 3 year warranty;
- (iv) to pay a registration fee in relation to the automobile purchased; and
- (v) to obtain a valuable asset, being the Nissan.
- (b) in the premises of the benefit received, set out in 145D(a) of this Defence, says that the Second Plaintiff would be unjustly enriched at St. George's expense if St. George were required to repay the Second Plaintiff Interest Charges received by it and she is not entitled to the remedies or relief sought; and
- (c) further or in the alternative, the Second Plaintiff is not entitled to the remedies or relief sought unless the Second Plaintiff accounts for such benefit.

**E. COMMON QUESTIONS OF LAW OR FACT**

146 Paragraphs 146 to 171 of the SOC are Not Applicable.

**Dated:** 20 November 2020

**P A NESKOVCIN QC**

**A SMITH**

.....  
**King & Wood Mallesons**  
Solicitors for the Second Defendant